

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO.5 OF 2017 (CRIMINAL)
(ON APPEAL FROM HCMA NO. 229 OF 2016)**

BETWEEN

HKSAR

Respondent

and

LEUNG, HIU YEUNG

Appellant

CASE FOR THE APPELLANT

[A/1/2 = Part A of the Record, Tab 1, Page 2]

A. THE APPEAL

1. This is the Appellant's appeal against his conviction of the offence at s.19(b) of the Legislative Council (Powers and Privileges) Ordinance ("LC(PP)O"), Cap. 382, namely "obstructing an officer of the Legislative Council while in execution of his duty".
2. The Appellant is alleged to have obstructed a police officer who entered the precincts of the Legislative Council ('Legco') Chamber along with other police officers, at the invitation of the Chairman of the Legislative Council Commission ('the LCC' or 'the Commission') to deal with members of the public trying to enter Legco.
3. The information laid against the Appellant provided a statement of the offence under the LC(PP)O and alleged in the recital of particulars, '*LEUNG Hiu-*

yeung, you are charged that on the 13th day of June 2014, in Hong Kong, you did obstruct an officer of the Council, namely Inspector of Police KWOK Chun-kit while in the execution of duty. ‘

4. The prosecution’s case was that Inspector Kwok was ‘an officer of [Legco]’ within the meaning of those words at section 2(1) LC(PP)O. The Appellant disputed the police officer’s status as an ‘officer of the Council’ and the lawfulness of his presence in the Legco premises. [A/6/110 §12]
5. On 15 August 2017, the Appeal Committee certified that there are were two points of law of great and general importance in the Appellant’s application for leave to appeal the conviction for obstruction. They were: [A/6/108 §3]
 - (1) Do police officers entering the “precincts of the Chamber” as defined in s.2 of LC(PP)O to deal with issues arising under s. 8(3) LC(PP)O, require an authority given under s. (8)2 or (3) LC(PP)O? (“Issue (1)”) [A/6/108 §3]
 - (2) When a police officer enters the precincts of the Chamber as defined in s.2 LC(PP)O but without an authority under s.8(2) or (3) LC(PP)O is that police officer “on duty within the precincts of the Chamber” and so an “officer of the Council” within the meaning of s.2 LC(PP)O? (“Issue (2)”) [A/6/108 §3]
6. Issue (1) concerns the need for a written authority, whether a Legco Rule of Procedure, a Council Resolution or an administrative instruction issued by the President of Legco (‘the President’), prohibiting or limiting the public right of access to the Council under section 8(1) LC(PP)O. If no written authority exists, as was the case here, police officers entering Legco to prevent a right of public access to attend meetings would not be acting in their course of their duties.
7. Issue (2) relates to police access to Legco generally. A police officer who has been invited into Legco by, or on, the authority of the President becomes an “officer of the Council” and may remain there until the invitation is

withdrawn. Without an invitation, the police officer may not enter and remain Legco lawfully and he or she is not an “officer of the Council”.

8. The outcome of the appeal will help determine the circumstances in which police officers may lawfully enter and perform policing duties in the precincts of Legco.

The Appellant’s Case Summarized

9. Legco premises, as defined in the terms ‘Chamber’ and ‘precincts of the Chamber’ in s. 2(1) LC(PP)O, are not a public place. They are private premises to which the public has a limited right of access for one purpose only, namely attending Council sittings. How this limited right of access by the public is to be limited and regulated is solely to be determined by the Rules of Procedures, Legco resolution or Administrative Instructions in accordance with section 8(2) and 8(3) LC(PP)O.
10. Police officers have no right to enter and remain on private premises without the leave of the owner or occupier. The President could have given permission to police officers to enter the premises but he did not do so. He gave permission in another capacity, namely as Chairman of the LCC.
11. Any common law right to enter private premises without the permission of the owner to prevent a breach of the peace has been limited by s. 10(g) Police Force Ordinance, Cap. 232 (‘PFO’). That provision authorizes police entry to public assemblies and places of entertainment only.
12. In any event, a right of entry onto Legco premises is incompatible with the powers and privileges of Members as found in BL Article 78 [freedom from arrest for members when in Legco] and other powers and privileges in Part II LC(PP)O. It is also inconsistent with the LC(PP)O conferring on Legco’s own staff comprehensive police powers to control order on the premises and limit public access.
13. Further, it is incompatible with the separation of powers that the Commissioner of Police who, subject to orders and control of the Chief

Executive, has the right of ‘supreme direction’ of the police force under s.4 PFO, could direct police officers to go into Legco premises and, because of that, become “officers of the Council” when the President had not invited them, or even did not want them to enter.

B. BACKGROUND

B1. The Offences brought against the Appellant

14. The Appellant took part in a demonstration outside Legco. The demonstration became an unlawful assembly. 13 people, including the Appellant, were charged with a variety of public order offences. Only he was charged with the offence of obstructing an officer of the Council while in execution of his duty. The Appellant was also charged with the offence of unlawful assembly, contrary to s. 18(3) Public Order Ordinance, Cap. 245.

B2. Factual background

15. On 13 June 2014, the Appellant was just one protester in a protest meeting held at the demonstration area outside the Legislative Council Complex. The Legco Finance Committee was scrutinizing the appropriation application related to advanced works at North East New Territories New Development areas at the time of the protest. [A/2/21-22 §5]
16. The protesters attempted to enter the Complex. The public entrance was blocked by police and Legco security staff. The protesters started to remove barriers outside the Complex to gain entry. Conflicts broke out between the protestors and the police and the security staff who were trying to prevent them from entering. The Appellant and the other defendants were arrested. [A/2/21-23 §§5-10]
17. The police had entered the Complex in response to a request for assistance made by the President acting in his capacity as Chairman of the LCC. [A/2/22-23 §§6, 12-14]

B3. Trial at the magistrate’s court

18. The Appellant pleaded not guilty to both offences before Mr. Jason WAN Siu-Ming (“the Magistrate”) in the Eastern Magistrate’s Court. He was convicted of both offences. [A/2/30] [A/2/32 §40]
19. The issue on the obstruction charge was whether the police officer named in the charge came inside the definition of ‘officer of the Council’ within the meaning of s. 2(1) LC(PP)O.
20. The President gave evidence that the police had been invited into Legco by him in his capacity as Chairman of the LCC only. He was emphatic that issues of security and order were Commission issues. When asked to distinguish between his dual capacities under which he invited the police into Legco, he identified that his power derived from his position as Chairman of LCC. The argument for the defence was that permission to enter Legco had to be given under an authority found in, or derived from, the LC(PP)O and no such authority existed. [A/2/23 §§12-14, and Leave Application Bundle 2 (p. 496 O-Q) and Bundle 3 (p. 673 J-L)]
21. The Magistrate thought that it did not matter who had called for the police. The protest had turned into an unlawful assembly and the police could deal with that as such when inside Legco. The police officer named in the charge was therefore on duty inside Legco and was an ‘officer of the Council’ within s. 2(1) LC(PP)O. See the Magistrate’s Statement of Findings at [22] and [38]. [A/2/26 §22] [A/2/31 §38]

B4. Proceedings at the Court of First Instance

22. The Appellant appealed the convictions. The appeal was heard by Hon Wong J (“the Judge”) on 19 and 20 December 2016. Judgment was published on 25 January 2017. [A/4/75]
23. The Appellant’s argument on the obstruction offence was basically the same that was advanced before the Magistrate. A police officer could not enter and remain on Legco premises unless authorized by Legco or the President and then he or she would act under ‘the orders of the President’. The invitation from the Chairman of the Commission was not an invitation from Legco and the President had not given orders to the police when on the premises. The [A/4/97 §§140-142]

police officer named in the charge was therefore not an ‘officer of the Council’ within the definition in s. 2(1) LC(PP)O:

“officer of the Council (立法會人員) means the Clerk or any other officer or person acting within the precincts of the Chamber under the orders of the President and includes any police officer on duty within the precincts of the Chamber)”

24. The Judge held that there was no requirement that a police officer inside Legco need be under the orders of the President. It sufficed that they were inside Legco and on duty. See [140]-[148] of Judgment. Therefore, the Appellant’s appeal against conviction on this charge failed. [A/4/97-98]

C. THE LEGAL CONTEXT

C1. Legco in the Basic Law

25. Chapter IV, Section 3 Basic Law (“BL”) establishes a Legislative Council with members to be returned by election which holds meetings at which a President presides. See BL Arts 66, 68, 72.

C2. Access to Legco

26. Legco premises comprise “the Chamber” and “precincts of the Chamber” in the LC(PP)O. S. 2(1) provides that:
- (1) *“Chamber (會議廳) means the Chamber in which the proceedings of the Council are conducted, and any galleries and places therein provided for members of the public and representatives of the press, television and radio, and includes any lobbies, offices or precincts used exclusively in connexion with the proceedings of the Council”;*
 - (2) *“Precincts of the Chamber (會議廳範圍) means the Chamber and offices of the Council and any adjacent galleries and places provided for the use or accommodation of members of the public and representatives of the press, television and radio, and subject to any exceptions made by the President under subsection (2) includes, during*

the whole of any day the Council or a committee is sitting, the entire building in which the Chamber is situated and any forecourt, yard, garden, enclosure or open space adjoining or appertaining to such building and used or provided for the purposes of the Council”.

27. The President may, by notice in the Gazette, exclude areas within the definition of “Precincts of the Chamber” either temporarily or permanently: s. 2(2) LC(PP)O.
28. “President” means “President of the Council, and includes any other member of the Council when presiding at a sitting of the Council”: s.2(1) LC(PP)O.
29. S.8 LC(PP)O regulates admittance to precincts of the Chamber. In particular,
 - (1) S. 8(1) provides that “*subject to this section, sittings of the Council shall be open to the public.*”
 - (2) S. 8(2) provides that “*the right of persons other than members or officers of the Council to enter or remain within the precincts of the Chamber shall be subject to the Rules of Procedure or any resolution of the Council limiting or prohibiting the enjoyment of such right.*”
 - (3) S. 8(3) provides that “*the President may from time to time, for the purpose of maintaining the security of the precincts of the Chamber, ensuring the proper behaviour and decorum of persons therein and for other administrative purposes, issue such administrative instructions as he may deem necessary or expedient for regulating the admittance of persons (other than members or officers of the Council) to, and the conduct of such persons within, the Chamber and the precincts of the Chamber.*”
 - (4) S. 8(4) requires written notice of an administrative instruction under sub-section (3) to be posted in conspicuous places inside Legco.
30. The definition of ‘Precincts of the Chamber’ at s. 2(1) LC(PP)O includes the Chamber and places where committees sit. The right of access at s. 8(1) is, as

can be seen, described more fully at sub-sections (2) and (3) as the right to enter and remain in the “Precincts of the Chamber”.

31. The effect of s. 8 means that:

- a. Only Members or officers of the Council can enter and remain within the precincts of the Chambers as of right.
- b. The public has a right of access to the precincts of the Chamber under s. 8(1) LC(PP)O but that right can be limited or prohibited by measures taken under sub-sections (2)-(4).

32. The definition of ‘Precincts of the Chamber’ at s. 2(1) LC(PP)O and the very limited right of public access created by s. 8(1), means that areas in and around the Chamber, including areas of land on the exterior, are subject to the control of the President unless he makes an exception to a place or area under s. 2(2). That provision says:

*The President may, by notice published in the Gazette, order that any part of a building, forecourt, yard, garden, enclosure or open space referred to in the definition in subsection (1) of **precincts of the Chamber** shall be excluded from that definition, either generally or for a specific purpose and either temporarily or permanently.*

33. This means that Legco premises cannot come within the definition of a ‘public place’ within the meaning of those words in s. 3 Interpretation and General Clauses Ordinance, Cap. 1:

- (a) any public street or pier, or any public garden; and*
- (b) any theatre, place of public entertainment of any kind, or other place of general resort, admission to which is obtained by payment or to which the public have or are permitted to have access*

C3. “Officer of the Council”

34. “Officer of the Council” means “the Clerk or any other officer or person acting within the precincts of the Chamber under the orders of the President and includes any police officer on duty within the precincts of the Chamber”: s.2(1) LC(PP)O.

35. S.24 LC(PP)O provides for powers to the persons named in within the above definition. It says:

“within the precincts of the Chamber, every officer of the Council shall, for the purposes of this Ordinance and of the application of the criminal law, have all the powers and enjoy all the privileges of a police officer.”

36. The effect of the provision is to grant every officer of the Council a status equivalent to a police officer. This means that those officers of the Council who are not police officers have the benefit of powers of arrest:

(a) The power of arrest under s. 50 Police Force Ordinance (“PFO”) which would permit arrest for the offences created by ss. 17, 18, 19 and 20 LC(PP)O and any other criminal offence.

(b) The power of arrest for an actual or apprehended breach of the peace derived from s.10(a) PFO.

(c) Other miscellaneous powers of arrest. (See 300.095 Halsbury’s Laws of Hong Kong (2nd edn.), Vol. 42.)

37. It is crucial that Legco, through its President, should have control of all means of access to its premises, subject only to the public right of access under s. 8(1) LC(PP)O, to ensure that Members can perform their functions under the BL (see Article 73 for list of functions) without outside interference.

38. It is for this reason that other legislative bodies either maintain their own police and security services or, where they rely on an external police force to supplement their own security staff, they ensure that operational control of police in the precincts of the legislature lies with a senior representative of the legislature. See summary of management and security arrangements for

legislatures in the U.K., Canada, New Zealand, Australia and U.S.A in the Appendices to LegCo Secretariat's Information Note "*Parliamentary security in selected places*" (INC03/15-16). See also the explanation of the right to self-regulation of the Canadian Parliamentary precincts in chapter 3, "Rights of the House as a Collectivity" of the "*House of Commons Procedure and Practice*" (2nd Edition, 2009).

"Right to Regulate and Administer Its Precinct

The privileges of the House of Commons include 'such rights as are necessary for free action within its jurisdiction and the necessary authority to enforce these rights if challenged'. It is well established that, by extension, the House has complete and sole authority to regulate and administer its precinct, without outside interference, including controlling access to the buildings.*

Police forces also may not enter the precinct to investigate the commission of an offence without permission from the Speaker. Cases have arisen where representatives of outside police forces have wanted to enter the precinct of Parliament for purposes of making an arrest, conducting an interrogation or executing a search warrant within the terms of the Criminal Code. The Speaker has the authority, on behalf of the House, to grant or deny outside police forces permission to enter the precinct, and oblige police to seek this permission prior to conducting their business.

The House of Commons cannot be used to give a Member sanctuary from the application of the law. Even the floor of the Chamber of the House is not a sanctuary and the application of the law particularly in criminal matters, is foremost. It is not the precinct of Parliament but the function being carried out which is protected. A Member cannot be arrested within the Parliament Buildings without the permission of the House, but can be arrested on the grounds surrounding the buildings as suggests the 1965 case of Gilles Grégoire (Lapointe) who was arrested for non-payment of traffic fines."

*[*Original footnote includes an extract from case Zündel v Boudria (1999) 127 O.A.C. 251 (C.A.) (para 18); 181 D.L.R. (4th) 46]*

D. POLICE POWERS OF ENTRY WITHOUT A WARRANT

D1. The Starting Point

39. Police officers may not enter or remain on premises, public or private, unless invited by an owner or occupier or there exists some common law or statutory power of entry. See *Halliday v Nevill* (1984) 57 ALR 331 at p. 335, line 44-p.336, line 10.

D2. Powers of entry under the common law

40. Police officers have a common-law duty to preserve the peace. That duty included a power of arrest. See *R (Laporte) v Chief Constable of Gloucester* [2007] 2 A.C. 105 per Lord Bingham of Cornhill at [29]:

“Every constable, and also every citizen, enjoys the power and is subject to a duty to seek to prevent, by arrest or other action short of arrest any breach of the peace occurring in his presence, or any breach of the peace which (having occurred) is likely to be renewed, or any breach of the peace which is about to occur.”

41. *Laporte* has been approved by this Court in *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837. At [192]:

“In the list of duties imposed on the police force under s.10 of the Police Force Ordinance (Cap.232), the very first is that of “preserving the public peace”. And, as the English Court of Appeal in R v Howell [1982] QB 416, 427 reminds us, when breach of the peace or the reasonable apprehension of such breach, happens in the ordinary citizen’s presence, that citizen has the right to arrest the offender without warrant. It goes further: At common law, the citizen not only has such right, he has a duty to take reasonable steps “to make the person who is breaking or threatening to break the peace refrain from

doing so, and those reasonable steps in appropriate cases will include detaining him against his will”: See Lord Bingham’s judgment in R (Laporte) v Chief Constable of Gloucestershire [2007] 2 AC 105, 125–126, quoting Lord Diplock in Lavin v Albert [1982] AC 546, 565”.

42. In England & Wales, the common-law power of entry to prevent a breach of the peace has been held even to extend to entry on private premises: *Thomas v Sawkins* [1935] 2 K.B. 249. See also *McGowan v Chief Constable of Kingston on Hull* [1968] Crim L.R. 34 and *McLeod v Metropolitan Police Commissioner* [1994] 4 All ER 553.
43. The power has been expressly preserved in the law of England & Wales when other common law powers of entry of premises were abolished: see s. 17(5) and (6) Police and Criminal Evidence Act 1984.

D3. Position in Hong Kong

44. As for police duties in Hong Kong, earlier versions of the PFO contained no provision that specifically addressed the issue. It was only after the Police Force Ordinance of 1948 was enacted that the duties of police officers were listed in the PFO. The current provision governing duties is s.10 PFO.
45. S.10(a) PFO reproduces that common-law duty to preserve the peace in statutory form:

“The duties of the police force shall be to take lawful measures for-

(a) preserving the public peace;”

46. That statutory duty has been held to allow entry on private premises where there is a reasonable apprehension of a breach of the peace but entry must be with the permission of the landowner. See *HKSAR v Au Kwok Kuen* [2010] 3 HKLRD 371 per Andrew Cheung J (as he then was) at [72]:

72. I reject the argument. First, as Ms Anna Lai for the prosecution correctly pointed out, a police officer’s duty is to be a keeper of the peace and to take all necessary steps with that in view. If invited by

the landowner, the police can enter private premises to keep the peace, prevent crime or protect property from criminal injury. Coffin v Smith (1980) 71 Cr App R 221; Lewis v Prosser (unrep., CO/1150/83, 30 October 1984); Lamb v Director of Public Prosecutions (1990) 154 JP 381. In particular, depending on the facts, even though whilst at the premises the police officers were satisfied that there was no breach or suspected breach of the peace, and that there was nothing in the suspected troublemakers' conduct which gave cause for concern, the police officers could stay behind at the premises and take all necessary steps to ensure that the suspected troublemakers peacefully left the premises (Lewis v Prosser).” (emphasis added)

47. As held in *Laporte*, a breach of the peace is not a criminal offence. At [114], Lord Brown of Eaton-under-Heywood said:

“Generally nowadays if an arrest in such cases becomes necessary it is for the offence of obstructing a police officer in the execution of his duty (in Albert v Lavin it was in fact for assaulting the officer in the execution of his duty). But it could equally be for conduct likely to cause a breach of the peace - not, of course itself a criminal offence (as in the case of the first two applicants in Steel).”

48. This Court has accepted this statement of the law. In *Chow Nok Hang*, Ribeiro PJ said at [81], *“while a breach of the peace is not, as such, a criminal offence, it founds an application to bind over.”*
49. It is for this reason that the general powers of arrest for criminal offences at s.50 PFO and s.101 CPO are not available to police officers when dealing with breaches of the peace. A power of arrest must be incidental to the statutory duty at s.10(a) PFO to enable a police officer to bring a person who has breached the peace, or one who is thought likely to breach the peace, before a magistrate on complaint to bind him or her over to keep the peace: see s.109I Criminal Procedure Ordinance, Cap. 221 and s.61 Magistrates Ordinance, Cap. 227.

50. S.10(g) PFO creates a power of entry to public places and places of public resort and public entertainment to preserve public order. It reads:

“(g) preserving order in public places and places of public resort, at public meetings and in assemblies for public amusements, for which purpose any police officer on duty shall have free admission to all such places and meetings and assemblies while open to any of the public; ...”

51. These places are of the kind covered by the facts of *Thomas v Sawkins*, which was about a political meeting in a private hall open to members of the public.¹
52. It is arguable that by enacting s. 10(g) PFO the legislature cut down the scope of the common-law power in *Thomas v Sawkins* to go onto private premises in cases of breaches of the peace. See *Bennion Statutory Interpretation* (6th) at S. 32 ‘Overriding effect of an Act’, pp 168-174.
53. The enactment of ss.10(a) and 10(g) limits the places where police might perform common law duties to preserve public order. Police officers preserve *public* peace and *public* order in public, not private, settings.
54. The upshot is that police officers cannot claim a power to enter private premises to preserve order without the consent of the owner other than those of a kind within s. 10(g) PFO if they apprehend the risk of a breach of the peace.
55. In *Kuru v New South Wales* (2008) 246 ALR 260, the High Court of Australia commented, at [48], on the fact that *Thomas v Sawkins* was a decision concerning a set of special facts:

¹ *Thomas v Sawkins* [1935] 2 K.B. 249 concerned a widely-advertised public meeting that was being held at a public library which had been hired for private use for the occasion. The police had been refused entry by the organisers. Nonetheless, the police insisted on entering it and remaining there during the meeting. No criminal offence was committed by any person at the meeting, nor was there any actual breach of the peace or disorder. The police maintained they had reasonable grounds for believing that, if they were not present at the meeting, seditious speeches would be made and that incitements to violence and breaches of the peace would occur.

“As has been cogently argued in academic commentary on Thomas, the statements made by Avory J and Lord Hewart CJ that have been set out earlier were cast in “unnecessarily wide terms”. The immediate context for the decision in Thomas was the attendance of police at a public meeting held to consider, among other things, a call for the dismissal of the chief constable of the county. For at least Avory J, and perhaps the third member of the court, Lawrence J, much turned on the fact that the meeting was a public meeting to which all members of the public were invited. What was decided in Thomas must be approached with the facts of the case well in mind, and of course, the facts of the present case are very different.”

56. The academic criticism referred to in *Kuru* included that of Professor Goodhart in *Thomas v Sawkins*: “A Constitutional Innovation”, (1936) 6 CLJ 22. Professor Goodhart doubted the constitutionality of a power enabling the police to go into private premises to guard against the off chance of disorder occurring. Bokhary PJ approved the Professor’s criticism in a dissenting judgement in another case concerning preventative policing (prior notification of protests). See *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at [136].

D4. For preventive purposes

57. Whatever the scope of the power of entry to prevent a breach of the peace, this power is for preventive purposes only. It cannot be used to justify remaining on the premises for investigative or other purposes. See *Kuru* at [40]-[54]. If exercised inappropriately the power can give rise to breaches of the right to a private life and home because intrusive police force might well be a disproportionate response to a domestic issue: *McLeod v UK* (1999) 27 EHRR. 493 at [52]-[53]. In the Hong Kong context, these issues would arise under Article 29 BL: ‘The homes and other premises of Hong Kong residents shall be inviolable.’

58. Once the power of entry has been used, if matters have progressed beyond an actual or apprehended breach of the peace and criminal offences are suspected, police officers may arrest for those offences.

E. POLICE OFFICERS' CAPACITY

59. It is submitted that the police officer named in the charge, Inspector Kwok, was not an officer of the Council at the material time.

E1. No orders from the President or from Legco for entry

60. When entering Legco, the police officers did not act on the invitation, or the orders, of the President or the Council. This is clear from the evidence.
61. In the prosecution's closing submission in the Magistrate's court, the prosecutor said:

"6. Due to fear that the order would further deteriorate, the Chief Security Officer of the Legislative Council (PW2 Chow Wai Tak) reported the situation to the Assistant Secretary General of the Legislative Council (PW 18 Loo Sze Yuen), then PW18 contacted the Chairman of the Legislative Council Commission ("the Commission") (DW Tsang Yok-Sing), who was concurrently the Chairman of the Legislative Council, and let the DW decide on what emergency measure to adopt. In simpler words, DW eventually decided to request for police's assistance, and the Police entered the Complex Lobby to stand by under PW2's arrangement."

[A/2/21]

62. There was no dispute about this. Mr. Tsang Yok Sing ("Mr. Tsang"), the President of Legco and Chairman of the Commission, gave more details about the two posts in his testimony as a defence witness as recorded by the Magistrate in his Statement of Findings:

"12. DW testified, that, as President of the Legislative Council, and thus that of the Commission, issues of security and order was within the management of the Commission. As such, he participated in

making decisions about the arrangement of the security of the Complex. On the day of the incident, he received report from the Legislative Council Secretariat that there were many protestors outside the Complex, and some of them were agitated. He decided that the security issue and crowd control of the Complex had exhausted the capacity of security personnel of the Legco Secretariat, and in consideration of forced entry attempts to the complex by protestors a week ago and concern for the order and safety of the Complex, he considered requesting the police to enter the Complex to help maintain order.

13. He first discussed with the Deputy Chairman, and then consulted two ex officio members. They all agreed to seek assistance from the police. He notified all Commission members via WhatsApp Group, and the decision was approved with no opposition. This had been the decision-making protocol of the Commission for emergency decisions. In response to being asked why this was not handed over to be decided in a Legco meeting, he said he did not consider it inappropriate for the Commission to make the aforementioned decision as a statutory body responsible for the management of the Complex.

14. As for the access of the Complex, DW agreed that members of the public generally can freely access of the Complex during office hours, but not all areas are open for public use. For example, use of the library is by appointment, and entering the Complex requires registration of personal details. As for the decision to close the public entrance of the Complex, he couldn't recall the details of the decision-making, but he believed it was the worsening of the order outside the Complex, as reported by the Secretariat, that led to the Commission's decision.” (emphasis added)

[A/2/22-23]

63. Mr. Tsang's understanding of his powers when acting as the Chairman of LCC is wrong. Access, security and order issues inside Legco are the Council's and the President's responsibilities. He discharges his responsibilities on behalf of

the Members. He is accountable to them and no one else. These responsibilities are derived from the Basic Law and the LC(PP)O.

64. At the BL level, Article 78 gives Members protection from arrest when attending Council meetings. This must include a power to refuse entry to persons, including police officers, who seek entry to Legco premises to arrest a Member and the power to eject if the police officers are already inside.
65. Art 72 BL states the powers and functions of the President of Legco to be:

“(1) To preside over meetings;

(2) To decide on the agenda, giving priority to government bills for inclusion in the agenda;

(3) To decide on the time of meetings;

(4) To call special sessions during the recess;

*(5) To call emergency sessions on the request of the Chief Executive;
and*

(6) To exercise other powers and functions as prescribed in the rules of procedure of the Legislative Council.” (emphasis added)

66. LC(PP)O contains various provisions which indicate that the President controls Legco premises free from any interference. They include:
- a. The definition at s. 2(1) ‘officers of the Council’ including an ‘officer or person within the precincts of the Chamber ‘under the orders of the President’. These would normally be the regular security staff of Legco.
 - b. The provisions at ss. 17,19 and 20 creating offences relating to conduct in Legco and enforcement of restrictions of public access. Arrests may be made for these offences by officers or persons ‘under the orders of the President’.

- c. Section 23, which provides that the lawful exercise of any of the Council, the President or any ‘officer of the council’ may not be subject to the jurisdiction of any court.
67. Legco’s Rules of Procedure, made by the Council under BL 75(2), gives the President primary responsibility for order issues in Legco. These include regulating Members’ conduct in session [Rule 45]; subject to other rules, regulating access to the press and public [Rule 86]; and, subject to other rules, removing members of the press and the public who behave in a disorderly manner [Rule 87].
68. The regulation of the right of entry for the public under s.8(1) LC(PP)O at sub-sections (2) and (3) is shared with the Council. Only Rules of Procedure or Council Resolutions, can regulate public access in general terms under sub-section (1). The President may, exceptionally, for the purposes of security and ensuring proper behaviour, issue administrative instructions. Such instructions must be written and posted in conspicuous places: sub-section (4).
69. The Appellant accepts that the President might have been in a position to issue an administrative instruction under s.8(4) closing Legco on the evening of 13 June 2014 and invited police officers onto the premises to help enforce the instruction. That would have been their task when they were inside.
70. The police officers would then have been ‘officers of the Council’ and could have arrested the Appellant for the offence at s. 20(b) LC(PP)O (trying to enter in contravention an administrative direction] or for any other offence under the LC(PP)O or under any other relevant law. The police officers would also have the power to arrest for an actual or apprehended breach of the peace.
71. Even without issuing an administrative instruction under s. 8(3), the President might have invited police officers onto the premises because of apprehended disorder. The police officers would then also have been ‘officers of the Council’ but they would not have been acting in their duties in trying to close the entrances of Legco when no written authority under sections 8(2) and (3) LC(PP)O for closing them existed. They would have been acting unlawfully

because they were preventing unrestricted public access under section 8(1) LC(PP)O.

72. Mr. Tsang claimed to act as Commission Chairman, and not as President, mistakenly believing that closing Legco was an issue for the Commission. His invitation was not effective to turn the police officers that entered into ‘officers of the Council’ and the police officers had no other lawful power of entry.
73. Even if Mr. Tsang was also the President, he could not discharge his responsibilities as President when choosing to act as Chairman of the Council. The only way that the Chairman and other members of the Commission could be involved in decision-making about access to Legco was if Legco had resolved that some limited responsibilities in this area be given to it.
74. The list of statutory functions of the Council is at s.9 Legislation Council Commission Ordinance, Cap 443:

“(a)to provide through the Secretariat administrative support and services to the Council;

(b)to provide office accommodation to the members of the Council and staff of the Secretariat;

(c)to supervise the operation of the Secretariat;

(d)to produce an official report of all proceedings in the Council and in any committee of the whole Council; and

(e)to perform such other duties as the Council may by resolution determine.” (emphasis added)

75. A resolution under s.9(g) LCCO could not devolve all responsibility for access and security decisions to the Commission but it might enable members of the Commission to invite police officers into Legco by a standing instruction or order when the President or Deputy President was not present. See *Police v Beggs* [1999] 3 NZLR 615 at 632, lines 8-15: Member of Speaker’s staff

competent to ask protesters in New Zealand Parliament grounds to disperse before invoking criminal trespass legislation

E2. Conclusion

76. For the above reasons, the Appellant submits the answers to Issues (1) & (2) are:

- (1) “Do police officers entering the “precincts of the Chamber” as defined in s.2 of LC(PP)O to deal with issues arising under s. 8(3) LC(PP)O, require an authority given under s. (8)2 or (3) LC(PP)O?”

Answer:

Yes. The right of access under s. 8(1) LC(PP)O can only be restricted or prohibited under an authority made under s.8(2)-(3). Police officers entering Legco to enforce restrictions on the right of access under s. 8(1) need to be able to rely on such an authority if they seek to prevent access.

- (3) When a police officer enters the precincts of the Chamber as defined in s.2 LC(PP)O but without an authority under s.8(2) or (3) LC(PP)O is that police officer “on duty within the precincts of the Chamber” and so an “officer of the Council” within the meaning of s.2 LC(PP)O? (“Issue (2)”)

Answer:

No. The common-law duty of preserving the peace has been narrowed down by s.10(g) PFO to the effect that the police officers can only enter and remain on private premises upon the invitation of the owner of the premises, in this case the President. If they are not so invited, they cannot be regarded as being on duty within the precincts of the Chamber and they are not officers of the Council within the meaning of the definition at s.2(1) LC(PP)O.

77. The Appellant therefore respectfully asks this Court to allow the appeal.

Dated this 21st day of September 2017

Philip J. Dykes

Counsel for the Appellant

Douglas Kwok

Counsel for the Appellant

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO.5 OF 2017 (CRIMINAL)
(ON APPEAL FROM HCMA NO. 229 OF 2016)**

BETWEEN

HKSAR

Respondent

and

LEUNG, HIU YEUNG

Appellant

CASE FOR THE APPELLANT

Filed on the 21st day of September 2017

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