

ON APPEAL
FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN :

LEUNG CHOW PUBLIC CAR CO. (a firm) Appellants

- and -

THE ATTORNEY GENERAL OF HONG KONG Respondent

CASE FOR THE RESPONDENT

Record

10	1. This is an appeal from a judgment of the Court of Appeal of Hong Kong (Sir Alan Huggins, V.P., Leonard and Cons J.J.A.) dated the 28th January 1981 dismissing with costs the Appellants' appeal from a reserved judgment of Liu J. in the High Court of the Supreme Court of Hong Kong dated the 8th May 1980 whereby it was ordered that the Appellants' claim against the Respondent be dismissed with costs.	p.130 l. 15 - P.131 l. 1 -
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20	2. The questions for decision relate to the Road Traffic (Registration and Licensing of Vehicles) Regulations Chapter 220 of the Laws of Hong Kong.
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3. The regulations which are relevant to this case are:

Regulation 4

30	"4. (1) Any person who wishes to have registered a motor vehicle, of which he is the owner, shall deliver to the Commissioner an application for registration in such form as shall be prescribed by the Commissioner, and shall pay to the Commissioner a fee of \$10.
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(2) An application for registration shall be duly completed and shall be signed by the owner of the motor vehicle or by some person duly authorised by him in writing."

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Regulation 6

"6. (1) Upon receipt of an application for registration of a motor vehicle the Commissioner, if he is satisfied with the particulars contained in such application, subject to the provisions of regulation 17, shall -

(a) register the motor vehicle; and

(b) assign to the motor vehicle a registration mark which shall consist of a number or one or more letters and a number or the registration mark allocated under regulation 6A(1) or 6E or 6F, as the case may be; and 10

(c) register the person by whom or on whose behalf the application for registration was made as owner of the motor vehicle; and

(d) issue to that person a registration book in respect of the motor vehicle, marked with the registration mark assigned to the motor vehicle. 20

(2) A registered owner shall produce his registration book for inspection upon the request of a police officer or the Commissioner within 72 hours of such request".

Regulation 13(1) 30

"13.(1) On a transfer of ownership of a registered motor vehicle the registered owner shall forthwith deliver to the new owner of the vehicle -

(a) the registration book; and

(b) a notice of transfer of ownership in such form as may be specified by the Commissioner which shall - 40

(i) specify the name and address of the new owner;

(ii) contain such particulars and information as may be

required by the
Commissioner;

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(iii) be signed by the
registered owner; and

(iv) be signed by the new
owner, verifying the
accuracy of the
information and
particulars contained in
the notice."

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Regulation 17(1) & (2)

"17. (1) The Commissioner may refuse to
register any motor vehicle -

(a) if it appears to him to be
necessary or expedient so to do
in the interests of -

(i) public safety; or

(ii) the regulation of
vehicular traffic in the
Colony;

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(b) if the design, construction,
adaptation or condition of the
vehicle or any equipment thereof
does not comply with the Road
Traffic (Construction and Use)
Regulations or any other
enactment having regard to the
class or division of the class
of motor vehicle within which
application had been made to
register the vehicle;

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(c) which is not roadworthy;

(d) which does not accord with the
particulars contained in the
form of application for the
registration thereof; or

(e) the owner of which fails to
comply with a notice served upon
him under Regulation 18A(1).

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(2) The Commissioner shall refuse to
register a motor vehicle if the
total number of motor vehicles
registered within the class in
respect of which application has been

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made to register the motor vehicle is equal to or exceeds the total number of motor vehicles that may be registered within that class having regard to any direction given by the Commissioner under regulation 18B."

Regulation 17(F)

"17F.(1)In any case in which the Commissioner -

(a) refuses to register; or

(b) cancels the registration of, 10

a motor vehicle, the Commissioner, within 7 days of such refusal or cancellation shall cause to be served either personally or by post, upon the owner of the motor vehicle, a notice which -

(i) describes the motor vehicle with sufficient particularity to enable it to be identified; and

(ii) specifies the general grounds for the refusal or cancellation. 20

(2)Failure to comply with paragraph (1) shall not affect the validity of -

(a) any refusal by the Commissioner to register; or

(b) the cancellation by the Commissioner of the registration of,

any motor vehicle."

Regulation 18B

"18B. (1)Without prejudice to any other enactment the Commissioner by notice in the Gazette may limit the number of motor vehicles which may be registered or licensed as - 30

(a) public omnibuses;

(b) public light buses;

(c) Hong Kong and Kowloon taxis;

(ca) New Territories taxis; or

(d) public cars.

(2) The exercise by the Commissioner of his powers under paragraph (1) shall not thereby invalidate, operate to cancel, or render void the registration of a motor vehicle or of a motor vehicle licence. Record

(3) If the Commissioner -

(a) receives applications for -

(i) the registration; or

(ii) the licensing,

of vehicles within any class of motor vehicle which is referred to in paragraph (i);

(b) has under paragraph (1) specified the maximum number of motor vehicles which may be registered or licensed within such class; and

(c) would, but for the limitation under paragraph (1) of the maximum number of motor vehicles that may be registered or licensed in the class in which the applications have been made, grant the applications,

the Commissioner may cause the applications to be determined by lot."

4. The main issues raised by this appeal are:

(i) Whether the Commissioner for Transport acted ultra vires or abused his discretionary power when, by Gazette Notices (Extraordinary) No. 15 & 16 of 1977, he reduced the number of motor vehicles which might be registered and licensed as public cars from 1388 to 1376 and then to 1329;

(ii) If so, whether the Commissioner for Transport was actuated by malice towards the Appellants or acted ultra vires with the knowledge that he was so acting when publishing or acting upon the said Notices.

(iii) The meaning and effect of declarations granted to the Appellants by McMullin J. on 6th July 1977 in High Court Miscellaneous Proceedings No. 750, whereby the Appellants were

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declared to be entitled to have applications for the registration of 47 motor vehicles as public cars "entertained" by the Commissioner for Transport;

(iv) Whether the Appellants were for the purposes of the Regulations the owners of the 47 motor vehicles for the registration of which as public cars they applied on the 11th July 1977;

(v) Whether if the refusal of the Commissioner pursuant to Gazette Notice (Extraordinary) No. 16 of 1977 to register as public cars the 47 vehicles for which the Appellants applied on the 11th July 1977 was void or voidable, the Appellants are thereby entitled to damages from the Commissioner for Transport;

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(vi) If so, how such damages are to be calculated having regard inter alia to the facts that before the Appellants' said application two other applicants had each applied for 50 registrations as public cars, and that the Appellants could and should have mitigated their damage by tendering for 47 taxi licences at realistic prices in the public tenders held from time to time.

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5. The following facts and matters are not in dispute:

P.167
1. 1 - (i) By a Gazette Notice No. 2670 of 1975 dated the 5th December 1975 the Commissioner for Transport properly acting under Regulation 18B(1) limited the number of motor vehicles permitted to be registered and licensed as public cars to 1388.

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P.168
1. 1 - (ii) On the 15th July 1976 the Appellants submitted applications in the prescribed form to the Commissioner for Transport for the registration and licensing of 47 public cars together with applications for the registration and licensing of 25 public light buses.

P.209
1. 19 - (iii) As at the time of the said applications there were 95 vacancies for public cars and 4 vacancies for public light buses within the maximum numbers set by the Commissioner for Transport for these respective motor vehicles.

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P.162
1. 1 - (iv) The Commissioner for Transport had previously informed the Appellants that the vacancies were not available as they were "committed" to other applicants who had been approved by the Commissioner for Transport but who had not lodged their applications in the proper

form. The Commissioner for Transport accordingly refused all the Appellants' applications. Record
P.182
1. 1 -

(v) The Appellants instituted proceedings against the Commissioner for Transport in the name of the Attorney General under the Crown Proceedings Ordinance (Cap. 300) of the Laws of Hong Kong.

10 (vi) High Court Miscellaneous Proceedings No. 749 of 1976 were issued in respect of the refused applications for 25 public light buses and High Court Miscellaneous Proceedings No. 750 of 1976 were issued in respect of the refused applications for 47 public cars. P.146
1. 1 -

(vii) The hearing of High Court Miscellaneous Proceedings No. 749 of 1976 took place on the 24th, 25th May and 17th June of 1977. McMullin J. (as he then was) delivered his reserved judgment on the 30th June 1977. The following declarations were made:- P.245
1. 6 -

20 (1) that the Commissioner for Transport was wrong and had no authority when entertaining or considering the Plaintiffs' applications all of 15th July 1976 for registration of 25 vehicles as public light buses to have taken into account applications for the registration of motor vehicles as public light buses unless such latter mentioned applications had been made in the form prescribed by the Commissioner under the provisions of Regulation 4 of the Road Traffic (Registration and Licensing of Vehicles) Regulations, Cap. 220 of the Laws of Hong Kong; P.246
1. 19

30 (2) that the Commissioner for Transport ought to have entertained the Plaintiffs' said applications made in the form prescribed by the Commissioner under the provisions of Regulation 4 of the Road Traffic (Registration and Licensing of Vehicles) Regulations, Cap. 220 only with like applications, if any, without taking into consideration any other applications not made in the said form or at all; P.246
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40 (3) that the Plaintiffs are entitled to have four applications for the registration of four vehicles as public light buses entertained under the provisions of Regulation 6 of the P.246
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<u>Record</u>	Road Traffic (Registration and Licensing of Vehicles) Regulations; and	
P.246 1. 44	(4) that in the alternative to (3), the Plaintiffs are entitled to have applications for the registration of four vehicles as public light buses entertained together with other like applications by other person, if any, such applications to be determined by lot under and in accordance with Regulations 18B(3) of the Road Traffic (Registration and Licensing of Vehicles) Regulations.	10
P.212 1. 1	(viii) On the 15th June 1977 Road Traffic (Amendment)(No. 2) Ordinance, Chapter 220 of the Laws of Hong Kong was passed by the Legislative Council of Hong Kong. His Excellency the Governor assented to the passing of the Ordinance on the 16th June 1977. Section 4 of the Amendment Ordinance contains the following relevant provisions: -	20
P.213 1. 6	"4. The principal Ordinance is amended by adding after section 4 the following new section - 4A(1) Subject to subsection (2), the Commissioner shall, on application by the registered owner, reregister as a taxi a motor vehicle which immediately prior thereto was registered as a public car.	30
P.213 1. 13	(2) A premium of \$75,000 shall be payable in respect of the registration of such motor vehicle as a taxi, and the Commissioner shall not register such vehicle as a taxi unless a first instalment of \$50,000 has been paid.	
P.213 1. 17	(3) The second instalment of \$25,000 shall be payable not later than 12 months after the registration of such vehicle as a taxi, and until instalment is paid the Commissioner shall refuse to issue a further vehicle licence in respect of that vehicle as a taxi.	40
P.213 1. 22	(4) The premium payable under this section shall be in addition to the registration and licence fee payable under the regulations and	

may not be refunded.

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- (5) With effect from the expiry of the vehicle licence in force at the commencement of this section in respect of a motor vehicle registered as a public car, the registration of that vehicle as a public car shall cease to have effect."

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10 (viii) (a) On the 22nd June 1977 Mr. Peter Frederick Leeds, Deputy Commissioner for Transport started acting as Commissioner for Transport in the absence of Mr. Ian Macpherson, the substantive holder of the office.

(ix) On the 2nd July 1977 Gazette Notice (Extraordinary) No. 15, dated 30th June, 1977, was published on the instructions of Mr. Leeds acting as Commissioner for Transport. The Gazette Notice, inter alia, reduced the limit of the number of motor vehicles that might be registered and licensed as public cars to 1376.

P.217
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(x) At the date of publication of Gazette Notice (Extraordinary) No. 15 of 1977 there were 1329 motor vehicles registered and licensed as public cars. There were 47 vacancies for public cars within the new limit set by Gazette Notice (Extraordinary) No. 15.

30 (xi) Following the judgment in The High Court Miscellaneous Proceedings No. 749 the Appellants applied to the Commissioner for Transport on the 6th July 1977 for the registration and licensing of 4 public light buses. The applications were granted by the Commissioner for Transport on the 12th July 1977.

40 (xii) On the 6th July 1977 the hearing of High Court Miscellaneous Proceedings No. 750 of 1976 in respect of the Appellants' applications for registration and licensing of 47 public cars, took place before McMullin J. The Respondent did not oppose certain declarations sought in this action as the issue of "committed" vacancies had been decided upon by McMullin J. in High Court Miscellaneous Proceedings No. 479 of 1976.

P.210
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(xiii) Accordingly on the 6th July 1977 McMullin J. granted the following declarations:

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- (1) that the Commissioner for Transport was wrong and had no authority when entertaining or considering the

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- Plaintiffs' applications all of 15th July 1976 for the registration of 47 vehicles as public cars to have taken into account applications for the registration of motor vehicles as public cars unless such latter mentioned applications had been made in the form prescribed by the Commissioner under the provisions of Regulation 4 of the Road Traffic (Registration and Licensing of Vehicles) Regulations Cap. 220 of the Laws of Hong Kong; 10
- P.211 (2) that the Plaintiffs are entitled to have applications for registration of 47 vehicles as public cars entertained under the provisions of Regulation 6 of the Road Traffic (Registration and Licensing of Vehicles) Regulations. 1. 25
- (xiv) The Appellants did not pursue and McMullin J. did not grant three other declarations which had been claimed in the Originating Summons. These were declarations that : 20
- P.147 (a) the Appellants were entitled vehicles for which registration was sought on 15th July 1976 registered as public cars; 1. 22
- P.147 (b) the Commissioner for Transport had no authority to refuse the registration of such vehicles as public cars; 1. 29
- P.147 (c) the Appellants were entitled to have the said applications determined by lot together with other like applications by other persons, if any. 1. 32 30
- P.218 (xv) On the 7th July 1977 Gazette Notice (Extraordinary) No. 16 of 1977, dated 6th July 1977 was published on the instructions of Mr. Leeds acting as Commissioner for Transport. This Gazette Notice reduced the limit of the number of motor vehicles that might be registered and licensed as public cars by 47 and set a new limit at 1329. 1. 1 - 40
- (xvi) On the 8th July 1977 Mr. Leeds ceased to act as Commissioner for Transport and the substantive holder of this office, Mr. Macpherson returned to duty as Commissioner for Transport.
- P.252 (xvii) Meanwhile, on the 5th July 1977 and 1. 1 - 6th July 1977 UEE Limited and John Ip and Co. had submitted applications to the Commissioner for Transport for the registration and licensing of 50 P.254 1. 1 -

		<u>Record</u>
	public cars each. These applications were refused by the Commissioner for Transport on the 12th July 1977 on the ground that the limit set by Gazette Notice (Extraordinary) No. 16 on the number of motor vehicles that might be registered as public cars had been reached.	P.266 1. 1 - P.267 1. 1 -
10	(xviii) On the 11th July 1977 the Appellants applied for the registration and licensing of 47 public cars. The Appellants' applications were refused by the Commissioner for Transport on the 14th July 1977 on the same ground as the earlier applications lodged by UEE Limited and John Ip and Co.	P.221 1. 1 - P.222 1. 1 - P.223 1. 1 - P. 228 1. 1 -
	(xix) On the 22nd July 1977 by Gazette Notice No. 1741 notification was given of tenders for new taxi licences which had been accepted by the Commissioner for Transport. The lowest tender accepted for a taxi licence was \$181,000.00 and the highest tender accepted was \$196,005.00.	P.229 1. 1 -
20	(xx) On 1st November 1977 the Road Traffic (Amendment No. 2) Ordinance came into operation and by virtue of section 4(A)(6) of the Ordinance it was declared that the power of the Commissioner for Transport to register and license motor vehicles as public cars ceased as from the 1st November 1977. Provision was made for public cars to be re-registered as taxis in payment of a premium of HK\$75,000.	
30	6. Following the refusal of the Commissioner for Transport on the 14th July 1977 to grant the Appellants' applications for registration and licensing of 47 public cars, the Appellants commenced the present action.	P.1 1. 1 -
	7. In the Amended Statement of Claim the Appellants sought the following declarations :	
40	"(1) A declaration that the Plaintiffs are entitled to have 47 vehicles which comply with the Road Traffic (Construction and Use) Regulations registered as taxis by the Commissioner on payment of \$75,000.00 premium for each of the 47 vehicles.	P.8 1. 7
	(2) A declaration that the Commissioner was acting ultra vires knowing that he was so acting or maliciously in reducing the limit of the total number of the motor vehicles that might be registered as public cars in the terms of the Gazette Notice (Extraordinary) of 6th	P.8 1.13

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July 1977.

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- (3) A declaration that the Commissioner was acting wrongfully and unfairly in reducing the limit of the total number of motor vehicles that might be registered as public cars in the terms of the Gazette Notice (Extraordinary) of 6th July 1977."
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8. Further, the Appellants' claimed damages in the sum of \$6,074,750.00 or such damages as the court might deem reasonable and just, together with, interest and costs. 10
9. The action was heard before Liu J., sitting in the High Court of the Supreme Court of Hong Kong.
- P.122
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P. 123
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10. On the 8th May 1980 Liu J. gave judgment in favour of the Respondent and dismissed the Appellants' claims with costs.
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1. 14 -
11. Liu J. gave the following among other reasons for his judgment: 20
- (i) Gazette Notices (Extraordinary) No. 15 and No. 16 were not ultra vires. The exercise by the Commissioner for Transport of the discretion under Regulation 18B(1) to impose a limit on the number of public cars and other classes of motor vehicles that might be registered and licensed was not restricted to the two purposes set out in Regulation 17(1).
- P.110
1. 18 -
- P.114
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- (ii) There had been no failure by Mr. Leeds, who acted as Commissioner for Transport to properly exercise his discretion under Regulation 18B(1). On the facts, the case of Hong Kong Hunters Association Limited (M.P. No. 57 of 1980) (unreported) was distinguished. 30
- P.114
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- P.117
1. 3 -
- (iii) On the evidence Mr. Leeds had not been actuated by malice nor had he acted ultra vires knowing that he was so doing when he caused Gazette Notices (Extraordinary) No. 15 and No. 16 to be published.
- P.120
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- (iv) The Appellants had not been the "owners" of the vehicles which had been the subject of the applications submitted to the Commissioner for Transport on the 15th July 1976 and the 11th July 1977. The word "owner" in Regulation 4 had the legal meaning in that the property in the vehicles had to be vested in the Appellants at the 40

time of their respective applications. Liu J. followed the meaning of "owner" as expressed by the majority of the Court of Appeal in the case of Ho Choi Yim-fong v. Attorney General (Civil Appeal No. 69 of 1978) (unreported).

(v) The Respondent was not estopped from raising the issue of ownership because;

10 (a) The issue had been raised in High Court Miscellaneous Proceedings No. 749 and there was no suggestion that the issue had been abandoned in High Court Miscellaneous Proceedings No. 750. P.119
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20 (b) The service on the Appellants by the Commissioner for Transport of a notice of refusal of registration under Regulation 17F which declined to register on other grounds did not estop the Respondents from arguing, if the refusal was challenged, that the Appellants were not the owners of the vehicles at the date of their respective applications. P.120
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30 (vi) The Respondent was not estopped from relying upon Government policy to phase out public cars as a class of vehicle because Gazette Notice (Extraordinary) No. 15 did not mislead the Appellants into believing that the 47 vacancies had been provisionally allocated to them pending fresh applications to the Commissioner for Transport following the declarations being granted in High Court Miscellaneous Proceedings No. 750. P.120
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40 (vii) The Appellants' monetary claims also failed because the Appellants had not established that Mr. Leeds had acted maliciously or ultra vires with the knowledge of so acting. On the issue of damages Liu J. regarded himself bound by the decision of the Court of Appeal in the case of Attorney General v. Ng Kee (1978) HK LR. 52. P.121
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12. By Notice of Appeal dated 13th June 1980 the Appellants appealed to the Court of Appeal (Sir Alan Huggins, V.P., Leonard and Cons JJA). P.123
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13. In outline the submissions of the parties were as follows:

(A) The Appellants submissions:

(i) The power of the Commissioner for Transport under Regulation 18B(1) P.134
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- to impose a limit on the number of public cars and other motor vehicles that may be registered is derived from the power under Regulation 17(1) to refuse registration of any motor vehicle for either of the two purposes set out in Regulation 17(1). In this respect the Appellants relied upon obiter dicta of the Court of Appeal in the case of Attorney General v. Wong Kwong Shing (Civil Appeal No. 58 of 1977)(unreported). As the Commissioner for Transport had caused Gazette Notices (Extraordinary) No. 15 and No.16 to be published in pursuance of Government policy and not for either of the purposes set out in Regulation 17(1) the Gazette Notices were ultra vires. 10
- P.135
l. 19
- (ii) Mr. Leeds, acting as Commissioner for Transport had allowed himself to be dictated to by Government policy and had not properly exercised his discretion when reducing the limit on the number of public cars by causing Gazette Notices (Extraordinary) No. 15 and No. 16 to be published. On the facts the case of the Hong Kong Hunters Association Limited (M.P. No. 57 of 1980) (unreported) applied. 20
- P.136
l. 4
- (iii) Mr. Leeds, acting as Commissioner for Transport, had caused Gazette Notice (Extraordinary) No. 16 to be published deliberately and specifically to thwart the expectations of the Appellants following their success in obtaining the declarations in High Court Miscellaneous Proceedings No. 750 of 1976. 30
- P.136
l. 40
- (iv) The learned trial judge, Liu J., had been wrong to rely, when assessing the evidence of Mr. Leeds, upon the fact that Mr. Leeds had acted throughout on legal advice, for the fact of the advice had not been pleaded in the Amended Defence. The case of Davis v. New Merton Board Mills 40

Ltd. (1956) 1 All E.R. 379
applied.

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- 10 (v) That the Appellants were the "owners of the vehicles within the meaning of Regulation 4. It was not necessary for an owner applying for the registration of a motor vehicle to have the property in the vehicle at the date of the application to the Commissioner for Transport. It was sufficient if the applicant had the right to obtain the property in the vehicle at the time of the actual registration. In this respect, the Appellants' earlier action, Leung Chow Public Car Co. v. Attorney General (Miscellaneous Proceedings No.749 of 1976) (unreported) supported the Appellants together with the case of Ho Choi Yim-fong v. Attorney General (Miscellaneous Proceedings No. 775 of 1976) (unreported) and the judgment of McMullin J., in the same case on appeal (Civil Appeal No. 69 of 1978) (unreported).
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- 30 (vi) On the facts the case of Attorney General v. Ng Kee ((1978) H.K.L.R. 52) was distinguishable. Further, the law had developed since the case of Attorney General v. Ng Kee. The case of Thornton v. Kirklees Borough Council (1979) 1 Q.B. 626 supported the Appellants' claim for damages without the need to prove that Mr. Leeds was malicious or that he acted ultra vires with the knowledge of so acting.
- 40 P.138
1. 30 -
P.139
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(B) The Respondent's submissions (which on the directions of the Court were confined to the issue of damages only)

- (i) Attorney General v. Ng Kee (1978) H.K.L.R. 52 should be followed. It was correctly decided and it was not distinguishable.
- 50 (ii) The case of Thornton v. Kirklees Borough Council (1979) 1 Q.B. 626 was distinguishable in that it related to legislation passed to

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protect "private persons". In this respect the case of De Falco v. Crawley Borough Council (1980) Q.B. 460 supported the Respondent.

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(iii) The Appellants were under a duty to mitigate their loss following the refusal by the Commissioner for Transport in 1976 and 1977 to grant their application for public cars. The Appellants should have tendered for 47 taxi licences at a reasonable figure.

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(iv) It was not certain that the Appellants would have been entitled to register and license 47 public cars if their applications had not been refused. Other applicants may have had their vehicles registered and licensed before the Appellants and in this respect the Appellants' claim for damages was at best based on the loss of a chance in a ballot and should fail for uncertainty.

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14. The Court of Appeal gave judgment on the 28th January 1981 dismissing with costs the Appellants' appeal. The reasoned judgment of the Court of Appeal was delivered by Cons J.A. on the 20th February 1981. The Court of Appeal upheld the judgment of Liu J. for the following reasons:

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(i) The power to impose a limit under Regulation 18B(1) did not derive from Regulation 17(1), and (in any case) the imposition of a limit on the number of public cars was ipso facto the regulation of vehicular traffic in the colony.

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P.136
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(ii) The facts of the case did not show that Mr. Leeds, acting as Commissioner for Transport, had failed properly to exercise his discretion under Regulation 18B(1) or had acted maliciously.

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P.136
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P.136
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The Commissioner had reduced the limit out of a desire to prevent any increase in the number of public cars on the road and not deliberately and specifically to thwart the ambitions of the Appellants, though the reductions had that result.

		<u>Record</u>
	In reaching this conclusion the learned trial judge was entitled to take account of the fact that the acting Commissioner for Transport had acted throughout on legal advice though this had not been expressly pleaded.	P.137 1. 15
10	(iii) The majority view of the Court of Appeal in the case of <u>Ho Choi Yim-fong v. Attorney General</u> (Civil Appeal No. 69 of 1978) (unreported) that an "owner" in Regulation 4 meant an applicant in whom the property in the vehicle had passed was to be followed.	P.137 1. 39
	(iv) On the facts the Appellants were not the "owners" of the vehicles within the meaning of Regulation 4 at the date of their respective applications to the Commissioner for Transport.	P.138 1. 15
20	(v) The case of <u>Attorney-General v. Ng Kee</u> (1978) HKLR 52 was not distinguishable and the Court of Appeal was bound to follow this decision as none of the exceptions set out in <u>Young v. Bristol Aeroplane Co. Ltd.</u> (1944) K.B. 718 applied.	P.138 1. 30 P.139 1. 1 P.142 1. 1
	(vi) It was not reasonable to expect the Appellants to mitigate their loss by tendering for taxi licences and the damages claimed by the Appellants were not too uncertain to be assessed.	P.142 1. 4
30	15. On the 28th July 1981, the Court of Appeal of Hong Kong made an order granting the Appellants final leave to appeal to Her Majesty in Council.	P.142 1. 9
	16. The Respondent submits that this appeal should be dismissed with costs for the following amongst other reasons:	
40	(i) The Courts below rightly held that Gazette Notices (Extraordinary) No. 15 and 16 of 1977 were not ultra vires.	P.114 1. 14 - P.135 1. 7 -
	(ii) The Courts below rightly held that in publishing the said Gazette Notices and in acting thereon the Commissioner for Transport was not actuated by malice towards the Appellants nor did he abuse his discretion. He acted throughout in pursuance of a policy which he regarded as being desirable, namely to phase out public cars which	P.117 1. 3 - P.136 1. 17 -

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were not fulfilling their intended function and were instead operating as private taxis competing unfairly with licensed taxis. If, contrary to the findings of the lower Courts he acted ultra vires he did not do so knowingly.

(iii) Alternatively, there are no or no sufficient grounds for reversing the findings under (i) and (ii) above.

(iv) When assessing the evidence of the acting Commissioner for Transport, the trial judge rightly took into account the fact that Mr. Leeds relied on legal advice as rebutting the Appellants' allegations. At the trial the Appellants amended their Statement of Claim to allege for the first time that the reduction by the Commissioner in the limit by Gazette Notice (Extraordinary) No. 16 of 1977 "was malicious and/or ultra vires with the knowledge that he was so acting". In response (paragraph 20 of the Amended Defence) it was contended that the Commissioner "reasonable believed (as was the case) that he was acting lawfully properly and within his powers". No particulars were sought by the Appellants of this allegation and reliance on legal advice was part of the evidence led in support of it. The Appellants never sought nor needed an adjournment to deal with this evidence. When the evidence was given, the only objection raised was that the advice was "hearsay". It was expressly conceded that Mr. Leeds could give evidence of the fact that legal advice was given. It was argued only that he could not give evidence as to the correctness or otherwise of that advice.

P.1
l. 15 -

P. 7
l. 33 -

P.44
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P.45
l. 4 -

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l. 44 -
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l. 17 & 27

P.119
l. 20 -
P.120
l. 6 -

(v) The Courts below rightly held that Appellants were not for the purposes of the Regulations the owners of either group of 47 vehicles which they applied to register as public cars respectively on the 15th July 1976 and 11th July 1977.

(vi) Liu J. rightly held that the Commissioner for Transport was not estopped from advancing the contentions set out under (v) above. This point

was not pursued by the Appellants in the Court of Appeal.

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10 (vii) The Appellants were in any event not entitled to damages. It was not suggested that the Commissioner acted tortiously. It is not for every unlawful administrative act that an individual is entitled to recover damages even when he can show that that act has caused him loss. The case of the Attorney-General v. Ng Kee (1978) HKLR 52 correctly held that damages are not recoverable for an unlawful act of administration in the absence of malice or knowledge on the part of the administrator that he is acting ultra vires. The Appellants' reliance on Thornton v. Kirklees Borough Council (1979) 1 QB 626 was 20 misconceived; even if correctly decided, that decision was concerned with a statute (the Housing (Homeless Persons) Act 1977) passed for the protection of individuals who comprise a particular class of persons. It imposes mandatory functions on a local authority for the benefit of those persons, and creates what the Court of Appeal held was an 30 obligation towards an individual for breach of which that individual could recover damages: see also De Falco v. Crawley Borough Council (1980) QB 460.

40 (viii) The Appellants' claim for damages was in any case not established. It was at best a claim based on the loss of a chance that the Commissioner would decide not to grant (up to a maximum of 47 vehicles) either of the two earlier applications each for 50 vehicles made on the 5th and 6th July 1977; that he would put all these applications in a ballot and that the Appellants would then succeed in the ballot.

50 (ix) The Appellants failed to mitigate their alleged loss, (which was primarily for loss of profit which would have been made after converting 47 public cars into taxis) by making any effort to acquire licences for taxis by tendering for them at public

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auctions held from time to time after July 1977. The learned trial judge held that to do so would involve "a commercial transaction different in kind and involvement attracting a far heavier capital outlay". The Court of Appeal in Hong Kong accepted this finding. But it is submitted that it is not open to a person complaining that he has been wrongfully deprived of a profit earning chattel to decline to acquire it though it is available on the market albeit at a higher price (about HK\$185,000 as opposed to HK\$75,000), and then to claim loss of profits over a period of years. The Appellants claimed to have resources of HK\$5,000,000 in cash and bank facilities and did not suggest that they could not finance the acquisition of taxis by tender. 10 20

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(x) The Appellants' claim for damages contained overlapping elements. They claimed (paragraph 15 of the Amended Statement of Claim) both the difference between the premium of HK\$75,000 and the lowest tender price of HK\$181,000. The latter figure represented the market value in profit earning terms of registration as a taxi, but in addition the Appellants claimed \$1,663,800 for loss of operating profit on the same taxis. 30

(R.A. McCallough)
Counsel for the Respondent

No. 30 of 1981

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

LEUNG CHOW PUBLIC CAR CO.
(a firm) Appellants

- and -

THE ATTORNEY GENERAL OF
HONG KONG Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.,
Hale Court,
Lincolns Inn,
London WC2A 3UL.

Solicitors for the Respondent