ANALYSIS

INTERLOCUTORY OR FINAL ORDERS: POURING NEW WINE INTO OLD WINESKINS

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Whether a court order under appeal is interlocutory or final can be of immense legal and practical significance. In particular, the Hong Kong Court of Final Appeal has recently held that any decision made by a two-member panel of the Court of Appeal on appeal from an order which transpires to be a final one is a nullity so that the Court of Final Appeal has no jurisdiction to hear any further appeal on merits. This article examines three recent decisions of the Court of Final Appeal and concludes that notwithstanding these judicial pronouncements of the highest authority in Hong Kong, the waters are probably now muddier rather than clearer. There is therefore a need to formulate plain and workable statutory rules to deal with the problem.

Introduction

Whether a court order under appeal is interlocutory or final may affect the time limit for appealing[1] and whether a party has an unfettered right to appeal.[2] More importantly, the distinction goes to the jurisdiction of a two-member panel of the Court of Appeal in hearing an appeal.[3] Hence, if in the course of hearing an appeal from a decision of a two-member Court of Appeal, the Court of Final Appeal discovers that as a matter of law the order or judgment being appealed is final instead of interlocutory, then the Court of Final Appeal does not have any jurisdiction to determine the merits of the appeal, but has to set the decision of the invalidly constituted Court of Appeal aside as a nullity and remit the matter back to a freshly constituted three-member Court of Appeal.

Despite the immense legal and practical importance of the distinction, the statutory provisions in Hong Kong provide no guidance at all as to what is a final or interlocutory order. In so far as judge-made guidance is concerned, before the handover the Hong Kong courts have followed faithfully the common law in England, which unfortunately was in a state of flux.

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1 *See* for example the Rules of the High Court (Cap 4A), O 59, r 4.

2 *See* for example Hong Kong Court of Final Appeal Ordinance (Cap 484), s 22(1).

3 *See* High Court Ordinance (Cap 4), s 34B; for a general discussion on the composition and jurisdiction of the 2-member Court of Appeal, *see* further Wilkinson, Booth & Cheung, *The Student Guide to Civil Procedure in Hong Kong* (Hong Kong: LexisNexis Butterworths, 2nd edn, 2005), pp 868–871.

In 1910, Buckley LJ commented in *Re Page, Hill v Fladgate*:[4]

> "The rules [on how to decide whether an order is interlocutory or final] are so expressed and the decisions are so conflicting that I confess I am unable to arrive at any conclusion satisfactory to my own mind as to whether this is an interlocutory or a final order. . . . I desire to say that in my opinion it is essential that the proper authority should lay down plain rules as to what are interlocutory orders, for as matters now stand it is the fact that it is impossible for the suitor in many cases to know whether an order is interlocutory or final."

The position in England was such that the issue never reached the House of Lords, because section 12 of the Supreme Court of Judicature Act 1875[5] provided: "Any doubt which may arise as to what decrees, orders, or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal." Unfortunately the English Court of Appeal from the start did not address the issue in a principled manner, but rather allowed itself to be dictated by pragmatism, thereby resulting in anomalous and sometimes conflicting Court of Appeal decisions on this issue. As a result, Lord Denning, MR lamented in *Salter Rex & Co Ltd v Ghosh*[6] that the answer to the question whether an order was "final" or "interlocutory" was so uncertain that ". . . the only thing for practitioners to do is to look up the Practice Books and see what has been decided on the point."

But looking up Practice Books did not always provide a safe solution. In his Lordship's subsequent judgment in *Technistudy Ltd v Kelland*,[7] Lord Denning MR disapproved what was then stated in the White Book[8] to the effect that an appeal from a judgment on admissions was a final appeal.

More than 70 years after Buckley LJ gave his sound advice in 1910, Sir John Donaldson MR unfortunately had to repeat essentially the same advice in *Steinway & Sons v Broadhurst-Clegg*[9] in 1983:

> "I confess that I have found this whole question of what is an interlocutory order and what is a final order fraught with difficulty. I am not alone in that, Lord Denning having expressed exactly the same view in *Salter Rex & Co v Ghosh*.[10] Section 60 of the Supreme Court Act[11] gives the

4 [1910] 1 Ch 489 at 493–494.
5 Repealed and substantially re-enacted by the Supreme Court of Judicature (Consolidation) Act 1925, s 68(2), and later by the Supreme Court Act 1981, s 60(2).
6 [1971] 2 QB 597, at 601.
7 [1976] 1 WLR 1042.
8 The Supreme Court Practice 1976, Vol 1, p 855, para 59/4/4.
9 *The Times*, 25 February 1983, CA.
10 Note 6 above.
11 Similar to s 14(4) of the High Court Ordinance.

> Rules Committee power to determine what orders shall be regarded as final or as interlocutory for the purposes of the Court of Appeal. For my part I think it would be a great service if the Rules Committee were able to give some guidance in accordance with the powers which they have under that section."

It was not until the enactment of the Access to Justice Act 1999 (Destination of Appeals) Order 2000 that the position in England was governed by express statutory rules.[12]

What about the latest position in Hong Kong? So far no statutory guidance has been given. However, the Court of Final Appeal has had a chance to deal with the distinction between interlocutory and final orders on three separate occasions. The writer examines below these decisions to see whether the judicial pronouncements of the highest authority in Hong Kong have provided a satisfactory answer to this issue.

The First Case: *B+B Construction*

The Facts and Issues

In *B+B Construction Ltd v Sun Alliance and London Insurance Plc*,[13] the plaintiff sought an indemnity against the defendant insurer for payments made to some injured employees in excess of HK$1 million. At issue was whether on a proper construction of the insurance policy taken out in the name of the plaintiff's sub-contractor, the defendant was liable to the plaintiff. The plaintiff applied for summary judgment against the defendant by invoking Order 14 and Order 14A of the Rules of the High Court.[14] The defendant took out a cross summons to strike out the plaintiff's claim under Order 18 rule 19 and further or alternatively, for a determination of the questions of law under Order 14A. All summonses were heard together and the parties agreed that the decision of the court would be dispositive of the action. Yam J gave judgment for the plaintiff, but the Court of Appeal allowed the appeal and made a declaration that the defendant was not liable to the applicant under the insurance policy.

Upon the refusal by the Court of Appeal to grant leave to appeal to the Court of Final Appeal, the plaintiff sought leave from the Appeal Committee of the Court of Final Appeal. The plaintiff argued that leave should be granted to it as of right under section 22(1)(a) of the Hong Kong Court of Final

[12] *See Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311, CA, for a summary of the operation of the new rules and *see* further *Scribes West Ltd v Relsa Anstalt and Another* [2004] 4 All ER 653, CA.
[13] (2000) 3 HKCFAR 503.
[14] Cap 4A.

Appeal Ordinance.[15] As the total amount sought to be recovered under the indemnity claim exceeded HK$1 million, the real issue was whether the judgment of the Court of Appeal was final or interlocutory.

The Judgment and Analysis

The Appeal Committee ruled in favour of the plaintiff on this issue. Delivering the judgment for the Appeal Committee, Chan PJ formulated the test and principles as follows:

> "For the purpose of obtaining leave under section 22(1)(a), we have adopted, as the Privy Council had under the old regime adopted, the application test in deciding whether an order of the Court of Appeal is a final or interlocutory order. This involves an examination of the nature of the application to see whether the order made upon such application would, whether it fails or succeeds, determine the whole action. In considering the nature of the application, it is necessary to look not only at its form, eg under which order or rule of court it is made, but also the purpose and substance of the application and the issues to be determined by the court."[16]

His Lordship then analysed the criteria for invoking Order 14A and held that:

> "If however the court does proceed to hear the application on the basis that its determination will have the effect of finally disposing of the cause or matter before it, an order made pursuant to such an application should be regarded as a final order for the purpose of section 22(1)(a)."[17]

While acknowledging that "an order made pursuant to an application for summary judgment under Order 14 or for the striking-out of an action for disclosing no reasonable cause of action under Order 18 rule 19 has always been regarded as interlocutory", Chan PJ did not see any problem arising from the fact that the parties also invoked Order 14 and Order 18 rule 19 in their applications, nor the fact that both Yam J and the Court of Appeal did not make any express reference to their decisions being made under Order 14A. His Lordship was satisfied from the facts of the case that both Yam J and the Court of Appeal in substance considered and determined the matter under Order 14A and that their decisions on the parties' applications would be determinative of the whole action whichever way they went.

[15] Cap 484.
[16] *B+B Construction* (n 13 above), p 506H.
[17] *Ibid.*, p 508B.

The decision of the Appeal Committee in *B+B Construction* seems impeccable on grounds of fairness and commonsense. Its adoption of the "application test" is also in line with the prevailing decisions of the Court of Appeal both in Hong Kong and in England.[18] What is questionable is its assertion that the Privy Council had under the old regime adopted the "application test" for deciding whether an order was interlocutory or final. Indeed, a quick survey of some relevant Privy Council decisions below show that the Judicial Committee did not see fit to lay down any formulation of universal application for distinguishing between interlocutory and final order. Some of the judicial pronouncements or observations by the Privy Council are as consistent with the "application approach" as with the "order approach".

In short, the "application approach" was used in *Standard Discount Co v Le Grange*[19] and adopted by Lord Esher MR in *Salaman v Warner*[20] where the yardstick is the nature and effect of the application instead of the eventual order made on the application. The order is final if the application is of such a character that whatever order is to be made thereon it would have finally disposed of the action. On the other hand, the "order approach" was adopted by Lord Alverstone CJ in *Bozson v Altrincham Urban District Council*[21] where the yardstick is whether the judgment or order, as made, finally disposed of the rights of the parties.

A Survey of the Privy Council Approach

In *Tampion v Anderson*,[22] the Privy Council held that an order made in the Supreme Court of Victoria staying an action on the ground that it was frivolous, vexatious and an abuse of the process of the court was an interlocutory order, so that an appeal did not lie as of right. Speaking for the Board, Lord Kilbrandon acknowledged that:

> ". . . the authorities are not in an altogether satisfactory state. There is a continuing controversy whether the broad test of finality in a judgment depends on the effect of the order made [ie the order approach] . . . or on the application being of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute [ie the application approach]."[23]

[18] *First Pacific Bank Ltd v Robert HP Fung* [1990] 1 HKLR 527; *Salter Rex & Co Ltd v Ghosh* (n 6 above); *White v Brunton* [1984] 1 QB 570.
[19] [1877] 3 Common Pleas Division 67, CA.
[20] [1891] 1 QB 734.
[21] [1903] 1 KB 547 at 548.
[22] (1973) 48 ALJR 11.
[23] *Ibid.*, p 12.

However, instead of choosing any preference for one approach over the other, Lord Kilbrandon continued:

> "But the difficulty seems to arise out of attempts to frame a definition of 'final' (or of 'interlocutory') which will enable a judgment to be recognised for what it is by appealing to some formula universally applicable in any contingency in which the classification falls to be made."[24]

At the end, Lord Kilbrandon disposed of the issue by resorting not to any formulation of principles or approach, but to past practices and authorities which consistently held that an order staying an action on the ground that it is frivolous, vexatious, and an abuse of process was an interlocutory order.

In *Becker v Marion City Corporation*,[25] the plaintiff lodged a proposal plan for the subdivision of her land, but the council refused to examine it on the ground that it was precluded from accepting the plan by reason of the plan's non-compliance with the statutory conditions. By originating summons the plaintiff sought, first, a declaration that she was entitled to require the council to examine the plan and make a decision, and two further declarations regarding her right to submit an outer boundary tracing and a final plan. The Full Court of the Supreme Court of South Australia refused the first declaration and treated the other claims for declarations as being rendered inappropriate. In seeking special leave to appeal to the Privy Council, the first issue that required a decision was whether the decision of the Full Court was final or interlocutory.

Speaking for the Board, Lord Edmund-Davies acknowledged that a favourable answer to the plaintiff on the declarations sought:

> "would not have established her right to have the necessary approvals to the subdivision of her land which she seeks. It would have merely established that she had the right to have her original plan, A2, considered by [the council] for possible approval . . ."[26]

On the other hand:

> "to answer the question in the negative (as the Full Court did) rendered it impossible for the plaintiff to proceed further. Unless she can get the planning machinery moving again she has forever lost any chance she ever had of being granted permission to subdivide and dispose of her land as she is minded to do."[27]

[24] *Ibid.*, p 12.
[25] [1977] AC 271.
[26] *Ibid.*, at 281F, citing the judgment of Hogarth J in the Full Court in (1974) 9 SASR 560, 562.
[27] *Ibid.*, at 281G.

At the end, the Privy Council held that the Full Court's decision was a final judgment. However, it was unclear from the speech of Lord Edmund-Davies whether the Privy Council preferred the "application approach" or the "order approach". On the one hand, his Lordship quoted with approval the views expressed by the Full Court judges, who sought to apply the "application approach" by defining the *lis* as being the rights claimed in the originating summons (ie whether the plaintiff was entitled to have her plan considered by the council) and came to the conclusion that whichever way the Full Court's decision went such rights would have been finally determined. The express acceptance of the Full Court judges' views seems to support an interpretation of an endorsement by Lord Edmund-Davies of the "application approach".

On the other hand, Lord Edmund-Davies added that in coming to the conclusion in favour of a final judgment, his Lordship "[bore] in mind that the refusal of the first declaration sought made it impossible for the second and third questions raised in the originating summons to be considered".[28] The focus seems to be on the effect of the order made by the Full Court, which finally disposed of the plaintiff's action, rather than on the nature of the application. It is also unclear whether his Lordship would still have treated the judgment as being final if the Full Court had granted the first declaration.

Indeed, if the "application test" were actually adopted, the English Courts would probably have come to a conclusion that the Full Court's decision was an interlocutory one. For example, in *R (Curry) v National Insurance Commissioner*,[29] the English Court of Appeal held that by applying the "application test", an order of certiorari granted by the Queen's Bench Division to quash the decision of the National Insurance Commissionerm, was an interlocutory order.

The clearest case which shows that the Privy Council has not opted for the "application approach" as the generally applicable approach is *Haron bin Mohammed Zaid v Central Securities (Holding) Bhd*,[30] a decision on appeal from the Federal Court of Malaysia. The Privy Council recognised that the Malaysian courts, after a careful review of the leading English Court of Appeal decisions, had consistently chosen to adopt the "order approach" instead of the "application approach". Speaking for the Board, Sir William Douglas commented: "Their Lordships are unable to find any error in this reasoning: on the contrary their Lordships feel entitled to say that the test is both sound and convenient."[31] Accordingly, the Privy Council affirmed the Federal Court of Malaysia's decision that an order giving leave to a plaintiff to sign final

28 *Ibid.*, at 283A.
29 [1974] NI 102.
30 [1983] 1 AC 16.
31 *Ibid.*, at 27H.

judgment against a defendant in summary proceedings was a final judgment, notwithstanding the contrary decisions of the English Court of Appeal under the "application approach".

Hence, it can be seen that contrary to the suggestion of Chan PJ in *B+B Construction*,[32] the various decisions of the Privy Council do not support the proposition that the Judicial Committee has adopted or preferred the "application test". On the contrary, the panel consisting of Lord Wilberforce, Lord Simon of Glaisdale, Lord Keith of Kinkel, Lord Bridge of Harwich and Sir William Douglas in *Haron bin Mohammed Zaid*[33] considered the "order approach" as being "both sound and convenient."[34] Indeed, apart from the Malaysian courts, the High Court of Australia[35] and the Canadian courts[36] have also opted for the "order approach".

The Second Case: *Shell*

The Facts and Issues

In *Shell Hong Kong Ltd v Yeung Wai Man Kiu Yip Co Ltd and Another*,[37] the plaintiff appellant brought proceedings against the first defendant for sums allegedly outstanding under a franchise agreement and against the second defendant as guarantor. The second defendant's defence was that the guarantee was executed for the purpose of a previous operator agreement between the parties and lapsed on the signing of the franchise agreement, which replaced the operator agreement. The second defendant sought a determination pursuant to Order 14A on his liability under the personal guarantee. The Deputy Judge granted the application and eventually held that the second defendant was still bound by the personal guarantee. The second defendant's appeal was treated as an interlocutory appeal and so was heard by a two-member Court of Appeal, which allowed the appeal. At that time, neither party was aware of the possibility of the Deputy Judge's order being final instead of interlocutory. At the subsequent hearing on costs, counsel for the

32 Note 13 above.
33 Note 30 above.
34 *Ibid.*, at 27H.
35 See for example *Licul v Corney* (1976) 180 CLR 213 and *Carr v Finance Corporation of Australia Ltd* (1981) 147 CLR 246. In the latter case, Gibbs CJ said at p 248: "The test now applied in this Court for determining whether a judgment is final or not is whether the judgment or order appealed from, as made, finally determines the rights of the parties: *Licul v Corney* . . . In my opinion the test in *Licul v Corney* requires the Court to have regard to the legal rather than the practical effect of the judgment."
36 See for example *Re BC Power Comm and Nanaimo-Duncan Utilities Ltd* [1948] 2 DLR 111; *Brouwer v Inkameep Vineyards Ltd* (1987) 17 BCLR (2d) 253; *BCGEU v Royal Canadian Legion* (1989), 36 BCLR 308, and *Hockin v Bank of British Columbia* (1989), 37 BCLR (2d) 139.
37 (2003) 6 HKCFAR 222.

plaintiff started to query the jurisdiction of the two-member Court of Appeal to hear the appeal, on the basis that the Deputy Judge's judgment was a final one. The plaintiff subsequently applied for and was granted leave to appeal to the Court of Final Appeal on the sole ground of lack of jurisdiction.

The Judgment and Analysis

The Court of Final Appeal eventually held that the Deputy Judge's determination under Order 14A was a final judgment, so that the two-member Court of Appeal did not have any jurisdiction to hear the appeal. It therefore set aside the Court of Appeal's judgment as a nullity and remitted the case to a properly constituted Court of Appeal consisting of three Justices of Appeal. Chan PJ, who delivered the leading judgment of the Court of Final Appeal, reiterated that the court had preferred the "application approach" to the "order approach".[38] However, unlike the *B+B Construction*[39] case where the issue to be determined was intended by both parties as dispositive of the whole action, any determination by the Deputy Judge under Order 14A that the second defendant remained bound by the personal guarantee did not finally determine the whole action. In that event, the plaintiff would still be required to prove the sums owed by the first defendant in order to establish the second defendant's liability.

Chan PJ, however, stated that, "on the application approach, a judgment, in some circumstances, may be final even if it does not finally determine the whole action".[40] By following *White v Brunton*[41] and the subsequent English and Hong Kong Court of Appeal decisions,[42] Chan PJ stated:

> "where an order or judgment given in an application does not finally dispose of the whole action but only an issue in the action, it is necessary to consider the purpose and substance of the application, the issue dealt with and determined by the court and the effect of a determination of this issue on the rights of the parties, the further conduct of the proceeding and the final disposal of the whole action. A broad commonsense approach should be adopted. If the issue dealt with and determined by the court is 'a substantive part of the final trial' . . . or 'a crucial issue' in the case or a point 'that goes to the root of the case' . . . or 'a dominant feature of the case' . . . then the order or judgment, even if it does not finally dispose of the whole action, should nevertheless be regarded as a final judgment."[43]

[38] *Ibid.*, paras 26 and 27.
[39] Note 13 above.
[40] *Shell* (n 37 above), para 31.
[41] Note 18 above.
[42] *Holmes v Bangladesh Biman* [1988] 2 Lloyd's LR 120; and *First Pacific Bank Ltd v Robert HP Fung* (n 18 above).
[43] *Shell* (n 37 above), para 31.

It is worth noting that none of the earlier English or Hong Kong cases was dealing with the distinction between a final or interlocutory judgment for the purpose of determining the jurisdiction of a two-member Court of Appeal. The *Shell* case is the first case in history in which a decision of a two-member Court of Appeal was declared a nullity because the higher court found that the original judgment being appealed was a final instead of an interlocutory one.

The Third Case: Hip Hing Timber

The Facts and Issues

The most recent decision of the Court of Final Appeal on this issue is *Hip Hing Timber Co Ltd v Tang Man Kit and Another*.[44] The facts of the case are not particularly complicated, but the history of the proceedings is rather convoluted and peculiar. The case concerns an action for the recovery of land occupied by the defendant following the expiry of a notice to quit. The land is beneficially owned by Wah Yan Mo Fan Heung ("the Heung"), an unincorporated body. The Writ first issued in November 1990 was in the name of the Heung with two named persons as managers. The defendant's pleaded case was that the Heung was the beneficial owner of the land, but that the defendant was entitled to remain in possession by virtue of oral agreements made with another person acting as manager of the Heung.

In March 1998, when the trial was due to take place within a few months, the defendant applied by summons to strike out the Writ on the ground that the plaintiff named in the Writ (ie the Heung) was an unincorporated body with no separate legal existence. The plaintiff responded by obtaining leave to amend the Writ by changing the name of the plaintiff to a named person "suing as sole manager" of the Heung and adding an allegation in the pleadings that the Heung was and is a t'ong within the meaning of section 15 of the New Territories Ordinance.[45] The defendant then took out a further summons for the trial of preliminary issues on the validity of the various appointments of the managers of the Heung and on whether the Heung was a t'ong. The summons was heard by Yuen J, who accepted that the authority of the named plaintiff to sue on behalf of the Heung should be a matter for final determination before the trial, but ruled that want of authority to sue could not be raised by way of defence and so the question could not be a subject matter of a preliminary issue.

[44] [2005] 1 HKLRD 572.
[45] Cap 97.

As a result, the defendant promptly applied by a Notice of Motion for an order to set aside the Writ as having been issued without authority. In the meantime the title to the Writ was further amended by adding another named person as a manager of the Heung, so that there were two managers named as the plaintiffs. After a hearing in which factual and expert oral evidence was taken, Yuen J found that the plaintiffs had no authority to sue and dismissed the action. Yuen J took the view that (i) that the Heung was not a t'ong, so that it had no cause of action and could not authorise the bringing of proceedings on its own behalf; and (ii) that the individual plaintiffs could not maintain the action in their own right because they had not brought it in that capacity.

The plaintiffs' appeal came before a two-member Court of Appeal (Rogers VP and Le Pichon JA). At the outset of the hearing there was a brief discussion between leading counsel for the plaintiffs and Rogers VP as to whether the court was properly constituted to hear the appeal. The court did not invite substantive argument and made no formal ruling, but merely indicated that it was satisfied that the order was interlocutory and both parties were content to proceed on this basis. At the end the Court of Appeal allowed the appeal and the defendant obtained leave to appeal to the Court of Final Appeal.

In April 2004, the Court of Final Appeal by correspondence to the parties expressed its concern that Yuen J's order might have been a final order so that the Court of Appeal's judgment was a nullity and that the Court of Final Appeal would have no jurisdiction to hear the appeal on merits. The parties initially responded by a written confirmation that they would not challenge the jurisdiction of the Court of Appeal. But such a confirmation failed to alleviate the Court of Final Appeal's concern, for the obvious reason that the parties could not confer on the court by consent a jurisdiction which it did not possess. When the appeal came on for hearing on 25 May 2004, the Court of Final Appeal reiterated its concern over the jurisdictional issue and suggested to the parties a practical way out. Under section 34B(4)(c) of the High Court Ordinance, a two-member panel will have jurisdiction to hear an appeal from a final judgment if the parties have filed a written consent before (but not after) the hearing. Hence, the Court of Final Appeal adjourned the case for two weeks to enable the parties to file such written consent before returning to a similarly constituted Court of Appeal and inviting it without hearing further argument to redeliver its previous judgment and again grant leave to appeal. This would enable the Court of Final Appeal to hear both appeals without having to decide which of them was from an order of a properly constituted Court of Appeal.

However, the two-member Court of Appeal refused to take this suggested course. At the end, the parties were back to square one before the Court of Final Appeal after the two-week adjournment, which eventually ruled that

Yuen J's order was a final one and therefore set aside the Court of Appeal's judgment as a nullity, without hearing the appeal on merits.

The Judgment and Analysis

Giving the leading judgment for the Court of Final Appeal, Lord Millet NPJ emphasised that "Yuen J plainly considered that she was making a final order", as "she thought that [the striking out application for want of authority to sue] could not be raised as a defence in the action or at the trial but must be made the subject of a final determination in a separate application brought for the purpose."[46] Had the Court of Final Appeal confined the justification for its decision that Yuen J's order was a final one on the basis of these special facts, little problem would have arisen. However, a careful reading of Lord Millet NPJ's speech shows that the Court of Final Appeal might have unwittingly adopted an approach which represents a radical departure from the approach hitherto adopted in the English and Hong Kong cases which it purports to follow.

Lord Millet NPJ first held that Yuen J was wrong to say that the defendant's challenge for want of authority to sue could not be raised in the Defence. In his Lordship's views, as the plaintiffs were named natural persons instead of the Heung, they could surely bring proceedings in their own names. Hence the real issue was not whether the plaintiffs had authority to bring the proceedings in their own names, but whether they were the persons in whom the cause of action was vested. This question regarding the existence of the plaintiffs' cause of action should therefore have been raised in the Defence and could have been made the subject of a preliminary issue.

Given Yuen J's erroneous views, the actual application before her Ladyship was not one for final determination of a preliminary issue, but an application to strike out the plaintiffs' claim by a Notice of Motion. As a result, Lord Millet NPJ had to address the contention that any order made upon an application to strike out a plaintiff's claim has long been treated in England as an interlocutory order. However, instead of treating the current application to strike out before Yuen J as an exceptional case in the light of the peculiar history of the proceedings, Lord Millet NPJ sought to rationalise the earlier cases[47] on the basis that the decisions to treat those striking out applications as interlocutory "must be on the footing that the issue is concerned with the sufficiency of the pleadings so that the defect may be curable by amendment."[48]

This rationalisation involves a novel and, it is submitted, erroneous interpretation of the earlier cases. First, in none of those earlier cases was the

[46] *Hip Hing Timber* (n 44 above), para 39.
[47] *Re Page* (n 4 above); *Hunt v Allied Bakeries Ltd (No 1)* [1956] 1 WLR 1326 and the cases cited therein.
[48] *Hip Hing Timber* (n 44 above), para 44.

curability of defect by amendment of pleadings treated as the reason for deciding that the order involved was interlocutory. Instead, the traditional "application approach" was generally cited as the reason, namely, the whole action would only be finally determined if the court allowed the striking-out application, but the action would have to proceed if the application was rejected. Second, the cases cited did not all involve striking out a claim for disclosing no reasonable cause of action. In *Re Page*,[49] the statement of claim was struck out and the action dismissed, not in terms because it disclosed no reasonable cause of action, but because it was frivolous and vexatious. Indeed, the plaintiff in *Hunt v Allied Bakeries Ltd (No 1)*[50] raised the point whether a distinction should be drawn between these two kinds of case. In rejecting the distinction, Lord Evershed MR said:

> "After consulting with the Chief Registrar and looking at the cases, and also after consultation with my colleagues, I am left in no doubt at all that, rightly or wrongly, orders dismissing actions – Either because they are frivolous and vexatious, or on the ground of disclosure of no reasonable cause of action – have for a very long time been treated as interlocutory."[51]

Lord Evershed MR further referred to other earlier cases of striking out on ground of failure to provide security for costs[52] and of dismissal for want of prosecution,[53] where the orders made were held to be interlocutory.

Of greater concern is the implication from Lord Millet NPJ's rationalisation statement that if the striking out application is on a basis which could not be cured by an amendment to the pleadings, then the order might well be a final instead of an interlocutory one. Such an implication being intended seems to be borne out by his Lordship's subsequent analysis on whether another part of Yuen J's decision was interlocutory. The plaintiffs had raised an alternative basis for maintaining the action, namely, even if the Heung was not a t'ong, the plaintiffs could sue to recover the land as successors of the persons who had granted the tenancy under which the defendant claimed to remain in possession. Yuen J rejected this by saying that the plaintiffs were not suing in their own right but as managers of the Heung. Lord Millet NPJ opined that this part of Yuen J's decision "may have been interlocutory, for it was based on the state of the pleadings and could be cured if necessary by amendment."[54] His Lordship further added that had Yuen J decided that the plaintiffs would

[49] Note 4 above.
[50] Note 47 above.
[51] *Ibid.*, at 1328.
[52] *Stewart v Royds* (1904) 118 LT Jo 176
[53] *Arnot v Amber Chemical Ltd*, *The Times*, 20 May 1953, CA.
[54] *Hip Hing Timber* (n 44 above), para 47.

still have no cause of action even if the pleadings were further amended to allow the point to be taken, then her decision would have been final.

Lord Millet NPJ's analysis seems to represent a radical departure from the "application approach". First, the basic distinction between the "application approach" and the "order approach" is that the former focuses on the nature and effect of the application instead of the actual order or decision made. However, by saying that one part of Yuen J's decision was final while another part of the decision on the same application might be final or interlocutory depending on what Yuen J had actually decided, Lord Millet NPJ seems to have adopted the "order approach" instead.

Second, his Lordship has apparently converted an exception to the "application approach" developed by Sir John Donaldson MR in *White v Brunton*[55] (which exception should be confined to cases where the court has exercised its discretion to order the trial of some preliminary issues) into a test of general application for deciding whether an order is final or interlocutory. To understand this distinction, perhaps some reference to the history and underlying rationale of the development of the "application approach" in England is useful.

History and Underlying Rationale of the Application Approach

To begin with, one should note that the relevant statutory provisions have all along referred to interlocutory or final "order" or "judgment", instead of "application" or "proceedings". Hence, as a matter of pure linguistic construction, it seems that one should adopt the "order approach", namely, to look at the nature and effect of the order or judgment to decide whether it is final, and to treat it as final if it would put an end to a party's right in the action. However, at the time when those earlier English cases were decided, there was a huge difference in the applicable appeal period: 21 days for an appeal from an interlocutory order and one year for an appeal from a final order.[56] Hence it is understandable that the court did not wish to treat an order striking out a frivolous or unmeritorious claim or an order granting summary judgment for want of a meritorious defence being a final order. A lengthy appeal period clearly did not fit in well with the summary process. Accordingly, the "application approach" was adopted by Lord Esher MR in *Salaman v Warner*[57] to rationalise or justify the decision to treat those orders as being interlocutory. As explained by Lord Esher MR:

[55] Note 18 above.

[56] See Rules of the Supreme Court 1877, Order LVIII, Rule 15: "No appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year."

[57] Note 20 above.

> "As an example of the difficulties produced by the opposite view [ie the 'order approach'], take the case where an order is made staying or dismissing an action as frivolous and vexatious; if that is a final order, the period during which an appeal may be brought is a year. In this case the Divisional Court allowed what is really equivalent to a demurrer to the statement of claim, and, as long as that decision stands, it is no doubt final in one sense; but, if they had disallowed the point taken, then the action must have gone to trial. If in such a case the order were final, there would be a year to appeal in, and the case might have to go on after that lapse of time, when there might be increased difficulty in dealing with the matter in dispute from the death or disappearance of parties or witnesses."[58]

In *Re Page*,[59] Buckley LJ explained his dilemma when deciding whether to concur with the decisions of the other two members of the Court of Appeal that the order striking out the plaintiff's frivolous and vexatious claim was an interlocutory order:

> "This, however, is an order in favour of the defendants and it brings this action altogether to an end. To my mind it would be reasonable to say that that is a final order. But I do not think I am entitled to found myself on that, because there have been many decisions in which orders apparently final have been treated as interlocutory. . . . I am not prepared to differ from the view taken by the other members of the Court. I yield my judgment to theirs without saying that I am completely satisfied with the reasons given for the view that this is an interlocutory order. A decision to that effect is certainly the more desirable, because if the order is reversed the action will have to go on and if it is to go on it ought to go on at once."[60]

Hence, one can readily understand why Lord Denning M.R. commented in *Salter Rex & Co v Ghosh*[61] that the "order approach" was right in logic while the "application approach" was right in experience and had always been applied in practice.

By the time of *White v Brunton*,[62] the difference in the applicable appeal period between interlocutory and final order was no longer significant. What the court in that case needed to address was whether the plaintiff should have an unfettered right of appeal from an order made at the trial of a preliminary issue that the defendant was not liable to him upon the proper construction

58 *Ibid.*, at 735–736.
59 Note 4 above.
60 *Ibid.*, at 494.
61 Note 6 above.
62 Note 18 above.

of the contract. It appears that if one were to apply the "order approach", the order in question would be final, as it would finally determine the plaintiff's right to claim against the defendant. However, if one were to apply the "application approach", the order would be interlocutory, as the action would still need to go on for determining the extent of the defendant's liability in case the court ruled against the defendant on the preliminary issue.

Sir John Donaldson MR recognised that by that time the English court had clearly committed to the "application approach" as a general rule. However, the preliminary issue in question would have formed the main part of the trial hearing had there been no order for the trial of a preliminary issue. If the court were to apply the "application approach" and treat the order being interlocutory, then the parties would be deprived of an unfettered right of appeal. This might indirectly fetter the court's discretion to order split trials of preliminary issues in appropriate cases, as the court might be reluctant to exercise a discretion to deprive a party's unfettered right of appeal. In the circumstances, Sir John Donaldson MR found a way out by creating an exception to the general rule of the "application approach" in cases of a split trial of a preliminary issue.

It is submitted that this exception should only be confined to cases where the court has to exercise a discretion to order an early hearing of an issue in the interests of the more efficient administration of justice, for example, an early trial of an issue under Order 14A and Order 33. If the court is duty-bound to try a particular issue upon the application by a party (eg in a striking-out application or in a summary judgment application), then the rationale for the exception (namely, the indirect fetter upon the court's ability to order slit trials in appropriate cases) is simply not there. Unfortunately, the Court of Final Appeal in *Hip Hing Timber*[63] seems to have treated this exception as a general part of the "application approach" applicable to all situations, with the yardstick being whether the application, whichever way it goes, "is finally determinative of a crucial or substantial issue in the cause of matter".[64] By so doing, it cast into doubt the correctness of many earlier cases which treated orders made on striking out applications, summary judgment applications as well as applications to set aside default judgment as being interlocutory orders. In many of those cases, crucial issues such as the plaintiff's right to bring the action would have to be determined. As Lord Millet NPJ stated: "It is difficult to conceive of an issue which is more crucial to the success or failure of an action than the right of the plaintiffs to bring it."[65]

As a matter of principle, there may be nothing objectionable for the court to adopt a "broad commonsense approach" to decide whether an order is final

[63] Note 44 above.
[64] *Ibid.*, para 38.
[65] *Ibid.*, para 43.

or interlocutory by considering whether an issue to be determined in an application is a crucial one in the light of "the purpose and substance of the application, the issue dealt with and determined by the court and the effect of a determination of this issue on the rights of the parties, the further conduct of the proceeding and the final disposal of the whole action."[66] However, this so-called "broad commonsense approach" is simply not workable in practice. In deciding whether a particular appeal should be listed before a two-member Court of Appeal, the listing clerk is in no way qualified or equipped to apply this "broad commonsense approach". Even the Justices of Appeal may find it difficult, if not impossible, to decide whether an issue is a crucial one by just looking at the Notices of Appeal, without reading the entire appeal bundle or without the assistance of the parties.

As Roger VP remarked:[67]

> "The importance of the matter to the proper functioning of this court can be seen in its practical application. Given the volume of cases which come before this court, there were 404 civil appeals in the 2003 (in comparison to 198 civil appeals in 1990 when this case was first launched) in addition to the 555 criminal appeals the court must make best use of the eight appellate judges (in comparison to nine appellate judges in 1990). Indeed, this is emphasised by the fact that of the 404 appeals heard in 2003, 221 were interlocutory appeals. It is thus in the interests of the efficient operation of this court that it applies the application test in a straightforward and easily comprehensible manner."

Damage Control by the Court of Appeal

Given the uncertainty created in particular by the Court of Final Appeal's decision in *Hip Hing Timber*[68] as to what constitutes a final order, something needs to be done to prevent the dire consequence of having a decision on appeal being declared a nullity, with all the resulting wastage of legal costs and time. Otherwise, in case of any doubt, a party to the litigation may insist on the appeal being listed before a three-member panel. At the end, there will be wastage of judicial resources, as many interlocutory appeals which should otherwise be heard by a two-member panel may need to be heard by three Justices of Appeal, just to play safe.

66 *Shell* (n 37 above), para 31.
67 Court of Appeal's judgment in *Hip Hing Timber Co Ltd v Tang Man Kit and Another* CACV 137/2002, 5 June 2004, para 18.
68 Note 44 above.

In *True Rank Holdings Ltd and Another v Lam Ka Chung, William and Others*,[69] the two-member Court of Appeal came up with a damage control measure. It sought to avoid the jurisdictional problem being raised in future by volunteering an express statement in its decision:

> "To avoid any doubt about the matter and to save any waste of time and costs which might result from the matter being raised in the future, despite the fact that there was no question raised in argument, it is specifically stated that this court has considered whether the appeal was against an interlocutory order and is of the view and so decides that it was against an interlocutory order. The matters in question are not determinative of the action, nor are they determinative of a crucial issue in the action."[70]

Rogers VP further explained that the provisions of section 14(5) of the High Court Ordinance[71] "appear to have been overlooked"[72] in the Court of Final Appeal's decisions. His Lordship apparently took the view that once it volunteered an express decision that the appeal was from an interlocutory order, section 14(5) would apply so that no challenge could be made on the jurisdictional ground.

With respect, it is submitted that section 14(5) may not have the desired effect of preventing the jurisdictional issue from being raised before the Court of Final Appeal. First, it begs the question whether an invalidly constituted two-member Court of Appeal can make a valid "decision of the Court of Appeal" under section 14(5). Second, even if it does, section 14(5) only prevents an appeal being brought against such an ancillary decision. Section 14(5) may not however prevent the Court of Final Appeal from enquiring into the question whether the main decision of the two-member Court of Appeal under appeal is or is not a nullity and as to whether the Court of Final Appeal has the jurisdiction to determine the appeal on merits. In particular, as highlighted by Lord Millet NPJ in *Hip Hing Timber*,[73] since the issue goes to the Court of Final Appeal's own jurisdiction, "we are bound to enquire into it whether the parties raise it or not."[74]

Hence it is submitted that the best way forward is to introduce legislative amendments to satisfactorily resolve the issue regarding the composition and jurisdiction of the Court of Appeal. Apart from providing clear and workable statutory guidance to determine when an order or judgment is final or

69 CACV 38 of 2004, 30 Oct 2004 (Rogers VP and Le Pichon JA); followed in *Kong Wai Tsang v Hospital Authority* CACV 76/2004, 5 Nov 2004 (Rogers VP and Le Pichon JA).
70 *Ibid.*, para 14.
71 Section 14(5) reads: "No appeal shall lie from a decision of the Court of Appeal as to whether a judgment or order is, for any purpose connected with an appeal to that court, final or interlocutory"
72 True Rank Holdings (n 69 above), para 16.
73 Note 44 above.
74 *Ibid.*, para 35.

interlocutory, it is suggested an express provision be inserted to the effect that any non-compliance with the composition requirement of the Court of Appeal shall not affect the validity of any judgment delivered. Pending the legislative changes, in case of doubt as to whether an order or judgment under appeal to the Court of Appeal is a final or interlocutory one, the parties should either insist that the appeal be heard by a three-member panel or file a written consent pursuant to section 34B(4)(c) of the High Court Ordinance before the hearing to allow the appeal be heard by a two-member panel.

Concluding Remarks

It is submitted that the judicial pronouncements so far made by the highest authority in Hong Kong on the issue of interlocutory and final order unfortunately make the already muddied waters muddier rather than clearer. The fundamental problem of the approach adopted by the Court of Final Appeal is that it seeks to develop some principled approach while at the same time holding onto the "application approach" which was developed out of pragmatism. The truth remains, however, that in the realms of pragmatism there are anomalies irreconcilable with principles. As Lord Denning M.R. remarked in *Technistudy Ltd v Kelland*:[75]

> "As we have said before in this court [in *Salter Rex & Co v Ghosh*[76]], it is impossible to lay down any principles about what is final or what is interlocutory. The only thing to do is to go to the practice books and see what has been done in the past."

As Jesus said: "Neither do men pour new wine into old wineskins. If they do, the skins will burst, the wine will run out and the wineskins will be ruined."[77]

The way out is to replace the old wineskins with new ones, so as to be able to contain new wine. In this connection, the new wineskins should be obtained by way of legislative changes[78] instead of through judicial decisions,

[75] Note 7 above, at 1045B.

[76] Note 6 above.

[77] The Book of Matthew 9: 17, New International Version of the Bible.

[78] With the introduction of statutory provisions under the Access to Justice Act 1999 (Destination of Appeals) Order 2000 to define what a final decision is for the purpose of appeal, Brooke LJ was able to say that "nothing will be gained . . . by a return to the old case law when this court was having to decide, without statutory guidelines, whether an order was an interlocutory order within the meaning of the former rule.": *Scribes West* (n 12 above), para 22. Under the 2000 Order, a final decision is one that would finally determine the entire proceedings, subject to any possible appeal or detailed assessment of costs, whichever way the court decided the issues before it (Art 1(2)(c)). A final decision includes the assessment of damages or any other final decision where it is "made at the conclusion of part of a hearing or trial which has been split up into parts and would, if made at the conclusion of that hearing or trial, be a final decision" (Art 1(3)).

as any fundamental change to be effected by judicial pronouncement will inevitably call into question the validity of decisions previously made on the understanding of the old common law. As regards the contents of the legislative provisions, they are of lesser importance so long as the rules are clear, straightforward and easily comprehensible. What matters most is not where the line between an interlocutory and a final order is drawn, but lies in the need to have the line drawn clearly so that every party to a litigation knows where he stands.