CACV 256/2017
[2021] HKCA 1627

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO 256 OF 2017
(ON APPEAL FROM HCAL NO 102 OF 2016)

BETWEEN

KWP QUARRY COMPANY LIMITED — Applicant

and

INLAND REVENUE BOARD OF REVIEW — Respondent

THE COMMISSIONER OF INLAND REVENUE — Interested Party

Before : Hon Kwan VP, Yuen JA and Barma JA in Court
Date of Hearing : 11 April 2019
Date of Judgment : 11 April 2019
Date of Reasons for Judgment : 3 November 2021

REASONS FOR JUDGMENT

Hon Kwan VP:

1. I agree with the reasons for judgment of Barma JA.

Hon Yuen JA:

2. I agree with the reasons for judgment of Barma JA.

Hon Barma JA:

Introduction

3. This is an appeal by the applicant taxpayer, KWP Quarry Company Limited, against the decision of Anthony Chan J ("the Judge") dated 10 October 2017, dismissing the applicant's application for judicial review of the decision of the Inland Revenue Board of Review ("the Board") dated 8 April 2016 ("the Case Stated Decision") refusing to state a case on a question of law for the opinion of the Court of First Instance, under the then prevailing provisions of s 69 of the Inland Revenue Ordinance, Cap 112 ("the IRO"). References in this judgment to s 69 or s 69(1) are to the then prevailing provisions of the IRO.

4. We heard the appeal on 11 April 2019, when the applicant appeared by the late Mr Gerard McCoy SC, and the Commissioner of Inland Revenue ("the Commissioner") appeared (as an interested party) by Ms Yvonne Cheng SC. At the conclusion of the hearing we dismissed the appeal with costs to the Commissioner and indicated that we would hand down our reasons in due course. These, with apologies for the delay, are my reasons for our judgment.

Background

5. On 5 March 1997, the applicant (a private limited company incorporated in Hong Kong) entered into a contract with the Hong Kong Government by which it was granted the right to operate the Anderson Road Quarry ("the Quarry"), in return for semi-annual payments by the applicant to the Government over the lifetime of the Quarry. The contract also obliged the applicant to conduct civil engineering works for the rehabilitation of the Quarry. This work involved removal of "overburden" (weathered rock and soil of low value) in order to obtain access to the rock below which could then be quarried by the applicant. The overburden then had to be stored and backfilled into a drop cut – an area from which rock had previously been excavated. This was required for the landscaping of the Quarry with a view to future building development.

6. The removal of the overburden was carried out over a number of years, and in stages, for two main reasons. First, the Quarry covered a very large area and so it would have taken a long time if all the overburden were to be removed in one go before quarrying operations commenced. In other words, it was more sensible and efficient in terms of business operation of the Quarry to carry out the work in sections, by removing overburden from one section and then extracting the rock thereby exposed, and thereafter moving on to do the same in another section. Secondly, the applicant's obligation to rehabilitate the Quarry by backfilling it so as to produce a stable and safe landform meant that it had to remove the overburden in stages, using the overburden removed during one stage to backfill a cavity created in any earlier stage of quarrying. For both of these reasons, the Quarry was divided into sections measuring 50 metres by 50 metres, and the applicant would remove the overburden from one section, quarry the rock thereby exposed, and only move on to an adjacent section when quarrying in the first section had been completed.

7. Disputes arose between the applicant and the Commissioner regarding the deductibility of the applicant's costs of removing the overburden ("the overburden costs") for the purpose of ascertaining the applicant's assessable profits from its operations. The applicant took the view that the disputed costs were revenue in nature, and deducted them in ascertaining its assessable profits or adjusted loss for the years of assessment from 1996/97 to 2007/08. The assessor disagreed, taking the view that the overburden costs were capital in nature, and raised profits tax assessments for the years 2002/03 to 2007/08 disallowing the overburden costs as deductions.

8. The applicant lodged objections to the assessments by the assessor, but the assessments were confirmed by the Deputy Commissioner by a determination dated 28 April 2011. The applicant then appealed to the Board, which dismissed the appeal by its decision dated 31 December 2015 ("the Appeal Decision"), agreeing with the Commissioner that the overburden costs were in the nature of capital expenses.

The Board's Appeal Decision

9. The key issue before the Board on the appeal from the determination was whether the removal of the overburden by the applicant should be regarded as a "first cut" or as a "subsequent cut". The difference between these was explained in the evidence before the Board. In typical mining (or for that matter, quarrying) operations, it is generally necessary for the operator to make a "first cut" into the ground to remove the overburden in order to obtain access to the target minerals or rock. Depending on the way in which the minerals lie under the overburden, it may be necessary for further "subsequent cuts" to be made in order to enable mining to be carried out. This will be necessary, for example, where overburden and mineral ore are layered, so that the valuable mineral ore has to be extracted from between layers of overburden. Such "subsequent cuts" will be made repeatedly over the life of the mine as successive layers of mineral ore are accessed as operations reach further downwards. It was common ground that costs of a "first cut" are capital in nature, whereas costs of "subsequent cuts" are income in nature.

10. Before the Board, the applicant contended that the removal of the overburden was not a "first cut" as the Quarry had been worked by its predecessors and it was they who had prepared the Quarry for quarrying. Additionally, the applicant contended that it was required to continuously remove the overburden as it moved from area to area within the Quarry, as described in [6] above.

11. The Board disagreed, and found that the overburden removal was in the nature of a "first cut" and that consequently the overburden costs were capital in nature (and hence not deductible), it being common ground that "first cut" costs were capital in nature. The Board's findings in this respect were set out in [9] of the judgment below. The Board found that:

> (1) Overburden would be removed from one section of the Quarry and the rock underneath quarried. After the quarrying in a particular section was complete, the process would be repeated in

an adjacent section of the Quarry. The overburden removed from the new section would be back-filled into the drop cut created by the quarrying in the previous section, and the back-filling had to be engineered to ensure that the resulting landform would be stable and safe, in compliance with the applicant's rehabilitation obligations under the contract.

(2) Once overburden had been removed in any particular section of the Quarry, the removal process was complete for that particular section, and no further overburden costs would be incurred in respect of that section. Thus, for any particular section, the overburden cost was a "once and for all" expense.

(3) The overburden costs were *not* of a recurring nature because it was *not* the case that the applicant had to remove overburden in the same section repeatedly or that overburden was sandwiched within the rock (as might be more typical in a mining, rather than a quarrying operation) so that it had to be continuously or repeatedly removed as rock was extracted. Once the overburden in a particular section was removed, the underlying rock could be continuously quarried until it was exhausted without any need to remove further overburden.

(4) The overburden costs were incurred in stages over a long period of time because:

(a) The Quarry spanned a very large area. So it took a considerable period of time (several years) to remove all the overburden.

(b) The applicant had to remove the overburden in stages as rock was excavated due to technical requirements of the backfilling process, in order for to applicant to comply with its rehabilitation obligations, and not because this was part of the day to day process of rock quarrying.

Application for a case to be stated

12. Dissatisfied with the Appeal Decision, on 29 January 2016, the applicant applied to the Board for the Board to state a case for the Court of First Instance's consideration pursuant to section 69 of the IRO. In its application, the applicant proposed the following question to the Board ("the proposed question"):

> "Did the [Board] err in law in concluding, upon the facts found by them, that, for the purposes of Part IV of the [IRO], within the assessment of the [applicant]'s assessable profits, the [applicant]'s expenditure on [overburden costs], during each of the years of assessment 2002/03 to

2007/08, was not deductible revenue expenditure because the [overburden costs] were capital in nature?"

13. The Board invited submissions on the application for a case stated. The Commissioner contended that the applicant had failed to identify the error of law that it alleged the Board had committed. For its part, the applicant submitted that the proposed question was not improper, and alternatively that if the Board did not agree with the question of law formulated by the applicant, it could state a case based on certain questions of law said to have been outlined in the applicant's submissions.

Application for Judicial Review

14. On 8 April 2016, the Board dismissed the application by the Case Stated Decision, and on 30 May 2016, the applicant applied for leave to seek judicial review against the Board's refusal to state a case. Leave to apply was granted by the Judge on 1 September 2016, but the substantive application for judicial review was dismissed by the Judge on 10 October 2017.

The judgment below

15. The Judge's reasons for dismissing the application were as follows:

(1) The proposed question was not a proper question of law because:

(a) the Board having found that the overburden costs were not revenue in nature, "it is difficult to see how a general challenge that the Board erred in law can constitute a proper question of law";

(b) the proposed question was "singularly uninformative as to the basis of the alleged error"; and

(c) it was "quite embarrassing for the Board to deal with such a question, and impossible for it to properly discharge its function to scrutinize the same".

(see the judgment below at [19]). The Judge considered (at [27] of his judgment) that the application should be dismissed on this ground alone.

(2) The Judge also found the proposed question, as reformulated in the course of the applicant's submissions to be "plainly and obviously unarguable" because the applicant's argument boiled down to the contention that the process or methodology by which the overburden was removed (namely, removing the overburden section by section) rendered the overburden costs revenue in nature, and because this meant the overburden costs were incurred in the actual process of quarrying rather than in acquiring or constructing any infrastructure or with any lasting benefit.

> However, given the Board's findings that there was no overburden sandwiched between the rock so that the applicant did not have to remove overburden continuously as part of the rock extraction process, the overburden costs should be regarded as being incurred to get the Quarry into a condition fit for quarrying, and thus capital costs. It would not have been open to the applicant to argue that the overburden costs were revenue expenditure if all the overburden had been removed in one go to get the Quarry into a condition ready for quarrying, and the Judge was not satisfied that the mere fact that the overburden was removed in stages could change the nature of the overburden costs. It was wrong for the applicant to isolate part of the relevant facts found by the Board and contend that it had erred when the Appeal Decision was based on all the relevant facts and not just those now picked out by the applicant.

The arguments on appeal

16. Although the applicant's Notice of Appeal advances various grounds of appeal, in his written submissions and before us, Mr McCoy SC focused his submissions on two issues:

(1) whether the proposed question is a proper question of law; and

(2) whether the proposed question is plainly and obviously unarguable.

17. Mr McCoy SC submitted that the answers to these questions should have been "yes" and "no" respectively, and that the judicial review application should therefore have been allowed.

18. As to the first question, Mr McCoy SC submitted that the question was in what he called a "standard form", providing us with some 48 previous cases in which similarly worded questions had been permitted to proceed by way of case stated. He submitted that the challenge was directed at the conclusion the Board drew, from the primary facts, as to whether the overburden costs were revenue or capital in nature. He suggested that the Board erred in elevating the question of whether the expenses were recurrent or once and for all in nature into a hard and fast test, when it should have focused on the facts of the case before it. He also claimed that the Board had failed to have regard to the fact that the right to work the Quarry was a single composite asset, and instead split that right into multiple parts.

19. In relation to the second issue, of arguability, while supporting the Judge's view that the threshold for arguability was whether the proposed question was "plainly and obviously unarguable", Mr McCoy submitted that the judge had in fact applied a higher threshold and should have found that the overburden costs were revenue in nature, taking account of the following factors:

(1) Viewing the Quarry as a single asset, the costs were incurred as an integral part of the day to day operation of the quarry, and were recurrent in nature as the overburden was removed progressively due to practical considerations.

(2) The costs did not give rise to an enduring benefit in that there were limits imposed by the contract on how much rock could be extracted from particular areas.

(3) The costs were incurred as part of the applicant's obligations to rehabilitate the Quarry by backfilling the drop cuts, and were therefore an operational expense.

20. Finally, Mr McCoy SC suggested that the judge had failed to give due weight to the applicant's right of access to the courts under Article 35 of the Basic Law, by preventing the applicant from proceeding on the technical ground that the proposed question was purportedly improperly drafted.

21. For the Commissioner, Ms Cheng SC submitted that the Judge was correct in his judgment.

22. As to whether the proposed question of law was a proper one, she submitted that it was not, as it did not identify any issues of law for the court's consideration, but instead sought a general reopening of the case. She also submitted that the inadequate specificity of the question was further demonstrated by the fact that it was wide enough to encompass new arguments which had not been taken before the Board, such as the suggestion that the Quarry should not have been allegedly "split" into sections, and the argument that the costs were for rehabilitation and thus operational in nature. Further, she contended that the Judge should also have held that the proposed question was in fact a disguised challenge to the findings of fact made by the Board as the arguments being raised under the proposed question were in fact based on alleged findings never made by the Board (this last point being raised by way of the Commissioner's respondent's notice to affirm).

23. As to arguability, Ms Cheng SC submitted that the Judge had erred in concluding that it sufficed for an intending applicant to show that his proposed question was "not plainly and obviously unarguable" (although she did support the Judge's conclusion that the matters raised by the applicant were indeed plainly and obviously unarguable). The correct standard was that the applicant had to show that he had "reasonable prospects of success" in relation to the question proposed in the case stated, and that this had to be considered in the light of the nature of the challenge being made (this was the second point raised in the Commissioner's respondent's notice). As the present case concerned a challenge to the Board's conclusion on the facts, it would not suffice for the applicant to show that it was reasonably arguable that the Board came to the wrong conclusion, or that the conclusion contended for by the applicant was a reasonably arguable one. Rather, as the case stated was required to raise a question of law, it would be necessary for the applicant to demonstrate that the conclusion for which the applicant contended (ie that the overburden

costs were of a revenue nature) was the only one open to the Board on the basis of the facts found. In other words, that the Board erred in law in coming to the conclusion that such costs were capital in nature, as that conclusion was one which was not open to it. It was therefore necessary for the applicant to show that it was reasonably arguable that the Board had committed such an error of law, by coming to a conclusion that was not open to it, and not merely that the applicant's view of the matter was reasonably arguable. If both the applicant's and the Board's view of the matter were reasonably arguable, or conclusions which could be supported, there would be no error of law on the part of the Board in coming to the conclusion which it did, and thus there would be no basis on which the case stated could result in the Board's decision being set aside.

24. Ms Cheng finally submitted that this (correct) standard (ie reasonably arguable) and approach (i.e. that the Board's conclusion was contrary to the only proper conclusion they could reach) could not be met on the facts of this case because:

(1) The overburden costs were incurred once and for all, in relation to preparatory antecedent work, and not on day to day quarrying operations. The Board's finding of fact was that the removal of overburden in relation to the Quarry was in the nature of a "first cut".

(2) The costs did create an advantage for the enduring benefit of the applicant's business, in that once the overburden was cleared and the rock exposed for quarrying, rock extraction could continue (subject to the contractual limits) for many years.

(3) The capital nature of the overburden costs was also reflected in the applicant's own accounts, which treated them not as operational costs but non-current assets providing economic benefits over the life of the Quarry.

(4) The splitting or dividing up of the Quarry into sections was irrelevant to the application of the indicia, and the Judge rightly rejected this as being a relevant factor.

(5) As to the suggestion that the costs were incurred for the purpose of the rehabilitation obligation, if that were correct, then by definition the costs would not be deductible under s.16(1) of the IRO as they would not have been incurred for the production of profits.

25. Although I am inclined to think that the question of arguability is an aspect of the issue of whether the proposed question is a proper question of law, given the way in which the matter was argued both before us and in the court below, I shall deal with the merits of this appeal by first considering the arguments as to whether a proper question of law has been framed, and then going on to consider the issue of arguability, doing so first in terms of the correct standard of arguability, then in terms of the correct formulation of

what it is that the applicant must show to be arguable to the necessary standard, and finally in terms of whether that standard is met.

A proper question of law?

26. As to whether or not the proposed question of law was a proper one, such that the Board was obliged to state it for the consideration of the court, I am satisfied that the Judge was entirely correct to hold that it was incumbent on the applicant to state a proper question of law, and that the proposed question did not meet this requirement. The relevant principles were correctly summarised by the Judge at [13] of his judgment. Indeed, the applicant does not appear to take issue with this.

27. I would also accept Ms Cheng's submission that a stated case ought to be self-contained, and set out the material findings of fact, the parties' legal contentions, a statement of the tribunal's decision, and the questions of law which the Court is asked to answer. Thus, if it is to provide a satisfactory case for the Court, the Board must know about what precisely it is stating a case: *Commissioner of Inland Revenue v Inland Revenue Board of Review and Another* ("*Aspiration*") [1989] 2 HKLR 40 at 47J to 49I.

28. Mr McCoy appeared to submit that the only reason for which it is lawful to refuse to state a case is that the application is "frivolous". In support of this proposition, he relied on *R (on the application of Cuns) v Hammersmith Magistrates' Court* [2016] EWHC 748 (Admin); (2017) 181 JP 111, *Butterworths Stone's Justices' Manual 2018 Vol.1* (115th ed. LexisNexis 2018), at §1.382; and *Honorcan Ltd v Inland Revenue Board of Review* [2010] 5 HKLRD 378, at §50.

29. *Cuns* and *Stone's Justices' Manual* concern an application to state a case from a magistrate's decision in criminal proceedings, where the rule is that the court may refuse to state a case where the question is "frivolous", which has been given a technical and enlarged meaning covering a conclusion that the question asked is not a question of law or that the question asked has no reasonable basis for being pursued at all, is totally without merit or hopeless: *Cuns* at [12]. Where a question could only be answered one way on the evidence before the magistrate, the application would also be frivolous as no tenable point of law would be raised: *Cuns* at [13].

30. In *Honorcan*, Fok J (as Fok PJ then was) was faced with a similar judicial review application against a Board decision refusing to state a case under s.69(1) of the Ordinance. At [50] (in a passage which Mr McCoy SC accepted as correct), Fok J said this:

> "…I do not consider that s.69(1) does confer an absolute and unqualified right to appeal. In my judgment, the Board is duty bound to decline to state a case if the question of law proposed to be stated is not a proper one, as the authorities have consistently held. A question proposed to be stated may, it seems to me, be improper for various reasons, … it may be irrelevant or premature; it may be immaterial and therefore academic

> to the outcome of the appeal; it may be plainly and obviously unarguable."

31. In my view, what is described as a "frivolous" question in *Cuns* would be an improper question for the purpose of a case stated application under s.69(1). However, as Fok J observed in *Honorcan*, the authorities under s.69(1) have consistently held that the Board is duty bound to decline to state a case if the question of law proposed is not a proper one. In the circumstances, I see no particular utility in limiting the right of the Board to refuse to state a case to cases where the question proposed might be described as frivolous, assuming that this means something other than not "proper" in the sense of the examples given in *Honorcan.*

32. In fairness to Mr McCoy SC, he did accept that the requirement that a proposed question of law be "proper" involved a qualitative, multifaceted assessment. Thus, a question of law would be improper if it were irrelevant or premature, academic to the outcome of the appeal, or plainly unarguable (see *Honorcan* at [50]). Further, as Barnett J held in *Aspiration*, a question of law will not be proper if it is imprecise or ambiguous, or gives the Board no clear idea of what material it is required to marshal for the purposes of enabling the question to be answered. In addition, as Chow J observed in *China Mobile Hong Kong Co Ltd v Commissioner of Inland Revenue* [2018] 2 HKLRD 146, a question which simply frames the ultimate conclusion of the Board and asks whether it was correct in law will not generally be a proper question of law, as it is hard to see how such a question would identify the point of law involved with any precision. On the face of it, such a question could engage every conceivable question of law that might arise, whether or not it had been ventilated before the Board.

33. Ms Cheng SC submitted that the proposed question was not a proper question of law because:

> (1) it failed to identify the error of law complained of;
>
> (2) it was a disguised attempt to challenge findings of fact.

34. Each of these criticisms is, in my view, well founded. As the Judge found at [19] of his judgment, the proposed question was not a proper one, because it failed to identify any error of law, making it impossible for the Board to properly discharge its function to scrutinize the question. He was justified in doing so. It is apparent from the Case Stated Decision that the Board was dissatisfied with the form of the proposed question (see e.g. [4]-[5], [7], [9], [12]-[16] and [21] of the Case Stated Decision). At [22] and [25] of the Case Stated Decision, the Board observed that the proposed question suffered from "embarrassing opacity" and did not set out the parties' contentions of law upon the issues referred for the opinion of the Court.

35. Further, even if a question may superficially appear to be a question of law, if it is general and vague and does not identify the issue to be argued, it will not be satisfactory or proper. As Barnett J held in the *Aspiration* case (at p 50G), an applicant for

a case stated cannot rely on a question of law "which is imprecise or ambiguous and which gives the Board no clear idea of what material must be marshalled in their case".

36. Mr McCoy SC also submitted that, because the applicant was not challenging the facts found, but only the conclusion of law to be drawn from them, the applicant should not be criticized for not pinpointing the facts it sought to challenge. This misses the point. The Judge found the proposed question unsatisfactory because it was singularly uninformative as to the basis of the alleged error. Even where no findings of fact are challenged, it remains necessary to set out the relevant factual background against which it is said that an error of law was committed. The proposed question simply did not give the Board a clear idea of what material was to be marshalled in the case to be stated.

37. Only after the Commissioner objected to the lack of specificity in the proposed question did the applicant provide some details of the nature of its challenge, and indicate that the Board could, if it wished, reformulate the question in the light of that. But this was said to be without prejudice to the applicant's primary stance that it need not state its case with precision, and that it was not committed to the issues that were belatedly put forward. The applicant seemed to expect the Board either to adopt its wholly general proposed question, or to draft alternative questions itself based on the arguments identified by the applicant in its submissions. Faced with such an approach, it seems to me that the Board was entirely justified in declining to state a case.

38. Further, as Ms Cheng SC pointed out, the inadequacy of the proposed question is underlined by the fact that the applicant now seeks to advance new arguments that it had not run before the Board, including the argument that the Quarry should not have been "split" into sections by the Board, and the suggestion that the overburden costs were for rehabilitation and therefore operational expenses. Quite apart from this, these arguments were not raised before the Judge, and do not appear in the Notice of Appeal. Notably, both in the case stated application before the Board and in the judicial review application below, the applicant insisted that it should not be bound by the questions proposed but instead should be free to reformulate its case at the substantive hearing of the case stated (see [7] of the Case Stated Decision and [22] of the judgment below).

39. In my view, a proper question of law should not allow the applicant to keep raising new arguments which were not taken before the Board in the original appeal or in the case stated application. To permit this would be bordering on an abuse of process.

40. Mr McCoy submitted that a question in the general form of "whether, on the facts found, the Board's decision was correct" might, depending on the circumstances, be a proper question of law for a case stated: *Nam Tai Trading Co Ltd v Board of Review* (2009) 8 HKCT 258, [17]-[18]. He also referred to the Appendix to the Form 86 in which the applicant set out the proposed questions in 48 Hong Kong appellate tax cases where the courts had found the questions to constitute proper questions of law, and suggested that the proposed question here was in similar terms, and suggested that it followed in that the proposed question was a question of law.

41. However, whilst in *Nam Tai Trading* (at [18]) and *Honorcan* (at [59]) the court accepted that a question in such a general form could be a question of law, they made it clear that it still had to be a *proper* question of law in the circumstances of the case. In both those cases, the court found the question proposed not to be a proper question of law because it had no reasonable prospect of success or was unarguable.

42. Thus, while the proposed question may conceivably be a question of law, whether it is a *proper* question of law has to be assessed with regard to all the circumstances of the case. I therefore do not find the fact that similarly worded questions may have passed muster in other cases to be of any real assistance here. What is necessary is to consider whether or not the proposed question in this case is a proper one in the circumstances of this case.

43. As to the complaint that the proposed question was a disguised attempt to challenge the Board's findings of fact, despite the applicant repeatedly asserting that it is not mounting a factual challenge, its arguments suggest otherwise.

44. Before us, the applicant contended that the crux of its complaint was the Board's elevation of the "once and for all" and "recurring" considerations, as if these were a statutory test (see [67] of the applicant's Form 86). [67] of the Form 86 makes it clear that the alleged error of law is premised on an alleged finding that the costs were incurred "in the actual working process of quarrying". However, as Ms Cheng SC correctly pointed out, this is the very opposite of what the Board found. As mentioned above, the Board found that for each particular section of the Quarry, the overburden only had to be removed once to gain access to the rock, and did not have to be removed continuously as rock was extracted. The overburden removal work thus was not of a recurring nature.

45. Notably, the Board found that mining and quarrying were fundamentally different operations: mining typically requires repeated, subsequent cuts into overburden as part of day-to-day operations because minerals and overburden are usually intermingled. The overburden removal work in the Quarry, on the other hand, was of a "*first cut*" nature – once the top layer of overburden was removed in a particular location, rock could be extracted for the full depth of the Quarry at that location.

46. In any event, I am not persuaded that the Board applied the "once and for all" and "recurring" concepts in a rigid manner. On the contrary, I am satisfied that the Board has carefully considered the various aspects of the overburden removal work as presented in the evidence before it, when coming to the conclusion that the overburden costs were not incurred in the revenue generating process but as part of the preparatory works required to enable the applicant to carry out its operations.

47. Further, as noted above, the applicant criticised the Board for allegedly splitting the Quarry into different sections instead of treating it as a single composite asset, and suggested that the overburden costs should be treated as operational expenses because they should have been regarded as incurred to comply with the applicant's rehabilitation obligations. However, as also noted, these arguments were never raised before the Board, the Judge, or in the Notice of Appeal. They thus proceed on the basis of a revision or

reassessment of the factual basis as found by the Board, and thus clearly involve an implicit challenge to the factual findings of the Board.

48. For all of the foregoing reasons, I am satisfied that the proposed question was not a proper one, and that the Board was right to reject the application for a case stated, and the Judge correct to reject the application for judicial review of the Case Stated Decision.

Arguability

49. Turning to the question of arguability, I agree with Ms Cheng SC that the threshold of arguability that must be met is that the application should have a reasonable prospect of success, or (in other words) that the contention of the applicant for the case stated must be reasonably arguable. This is a higher threshold than that adopted by the Judge, which was that the contention of the applicant should not be plainly and obviously unarguable. With respect, I am satisfied that insofar as the Judge appears to have thought that this lower standard was dictated by the decision of Fok J in *Honorcan* at [50] (upon which Mr McCoy SC heavily relied) he was mistaken in doing so.

50. It is correct that at [50] of his judgment in *Honorcan*, Fok J stated that a proposed question in a case stated which was plainly and obviously unarguable would not be a "proper" question to be included in the case stated. However, at [67] of his judgment, it is clear that Fok J in fact applied and accepted as correct the standard of "reasonable prospect of success" that had been established as correct by Tang VP (as he then was) in *Nam Tai Trading Co Ltd v Board of Review* (2009) 8 HKTC 258, at [18]. A question that was plainly and obviously unarguable (as Fok J found the question proposed in *Honorcan* to be) would clearly not meet the standard of a reasonable prospect of success.

51. Further, as Ms Cheng pointed out, the "reasonable prospect of success standard" is widely adopted in the context of the granting of leave to appeal in several situations, including leave to appeal to the Court of Final Appeal (see *Peter PF Chan v Hong Kong Society of Accountants* (2001) 4 HKCFAR 197 at [9]), leave to appeal to the Court of Appeal against interlocutory decisions of the Court of First Instance (see s 14AA(4)(A) of the *High Court Ordinance* (Cap 4)) and indeed for appeals against a decision of the Board on a question of law (which replaced the case stated procedure) under the current version of the IRO (see s.69(3)(c)(ii) of the IRO). To adopt the reasonable prospect of success standard in the context of the arguability threshold for a case to be stated would be entirely consistent. It is also, to my mind, difficult to see why appeals that do not enjoy a reasonable prospect of success should be entertained.

52. In considering whether a proposed appeal (whether by way of case stated or otherwise) has the requisite reasonable prospects of success, it is necessary to ascertain the approach that will be applied at the substantive hearing of the appeal. The Judge was therefore quite right to have regard to this in seeking to determine whether the proposed appeal by the applicant met the necessary standard of arguability. Insofar as Mr McCoy SC suggested that he should not have done so, as that standard appeared to be more stringent

than the "not plainly or obviously unarguable" standard for which the applicant contended, I am unable to agree with Mr McCoy SC.

53. As Ms Cheng SC submitted, given that the present case concerns a challenge to the Board's conclusion on the basis of the facts found by it, the conclusion would only involve an error of law if it could be shown that the conclusion for which the applicant contended was the only one open to the Board on the basis of the facts found. The applicant would thus have to show that it was reasonably arguable that the Board had committed such an error of law. Merely to show that the applicant's view of the matter was reasonably arguable would not suffice, as this would not amount to error of law on the part of the Board in coming to the conclusion which it did, and thus there would be no basis on which the case stated could result in the Board's decision being set aside.

54. This is clear from the judgment of Barnett J in *Aspiration* where he explained the applicable standard and the underlying rationale at p 56D-J:

> "It seems to me clear that an applicant for a case stated must distinguish between matters of fact and law because, depending upon the nature of the attack, the case will have to be prepared very differently. …
>
> "…where primary facts have been found by the tribunal and have been accepted. Those facts may admit of only one conclusion, in which case the court can overturn the decision of the tribunal if it has reached the wrong conclusion. If, however, the facts admit reasonably of either conclusion, the decision of the tribunal as the fact-finding body is left undisturbed. The court does not, and cannot, seek to substitute its own view for that of the tribunal because that would be to interfere with matters of 'fact and degree'.
>
> "If an applicant seeks to challenge the findings of primary fact, however, a different situation arises. The court will only interfere with a tribunal's finding of primary fact if it is demonstrated that there was no evidence to support that finding. That is not a question of fact and degree.
>
> "…The court will interfere with an inference drawn from primary facts, or with a conclusion drawn from a combination of primary fact and inference, if the true and only reasonable inference or conclusion was not the one reached by the tribunal. …" (Emphasis added)

55. This is essentially the same test as that for an appeal on law only, which, as Lord Radcliffe put it in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 36, is whether "the true and only reasonable conclusion contradicts the determination" appealed against. See also *Kwong Mile Services Ltd v Commissioner of Inland Revenue* (2004) 7 HKCFAR 275, at [31] to [37].

56. The applicant has repeatedly emphasized that it is not challenging the Board's findings of fact, but only its conclusion on the facts found. Thus, the applicant

will have to show that the conclusion that it contends for is the "*true and only reasonable conclusion*" on the facts found, and to establish a reasonable prospect of success of its proposed appeal. The applicant must show that it is reasonably arguable that the Board's conclusion is contrary to the true and only reasonable conclusion on the facts found.

57. In my view, it is quite clear that the applicant cannot meet this threshold on the facts of this case. Indeed, I would go as far as to say that to suggest otherwise is plainly unarguable (so that the applicant could not satisfy even the lower standard of arguability for which it contends, and which the Judge (with respect, mistakenly) adopted). The Board found, as a fact, that the removal of the overburden was in the nature of a "first cut", it being common ground that the expenses of a "first cut" were capital in nature. Having regard to the Board's findings that the overburden did not have to be continuously removed in the process of quarrying, but only had to be removed once at each section of the Quarry, that thereafter, it was possible to continuously work that section without further overburden removal, and that such work was part of the infrastructural work necessary to benefit the applicant's operations, it is simply unarguable that the only reasonable conclusion was that the overburden costs were revenue in nature. It therefore follows that the appeal that the applicant seeks to pursue is not one which is reasonably arguable. Indeed, I would go further, and hold that such an appeal would be plainly and obviously unarguable, and moreover, that the only reasonable conclusion for the Board to have reached was the one which it in fact did.

58. For completeness, I will deal briefly with some specific points made by Mr McCoy SC.

59. First, he suggested that the core of the Applicant's complaint, as mentioned above, was the elevation of the once and for all and recurring considerations to the status of statutory tests. This point has been dealt with and rejected at [44] to [46].

60. Second, he contended that the Board had misunderstood the mining cases cited at §§32-46 of the Board's Appeal Decision, and that it ought to have treated the Quarry as involving a single composite asset, rather than splitting it into different sections. Quite apart from the fact that this is a wholly new argument, never raised before (as previously observed), it has no merit, as there were obviously good practical reasons for doing the overburden removal work in stages.

61. Third, he contended that it was not plainly and obviously unarguable that the overburden costs were revenue rather than capital in nature in view of the features of the Quarry and the underlying rehabilitation obligations. But even if the applicant could show that its characterization of the overburden costs is not unarguable (ie that it is arguable), that falls well short of showing a reasonable prospect of success for its appeal, in which it will have to show that the true and only reasonable conclusion from the facts is that the overburden costs were revenue in nature. For the reasons already given above, I do not think that the applicant has any prospect of doing so. As to the argument based on rehabilitation costs, apart from being a wholly new point, which ought not to be permitted to be taken, this takes matters no further for the reasons given by Ms Cheng (set out at [24 (5)] above) with which I agree.

62. Finally, in relation to Mr McCoy's emphasis on the point that the overburden costs were expended over a period of many years, it is not reasonably arguable that this could, of itself, change the nature of the expenses. Nor is this characteristic consistent *only* with a conclusion that the overburden work and associated costs were revenue in nature. Ms Cheng SC put forward before the Board the following illuminating analogy, to which there is no real answer, which the Board accepted at [51] of the Appeal Decision:

> "for example, a large factory which manufactures garments may require the installation of hundreds of sewing machines, but the fact that the installation process has to be carried out hundreds of times does not thereby render the installation cost a "recurring" one – once each machine is installed, it is ready to be used to generate profit, and it does not need to be installed again. A recurring cost would be, for example, the cost of oiling each machine from time to time – it is a process which is repeated over and over with the same machine in the course of the profit-making process."

63. For the foregoing reasons, it is clear that the applicant has failed to show a reasonable prospect of establishing that the true and only reasonable conclusion from the findings made by the Board was that the overburden were revenue in nature. It follows that the proposed question cannot satisfy the threshold of arguability and is thus not one in respect of which a case should have been stated.

BL Article 35

64. Finally, the applicant made a somewhat half-hearted challenge to the effect that, by debarring the applicant from appealing, the Judge had failed to consider or give due weight to the fact that the applicant was thereby deprived of its fundamental right of access to the courts, under Article 35 of the Basic Law. This point was made very briefly in the applicant's skeleton submission, without any real elaboration. The point was not raised in its Form 86, and no reason has been shown why it should be entertained on appeal. In any event, as Ms Cheng SC observed at the hearing, if the applicant has failed (as I think it has) to identify a proper question of law with reasonable prospects of success in respect of which a case should be stated, it can scarcely complain that it has been deprived of meaningful access to the courts by the Board rejecting the proposed question for being improperly drafted.

Conclusion and costs

65. For all of the above reasons, I concluded that the appeal should be dismissed, with costs to the Commissioner to be taxed on the party and party basis if not agreed.

(Susan Kwan)	(Maria Yuen)	(Aarif Barma)
Vice-President	Justice of Appeal	Justice of Appeal

Mr Gerard McCoy SC, instructed by Linklaters, for the applicant

Ms Yvonne Cheng SC, instructed by Department of Justice, for the interested party

The respondent, unrepresented, absent