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HONG KONG BAR ASSOCIATION'S COMMENTS ON

Implications of the Ng Siu Tung Judgement on Multi-party Litigation

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SUBMISSION TO THE LEGCO PANEL ON
ADMINISTRATION OF JUSTICE AND LEGAL SERVICES

(For Meeting on 25th February 2002)

1. The Bar was asked by the Panel on the Administration of Justice and Legal Services of the Legislative Council to join the discussion with the Administration on the following issues –

   (a) How would the Director of Legal Aid deal with a large number of applications for legal aid which involve common issues of public importance?

   (b) What are the implications on the applicants who are not chosen as a "representative party" in a "representative case"?

   (c) How would the CFA's judgement affect the court's case management when there are a large number of parties who may have common issues for the court to determine?

Issue (a): Processing of large number of legal aid applications by DLA

2. The answer to issue (a) lies primarily with the Director of Legal Aid and involves consideration of not just the means of the applicants and the merits of their claims but also on resource allocation. The Bar would reserve its comments until it has sight of the submissions of the Director of Legal Aid.

Issue (b): Implications on legal aid applicants not chosen as "representative"

3. The implications upon legal aid applicants who are not chosen as "representative party" in litigation may be approached from two angles. The first involves how the legal aid applications of those not chosen to be

representative parties are to be handled by the Legal Aid Department. The second involves how the rights and obligations of those not chosen to be representative parties are to be protected.

The Legal Aid Ordinance (Cap 91)

4. Sections 9 and 10 of the Legal Aid Ordinance (Cap 91) make provision for the processing of legal aid applications and the grant of legal aid certificates. Reg 7 of the Legal Aid Regulations (Cap 91 sub leg) make provision for emergency legal aid certificates. Regulation 8 of the Legal Aid Regulations make provision for the revocation and discharge of legal aid certificates.

5. Section 9(e) of the Legal Aid Ordinance provides that where an application for legal aid is made, the Director of Legal Aid may "take or cause to be taken such steps as may be necessary to conserve the interests of the applicant or of any person on whose behalf the applicant is acting pending determination of his application". This provision therefore empowers the Director to act in respect of legal aid applicants who are not chosen as representative parties for the purpose of conserving their interests while their applications are being determined. Such action may include, in immigration cases, the securing of an administrative undertaking not to remove the applicant without notice or until the legal aid application or the representative proceedings have been determined.

Granting Legal Aid

6. Section 10(1) of the Legal Aid Ordinance empowers the Director of Legal Aid to grant in respect of an application for legal aid, legal and certificate, namely a certificate that the person concerned is entitled under the Legal Aid Ordinance to legal aid in connection with certain proceedings. The Director is empowered to grant such a certificate if he is satisfied that the application is in connection with proceedings that fall within the categories of proceedings for which legal aid may be grant; and that the applicant satisfies the relevant means test. It is to be noted that the Director is not obliged by law to grant a legal aid certificate when the conditions set out above are satisfied in the case of an application but rather has a discretion in granting or not granting the certificate.

Refusing Legal Aid

7. On the other hand, s 10(3) of the Legal Aid Ordinance requires or empowers the

Director of Legal Aid not to grant or refuse legal aid under specified circumstances. The main circumstance is that the applicant fails to show that he has reasonable grounds for taking, defending, opposing or continuing the proceedings in questions or being a party thereto. This is commonly known as the merit test.

8. Other circumstances are also specified in s 10(3) of the Legal Aid Ordinance. It is instructive for the purpose of this Submission to note the following circumstances –

"(a) only a trivial advantage would be gained by the applicant from such proceedings;

. . . . . .

(c) it is unreasonable that the applicant should be granted legal aid in the particular circumstances of the case;

(d) since making the application the applicant has departed Hong Kong and remained outside Hong Kong for any continuous period of 6 months;

. . . . . .

(g) there are other persons concerned jointly with, or having the same interest as, the applicant in seeking a substantially similar outcome of the proceedings unless the applicant would be prejudiced by not being able to take his own or joint proceedings."

9. The Bar is of the view that there is merit in the Legal Aid Department continuing the practice of choosing from a pool of applicants having complaints based upon common issues of law or even fact (such as standard form contracts) representative applicants to serve as parties in representative proceedings. This practice has particular merit where the proposed defendant or respondent is reasonable enough to indicate that it would abide by the result of the representative proceedings, and where no question under the Limitation Ordinance (Cap 347) is to arise in the near future.

Choosing Representatives and Those not being so chosen ("the non-selected applicants")

10. The Bar is also of the view that the fact that a legal aid applicant has not been chosen as a representative applicant to serve as a party in representative proceedings does not oblige the Director of Legal Aid to discontinue the processing of that applicant's application. This fact also does not oblige the Director to refuse legal aid under s 10(3) of the Legal Aid Ordinance, even though the Bar acknowledges that s 10(3)(g) provides a circumstances upon which the Director may refuse legal aid.

11. The Bar is further of the view that in public law cases, where remedy is to be sought by application for judicial review of decision(s) made in a case concerning an individual, the circumstance in s 10(3)(g) of the Legal Aid Ordinance does not necessarily apply. There is no "substantially similar outcome of the proceedings" sought amongst the pool of applicants since each one of them seeks to have the decision(s) made by the relevant authority in respect of his or her case quashed or to have his or her status or legal right and obligations declared, even though the relevant authority applied the same legal provision and supplied similar reasons in making the individual decision(s) sought to be impugned.

12. In any event, s 10(3)(g) of the Legal Aid Ordinance does not entitle the Director of Legal Aid to refuse legal aid where the applicant would be prejudiced by not being able to take his own or joint proceedings. This is of importance in public law cases where interim relief is often required to preserve the status quo or to injunct the taking of a irreversible course of action, for example, in preventing or staying executive action pursuant to a removal order of a deportation order.

13. It appears from a reading of the Legal Aid Ordinance that in respect of legal aid applicants who have not been chosen to be representative applicants to serve as parties in representative proceedings ("the not-selected applicants"), the Director of Legal Aid has the following legitimate courses to take -

- Refusing legal aid in respect of the cases of the not-selected applicants (though the applicants may re-apply, particularly where there are circumstances which necessitate the taking of proceedings to safeguard his own individual interest).

- Continuing to process the legal aid applications of the cases of the not-selected applicants and taking such action as the Director deems necessary pursuant to s 9(e) of the Legal Aid Ordinance (the proceeding to grant legal aid certificates and even assigning representation and taking legal action for any individual case to safeguard individual interest, there subsequent circumstances necessitate such a course if action to be taken).

- Granting legal aid certificates in respect of the cases of the not-selected applicants but without taking any further action (including the assignment of representation and the taking of legal action) with legal action to be taken where it is necessary to safeguard individual interest or to secure an enforceable judgement against a recalcitrant defendant or respondent.

Issue (c): The Ng Siu Tung CFA judgement and Case management of Applications for Judicial Review by large number of persons

Preliminary Observations

14. It should be noted that case management hearings were held in the course of the Ng Siu Tung conjoined proceedings whereupon 27 representative applicants were selected amongst 5,000 odd applicants. The 27 representative applicants appeared to have been chosen because the factual circumstances of each of them were typical of the different and various factual scenarios posed by the grounds of application. It seemed also that they were chosen because their factual circumstances were relatively undisputed, as two of them were withdrawn as representative applicants because there was in respect of their cases much dispute in the facts. See Ng Siu Tung (CFI judgement, p 13B-J.

15. The Court of First Instance (Stock J (as he then was)) then determined the applications for judicial review of each of the remaining representative applicants. There was an appeal to the Court of Appeal (which was dismissed) and a final appeal to the Court of Final Appeal (which was allowed to a limited extent). It is to be noted that what was appealed against should have been the determination by Stock J of the applications of remaining representative applicants but the Ng Siu Tung CFA judgement appears to be majority required the parties to submit for approval formal orders to be made by the CFA for disposing of the appeals in respect of each of the representative applicants and of each person represented by them; see Ng Siu Tung CFA judgement, para 300. This is intriguing.

Clarification?

16. The Bar considers that the matter(s) that issue (c) seeks to address deserve some clarification. If the matter is one of case management on the part of the courts, then it seems that the courts have handled the challenge of the multi-party litigation in the Ng Siu Tung conjoined proceedings with relative efficiency and effectiveness. This comment is subject to the observation in the preceding paragraph concerning the appellate process (where the final appellate court somewhat took it upon itself to deal with the cases of the "represented" applicants as if it were the first instance court), with the Bar reserving its opinion as to appropriateness of that course in every type of case. Credit, it seems, should also be given to the opposing parties and their legal representatives in the selection process and the subsequent process of dealing with the applicants who are represented by the representative applicants, both of which are largely performed outside the public gaze.

17. It may be that the Panel is concerned with the part of the Ng Siu Tung CFA judgement on the interpretation of Art 158(3) of the Basic Law of the HKSAR and how multi-party proceedings involving the interpretation of the Basic Law are to be case-managed in the light of that ruling so that the rights and obligations of the not-selected legal aid applicants and the "represented" litigants in the underlying proceedings remains protected.

What the CFA majority ruled in Ng Siu Tung CFA judgement on BL 158(3)

18. It is instructive to recall what the CFA majority ruled on the issue concerning the interpretation of Art 158(3) of the Basic Law. The majority concluded that -

> "Upon the true construction of "judgement previously rendered shall not be affected" in Art 158(3) of the Basic Law, the judgements in *Ng Ka Ling* and *Chan Kam Nga* are binding only on the actual parties in those cases. Since the applicants in these appeals were not parties in those cases, they are, unless they can succeed on another issue raised in these appeals, affected by the Interpretation and cannot benefit from the two judgements " (Ng Siu Tung CFA judgement, para 279).

In coming to this conclusion, the majority also held that the principle of "judgement previously rendered shall not be affected" in Art 158(3) of the

Basic Law applies to both "free-standing" NPCSC interpretations and "judicial reference" NPCSC interpretations. Thus where a "free-standing" NPCSC interpretation (such as the Interpretation of 26th June 1999) displaces a previous judgement and destroys its precedential value and states the law to be applied as from 1st July 1997, that previous judgement is unaffected (which the Director of Immigration accepted as meaning "not impaired") as a final determination of the rights of the parties to the litigation. "Judgement" in this context should be understood in the strict sense, having binding force over the parties to the litigation (who will include the class of persons represented by a representative party pursuant to a court order in the action) but not strangers to the litigation and determining and disposing finally (in case of a final judgement not appealable) and only of the rights of the parties to the litigation. This understanding is to be distinguished from the reasons given by the court for its decision or the ratio decidendi, both of which were relied on by counsel for the applicants and rejected by the CFA majority. See Ng Siu Tung CFA judgement, paras 27, 28, 30, 31, 32, 33, 36.

19. It is also instructive to note para 38 of the Ng Siu Tung CFA judgement. The CFA majority indicated therein that neither the Ng Ka Ling case nor the Chan Kam Nga case was constituted by a court order to make the plaintiffs therein representative parties; and that the orders of certiorari and declarations of right made in those cases were confined to the plaintiffs therein and not in favour of anyone else.

"Class of persons represented by a representative party pursuant to a court order" and RHC (Cap 4 sub leg) Ord 15 r 13

20. The Bar surmises that what the CFA majority might have had in mind when they spoke "the class of persons represented by the representative party pursuant to a court order in the action" (Ng Siu Tung CFA judgement, para 36) was a case in which an order was made under Rules of the High Court (Cap 4 sub leg) Ord 15 r 13(1). RHC Order 15 r 13 provides that -

"(1) In any proceedings concerning –

(a) the estate of a deceased person, or

(b) property subject to a trust, or

(c) the construction of a written instrument, including an Ordinance or any written law

the Court [ie the Court of First Instance], if satisfied that it is expedient so to do,

and that one or more of the conditions specified in paragraph (2) are satisifed, may appoint one or more persons to represent any person (including an unborn person) or class who is or may be interested (whether presently or for any future, contingent or unascertained interest) in or affected by the proceedings.

(2) The conditions for the exercise of the power conferred by paragraph (1) are as follows -

(a) that the person, the class or some member of the class, cannot be ascertained or cannot readily be ascertained;

(b) that the person, class or some member of the class, though ascertained, cannot be found;

(c) that, though the person or the class and the members thereof cannot be ascertained and found, it appears to the Court expedient (regard being had to all the circumstances, including the amount to stake and degree of difficulty of the point to be determined) to exercise the power of the purpose of saving expense.

(3) Where in any proceedings to which paragraph (1) applies, the Court exercises the power conferred by that paragraph, a judgement or order of the Court given or made when the person or persons appointed in exercise of that power are before the Court shall be binding on the person or class represented by the person or persons so appointed.

(4)….."

21. Enquiries were made of some of the counsel involved in the Ng Siu Tung and Chan Kam Nga litigations and the Bar was informed that the issue of whether an order under RHC Ord 15 r 13 should be made was not at any stage countenanced.

RHC Ord 15 r 13 NOT suited for applications for judicial review under RHC Ord 53

22. It might be suggested that ex facie applications for judicial review involving a question of interpretation of a provision of the Basic Law presumably come within the meaning of "proceedings concerning the construction of a written instrument, including an Ordinance or any other written law" (RHC Ord 15 r 13(1)(c)). However, this suggestion is, in the opinion of the Bar, misconceived on the basis of the following authories: Nguyuen Tuan Cuong v SJ [1999] 1 HKC 242, CA; and Tong Tim Nui v Hong Kong Housing Authority [1999] 4 HKC 466, CA.

In Nguyen Tuan Cuong, the Court of Appeal allowed an appeal by the Secretary for Justice against an order of Findlay J directing that 64 individuals be joined as plaintiffs in judicial review proceedings which had been ordered to proceed with as if the same had been begun by writ. Godfrey JA (as he then was), giving a judgement concurred by other members of the court (Mortimer V-P and Rogers JA (as they then was)), held that bearing in mind the provision for leave to act as a filter, it was illegitimate to add in judicial review proceedings, parties who had never yet applied for judicial review at all. The rules of court could not possibly be construed to have such a meaning.

In Tong Tim Nui, the Court of Appeal applied Nguyen Tuan Cuong and held that the order of Sears J in judicial review proceedings brought by some former residents of Rennie's Mill that other former residents who had not been parties to the proceedings before him be joined as parties at an advanced stage of the proceedings (where the original applicants had had established their rights in the substantive hearing to relief and then proposed to proceed to have their entitlement to damages assessed) was misconceived. (It is to be noted that the Tong Tim Nui CA judgement affected only those former residents involved in the appeal. Others, who benefitted from Sears J's order and reasoning in his judgements (which was overturned by the Court of Appeal) but whose cases were not appealed upon by the Housing Authority, were not affected.)

See also, in this connection, Supreme Court Practice 1999, Vol 1, para 53/14/37, which states, inter alia, that the doctrine of issue estoppel cannot be relied on in judicial review proceedings and that in such proceedings, the decision of the court is not a final determination (as the court has only the power of review) and dicta of Litton PJ (as he then was) in Lau Kong Yung (an infant) v Director of Immigration [1999] 4 HKC 731, 772-773, CFA, which emphasized on the discipline of law and legal procedures in judicial review proceedings and disapproved of operating a system of administrative law in an "amorphous way".

23. The Bar accordingly is of the view that the provisions of RHC Ord 53 preclude the Court of First Instance from taking an order under RHC Ord 15 r 13 for a certain applicant in judicial review proceedings before it to represent other individuals who are not before the court by way of their own judicial review proceedings. A fortiori, the application of RHC Ord 15 r 13 to a class of persons consisting of unascertained individuals, unborn individuals and individuals having a future, unascertained or contingent interest is precluded. It

is the Bar's view that the CFA majority in para 36 of the Ng Siu Tung CFA judgement meant what they stated when they averted (in obiter dicta) to "the class of persons represented by a representative party pursuant to a court order in the *action*" (emphasis supplied) and were not suggesting a course contrary to or doubting the reasoning of the Court of Appeal in Nguyen Tuan Cuong and Tong Tim Nui.

Implications to not-selected legal aid applicants and "represented" litigants in case of a NPCSC interpretation

24. Therefore, to answer the Panel's concern on the assumption that the not-selected legal aid applicants and the "represented" litigants (in multi-applicant judicial review proceedings where several of the applicant's claims are heard and determined first on the understanding that those selected are representative of the claims of the others) wish to rely on a previous final judgement that is subsequently displaced and its precedential value destroyed by reason of a NPCSC interpretation, the Bar is of the view that the said two categories of persons cannot possibly claim the benefit of the previous final judgement. The same applies to litigants in proceedings other than the proceedings underlying the previous final judgement which have been adjourned pending the determination of the proceedings underlying the previous final judgement, even though those two sets of proceedings have been commenced in close temporal proximity to each other. The destruction of the precedential value of the previous final judgement by reason of the NPCSC interpretation must imply that the doctrine of precedent cannot operate to compel a similar outcome in cases like the one that led to previous final judgement, whether those cases are contained in proceedings commenced before, after or even within the proceedings underlying the previous final judgement. See, in this connection, Ng Siu Tung CFA judgement, para 36.

What they would have to do or should have done……

25. What the said two categories of persons would have to do or should have done is to secure in separate judicial review proceedings judgements (in the strict sense of remedies person to them) in their favour (which had not been overturned by any subsequent appeal). Such judgements would then come within Art 158(3) of the Basic Law as "judgement previously rendered" and would not be affected by a subsequent NPCSC interpretation.

26. A way of mitigating the effect of the propositions in paragraphs 24 and 25 above, in relation to "represented" litigants in the sense elaborated in paragraph 24 above, would be for the final appellate court to determine and dispose in its final judgement in rights and obligations of the "representative" litigants whose determination in the courts below formed the subject of appeal before the final appellate court, but also (as the CFA majority did the Ng Siu Tung case) the rights and obligations of the other litigants represented by them.

Procedural Reform?and a Note of Caution

27. Members of the Panel on the other hand are drawn to Topic K12 of the Interim Report and Consultation Paper of the Chief Justice's Working Party in Civil Justice Reform, pp 146-155, on multi-party litigation and on the discussion of "Group Litigation Orders" under the Civil Procedure Rules (Eng). Members may be interested in the following features discussed; specified case management court, establishment of case register, specification of common issues, criteria for entry in case register, test claims, cut-off date for entry in case register, and binding effect of judgement or order in claim on case register on all claims on same register. How a case register under a GLO may fare upon its intersection with Art 158(3) of the Basic Law is a matter for reasoned hypothetical endeavour, though it can be suggested that presumably all those registered on the register would be bound by any final judgement arising out of a set of GLO-managed proceedings and might therefore have secured a previous judgement countenanced by the part of the Ng Siu Tung CFA judgement under discussion.

28. Members, on the other hand, should also note the words of caution in the Interim Report and Consultation Papers that the CPR (Eng) plus the relevant Practice Directions (Eng) do not address all the issues discussed in the Woolf Final Report regarding multi-party litigation and further investigation of models in other jurisdictions might be required; see Interim Report and Consultation Paper, para 402.

29. Members should further note that the applicability of the GLO procedure to applications for judicial review is an issue scarcely discussed in the Interim Report and Consultation Paper. The discussion under Topic L of the Interim Report and Consultation Paper (pp 251 and 254) does not touch upon at all multi-applicant applications or the issue of joinder raised in the Nguyen Tuan

Cuong and Tong Tim Hui cases. Proposals 70 and 71 and the discussion associated have nothing to do with those two matters.

30. It may be that a new procedure is needed to tackle the case management issues associated with the applications for judicial review by a large number of applicants purportedly involving a common issue of law of great importance and to ensure that no such applicant is left in the cold, unable to benefit from a previous judgement in his favour in terms of reasoning. The Bar, in this connection, cautions that discussion on this matter might well undermine the policy of good administration underpinning applications for judicial review, particularly the provision of a leave stage and the nature of review being process review, not merits review. Members of the Panel might find it useful first to evaluate the value of the existing framework and how judges can best work within that framework through suitable directions. What had been done in the Ng Siu Tung litigation might be a suitable starting point.

Dated 21st February 2002.

The Bar Council
Hong Kong Bar Association