FINAL
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JUDGES FROM OTHER COMMON LAW JURISDICTIONS IN THE HONG KONG COURT OF FINAL APPEAL

The Hon Mr Justice Gummow NPJ

I begin by referring to my experience of sitting as an NPJ. Shortly put, it was a continuation of my past experience in Australia. But, of course, now I was a Hong Kong judge after taking the judicial oath before the Chief Executive.

I had sat in the Full Court of the Federal Court of Australia from 1986 and in the High Court from 1995 to 2012. My views as to the conduct of appeals was formed in the Federal Court under the wise stewardship of Sir Nigel Bowen CJ. He had been resolved to avoid in the Federal Court after its establishment in 1976 the atmosphere of jovial brutality that had marked hearings in the NSW Court of Appeal. Rather what was needed was an atmosphere of joint pursuit by Bench and Bar of the issues truly in dispute, without histrionics raising emotional turbulence. Sir Nigel had been Attorney-General of the Commonwealth (1966-1969) and had developed a disdain for the partisan wrangling to be seen in the House of Representatives.

Another feature of appellate judging in the Full Federal Court was the practice after argument had concluded of the presiding judge asking colleagues to Chambers for an informal discussion over a cup of tea. It was something of a surprise on my arrival at the High Court in April 1995 to see that no such practice was observed. Each Justice was expected to retire to Chambers to wrestle alone with the issues at stake.

Something had to be done. On Wednesday 4 March 1998 a High Court of 6 Justices, led by Gaudron J, heard the appeal in *Garcia v National Australia Bank*[1], an important case dealing with the position in equity of wives who without the benefit of independent advice guarantee borrowings by their husbands. After the Court adjourned her Honour took the initiative, readily accepted by the other 5 Justices (McHugh, Gummow, Kirby, Hayne, Callinan JJ) and suggested we adjourn to her Chambers to discuss the appeal.

When Gleeson CJ took up his appointment in May 1998 he readily acceded to what he was told had become established practice.

When I first sat in the CFA I was stuck by the ambience in what was then the Court room where the CFA sat in the Former French Mission Building. As the hearing progressed I reflected that Sir Nigel Bowen and Geoffrey Ma CJ were cut from the same cloth. The collegial discussions after the conclusion of argument were, as indicated above, no novelty to me.

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[1] (1998) 194 CLR 395.

In by far the majority of appeals the CFA produces one judgment and dissenting judgments are infrequent. Views vary on these matters. To my mind the fewer the judgments on a final appeal the better for the parties, particularly the unsuccessful party, the courts below and the legal profession. Shades of expression in multiple judgments tend to bewilder the reader and encourage academic speculation.

On the other hand, it must be acknowledged that the traditional practice in the Judicial Committee of the Privy Council of producing but one set of reasons was a cause of dissatisfaction in the countries whence the appeal had been taken. It is said that for this reason Sir Owen Dixon never sat there. His successor, Sir Garfield Barwick agreed with Lord Gardiner LC that High Court Justices would sit on the Judicial Committee but only if dissenting opinions might be expressed.

There was something of a paradox in the practice in Privy Council and that in the House of Lords. The legislative nature of the Lords made it impossible for speeches (for that is what judgments there were) to be joint endeavours. The advent of the UK Supreme Court has made joint judgments possible. An example is that of Lords Walker and Collins (both also NPJs) in the "Star Wars" copyright case, *Lucasfilm Limited v Ainsworth*[2].

[2] [2011] 1 AC 208.

The present practices of the High Court of Australia were detailed by Kiefel CJ in a paper she presented in 2017 under the title "Judicial Methods in the 21st Century"[3]. Her Honour makes several points of continued interest both for her Court and for the CFA.

First, "gone are the days when a justice entered the courtroom unencumbered by any real knowledge of the parties' arguments"; comprehensive written submissions, filed well before the hearing have been required by the High Court since 1997. In recent years Counsel also have been required at the start of addresses to hand up a short and succinct outline of their argument.

Secondly, since the Chief Justiceship of French NPJ, at the beginning of each Sittings a short meeting has been held to identify any matters to which the attention of the parties should be drawn and an "ambush" at the hearing thus be avoided.

Thirdly, after the hearing there is a free exchange of views, as in the CFA meetings, with no particular order between the judges. For myself, I have found this collegiate approach of great assistance, whether in Canberra or Hong Kong. I note that in 1984 in his essay "Lord Denning as Jurist"[4] Professor AWB Simpson wrote of "undisciplined individualism" of

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[3] Available on the High Court website.

[4] Published in Jowell and McAuslan "Lord Denning: The Judge and the Law" 441 at 451.

appellate judges and “lack of any collegiate spirit” as productive of “mere confusion.”

My colleague Mr Justice Fok PJ has referred to central provisions in the Basic Law which use the terms “the common law” and “other common law jurisdictions”.

The term “jurisdiction” is used in the sense of “law area” or “law district” as understood in private international law or conflict of laws. The one nation state may encompass more than one law district and the common law may not apply throughout the nation state. An example is provided by Canada where Quebec retains much of its French legal inheritance.

What is the force of the term “common law” in the expression “common law jurisdiction”? Plainly it identifies that body of legal principle which originated in the Courts of King’s Bench, Common Pleas and Exchequer at Westminster. But it also encompasses the principles of equity, succession and Admiralty which since the 19th century reforms in England are applied in the one court system.

The expression “common law jurisdiction” also applies to the enforcement of statute law. This is very important in Hong Kong. It is one of the leading financial centers in the world. It is important for the confidence of participants, on the Stock Exchange or otherwise, that there is

available a judiciary skilled in commercial litigation, whether for regulatory enforcement or private disputes.

In a broad sense, the expression "the common law" identifies a method of adjudication and the state of mind of those who participate in adjudication whether on the Bench, in the jury box, at the Bar, as instructing solicitors, or, indeed, as witnesses.

Over 50 years ago the Privy Council accepted that the content of the common law (in *Australian Consolidated Press v Uren*[5] the award of exemplary damages in defamation actions) might differ from one jurisdiction to another. Henceforth, if not earlier it did not reflect reality to speak of the need for appellate decisions to accord with "generally accepted principles of the common law."

Accordingly, with the establishment in 1997 of the Hong Kong SAR the issue was presented to its courts, particularly the CFA, of what course was to be followed in applying "the common law". Article 84 of the Basic Law specifically provided that Hong Kong Courts "may refer to precedents of other common law jurisdictions". The expertise of judges from other common law jurisdictions would be made available to the CFA under Article 82 of the Basic Law. Let us take three examples of how this situation has developed since 1997 and may be expected further to develop.

[5] (1967) 117 CLR 221; ct *Rookes v Barnard* [1964] AC1129.

First, as to the defence of illegality. In various jurisdictions there has been a difficult question of the effect of illegality under the law of the place of contractual performance where the law chosen by the parties as the proper law is that of another "law area". Further, what is the position where the proper law of the contract chosen by the parties is that of Hong Kong but a principal place of performance is the Mainland?

These issues were presented to the CFA in *Ryder Industries Ltd v Chan Shui Woo*[6]. A contract had Hong Kong as the proper law but was performed in the Mainland, partly in breach of PRC law. Lord Collins sat as NPJ and gave the leading judgement. He considered illegality in the conflict of laws, observing[7] with reference to his judgment in *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd*[8], that:

> "The HKSAR and the Mainland PRC are part of one country, but for the purposes of the conflict of laws they are separate law districts".

His Lordship referred to the serious nature of the laws of the United States and India considered in the leading English cases *Foster v Driscoll* [9] (Prohibition in the USA) and *Regazzoni v KC Sethia (1944) Ltd* [10] (trading with South Africa in the Apartheid era) but observed that "plainly" the

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6 (2015) 18 HKCFAR 544.

7 At [37].

8 (2012) 15 HKCFAR 569 at [43].

9 [1929] 1 KB 470.

10 [1958] AC 301.

illegality rule did not apply to every breach of law. Here, the alleged breaches of PRC law appeared to be in the nature of "administrative" contraventions and had not led to criminal proceedings; it was too wide a proposition that every breach of the law of the place of performance would render the contract unenforceable.

In its issue for February 2016, the Hong Kong Lawyer, the official journal of the Law Society, observed that the judgement of Lord Collins in *Ryder Industries* was a good illustration of the value of NPJs especially in cases in which they had undoubted expertise.

Both *Ryder* and *First Laser* shed light on difficult issues in conflict of laws studies, *Ryder* with respect to illegality in the place of performance and *First Laser* with respect to characterization by the forum of a foreign legal system which does not use the term "fiduciary" as such.

The second example concerns the conduct of foreign relations. In Australia, this primarily is for the federal government, whether by executive action or pursuant to legislation. An example of the latter is the Foreign States Immunities Act 1985 (Cth). With respect to the conduct by foreign states of commercial transactions this mandates a "restrictive" view of immunity. That replaces what in many countries (including in the common law world) had been the "absolute" theory of immunity. What is apparent is that in a federal nation state there must be only one prevailing doctrine.

How did such thinking apply to the "one country two systems" structure of the PRC? Experience of NPJs with comparable structures in their home country could be of assistance when the issue arose in the CFA. So it proved to be in the *Democratic Republic of the Congo v FC Hemisphere Associated LLC*[11]. The majority judgment of Sir Anthony Mason NPJ explained that the courts of Hong Kong could not apply a common law "restrictive view" at variance with the "absolute view" to which the PRC adhered. A State with multiple "law areas" as "regions" still had to speak with "one voice" in the conduct of foreign affairs. The "interpretation" under Article 158 of the Basic Law then issued in Beijing by the Standing Committee of the National People's Congress was to the same effect.

Thirdly, the emergence of cryptocurrencies such as Bitcoin and Etherum presents challenges to basic common law concepts of "property" and "trust". Sooner or later such issues will be presented to the CFA. In *B2C2 Ltd v Quoine Pte Ltd*[12] French NPJ, as a member of the Singapore International Commercial Court, considered various issues that arise in this area. The High Court of New Zealand considered this and other decisions in *Ruscoe v Cryptopia Limited (in liquidation)* [2020] NZHC 728.

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[11] (2011) 14 HKCFAR 95, 395.

[12] [2019] 4 SLR 7. See the paper by French NPJ "Cryptocurrency and Trust" presented to the Society or Trusts and Estates Planning at Adelaide, 6 March 2020.

The availability of precedents from elsewhere may place a heavy burden on the Hong Kong legal profession. Mr Justice Fok refers to the advantage to the CFA of NPJs with first hand knowledge of the case law in their home jurisdiction on which reliance may be placed by Hong Kong counsel. A recent example is *HKSAR v CT*[13]. The New South Wales decision in *R v Markuleski*[14] appeared to require that the traditional direction to treat separately each of a multiplicity of counts be supplemented "in a word against word case" by a direction as to the effect upon assessment of the credibility of a complainant (especially in a sexual assault prosecution) if the jury is unable to accept the complainant's evidence with respect to any one count. Later Australian decisions, particularly that of Keane JA in *R v Ford*[15], stressed that the *Markuleski* direction was not always desirable as a counterweight to the "separate offences" direction; it must be clear that the risk of unfairness to the accused "has truly arisen".

In conclusion, I should say something more of the "common law." A final court of appeal, in particular, must grapple with the fundamental mystery (in the Classical sense of that term) of the common law system, how things must change if they are to remain the same. There is the adaptation of fundamental learning which is the fruit of practical experience over time by seamlessly connecting the instant decision to what has gone before whilst showing the way to the future.

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[13] (2019) 22 HKCFAR 225 at [13]-[19].

[14] (2001) 52 NSWLR 82 at 121-122.

[15] [2006] QCA 142 at [123]-[126].

I have endeavoured to present my tribute to the CFA, leavened by practical examples from its procedures and techniques, and thereby acknowledge the sagacity and foresight of those who drafted and then approved the enactment of Articles 82 and 84 of the Basic Law.