LORD MILLETT IN HONG KONG——

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Lord Millett, Non-Permanent Judge of the Hong Kong Court of Final Appeal since 2000, passed away on 27 May 2021. Mrs Carrie Lam, Chief Executive of the HKSAR, expressed her deep sorrow on his passing, and referred to Lord Millett's "immense contribution to the establishment of a robust and well-recognised judicial system" in Hong Kong; he had "handled complicated cases and wrote landmark judgments, covering various legal aspects, over the years". This article builds upon that summation by considering various aspects of the judicial technique applied in a range of Lord Millett's CFA judgments. That technique involved an appreciation that the practice of the law involves both art and science.

Lord Millett retired as a Lord of Appeal in Ordinary in 2004, but he had been appointed in 2000 as a Non-Permanent Judge of the Hong Kong Court of Final Appeal (CFA). He delivered his last judgment in office in 2017.[1]

On his death in May 2021, the Hong Kong Chief Executive expressed her deep sorrow on his passing and added that "the appointment of illustrious judges from other common law jurisdictions as Non-Permanent Judges of the Court of Final Appeal is an important component of the justice system in Hong Kong". The Chief Executive went on to refer to Lord Millett's "immense contribution to the establishment of a robust and well recognised judicial system" in Hong Kong and added that he had "handled complicated cases and wrote landmark judgments, covering various legal aspects, over the years".

The author seeks to build upon that summation by considering various aspects of the judicial technique applied in a range of Lord Millett's CFA judgments. That technique involved an appreciation that the practice of the law involves both art and science.

One of his first judgments, in *Suen Toi Lee v Yau Yee Ping*,[2] displayed an

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1 *Tang Ying Loi v Tang Ying Ip* (2017) 20 HKCFAR 53.

2 (2001) 4 HKCFAR 474.

awareness of the character of Hong Kong and the Mainland as district "law areas" for the application in Hong Kong courts of Conflict of Laws principles, albeit both law areas are components of the "One Country".

The expert evidence was that in 1931 the Republic of China had abolished concubinage. However, in 1945, in Shanghai, Mr Sung took Madam Chu as his concubine. He moved to Hong Kong in 1951, and Madam Chu followed him there in 1952. But both remained domiciled in the Mainland. Madam Chu died intestate in 1987. The present appeal was concerned with her immovable property situated in Hong Kong, and under the rules of Conflict of Laws, which also form part of the Hong Kong law, succession to such property was governed by that *lex-situs*.[3]

Concubinage as a legal institution had been abolished in Hong Kong in 1971, but the legal status and rights of concubines previously "lawfully taken" were preserved. The legislation used the expression "union of concubinage".

Lord Millett held that this expression "means one which is recognised by the law of Hong Kong" but added[4]:

> "But that does not necessarily mean by the domestic law of Hong Kong. The law of Hong Kong recognises unions of concubinage validly entered into abroad just as it recognises marriages validly entered into abroad."

What then was the scope of the Hong Kong legislation preserving rights under a pre-1971 union of concubinage? Lord Millett agreed with the view of Ribeiro JA (as he then was) in the Court of Appeal that the post-1931 union of concubinage had no legal effect under the Mainland domicile of the parties; that the Hong Kong legislation preserved the legal status of unions only if recognised by the law of the domicile and that as a result Madam Chu's status had not been recognised in Hong Kong and her intestate immovable property in Hong Kong was to be administrated accordingly.[5]

Another feature of Lord Millett's sophisticated judicial technique is his appreciation of the adaptation of the English common law in jurisdictions of which, in particular since 1997, Hong Kong is one. Thus, a rule or doctrine in English law might not be suitable for conditions in Hong Kong or might call for an examination by the CFA as to its persuasive force in those conditions.

Writing in 2009, Lord Millett said[6]:

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3 *Ibid*., [73], [74].

4 *Ibid*., [79].

5 *Ibid*., [79]–[80].

6 Foreword to Lawrence Ma, *Equity and Trusts Law in Hong Kong* (Hong Kong: LexisNexis, 2nd ed., 2009).

> "As the years pass since the resumption of sovereignty by the PRC, so the independence of Hong Kong law from its English progenitor will increase. Today the Hong [Kong] Courts regard decisions of the High Court of Australia as of equal authority to those of the Privy Council, and with the establishment of their own Court of Final Appeal are creating a strong line of domestic authority, choosing where necessary between differing analyses which have been adopted by other legal systems and seeking to ensure that the law meets the needs of their own community."

With these words in mind, the author turns to consider the work of Lord Millett NPJ in matters of revenue law, land law, company law, Conflict of Laws, equitable remedies and trusts.

In the absence of statutory anti-avoidance provisions in UK revenue laws, the House of Lords developed a method of statutory interpretation known as the *Ramsay* principle.[7] To some, this appeared to be an instance of judicial legislation. But, in 2000, it was accepted as applicable to Hong Kong by both parties in *Shiu Wing Ltd v Commissioner of Estate Duty*.[8]

Thereafter, in *Collector of Stamp Revenue v Arrowtown Assets Ltd*,[9] Lord Millett said:

> "This does not mean that we must slavishly follow every twist and turn of an approach which, even after 20 years, is still in course of development in the United Kingdom. But it does behove us to understand its nature and the basis on which it rests, possibly with a greater recourse to comparative law and more explicit recognition that it derives from principles developed in the United States [notably by Judge Learned Hand in *Helvering v Gregory*[10]] than the English cases have accorded it."

A second example of the method of Lord Millett as a Hong Kong judge is provided by his treatment of the doctrine in land law of the fiction of the "lost modern grant". The doctrine was considered in *China Field Ltd v Appeal Tribunal (Buildings)*.[11] Lord Millett began by referring to the statement by Charles Harpum that this doctrine was the most common basis in England for a prescrip-

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7 After *W T Ramsay Ltd v IRC* [1982] AC 300.

8 (2000) 3 HKCFAR 215.

9 (2003) 6 HKCFAR 517, [104].

10 69 F2d 809 (1934).

11 (2009) 12 HKCFAR 342.

tive claim to an easement.[12] He then made the following points:

(1) It is well recognised that the common law is no longer monolithic but may evolve differently in the various common law jurisdictions.[13]
(2) [The CFA] will continue to respect and have regard to decisions of the English courts, but it will decline to adopt them not only when it considers their reasoning to be unsound or contrary to principles or unsuitable for the circumstances of Hong Kong but also when it considers that the law of Hong Kong should be developed on different lines.[14]
(3) Article 84 of the Basic Law recognises that "[i]t is of the greatest importance that the courts of Hong Kong should derive assistance from overseas jurisprudence, particularly from the final appellate courts of other common law jurisdictions".[15]

Lord Millett then moved to the dispute at hand in *China Field*. The appellants contended, upon English authority, that the user relied upon must be by or on behalf of the owner of a fee simple against another owner in fee simple. He noted that "[w]ith the sole exception of the Anglican Cathedral, all land in Hong Kong is either owned by or ultimately held under a lease granted by a single landlord" so that if the appellant's argument were accepted, "the doctrine of lost modern grant has no significant application in Hong Kong".[16]

The Authority had rejected development applications on the basis that the proposals did not allow for certain rights of way acquired by lost modern grant and enjoyed by owners and occupiers of adjacent land. The decision of the Authority was upheld by the CFA.

Lord Millett doubted whether the fee simple requirement would be upheld by the House of Lords but emphasised that it was the law in Hong Kong that was in issue. If Hong Kong were to move to a comprehensive system of land title by registration (as in Torrens system), the acquisition of rights by prescription might disappear, but at present[17]:

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[12] Charles Harpum, "The Acquisition of Easements" [1992] *Cambridge Law Journal* 220, 221.

[13] *China Field Ltd v Appeal Tribunal (Buildings)* (2009) 12 HKCFAR 342, [78].

[14] *Ibid*., [81].

[15] *Ibid*., [79].

[16] *Ibid*., [40].

[17] *Ibid*., [86].

> "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, without being affected by restrictions [such as the fee simple requirement]."

A feature of commercial activity in Hong Kong has been the business structure with the holding company of subsidiaries incorporated in Hong Kong itself being incorporated in a tax haven, such as the British Virgin Islands (BVI). This presents a challenge to the Hong Kong courts when it is sought to litigate there disputes leading to derivative actions or winding-up applications brought on the "just and equitable" ground. The basic rule of Conflict of Laws is that, enabling legislation of the forum aside, jurisdiction will be declined whenever the courts of the place of incorporation are appropriate for determination of a dispute concerning the internal affairs of the holding company.[18]

This challenge was taken up by two judgments of Lord Millett, in *Waddington Ltd v Chan Chin Hoo Thomas*[19] in 2008 and *Kam Leung Sui Kwan v Kam Kwan Lai*[20] in 2015.

In the 2008 case, the plaintiff Waddington Ltd was incorporated in the BVI and was a minority shareholder in Playmates Holdings Ltd (Playmates), a Bermuda company listed on the Hong Kong Stock Exchange. Mr Thomas was Chairman and Executive Director of Playmates and was alleged to have an indirect controlling interest in Playmates and its subsidiaries and sub-subsidiaries. Waddington challenged three Hong Kong transactions which Mr Thomas allegedly procured in breach of his fiduciary duties to members of the Playmates Group. Some form of derivative action was needed to enable Waddington to bring the proceedings.

The upshot was to decide against Waddington and to affirm that (1) a minority shareholder may be allowed by the Court to bring proceedings on behalf of a wholly owned subsidiary, where the alleged wrongdoer, here Mr Thomas, is effectively in control at every level of the chain, but (2) while it may be said that the minority shareholder suffers a "reflective loss", as a matter of legal policy to protect creditors of the subsidiary itself, the action must be brought on behalf of the subsidiary.[21]

The *Kam* litigation[22] turned on Hong Kong statute law. The issue was whether

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[18] See *Mills v Mills* [1938] 60 CLR 150 (Dixon J).

[19] (2008) 11 HKCFAR 370.

[20] (2015) 18 HKCFAR 501.

[21] *Waddington Ltd v Chan Chin Hoo Thomas* (2008) HKCFAR 370, [74].

[22] (2015) 18 HKCFAR 501.

a BVI-incorporated company which was not registered in Hong Kong should be wound up in Hong Kong under the "just and equitable" ground in s 327(3)(c) of the Companies Ordinance. The dispute was not between a creditor and the company but between members of the family who held the shares in the company.

Ma CJ and Lord Millett NPJ, in their joint reasons, said[23]:

> "[T]he jurisdiction to wind up a foreign company has often been described as 'exorbitant' or as 'usurping' the functions of the courts of the country of incorporation.[24] These expressions are, however, unhelpful and potentially misleading except as a reminder that there must be good reason to exercise an abnormal jurisdiction even though it is one which statute has expressly conferred on the court."

A sufficient connection with Hong Kong was supplied by the conduct there of the family business by Hong Kong sub-subsidiaries of the BVI holding company. There were, their Lordships noted, likely to be far more Hong Kong family companies owned by a foreign holding company than would be encountered elsewhere.[25]

There may be an attraction for NPJs to look most closely to authorities in the jurisdiction where they have come to the CFA. This certainly was not the case with Lord Millett, as is strikingly apparent in his reasons in equity cases he decided as NPJ.

Writing in 1998, the year in which he was elevated from the Court of Appeal to the House of Lords, Lord Millett had declared that "[i]t is of the first importance not to impose fiduciary obligation on parties to a purely commercial relationship".[26] However, as NPJ he was party to the decision in *Libertarian Investments Ltd v Hall*.[27] The leading judgment was delivered by Ribeiro PJ who, with reference to Australian, Canadian and New Zealand authorities, proceeded on the footing that even in a commercial relationship of a generally non-fiduciary kind there may be aspects which engage a fiduciary duty and equitable remedies.[28] Lord Millett did not dissent from the orders to which that reasoning led

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[23] *Ibid*., [19].

[24] See e.g., in *Drax Holdings Ltd* [2004] 1 WLR 1049, [24], per Lawrence Collins J (as he then was).

[25] *Kam Leung Sui Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501, [28].

[26] "Equity's Place in the Law of Commerce" (1998) 114 *LQR* 214, 217.

[27] (2013) 16 HKCFAR 93.

[28] *Ibid*., [56]–[62], [70]–[72].

Ribeiro PJ and the other members of the CFA. He devoted his judgment to the principles applicable to account and equitable compensation, a valuable contribution further considered below.

What is apparent in the other equity judgments of Lord Millett NPJ is the particular assistance he did derive from the decisions of the High Court of Australia in the area immediately under consideration. Two examples may be given here.

Lau Suk Ching Peggy v Ma Hing Lam[29] concerned a contract for the sale of shares in which no date for completion was fixed by the contract. At trial, the order for specific performance sought by the plaintiff was refused by the Recorder.

As to the requirement that the plaintiff herself be ready and willing to perform, Lord Millett declared that the Recorder should "have inquired whether at the date of the writ [the plaintiff] was substantially incapacitated from completing or had determined not to complete at the then indeterminate time in the future when the court should fix a time for completion". Lord Millett went on as follows: "[T]he answer being in the negative, he should have granted a decree of specific performance, inquired how long each of the parties reasonably required to complete, and fixed a date for completion accordingly".[30]

Lord Millett referred to the observation by Dixon CJ in *Rawson v Hobbs*,[31] approved by Mason CJ, Brennan, Dawson JJ in *Foran v Wight*,[32] that one

> "must be very careful to see that nothing but a substantial incapacity or definitive resolve or decision against doing what in the future what the contract requires is counted as an absence of readiness and willingness."

Tang Ying Loi v Tang Ying Ip[33] concerned an administrator of an intestate deceased's estate who in 2003 applied estate money to provide 40.4 per cent of the purchase price (HK$27.3 million) of a property. He repaid the money later in 2003. But in proceedings, which came to trial in 2009, one of the beneficiaries of the estate claimed a share in the substantially increased value of the property. When the litigation reached the CFA, Lord Millett emphasised that beneficiaries can elect to treat as part of the trust fund property purchased by an unauthorised but profitable application of trust money. The repayment in 2003 was to be treated not as restoration of that which had wrongly been taken from the estate but as

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[29] (2010) 13 HKCFAR 226.

[30] *Ibid*., [56].

[31] (1961) 107 CLR 466, 418.

[32] (1989) 168 CLR 385, 409, 425, 453–454.

[33] *Tang Ying Loi v Tang Ying Ip* (n 1 above).

an attempt by the administrator to buy out the interest of the estate in the property, an attempt which the estate rejected. The increase in value was not the product of a complex "tracing" exercise, nor was it a case of a "secret profit" by diversion of a business opportunity. The increase in value was simply an incident of ownership of the property, part of which had been elected to be a trust asset.

Lord Millett quoted from the judgment of the High Court of Australia in *Scott v Scott*[34] where, as Lord Millett put it, the issue was "the same as in the present case".[35]

The importance of the accounting process was stressed by Lord Millett. On taking of an account, the beneficiaries, where there has been a misapplication of trust money, have the right to elect whether to reject (as in this case) or affirm the transaction.[36]

Earlier, in his concurring judgment in *Libertarian Investments Limited v Hall*,[37] Lord Millett had made the following points with respect to the taking of accounts:

(1) An account is not a remedy; the beneficiaries or principals of trusts and other fiduciary relations are entitled to an account as of right.
(2) An order for an account is the first step in a process which enables the plaintiff to make good, as a restorative measure, a deficiency "sometimes described as equitable compensation".
(3) If the defendant trustee invested money wrongfully, but at a profit, the plaintiff may treat the property acquired (or its proceeds) as restored to the trust.
(4) The amount of an unauthorised investment is often established by evidence at trial so that an order for an account is not required and the court may proceed without more to award the appropriate amount of compensation.

It will be seen that point (3) foreshadowed the result in *Tang*, which has been discussed above.

It is appropriate to conclude on a personal note. Lord Millett was not a remote and unapproachable savant of the law. This was apparent when in 2015, one of our Equity students at Sydney University, puzzled by academic wrangling over the import of Lord Millett's analysis of the so-called *Barclays Bank Ltd v Quistclose*

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[34] (1963) 109 CLR 649.

[35] *Tang Ying Loi v Tang Ying Ip* (n 1 above) [24].

[36] *Ibid*., [18].

[37] (2013) 16 HKCFAR 681, [166]–[172].

Investments Ltd trust,[38] which he gave in *Twinsectra v Yardley*,[39] emailed Lord Millett at Essex Court seeking enlightenment. He replied. Somewhat embarrassed at what he might have seen as student impertinence, the author contacted Lord Millett. He responded, "I regard it as a duty (as well as a privilege) to give whatever assistance I can to students". To the student he had replied that "[t]erminology is the great trap in equity – there is often no single agreed meaning even of the commonest terms (e.g. constructive trust)". Neither description of the *Quistclose* trust, as an express or a resulting trust, was "wrong".

A reviewer in the *Law Society Gazette*[40] of Lord Millett's memoir *As in Memory Long*[41] well wrote: "[W]e are left with the impression of a warm and humane judge".

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[38] After *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

[39] [2002] 2 AC 164.

[40] 11 January 2016.

[41] Peter Millett, *As in Memory Long* (London: Wildy, Simmonds & Hill Publishing, 2015).