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By Hand

c.c. : LegCo Panel on Administration of Justice & Legal Services
(Ref : CB2/PL/AJLS)

c.c. : Complaints Division of the Legislative Council Secretariat
(Ref : CP/C 140/2003)

c.c. : Hong Kong News Section, South China Morning Post

c.c. : 蘋果日報港聞版

c.c. : 東方日報港聞版

c.c. : 明報政情版

c.c. : 經濟日報政治版

Dear Sir,

The Member of Public's Comments on the Administration's Submission (dated (dated 18th December 2003) regarding the issue of "review and amendment of section 18(3) of the Hong Kong Court of Final Appeal Ordinance ("the CFA Ordinance")"

Thank you for your reply letter dated 18th December 2003.

First, I would present the arguments to explain why amendment ought to be made to the defective section 18(3) of the CFA Ordinance as follow :

(1) **It is a practice of Privy Council that there is no bar to re-open the petition for special leave.**
(see judgment of *Thomas Reckley (No. 2) v. The Minister of Public Safety and Immigration and Others (Petition for a stay of execution)* delivered by the House of Lords of Judicial Committee of Privy Council on 5th February 1996)

* This judgment is one of the pre-1999 Judgments disclosed by the Judicial Committee at its official website on the internet.

* This judgment is marked as Exhibit No. 1 ("Ex-1") attached.

Also, **it is a practice of the High Court of Australia** (which replaces Privy Council as the Court of Final Appeal in Australia) **that there is no bar to re-open the application for special leave to appeal.**
(see judgment of *Cachie v. St. George Bank Ltd.* [1994] 68 ALJR, H.C. of Australia)

* This judgment is marked as Exhibit No. 2 ("EX-2") attached.

However, **as a result of the defective section 18(3) of the CFA Ordinance, my request to re-open the leave application to appeal was refused by the Hong Kong Court of Final Appeal**, which replaces Privy Council as the Court of Final Appeal in Hong Kong.
(see paragraph 3(a) of my letter dated 30th August 2003 and Judiciary replies annexed to my submission dated 1st December 2002)

(2) **The legal principle of the finality provision (being inconsistent with the Basic Law and is unconstitutional and invalid),** which is made clear by Chief Justice Li in the judgment of *A Solicitor v. The Law Society of Hong Kong* [2003] delivered by the Hong Kong CFA (FACV 7/2003), unreported, is relevant to the issue of "review and amendment of section 18(3) of the CFA Ordinance". The grounds are :

(a) Both section 13(1) of the Legal Practitioners Ordinance, Cap. 159 and section 18(3) of the CFA Ordinance, Cap. 484 include provisions stipulating that "decision of the Court of Appeal shall be final or decision of the Appeal Committee shall be final".

(b) Both section 13(1) of Cap. 159 and section 18(3) were drafted before 1 July 1997 at the Bills stage.

(c) Section 13(1) of Cap. 159 became law before 1 July 1997 whereas section 18(3) of Cap. 484 became law after 1 July 1997.

(d) Critical portions of the said judgment (including paragraphs 27, 29 and 39) are :

"The function of the CFA is to exercise the power of final adjudication vested in it by article 82 of the Basic Law. The crux of the matter is the proper interpretation of the Court's power of final adjudication vested in this article" ;

"Having regard to the purpose of the CFA's establishment and the context of the hierarchy of courts, it is clear that the CFA's power of final adjudication, as contemplated by the Basic Law, is by its nature, a power exercisable only on appeal and indeed on final appeal. The CFA's function as envisaged by the Basic Law is not merely to exercise an appellate power, but a *final* appellate power, which, by its nature, is usually exercisable upon appeal from an intermediate appellate court, such as the Court of Appeal. The CFA's function is similar to the previous role of the Privy Council in relation to Hong Kong and is consistent with the role of final appellate courts in a number of common law jurisdictions." ; and

"In the absence of the finality provision, any further appeal to the CFA from a judgment of the Court of Appeal under s.13 is already limited by s.22(1) (b) of the CFA Ordinance. Such an appeal is only permitted where the Court of Appeal or the CFA in its discretion grants leave on being satisfied that the criteria set out in s.22(1)(b) are satisfied, namely, that the question is one "which, by reason of its great general or public importance or otherwise" ought to be submitted to the CFA for decision. Thus, the finality provision constitutes a *further* limitation. The limitation is an absolute one and precludes any appeal to the CFA, even where such criteria are satisfied."

(e) Following the legal principle of the final provision (being inconsistent with the Basic Law and is unconstitutional and invalid) made clear by Chief Justice Li in the judgment of *A Solicitor v. The Law Society of Hong Kong* [2003] delivered by the CFA (FACV 7/2003), unreported, it is reasonable to make comments on the finality provision of section 18(3) of the CFA Ordinance as follow :

i. Pursuant to Article 82 of the Basic Law,
"**The power of final adjudication of the HKSAR shall be vested in the CFA** ----------".

Also, pursuant to section 17(1) Powers of the Court (i.e. CFA) and section 18(2) Appeal Committee of the CFA Ordinance,
"The Court (i.e. CFA) may confirm, reverse or vary the decision of the court from which the appeal lies or may remit the matter with its opinion here on to that court, or may make such other order in the matter, including any order as to costs, as it thinks fit"; and
"The power of the Court (i.e. CFA) to hear and determine any application to leave to appeal ---------- shall be exercised by the Appeal Committee".

Accordingly, it is reasonable to make comment that **the finality provision of section 18(3) of the CFA Ordinance is also inconsistent with the Basic Law and is unconstitutional and invalid**.

ii. In the absence of the finality provision of section 18(3) of the CFA Ordinance, any appeal to the CFA from a judgment of the Court of Appeal is already limited by s.22(1)(b) of the CFA Ordinance. Such an appeal is only permitted where the Court of Appeal or the CFA in its discretion grants leave on being satisfied that the criteria set out in s.22(1)(b) are satisfied, namely, that the question is one "which, by reason of its great general or public importance or otherwise" ought to be submitted to the CFA for decision. Thus, the finality provision constitutes a *further* limitation. The limitation is an absolute one and precludes any appeal to the CFA by way of re-opening of the leave application, even where such criteria are satisfied.

* The judgment of *A Solicitor v. The Law Society of Hong Kong* [2003] delivered by the CFA (FACV 7/2003), unreported is marked as Exhibit No. 3 ("Ex-3") attached.

(3) According to the Official Record of Proceedings of the Hong Kong Legislative Council dated 4th June 1995, the Attorney General addressed to the LegCo (when delivering a speech in Second Reading of the Hong Kong CFA Bill (1995)) :
"---------- this Bill is based on the principles and practices of the Judicial Committee of the Privy Council".

Also, according to the Information Note for the Bills Committee to study the CFA Bill (1995), the Attorney General claimed that :
"clause 18 is only different from the law governing the Judicial Committee of the Privy Council in respect of 'hearing of petitions for leave to appeal are normally by three members of the Judicial Committee".

However, even though I have perused all the relevant statutes of the Judicial Committee of Privy Council (including :
Judicial Committee Act 1833
Judicial Committee Act 1843
Judicial Committee Act 1844
Court of Chancery Act 1851, section 16
Privy Council Registrar Act 1853
Appellate Jurisdiction Act 1876, sections 16 and 25
Judicial Committee Act 1881
Appellate Jurisdiction Act 1887, sections 3 and 5
Judicial Committee Amendment Act 1895
Appellate Jurisdiction Act 1908
Judicial Committee Act 1915
Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (S.I. 1982 No. 1676)),
I cannot find out a provision stipulating that "decision on special leave shall be final and and not itself subject to appeal", whose meaning is similar to section 18(3) of the CFA Ordinance ("decision of the Appeal Committee shall be final and not itself subject to appeal")

Accordingly, the defective section 18(3) of the CFA Ordinance is the only reason to

explain why the practice of the Hong Kong Court of Final Appeal is different from the practice of the Privy Council and the High Court of Australia.

* A copy of the said statutes of the Judicial Committee are marked as Exhibit No. 4 ("Ex-4") attached.

(4) According to the official website of the High Court of Australia on the internet (which replaces Privy Council as the CFA in Australia),

"Operation of the Court

Most of the Court's work relates to the hearing of appeals against decisions of other courts. **There is no automatic right to have an appeal heard by the High Court and parties who wish to appeal must persuade the Court in a preliminary hearing that there are special reasons to cause the appeal to be heard. Decisions of the High Court on appeals are final.** There are no further appeals once a matter has been decided by the High Court, and the decision is binding on all other courts throughout Australia."

Also, I have perused the relevant statues of the High Court of Australia (including Judiciary Act 1903 and High Court of Australia Act 1979). I note **there is no such a provision stipulating that "decision on special leave shall be final and not itself subject to appeal"**, whose meaning is similar to section 18(3) of the CFA Ordinance.

Accordingly, the defective section 18(3) of the CFA Ordinance is the only reason to explain why the practice of the Hong Kong Court of Final Appeal is different from the practice of the High Court of Australia.

* A copy of the operation of the High Court of Australia and relevant statues governing High Court are marked as Exhibit No. 5 ("Ex-5") attached.

(5) Special circumstances of the case in FAM V 30/1999 (on application for leave to appeal from the Court of Appeal (case no. : CACV 171/1999)) constitute good reason to amend the defective section 18(3) of the CFA Ordinance. The details are :

(a) At the Court of First Instance, the Defendants'/Respondents' legal representatives have applied to dismiss the case on the grounds of 'res judicata' or abuse of process of the court.

However, as court officials having obligation to guide the court properly, they win the case by filing only 3 common law cases (including :

Brunsden v. Humphrey [1884] 14 QBD
Conquer v. Boot [1928] QB 336
Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] AC 581)
to support their application.

After conducting extensive research on the legal principle of 'res judicata' in the High Court Library and reviewing the matters of fact of the case, I managed to find out that the Defendants/Respondents win the case in a circumstance that they have failed to prove that "I have abused the process of the court".

In order to seek for justice, I applied to the Court of Appeal to lodge leave application to appeal to the CFA and have filed many common law cases on the legal principle of 'res judicata' to support my application.

However, the Court of Appeal dismissed the leave application on the grounds that "the matter in dispute was unliquidated damages. The applicant's claim is plainly an abuse of process. There is no question of great general or public importance involved in the matter in dispute or otherwise this Court should exercise its discretion to have the matter submitted to the CFA for decision".

(b) After conducting further legal research on the legal principle of 'res judicata' in the High Court Library and reviewing the matters of fact of the case, I am convinced that the Court of Appeal misunderstood both the legal principle of 'res judicata' and matters of fact of the case and it is against the principle of justice the Defendants/Respondents win the case in a circumstance that they have failed to prove that "I have abused the process of the court".

Therefore, in order to seek for justice, I applied to the CFA to lodge leave application to appeal to the CFA and filed additional common law cases to support my application.

However, the Appeal Committee of 3 permanent judges who are handling the leave application, did not know well the legal principle of 'res judicata' and the matters of fact of the case and ruled that "the Court of Appeal justifiably in all of the circumstances, dismissed the application to appeal to the CFA and there is no room for any argument based on questions of abuse of process short of res judicata, the parties and the cause of action being precisely the same in each action".

The reason of Appeal Committee's misjudgment on the legal principle of 'res judicata' can be referred to the judgment of *Johnson v. Gorewood* [2001] H.L. 2 WLR or the judgment handed down by House of Lords on 14 December 2000 – Publications on the Internet (Session 2000-01) :

《After reviewing the facts and the relevant authorities (as much as 57 common law cases) in lucid detail, Lord Bingham of Cornhill held that :

"---------- It may very well be, as has been convincing argued (Watt, "The Danger and Deceit of the Rule in *Henderson v. Henderson* : A new approach to successive civil actions arising from the same factual matter," 19 *Civil Justice Quarterly*, (July 2000), page 287), that what is now taken to be the rule in *Henderson v. Henderson*, has diverged from the ruling which Wigram V.-C. made, which was addressed to res judicata. But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. 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. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As

one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by that party against whom it is sought to claim. While the result may often be the same, it is **in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the**
conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.---------- In my opinion, based on the facts of this case, the bringing of this action was not an abuse of process. The Court of Appeal adopted too mechanical an approach, giving little or no weight to the considerations which led Mr. Johnson to act as he did and failing to weigh **the overall balance of justice**. I would allow Mr. Johnson's appeal.")

(c) Pursuant to Article 84 & 87 of the Basic Law,
"the courts of the HKSAR shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to **precedents of other common law jurisdictions**".

Therefore, it is a constitutional duty of the CFA to re-open the leave application to exercise discretion to adjudicate the legal principle of 'res judicata', which is complex and is a matter of great general or public importance be submitted to the CFA for decision.

(d) In a judgment of the Court of Appeal (CACV 136/2000), the Court of Appeal has exercised discretion to grant leave application on the grounds that
"--------- **the legal point involved in this case** is by no means an easy one. It is **complex**. ---------- We consider that **the matter involved** ---------- **is a matter of great general or public importance and in those circumstances, this court is disposed to grant leave subject to conditions.**"

* A copy of said judgments in FAM V 30/1999, CACV 171/1999 and CACV 136/2000 are marked as Exhibit No. 6 ("Ex-6") attached.

Second, my comments on your reply letter of 18th December 2003 are :

(1) My comments on your letter dated 17 October 2003

I do **not** agree that "your letter dated 17th October 2003 have covered the outstanding issues that I have raised".

I suggest you review the points raised in my comment letter dated 21st October 2003 again.

(2) My comments on your letter dated 27 August 2003

i. Whether section 18(3) of the CFA Ordinance reflects the practice of the Privy Council

I do **not** agree with your argument that "As stated in our previous letters, there is no express provision to allow decisions of the Judicial Committee to refuse special leave to appeal to be re-considered. This already implies that there can be no more appeal against the decision of the Judicial Committee, i.e. such decision is already final. We are therefore of the view that section 18(3) reflects practice of the Privy Council.".

I suggest you read carefully the points raised in the first paragraph above and then give feed-back whether section 18(3) of the CFA Ordinance reflects the practice of the Privy Council.

ii. Vasquez and O' Neil case

Since the judgment of *Vasquez and O' Neil* [1994] 1 W.L.R. is a judgment on appeal and is **not** a judgment on petition, it is reasonable that second petition for special leave **cannot** be found in the said judgment.

I suggest you study "Ex-1" instead and give your feed-back on the issue of second petition for special leave.

iii. Passage of the Hong Kong Court of Final Appeal Bill

I suggest that you consider the personal opinion of that particular Member, (which I have quoted from the Hansard) in the context of his comments that "after these nine meetings, I cannot feel confident, in spite of my legal training

that we have covered every possible point with the sort of attention that a Bill of this nature deserves."

I have read carefully the website of Bar Association on the internet and note that this particular Member is a very experienced lawyer occupying the no. 1 position in the Bar Association's List of Senior Counsel and was admitted to the Hong Kong Bar in 1966 and became Senior Counsel in 1979. His legal training is therefore a key factor to consider the credibility and integrity of his observation and comments on the passage of the CFA Bill.

Regarding the suggestion that "the relevant provision is defective", I suggest you read carefully the first paragraph above to produce your feed-back.

(3) Drafting process of the CFA Ordinance and the issue of finality

I do not agree with the your view that "since we have already taken account relevant common law cases when drafting the CFA Ordinance, and hence the usual drafting process was followed".

This is because, if usual drafting process was followed, the section 18(3) of the CFA Ordinance will not be defective.

Regarding the issue of finality, I suggest you read carefully the first paragraph above and produce your feed-back on the said issue.

(4) Number of CFA judges to hear and determine appeals against the decisions of the Appeal Committee

Since review of the defective section 18(3) of the CFA Ordinance is more important, it is not justified to discuss the issue of appeal against decision of the Appeal Committee only.

(5) Whether the present mechanism is consistent with the constitutional guarantee of fair trial

I do not agree with your view that "the present mechanism should be consistent with the constitutional guarantee of fair trial".

The reason is that, if present mechanism is consistent with the constitutional guarantee of fair trial, there would be no wrongs in the judgments of the Appeal Committee in FAM V 30/1999 and FAM V 171/1999.

I suggest you to read carefully item 5 of first paragraph above before producing your feed-back on this issue

(6) The Panel's view towards the matter

Whether the Panel's view of "the matter had been appropriately dealt with" is not relevant much to the thorough discussion of the subject matter on "review and amendment of section 18(3) of the CFA Ordinance".

By the way, I would like to inform you that I will only fax the content of this letter to the LegCo. Please feel free to copy the enclosures annexed to this letter if the LegCo Secretariat asks for them.

Thank you for your kind attention.

I am looking forward to your kind feed-back at your latest convenience.

Yours faithfully,

CHAN SIU LUN
(Member of the Public)