CSO/ADM CR 6/3221/93(01)

21 November 2001

By Fax [2509 9055]

Mrs Percy Ma Clerk to the Panel on Administration of Justice and Legal Services Legislative Council Building 8 Jackson Road Hong Kong

Dear Mrs Ma,

LegCo Panel on Administration of Justice and Legal Services

Review and amendment of section 18(3) of The Hong Kong Court of Final Appeal Ordinance ("the Ordinance")

Thank you for your letter of 8 November, seeking our comments on the points raised by Mr Chan Siu-lun. With the inputs from the Department of Justice and the Judiciary Administrator, the Administration's responses, in seriatim, are as follows: -

Point (a) - Section 18(3) of the Ordinance is inadequate to safeguard justice because further petitions seeking leave to appeal on grounds of unfair trial is impossible

- 2. The threshold for the Appeal Committee to grant leave is to establish that the question involved in the appeal is one which by reason of its great general or public importance, or otherwise, ought to be submitted to the Court of Final Appeal ("CFA") for decision. In cases where even this threshold cannot be passed, there should be no reason for the whole matter to be heard by the CFA again. Indeed, it is a general legal policy principle that there should be a limit to, or a finality of, legal proceedings. Providing another layer of appeal for cases that are unlikely to be meritorious would contravene such principle and does not serve the public interest.
- 3. The legal policy principle of having a finality of legal proceedings was described by Lord Bingham in the House of Lords in the case <u>Johnson v. Gore Wood & Co.</u> (the case cited by Mr Chan) [2001] 2 WLR at page 90 -

"The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."

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4. Moreover, the Appeal Committee comprises the Chief Justice and two permanent judges or three permanent judges. The existing arrangement ensures that applications for leave are heard fairly by judges of high standing who sit at the apex of our court system. There is no sound reason to provide for another tier of appeal against the decision of the Appeal Committee. We note that the Administration's view on this is shared by the Hong Kong Bar Association and the Law Society of Hong Kong.

Point (b) – There is no evidence that the Judicial Committee of the Privy Council has established practices and procedures similar to section 18(3) of the Ordinance

- 5. In the United Kingdom ("UK"), Rule 2 of the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 ("Rules") relating to the Judicial Committee of the Privy Council and its proceedings provides that no civil appeal shall be admitted unless either
 - (a) leave to appeal has been granted by the Court appealed from; or
 - (b) in the absence of such leave, special leave to appeal has been granted by Her Majesty in Council.
- 6. Special leave to appeal is heard by the Judicial Committee of the Privy Council. There are no provisions in the Rules in the UK permitting appeal against a decision of the Judicial Committee. Sections 23(1) and 18(3) of the HKCFA Ordinance reflect the practices of the Judicial Committee of the Privy Council.

Point (c) – There are sufficient CFA judges competent to hear and determine appeal against decision of the Appeal Committee

7. At present, an appeal shall be heard and determined by the CFA comprising the three permanent judges in addition to the Chief Justice and a non-permanent judge. Section 18(1) of the Ordinance provides that an Appeal Committee shall consist of the Chief Justice and two permanent judges or three permanent judges. If there were to be a further appeal against a decision of the Appeal Committee, there would be either insufficient permanent judges to sit on the Appeal Committee to hear that further appeal, having regard to the principle of natural justice.

Point (d) – Complaints from other members of the public

- 8. Mr Chan cites <u>Sun Wai Chun v. Fairview Park Property Management Ltd.</u> (CACV 271/98 and 61/99, FAMV1/2000) as an example of complaints from other members of the public against decisions of the Appeal Committee for "unfairly and unjustly" dismissing applications for leave to appeal.
- 9. In that case, the Applicant applied to the Court of Appeal for leave to appeal to the CFA. However, the application was rejected. The Applicant then applied to the Appeal

Committee of the CFA for leave to appeal, but was unsuccessful. The Applicant was legally represented in both instances. The Applicant failed on two occasions to persuade the Court of Appeal and the Appeal Committee of the CFA that leave to appeal ought to be granted. It is uncertain whether the Applicant would be successful if he were given a third chance to seek leave to appeal. However, such further chance to seek leave would be contrary to the principle that there should be finality in litigation, and would be unfair to the Plaintiff who would be repeatedly vexed in the same matter.

Point (e) – Arrangements in other jurisdictions such as the UK and Australia

- 10. Mr Chan is of the view that in other jurisdictions such as the UK and Australia, a second application for leave to appeal to the top court is permitted.
- 11. In the UK, leave to appeal is required before an appeal may be presented to the House of Lords. An application for leave to appeal must first be made to the Court of Appeal. If leave is refused, a petition for leave to appeal may be presented to the House of Lords.
- 12. Hong Kong also allows a second application for leave to appeal to the highest court of appeal. Section 23(1) of the Ordinance, which is based on the principles and practices of the Judicial Committee of the Privy Council, provides that no appeal shall be admitted unless either -
 - (a) leave to appeal has been granted by the Court of Appeal; or
 - (b) in the absence of such leave, leave has been granted by the Court.
- 13. Mr Chan is of the view that a further tier of appeal should be provided to permit an appeal against a decision of the Appeal Committee. In the UK, there are <u>no</u> provisions in the Practice Directions or Rules permitting appeal against a decision of the Appeal Committee of the House of Lords or the Judicial Committee of the Privy Council to refuse leave to appeal.
- 14. In Australia, the High Court of Australia is able to deal with cases which come to it on appeal against decisions of other courts. There is <u>no</u> automatic right to have an appeal heard by the High Court and parties who wish to appeal must persuade the High Court in a preliminary hearing that there are special reasons to cause the appeal to be heard. Section 21 of the Judiciary Act 1903 provides that applications for special leave to appeal to the High Court are required. There are <u>no</u> provisions permitting an appeal against a decision of the High Court to refuse leave to appeal.

Point (f) – In the UK, judgment handed down by the House of Lords could overturn the decision of the Court of Appeal

15. Mr Chan argues that in the UK, judgments handed down by the House of Lords could overturn decisions of the Court of Appeal. In fact this is also the situation in Hong Kong. In order for an appeal to be heard by the CFA, leave to appeal is required. The onus is on the applicant to persuade the Appeal Committee to grant him leave to appeal to the CFA to overturn the decision of the Court of Appeal.

Yours sincerely,

(Chan Yum-min, James) for Director of Administration

cc JA (Attn: Ms Rebecca Pun)
DoJ (Attn: Mr Michael Scott)