Speech by The Honourable Chief Justice Geoffrey Ma at the International Academy of Mediators – The Hong Kong Mediation Council Symposium 27 October 2020, Hong Kong

Review of the Civil Justice Reforms and the Future Landscape of Dispute Resolution

1. In the earliest case[1] heard by the Hong Kong Court of Final Appeal not long after the Civil Justice Reform (the CJR) had come into effect in Hong Kong, the court said:[2] "Critical to the success of the CJR and its objectives is the realisation that litigation is not to be treated as a game, but as a serious legal contest." I have used this turn of phrase in a few judgments; it is borrowed (albeit in another context) from Walton J's judgment in *Rightside Properties Ltd v Gray*.[3] Ten years of the CJR having passed in Hong Kong, we should ask: is litigation still being treated sometimes as a game or do we

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1 *Wing Fai Construction Co Ltd v Yip Kwong Robert* (2011) 14 HKCFAR 935.

2 At para 34.

3 [1975] Ch 72, at 88E-F.

all now accept that the proper, effective and just resolution of legal disputes is the priority?

2. The truth is that important steps have been taken in the right direction, but there is still some ground to cover and we still have a little distance to travel to the destination. The final destination is perfection itself but, as Lord Goff of Chieveley reminded us,[4] this is "unattainable". Hong Kong took the best part of nine years to study and report on the need for reform before it took effect, and a part of this was to study the changes brought about by the Woolf Reforms in England and Wales. It has now been another ten years since the reforms came into effect. Judgments of the courts have not been shy to emphasise time and again their significance as well as the overall importance of the objectives of litigation (cost-effectiveness, expedition, proportion, procedural

[4] In *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, at 488C.

economy, fairness, the facilitation of settlement and the recognition that judicial resources are limited). In England and Wales, these objectives are "overriding"; in Hong Kong we have chosen to call these "underlying".[5]

3. In particular, the courts have reminded practitioners of their responsibility in furthering these objectives. In Hong Kong, this is put in terms of a duty on legal practitioners "to assist the Court to further the underlying objectives of these rules".[6] I have always regarded this rule as one of the most significant ones representing the new culture introduced by the CJR. The significance lay in the fact that as far as I know this was the first time in Hong Kong that the duty owed to the administration of justice was put on a statutory basis. Hitherto

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[5] Rules of the High Court (RHC) Order 1A r.1. This is not a play with words and was quite deliberate given the arguments which might take place over the word "overriding". It was important to make the point that the court should be given maximum flexibility to apply procedural rules intelligently and not too rigidly.

[6] RHC Order 1A r.3.

(and this is still the position), such duties were contained only in judgments and in professional codes.

4. There are numerous judgments in which this duty is articulated. I have chosen a well-known passage in the judgment of Mason CJ in *Giannarelli v Wraith*[7] to illustrate this (referring to the duties of counsel):-

> "a barrister's duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions

[7] (1988) 165 CLR 543.

> will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case."

5. Many professional codes contain references to the duty to uphold the administration of justice. One of the core duties in the United Kingdom's Code of Conduct of the Bar is the duty to the court in the administration of justice.[8] In Australia, the Legal Profession Uniform Conduct (Barristers)

[8] Core Duty 3.1.

Rules 2015 refers to the overriding duty to ensure the efficient administration of justice.[9] In New Zealand, the Rules of Conduct and Client Care for Lawyers[10] states in Rule 16.1: "A lawyer is obliged to uphold the rule of law and to facilitate the administration of justice."

6. The reference in the New Zealand rules to the client is a reminder that the duty to assist the court to further the objectives of litigation applies not only to lawyers but also to the parties themselves.[11] This is also the position in England. Thus:-[12]

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9 Rules 4(a), 23 (a barrister "has an overriding duty to the court to act with independence in the interests of the administration of justice".), 58.

10 In the Schedule to the Lawyers and Conveyancers Act 2008.

11 For example, RHC Order 1A r.3, to which reference was made earlier, states: "The parties to any proceedings and their legal representatives shall assist the Court to further the underlying objectives of these rules."

12 Sorabji, Woolf's New Theory of Justice in "English Civil Justice after the Woolf and Jackson Reforms – A Critical Analysis" (CUP, 2014), at para 6.3.1.

"The introduction of active case management, coupled with the introduction of a positive obligation on litigants to assist the court in achieving the overriding objective rather than substantive justice, was perhaps the most significant structural change implemented as a consequence of the Woolf Reforms. The court was now able to control litigation so as to ensure that it was conducted consistently with the new theory of justice. Litigants were also, due to the duty imposed on them to ensure that their conduct during the course of litigation was not only carried out to ensure that their claim was prosecuted so as to secure substantive justice at minimal and proportionate cost, but equally so as not to breach the requirements imposed by collective proportionality. It would be, or ought to be,

> impermissible for parties to conduct litigation in a spirit that was inconsistent with this express duty. They would, as Best CJ had put it in 1830, be under an explicit obligation that required those who came to justice to do justice, albeit it was to be a more distributed form of justice."

7. That said, the duty on the client is one that is often overlooked. It would be interesting to discover the extent to which in practice lawyers advise their clients of this duty. The experience in Hong Kong has been a reluctance on the part of some legal practitioners to allow their clients to be present before the judge when case management meetings or conferences take place. There may be good reasons for this reluctance and there is some controversy over this. However, as far as the court is concerned, it is often useful for the client to be present at hearings when important directions are

considered regarding the future conduct of any litigation. It provides an invaluable opportunity not just for the parties to know exactly the state of progress but also to be fully apprised of matters such as the overall costs involved, as well as to be reminded of their role and duty to assist the court as I have earlier described. The importance of the client being made fully aware of what is going on, one would have thought, is fairly obvious and is fully recognised when we consider presently the other principal theme of any civil justice reform – the facilitation of settlements and in particular in this context, mediation.

8. For the time being, I concentrate on the theme of the efficient and effective resolution of disputes within the court system, this being one of the two main objectives of civil justice reform. I have earlier qualified my applause for the success of the CJR in Hong Kong by saying that we still have

some way to go. One of the reasons for this is that it remains the case even now that the pace of court proceedings is still to a not insignificant extent in the hands of the lawyers, even though admittedly there have been substantial improvements compared with the position prior to the reforms. That this is so is an inevitable by-product of the legal system in which most of us practice, namely an adversarial system in which it is left mainly to the parties to place relevant matters and materials before the court to enable it to adjudicate on the relevant dispute. Notwithstanding the clear duty on lawyers to promote the proper administration of justice, it remains a fact of life that most lawyers have to deal with conflicts of interest. When I started practice over 40 years ago, I was number 125 on the Bar List in Hong Kong. There are now about 2,000 barristers. The number of solicitors has also grown more than ten-fold during this time. It is the same in most other jurisdictions. The practice of law was always a

business and even before there was any thought of civil justice reform, it was big business. Since the reforms, it is even bigger. When competition is as intense as the practice of law now is, the possibility of conflicts increases as well. As we all know, very real conflicts can exist between the interests of the client and the administration of justice. Put simply, while the client (whatever the content of his or her responsibility towards the administration of justice[13]) is on the whole only interested in achieving the most advantageous outcome for himself or herself, this can sometimes collide with the court's overriding interest to arrive at a just resolution of the dispute before it as expeditiously and efficiently as possible. Lawyers have to deliver what the client wants, otherwise the client will simply go elsewhere. This then brings into play the interests of the lawyer and those of his or her firm.

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[13] See para 6 above.

9. I draw attention to these matters in order just to make the point that the effectiveness or success of any civil justice reform in practice cannot be evaluated merely by the existence of new procedural rules or talking in aspirational terms of a "change in litigation culture". There are a number of relevant and legitimate factors which can at times pull in diametrically different directions to make the reality potentially quite complex. The Hong Kong courts have had to grapple with these issues. The English courts have similarly had to grapple with a number of grey areas: for example *Khudados v Hayden*[14] (whether duty on counsel to supplement the deficiencies in his opponent's evidence: held there was a duty to the administration of justice but not to the other side); *Phoenix Healthcare Distributor Ltd v Sally Woodward*[15] (whether duty on solicitors to warn the other side of a mistake to which the solicitors had in no way contributed: held there

[14] [2007] EWCA Civ 131, [2008] CP Rep 12.

[15] [2018] EWHC 2152.

was no such duty); *Barton v Wright Hassall LLP*[16] (whether any duty on solicitors to advise the other side of a mistake as to law made by the latter as to service: held no duty to do so).

10. Despite the differences and complexities just discussed, it is also right to point to the positives that have emerged as a result of the implementation of the civil justice reforms. The experience in Hong Kong has been a gradual acceptance by the legal profession that a change in litigation culture is here to stay and that there cannot be a return to the "bad old days". A Paper[17] was prepared reporting on ten years of the CJR in Hong Kong. This was the observation made regarding the legal profession:[18] "In the tenth year of CJR, the Judiciary notes that the change of culture continued along the right track. By now, the legal profession and the

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[16] [2018] UKSC 12, [2018] 1 WLR 1119.

[17] Titled "Ten Years' Implementation of the Civil Justice Reform from 2 April 2009 to 31 March 2019".

[18] At para 12.

public are much more familiar with the new initiatives under CJR, though sometimes reminders are still necessary." The Paper had this to say about judges:[19] "…. Judges have taken up their case management roles more seriously to prevent abuses and excesses that may delay trials and increase costs." The Bar's position[20] is that the changes brought about by the CJR have been welcomed and embraced by stakeholders. The Law Society also welcomed the changes.

11. What do the statistics reveal? This is not the occasion to go too much into detail (full details are contained in the Paper) but the following points can be made:-

(1) On the positive side, it is clear that adjournments of what are known as "milestone dates" (mainly trial dates) are much less likely to occur than before. For

[19] At para 13.

[20] Stated in para 104.

example, in the past ten years, the percentage of trial dates that were adjourned after being fixed in the Court of First Instance was in the region of 6-7%, even less in the District Court.

(2) Also on the positive side is the fact that the duration of trials tends to be shorter than before, with fewer overruns. This is an indication of the effectiveness of, among other things, case management conferences in which issues are thrashed out, considered and trimmed. It is indicative as well of the understanding on the part of judges and lawyers of the need to be more efficient.

(3) On the negative side, the number of interlocutory applications has not decreased compared with the pre-CJR period. It will be recalled that one of the

> driving forces for a change in civil justice was the proliferation of interlocutory applications, this being among the more serious causes of the delay and expense of litigation. Yet the experience in Hong Kong has been, if anything, an increase in interlocutory activity, although this has been somewhat mollified by there being fewer interlocutory appeals.[21]

12. If I have been cautious so far in lauding the impact of the CJR, it is because I believe there should be no question of relenting in the pursuit of the ideal, and challenges should be met head on. One of the main challenges is of course budgetary constraints, but this again is not the occasion to discuss this topic.

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[21] One of the main reasons for this is the requirement for leave to appeal decisions in interlocutory matters.

13. Where I am able to praise the impact of the CJR is in relation to the facilitation of settlement, which is one of the six underlying objectives of the procedural rules. All I have been talking about so far about the challenges of case management and court efficiency must be seen against the context of the unpredictable nature of litigation in which there is no certainty as to the outcome of any dispute until the very end of that litigation. The "all or nothing" nature of litigation in the courts, in which there is either a win or a loss (with very few draws or score-draws in between) breeds uncertainty, and this is apparent as much now as it was prior to the civil justice reforms.

14. In a sense, my presentation up to this point is but an introduction to the importance of parties working, preferably at an early stage, towards the amicable settlement of their differences, particularly given the "all or nothing" nature of

litigation. This area has been where the CJR has in my view significantly and tangibly served the community. The statistics point to this. For example, we have seen over the past ten years in Hong Kong, regular use made of the availability of sanctioned payments and sanctioned offers that have resulted in cases being settled. These have been particularly successful in relation to personal injury cases.

15. However, it is in the area of mediation where substantial progress has been made. The Paper to which I referred earlier makes this point clearly[22] "As indicated in the above statistics, there is generally a steady increase in the number of mediation cases in the Post-CJR Periods which suggest a gradual change of litigation culture. Of the cases going through mediation, the percentage of them resulting in agreements ranged from 38% to 51% during the period from

[22] At para 66.

2011 to 2018. With the court's increased emphasis on mediation, more and more litigating parties are aware that mediation would be one of the means of alternative dispute resolution." Both the Bar and the Law Society recognise the push towards mediation. This is the least that can be expected.

16. A respectable argument can be put forward to suggest that mediation in some ways has become the principle means of dispute resolution. Given the vagaries and vicissitudes of litigation as earlier intimated, the process of mediation allows the parties to think seriously about resolving a legal dispute, hopefully without the emotion that may exist. I mentioned earlier the importance of getting the client involved. Experience shows that the client must be made more aware of what is happening. Mediation allows clients to be fully informed of all relevant facts and factors to enable them to decide, after of course being properly advised by their

own legal advisers, how best to resolve the relevant legal dispute. The case made out in favour of mediation continues to be compelling.

17. To conclude, without doubt the CJR has considerably benefitted the community. But it is the emergence and maturity of mediation (cementing the culture of alternative dispute resolution) that has been the most impressive. It has now become an integral part of what we call the administration of justice and those engaged in mediation should fully embrace this role. While, as I have said, perfection is unattainable, we must nevertheless do our best.

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