Judgment Update

Secretary of Justice v Yau Yuk Lung and Another
FACC No 12 of 2006 (July 2007)[1]
Court of Final Appeal

The respondents were charged with having committed buggery with each other otherwise than in private, contrary to s 118F(1) of the Crimes Ordinance (Cap 200). The CA upheld the decision of the Magistrate that the provision was unconstitutional and dismissed the appeal. The appellant appealed to CFA which certified that two questions of law were of great and general importance:

(1) Was s 118F(1) discriminatory to the extent that it was inconsistent with the BL and the BoR?

(2) What was the proper order to be made when the charge against the defendant was found to be unconstitutional?

The constitutional provisions

The CFA was of the view that equality before the law was a fundamental human right. Equality was the antithesis of discrimination. The constitutional right to equality was in essence the right not to be discriminated against. It was guaranteed by BL 25 and art 22 of the BoR (corresponding to art 26 of the ICCPR).

Discrimination on the ground of sexual orientation would plainly be unconstitutional under both BL 25 and art 22 of the BoR in which sexual orientation was within the phrase "other status".

Principles – difference in treatment and justification

The CFA held that in general, the law should usually accord identical treatment to comparable situations. However, the guarantee of equality before the law did not invariably require exact equality. Differences in legal treatment might be justified for good reason. To satisfy this test (the justification test), it must be shown that (a) the difference in treatment must pursue a legitimate aim, ie a genuine need for such difference must be established; (b) the difference in treatment must be rationally connected to the legitimate aim; and (c) the difference in treatment must be no more than was necessary to accomplish the legitimate aim.

The CFA held that where one was concerned with differential treatment based on grounds such as race, sex or sexual orientation, the court would scrutinize with intensity whether the difference in treatment was justified. Where the difference in treatment satisfied the justification test, the correct approach was to regard the difference in treatment as not constituting discrimination and not infringing the constitutional right to equality. Unlike some other constitutional rights, such as the right of peaceful assembly, it was not a

[1] Reported at [2007] 3 HKLRD 903.

question of infringement of the right which might be constitutionally justified.

Whether s 118F(1) was discriminatory and unconstitutional

The CFA held that s 118F(1) in criminalizing only homosexual buggery otherwise than in private plainly gave rise to differential treatment on the ground of sexual orientation which required to be justified. The first stage of the justification test was to consider whether the differential treatment pursued a legitimate aim. For this purpose, a genuine need for the difference in treatment had to be made out. That need could not be established from the mere act of legislative enactment. In the present case, no genuine need for the difference in treatment had been shown. That being so, it had not been established that the differential treatment in question pursued any legitimate aim. The matter failed at the first stage of the justification test. In enacting a package of measures to reform the law governing homosexual conduct, the Legislature was entitled to decide whether it was necessary to enact a specific criminal offence to protect the community against sexual conduct in public which outraged public decency. But in legislating for such a specific offence, it could not do so in a discriminatory way. Section 118F(1) was a discriminatory law. It only criminalized homosexual buggery otherwise than in private but did not criminalize heterosexuals for the same or comparable conduct when there was no genuine need for the differential treatment. The courts had the duty of enforcing the constitutional guarantee of equality before the law and of ensuring protection against discriminatory law. Accordingly, s 118F(1) was discriminatory and infringed the right to equality and was unconstitutional.

Proper approach where magistrate held a charge to be unconstitutional

Section 27 of the Magistrates Ordinance (Cap 227) was capable of supplying the framework for the magistrates' court to deal with findings of unconstitutionality. Where an information charged a defendant with an offence which was held to be unconstitutional, there was plainly a "defect in the substance ... of ... the information" so that s 27 was engaged. Under s 27, the magistrate was next required to consider, subject to subsection (2), either amending the information or dismissing it. Subsection (2) stipulated that the magistrate should amend the information if, inter alia, an amendment could be made without causing injustice. Pursuant to s 27(4), it would in principle be open to a magistrate to amend the information by substituting a suitable alternative offence which raised no constitutional difficulties, provided that this caused no injustice and that the s 27(3) procedures were then followed.

If that could not be done, s 27(1) required the magistrate to dismiss the information.

Where the prosecution wished to question a magistrate's determination of unconstitutionality, the magistrate should generally, before proceeding to consider possible amendment under s 27, accede to an application to state a case pursuant to s 105 of the Ordinance in respect of that determination, adjourning the proceedings pending the outcome of such appeal. This procedure enabled the question of constitutionality to be examined at the highest levels of court while preserving the position in the magistrates' court. As the magistrate's determination was not merely interlocutory, an appeal by way of case stated was consistent with the principles precluding appeals from interlocutory magisterial decisions.

The CFA considered that it was hard to see what role there was at all for the notion of "nullity" in s 27. That notion suggested that in certain cases a defect in an information might be so fundamental as to render it a nullity which was incapable of being cured by amendment. Given the overall scheme of s 27 (which required a defective information to be dealt with either by amendment or dismissal) and the great width of the power of amendment it conferred, it was hard to conceive of a defect in an information which could not in principle be amended, particularly by substitution of the offence charged. Hence, the notion of "nullity" should not be injected into that scheme.

In the present case, the considerations to amend the information by substituting another charge did not arise since, in obtaining leave to appeal, the Government undertook that it would not seek remittal of the case and would not bring any charge in relation to the conduct alleged in this case.

Koon Wing Yee v Insider Dealing Tribunal
FACV Nos 19 & 20 of 2007 (March 2008)[1]
Court of Final Appeal

The appeals were brought by the Financial Secretary from a decision of the CA. The appeals to the CA arose out of the inquiry by the Insider Dealing Tribunal under the Securities (Insider Dealing) Ordinance (Cap 395) (SIDO), which has now been repealed and replaced by the Securities and Futures Ordinance (Cap 571). The principal questions were whether arts 10 and 11 of the BoR applied to the proceedings and, if so, whether the use by the Tribunal of incriminating answers compulsorily given to incriminating questions and the standard of proof applied by the Tribunal complied with these provisions.[2] The CA concluded that the respondents were entitled to the protection of arts 10 and 11 of the BoR in the insider dealing proceedings and that the evidence obtained under s 33(4) of Securities and Futures Commission Ordinance (Cap 24) (SFCO) (now repealed), in relation to which the respondents had claimed the privilege against self-incrimination, was inadmissible in those proceedings. The CA also concluded that the respondents should not have been compelled to give evidence under s 17 of SIDO in the insider dealing inquiry and that, in the inquiry, the standard of proof to be applied was proof beyond reasonable doubt.

The appeal to the CFA raised important issues of constitutional law, including the following ones:

(a) Did the insider dealing proceedings heard by the Tribunal involve the determination of a criminal charge within the meaning of arts 10 and 11 of the BoR either by reason of the Tribunal's power (a) to impose a fine or (b) to order disqualification?

(b) If so,
  (i) Was there a breach of the right to protection against self-discrimination or the right to silence?
  (ii) Was the Tribunal obliged to apply the criminal standard of proof beyond a reasonable doubt?

(c) Did the CA err by not confining the remedy to an order that the statutory power to impose a fine was a breach of the BoR and so invalid?

Whether there was a criminal charge by reason of the power to impose a penalty

Following the decisions of the European Court of Human Rights and the English decisions relating to art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the

1 Reported at [2008] 3 HKLRD 372.

2 Art 10 of the BoR provides (insofar as relevant): In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Art 11 of the BoR provides (insofar as relevant): (1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (g) not to be compelled to testify against himself or to confess guilt.

CFA held that the three criteria to be taken into account for the purpose of determining whether there was a "criminal charge" in the context of arts 10 and 11 of the BoR were: (a) the classification of the offence under domestic law; (b) the nature of the offence; and (c) the nature and severity of the potential sanction.

The classification of the proceedings under domestic law was no more than a starting point, and factors (b) and (c) carried substantially greater weight than factor (a).

The CFA held that the proceedings involved the determination of a criminal charge by reason of the power to impose a penalty under s 23(1)(c) of SIDO. Applying the above three criteria here, the CFA held that the classification of the insider dealing proceedings according to domestic law was civil. It then considered the nature of the misconduct which was the subject of the proceedings, and the nature and severity of the penalty. The CFA considered that insider dealing amounted to very serious misconduct, and that it was a form of conduct which could be readily characterized as criminal conduct. The penalty imposed under s 23(1)(c) of SIDO was comparable to a fine, and its purpose was punitive and deterrent. The very serious and dishonest nature of the misconduct and the severity of the penalty were considerations which argued powerfully in favour of classifying both the proceedings and the misconduct as criminal.

On the other hand, the CFA noted that the proceedings had some characteristics which had been regarded as indications of the civil character of proceedings. These characteristics included the absence of a formal charge, the absence of a conviction constituting a criminal record and no provision for imprisonment. These characteristics, however, had to be viewed in the light of the important principle that guarantees of human rights and fundamental freedoms were matters of substance, not of form. To hold that the absence of a formal charge and the absence of a provision for the recording of a conviction in such circumstances took the proceedings outside the protection conferred by arts 10 and 11 of the BoR would reduce substantially the protection conferred by these articles and facilitated the triumph of form over substance. Further, the absence of a provision for imprisonment was to be seen in the light of the fact that failure to pay a penalty ordered under s 23(1)(c) of SIDO and registered under s 29 was punishable as a contempt of court with the result that non-payment of the penalty could result in a deprivation of liberty. The significance of the absence of a provision for imprisonment was also lessened by the circumstance that the power to impose a penalty was comparable to the power to impose a fine and its purpose was punitive and deterrent.

Whether there was a criminal charge by reason of the power to order disqualification

The CFA was of the view that a disqualification order in the context of SIDO was to be classified as protective. Insofar as the making of such an order had a deterrent effect, that effect was incidental and subservient to the purpose of protecting shareholders, investors and the public from corporate officers who were unfit to hold office. Accordingly, the power to order disqualification

under s 23(1)(a) of SIDO did not have the consequence that the insider dealer provisions involved the determination of a criminal charge within the meaning of arts 10 and 11 of the BoR.

Whether there was a breach of the right to protection against self-incrimination or the right to silence

The question here was whether the evidence obtained under s 33(4) of SFCO was admissible before the Tribunal and whether the Tribunal was right in compelling the respondents to give evidence under s 17 of SIDO. The first issue was whether the direct use of evidence by the Tribunal by virtue of s33(6) of SFCO was a breach of the right to a fair trial guaranteed by art 10 of the BoR.

Following Ribeiro PJ's judgment in *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133, the CFA held that the privilege against self-incrimination was an integral part of the right to a fair trial, which was closely linked to the presumption of innocence. Since the art 10 protection was based on respecting the will of an accused person to remain silent, this privilege extended to answers to questions compulsorily obtained before the commencement of criminal proceedings. Hence, the use of the questions and answers obtained compulsorily violated art 10 of the BoR, even though the answers were obtained before the issue of the Type "A" Salmon letters. These letters required the respondents to attend before the Tribunal and give evidence under s 17 of SIDO, and might be regarded as commencement of the insider dealing proceedings.

The protection given by art 10 of the BoR to the privilege against self-incrimination was nevertheless not absolute. The direct use of compulsorily obtained self-incriminating materials could be justified if it was not a disproportionate response to a serious social problem and "did not undermine the accused's right to a fair trial viewed in the round". In this regard, s 33 authorized the obtaining of compulsory answer to questions which went to the very core of a case of insider dealings. In this respect, it constituted, as held by the CA, "the complete abrogation of the right of silence". In the present case, the direct use prohibition was limited to criminal proceedings but with permission expressly given by the statute for the questions and answers to be used directly for all the purposes of the SIDO, including use in proceedings before the Tribunal. The CFA said that there was nothing to show that a direct use prohibition which excluded use in the Tribunal as well would not have been enough to achieve the legislature's rational and legitimate aim to eliminate insider dealing.

Accordingly the CFA held that s 33(4) & s 33(6) of SFCO violated art 10 of the BoR. As s 17 of the SIDO applied after the issue of the Type "A" Salmon letters, it violated both arts 10 and 11(2)(g) of the BoR.

Whether the Tribunal was obliged to apply the criminal standard of proof beyond reasonable doubt

Having regard to General Comment Nos 13 and 32 published by the United Nations Human Rights Committee, the CFA held that proof beyond reasonable doubt was the appropriate standard to be applied for the purposes of art 11 of the

BoR. This view was strongly fortified by the fact that in our criminal jurisprudence proof beyond reasonable doubt was the standard to be applied once proceedings had been classified as involving the determination of a criminal charge.

Whether the Tribunal applied the requisite standard of proof

The Tribunal applied the civil standard as applied to the gravity of the misconduct charged. As there was no means of knowing whether, in the minds of the members of the Tribunal, they equated the standard of "a high degree of probability" with proof beyond reasonable doubt, the CFA found that the Tribunal's findings were impaired by the use of inadmissible evidence and by the failure to apply the criminal standard of proof.

Appropriate remedy

The CFA held that it was appropriate and just to hold that the power under s 23(1)(c) of SIDO to impose a penalty was invalid on the ground that it had resulted in violations of arts 10 and 11 of the BoR. The declaration sought was novel because, if made, it would result in the striking down of a legislative provision which did not itself infringe the BoR. Section 6(1) of the BoR Ordinance provided for the remedies for contravention of the BoR. The CFA was of the view that s 6(1) should be interpreted in accordance with its wide language as conferring power to strike down a non-infringing provision where to do so best conformed with the legislative intention. The only express limitation imposed by s 6(1) which had relevance for this case was that the remedy, relief or order must be "in respect of such a violation". These words contemplated a relationship or connection between the remedy, relief or order and the violation. In this case, which was quite exceptional, there was such a relationship or connection: s 23(1)(c) conferring the power to impose a penalty was the reason for and the cause of the violations which had been identified.

Accepting that there was power to make the order sought, the remaining question was whether it was appropriate and just to do so. In this respect, the history of the matter demonstrated that the legislature would have preferred to sacrifice the power to impose a penalty and retain the other provisions in SIDO rather than lose the investigatory powers which had resulted in violations of the BoR. The remedy brought about a situation which was entirely consistent with what the legislative intention would be in the prevailing circumstances. The CFA thus restored the Tribunal's findings and orders other than the imposition of penalties under s 23(1)(c) of SIDO.

A Solicitor (24/07) v Law Society of Hong Kong
FACV No 24 of 2007 (March 2008)[1]
Court of Final Appeal

The appellant appeared before the Solicitors Disciplinary Tribunal ("the Tribunal") on eight complaints of professional misconduct. The Tribunal found all eight complaints proved. As to the standard of proof, the Tribunal said that it applied "the civil standard albeit with the higher degree of probability commensurate with the gravity of the allegations". The Tribunal ordered that the appellant be censured, fined, suspended from practice, and placed restrictions on how he might practise for the first two years of any resumed practice and made awards of costs against him. The appellant appealed to the CA, which set aside the findings on two complaints and affirmed, by a majority, the findings on the rest. Two members of the CA were of the view that the standard of proof in disciplinary proceedings was proof on a balance of probability, and the other member considered himself free to depart from previous CA authority and held that the standard of proof in disciplinary proceedings was proof beyond reasonable doubt. The appellant appealed to the CFA.

The appeal raised the question of the extent to which the CA might depart from its previous decisions. The question of the extent of its freedom to depart from its previous decisions was an important question relating to the operation of the doctrine of *stare decisis*[2] which was a part of the wider doctrine of precedent.[3] In granting leave to appeal, the CA formulated the specific question whether it was bound by its own decision(s) when that previous decision(s) was influenced or itself bound by a Privy Council decision(s), which had since been either overtaken and/or developed and/or departed from. The CFA was of the view that the rule of *stare decisis* in relation to the CA had to be considered in the context of the judicial system as a whole. Before discussing that rule, it was appropriate to address two aspects of the judicial system. First, the binding effect of decisions of the Judicial Committee of the Privy Council ("Privy Council") in Hong Kong both before and after 1 July 1997. Secondly, the position of the CFA, which replaced the Privy Council as Hong Kong's final appellate court on 1 July 1997, as regards departure from previous decisions.

Privy Council decisions on Hong Kong appeals

The CFA held that before 1 July 1997, when the Privy Council entertained an appeal from Hong Kong, it was functioning solely as the final appellate court in and as part of the Hong Kong judicial system. Its decisions on appeals from Hong Kong were therefore binding on the CA and the lower courts in

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1 Reported at [2008] 2 HKLRD 576.

2 Keep to what has been decided previously.

3 The doctrine of precedent involves a decision of a superior court being binding on a lower court. The doctrine of precedent also includes the doctrine of *stare decisis* which involves a superior court being bound by its own previous decision.

Hong Kong before 1 July 1997.

The BL enshrined the theme of continuity of the legal system. Under BL 8, the laws previously in force in Hong Kong should be maintained except for any that contravened the BL and subject to any amendment by the legislature. This was reinforced by BL 18(1).[4] By virtue of these articles, the body of jurisprudence represented by Privy Council decisions on appeal from Hong Kong continued to be binding in Hong Kong after the BL came into effect on 1 July 1997.

Privy Council and House of Lords decisions on non-Hong Kong appeals

The position of Privy Council decisions, which were not made on appeals from Hong Kong, was however entirely different. In principle, its decisions on non-Hong Kong appeals were not binding on the courts in Hong Kong under the doctrine of precedent prior to 1 July 1997. Before 1 July 1997, decisions of the House of Lords stood in a similar position to decisions of the Privy Council on non-Hong Kong appeals. Although they were only persuasive, their authority was very great unless the decision was in a field where local circumstances made it appropriate for Hong Kong to develop along different lines.

Overseas jurisprudence after 1 July 1997

The CFA was of the view that after 1 July 1997, in the new constitutional order, it was of the greatest importance that the courts in Hong Kong should continue to derive assistance form overseas jurisprudence. This included the decisions of final appellate courts in various common law jurisdictions as well as decisions of super-national courts, such as the European Court of Human Rights. This was underlined in the BL itself: under BL 84 Hong Kong courts might refer to precedents of other common law jurisdictions. While decisions of the Privy Council and the House of Lords should be treated with great respect given that Hong Kong's legal system originated from the British legal system historically, their persuasive effect would depend on all relevant circumstances, including in particular, the nature of the issue and the similarity of any relevant statutory or constitutional provision.

The CFA

As from 1 July 1997, with the CFA as Hong Kong's final appellate court, its decisions were binding on the CA and lower courts. As the final court at the apex of Hong Kong's judicial hierarchy, the CFA might depart from previous Privy Council decisions on appeal from Hong Kong and the CFA's own previous decisions. However, it would approach the exercise of its power to do so with great circumspection and exercise such power most sparingly.

Adoption of *Young v Bristol*

The CFA considered the rule in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 regarding the circumstances in which the CA might depart from

[4] BL 18(1) provides "The laws in force in the HKSAR shall be [the BL], the laws previously in force in Hong Kong as provided for in BL 8 of [the BL], and the laws enacted by the legislature of the Region."

its previous decisions in civil cases, ie the CA was bound to follow its own previous decisions subject to three exceptions.[5] The question in this appeal was whether this rule should continue to apply to Hong Kong in civil cases. The CFA recognized that there was a tension between the need for certainty, predictability and consistency and the need for adaptability, flexibility and justice. A proper balance had to be struck between these conflicting demands. The real question was the degree of flexibility which was suitable for the CA as an intermediate appellate court in Hong Kong, taking into consideration the extent of availability of an appeal to the CFA. Balancing the competing and conflicting demands referred to above, the CFA considered that the rule in *Young v Bristol Aeroplane Co Ltd* be replaced by the rule that the CA was bound by its previous decisions but it might depart from a previous decision where it was satisfied that the previous decision was plainly wrong.

The CFA further held that decisions of a two-judge CA had the same authority as a three-judge court, and that a five-judge CA did not have any greater power than a three-judge court. The CA's decision in *SJ v Wong Sau Fong* [1998] 2 HKLRD 254 that only a five-judge court had the power to depart from a three-judge court's decision was incorrect.

Plainly wrong

The CFA held that the plainly wrong test was only satisfied when the CA was convinced that the contentions against its previous decision were so compelling that it could be demonstrated to be plainly wrong. Previous decisions reached in ignorance of an inconsistent statutory provision or a binding authority satisfied the plainly wrong test. Further, decisions which satisfied the manifest slip or error yardstick, which the CA had applied in the past also satisfied the plainly wrong test. The reasoning of a decision might be so seriously flawed that it should be regarded as plainly wrong.

In examining whether a previous decision was plainly wrong, the CA was not confined to a consideration of the matters as they stood at the time the previous decision was made. It might take subsequent developments into account. These included subsequent legal developments, including the enactment of relevant constitutional or statutory provisions and the development in jurisprudence in Hong Kong or elsewhere.

A conclusion by the CA that its previous decision was plainly wrong did not finally resolve the question whether it should depart from it. The CA should take all circumstances into account before deciding whether to take that course. Such circumstances included the nature of the issue involved, the length of time for which the previous decision had stood, the extent of its application, whether the issue was likely to be before the CFA or the Legislature, whether the matter was best left to the CFA or the Legislature, and whether and the extent to which failure to depart from it would occasion injustice in

[5] The three exceptions were (1) it was entitled and bound to decide which of two conflicting decisions of its own it would follow; (2) it was bound to refuse to follow a decision of its own which, though not expressly overruled, could not, in its opinion, stand with a subsequent decision of the Privy Council on appeal from Hong Kong or of the CFA; (3) it was not bound to follow a decision of its own if it was satisfied that the decision was given *per incuriam* (through want of care).

the case in question and similar cases. The CA would undoubtedly approach the matter with great caution, having regard to the great importance of the doctrine of *stare decisis*. The CFA emphasized that the plainly wrong test set a high hurdle. The departure from a previous decision in accordance with this test should be wholly exceptional and should only occur very rarely.

Applying the plainly wrong test in the present case, the CFA held that the CA would not have been justified in departing from its previous decisions establishing the civil standard of proof for solicitors disciplinary proceedings. The CA was bound by its previous decision unless it concluded, after an examination of legal developments, including subsequent comparative jurisprudence, that its earlier decision should now be regarded as plainly wrong.

Standard of proof for disciplinary proceedings

The CFA held that the standard of proof for disciplinary proceedings in Hong Kong was the civil standard of a preponderance of probability under the *Re H*[6] approach. The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable it was regarded, the more compelling would be the evidence needed to prove it on a preponderance of probability.

The CFA held that there was on the Tribunal's part no error in regard to the standard of proof as would vitiate its findings against the appellant.

Appellate court's role when reviewing disciplinary tribunal's findings

The previous restrictive approach, namely that findings of a professional disciplinary committee should not be disturbed unless sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence was misread, could no longer be taken as definitive. This did not mean that respect would not be accorded to a professional tribunal's opinions on technical matters, but the appropriate degree of deference would depend on the circumstances.

[6] *Re H & Others (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563.