

Chancery Bar Association's

Hong Kong Conference

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Speech by The Honourable Mr Justice Tang PJ¹

The Common Law and the Market Place of Ideas

1. Thank you for inviting me to speak at your conference. I see in your panel discussions you will compare Hong Kong decisions with English decisions on various topics, beginning with multiple derivative actions and the exercise of the court's jurisdiction over the winding up of foreign companies in shareholders' disputes. I think you might want to know some of our other decisions where we differed from English decisions.

2. As you know, Hong Kong became a Special Administrative Region of the People's Republic of China on 1 July 1997. Under the one country two systems policy, so far our legal system has remained largely unchanged. We remain a member of the common law family. We have an independent judiciary as well as an independent legal profession. The Basic

¹ Permanent Judge of the Hong Kong Court of Final Appeal. I would like to express my thanks to Mr HUI Sui Hang and Mr Franklin KOO, Judicial Assistants in the Court of Final Appeal (2016-17), for their help in preparing this speech.

Law, Hong Kong's constitution, provides that subject to amendments by the legislature and inconsistency with the Basic Law, the common law and rules of equity previously in force in Hong Kong shall be maintained, that our courts shall adjudicate cases in accordance with the common law and rules of equity previously in force in Hong Kong, and we may refer to precedents of other common law jurisdictions.² One important change is that, before 1 July 1997, the Judicial Committee of the Privy Council was the final appellate court for Hong Kong, but thereafter, the power of final adjudication is vested in the Court of Final Appeal, of which I am a member. Since the power of final adjudication is vested in Hong Kong, like other common law jurisdictions which have severed their links with the Privy Council, theoretically, we are free to develop a distinctly Hong Kong common law.

3. As the House of Lords declared in 1966, to avoid injustice in individual cases and so that the proper development of the law should not be unduly restricted they would:

“while treating former decisions of this House as normally binding, [depart] from a previous decision when it appears right to do so.”³

² Articles 8, 18 and 84.

³ *Practice Statement (Judicial Precedent)*(1966) 1 WLR 1234.

4. In Hong Kong, the Court of Final Appeal adopted the same approach but as Li CJ said freedom to develop the law to meet changing needs and to avoid injustice must be balanced against the need for certainty, consistency and predictability in the law. That is why although the Court of Final Appeal is free to depart from its previous decisions and is not bound by decisions of any other court, it would approach its power to do so with great circumspection and it is a power which should only be exercised sparingly.⁴

5. The doctrine of precedence which is fundamental to the common law, indeed, I believe, its defining feature, requires that like cases should be decided alike unless there are good reasons to decide otherwise. As Cross and Harris put it there is “a positive obligation to follow a previous decision in the absence of justification for departing from it.”⁵ Lord Steyn said in *R v Powell*, the fact that the law has been authoritatively stated:

“... does not mean [it] cannot be re-examined and, if found to be flawed, reformulated. But the existing law and practice forms the starting point.”⁶

⁴ *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, para 20.

⁵ *Precedent in English Law*, 4th Edition by Rupert Cross and JW Harris, page 3.

⁶ *R v Powell* [1999] 1 AC 1 at 13.

6. In *Solicitor (24/07) v Law Society of Hong Kong*, the Court of Final Appeal explained that because of the continuity of the legal system after 1 July 1997 under the doctrine of precedents, our Court of Appeal and below are bound by decisions of the Privy Council decided on appeal from Hong Kong before 1997.⁷ As for other decisions of the Privy Council or the House of Lords, although they are not strictly speaking binding “their persuasive authority was so great that the courts in Hong Kong virtually invariably followed them before 1 July 1997.”⁸ I think it is right to say that prior to 1 July 1997, decisions of the Privy Council and the House of Lords touching on the common law or rules of equity were routinely followed in Hong Kong, whether or not it was strictly binding. That made sense because any deviation from the English position would be reined in by the Privy Council. The position after 1997 is different. Subject to binding authorities as explained earlier, our courts, when faced with a choice between an English decision and a decision from another common law jurisdiction was free to choose. As Li CJ said “There is no universal common law and no single common law system.”⁹ Nor is there a hierarchy in the common law world. No one jurisdiction has precedence over another. Li CJ also said “...

⁷ Para 7.

⁸ Paras 14 & 15.

⁹ Speech at the Opening Ceremony of the 16th Commonwealth Law Conference in Hong Kong.

common law jurisdictions, both within and outside the Commonwealth, provide a flourishing market place of ideas for dealing with the challenging legal issues of our times.” I think, in the common law world, “bad ideas will be subordinated to good ideas in the long run, as good ideas will win more adherents”¹⁰ So after 1997, English decisions, with the exception of decisions of the Privy Council on appeal from Hong Kong which remain binding on the Court of Appeal and below, common law decisions will be considered on their merits by our courts. The rigidity of the rule of precedence having been relaxed, essentially good reasons will chase out bad reasons, subject always to the need for certainty, especially in the criminal law.

7. It is with this in mind that I wish to take you to some of the cases where we have differed from English decisions.

8. Some differences are the result of the special circumstances of Hong Kong and are straight-forward. One example is *China Field Ltd v Appeal Tribunal (Buildings)(No 2)*.¹¹ Which concerned the acquisition of an

¹⁰ http://www.conservapedia.com/Marketplace_of_ideas (Accessed 21 April 2017).

¹¹ (2009) 12 HKCFAR 342.

easement of way under the doctrine of lost modern grant. Given that land in Hong Kong is generally held under lease from the government, the English Fee Simple Rule or the Common Landlord Rule, was held not to represent or continue to represent the law of Hong Kong. These rules which rendered the doctrine of lost modern grant in-applicable as between leaseholders holding under a common landlord should not be part of the law of Hong Kong because as Lord Millett said:

“... A coherent system of prescription demands that, if an easement over land can be acquired by express or implied grant, it should be capable of being acquired by the fiction of lost modern grant ...”¹²

9. In case, you are puzzled about Lord Millett’s involvement, I should add that under the Basic Law, our Court of Final Appeal, “... may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal.”¹³ So far judges from the UK, Australia and New Zealand have been invited to sit in the Court of Final Appeal, and for the purpose they are appointed overseas non-permanent judges of the Court of Final Appeal. Since 1 July 1997, with rare exceptions, one such overseas non-permanent judge always sits with four local judges on the hearing of substantive appeals.

¹² *Per* Lord Millett at para 86.

¹³ Article 82.

10. Then there are the two decisions of the Court of Final Appeal which will feature in your first panel discussion, namely *Waddington*¹⁴ and *Yung Kee*.¹⁵ They are not departures. Rather, we took well established English principles and applied them to situations to which they had not been so distinctly applied before.¹⁶ Since they will feature in your panel discussion, I will say no more.

11. I turn now to decisions where the Court of Final Appeal has deliberately parted company with English decisions. They provide examples about the competition of ideas in the common law market place.

12. The first concerns the standard of proof in solicitors disciplinary proceedings where the Court of Final Appeal refused to follow *Campbell v Hamlet*,¹⁷ a decision of the Privy Council on appeal from Trinidad and Tobago. Lord Brown of Eaton-under-Heywood who delivered the judgment of the Board, after examining the argument that the correct standard was the civil standard of a mere balance of probabilities or a standard somewhere

¹⁴ *Waddington Ltd v Chan Chun Hoo* (2008) 11 HKCFAR 370.

¹⁵ *Kam Leung Sui Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501.

¹⁶ As Lord Millett said in *Waddington*: “63. Similar actions have been brought in England since then, but in every case the right to bring the (multiple derivative) action has been assumed without argument ...”

¹⁷ [2005] 3 All ER 1116.

between that and the criminal standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matter, opted unequivocally for the criminal standard. The Court of Final Appeal disagreed. Bokhary PJ who delivered the lead judgment said the standard of proof for disciplinary proceedings in Hong Kong is a preponderance of probability under the *Re H* approach, namely that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.

13. I mention this authority because *Campbell v Hamlet* may be reconsidered in England. In November 2016, Leggatt J said, and Sir Brian Leveson P agreed *Campbell v Hamlet* and a decision of the English Court of Appeal,¹⁸ to similar effect, were ripe for reconsideration.¹⁹ So the competition of ideas continues and our divergence from England may be temporary.

¹⁸ *Re A Solicitor* [1993] QB 69.

¹⁹ *Solicitors Regulation Authority v Solicitors Disciplinary Tribunal and Huseyin Arslan and Another* [2016] EWHC 2862 (Admin).

14. In the next two examples the Court of Final Appeal deliberately rejected the English positions and allied ourselves with Australia.

15. The first is *HKSAR v Chan Kam Shing*,²⁰ where we refused to follow the decision of the Supreme Court in *R v Jogee*²¹ on joint enterprise in crime. Here, you will see this provides a good example of how important decisions reverberate in the common law world.

16. Joint enterprise in crime is probably of little interest to you so I will be as brief as possible. Where a group of persons set out to kill and one of them kills the victim. They would all be guilty of murder and it does not matter who struck the fatal blow. The more difficult situation is where a group of persons set out to rob in the course of which one of them kills the victim but the killing was not part of the agreed enterprise, namely, robbery but was incidental to the carrying out of the agreed enterprise. In Australia and Hong Kong this is called extended joint criminal enterprise. In *Jogee*, the Supreme Court called it parasitic accessory liability. At heart the question is what is the basis for liability of the accessory for the killing.

²⁰ (2016) 19 HKCFAR 640.

²¹ [2016] 2 WLR 681.

17. I begin the Hong Kong position with *Chan Wing Siu v R*,²² where the Privy Council on appeal from Hong Kong held and I take this from the headnotes:

“ ... that all those that take part in an unlawful joint enterprise would have the necessary intent to be guilty of murder or grievous bodily harm if they had foreseen that the infliction of serious bodily harm would be a possible incident of the joint enterprise; ... ”

18. The judgement of the Privy Council was delivered by Sir Robin Cooke, who said:²³

“The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.

That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be expressed but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.”

This is the so-called foresight test.

19. Although *Chan Wing Siu* was a decision of the Privy Council, it represented English law and had been followed by the House of Lords on a

²² [1985] 1 AC 168.

²³ Page 175G.

number of occasions. But in *Jogee*, the Supreme Court refused to follow *Chan Wing Siu*. Lord Hughes and Lord Toulson JJSC, whose judgments were agreed to by the other members of the court, after noting that *Chan Wing-Siu* was followed by the High Court of Australia in *McAuliffe v the Queen* which in turn was followed,²⁴ said:

“79. It will be apparent from what we have said that we do not consider that the *Chan Wing-Siu* principle can be supported, except on the basis that it has been decided and followed at the highest level. In plain terms, our analysis leads us to the conclusion that the introduction of the principle was based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments. We recognise the significance of reversing a statement of principle which has been made and followed by the Privy Council and the House of Lords on a number of occasions. We consider that it is right to do so for several reasons.”

20. Principally, I think, because “... a wrong turn has been taken, [and] should be corrected.”²⁵ Also that the foresight test under *Chan Wing-Siu* required a lesser degree of culpability of the accessory (D2) than that required of the killer (D1), whereas the correct test should be if the incidental crime requires a particular intent, D2 must intend (it may be conditionally) to assist D1 with such intent.

²⁴ (1995) 183 CLR 108, para 60.

²⁵ Para 82.

21. The judgment in *Jogee* was handed down on 18 February 2016 and was considered by the High Court of Australia in *R v Miller*²⁶ in a judgment handed down on 24 August 2016. In *Miller*, French CJ, Kiefel, Bell, Nettle, and Gordon JJ, in their joint judgement examined Australian and English authorities leading up to *Jogee* and *Jogee* itself and said:

“in light of this history, it is not appropriate for this court to now decide to abandon extended joint criminal enterprise liability and require, in the case of joint criminal enterprise liability, proof of intention in line with *Jogee*.”²⁷

In his dissenting judgment Gagler J said:

“if the common law of Australia [were to return] to the path it was on before *McAuliffe*, the only justification could be that the return is compelled by principle.”²⁸

He would do so because:

“to excise [extended joint criminal enterprise] would do more to strengthen the common law than to weaken it. Where personal liberty is at stake, no less than where constitutional issues are in play, I have no doubt that it is better that this Court be ‘ultimately right’ than that it be ‘persistently wrong’.”²⁹

²⁶ [2016] HCA 30.

²⁷ Para 43.

²⁸ Para 107.

²⁹ Para 128.

I believe the majority led by French CJ did not think they were compelled by principle to do so. But Keane J who agreed with the majority went further in his separate judgement and said he did not agree with *Jogee*.³⁰

22. Hong Kong's turn to consider *Jogee* came in December 2016. In *Chan Kam Shing*, Ribeiro PJ (whose judgment was agreed to by the rest of the court), distinguished between accessorial liability, such as aiding, abetting, counselling, inciting or procuring from what he called basic joint criminal enterprise, which "involves the co-adventurers simply agreeing to carry out and then executing a planned crime."³¹ Where "in some cases, the facts will be such that guilt can be established either under traditional accessorial principles or the basic joint criminal enterprise doctrine."³² Ribeiro PJ would distinguish them from cases of extended joint criminal enterprise where:

"The requirement is ... for the defendant to have 'contemplated' commission of the relevant crime as possible - as an act which 'might' be done - by one of the other participants in the course of carrying out the primary criminal enterprise."³³

³⁰ Paras 139-140.

³¹ Para 41.

³² Para 44.

³³ Para 48.

23. In short, in *Chan Kam Shing*, we took the view that *Chan Wing-Siu* was right. It was not a wrong turn at all.

24. This talk is not about the correctness of *Jogee* or *Chan Kam Shing*. I use them to show that the common law is basically reasons driven, and that there is an active market place of ideas where ideas can and do contend.

25. But the law of joint enterprise is not confined to homicide,³⁴ and I don't think we have heard the last of the subject. In a note published in May 2016 in the *Hong Kong Lawyer*, Mr Franklin Koo, then of Chiu & Partners,³⁵ "*Is Abolishing Joint Enterprise Beneficial for Hong Kong?*" said the approach adopted in *Jogee* "prevents the possibility of oppression against a particular group by abusing the *Chan Wing-Siu* principle. This is pertinent given the many local social movements and politically-sensitive groups here in Hong Kong." This concern was repeated after our decision in another article.³⁶

³⁴ *Miller* para 1.

³⁵ Currently, a Judicial Assistant of the Court of Final Appeal.

³⁶ <http://www.davidasonthern.com/blogs/post/Why-the-CFA-should-have-abolished-the-extended-Joint-Enterprise-Doctrine-in-Hong-Kong/> (*Abolishing the Joint Enterprise Doctrine in Hong Kong*, David A Southern on 28 March 2017).

26. I understand the concern. But, the facts in *Chan Kam Shing* are far removed from cases contemplated by Mr Koo. *Chan Kam Shing* was “the paradigm case of murder”.³⁷ Nor has it been suggested (at least, I am not aware of any) that a person who participates in peaceful demonstrations, albeit technically unlawful, could by merely taking part, be held responsible for, say, violence committed by other participant(s), simply because violence was foreseeable in a public demonstration. No doubt if such a case were to arise, the courts will deal with it. The court’s duty in regard to civil liberty is clear.

27. The last authority on divergence from English common law concerns an authority which is familiar to you. *Seldon v Davidson*,³⁸ a decision of the Willmer and Edmund Davies LJJ in English Court of Appeal decided in 1968 and followed in England ever since. Seldon claimed the return of £1,550 for debt or as money had been received from her chauffeur and handyman. The money was paid by two cheques to Davison’s solicitors and used in the purchase of a house. The receipt of the money was admitted but the defence relevant to this talk is that it was a gift. The county court

³⁷ *Miller* at para 45.

³⁸ [1968] 1 WLR 1083.

judge ordered the defendant to begin because the legal burden was on him to prove it was a gift. The trial was adjourned to enable the defendant to appeal. On appeal counsel for the defendant relied on *Cary v Gerrish*³⁹ where on a plea of non assumpsit, Lord Kenyon said, payment by a draft made out in the name of the defendant and paid “is no evidence to establish a debt” and counsel submitted that the burden was on the plaintiff to prove a loan of money. The Court of Appeal rejected that argument and held that, in the absence of circumstances where the presumption of advancement can or may arise, the burden was on the defendant to show that the money was a gift.

28. In *Seldon*, counsel for the defendant conceded that the house which was bought with the money supplied by the plaintiff would be held on a resulting trust for her and Lord Justice Willmer said it would be strange:

“if the same considerations did not apply to the money paid by the plaintiff to the defendant to assist him in the purchase of the house.”⁴⁰

29. In *Big Island Construction (Hong Kong) Ltd v Wu Yi Development Company Limited*,⁴¹ the Court of Final Appeal by a majority

³⁹ (1801) 4 Esp 9.

⁴⁰ Page 1088C.

⁴¹ (2015) 18 HKCFAR 364.

refused to follow *Seldon v Davidson*, preferring *Heydon v Perpetual Executors, Trustees & Agency Co (WA) Ltd*,⁴² a decision of the High Court of Australia, where the successful appellant also relied on *Cary v Gerrish* and the High Court of Australia held that the burden was on the plaintiff to prove the loan and there was no presumption of a resulting trust.

30. The view that a presumption of resulting trust may arise on a payment of money has the support of Lord Browne-Wilkinson where he said in *Tinsley v Milligan*⁴³ a presumption of resulting trust also arises in equity when A transfers personalty or money to B citing Snell's Equity,⁴⁴ Cotton LJ in *Standing v Bowring*⁴⁵ and Goff J in *Dewar v Dewar*.⁴⁶

31. No doubt the comparative merits of *Seldon* and *Big Island* will be weighed in the marketplace of ideas.

32. To conclude, I wish to say that given the rules of precedence and that the court should not depart from its former decisions without good reason, the freedom to develop a distinct common law for any jurisdiction is

⁴² (1930) 45 CLR 111.

⁴³ [1994] 1 AC 340 at 371.

⁴⁴ Page 182.

⁴⁵ (1885) 31 Ch.D 282, 287.

⁴⁶ [1975] 1 WLR 1532, 1537.

limited. That in the common law world, there is a thriving market place where ideas contend and good ideas will win more adherents.

33. Lastly, I wish to say you are most welcome here. It is entirely fitting that you should hold your conference in Hong Kong, where, I hope I have shown, common law and the rules of equity thrive and where with the benefit of our overseas non-permanent judges, we are as it were physically linked to important parts of the common law world. I wish you a successful conference and a happy time in Hong Kong.