

The Court of Final Appeal

(Relevant to AAT Examination Paper 6 — Fundamentals of Business Law)

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Introduction

The Court of Final Appeal (“CFA”) was established on 1 July 1997. It is the final appellate court of the Hong Kong Special Administrative Region. Before the CFA was established, the highest court in Hong Kong was the Court of Appeal, and the final appellate court was the Judicial Committee of the Privy Council in London. At that time, the Supreme Court consisted of the Court of Appeal and the High Court (now the Court of First Instance)¹ and was located in the Supreme Court Building on Jackson Road, Central.²

Article 2 of the Basic Law of the Hong Kong Special Administrative Region (HKSAR) provides, among others, that the National People’s Congress authorizes the HKSAR to enjoy an independent judicial power, including that of final adjudication. Article 81 continues on to state that: ‘The Court of Final Appeal, the High Court, district courts, magistrates’ courts and other special courts shall be established in the Hong Kong Special Administrative Region’. Thus, the CFA was established under the Basic Law and has served Hong Kong since 1 July 1997. At the time of its establishment, the CFA was located in a declared monumental building, the former French Mission Building, on Battery Path, Central. In September 2015, the Court of Final Appeal moved to the Old Supreme Court Building on Jackson Road, its current location.

The structure and the jurisdiction of the CFA are governed by the Hong Kong Court of Final Appeal Ordinance (Cap. 484). The CFA is therefore important due to its role as the final appellate court and because it plays an important part in the development of the common law in Hong Kong.

¹ Since 1997, the High Court consists of the Court of First Instance and the Court of Appeal.

² The Supreme Court building was originally constructed in the early 20th century and was used as the Supreme Court from 1912 to 1984. After 1984 and until 2011, the building was occupied by the Legislative Council. The Legislative Council has now been relocated to the Legislative Council Complex, a new building situated at 1 Legislative Council Road, Tamar site.

The Constitution of the CFA

The Chief Justice and the permanent judges are the judges of the court. The CFA may invite non-permanent Hong Kong judges and/or judges from other common law jurisdictions to sit on the court, as required.

According to section 2 of the CFA Ordinance, "Chief Justice" (首席法官) means the Chief Justice of the CFA. The Chief Justice is appointed by the Chief Executive in accordance with the recommendation of the Judicial Officers Recommendation Commission. The Chief Justice must be a Chinese citizen who is a permanent resident of the HKSAR with no right of abode in any foreign country. The Chief Justice is the head of the Judiciary and is charged with the administration of the Judiciary. At present, the Chief Justice is the Honourable Geoffrey MA Tao-li.

A "permanent judge" (常任法官) is a judge appointed as a permanent judge by the Chief Executive acting in accordance with the recommendation of the Judicial Officers Recommendation Commission. Under normal circumstances there are not less than three permanent judges. At present, the three permanent judges are Mr. Justice Roberto Alexandre Vieira RIBEIRO, Mr. Justice Robert TANG Kwok-ching and Mr. Justice Joseph Paul FOK.

A "non-permanent judge" (非常任法官) is either a non-permanent Hong Kong judge (非常任香港法官) who is a former Hong Kong judge or an eminent judge appointed as a judge of the CFA from another common law jurisdiction. Judges in the latter category come on a rotational basis for a month at a time. The total number of persons holding office as non-permanent judges should not at any one time exceed 30.

Under the Basic Law of the HKSAR, in the appointment of judges of the CFA, the Chief Executive shall, in addition obtain the endorsement of the Legislative Council and report such appointment to the Standing Committee of the National People's Congress for the record.

Final appeals are heard and determined by the CFA and its constitution is (a) the Chief Justice, (b) three permanent judges, and (c) one non-permanent Hong Kong judge or one judge from another common law jurisdiction selected by the Chief Justice and invited by the CFA. The Chief Justice will be the President of the CFA in the hearing. The judgment which is that of the majority of the judges sitting in the hearing, will be the judgment of the CFA. If there is no judgment which is that of the majority of the judges sitting, a rehearing will be ordered.

The Jurisdiction of the CFA

Under the Court of Final Appeal Ordinance, the Hong Kong CFA is a 'superior court of record'. By saying that it is a court of record, this means that the proceedings are recorded, published and the transcripts are available to the public. Further, it is superior because it is a higher court in the court hierarchy. Thus, the Court of Appeal, the Court of First Instance and the recently established Competition Tribunal are also superior courts of record. In contrast, courts like District Courts, the Labour Tribunal, Small Claims Tribunal and Lands Tribunal are only courts of record.

The CFA hears appeals on civil and criminal matters from the Court of Appeal and the Court of First Instance. The CFA may confirm, reverse or vary the decision of the lower court or may remit the matter with its opinion to that court, or may make any other order as it thinks fit.

There is a CFA Rules Committee that makes rules of court regulating and prescribing the procedures and the practices to be followed in the CFA.

For civil appeals, an appeal may be permitted at the discretion of the Court of Appeal or the CFA, from any judgment of the Court of Appeal in any civil matter, if the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the CFA for decision. Previously under the Court of Final Appeal Ordinance, appeals can lie to the CFA as of right from any final judgment of the Court of Appeal where the matter in dispute amounts to or is worth more than \$1,000,000. But that section was repealed following the commencement of the Administration of Justice (Miscellaneous Provisions) Ordinance 2014.

For criminal appeals, an appeal shall, at the discretion of the CFA, lie to the CFA in any criminal matter from any final decision of the Court of Appeal or from any final decision of the Court of First Instance (not being a verdict or finding of a jury) from which no appeal lies to the Court of Appeal.

Where the CFA restores a conviction, it may make any order for the restitution of property which the court of trial could have made; and any compensation order which the court of trial could have made under the Criminal Procedure Ordinance.

The Role of the Court of Final Appeal in Common Law

As the final appellate court of the HKSAR, the CFA is very important in the development of the common law in Hong Kong. Article 8 of the Basic Law provides that the common law, among others, as a law previously in force in Hong Kong, shall be maintained, except for any that contravene the Basic Law. So, one feature in the development of Hong Kong common law is that it must be in conformity with the Basic Law.

At the Ceremonial Opening of the Legal Year 2016, the Chief Justice reminded us that “Hong Kong's legal system is based on the common law and on that system's characteristics of fairness, transparency and access to justice. The key players include of course those who are most intimately connected with the law's operation, the courts and the legal profession, but of considerable importance is also the understanding and acceptance by everyone, especially those with influence or power (chief among whom is of course the Government and all those within it), of the purpose of the law. The law is there to facilitate the well-being of our society, and not to be seen as somehow obstructing it.”

One example of the development of common law by the CFA is the libel case of *Albert Cheng and Another v Tse Wai Chun Paul*³. In the final appeal, the court had to decide “whether the purpose for which a defendant stated an honestly held opinion may deprive him of the protection of the defence of fair comment; for instance, if his purpose was to

³ (2000) 3 HKCFAR 339

inflict injury, as when a politician seeks to damage his political opponent, or if he was simply acting out of spite.” It was noted that this issue has not been settled by the courts in common law jurisdiction. The meaning of malice has been analysed in relation to the defence of qualified privilege. “But no similar exposition has been undertaken regarding fair comment. Indeed, there has been surprisingly little judicial discussion of this subject over the last 150 years.”

In the leading judgment, Lord Nicholls of Birkenhead, non-permanent judge, concluded that: “... a comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence. However, proof of such motivation may be evidence, sometimes compelling evidence, from which lack of genuine belief in the view expressed may be inferred. Proof of motivation may also be relevant on other issues in the action, such as damages.”

The case has been considered as a leading case on this issue in other countries. In this regard, the CFA has also played a role in the development of common law in all common law jurisdiction.