Administrative Law in Hong Kong

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Temple Chambers

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Contents

PART II

PROCEDURAL ASPECTS AND SCOPE OF JUDICIAL REVIEW

[2-88] The exercise of these special powers under section 9(1) of the LCPPO has also been the subject of judicial review proceedings. On 10 December 2008, the Legislative Council passed a motion to establish:

> a select committee to inquire into the vetting and approval for Mr Leung Chin-man, former Permanent Secretary for Housing, Planning and Lands (Housing) and Director of Housing, to take up post-service work with New World China Land Limited and other real estate organisations, and whether there was any connection between such work and the major housing or land policies which Mr Leung had taken part in the formulation or execution and decisions which he had made pursuant to such policies while serving as Director of Buildings, Permanent Secretary for Housing, Planning and Lands (Housing) and Director of Housing, that had given rise to any potential or actual conflict of interest, as well as related matters, and based on the results of the above inquiry, to make recommendations on the policies and arrangements governing post-service work of directorate civil servants and other related matters, and that in the performance of its duties the committee be authorised under section 9(2) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) to exercise the powers conferred by section 9(1) of that Ordinance.[95]

[2-89] In *Cheng Kar Shun (鄭家純) & Anor v Honourable Li Fung Ying (李鳳英議員) & Ors (S-J, Interested Party)*[96] the Court of First Instance had to consider a constitutional challenge to the powers of the Select Committee to exercise the powers under section 9(1) of the LCPPO. The applicants' argument was that these powers were vested in the Legislative Council itself (acting as a full Council) and not with any of its sub or select committees. The applicants' argument was based on article 73(10) of the Basic Law which states that such a power belongs to the 'Legislative Council'. Counsel for the applicants' argued, inter alia, that under article 73(10), 'Legislative Council' simply means what it says, the full body of the Legislative Council, but not any other combinations of its members – be they called committees, panels or otherwise'.[97] The question for the court was, inter alia, the proper interpretation of article 73(10) and, in particular, whether it should be interpreted as vesting such powers in the Legislative Council acting as a full council or whether such powers could also be exercised by one of its committees.

95 See Legislative Council Chamber, 'Minutes of the meeting held on Wednesday 10 December 2008 at 11:00 am and Thursday 11 December 2008 at 9:00 am' (LC Paper No CB(3)350/08-09, 26 February 2009) https://www.legco.gov.hk/yr08-09/english/counmtg/minutes/cm20081210.pdf accessed 21 May 2025.

96 *Cheng Kar Shun (鄭家純) & Anor v Honourable Li Fung Ying (李鳳英議員) & Ors (S-J, Interested Party)* [2009] 4 HKC 204, [2011] 2 HKLRD 555 (CFI).

97 *Cheng Kar Shun (鄭家純) & Anor v Honourable Li Fung Ying (李鳳英議員) & Ors (S-J, Interested Party)* [2009] 4 HKC 204, [2011] 2 HKLRD 555 (CFI) at para 94.

Cheng Kar Shun (鄭家純) & Anor v Honourable Li Fung Ying (李鳳英議員) & Ors (S-J, Interested Party)
[2009] 4 HKC 204, [2011] 2 HKLRD 555 (CFI)

Hon Andrew Cheung J:

4.3 Interpretation: the primary issue

103. I have already set out the relevant principles of interpretation of the Basic Law enunciated by the Court of Final Appeal in the two leading cases of *Ng Kar Ling* and *Chong Fung Yuen*. The Basic Law must not be read with a literal, technical, narrow or rigid approach. It must be given a purposive interpretation, which fully takes into account the context and purpose of the relevant provisions. The context and purpose of the relevant provisions, and indeed that of the Basic Law, should be considered in the light of the internal, as well as the external, aids to interpretation already described.

104. Although there are many differences between the Basic Law and the United States Constitution, I find the words of Chief Justice Marshall, said in the course of his judgment in *M'Culloch v Maryland* 17 US 316 (1819), a case dealing with the question of whether the US Constitution empowers Congress to incorporate a bank, a very useful reminder of the general nature of a constitutional instrument like the Basic Law:

> 'A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.' (at p 407)

4.4 A closer look at art 73

105. It is noteworthy that article 73 is not about meetings of the Legislative Council. It is about the powers and functions of the Legislative Council. Article 73 sets out those powers and functions. It is silent on how those powers and functions are to be exercised by the Legislative Council.

106. Ms Rose's [counsel for the applicants] contention is straightforward enough: 'Legislative Council' means the full body of the Council. It does not mean any committees of the Council. Thus the power to summon witnesses in article 73(10) may only be exercised by the full body of the Legislative Council. As the full body only functions in meeting, that is to say, in plenary meeting, the quorum for which is governed by article 75, the power to summon witnesses may only be exercised by the Council sitting in plenary session.

107. Yet the immediate problem with counsel's contention lies precisely with its simplicity. Her interpretation of 'Legislative Council' as meaning the full body of the Council is as rigid as it is simple. It applies equally to

all 10 subparagraphs in article 73. In other words, it means that only the Legislative Council functioning and sitting in plenary session may exercise the various powers and functions set out in article 73(1) to (10). This is, however, problematic for two reasons. First, it does not square well with the fact that at least as a matter of actual practice, many powers and functions of the Legislative Council were and are exercised not only by the Council as a full body, but also at committee level. Secondly, it raises the question of what then are the powers and functions (if any) under the Basic Law which are exercised by the committees, panels and sub-committees of the Council when they carry out or purport to carry out work as such.

...

115. As regards article 73(10), it is of course true that it does not expressly say that the power to summon witnesses to testify or to give evidence may be exercised by the Legislative Council at the committee level. Yet it is equally significant that article 73(10) does not expressly say that this cannot be done. Needless to say, the Ordinance, which allows the power to be exercised at committee level, has been around since 1985.

116. All this brings me back to the difficulties faced by Ms Rose's interpretation of article 73. As pointed out above, counsel's interpretation does not square well with the fact that at least as a matter of actual practice, many powers and functions of the Legislative Council were and are exercised not only by the Council as a full body, but also at committee level. Furthermore, it raises the question of what then are the powers and functions (if any) under the Basic Law which are exercised by the committees, panels and sub-committees of the Council when they carry out or purport to carry out work as such. Counsel's attempts to deal with these difficulties have not been entirely satisfactory.

...

119. At the substantive hearing, Ms Rose attempted to answer all this by a complicated argument. She accepted that committees, panels and subcommittees are not ultra vires the Basic Law. But she submitted that there is a distinction between so-called 'public law powers' and 'non-public law powers' of the Legislative Council. The former would include the powers set out in, for instance, article 73(1) to (3). They are powers that can only be exercised by the Legislative Council sitting in plenary session. For non-public law powers, counsel had in mind things that can be done by ordinary, private citizens, inasmuch as they may be done by Legislative Council members. One example she gave was debating issues concerning public interests. That can be done by legislators in the Legislative Council building. It may also be done by citizens in a park.

120. Building on that distinction, counsel accepted that, in relation to non public law powers, groups of members of the Legislative Council (in whatever combinations they prefer and by whatever names they wish to call themselves), might gather together to exercise those powers. In doing so, importantly, counsel submitted, they would not be exercising the powers

and functions given to the Legislative Council (as a body) under article 73. They would simply be exercising the right and liberty of every member of this society, including Legislative Council members alike, to, using the same example, debate amongst themselves issues concerning public interests. Article 73 does not prohibit members of the Legislative Council from doing so. But, and it is an important plank in counsel's argument, when they do so, they are not performing the powers and functions exercisable only by the Legislative Council (as a full body), and therefore cannot resort to the coercive power granted under article 73(10) only to the Legislative Council (as a full body).

121. With great respect, I do not find the argument convincing. The supposed distinction between public law powers and non-public law ones is one without any relevant difference in the present context. The powers and functions given to the Legislative Council—regardless of how they may be exercised - are given to it as the legislature of the Hong Kong Special Administrative Region. Insofar as those powers and functions may be exercised by its members in any particular way (such as in a plenary sitting with the necessary quorum), the members exercise them as the legislature of the Special Administrative Region. They do not do so as mere residents of the Special Administrative Region. Nor can any arbitrary combinations of members of the Legislative Council exercise the powers and functions set out in article 73. Very significantly, article 75(2) specifically provides that the Rules of Procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene the Basic Law. Thus members sitting in a tea room inside the Legislative Council building may discuss whatever they wish to discuss over a cup of tea. But what they do is not an exercise of the powers and functions of the Legislative Council.

122. On the other hand, where a combination of members of the Legislative Council gather together, pursuant to the Rules of Procedure made by the Legislative Council on its own pursuant to article 75(2), as a committee of the Legislative Council, and transact business accordingly, they are not gathering there as ordinary residents of the Special Administrative Region. The powers they exercise and the functions they perform are fundamentally different from that exercised or performed by those sitting on benches in a public park, discussing issues of great public interests amongst themselves. That is where counsel's argument detaches from reality.

123. Again, it must be emphasised that the Basic Law does not create a new legislature out of a vacuum. The committee system had been around for a long time and was still under development in 1990 when the Basic Law was promulgated. The Basic Law expressly leaves it to the new Legislative Council to make its own Rules of Procedure. Both as a matter of history and development as well as a matter of the nature of the substantive powers and functions to be performed, that at least some of the powers and functions described in article 73(1) to (9) may be exercised at committee level must have been something fully envisaged by the drafters of the Basic Law.

124. Ms Rose asks rhetorically whether 'the Legislative Council' in article 73 can mean one single member of the Legislative Council, so that he or she alone may exercise the powers and functions set out in article 73. This is merely a pseudo reductio ad absurdum argument. An answer of 'no' to counsel's rhetorical question does not mean, whether as a matter of logic or interpretation, that the Legislative Council in article 73 must mean the whole Legislative Council, i.e. its total membership. Counsel's question simply begs the core issue in this case – how may the powers and functions of the Legislative Council be exercised.

125. As I read it, article 73 is concerned with setting out or describing the powers and functions that the Legislative Council may exercise. It is not primarily concerned with how those powers and functions are to be exercised. Nor is it concerned with providing a precise definition of what 'Legislative Council' means in the context of exercising its powers and functions.

126. One must therefore look not only at article 73 itself but also elsewhere for guidance on how the powers and functions are meant to be exercised. There are, in my view, several answers. First, the nature and purpose of the powers and functions, which has been briefly touched on.

127. Secondly, one has past history and usage as guidance. Thus, for instance, receiving the policy addresses of the Chief Executive (article 73(4)) has always been done by the Council sitting in plenary session; whereas receiving and handling complaints from residents (article 73(8)) have for a long time been handled by Legislative Council members working in groups under a roster system (known as 'the Legislative Council Redress System').

128. Thirdly and importantly, one has the Rules of Procedure of the Legislative Council made pursuant to article 75(2).

129. Fourthly, one also has other provisions in the Basic Law, such as the quorum requirement in article 75(1), insofar sitting in plenary session of the Legislative Council is concerned. No Rules of Procedure can override the express provisions in article 75(1). Likewise, Annex II, Part II, dealing with procedures for voting on bills and motions in the Legislative Council, cannot be contradicted by any Rules of Procedure, nor can it be affected by the nature of the bills or motions, or by what has happened in the colonial days.

130. Finally, how the powers and functions are to be exercised may be governed by legislation, whether passed before or after 1997, so long as it is compatible with the provisions in the Basic Law. Subject to its compatibility with the Basic Law, the Ordinance is such a piece of legislation.

[2-90] The court also rejected the applicants' more specific arguments based on other articles of the Basic Law (namely, 75, 77, 78, 19(2), 48(11) and 62(6)) which the applicant argued supported their reading of 'Legislative Council'. The court's conclusion that section 9(1) of the LCPPO was constitutional was also based on its consideration of the purpose of the powers in section 9(1) and the Basic Law (paragraphs 144–155); the historical context in which the relevant provisions of the Basic Law were introduced (paragraphs 156–167); the drafting history of article 73 of the Basic Law (paragraphs 168–186); and the need to give the Basic Law an interpretation that accords with the realities of the operation of the Legislative Council and its sub-committees (paragraphs 187–199).[98]

The applicants accordingly had to participate in the inquiry which concluded in November 2009. It is clear that the decision to exercise such special powers should be carefully made as it has an impact on the time and resources of the executive. However, it is also clear that such powers are an important part of the machinery of the Legislative Council and an important tool for compelling participation and disclosure by those subject to legislative inquiries. Without such powers, such inquiries could be ineffective. This could ultimately undermine the role of the Legislative Council as a means of promoting political accountability.

98 The applicants' alternative argument was that the Select Committee had, in any event, exceeded its powers under s 9(1) of the LCCPO. Section 9(2) of the LCPPO specifies that the powers in s 9(1) apply in relation to '[the] matter or question specified in the resolution' authorising the exercise of the special powers under s 9(1). The applicants argued that the Select Committee had gone beyond 'the matter or question specified in the resolution' when exercising its special powers. This involved the court interpreting the scope of the terms of reference of the Select Committee. This raised an a priori question of whether this was a justiciable issue for the court to consider in light of the fact that it relates to the internal workings of the Legislative Council. The court held (at para 220) that:

> ... the courts of the Hong Kong Special Administrative Region do not, as a rule, interfere with the internal working of the legislature. Exceptionally, where questions of whether the Legislative Council, in going about its business, has acted in contravention of the provisions in the Basic Law arise, the courts do have jurisdiction to intervene. But the jurisdiction must be exercised with great restraint, having regard to the different constitutional roles assigned under the Basic Law to different arms of the government.

Issues of 'justiciability' are discussed further in **Chapter 5**.

2. The Exclusivity Principle

2.1 Overview

[3-2] As a result of the decision in *O'Reilly v Mackman*, applicants seeking to challenge an executive act or decision must be sure that they make their claim by means of the appropriate process. The distinction as to appropriate process is drawn between challenges based on public law matters and those on private law matters. Challenges arising from public law matters should be brought through the application for judicial review via Order 53, while cases turning on private law rights should be commenced by the ordinary procedure; that is, by writ or originating summons.[2] Any attempt to avoid this procedural distinction will be deemed by the court to be an abuse of process. The legitimacy of the charge of abuse of process lies in the deliberate creation of Order 53 as a special procedure designed to balance the needs of both public authorities and the applicants whilst bearing in mind the need for public authorities to be able to carry out their work efficiently: 'The intention behind the rule is that public authorities and the like should not be vexed with hopeless applications'.[3] The Order 53 procedure was designed not only to keep hopeless applications out of the courts but also to ensure that even prima facie valid challenges are disposed of as promptly as possible because, as Lord Diplock said in *O'Reilly*:

> The public interest in administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.[4]

[3-3] Nonetheless, as Lord Diplock was at pains to make clear, the exclusivity principle is a general rule rather than a rigid barrier to raising an otherwise meritorious challenge before the courts. He could foresee, even at that early stage, valid exceptions to the principle of procedural exclusivity:

> My Lords, I have described this as a general rule; for, though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties

2 For a discussion of the key procedural differences between an O 53 application for judicial review and the ordinary procedure, see H Woolf, 'Public Law – Private Law: Why the Divide? A Personal View' [1986] Public Law 220 at 229–231.

3 *Financial Secretary v Felix Wong* (2003) 6 HKCFAR 476, [2004] 1 HKLRD 303, [2003] HKCU 1304 (CFA) at para 90.

4 *O'Reilly v Mackman* [1983] 2 AC 237 at 281, [1982] 3 All ER 680.

> objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis.[5]

[3-4] Notwithstanding the possibility of permissible exceptions to the exclusivity principle, any unauthorised attempt to circumvent the procedural safeguards afforded to public authorities by the Order 53 application will be an abuse of process.[6]

[3-5] Section 21K of the High Court Ordinance (Cap 4) provides for a specific process by which an application for judicial review may be made with a view to obtaining a remedy in the form of a mandamus, certiorari, prohibition, declaration or injunction. This statutory provision is based upon the Order 53 proceeding in the English jurisdiction which was introduced in 1977[7] and subsequently incorporated as section 31 of the Supreme Court Act 1981 (UK). The effects of introducing the Order 53 process were several: to make the full range of remedies (the prerogative remedies of mandamus, prohibition, certiorari and the common law remedies of declaration and injunction) available to an applicant under one application without having to issue specific proceedings for individual remedies; to streamline the process for seeking those remedies; to make discovery and cross-examination available; and to put in place safeguards for public bodies such as the three-month time limit and the requirement of leave. These safeguards were seen as essential to achieving a balance between providing a means for individuals to challenge the decisions of public bodies whilst limiting the adverse impact that such legal challenges may have on good public administration, particularly in terms of delay and uncertainty surrounding the execution of public policy and the delivery of public services that such legal challenges can bring.

[3-6] These principles are explained in *Wong Fuk Tim v HKSAR Government & Ors*[8] where Lam J (as Lam PJ then was) said at paragraphs 6–10:

> 6. The matters relied upon by the Plaintiff in his Statement of Claim are patently public law challenges. Yet, instead of proceeding by way of judicial review, the Plaintiff issued the writ in this action and in so doing he circumvented the usual procedure for advancing public law challenges in terms of seeking leave for judicial review under Section 27K(3) of the High Court Ordinance and Order 53 Rule 3 of the Rules of the High Court.

5 *O'Reilly v Mackman* [1983] 2 AC 237 at 281, [1982] 3 All ER 680.

6 *Lau Chi Fai & Anor v S-J & Anor* [1999] 2 HKLRD 494, [1999] HKCU 1747 (CFI) at 503.

7 The Rules of the Supreme Court (Amendment No 3) 1977, SI 1977/1955.

8 *Wong Fuk Tim v HKSAR Government & Ors* [2011] HKCU 1948 (unreported, HCA 1008/2011, 12 October 2011) (CFI).

7. This is not a mere arid procedural point. On a leave application, the court will consider whether a challenge is reasonably arguable and whether the challenge has been mounted promptly. If a challenge is advanced later than three months from the date of the decision, requirement was explained by the Court of Final Appeal in *Po Fun Chan v Winnie Cheung* [2008] 1 HKLRD 319. Chief Justice Li said at para 14,

> Its purpose is to prevent public authorities from being unduly vexed with unarguable challenges. Whilst in a society governed by the rule of law, it is of fundamental importance for citizens to have access to the courts to challenge decisions made by public authorities on judicial review, the public interest in good public administration requires that public authorities should not have to face uncertainty as to the validity of their decisions as a result of unarguable claims. Nor should third parties affected by their decisions face such uncertainty.

8. To the same effect is the judgment of Ma CJHC (as he then was) in *Leung v Secretary for Justice* [2006] 4 HKLRD 211 at para 21,

> The procedural conditions imposed in judicial review proceedings such as the need to act without delay and the need for an applicant to obtain leave, afford a measure of protection to public authorities to ensure that matters involving the public at large are not unnecessarily disrupted where the damage to the individual is outweighed by the public interest.

9. Though there are exceptions as recognized by His Lordship at para 22, the general rule was stated as follows at para 21,

> As a general rule, where the subject matter of an action involves public law, judicial review proceedings should be the norm.

10. The same rule was stated by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 at p 285D,

> … it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means evade the provisions of Order 53 for the protection of such authorities.

[3-7] Craig notes that when the Order 53 process was first introduced, it was considered that although the declaration and injunction would still be available outside of the Order 53 process, it would not be appropriate to seek those remedies under Order 53 if the matter was not a public law matter.[9] It was this distinction between seeking a declaration or injunction within or without the Order 53 process which gave rise in *O'Reilly v Mackman* to the 'exclusivity principle': the principle that a remedy for

9 P Craig, *Administrative Law* (6th edn, Sweet & Maxwell 2008) at 863–864.

a public law matter should be pursued only through the application for judicial review and, conversely, that private law matters should not be the subject of an application for judicial review. Lord Diplock, as can be seen in the extract from his judgment below, stated that Order 53 was 'a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding' and to do otherwise would be an abuse of court process, That said, Lord Diplock nonetheless went on to characterise the exclusivity principle as a 'general rule' subject to certain exceptions. The potential parameters of the exceptions to which Lord Diplock alluded have since been explored at great length in the courts. The *O'Reilly v Mackman* decision in 1982, setting down the exclusivity principle, came shortly after the legislative adoption of the Order 53 proceedings. Now, following civil justice reforms, Order 53 rule 1A includes within the definition of an application for judicial review the following: applications for review of the lawfulness of an enactment; applications for review of the lawfulness of a decision, action or failure to act in relation to the exercise of a public function. In each and any of these applications, the application must conform to the requirements of the exclusivity principle, albeit an exclusivity principle as modified by the developments and exceptions provided for by the subsequent case law.

O'Reilly v Mackman
[1983] 2 AC 237, [1982] 3 All ER 680

The four plaintiffs were prisoners in Hull Prison who had been charged with disciplinary offences before the Board of Visitors. The Board found that the charges had been proved in each case and applied penalties. The plaintiffs alleged, three of them starting actions by writ before the Queen's Bench Division and the fourth by proceedings in the Chancery Division, that the Board of Visitors had acted in breach of the prison rules. The first three plaintiffs sought a declaration claiming that the Board's decisions were duly void. The defendants applied to have the applications struck out and the judge dismissed their applications. However, the Court of Appeal upheld the applications for striking out and found that the plaintiffs' suits were an abuse of process because the only manner in which the plaintiffs were eligible to seek a remedy would be under the O 53 process. The House of Lords upheld the Court of Appeal's decision finding that the creation of a special process, O 53, by which to challenge a public body's infringement of public law rights meant that use of a process other than O 53 to achieve the same means would be an abuse of process and an avoidance of the special protection that O 53 afforded to public bodies.

Lord Diplock (at 1133):

> … So O 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to

protection in public law can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged on the hearing of the application, can be granted to him. If what should emerge is that his complaint is not of an infringement of any of his rights that are entitled to protection in public law, but may be an infringement of his rights in private law and thus not a proper subject for judicial review, the court has power under r 9(5), instead of refusing the application, to order the proceedings to continue as if they had begun by writ. There is no such converse power under the Rules of the Supreme Court to permit an action begun by writ to continue as if it were an application for judicial review …

… My Lords, at the outset of this speech, I drew attention to the fact that the remedy by way of declaration of nullity of the decisions of the board was discretionary: as are all the remedies available on judicial review. Counsel for the appellants accordingly conceded that the fact that by adopting the procedure of an action begun by writ or by originating summons instead of an application for judicial review under O 53 (from which there have now been removed all those disadvantages to applicants that had previously led the courts to countenance actions for declarations and injunctions as an alternative procedure for obtaining a remedy for infringement of the rights of the individual that are entitled to protection in public law only) the appellants had thereby been able to evade those protections against groundless, unmeritorious or tardy harassment that were afforded to statutory tribunals or decision-making public authorities by O 53, and which might have resulted in the summary, and would in any event have resulted in the speedy, disposition of the application, is among the matters fit to be taken into consideration by the judge in deciding whether to exercise his discretion by refusing to grant a declaration; but, it was contended, this he may only do at the conclusion of the trial.

So to delay the judge's decision as to how to exercise his discretion would defeat the public policy that underlies the grant of those protections: viz the need, in the interests of good administration and of third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision that is valid in public law …

… The position of applicants for judicial review has been drastically ameliorated by the new O 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under O 53), despite the fact that this procedure had the effect of depriving the defendants of the protection to statutory tribunals and public authorities for which for public policy reasons O 53 provided.

Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained on an

application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O 53 for the protection of such authorities.

My Lords, I have described this as a general rule; for, though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis: a process that your Lordships will be continuing in the next case in which judgment is to be delivered today (see *Cocks v Thanet DC* [1982] 3 All ER 1135).

In the instant cases where the only relief sought is a declaration of nullity of the decisions of a statutory tribunal, the Board of Visitors of Hull Prison, as in any other case in which a similar declaration of nullity in public law is the only relief claimed, I have no hesitation, in agreement with the Court of Appeal, in holding that to allow the actions to proceed would be an abuse of the process of the court. They are blatant attempts to avoid the protections for the respondents for which O 53 provides.

Sit Ka Yin Priscilla v Equal Opportunities Commission
[1998] 1 HKC 278 (CFI)

The applicant's employment was terminated by the respondent, a public body established under the Sex Discrimination Ordinance (Cap 480). She claimed that her dismissal was not in accordance with the respondent's Disciplinary Policy and Procedures and that the dismissal contravened her right under the rules of natural justice to a fair hearing before any disciplinary action was taken against her. The applicant applied for leave for judicial review of the respondent's decision. Leave was refused on ex parte affidavit evidence on the ground that the applicant only had private law rights against the respondent, but a hearing of the application was ordered. At the hearing, a preliminary issue of whether the hearing should be in chambers was dealt with.

Keith J (at 282):

I was not prepared to grant the applicant leave on the papers. Such rights as she had to be treated fairly in accordance with the Disciplinary Policy and Procedures, and to be accorded a fair hearing before any disciplinary action was taken against her, appeared to me to be rights which she enjoyed in private law only. If that was right, her claim was not properly the subject of an application for judicial review …

Mr Mok also argues that the applicant had a legitimate expectation that she would not be disciplined otherwise than in accordance with the Disciplinary Policy and Procedures. That may be so, but that legitimate expectation only gives the applicant legal rights if those rights are enjoyed in public law. For the reasons I have given, I have no doubt that such rights which the applicant has are only rights enforceable under private law. This application for leave to apply for judicial review must therefore be dismissed.

There are two things which I should add in conclusion. First, I understand entirely why the applicant's solicitors thought it right to proceed initially by way of an application for leave to apply for judicial review. As Lord Woolf MR said in *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1997] 4 All ER 747 at 755a–c:

> If it is not clear whether judicial review or an ordinary action is the correct procedure it will be safer to make an application for judicial review than commence an ordinary action since there then should be no question of being treated as abusing the process of the court by avoiding the protection provided by judicial review. In the majority of cases it should not be necessary for purely procedural reasons to become involved in arid arguments as to whether the issues are correctly treated as involving public or private law or both. (For reasons of substantive law it may be necessary to consider this issue). If judicial review is used when it should not, the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should be heard by a judge who is not nominated to hear cases in the Crown Office list.

Secondly, I do not think that it would be appropriate to direct that these proceedings continue as if begun by writ. Such rights as the applicant has are rights under the law of contract, and this is a case in which I think the applicant should plead her case properly, in particular how she claims that the terms of the Disciplinary Policy and Procedures became incorporated into her contract of employment. I appreciate that if the Disciplinary Policy and Procedures have not been incorporated into her contract of employment, she may not be able to establish a breach of contract at all, but the absence of a remedy in private law does not mean that the applicant necessarily enjoys rights in public law.

2.2 Abuse of process and the exclusivity principle

[3-8] If such an abuse of process is found to exist, the consequences will vary depending on whether the applicant has attempted to raise a private law challenge in an application for judicial review or, vice versa, a public law challenge via the ordinary procedure. If it is the first scenario, then the finding of abuse of process is not fatal to the applicant: the shorter time limits for making an application for judicial review mean that the applicant will, despite having his application for judicial review rejected, still be within time to issue a challenge through the ordinary procedure

on a private law cause of action. The applicant will also be able to take advantage of the more expansive provisions in the ordinary procedure for discovery and cross-examination of any witnesses. If, however, the abuse of process is found to lie in the second scenario, making a public law challenge via the ordinary procedure, this finding could be fatal to the applicant's case being brought to court if in fact the ordinary procedure had been commenced after the public law Order 53 three-month time limit. Hence, the significance of getting the right procedure: the exclusivity principle provides ample incentive for parties to argue, depending on their respective positions, that the matter should properly be heard either by judicial review or by ordinary procedure. Lord Woolf, writing extra-judicially as Harry Woolf, summed up the practical consequences of the *O'Reilly* exclusivity principle thus:

> Order 53 has built within it a power to direct that an action started by way of judicial review should be able to be continued as though begun by writ. So if an applicant obtains leave when he does not really need it, this amounts to a minimal inconvenience. It is correct that there is no reverse escape route. Presumably the reason for this is that if an action is commenced by a writ when it should have been commenced by judicial review, it involves bypassing the safeguards contained in the application for judicial review and obviously it would defeat the whole purpose of the safeguards which the new procedure contains if they could be bypassed. This was the logic of the decision in *O'Reilly v Mackman*. However, in a meritorious case where there is doubt, there is no need for problems to arise if the applicant proceeds initially by way of judicial review just in case leave is necessary. Even if this is not done, if there comes before the High Court a case which has obvious merit, the court can there and then give leave and treat the material which is before it as fulfilling the procedural requirements of an application for judicial review and this is what I have done on more than one occasion.[10]

[3-9] Lord Woolf, as can be seen in the final sentences in the above quotation, shares Lord Diplock's view in *O'Reilly* that the exclusivity principle should not be so rigidly applied that it serves to block worthy challenges to the decisions and actions of public authorities. This is in keeping with the intention of the original authors of Order 53 that the process of judicial review should be a discretionary procedure, leave for which is ultimately in the hands of the court. Thus, it might be accurate to say that the exclusivity principle exists, its continuation is guaranteed by the courts' power to strike out challenges made under what precedent tells us is the wrong procedure, but that the courts reserve to themselves the

10 H Woolf, 'Public Law – Private Law: Why the Divide? A Personal View' [1986] Public Law 220 at 232.

discretion in exceptional and meritorious cases to hear the challenge as if it has been made in a procedurally proper manner.

2.3 Enforcing of the exclusivity principle

[3-10] *Cocks v Thanet District Council*[11] provides an example of the enforcement of the exclusivity principle by the court in an application made under the ordinary procedure. This mode of application was deemed to be incorrect and, therefore, an abuse of process. Furthermore, the application was found to lack any exceptional qualities that might persuade the court to exercise its discretion to hear the application as if it had been made in a procedurally proper manner. This case was also being heard in the House of Lords and at almost the same time as *O'Reilly*. The *Cocks* case concerned a challenge by a homeless person to a local public authority's decision to designate him, under the 1977 housing legislation, as intentionally homeless and therefore not entitled to public housing, the House of Lords upheld the reasoning applied in *O'Reilly* saying:

> The safeguards built into the O 53 procedure which protect from harassment public authorities on whom Parliament has imposed a duty to make public law decisions and the inherent advantages of that procedure over proceedings begun by writ or originating summons for the purposes of investigating whether such decisions are open to challenge are of no less importance in relation to this type of decision than to the type of decision your Lordships have just been considering in *O'Reilly v Mackman* … It follows from these considerations that proceedings in which an unsuccessful applicant for accommodation under the Act of 1977 sets out to challenge the decision of the housing authority against him will afford another application of Lord Diplock's general rule and will amount to an abuse of the process of the court if instituted otherwise than by an application for judicial review under RSC O 53.

[3-11] In general, the courts in Hong Kong continue to uphold the exclusivity principle, most particularly in the interests of affording public authorities the protection afforded by the safeguards built into the Order 53 process.[12]

2.4 Private law and the exclusivity principle

[3-12] The decision in *Sit Ka Yin* (see the extract above), that private law rights arising out of an employment contract, notwithstanding that

11 *Cocks v Thanet District Council* [1983] 2 AC 286, [1982] 3 All ER 1135.

12 *Right to Inherent Dignity Movement Association & Anor v HKSAR & Ors* [2008] HKCU 1692 (unreported, HCAL 108/2008, 31 October 2008) (CFI) at paras 57–58. See also *Chow Wai Hung v Hong Kong Government* [1983] 2 HKC 537 (HC); *A-G v Yau Kwok-Lam, Johnny* [1988] 2 HKLR 394, [1988] HKCU 421 (CA).

the employer was a statutory body, affirmed the existing application of the principle of procedural exclusivity in Hong Kong administrative law.[13] The courts had already applied the principle in the earlier case of *Re an application by Yau Fook Hong Co Ltd and Anor for judicial review*.[14] In this case, the question of tenders for lots of land in the New Territories based on the land exchange entitlement was raised. Here, the judge found that the relationship was one purely of contract and therefore fell within private law and was not consequently amenable to judicial review, even though one of the contracting parties was, in other respects, a 'public body': the Director of Lands.

[3-13] The decision in *Re an application by Yau Fook Hong Co Ltd and Anor for judicial review* that contractual matters are private law matters and therefore outside the permitted scope of the application for judicial review was confirmed one year later in *Re an Application by Harris Tsang Shing-Kung and Anor for judicial review*.[15] The contract in question here was between the applicants and the Hong Kong Jockey Club. The applicants were not members of the Club but had paid for a guest badge for the 1984/1985 racing season. In 1985, the applicants were told they were suspected of illegal bookmaking and had their badges removed and were banned from the racecourse for the next two years. Despite factors such as no reasons being given by the Club's for its suspicions and the use of a security guard to escort the applicants from the racecourse, the court found that this matter turned only on the Club's unilateral termination of the contract between the Club and the applicants and that this was therefore a private law matter and subject to the exclusivity principle.

2.5 The problematic nature of the exclusivity principle

[3-14] On the face of it, the exclusivity principle seems to be a simple procedural distinction between two types of legal challenge: those turning on public law matters are to be addressed by the application for judicial review; those relating to private law rights should be taken to court using the ordinary procedure, that is by writ or originating summons. However, even when Lord Diplock first articulated the principle in *O'Reilly*, he was aware that there were necessary exceptions to the absolute application of

13 See also *Jonathon Lee Fraser v The Chief Executive of the HKSAR, the Secretary for the Civil Service* [2000] 3 HKLRD 492, [2000] HKCU 787 (CFI); *Tan Shih Ying v City University of Hong Kong* [2013] 1 HKLRD 675, [2012] HKCU 2498 (CFI).

14 *Re an Application by Yau Fook Hong Co Ltd and Anor for Judicial Review* [1985] HKLR 42, [1985] HKCU 4 (HC).

15 *Re an Application by Harris Tsang Shing-Kung and Anor for Judicial Review* [1986] 2 HKLR 356, [1986] HKCU 244 (HC).