

Drainage Appeal Board
Land Drainage Ordinance (Cap. 446)
Appeal No. 1 of 2018

BETWEEN

MAN TIN WAI (文天維)	1 st Appellant
MAN CHIU TAI (文天泰)	2 nd Appellant
and	
DRAINAGE AUTHORITY	Respondent

Appeal Board:	Professor CHUNG Kwok-fai	(Chairman)
	Ms. HO Suk-chun, Denise	(Member)
	Ir. LEUNG Kwok-yiu	(Member)
In attendance:	Mr. CHEUNG Wai-ho, Earnest	(Legal Advisor)
	Miss CHUEN Sin-ye, Cindy	(Secretary)
Representation:	Mr. CHONG Kai-man and Mr. Alvin CHONG instructed by Messrs. Au, Thong & Tsang for the 1 st and 2 nd Appellants	

Mr. Mike LUI instructed by the Department of Justice for the Respondent

Dates
of hearing: 2nd, 3rd, 7th and 9th August, 2018
26th September, 2018

Date of decision: 7th March, 2019

DECISION

1. This is an appeal under section 28(1) of the Land Drainage Ordinance (“LDO”).
2. The 1st and 2nd Appellants are respectively the owners of sub-section 7 of Section D of Lot 733 in Demarcation District No. 99, and sub-sections 1, 6 and 8 of Section D of Lot 733 in Demarcation District No. 99 (“the Appellants’ land”).
3. The Appellants’ land is situated in the San Tin Drainage Basin. San Tin Drainage Basin is a Drainage Authority Area (“DAA”) designated under the LDO. Within the DAA are four watercourses which are designated as main watercourses. One of the watercourses so designated is San Tin East Stream. This watercourse (“the subject watercourse”) runs through the Appellants’ land.
4. A part of the subject watercourse has been land-filled. There is no application to the Drainage Authority for consent to landfill the subject watercourse.
5. Section 20(1) of the LDO provides for the issuance of notice by the Drainage Authority to require the removal of obstructions from main watercourse. It is in the following terms:

“Where in the opinion of the Drainage Authority, obstructions block any main watercourse or impede its free flow or are likely to cause damage to any property or life in a Drainage Authority Area, the Drainage Authority may by notice require –

(a) the occupier and owner of the land on which the obstructions are situated; or

(b) any person causing the obstructions,

to remove such obstructions within such time as may be specified in the notice.”
6. By a notice dated 14th May 2018 (“Notice”), issued pursuant to

section 20(1) of the LDO, the Drainage Authority requires the 1st and 2nd Appellants to remove within 107 days from the date of the Notice the landfills from the subject watercourse. In the Notice, the Drainage Authority stated that the subject watercourse is a main watercourse, the landfills are unauthorized and that the Drainage Authority is of the opinion that the landfills block the subject watercourse. The part of the subject watercourse which is land-filled is identified in the drawing attached to the Notice.

7. In this Appeal, the Appellants appeal against the decision of the Drainage Authority to issue the Notice.

The Grounds of Appeal

8. The grounds of appeal are set out in the Notice of Appeal dated 4th June 2018.
9. In summary, the Appellants' main contentions in the grounds of appeal are that the requirement to remove the landfills is unreasonable or unnecessary, that the subject watercourse is not and/or is no longer a main watercourse to which section 20(1) of the LDO applies, that there is no blockage of the subject watercourse, that the Notice interferes with private property rights, and that compliance with the Notice would be contrary to the criminal and civil law. They also contend that there is no risk of flooding and hence the Notice serves no proper purpose.
10. In their closing submission, the Appellants make two additional contentions - first, the Drainage Authority has changed its position in relation to the land-filling of the subject watercourse; second, it is unnecessary to require removal of the landfills entirely.

Discussion

Whether the subject watercourse is a main watercourse to which section 20(1) of the LDO applies

11. The Board will first deal with the contention that the subject

watercourse is not a main watercourse to which section 20(1) of the LDO applies. The Appellants make three submissions.

12. First, the Appellants submit that the subject watercourse was wrongly designated as a main watercourse in the first place. They refer to the definition of “watercourse” in section 2 of the LDO¹, and submit that the subject watercourse has never been and is not used wholly or partly for the conveyance or storage of stormwater or surface water.
13. The Appellants’ second submission is that the subject watercourse was and still is, and forms, part of a “*channel intended primarily for sewage*”, and/or a “*drain and sewer*” as defined by section 2 of the Buildings Ordinance, and as such is within one or more of the exceptions of section 2 of the LDO. It is said that since around 2007/2008, no stormwater or surface water has been collected by the subject watercourse, and instead the subject watercourse has been collecting untreated sewage discharged from the nearby four villages in the San Tin area.
14. Thirdly, the Appellants submit that the legislative intent of the LDO is that only watercourses which are “*principal outlets in their respective drainage basins for surface water to reach the sea*” can be designated as main watercourses. They say that the subject watercourse has by 2007/2008 at the latest ceased to be such an outlet, and hence ceased to be a main watercourse.
15. In section 2 of the LDO, “*main watercourse*” is defined as “*any main water course designated in a draft Drainage Authority Area plan notified in the Gazette under section 5 or an approved plan*”

¹ In Section 2 of the LDO, “watercourse” is defined as follows:

“watercourse” includes -

- (a) any river, stream, ditch, channel, drain, pipe, cut, culvert, tunnel, nullah, dyke, weir, sluice, flood storage pond, flood pumping station, and other passage used wholly or partly for the conveyance or storage of stormwater or surface water but does not include –
 - (i) any pipe or channel intended primarily for sewage or industrial discharge; and
 - (ii) any drain and sewer as defined by section 2 of the Buildings Ordinance (Cap. 123);and
- (b) the bank, channel or bed of any watercourse which is wet normally but may be, from time to time, dry.

notified in the Gazette under section 11”.

16. The Respondent submits that the question of whether the subject watercourse is a main watercourse to which section 20(1) applies is entirely a question of whether it has been and remains to be designated as a main watercourse. The Board agrees with the Respondent’s submission.
17. The Board has considered the relevant provisions in the LDO for the designation of DAA and watercourses within the DAA as main watercourses. These provisions are summarized in paragraphs 18 to 24 below.
18. Under section 3(1), the Drainage Authority shall prepare draft DAA plans of such parts of Hong Kong as the Secretary for Development may direct.
19. Under section 3(2), such a draft DAA plan shall show the boundary of the DAA and such watercourses in the DAA as are considered to be appropriate by the Drainage Authority to be designated as main watercourses in the plan.
20. Under section 5, notice of the draft DAA plan shall be published in the Gazette.
21. Under section 10, the finalized draft DAA plan shall be submitted to the Chief Executive in Council for approval.
22. Under section 11(1), the Chief Executive in Council may approve the finalized draft DAA plan.
23. Under Section 11(3), the notice of approval of the DAA plan shall be published in the Gazette.
24. Under Section 12, upon publication of a notice of approval of a DAA plan in the Gazette, the LDO shall apply with respect to the DAA and the main watercourses designated in the approved plan.

25. Notice of the draft DAA plan for the San Tin Basin, in which the San Tin East Stream was designated as a main watercourse, was published in the Gazette on 19th July 1996. The finalized draft DAA plan was approved by the Chief Executive in Council on 29th September 1998. The notice of approval was published in the Gazette on 9th October 1998. The approved DAA plan is currently in force.
26. Based on the above, the Board finds that the subject watercourse is a main watercourse as defined in section 2 of the LDO, and hence is a main watercourse to which section 20(1) of the LDO applies.

Whether the landfills block the subject watercourse

27. At the site inspection on 31st July 2018, the Board noted that a large part of the subject watercourse was land-filled, and there had been constructed a concrete pipe, allegedly of 1,800 mm in diameter.
28. According to the Appellants, the concrete pipe serves as an underground drainage which allows water to be collected from the nearby four villages and channeled to the pumping station of the San Tin Polder, and the landfills ensure that water discharged from the villages would be directed to the underground drainage and prevent accumulation of water at the Appellants' land. The Appellants submit that with the underground drainage in place there is no blockage of the subject watercourse.
29. The Board does not agree that there is no blocking of the subject watercourse as the subject watercourse has been land-filled. Moreover, the Board does not agree that the phrase "*block any main watercourse*" in section 20(1) of the LDO only applies to a situation where obstructions cause complete blockage of the main watercourse.
30. Furthermore, the Board is not presented with evidence to demonstrate that the concrete pipe is sufficient to mitigate the

blocking of the subject watercourse. The Board is not presented with evidence on the design of discharge capacity, engineering drawings, materials, positions, alignment and levels, long term effectiveness, jointing and workmanship of the concrete pipe. There is no evidence that sufficient collecting points are provided to the pipe to collect surface run-offs.

Whether it is reasonable and necessary to require removal of the landfills

31. The Appellants submit that it is unreasonable or unnecessary to require removal of the landfills. Furthermore, it is said that the four nearby villages have been discharging untreated sewage into the subject watercourse, that this caused nuisance and the Appellants land-filled the subject watercourse and constructed the underground pipe to deal with the problem.
32. According to the evidence of Lai Ying Keung (“Mr. Lai”) of Drainage Services Department (DSD), which the Board accepts, the subject watercourse naturally receives stormwater and surface water, and is primarily used for the conveyance or storage of stormwater and surface water in the vicinity of the four villages in San Tin. It is the only watercourse collecting all discharge from the four villages via underground drains and u-channels connecting to it. The subject watercourse has still been receiving and channeling drainage runoff from the four villages despite and since the construction of the San Tin Polder and San Tin Eastern Channel.
33. DSD has presented to the Board its hydraulic assessment of the drainage impact of the land-filling and the underground drainage (which the Appellants say has been put in place) using numerical simulation. Under an event of 1 in 10 years rainstorm and 1 in 2 years tide, the simulation results are as follows:
 - (a) without land-filling, no flooding at the adjoining village area (scenario 1),
 - (b) with the land-filling and the drainage, flooding with depth of 0 to 0.15m at the adjoining village area (scenario 2);
 - (c) with the land-filling and blocked or collapsed drainage, flooding with depth of 0 to 0.6m (scenario 3).

34. The Board accepts the assessment results. The Board finds that the land-filling of the subject watercourse increases the risk of flooding in the adjoining village area.
35. The Board has also considered the evidence in the affirmation of the 1st Appellant of 19th September 2018, and the evidence in the respective affirmations of 27th September 2018 of Lie Fong Yee Flora (“Ms. Lie”) and Ching Yu Chung (“Mr. Ching”), both of the DSD, in reply to the 1st Appellant’s affirmation:
- (a) In his affirmation, the 1st Appellant stated that he observed no flooding in the vicinity of the subject watercourse in the evening of 29th August 2018 and at about noon of 30th August 2018 when the rainfall was quite heavy. He also stated that he observed no flooding in the morning of 16th September 2018 when Hong Kong was under the impact of Typhoon Mangkhut.
 - (b) In her affirmation, Ms. Lie stated that on 29th August 2018 there was flooding in the vicinity of Tung Wing On Road and Tung Chan Wai Playground. There was overflow of rainwater with average flooding level of approximately 150mm in the vicinity of Tung Wing On Road and the carpark near the Tung Chan Wai Playground at about 9:30pm, which was close to the very upstream of the subject watercourse. During the period of heavy rainfall, the screw pumps of the San Tin Stormwater Pumping Station were switched on, and this could be one of the reasons for subsidence of the overflowing stormwater at the flooding area in Tung Chan Wai. Notwithstanding, there was still an observation of flooding.
 - (c) In his affirmation, Mr. Ching stated that the flooding in the area near the very upstream of the subject watercourse tallied with the simulation results in scenario 3 of the hydraulic assessment.

36. Taking into account the evidence of Ms. Lie and Mr. Ching, which the Board accepts, the Board is not satisfied the mere fact that the 1st Appellant observed no flooding in the vicinity of the subject watercourse at certain periods of heavy rainfall undermines the reliability of the hydraulic assessment.
37. The Board accepts the observations reported by Ms. Lie and Mr. Ching, which co-relate well with the results of the hydraulic assessment and further reinforce the reliability of the hydraulic assessment.
38. The subject watercourse serves crucial drainage function. The landfills block the subject watercourse. It is not shown that the concrete pipe is a properly designed, constructed and functional drainage. The landfills increase the risk of flooding. The Board concludes that it is reasonable and necessary to require the removal of the landfills.
39. The Board notes the problem of discharge of untreated sewage into the subject watercourse. However, the problem should be addressed by proper and legal means.

The Appellants' other contentions

40. The Appellants contends that the Notice is an unjustified interference with private property rights.
41. The Board does not agree. The exercise of property rights is subject to the law. The LDO forbids carrying out engineering work or filling in any main watercourse without the consent of the Drainage Authority². The unauthorized landfills block the subject watercourse and increase the risk of flooding. To require their removal is not an unjustified interference with property rights.

² Section 26(1) of the LDO provides as follows:

"No person shall, without the consent in writing of the Drainage Authority, carry out any engineering work or filling or erect any dam, weir, culvert or other like obstruction in any main water course impeding its flow."

42. The Appellants contends that compliance with the Notice will expose the Appellants to civil and criminal liability. They say there is accumulation of sewage discharged from the four nearby villages in the subject watercourse. It is said that this constitutes public and private nuisance, and that they are at risk of criminal prosecution and civil liability.
43. The Appellants say it is with a view to purging the nuisance and the risk of criminal and civil liability that they caused the construction of underground drainage at and the land-filling of the subject watercourse.
44. Hence, it is said that removal of the landfills in compliance with the Notice will expose the Appellants to the risk of criminal and civil liability. In respect of criminal liability, the Appellants refer to section 4 of the Summary Offences Ordinance, which provides that *“Any person who without lawful authority or excuse ... allows any accumulation of filth or offensive substance within the premises occupied by him ... shall be liable to a fine of \$500 or to imprisonment for 3 months”*. It is said that this offence appears to fit the Appellants. In respect of civil liability in nuisance, the Board is referred to the case of Sedleigh-Denfield v O’Callaghan [1940] AC 880.
45. In the Board’s view, if indeed there is the alleged concern about civil and criminal liability, the Appellants should address the problem of discharge of untreated sewage into the subject watercourse by proper and legal means. Unauthorized landfilling of the subject watercourse is not the permissible way.
46. The Appellants contends that the subject watercourse was wrongly designated as a main watercourse in the first place, and hence it is unreasonable to issue the Notice. It is argued that with the completion of the San Tin Polder and the expected flood improvement works at the time of submission of the draft DAA plan to the Chief Executive in Council, the original San Tin East Stream flow would cease and the risk of flooding be eliminated. It is asserted that the attention of the Chief Executive in Council

was not drawn to these matters.

47. The Board does not agree that the subject watercourse ceased to serve as a main watercourse after completion of the San Tin Polder Scheme and the other flood improvement works in the area. The Board accepts Mr. Lai's evidence on the functioning of the polder system. The Board accepts that the subject watercourse remains to be an integral and essential part of the flooding mitigation system of the surrounding area after the construction of the San Tin Polder and the other flood improvement works.
48. The Appellants allege that DSD has changed its stance from agreeing to assist them in solving the sewage problem to requiring removal of the land-filling. They alleged that DSD knew that the land-filling and construction of the underground drainage would be carried out. During the period when the works were in progress, DSD did not raise objection. They said DSD had by conduct led them to believe that it consented to the works, and that it was unreasonable for DSD to change its stance after they have incurred substantial costs on the works.
49. The Board finds the allegation unsubstantiated. The Board accepts the evidence of the DSD staff concerned, in particular, that of Mr. Lai and Ms. Lie. DSD had not indicated any consent to the works.
50. The Appellants submit that it is unnecessary to require removal of the landfills entirely. In support, they purportedly rely on the answers of Mr. Ching to the questions of a member of the Board in which Mr. Ching said adding 1 or 2 pipes would be sufficient.
51. The Board disagrees with this submission. The Board has reviewed the relevant questions and answers. The exchange was not on the question of removal of the landfills at all. The Appellants have taken Mr. Ching's answers out of context. Mr. Ching's evidence does not support the Appellant's submission that it is unnecessary to require removal of the landfills entirely.

The Board's decision

52. For the above reasons, the Board dismisses the appeal. The Board affirms the decision of the Drainage Authority to issue the Notice and the requirements set out in the Notice.

Dated 7th March, 2019

(Signed)

Professor CHUNG Kwok-fai
(Chairman)

(Signed)

Ms. HO Suk-chun, Denise
(Member)

(Signed)

Ir. LEUNG Kwok-yiu
(Member)