

BARRISTERS QUALIFICATION EXAMINATION 2010

PAPER II: Property, Conveyancing, and Equity PART A: Property, Conveyancing

QUESTION 1

Lot A, a plot of land in the New Territories, has been in the ownership of Oswald since 1980. Oswald erected a low wire fence around Lot A. Oswald has left Lot A vacant as he has been trying to acquire an adjacent plot of land to the West of Lot A so that he can build a development of houses on the two adjoining plots.

Sam, a farmer, owned a small plot of agricultural land with a vegetable garden next to Lot A, but on the East side of Lot A. In 1984 Sam removed about 10 feet of Oswald's fencing and started growing vegetables and flowers on the whole of Lot A. In 1986, Sam replaced the fence that he had taken down with his own fence. He also put a gate in the fence which he kept locked.

In 2000 Sam let Lot A to his friend Felix for 6 months at a rent of HK\$2000 per month. Sam was ill at the time and unable to work in his garden. Felix continued to cultivate vegetables and flowers on Lot A. After 6 months Sam was well again and he retook possession of Lot A and continued to cultivate it.

In 2007 Oswald acquired the land he wanted to the West of Lot A. Oswald then tried to evict Sam so that he could start development. Sam, however, claimed that he had acquired possessory title to Lot A. Sam has already said in evidence that if Oswald had asked him for rent for Lot A then he would have been willing to pay.

Advise Sam whether Oswald can evict him from Lot A. Consider the arguments for and against Sam.

Give reasons for all your answers

[25marks]

QUESTION 2

On 30 March 2010 Pat inspected a shop on the Ground Floor of 1 South Street (the 'Property') and on 2 April Victor as vendor and Pat as purchaser entered into an agreement for sale and purchase of the Property for HK\$9 million and Pat paid Victor a deposit of 10% of the price. The agreement is in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance Cap. 219. Completion was due to take place on 15 September 2010.

On 3 April Victor's solicitors sent the title deeds to Pat's solicitors. These include a previous Assignment of the Property with a floor plan of the Property. Pat's solicitors raised requisitions on 20 April and Victor's solicitors answered them on 22 April.

On 2 September Pat's mortgagee's valuation surveyor inspected the Property and reported to Pat that the building plans show a mezzanine floor above the Property with a floor area equivalent to half the floor area of the Property. However, an inspection reveals that the mezzanine floor has been extended by building a concrete slab in the void above the Property so that the mezzanine floor now has a floor area the same size as the Property and the whole of the mezzanine floor (original and extended) from the ceiling to the Property. The mezzanine floor is in separate ownership from the Property.

On 5 September Pat's solicitors raised a further requisition asking for evidence that the consent of the Building Authority had been obtained to the extension of the mezzanine floor. Victor's solicitors refused to answer the requisition on the grounds that it was raised out of time. Later, after they had made enquiries of the Building Authority, Victor's solicitors sent Pat's solicitors a letter from the Building Authority saying that 'the extension of the mezzanine floor does not warrant prioritized enforcement action at the present time'. Pat refused to complete on the grounds that Victor had failed to satisfactorily answer requisitions.

Has Victor breached the agreement for sale and purchase?

Give reasons for all your answers

[25marks]

QUESTION 3

In May 2010, L Investments Ltd ('L') were in negotiations with T Stores Ltd ('T') concerning the proposed grant of a lease of Unit 10 ("Unit 10") in the Plaza Shopping Centre for a term of ten years starting on 1 September 2010 with a rent free period and option to renew.

At a meeting on 5 May 2010, Alvin Au of L and Boris Bui of T had a meeting at which they agreed terms for the letting including the precise extent of the property to be demised, the term of the lease and the rent to be paid. Alvin Au and Boris Bui had authority from their respective boards to sign a contract once agreement had been reached. No written document recording the agreed terms was produced or signed at this meeting.

The next day, 6 May, T's solicitor wrote to L's solicitor confirming the terms that had been agreed and asking for a draft lease. T's solicitor signed the letter. L's solicitor wrote back on 7 May as follows:

7 May 2010

Dear Sirs,

We confirm that we act for L Investment Ltd which has agreed to let property at the Plaza Shopping Centre to T Stores Ltd for a term of ten years starting on 1 September 2010 at a monthly rent of HK\$100,000. We enclose the draft lease.

L's solicitor signed this letter. Neither letter was marked "subject to contract".

By 10 July, L and T's negotiations concerning the lease had broken down. L had declared to T its intention to grant a lease of Unit 10 to another party. On 25 July, L granted a lease under seal of Unit 10 to Ultra Computers Ltd ('Ultra'). Ultra registered the lease at the Land Registry on 27 July. T has not made any attempt to register anything at the Land Registry.

- (1) **Can T enforce the agreement for lease against L?** (13marks)
- (2) **What effect would T's failure to register its agreement have if T later seeks specific performance of any agreement that it might have had with L?** (12marks)

Give reasons for all your answers

[25marks]

QUESTION 4

Wonder Investments Ltd ('Wonder') developed Wonderland, an apartment complex and in 1999 Wonder sold to Abacus 1 equal undivided 100th share of and in the land on which Wonderland is built and of and in Wonderland together with the right to the exclusive use occupation and enjoyment of Apartment 6B. Wonder and Abacus then entered into a Deed of Mutual Covenant (the 'DMC'). The DMC was registered in the Land Registry.

Wonder then sold most of the remaining apartments in Wonderland. Every assignment was of undivided shares and exclusive use rights and was made 'subject to and with the benefit of the DMC'. The DMC includes the following covenants by all owners of undivided shares:

- *No owner will create a nuisance or annoyance to other owners or occupiers of Wonderland,*
- *Every owner will pay management charges in proportion to the number of undivided shares owned by them, and*
- *No owner will do anything to harm the reputation of Wonderland.*

Abacus has leased flat 6B to Tony and mortgaged it to Goodwill Bank Ltd.

- (1) **Can the above DMC covenants be enforced against Tony and Goodwill Bank Ltd? (12marks)**
- (2) **Can the above DMC covenants be enforced by Tony and Goodwill Bank Ltd? (13marks)**

[25marks]

QUESTION 5

Xavier was a wealthy footballer with three children, Aaron, Ben and Carson. Before the commencement of the finals of the FIFA World Cup 2010, he purchased two pieces of limited edition World Cup 2010 gold coins in celebration of the event. The two gold coins were identical, machine-produced casts.

In June 2010, he decided to set up a trust, appointing Terry, his university friend, as the trustee. Xavier settled HK\$5 million upon the trust. He then handed over the two gold coins to Terry. The trust deed contained the following clauses:

Clause 3: “The Trustee shall hold one World Cup 2010 gold coin on trust for Aaron.”

Clause 4: “The Trustee may, in his absolute discretion as it thinks fit, make a distribution of HK\$2 million of the trust assets to Hong Kong Football Association (HKFA).”

Clause 7: “The Trustee may in his absolute discretion pay the whole or any part of the remaining HK\$3 million to anyone in the world in such proportions as the Trustee thinks fit, and in default, to my children equally.”

On the same day as the trust was executed, Xavier wrote a letter to Terry, saying that “...with no intention to bind you, it is my wish that you distribute half of my trust assets to my mistress, Macy.”

Xavier died in July 2010. In August, Terry distributed HK\$2 million to HKFA. Last week, Terry found out that Xavier had meant to benefit “Hong Kong Football Club (HKFC)” with which Xavier had been an enthusiastic member and participant, but Xavier mistakenly provided the name Hong Kong Football Association, a different organisation. Hong Kong Football Association had not expended the donation. Terry wanted to apply to court to declare the exercise of discretion invalid.

Ben and Carson found out last week that Terry decided to transfer HK\$2 million to Macy, claiming that it is Xavier’s wish. Ben and Carson do not believe that this was Xavier’s wish and have threatened to take legal action to challenge the proposed transfer.

Advise Terry in relation to the trust issues arising from the facts.

[25marks]

QUESTION 6

Michael and Wendy have been cohabiting since 1995. They were unable to purchase their own property because of high property prices. In 2003, when the property prices came down after the outbreak of severe acute respiratory syndrome (SARS), they decided to purchase a village house in Sai Kung. The house cost HK\$2 million. Michael paid the down payment of HK\$600,000, which came from his own savings and a loan of HK\$200,000 from his mother to help Michael and Wendy to set up their home. The rest of the purchase price was paid by a mortgage loan from Kowloon Bank taken out by Michael.

The house was bought in the sole name of Michael. After Michael and Wendy took possession of the house, Wendy spent HK\$100,000 renovating the house. She also did all the household work.

Since the purchase of the flat, Michael paid all the mortgage bills. Wendy paid all other household bills, which enabled Michael to pay the mortgage. Shortly after the purchase of the house, they opened a new joint bank account (while each of them still kept a bank account in their own name only), into which they occasionally deposited some savings for their annual overseas holiday.

Michael has recently paid for a greenhouse to be added to the house. When the greenhouse was completed, Michael told his neighbour, "I would not have had the means to pay for this were it not for Wendy's contribution to our general outgoings."

Recently, Wendy discovered that Michael had a girlfriend, Daisy. Wendy found a copy of a letter from Michael to Daisy, saying that he had signed a transfer form transferring all his shares in Kowloon Bank to Daisy, and that she would be able to get the shares without taking any further action. Upon being confronted by Wendy, Michael admitted that he had a relationship with Daisy and had sent that letter to her.

Feeling devastated, Wendy decided to break up with Michael. Last week, Michael was killed in a car accident. He died intestate. The share transfer form was found amongst his papers in his bedroom.

Advise Wendy.

[25marks]

QUESTION 7

First Electronics Ltd. was a company that sold computer products by mail-order. Max and Nancy were directors and shareholders of First Electronics. When Olive Inc., a multinational corporation that designed personal computers, released its OPad in Hong Kong, First Electronics received numerous orders with accompanying cheques. Because of the product's unexpected popularity, First Electronics had difficulties getting supplies in advance from Olive Inc., and was unable to dispatch the orders.

Max then decided to designate one of First Electronics' bank accounts (the "First Electronics Customers' Trust Deposit Account") for the payments which would be audited independently by PVC, a famous accountancy. Withdrawals from the account also had to be authorized by Dopey, senior partner at PVC. Max then paid the cheques (amounting to HK\$1million) into this account.

Because of the success of OPad, the share price of Olive Inc. soared. Nancy wanted to invest in the Olive shares but did not have sufficient cash-flow. The following month, Nancy withdrew HK\$1,500,000 from the First Electronics Customers' Trust Deposit Account. The withdrawal was signed by Dopey, who asked Nancy to explain the purpose of the payment. On being told that the withdrawal was to pay for consultancy fees due to PVC, Dopey signed the document without incident. Nancy did use HK\$1,000,000 from the withdrawn amount to settle a fee note issued by PVC, and used the remaining money to purchase Olive shares worth of HK\$700,000.

First Electronics recently went into liquidation. The liquidators found out the Bank's clerical error. Because of the credit crunch, the Olive shares are now worthless.

Advise Xavier, a customer who had ordered and sent payment for the Opad by mail.

[25marks]

QUESTION 8

In January 2009, Albert set up a trust, appointing Sam and Ted as his trustees to manage the trust assets for himself. The trust assets comprised of a piece of undeveloped land on Collywood Road at HK\$10million (the “Collywood Road property”) and a Ming vase. In November 2009, the trustees made the following decisions:

- (a) to sell the Ming vase; and
- (b) to explore investment opportunities in relation to the Collywood Road property.

Sam arranged for the sale of the Ming vase on the open market. Ted, who was also an antique collector, arranged for his wife to purchase the Ming vase. Within three months, the Ming vase had doubled in value.

In December 2009, Sam learnt that the Government intended to preserve the land surrounding the Collywood Road property as cultural heritage sites, with the result that the land in that area would become more valuable. In February 2010, a month before the change was announced, Sam used his own money to purchase a nearby property on Bollywood Road at HK\$8million (the “Bollywood Road property”). When the redevelopment plans were announced in March 2008, the value of both properties increased by 100%.

In April 2010, Sam sold the land for HK\$16million. He then handed over HK\$1million to his daughter, Daisy, as her birthday gift (and dissipated the remaining HK\$15million). Daisy had no idea of the source of the gift, but was overjoyed by her father’s generosity. She used the entire sum to purchase a Chinese painting which is now valued HK\$800,000.

The above has just come to light. Advise Albert. Would your answer be different if Sam has gone into bankruptcy?

[25 marks]

BARRISTERS QUALIFICATION EXAMINATION 2010
PAPER III: CRIMINAL LAW, CRIMINAL PROCEDURE
& CRIMINAL EVIDENCE

QUESTION 1

PC Chan is on patrol in uniform in Fa Yuen Street when he sees Wong, a minibus driver, standing talking to five of his fellow drivers. They are standing in a group on the pavement around a small table on which they have placed soft drinks, and PC Chan notices that a pedestrian walks off the pavement and onto the roadway as she passes them.

Earlier that day, at the daily briefing, Chan's senior officer, Sergeant Wu, had told his officers, including PC Chan, that he was "sick and tired of the minibus drivers causing trouble" in his area. The Sergeant told his officers, "Let's put so much pressure on them that they get out of here and go and annoy some other police commander."

He instructed his officers to, "lock them all up as soon as it looks like you have the slightest doubt about what they are up to. Get them back here to the police station and then we will see who is the boss once a few charges have been laid".

Remembering this, Chan runs over to the group and shouts, "Obstruction! Obstruction! Don't run!" Wong runs off and Chan runs after him. When Chan reaches Wong he pushes Wong to the ground. Chan then brings Wong back to the rest of the group who are still standing in the same spot. Chan then radios for assistance, and twenty minutes later, a police vehicle arrives with a back-up team of six officers.

Chan then tells all six of the minibus drivers to get on board the vehicle as "we are all going to the police station."

Susan Lee, a divinity student who has witnessed all of the above, tells Chan that he should be ashamed of himself, as he has just locked up a group of "total innocents."

Chan then says to her, "Right you're next." He tells her to hand over her handbag and when she refuses, Chan takes it and then searches it. In the handbag he finds a pamphlet entitled, "Stop police abuse – learn your rights, call 5354 0001 Now!!." He takes the pamphlet and puts it in his pocket, telling her "Under my powers to stop and search you, this document will be an important piece of evidence in the case." Lee tells PC Chan that she is going straight to the Complaints Against Police Office to make a formal complaint against him for his poor attitude. Chan then says "I can save you the bus fare", takes hold of Lee, handcuffs her, and pushes her into the police vehicle.

The six minibus drivers and Lee are driven to the nearby police station where they are brought before the Duty Officer and, eventually, the drivers are charged with obstruction of a public place contrary to s.4A, Cap.228 (see attached).

Question continued on next page.

Lee is placed in an interview room, where PC Chan visits her and tells her that she had better “do the right thing.” He then records a statement from her, under caution, in which she says, “As there is a lot of abuse by Government I thought the pamphlet would come in useful. I am very, very sorry.”

(a) Discuss the appropriateness or otherwise in law of the actions taken, and the words used by PC Chan. Support your answer with appropriate authority, if any. (18marks)

(b) In the event that the prosecution seek to adduce the statement made by Lee at any future trial she might face arising out of these facts, discuss any potential problem the prosecution might face. How might any such issue be resolved? Support your answer with appropriate authority, if any.

(7marks)

[25marks]

Chapter:	228	Title:	SUMMARY OFFENCES	Gazette
			ORDINANCE	Number:
Section:	4A	Heading:	Obstruction of public places	Version Date: 30/06/1997

Any person who without lawful authority or excuse sets out or leaves, or causes to be set out or left, any matter or thing which obstructs, inconveniences or endangers, or may obstruct, inconvenience or endanger, any person or vehicle in a public place shall be liable to a fine of \$5000 or to imprisonment for 3 months.

(Replaced 54 of 1972 s. 1

QUESTION 2

Ho Ho Tung (21), Wong Wai Mung (22) and Lee Kei Lo (34) are charged with robbery and face trial before HH Judge Smart in the District Court. The single count preferred against them reads (where relevant):

Statement of Offence

Robbery contrary to s.10 Theft Ordinance, Cap 210

Particulars of Offence

Ho Ho Tung, Wong Wai Mung, and Lee Kei Lo on the 23rd day of March 2010, at outside No. 99 Queen's Road Central Hong Kong, together robbed Judy Smith of one gold Rolex wristwatch valued at HK\$65,000 and at outside No. 123 Jardine's Bazaar, Causeway Bay Hong Kong together robbed David Smith of one pair of gold cufflinks valued at HK\$32,000.

On the first day of trial, defence counsel makes an application to stay the proceedings because of an abuse of process resulting from the drafting of the charge sheet. (No prior notice of any such application had been made by defence counsel).

- (a) **Is the application likely to succeed? Give reasons for your answer, supported with appropriate authority. (6marks)**
- (b) **Is there any other course of action which counsel could adopt? Support your answer with appropriate authority? (6marks)**

Assume now that Chan Faat is on trial in the District Court in respect of a theft case. He is alleged to have stolen a diamond from a jewellers shop in Central. Four of the shop staff give evidence against him at trial. There are a large number of discrepancies and self-contradictions in the evidence of the four prosecution witnesses, who disagree as to the sequence of events and the timings surrounding the theft. Defence counsel makes a submission of no case to answer, highlighting the inconsistencies and contradictions. The judge rules that there is a case to answer. Chan then gives evidence in his own defence and his version of events is unshaken during cross-examination by prosecuting counsel.

At the end of the trial the District Court judge convicts Chan. In his reasons for verdict he states:

“At the half-way point of the trial I found that there was a case to answer, as there were many facts described by the prosecution witnesses from which inferences of guilt could be drawn against the accused. I have accepted all the evidence of the prosecution witnesses. I find them all to be truthful witnesses and I therefore find that these inferences of guilt can now be taken to their logical conclusion in finding that the accused is guilty beyond a reasonable doubt. I therefore convict him as charged”

Question continued on next page.

- (c) **Comment on this extract from the trial judge’s reasons for verdict. Support your comments with authority if appropriate. (8marks)**

Prosecuting counsel then makes an application for the award of costs against Chan and the trial judge awards costs against Chan, stating that:

“It is an unfortunate situation for an accused that, in addition to any other penalty, they often have to bear the cost of their own prosecution upon conviction.”

- (d) **Comment on the trial judge’s ruling on this issue, supporting your answer with authority where appropriate. (5marks)**

Discuss this sequence of events and advise Wong.

[25marks]

Chapter:	210	Title:	THEFT ORDINANCE	Gazette
				Number:
Section:	10	Heading:	Robbery	Version Date: 30/06/1997

(1) A person commits robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

(2) Any person who commits robbery, or an assault with intent to rob, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for life.

[cf. 1968 c. 60 s. 8 U.K.]

QUESTION 3

Suzy Wong (13) and Harry Leung (14) were arrested at the scene of a gang attack in Wong Tai Sin during which they were alleged to have assaulted David Yip (17), and occasioned actual bodily harm to Wendy Wu (16).

Wong and Leung were two of a group of some six teenagers who had attacked Yip and Wu after a verbal dispute over 'staring affairs'. A fight had broken out after the initial verbal exchanges, and a large number of teenagers had become involved in the fracas. Upon the arrival of the police most of the participants had fled from the scene, but Wong and Leung had been caught whilst running away from the scene of the attack.

After the arrests the police had taken Wong and Leung to the nearby police station, where they had been brought before the duty officer and they were then detained overnight. During their detention the police had conducted formal interviews with both, and had recorded the interviews. Neither Wong nor Leung had made any admissions to the police.

They had both been released on police bail of HK\$500 the following afternoon.

When they reported back to the police station two weeks later they were each jointly charged with one count of Common Assault contrary to common law and punishable under s.40 of the Offences Against the Person Ordinance, Cap.212, in respect of the attack on Yip and with one count of Assault Occasioning Actual Bodily Harm contrary to s.39 of the same Ordinance in relation to the attack on Wu (see attached sections of the Ordinance).

- (a) **Which court will hear the trial of Wong and Leung? Provide reasons for your answer and cite any relevant authority. (4marks)**
- (b) **Comment on the actions of the police. Provide reasons for your answer and cite any relevant authority. (12marks)**

Two months later, and before the trial of Wong and Leung, Brian Lee (9) and Charlie Chan (17) surrendered to the police in connexion with the attack and, after investigation, were charged with the same two offences, in that they together with Wong and Leung had assaulted David Yip and had occasioned actual bodily harm to Wendy Wu.

- (c) **In which court should Lee be tried? Provide reasons for your answer and cite any relevant authority. (2marks)**
- (d) **Will the surrender and subsequent charging of these two suspects make any difference to the venue of trial for Wong? Provide reasons for your answer and cite any relevant authority. (5marks)**

Question continued on next page.

Wong is found guilty by the court after trial and, after calling for the necessary reports, the court sentences Wong to Detention Centre to “instil in her a respect for the law.”

(e) **Comment on the court’s disposal of the case against Wong. (2marks)**
[25marks]

Chapter:	212 	Title:	OFFENCES AGAINST THE PERSON ORDINANCE	Gazette Number:
Section:	40	Heading:	Common assault	Version Date: 30/06/1997

Any person who is convicted of a common assault shall be guilty of an offence triable either summarily or upon indictment, and shall be liable to imprisonment for 1 year.

(Replaced 24 of 1950 Schedule. Amended 22 of 1950 s. 3; 50 of 1991 s. 4)
[cf. 1861 c.100 s.47 U.K.]

Chapter:	212 	Title:	OFFENCES AGAINST THE PERSON ORDINANCE	Gazette Number:
Section:	39	Heading:	Assault occasioning actual bodily harm	Version Date: 30/06/1997

Any person who is convicted of an assault occasioning actual bodily harm shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for 3 years.

(Replaced 24 of 1950 Schedule. Amended 50 of 1991 s. 4)
[cf. 1861 c.100 s.4 U.K.]

QUESTION 4

Ho (54) was earlier committed to the Court of First Instance (CFI) for sentence, having pleaded guilty at his committal hearing, and having acknowledged the accuracy of the Summary of Facts in the case. Ho pleaded to three charges of throwing corrosive fluid with intent to do grievous bodily harm, contrary to s.29(c) Offences Against the Person Ordinance, Cap.212 (see attached). The summary showed that the charges arose from a family dispute during which Ho attempted to throw drain cleaner over his wife, Hydie's face. Ho had prepared the jar of fluid earlier that day and had waited for five hours for his wife to return from work before attacking her. Ho's son, David (22), whilst attempting to protect his mother, had suffered severe injury when the fluid spilled onto his face and, during the struggle with his father, the container had fallen spilling more of the liquid onto the arms of David's wife Viola (21). All three victims were hospitalised for long periods suffering from 1st and 2nd degree burns. The Government Chemist had analysed the fluid and found it to be a concentrated solution of Hydrochloric acid.

In reaching his sentence of six years imprisonment the judge in the CFI took into consideration the factual circumstances of the case. He did so, *inter alia*, by reading the Record of Interview (ROI) which had been made by Ho shortly after the time of his arrest. In the ROI Ho stated that he had been frustrated by problems at work and financial stress. He claimed that he had merely been going to replace the liquid on the top shelf of a kitchen cabinet after having unblocked a drain, and that in the heat of a verbal dispute with his wife he had accidentally dropped it, and the container had 'bounced around the floor shooting the stuff all over the place'. The judge also considered two witness statements made from their hospital beds, by Ho's son, David (32) and by Viola.

The judge rejected defence counsel's contention, made during the plea in mitigation, that Ho had merely thrown the container at his wife without intentionally trying to hit her on the face with it, and that it had bounced off the top shelf and landed on his wife's head.

On hearing this submission the judge had adjourned the hearing to give defence counsel the opportunity to consider the necessity or otherwise of a Newton Hearing. When the matter resumed, defence counsel informed the judge that no Newton hearing would be necessary, and continued with his plea in mitigation. Counsel submitted that there had been no premeditation in this case, and that Ho had lawfully had the cleaning fluid with him at the time, as was clear from Ho's statement. Counsel also stressed that Ho had merely been trying to replace the fluid on the shelf when the fight had started. Counsel also relied on the fact that Ho had been suffering from financial problems and general unhappiness at work.

Counsel produced to the court a letter from Ho's wife, in which she stated that she had 'completely forgiven him for his moment of madness'. Counsel also produced a letter from David in which he stressed his father's previous helpfulness to the family and how he had been a good breadwinner for them all.

Question continued on next page.

The judge noted that the summary of facts stated that ‘Ho had thrown the container of cleaning fluid from less than one metre directly at the face of his wife.’ The judge found also that Ho had ‘not cared a jot about the safety of the other two victims during the struggle for the container’. The judge noted how the contents of the letters advanced in mitigation were diametrically opposed to the content of the victim’s earlier witness statements and therefore he “would accord them very little weight.”

Ho now wishes you to appeal against his sentence, on the basis that it was wrong in principle in that inadmissible material was relied upon by the judge.

Ho instructs you that a further ground of appeal is to be that the sentence of six years - whilst well within the range of appropriate sentences for this type of crime (and candidates may accept that this is correct) - is manifestly excessive here, because of the adverse effect the three witness statements had had on the judge’s view of Ho, resulting in the judge failing to give Ho the usual discount for having no previous criminal record.

The last ground proposed by Ho is that the judge gave too much weight to the issue of deterrence, and accordingly the sentence was manifestly excessive.

Advise Ho in respect of his proposed grounds of appeal against sentence, citing appropriate authority, if any.

[25marks]

Chapter:	212	Title:	OFFENCES AGAINST THE PERSON ORDINANCE	Gazette Number:
Section:	29	Heading:	Causing gunpowder to explode, etc., or throwing corrosive fluid, with intent to do grievous bodily harm	Version Date: 30/06/1997

Any person who unlawfully and maliciously-

- (a) causes any gunpowder or other explosive substance to explode; or
- (b) sends or delivers to, or causes to be taken or received by, any person any explosive substance or any other dangerous or noxious thing; or
- (c) puts or lays at any place, or casts or throws at or upon or otherwise applies to any person, any corrosive fluid or any destructive or explosive substance,

with intent in any of such cases to burn, maim, disfigure, or disable any person or to do some grievous bodily harm to any person, shall, whether any bodily injury is effected or not, be guilty of an offence triable upon indictment, and shall be liable to imprisonment for life..

(Amended 30 of 1911 ss. 2, 4 & 5; 39 of 1954 Schedule; 50 of 1991 s. 4)
[cf. 1861 c.100 s.29 U.K.]

QUESTION 5

You are instructed to represent Mr. HO Choy in the District Court on a charge of 'Blackmail' and 'Claiming to be a Member of a Triad Society'. The prosecution alleges that having claimed himself to be a, "*Big Brother*" of the, "*Shing Wo*" Mr. HO demanded the owner of the Haam Gwo Tau Noodle Shop pay him and his "*brothers*" HK\$888.80 per month to ensure their continued patronage and protection. If he refused, the owner was told he would, "*suffer the consequences.*"

Mr. HO denies the offences. He admits that he and his friends frequent the Noodle Shop, but that relations with the owner have recently soured as a result of his frequently placing too much salt on the dishes. Mr. HO's complaints have led to one or two angry exchanges. He suggests the owner has a grudge and has fabricated the allegations.

Mr. HO claims to have been at home, watching television at the date and time of the alleged offence. His girlfriend, Ms. Kitty CHAN was present and can vouch for him.

1. **What statutory provisions govern the admissibility of alibi evidence given by the accused and by any witnesses called by him? (10marks)**
 2. **What is "evidence in support of an alibi"? (5marks)**
 3. **What consequences might arise if HO fails to comply with the standard statutory requirements? (5marks)**
 4. **What consequences might arise if HO complies with the requirements, but does not call the evidence? (5marks)**
- [25marks]**

QUESTION 6

You represent Stanley, a barman in a prestigious Hong Kong Club, who is charged with 'Theft' of a quantity of premium wines and spirits valued at HK\$4,424.00 from his employer.

Inter alia, the evidence against Stanley is derived from:

- a) CCTV footage of Stanley arriving and departing via the staff entrance of the club on a date and at times when he was not 'on duty';
- b) Stock records showing unauthorized removal of wines and spirits at approximately the same time;
- c) A statement by Stanley when told he was under arrest by Police to the following effect that he allegedly said, "*Blimey! Now I'm for the high jump!*" and
- d) A written 'Record of Interview' containing the words, "*I admit it. I succumbed to a moment of greed. Please give me a chance.*"

The Court having found a case to answer, Stanley elected to give evidence and call David, his colleague, as a witness.

Stanley was acquitted after trial. In his short reasons for verdict, the learned trial Magistrate inter alia stated:

- a) "The defendant's explanation that he returned to the club to pay-off a gambling debt to his colleague was corroborated by the man David, whom I believed."
- b) "It has long been the practise in Hong Kong, as in other right-thinking jurisdictions, to give absolutely no weight at all to alleged verbal responses which are unrecorded and to which the accused has had no opportunity of reply;
- c) "Having heard the defendant's objections to the admissibility of his Record of Interview" I was forced to rule the statement inadmissible.

You apply for Costs. Having heard representations on both sides the Magistrate rules that he will make no order for costs in favour of the defendant. The Magistrate asserts the defendant's conduct had brought suspicion upon himself and led the prosecution into thinking their case was far stronger than it in fact was.

1. **Under what circumstances is a Magistrate entitled to award costs in favour of an acquitted defendant? (5marks)**
2. **With reference to authority, what are the circumstances in which an order for costs to an acquitted defendant may be refused? (5marks)**
3. **With reference to the facts, discuss and comment upon the Magistrate's reasons for refusing costs. Where appropriate, support your answer with authority; (10marks)**

Question continued on next page.

4. **What procedure should be adopted in an application for costs following acquittal?**
(5marks)
[25marks]

QUESTION 7

You represent Mr. TO Tung, (“the client”), on a charge of ‘Robbery’ scheduled to be heard before the District Court on 24th December 2010.

The prosecution alleges your client robbed a lady (PW1 Ms. HO) late at night on 1st May 2010 as she returned to her home in Magnificent Mansions, the Peak. As PW1 stopped to remove her key to the metal security gate, she was pushed from behind into the adjacent bushes and thrown to the ground. Her handbag containing cash HK\$4,424.00 and credit cards was stolen. Before he fled, the culprit held a knife to PW1’s face and removed a gold chain and pendant in the form of the Goddess Tin Hau from her throat. PW1 is a University lecturer in Criminal Procedure at the University of Outer Mongolia.

PW2 Mr. KAN, the watchman at Magnificent Mansions, saw a male culprit briefly as he ran past under the doorway lights. PW2 called the police and gave a description of the culprit.

PW3 and PW4 are the Uniformed Police officers who attended the scene. PW1 and PW2 were able to give a description of the culprit. PW3 remained with PW1 to await the Ambulance, whilst PW4 set off on foot to look for the suspect

A short while later, at a road junction approximately 300 meters from the scene, PW4 found the client sitting at a bus stop. The client appeared to match the description of the culprit and was furtively looking right and left along the road in a suspicious manner. PW4 approached and questioned the client, who told him (PW4) he was waiting for a bus. PW4 asked for the client’s identity and checked the particulars with police Command and Control Centre. The operator informed PW4 that the client was on ‘Police Bail’ having been arrested in connection with an alleged ‘Theft’ in Wanchai 6 weeks earlier. PW4 declared the client under arrest.

A search disclosed the client to be in possession of HK\$4,620.00, a ‘Swiss Army’ penknife with a 3” blade and a broken gold chain. PW1 was subsequently “*almost sure*” she could identify the chain as her property, except that the exhibit chain was “*all broken.*” She recognized the penknife as “*frighteningly similar*” to the one used against her.

PW1 was unable to identify the client at a formal Identification Parade, but PW2 picked him out at the same parade.

The client instructs you that this is a case of mistaken identity. He was in the vicinity at the bus stop, having earlier gone for a long walk around the Peak to “think over” his problems, not least of which was his earlier arrest for ‘Theft’. This first case, the client claims, was a complete misunderstanding as he simply forgot to pay for some hair treatment products at his local convenience store. He has a similar previous conviction many years ago and was frightened he might be convicted and sentenced to jail.

Question continued on next page.

On transfer day, the client acknowledged receipt from the prosecution of the transfer bundle, including all relevant witness statements; sketches, photographs and reports.

Through instructing solicitors, you have now received a letter from the Department of Justice inviting you to admit certain facts. The letter states as follows:

“In accordance with the practice direction of the then Chief Justice dated 13th September 1990, you are hereby requested to admit the following facts in accordance with section 65C of the criminal procedure Ordinance, Chapter 221 of the Laws of Hong Kong:-

- (1) The chain of evidence in respect of non-documentary exhibits;*
- (2) Documentary exhibits (including sketch plans and photographs);*
- (3) That the offence was committed;*
- (4) That the money and chain found on the defendant were the property of PW1;*
- (5) That the penknife found on the defendant was used in the offence;*
- (6) That on 3rd May 2010, PW2 positively identified the defendant.*

Further, the letter goes on to state:

Written statements of the witnesses named below may be tendered in evidence before the Court pursuant to s.65B of the Criminal Procedure Ordinance, Cap. 221.

<u>Name</u>	<u>Role</u>	<u>No. of Statements</u>
Ms. HO Charm	PW1	2
Mr. KAN Lik	PW2	2
PC 4567	PW3	1

- 1. What primary considerations govern the admission into evidence of statements tendered under section 65B? (10marks)**
 - 2. What considerations govern the operation of formal admissions under section 65C? (10marks)**
 - 3. Applying the facts, describe how you might advise your client in respect of the notice to admit facts and written statements from the prosecution in the current case? (5marks)**
- [25marks]**

QUESTION 8

- 1) What are the duties and obligations of a prosecutor with regard to disclosure? (10marks)**
 - 2) List at least five types of material the prosecutor is under an obligation to disclose? (5marks)**
 - 3) What, if any, materials are the prosecution not required to disclose? (5marks)**
 - 4) What, if any, information might the Defence be required to disclose? (5marks)**
- [25marks]**

Barristers Qualification Examination 2010

PAPER IV: Hong Kong Legal System, Constitutional and Administrative Law; and Company Law

Part A (Hong Kong Legal System, Constitutional & Administrative Law)

QUESTION 1

After the hostage crisis in Manila in which quite a few Hong Kong tourists died, the Legislative Council at one meeting in September discussed the issue of whether to establish a sub-committee to inquire into the matter.

Though one member raised a concern whether the sub-committee has the authority under the Basic Law to conduct such an investigation, the majority of the members were of the view that a sub-committee properly established and authorized by the Legislative Council has the same authority as the Legislative Council itself enjoys.

At the end of the meeting, the Legislative Council resolved to establish a “Hostage Sub-Committee” under s. 9(2) of the Legislative Council (Powers and Privileges) Ordinance, Cap. 382, to inquire into the handling of the hostage crisis by various departments of the Hong Kong Government, and authorized the Hostage Sub-Committee to exercise the power to summon witnesses.

The relevant constitutional and statutory provisions are as follows:

Article 73 of the Basic Law provides:

“The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

...

(10) to summon, as required when exercising the above-mentioned powers and functions, persons concerned to testify or give evidence.”

Section 9 of the Legislative Council (Powers and Privileges) Ordinance, Cap. 382, provides:

“(1) The Council or a standing committee thereof may, subject to sections 13 and 14, order any person to attend before the Council or before such committee and to give evidence or to produce any paper, book, record or document in the possession or under the control of such person.

(2) The powers conferred by subsection (1) on a standing committee may be exercised by any other committee which is specially authorized by a resolution of the Council to exercise such powers in respect of any matter or question specified in the resolution.”

Question continued on next page.

Your written advice is sought by the Hong Kong Government on the constitutionality of s. 9(2) of the said Ordinance. You have been asked to address in particular the following legal questions in your written advice:

(1) The principles governing interpretation of the Basic Law; (15marks)

(2) Whether the Hostage Sub-Committee can compel a witness to appear before it to give evidence or to produce documents which is outside the scope of inquiry set out in the resolution establishing the Sub-Committee.

(10marks)

[25 marks]

QUESTION 2

James Ng was born in Hong Kong in 1970 and is a permanent resident in Hong Kong. He met a Chinese lady, Jane Li, two years ago on a holiday trip to Hangzhou and fell in love with her. They got married last year and his wife gave birth to a boy, Jason Ng, in July 2010 in Hangzhou.

Jane Li and Jason have moved from Hangzhou to Shenzhen since August 2010 so that James Ng could visit them as frequently as possible. But Mr. Ng still feels it is very tiring to cross the border every day. He wants to get at least Jason to live with him in Hong Kong as soon as possible even though he knows that the Immigration Ordinance contains the requirement of obtaining a one-way permit for Jason first.

- (1) Advise Mr. Ng, by explaining to him with reference to decided cases, whether Jason can avoid the one-way permit procedure to apply for permanent residence directly in Hong Kong. Support your advice with decided cases. (15marks)**
- (2) If Mr. Ng was not born in Hong Kong, but only came to Hong Kong in August 2003 and obtained permanent resident status in August 2010, would your advice be different? (10marks)**
[25 marks]

(Paragraph 4 of Article 22 of the Basic Law provides:

“For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region”.

Paragraph 2 of Article 24 of the Basic Law provides:

“The permanent residents of the Hong Kong Special Administrative Region shall be:

- (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
- (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;
- (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);
- (4)”)

QUESTION 3

More than a decade ago, Sir William Wade said this, in relation to England:

“We all understood the realities and knew perfectly well that the judges created their own powers as they went along. Furthermore, their claims to independence were already recognized in the law to some extent..... They might however, be ill-advised to advertise their creative powers..... There is wisdom, therefore, in the House of Lords’ firm support of the traditional ultra vires doctrine which is founded, however unrealistically, on the presumed intentions of Parliament.....”

(Sir William Wade, *Constitutional Realities and Judicial Prudence* in Forsyth, Christopher (ed), *Judicial Review and the Constitution* (Hart Publishing, 2000) p 431)

About two years ago, Chief Justice Andrew Li said this, in relation to Hong Kong:

“Court decisions in judicial review cases can have important repercussions for various political, economic and social problems which arise in our society. But it is important for the public to understand the proper role of the courts on judicial review. The role of the court is only to determine the limits of legality in accordance with the relevant constitutional and statutory provisions and the applicable common law principles. The court is only concerned with what is legally valid and what is not, in accordance with legal norms and principles. The court does not assume the role of the maker of the challenged decision and does not deal with the merits of the decision as such as if the court were the decision maker.

(Chief Justice Andrew Li, *Foreword* in Forsyth, Elliott, Jhaveri, Scully-Hill and Ramsden (eds), *Effective Judicial Review: A Cornerstone in Good Governance* (Oxford University Press, 2010) p xxxv)

Discuss.

[25marks]

QUESTION 4

The Court of Final Appeal had declared that a provision in the Disciplinary Rules for Public Servants of the HKSAR to be inconsistent with Article 10 of the Hong Kong Bill of Rights in that it excluded the possibility of the disciplinary tribunal exercising a discretion to permit the public servant who is the subject of disciplinary proceedings to be legally represented. The Court of Final Appeal declared the provision null and void and of no effect.

The Court of First Instance and the Court of Appeal were then subject to a spate of public servants and ex-public servants seeking to set aside the disciplinary awards, relying on the ruling of the Court of Final Appeal. Some applied for applications for leave to apply for judicial review. Some applied for amendment to their grounds for judicial review in their applications scheduled to be heard. Some applied to restore their adjourned or dormant applications for judicial review and to rely on the ruling as an additional ground. Some applied for leave to appeal against unfavourable judgments of the Court of First Instance out of time. Some applied to add a ground of appeal to their appeals scheduled to be heard. Some applied for leave to appeal to the Court of Final Appeal against unfavourable judgments of the Court of Appeal out of time.

You have been instructed by the Department of Justice to advise on the merits of each and every type of applications, applying the relevant legal principles and procedural rules of court.

[25 marks]

Part B (Company Law)

QUESTION 5

Alex and Bernard are childhood friends. When they were 18, they started a business of writing tailor-made computer programmes and designing web and blog pages for sale from Bernard's garage.

The business gradually expanded, and after they graduated from university, they incorporated Cybertech Limited ("Cybertech") in 2005 in Hong Kong to take over their business. Alex and Bernard each held 50 of the 100 issued shares of HK\$1 each (the authorized share capital of Cybertech being HK\$1,000) and were the only directors of Cybertech. Cybertech adopts Table A of the First Schedule to the Companies Ordinance (Cap.32) as its articles of association (which, for present purposes, should be taken as the 2010 version), with the following changes:

- (1) Deletion of article 53; and
- (2) Addition of an article providing that Alex and Bernard are appointed permanent directors of Cybertech.

The business of Cybertech prospered. It soon became a well-known boutique programming company in Asia. It had 20 highly-qualified, expert programmers in its employ.

Alex's cousin, Derek, a marketing executive who recently returned from Ecuador, expressed an interest in the business of Cybertech. He told Alex and Bernard that he had the necessary expertise to market the business of Cybertech worldwide and to procure Cybertech's listing on NASDAQ. After some persuasion, it was eventually agreed that Derek should become a shareholder of Cybertech, and the new shareholding structure would be Alex and Bernard each holding 40 of the issued shares, and Derek holding the remaining 20. Derek was also appointed a director of Cybertech.

Derek then took over the day-to-day management of Cybertech, while Alex and Bernard focused on the technical aspects of the business. The business of Cybertech prospered further, and it entered into negotiations with bankers with a view of procuring listing status in New York.

In the course of such negotiations, Derek became increasingly dissatisfied with his limited control over Cybertech. Derek and Bernard had different views as to the future development of Cybertech, with Derek wanting to have Cybertech listed as soon as possible and to branch out into the computer hardware business, and Bernard wanting to maintain and refine the core business of programming. Due to the disparity in shareholding, and the fact that Alex took a very "hands-off" attitude on everything apart from his programming work and simply went along with Bernard's decisions, Derek's proposals were always out-voted.

Question continued on next page.

Frustrated by Bernard's failure to co-operate, and fearing that this divergence in Cybertech might lead to the proposed listing being called off, Derek decided to take matters into his own hands. He called a board meeting to approve a resolution to allot all of the 900 unissued shares in Cybertech to him.

The notice of the board meeting was sent by post to Bernard at the address set out in Cybertech's Register of Members, but which to Derek's knowledge Bernard no longer resided in. Bernard had informed Alex and Derek of his change of address and that he would arrange for the necessary documentation to change his address, but never got round to do so. During that period (until after the date of the proposed Board meeting), Bernard was on holiday in Fiji and could not be contacted. Bernard never received notice of the board meeting.

Before the board meeting, Derek told Alex that everything he did was for the benefit of Cybertech, and that Bernard was getting in the way of Cybertech's success. He also told Alex that Alex's position in Cybertech would not be affected by the change in shareholding structure, that he would receive the same remuneration and would have control over the technical aspects of the business. He then appealed to Alex to help him make Cybertech a success. Although Alex was hesitant to be seen to have betrayed Bernard, he did not want to turn against his cousin either. He told Derek that he would "stay neutral" and raise no objection.

Having thus secured the support of Alex, the board meeting was convened in the absence of Bernard. Alex voted in favour of the resolutions tabled by Derek and they were passed unanimously. 900 shares of Cybertech were then allotted to Derek.

After the allotment, Derek immediately requisitioned a general meeting to pass a resolution to remove Bernard as director. Notice of this general meeting was also sent to Bernard's old address, and Bernard, who was present in Hong Kong on this occasion, did not receive the same. The general meeting was held in the absence of Bernard. Alex abstained from voting on the resolution, but the resolution was carried in any event.

Please advise Bernard on the options open to him.

[25marks]

QUESTION 6

Gormagon Limited is a company incorporated in Hong Kong and listed on the Stock Exchange of Hong Kong (main board). It is an investment holding company and has been carrying on the business of marketing time-shared holiday homes. Its business has wound down substantially in recent years.

Gormagon Limited's largest shareholder is Hectar, who holds 25% of the total issued share capital, and controls the board of directors through his appointees. Ibrahim is a long-time business associate of Hectar. He is a shareholder in Gormagon Limited holding 2% of its total issued share capital.

Gormagon Limited is solvent and has a substantial cash balance.

Meanwhile Hectar is approached by Jackel Limited, which expresses an interest in taking over Gormagon Limited as it wants a listed vehicle into which it could inject some of its natural gas mines. Jackel Limited proposes to acquire Hectar's shareholding in Gormagon Limited, but does not want to pay for the full consideration (of HK\$50,000,000) itself. Instead, noting that Gormagon Limited is cash-rich, it proposes that Gormagon Limited should advance a loan to it for the purpose of the payment of consideration, and offers to provide a valuable business opportunity, which Gormago Limited has for some time been trying to secure, to Hectar's private company, Kroon Limited.

Hectar agrees to this proposal. He then procures Gormagon Limited to advance a loan of HK\$50,000,000 to Jackel Limited, which the latter then applies to pay for Hectar's shares. As a result Jackel Limited becomes the largest shareholder of Gormagon and it procures its nominees to be appointed to the board of Gormagon.

Ibrahim comes to know about the transactions between Hectar and Jackel Limited. He is very concerned and wishes to know what he can do. He is in financial straits and is unable to shoulder substantial legal costs. He also suspects that given his relationship with Hectar, Hectar may be willing to settle the matter with him.

Please advise Ibrahim on the options open to him. For the purpose of this question, please ignore any Securities and Futures Ordinance (Cap.571), Listing Rules and Takeover Code implications.

[25marks]

QUESTION 7

Paul is the former managing director and substantial shareholder of Tan-Tai Ltd ('Tan Tai'), which was incorporated in Hong Kong in 2001 and specialised in manufacturing electrical products.

In the early years (2001-2006) Paul was very much in control of Tan Tai; he reviewed production figures and orders on a daily basis and would send frequent reminders to the company's two other directors, Bill and Ben, about ensuring compliance with the law and double checking facts and figures.

In 2006, Tan-Tai's future was still very bright but the recession badly affected its order book. Paul then developed a serious illness and was hospitalised for more than 6 months. Bill and Ben became increasingly lackadaisical and appeared to be more concerned about their golfing handicaps rather than the decline in Tai Tan's orders and in its profits.

In 2008 Paul, having partially recovered from his illness, set about improving Tai Tan's order book but he was increasingly dismayed by the response from former customers and their reference to a massive decline in Tai Tan's reputation. He was also dismayed by the state in which he found the company's recent records and could not bring himself to review Tan Tai's accounts.

In 2009 Paul, suspecting that Tan Tai was insolvent, fled Hong Kong.

Paul recently learned that one of Tan Tai's major creditors has successfully petitioned to wind up Tan Tai. Having fully recovered from illnesses he then decided to return to Hong Kong with a view to assisting the liquidator and putting the entire matter of Tan Tai behind him.

Paul seeks you advice with respect to the following questions:

- (a) **On what grounds, if any, and to what extent will Paul be personally liable for Tan Tai's debts and /or be imprisoned and what possible defence can be raised by Paul in answer to such claims which may be made by the liquidator against him?** (12marks)
- (b) **If Paul is approached by the liquidator to provide information and documents relating to the affairs of Tan Tai, should he assist the liquidator? Can he refuse to answer questions on the grounds of self-incrimination? What possible sanction may follow if Paul refuses to assist the liquidator?** (10marks)
- (c) **On what grounds, and for what duration, may he be disqualified from being a director?** (3marks)

[25marks]

QUESTION 8

- (a) **In 1996 the Law Reform Commission of Hong Kong issued a report concerning corporate rescue and insolvent trading. However a statutory corporate rescue procedure was not implemented** and, arguably, the Companies Ordinance is still deficient in this regard. Indeed a review of corporate rescue procedures was conducted by the Financial Services and Treasury Bureau in 2009 and legislation has again been proposed.

Critically examine the current provisions of the Companies Ordinance which concern (i) compulsory winding on the ground of insolvency and (ii) the appointment of a provisional liquidator in relation to a company with long-term viability but short-term financial difficulties. (15marks)

- (b) **Compare and contrast the winding up of an insolvent company with the dissolution of an insolvent partnership. (10marks)**
[25marks]

BARRISTERS QUALIFICATION EXAMINATION 2010

PAPER V: Civil Procedure and Civil Evidence, and Professional Conduct

Part A (Civil Procedure and Civil Evidence)

QUESTION 1

Mr. Tse, the Plaintiff in HCA 3710 of 2009, owns a large second floor flat in an old low rise block on the Peak where he lives with his family. Mr. Chung, the Defendant, owns the third floor flat immediately above. Mr. Chung recently undertook major renovation works to his flat that caused unbearable noise and disturbance for the Tse family and others in the block. Mr. Tse also noticed water seeping at the ceiling of his kitchen and 2 of his 4 bathrooms. The mains water supply had to be turned off to investigate the water source. In the mean time the Tse family has moved into a smaller serviced apartment at Pacific Place.

The Statement of Claim pleads nuisance and negligence and includes a claim for cost of repairs, alternative accommodation and damages. Mr. Chung filed a Defence denying the claim, alleging any water damage is caused by reason of old rusty pipes, the age and general state of repair of the building, and disputing the need and cost of the alternative accommodation. The Plaintiff's Timetabling Questionnaire states Mr. Tse would be the only witness at trial and he needed 28 days to exchange witness statements. The Defendant's Timetabling Questionnaire states Mr. Chung would be the only Defence witness and he agreed to exchange his statement in 28 days. The CMC summons sought that agreed direction.

Mr. Chung approached Mr. Tse personally with a view to resolving the matter. Mr. Chung apologised profusely. On a without prejudice basis he agreed to pay Mr. Tse's repair costs and legal fees if Mr. Tse now stopped running up legal fees. Mr. Chung's solicitors would formally end the proceedings for them both after Mr. Tse was fully reimbursed. Mr. Tse agreed in principle, settled his former solicitors' legal fees and terminated the retainer.

Mr. Tse sent Mr. Chung various bills and receipts for legal fees, the serviced apartment and quotations from Burns & Partners for the repairs. However, the water seepage became worse spreading to other rooms. Mr. Tse recently discovered several paintings have also sustained water damage. One is an extremely valuable painting he bought at auction six years ago for HK\$2.3million.

Question continued on next page.

Shortly thereafter he was offered HK\$3million for the painting and knows that since then it has greatly appreciated. He has been advised to send the painting to appropriate experts in London to be professionally restored. Mr. Tse has no idea how the water damage will impact on the value but as far as he is concerned Mr. Chung has destroyed an irreplaceable artwork and should be made to pay. When Mr. Tse told Mr. Chung he will be claiming at least HK\$5million for the painting Mr. Chung said that was ridiculous and now refuses to pay anything. Mr. Chung also accused him of being negligent in leaving the painting on a damp wall when he moved out.

Mr. Tse has retained new solicitors to proceed with HCA 3710 of 2009. On searching the Court file they discovered there was a Case Management Conference 10 days ago, no one appeared for the Plaintiff and the claim was provisionally struck out. Mr. Tse says he never had notice of the CMC. His solicitors came off the record a month before the CMC. He does not recall any notice posted to his Peak address but he has not been living there and the letter boxes are in the lobby which has been obstructed by Mr. Chung's builders and materials for several months. Mr. Tse suspects Mr. Chung and his solicitors deliberately colluded to have the action struck out.

Mr. Burns a successful architect and senior partner of Burns & Partners owns the other second floor flat. Mr. Burns thinks the water damage was caused by the negligence of Mr. Chung's workers. Mr. Burns has years of experience so Mr. Tse trusts his opinion on the real cause. Mr. Burns is willing to be a witness for Mr. Tse. As Mr. Tse has had to move out with his family, he has decided to take this opportunity to renovate his own flat. Mr. Tse has instructed Burns & Partners to prepare plans for the redesign, including 4 new bathrooms and a modern kitchen. Mr. Chung has been trying to make the other owners spend vast sums to replace all the pipes, reclad the block and upgrade the common areas, including adding a grand marble entrance. All owners have refused to contribute. Mr. Burns and Mr. Chung have fallen out over Mr. Chung's proposals.

You are instructed to advise Mr. Tse on procedure and evidence. The Timetabling Questionnaire is no longer accurate and the CMC summons does not seek all the directions that are necessary. Your instructing solicitors need to know exactly what they must do to proceed with the action.

- (1) Advise the detailed steps that must be taken in respect of the strike out and evidence giving reasons. You should explain the basis of any application, the tests to be applied and the procedure involved. If you require any additional instructions you should set out what is required and why.**
(25marks)
- (2) Draft any necessary summons(es) for any orders or directions sought. Do not draft the heading (the title to the action and parties).**
(25marks)
[50marks]

QUESTION 2

Over the past 10 years Mr. Poon has brought several separate actions against different parties in respect of failed business ventures. His funds are nearly exhausted. He has no known assets in Hong Kong. He is the Plaintiff in HCA 7774 of 2007 against Golden Treasure Limited (“Golden”) as Defendant.

On 15th October 2010 in HCA 7774 of 2007 judgment was entered in favour of the Plaintiff in the sum of HK\$13million with a costs order nisi for costs to be taxed if not agreed.

The figure is higher than a sanctioned offer Mr. Poon made to Golden in a letter dated 4th January 2010. The offer was to settle the claim and counterclaim on condition that Golden pays an additional sum of HK\$10million to him. Golden did not take up the offer. There may be some ambiguity as to the meaning of “*additional sum*”. Golden had previously settled fees of HK\$200,000 for Mr. Poon. There has been considerable animosity between the parties.

In 2003 Mr. Poon brought HCA 3375 of 2003 against Billion Treasure Limited (“Billion”). The action was dismissed with taxed costs to Billion. Mr. Poon is the paying party and Billion the receiving party under an Allocatur dated 20th March 2007 in the sum of HK\$1.2million.

Mr. Poon has never paid the HK\$1.2million. Billion has never found any assets against which to enforce. Billion and Golden are related companies. Billion is aware that in HCA 7774 of 2007 Golden made a payment into Court of HK\$1million that now stands to the credit of Mr. Poon. Billion is trying to recover that HK\$1million in partial satisfaction of the HK\$1.2million Allocatur.

Golden has taken out a summons in HCA 7774 of 2007 pursuant to Order 50, Rules of the High Court for payment out of the sum of HK\$1million, being funds in Court, in part satisfaction of the Allocatur. Mr. Poon wants you to advise and oppose the summons. He has no intention of ever paying a cent to Billion. He wants the funds in Court to immediately be paid out directly to him in part satisfaction of the HK\$13million judgment. However, Golden has appealed against the judgment.

Advise Mr. Poon on the following:

- (1) The HCA 7774 of 2007 costs order nisi. How can Mr Poon maximise his recovery? Explain the basis of your advice giving reasons including what must be done and how any tests would be applied to the facts. (20marks)**
 - (2) Golden’s summons in HCA 7774 of 2007 for payment of the funds in Court. (30 marks)**
- [50marks]**

Part B (Professional Conduct)

QUESTION 3

PART A

Betty, who has been a barrister in private practice for six months, is approached by Sammy a solicitor and asked if she will defend Tommy Ho who has been charged with obstruction. Tommy is a member of 'People for the Trees' a group who regularly protest against the Government's slope stabilization policy because it causes, in their words, "the premature death of healthy trees."

Betty checks her diary for the trial date and sees that she is available. She agrees a fee with Sammy and he promises to send her the case papers. She later holds a conference with Ho.

Five days later she is approached by Susanna, another solicitor, who wishes to brief her in a commercial fraud case which has been set down in the District Court for 75 days. Betty readily accepts the brief. Betty then notes that the dates of the two cases clash. She forgets to inform Sammy. Two months later, as she is preparing the fraud case she calls Sammy and tells him that because she is often instructed by the Department of Justice on *fiat* she does not think it would be a good idea for her 'to take on the Government' in Ho's case, and that she cannot represent Ho. She adds that, from what she learned at the conference, Ho is as "guilty as sin, anyway." She sends the case papers back to Sammy three weeks later.

Betty later holds a conference with the lay client in the fraud case. Susanna introduces the lay client, Diana Dixon to Betty and Betty discusses the allegation of fraud with Diana. Diana tells her that although the sums of money which were alleged to have been misappropriated had been taken by her, she felt no shame because everyone in the top echelons of the company was doing the same thing at the time.

Diana tells Betty she had been quite surprised to be charged with 57 counts of fraud, false accounting, obtaining property by deception, theft and conspiracy to defraud and she was amazed that the team of eight forensic accountants used by the prosecution had managed to unravel the complex structure which she, Diana, had devised to hide the disappearance of the cash from 'prying eyes.'

Throughout the conference Diana describes this structure as the 'offshore hiding place'. Diana tells Betty that she is confident that the prosecution will never prove her involvement in the case and Betty then tells Diana that she must not give evidence at trial, because the prosecutor will try to "tie her up in knots and get her to admit her guilt." Diana replies, "I'm in your hands on this."

At trial Betty cross-examines the prosecution witnesses by suggesting to them that Charlie Chan the CEO of the company was the person who devised the offshore hiding place for the funds.

Question continued on next page.

On the last day of the trial Diana does not attend court and is never seen again.

Susanna asks to withdraw from the trial and is given permission to do so. The trial judge, however, asks Betty to remain in court and assist him as necessary. Betty refuses saying, "I simply have no instructions to do so."

Discuss all issues of professional conduct which arise on the above facts in respect of Betty's conduct, with reference to the Code of Conduct of the Bar of the HKSAR.

Additionally provide your own opinion as to how you would have conducted yourself in each of the factual situations set out above.

(25marks)

PART B

Boris, a barrister, is instructed by Stanley a solicitor in a contractual dispute. Stanley asks him to prepare an opinion on the issue of undue influence having been exerted on the vendor during negotiations for the sale of an industrial building. Stanley requests that his opinion be prepared as a matter of urgency prior to Stanley's upcoming conference in ten days time, with his client. Boris agrees to do so and they agree a fee for the work.

The day before the conference Boris attempts to locate the case papers, but cannot find them. He finds out later that his secretary had mistakenly sent the papers for storage in the warehouse in the New Territories, when she was tidying the office.

- (i) With reference to the Code of Conduct of the Bar of the HKSAR describe what Boris should do in this situation. (4marks)**
- (ii) When should he do it? (3marks)**
- (iii) Advise Boris on any other issue of Professional conduct which arises in respect of this situation, with reference to the Code of Conduct of the Bar of the HKSAR. (3marks)**

Boris eventually takes the matter to trial in the Court of First Instance and, during submissions, informs the court that, "with all due respect to Lord Nicholls in *Etridge No. 2*, the personality of the parties has no role to play in undue influence cases. I should know because I was the victim of a similar situation when I bought my flat and I can assure you that my personality is very well-balanced, and I was still badly affected by it all. This is a clear case where the law actually is an ass, My Lord."

- (iv) Advise Boris on any issue of Professional conduct which arises in respect of this situation, with reference to the Code of Conduct of the Bar of the HKSAR. (2marks)**

Question continued on next page.

At a later stage of the trial the judge asks Boris if the issue is not really one of ‘presumed undue influence’, and Boris readily agrees with him. Boris is aware that the use of this particular term was disapproved of in Etridge’s case. Boris makes no mention of this fact because, as he tells his clerk after court, he has the duty to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged, and it is not part of his function to “stab his own client in the back” by telling the court about dubious decisions which might hurt his case.

- (v) Advise Boris on any issue of Professional conduct which arises in respect of this situation, with reference to the Code of Conduct of the Bar of the HKSAR. (3marks)**

During the trial Boris picks up a document from the Bar table and discovers that it is a memorandum from one of the other side’s witnesses, which is very damaging to their case. Boris decides to use it later in cross-examination of this witness if the opportunity arises. He makes a photocopy of the document and replaces the original on the bar table.

- (vi) Advise Boris on any issue of Professional conduct which arises in respect of this situation, with reference to the Code of Conduct of the Bar of the HKSAR. (3marks)**

During earlier conferences with the lay client Boris had been told by him that the initial agreement had been signed after a number of telephone conversations had taken place between the lay client and a Mr. Alex Chan. When the lay client gives evidence at trial he recounts how the calls from Chan had been made shortly after the signing of the agreement. When Boris confronts his lay client about his evidence the lay client tells him that he cannot remember when the calls were made, but that they had definitely been made either before or after the signing of the agreement.

Boris goes back into court and informs that judge that because his lay client has committed perjury he cannot in good conscience continue to represent him. Boris then asks for leave to withdraw from the trial.

- (viii) Advise Boris on any issue of Professional conduct which arises in respect of this situation with, reference to the Code of Conduct of the Bar of the HKSAR. (5marks)**

Question continued on next page.

After the trial has been ongoing for a considerable period of time, the lay client asks Boris if there is any other way the dispute might be resolved other than through the trial process. Boris tells him that there is no other effective way, as the other methods he might have heard about are too weak and never achieve good results for the client. Boris tells the lay client that the best way to obtain a result is to put the other side through the rigours of a full trial.

- (ix) Advise Boris on any issue of Professional conduct which arises in respect of this situation with, reference to the Code of Conduct of the Bar of the HKSAR.**
- (3marks)**
(25marks)
[50marks]

QUESTION 4

PART A

Wally, a barrister accepts Judy as his pupil for a period of two months. On the first day of her pupillage, Wally tells her “that things are a bit tight financially”, so he is going to uphold the traditions of the Bar and make her pay for all his expenses during her time as his pupil, and he further tells her that as he is “already doing her a big favour by taking her on she should reciprocate.”

Judy, who comes from a wealthy family, is amenable to this suggestion.

Wally has just completed a complex trial and his diary is now clear. Over the next eight weeks Wally engages in a flurry of social activity, taking Judy with him to breakfasts, lunches and dinners with his friends and acquaintances. Judy foots all the bills. At one particularly lavish function in a nightclub packed with celebrities and the media, Wally who is dancing on stage holding a champagne bucket, shouts to Judy who is some distance away, “Sorry there has been no work love, but that’s the Hong Kong bar for you. The joy of Counsel! Swings and roundabouts! You win some you lose some!”

Wally then falls off the stage and Judy eventually manages to carry him out of the club. She leaves him in the back seat of a taxi whilst she goes back into the club to retrieve his jacket, shirt and shoes.

The following month as Judy was using the photocopier in chambers she chats with Carson another pupil in chambers. Carson tells her that he is following Yasmina a leading silk in chambers for the next few days while she is conducting a Judicial Review on a human rights matter.

Later that afternoon, Judy asks Wally if she can also follow Yasmina for a few days. He explained that it was against the rules to follow anyone other than the appointed pupil master. He then asked her to assist him by continuing to prepare his tax return.

The following week, on the final day of her pupillage, Wally certifies that Judy is a fit and proper person to be a barrister in Hong Kong.

After Judy has moved on to her next pupil master Wally discovers that a set of papers for an appeal in the Court of appeal, which he had given to Judy to carry for him at the club, has gone missing.

After a fruitless search for them he calls the instructing solicitor and tells her that Judy has lost the papers and that he needs a new set. The instructing solicitor says that she is “fed up with pupils messing things up” and that she will write a formal letter of complaint to the Bar Council. Wally says that, “that would be a good idea and it would teach her a lesson.”

Question continued on next page.

Discuss all issues of professional conduct which arise on the above facts in respect of Wally's conduct, with reference to the Code of Conduct of the Bar of the HKSAR. Additionally provide your own opinion as to how you would have conducted yourself in each of the factual situations set out above. (25marks)

PART B

Wally is later instructed to defend Suzy Wong at trial in the District Court on a charge of trafficking in a dangerous drug. Suzy is charged jointly with two other persons, Ho and Li, with a single count of trafficking in heroin. All accused plead not guilty to the charge when they are arraigned.

On day one of the trial counsel for Ho objects to the admissibility of the confession allegedly made by his lay client, stating that the police had tortured Ho to obtain the confession. The trial judge tells counsel to submit his objections in writing and when Ho's counsel does so the judge informs the parties that he will proceed by way of the alternative procedure to determine the special issue.

The trial continues and the first prosecution witness, who is the arresting and cautioning officer of Ho, commences his evidence. At the mid-morning adjournment Wally goes with his solicitor David Chan, and his lay client Wong, who is on bail, to Chan's office to discuss whether or not Wong should give evidence in her own defence.

Whilst in the office Chan gives Wally a backsheet for the trial. Wally checks the details on the backsheet and notes that it has not been signed by the solicitor. When he asks Chan why this is so, Chan tells him that this is the draft backsheet and that the authenticated version will be provided at the start of the defence case as per his normal practice. Chan continues that Miranda, his clerk, must have told Wally this when she gave him his initial instructions in the case. Wally tells Chan that Miranda did say this to him when she was discussing fees with Wally. The backsheet instructs Wally to represent Wong at trial for the duration of the prosecution case.

Wally then tells Wong that, although this part of the trial is not really his concern, if she does not give evidence she will be convicted. He tells her that for her to have any hope at all she must let the court have her side of the story. Wong says that she is far too nervous to be able to offer a convincing version of events, but Wong says that this instruction is "100% non-negotiable". He tells Wong to sign an election to give evidence form, which she does.

Chan then notices that court is due to reconvene in five minutes and suggests that they go back to the court building, but Wally tells him that as there is a voir dire going on at present in respect of another accused, and that their client Wong is not affected by this, there is no need for counsel to be present for that part of the trial. Chan agrees that this is correct, and Wally sends Wong back to court. Wally and Chan continue to discuss the case and they eventually make their way back to court an hour later.

Question continued on next page.

On arrival Wally is surprised to find that the court is not in session and when the trial eventually resumes the trial judge berates Wally for being late. Wally tells him that they had been trapped in the court elevator which had stopped between floors. The judge tells Wally that he knows the lifts have problems, but that it had better not happen again. Wally assures the judge that he will be punctual in future.

After court Wally, Chan and Wong go back to Wally's chambers to discuss the events of the day. During the conference, Wally asks if Wong is more confident about testifying than she was that morning. Wong tells him not to be so rude and says that if he was in her position then he too would have a lot on his mind. She tells Wally not to be so patronising.

Wally takes Chan outside and tells him that he cannot continue to act for such a rude client and that he will be writing to the court advising it of his withdrawal from the case. Chan says that he fully understands and will inform the lay client. Wally then discards the case papers and goes home.

**Discuss all issues of professional conduct which arise on the above facts in respect of Wally's conduct, with reference to the Code of Conduct of the Bar of the HKSAR. Additionally provide your own opinion as to how you would have conducted yourself in each of the factual situations set out above. (25marks)
[50marks]**

**BARRISTERS QUALIFICATION EXAMINATION 2010
PAPER V: CIVIL EVIDENCE, CIVIL PROCEDURE,
PROFESSIONAL CONDUCT AND ADVOCACY
PART C (ADVOCACY)**

**CACC 5354 of
2010**

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CRIMINAL APPEAL No. 5354 of 2010
(ON APPEAL FROM DCCC No. 1234 of 2009)**

HKSAR	Respondent
v	
CHAN HO YAI	Applicant

**INSTRUCTIONS TO COUNSEL ON APPEAL AGAINST
CONVICTION & SENTENCE**

Counsel is hereby instructed to act on behalf of the Applicant in the above appeal.

Counsel is instructed to draft perfected grounds of appeal against both conviction and sentence and to attend the hearing in the Court of Appeal at 16.30 hours on the 29th day of October 2010.

Counsel is directed to the following documents which are attached:

- (1) Reasons for Verdict delivered by HH Judge Ho on 3 December 2009;
- (2) Reasons for Sentence delivered by HH Judge Ho on 3 December 2009.

Counsel should note that oral submissions in support of the application are to last no more than 20 minutes.

Please provide a copy of the skeleton argument, and authorities if any, to instructing solicitor by 10.00am on 29th October 2010.

Dated this 10th day of October 2010

Chin, Cheung and Chan
Solicitors for the Applicant

Reasons for Verdict

The accused, Lee Kei-lei, faced a single charge of Robbery, contrary to s. 10 of the Theft Ordinance, Cap. 210. The charge arose from the robbery, at knife point of the victim, David Wong, at 03:00 hours on 1 January 2010 outside No 99 Haak Mee Mung Street, Kowloon.

The prosecution case was that the accused followed the victim and his family, His wife Dotty and 12 year old son Daniel, from the car park adjacent to No. 99 and, as they approached the door of their residence at No. 99, the accused thrust a knife at the face of David Wong, and demanded that he hand over his wallet. When the victim did so, the accused took HK\$ 200 from it and ran off into the night discarding the wallet in the process.

The victim's family cried for help and these calls were heard by PW 4, police constable Ho Kan-lik, who chased the accused and apprehended him some 500 metres from the scene of the attack. The accused made no admission and the stolen property was not recovered. There was no forensic evidence in the case.

There were four important prosecution witnesses in this case, viz., the victim, his family members and the arresting officer.

Unsurprisingly, in view of the serious allegation against him and the fact that there were three witnesses to the actual robbery, the accused refused to take part in an identification parade. He was however positively identified by all three of the Wong family at trial and Mrs. Wong strengthened her identification by telling us that she had seen the accused on many occasions at his newspaper stall in nearby Ho Gwong Street. I am satisfied that the accused was the man.

During his very able submission of no case to answer Defence counsel focussed on what he described as 'pivotal points'. He noted that the victim had said in evidence that the robber shouted, "Don't move. Money or life.", but that Mrs. Wong had said the robber spoke quite softly and had said, "Robbery. Give the wallet quickly.", whereas the son testified that the man had said nothing at all but had just pointed the knife at his father. Defence counsel belaboured the point that the three family members had variously described the weapon as "Long and sharp" – the victim, "About 20 cm long and silver coloured" – the wife, and "50 cm long and very bright" – the son. In the event the weapon recovered from the inside pocket of the accused was a black-coloured pen knife with a blade of 5cm.

Defence counsel described this evidence as inconsistent and self-contradictory and so weak that no jury, properly directed, could convict upon it. With respect that is not the test at that stage of the trial. Had the prosecution produced some evidence of each element of the offence? Had they produced *prima facie* evidence of robbery by the accused? I found that they had. I therefore found that there was a case to answer.

The accused testified and the thrust of his evidence was that he had nothing to do with the robbery. He works near to where the victim family lives, he knows them and he would never commit a robbery. His arrest was a case of mistaken identity. All very well, what else could he be expected to say? The police officer PW 4 was adamant that this was the person he had arrested walking quickly away from the place where the robbery had taken place a few short seconds before.

A trial judge is in a unique position to judge the veracity and accuracy of a witness' testimony – he has seen and heard them in the witness box, sometimes for days on end. This is why an appellate court cannot interfere with a judge's findings of fact. That is the wisdom of our law. I discounted everything the accused said. I simply did not believe him. On the other hand I accepted all the prosecution witnesses as evidence of truth. One of them was even an experience police officer.

The fact that the money was not found is a neutral fact – the accused could have thrown it away. As to the knife, commonsense dictates that in the immensely stressful circumstances of a sudden and violent attack, victims cannot be expected to be fixated by the weapon brandished by an accused to the exclusion of all else. It is not surprising that there were minor discrepancies in their descriptions. The same stress could have resulted in the slightly varied recall of the witnesses as to the word used by the robber.

If the accused was the robber, would he have been in the nearby vicinity, close to the time of the robbery? Yes – and he was. Would he have been leaving the scene? Yes – and he was. Would he have been walking quickly? Yes – and he was. Would the victims have identified him given the opportunity? Yes – and they did.

I have recited above that I did not accept defence counsel's submissions on the so-called 'weakness' of this evidence at half-time. I have accepted the evidence of the prosecution witnesses in total – they are honest and truthful - and I accordingly find that the inferences of guilt which I drew at the half-way stage of this trial in rejecting the submission of no case to answer must now all be taken to their logical conclusions in finding the accused guilty of the offence as charged.

Dated this 3rd day of December 2009

Ho DJ

Reasons for Sentence

I take the view that the proper range of sentence for this heinous offence, before any discount I award in the light of the very able mitigation by defence counsel, exceeds the District Court's jurisdiction.

This was a robbery, at knife point, of a family with a young child.

The victim's dignity was shattered when he was made to hand over his personal possessions and further violation of his self-esteem occurred when he was forcibly deprived of his hard-earned cash. Violent street robberies of this kind must be deterred.

I take a starting point of around eight years' imprisonment and, in the light of the accused's continuing denials of having had any part in this offence, I do not feel that he warrants the normal one third discount – which is not set in stone in the laws of Hong Kong in any event.

Accordingly, I sentence the accused to a period of imprisonment of 6 years and 11 months.

Dated this 3rd day of December 2009

Ho DJ