

# BARRISTERS QUALIFICATION EXAMINATION 2013

## PAPER I: Contract & Tort

### PART A: Contract

#### QUESTION 1

In *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85 at 88, Cozens-Hardy MR remarked:

“If there is one principle more clearly established than another in English law it is surely this: It is for the court to construe a written document. It is irrelevant and improper to ask what the parties, prior to the execution of the instrument, intended or understood. What is the meaning of the language that they have used therein? That is the problem, and the only problem. In saying that, I do not mean to assert that no evidence can be admitted. Indeed, the contrary is clear. If a deed relates to Black Acre, you may have evidence to show what are the parcels. If a document is in a foreign language, you may have an interpreter. If it contains technical terms, an expert may explain them. If, according to the custom of a trade or the usage of the market, a word has acquired a secondary meaning, evidence may be given to prove it. ... But unless the case can be brought within some or one of these exceptions, it is the duty of the court, which is presumed to understand the English language, to construe the document according to the ordinary grammatical meaning of the words used therein, and without reference to anything which has previously passed between the parties to it.”

**Discuss the extent to which this is a correct statement of current law in Hong Kong, with reference to Hong Kong and English authority since 1911.**

**[25marks]**

## QUESTION 2

Tong owned a profitable hardware retail business in Mong Kok. In response to Tong's advertisement to sell the business including all stock in trade, Uma visited the shop on 1<sup>st</sup> May 2010 and was shown around by Tong.

At the inspection, the following words were exchanged.

**Uma:** I see you stock quite a lot of paint.

**Tong:** Sure. In fact this is the only paint store in Mong Kok, and paint is our biggest earner.

Tong then showed Uma a shed at the back of the shop. He said nothing, but Uma assumed it came with the business.

Uma said she would think about buying the business and went away. On 15<sup>th</sup> May 2010, Uma bought and took possession of the business from Tong. The purchase agreement contained a clause that is effective to prevent any pre-contractual statement from being incorporated into the contract as a term or constituting a collateral warranty. Uma immediately discovered that the shed belonged to the neighbouring herbal medicine business and was not included in the sale of Tong's business.

On 16<sup>th</sup> May 2010, Uma spent HK\$5,000 on advertising handbills which stated that her newly-purchased hardware business was the only paint store in Mong Kok. However, on 3<sup>rd</sup> May another paint store had already opened in Mong Kok; Tong knew this but made no mention of it when Uma bought his business. Uma did not bother to check whether Tong's was the only hardware store in Mong Kok. When Uma learned the truth about the nearby competitor, she had the handbills destroyed.

The absence of a nearby paint competitor and the use of the shed were both reasons for buying the business, but Uma was much more attracted by its central location in Mong Kok. Uma has been operating the business since the time she bought it, but it has recently started losing money because several new hardware stores have opened nearby.

Uma tells you that she now wants to 'get out of the deal' with Tong. She also wants to recover her expenditure on the handbills.

**Advise Uma with reference to Hong Kong and English authority.**

**[25marks]**

### QUESTION 3

Mandy is the franchisee of an Atlantic Coffee shop in Jordan. Atlantic Coffee Ltd ('ACL') is the franchisor.

According to the franchise agreement concluded between Mandy and ACL in July 2010, Mandy is obliged to pay ACL a monthly "premium" of HK\$50,000 and a monthly "commission" of 15% of the gross takings on all items sold at the shop. The franchise agreement expires in June 2015.

In August 2012, a large office block across the street from the coffee shop was closed for redevelopment. As a result, business in the coffee shop immediately declined. Mandy suddenly found it somewhat difficult to meet her premium and commission obligations under the franchise agreement.

On 1<sup>st</sup> October 2012, ACL wrote to Mandy expressing understanding of the new commercial environment in which she found herself. The letter contained the following passage:

"In view of the impact which the neighbouring redevelopment has had on your volume of business, and until that volume returns to its pre-redevelopment levels, we are prepared to reduce your monthly premium to HK\$20,000."

Mandy then began paying monthly premiums of HK\$20,000. However, she continued to experience difficulties making payments under the franchise agreement.

In a meeting on 1<sup>st</sup> February 2013, Mandy told ACL that unless her monthly commission obligation under the franchise agreement was reduced to 5% of gross takings, she would repudiate the agreement, close the shop and seek other business opportunities. Concerned at the impact of such a move on its good will in the Jordan area, ACL agreed to Mandy's demand until the shop's volume of business returned to its pre-August 2012 levels. Mandy immediately began paying commission at the reduced rate.

By October 2013, the volume of business at the coffee shop had returned to its pre-August 2012 levels.

Yesterday, ACL wrote to Mandy in the following terms:

"You must comply with your obligations under the franchise agreement. We demand that you immediately resume premium and commission payments in accordance with the agreement's written terms. Furthermore, unless we receive your unpaid premium obligations (HK\$30,000 per month since October 2012) and commission obligations (10% of monthly gross takings since February 2013), we will instruct our solicitors to take appropriate enforcement action."

**Advise Mandy as to whether ACL's demand and claims are enforceable.**

**[25marks]**

## QUESTION 4

NukeAsia Ltd is a contractor specialising in the construction of nuclear power plants. They entered into a contract with the Hong Kong Government to construct a nuclear power plant. The contract provided that work was to commence on 1<sup>st</sup> January 2013 and that it was to be completed by 30<sup>th</sup> November 2015. Time was expressed to be of the essence in every respect. NukeAsia was to receive a payment of HK\$20billion upon commencement of the work, and HK\$30billion upon completion. The contract document also provides as follows:

**‘Clause 44.** Should any event occur beyond the parties’ control which renders impossible completion of the project by 30<sup>th</sup> November 2015 (such as natural disaster, foreign invasion, fire, sabotage, or civil disturbance or protest), the [Government] may within 60 days of such event occurring serve a notice on [NukeAsia] substituting a later completion date, and the date so substituted shall become the new date for completion of the project.’

NukeAsia commenced work on 1<sup>st</sup> January 2013, and the Hong Kong Government immediately paid them the promised HK\$20billion.

When NukeAsia’s employees turned up for work on 2<sup>nd</sup> January 2013, they found that the construction site was occupied by anti-nuclear protesters many of whom had chained themselves to trees and structures making further work effectively impossible until they were removed. The protesters could have been quickly dispersed if NukeAsia had called the police for assistance. Instead, NukeAsia planned to wait out the protesters in the hope that they would leave of their own accord.

On 1<sup>st</sup> February 2013, the protesters were still present at the construction site and preventing the resumption of work. By this stage, it had become impossible to finish the project by 30<sup>th</sup> November 2015. On 15<sup>th</sup> February 2013, two things happened: (i) the protesters dispersed thereby permitting renewal of construction work; (ii) the Hong Kong Government served a notice on NukeAsia under Clause 44 designating a new completion date of 31<sup>st</sup> March 2016. NukeAsia asserts that the contract is no longer binding.

**The Hong Kong Government seeks your advice on two matters:**

- (a) Is the contract still binding?**
- (b) Assuming that the contract is not still binding, can it recover the HK\$20billion already paid to NukeAsia?**

**Supply the requested advice with reference to Hong Kong and English authority.**

**[25marks]**

## **PART B: TORT**

### **QUESTION 5**

Ip Kam Wo, the supervisor at SK Manufacturing Co. Limited ('the factory') engaged Lo Kin Nam of KK Engineering to repair equipment at its factory as he had done several times before. Lo and his worker, Waan Chuen Ming went to the factory where Ip instructed them to remove and repair a faulty separating unit ('the unit') from a sorting machine ('the machine'). Lo and Waan removed the unit and moved it 10 metres to an adjacent part of the factory to carry out the repairs.

The unit weighed approximately 1.5 tons. As directed by Ip, Lo and Waan used 2 of the factory's pallet jacks and a bearing trolley ('the equipment') to move the unit. The equipment was normally used by factory workers for transporting heavy rolls of fabric. It was in good, working condition. The maximum weight capacity of the pallet jacks was stated on the equipment as being 2.5 tons.

Lo and Waan completed the repair of the unit. They used the equipment to move the unit back to the machine so it could be reattached. Lo used one pallet jack to raise one end of the unit and position it near the machine. He placed two wood blocks under the raised end. Lo then positioned the second pallet jack at the other end of the unit and started to raise it. Waan was standing at the side of the machine waiting to bolt the unit back into place once Lo had jacked it up into the correct position. However, as Lo was jacking up the second side of the unit, it toppled over and fell on Waan, pinning him underneath and crushing his legs. Fire services personnel had to be called to free Waan from under the unit. He suffered serious injuries to his legs and feet.

**Advise Waan of his remedies.**

**[25marks]**

## **QUESTION 6**

Lo worked as an administrative assistant and driver for the Braemar Hill Tutorial College (“the college”). His duties included collecting visiting lecturers from the airport, driving senior staff members of the college to meetings and official functions and such other work as directed by the college’s Head of Administration. The College owned a number of vehicles which Lo, and others, drove.

College staff sometimes had to work late evenings helping at conferences, functions and receiving foreign guests from late night flights. The college canteen closed early in the evening so there developed a practice whereby staff would order food from elsewhere and bring it back to the college to share with colleagues when they had to work late. On some occasions they arranged this by food delivery service. On other occasions they collected the food by taxi.

One evening a junior clerk ordered takeaway food for staff working late at a college graduation ceremony. Lo had dropped off the VIP guests at the ceremony and was waiting there for it to finish before he had to transfer the VIPs to the graduation banquet which followed the ceremony. The clerk persuaded Lo to drive him to collect the food he had ordered for the staff. Sometime between 9:30 and 10:00 pm Lo drove the clerk to North Point along Cloud View Road. On one of the sharp bends in the road the car suddenly went out of control, mounted the pavement and struck down two pedestrians. They were both seriously injured.

**With reference to relevant authorities, advise the College of any liability it may have.**

**[25marks]**

## QUESTION 7

Mrs. Ma and the Wong family lived in adjacent flats in Pok Fu Lam Terrace. The Wong's were tenants of Flat C. They were a young married couple with one son who was 4 years old. He suffered from asthma so played indoors after school most days to avoid the worsening pollution in Hong Kong. Mrs. Wong was pregnant with their second child and she worked from home as a freelance researcher. Mrs. Ma, the owner of Flat D, was retired. She stayed at home most days aside from daily shopping trips to the local wet market.

Each day Mrs. Ma burnt incense outside her front door. The Wong's complained to the Incorporated Owners Committee of the building about the acrid smell and the smoke coming into their flat from Mrs. Ma's incense. Since moving in beside Mrs. Ma all members of the Wong family had suffered from headaches, nausea and breathing problems which they attributed to the incense burning. The Owners Committee pointed out to Mrs. Ma the Pok Fu Lam Terrace House Rule which stated that the burning of incense in common areas of the building was not permitted. This enraged Mrs. Ma who responded by burning even more incense all day long, making loud noises and using foul language in the corridor whenever she left her flat, and sweeping the burnt incense ashes on to the Wong's doormat every day.

One day the smell of incense and smoke was so strong in the Wong's flat that their son suffered an asthma attack. Mrs. Wong, who had a terrible headache and was resting at the time, grabbed her son and rushed from the building to hail a cab to Queen Mary hospital. While she waited on the footpath outside Pok Fu Lam Terrace a piece of concrete broke off the corner canopy of the building's podium floor garden, falling on to her left foot and breaking three of her toes.

**Giving a full and detailed legal analysis with reference to relevant authorities, discuss whether the Wong's have any rights and remedies.**

**[25marks]**

## QUESTION 8

**Answer all parts.**

**Each question is of equal value and carries 5 marks.**

- (i) Discuss in detail the 'economic reality' test for deciding whether a person is an employee.
- (ii) Explain the duty owed by an occupier to a trespasser.
- (iii) List and briefly describe all possible defences to private nuisance.
- (iv) With reference to relevant case examples, explain how the courts determine whether a system of work is safe.
- (v) Describe in detail the legal test applied in Hong Kong for determining whether a person is in breach of their duty of care.

**[25 marks]**

# **BARRISTERS QUALIFICATION EXAMINATION 2013**

## **PAPER II: Property, Conveyancing; and Equity** **PART A: Property and Conveyancing**

### **QUESTION 1**

On 27 September 2013 Agnes, an estate agent, showed Boris Flat 6C Green Gardens (the 'Flat'). Boris orally offered to pay HK\$10million to buy the Flat. Vera, the vendor of the Flat orally accepted the offer and Boris and Vera met at Agnes' office. At that meeting Boris and Vera agreed orally that completion would take place on 25 October 2013. Vera also agreed to include all her furniture in the sale.

Agnes wanted Boris to sign a written agreement to buy the Flat, but Boris refused saying that he would sign an agreement after he had taken legal advice from his solicitor. However, Boris did give Vera a cheque for HK\$100,000 by way of deposit.

On 2 October 2013 Vera sent Boris an e-mail message referring to their meeting and the agreed terms, save that the e-mail message did not mention that she would include her furniture in the sale. She told Boris that she was not happy about his refusal to sign the written agreement.

Boris replied to Vera by e-mail message saying that he would ask his solicitors to deal with the matter as quickly as possible. Vera sent a second email message to Boris telling him that their deal was off and that she had found another buyer and that she and the new buyer have signed a provisional agreement dated 20 October 2013.

- (a) Is there a valid contract for the sale and purchase of the Flat? (5marks)**
  - (b) Is there an enforceable contract for the sale and purchase of the Flat? (13 marks)**
  - (c) Assuming that there is an enforceable contract, can Boris obtain specific performance? (7marks)**
- [25marks]**

## QUESTION 2

On 1 October Victor as vendor and Peter as purchaser entered into a binding Agreement for Sale and Purchase of Flat 4, 4<sup>th</sup> Floor, Block 3, Blue Court. Blue Court consists of three blocks of flats erected in 1955 on Rural Building Lot No. 2468 at Deepwater Bay, Hong Kong. The agreement is in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance Cap. 219. Completion will take place tomorrow, 6 November 2013.

When investigating title, Peter's solicitor discovered that the Government Lease for Rural Building Lot 2468 restricts development on the lot to three storeys. Peter's solicitor also discovered that Blocks 1 and 2 of Blue Court each have three storeys and that only Block 3 has four storeys. On 15 October 2013 Peter's solicitor raised a requisition with Victor's solicitor explaining that there appeared to be a breach of the Government Lease and asking for evidence that the Government had consented to the construction of four storeys. On 3 November 2013 Victor's solicitor replied as follows:

*We have sent you the Occupation Permit issued in 1955. Victor has owned this flat for more than 30 years. It is very unlikely that the Government will try to enforce the height restriction in the Government Lease.*

- (a) **Advise Victor whether he is able to give good title. If you need more information to answer this question, say what information you need.**  
(18marks)
- (b) **Advise Peter whether Victor has breached the Agreement for Sale and Purchase by failing to show title.**  
(7marks)  
[25marks]

### QUESTION 3

Yip's father owned a piece of agricultural land in the New Territories (the 'Plot') where he grew vegetables. The adjacent land was unused and Yip's father started to use a dilapidated shed on the adjacent land to store his farming tools. In 1989 Yip's father repaired the shed and put a lock on the door. Yip's father died in 1996 and Yip inherited his father's estate.

Yip did not want to use the Plot and he leased it to Tom for five years. Yip also allowed Tom to use his father's farming tools which were stored in the shed on the adjacent land. Yip regained possession of the Plot in 2001. Yip has not used the Plot since then but his late father's tools are still stored in the shed on the adjacent land.

Zee, the owner of the adjacent land, has now discovered that Yip's farming tools are stored in the shed and that the door is locked.

- (a) **Advise Zee whether he can recover possession of the shed. (18marks)**
- (b) **How would your answer differ if Yip had volunteered the information that he would have been prepared to pay rent if Zee had asked him? (7marks)**
- [25marks]**

## QUESTION 4

Good Estates Ltd ('Good Estates') developed Goodland, an apartment block. In 1989 Good Estates sold to Alpha Ltd one equal undivided 100<sup>th</sup> share of and in the land on which Goodland is built and of and in Goodland together with the right to the exclusive use, occupation and enjoyment of Apartment 6B. Good Estates and Alpha Ltd then entered into a Deed of Mutual Covenant (the 'DMC'). The DMC was registered in the Land Registry.

Later Good Estates sold the remaining apartments in Goodland. 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:

1. *Every owner will pay monthly management charges,*
2. *No owner will do anything to damage the reputation of Good Estates Ltd, and*
3. *No owner will breach the Buildings Ordinance Cap. 123.*

The DMC contains details of exclusive use areas and their allocation between undivided shares and in addition provides that Alpha Ltd will enjoy the exclusive use of Apartment 6B and Good Estates will enjoy exclusive use of all other Apartments.

Beta Ltd bought Apartment 3C from Good Estates using a loan advanced by the Goodwill Bank Ltd which is secured by a first legal charge on Apartment 3C.

**(a) Can the above DMC covenants be enforced against the Goodwill Bank Ltd? (14marks)**

**(b) Beta has entered into a binding agreement to sell Apartment 3C with good title. During title investigation it is discovered that the DMC is not validly executed. Is Beta Ltd able to give good title? If you need more information to answer this question, say what information you need.**

**(11marks)**

**[25marks]**

## **PART B: Equity**

### **QUESTION 5**

In 2000, Steven set up a family trust known as the Steven Family Trust appointing his childhood friend, Ted, as trustee. The beneficiary of the trust was Steven's son, Ken. The trustee was expressly authorised to make investments in Hong Kong properties.

In 2011, Ted came across an apartment on the Peak (the 'Peak apartment') and considered it to have significant investment potential. Ted purchased the Peak apartment himself (using his own funds) at HK\$50million without informing the trust. In June 2012, he sold the Peak apartment for HK\$80million. Upon receipt of the sale proceeds of HK\$80million, Ted immediately took HK\$5million from the money to pay off a mortgage loan of HK\$5million from Lantau Bank on his Ferrari car which he purchased in March 2012.

Two months ago, Ted identified a potential apartment in South Bay (the 'South Bay apartment') for investment on behalf of the trust. The vendor, Venus, offered to sell the apartment at HK\$50million. Venus told Ted: "I'll pay you HK\$3million if you purchase the apartment at HK\$60million. Both of us will win and only the trust will lose. But that wouldn't bother you, would it?" Ted accepted Venus' payment and purchased the apartment on behalf of the trust at HK\$60million accordingly. At all material times, the market value of the South Bay apartment was HK\$50million.

The above facts have just come to light. Ted has just been declared bankrupt. Venus has fled to Utopia after selling the South Bay apartment and cannot be found.

**Advise Ken on what claims he may have against Ted.**

**[25marks]**

## QUESTION 6

ABC Ltd was the registered owner of an apartment on the Peak (the ‘Peak apartment’). The market value of the Peak apartment was at all material times HK\$10million. John was one of the two co-directors of ABC Ltd. The other co-director, Kelvin had always been a sleeping director, leaving the management of ABC Ltd to John.

In January 2013, John’s best friend, Carter, was in financial difficulties and needed a bridging loan of HK\$4million to pay for the second (and last) instalment of his Lamborghini car which he purchased 2 months ago at HK\$6million. He had always wanted to pay the second instalment by selling his holiday home on Lamma Island, but hitherto had not been able to locate a purchaser. Carter had also attempted to borrow money from Kowloon Bank but to no avail because he was not able to provide any satisfactory security (Carter’s holiday home had already been encumbered and hence not considered satisfactory security by Kowloon Bank).

Feeling desperate, he turned to John for help. John told Carter that ABC Ltd owned the Peak apartment, and offered to use the Peak apartment as security for a loan by Kowloon Bank to Carter. John said to Carter, “Kelvin does not care about the management of ABC Ltd. I’ll make the necessary arrangements.” A board resolution was duly passed by ABC Ltd to authorise John to sign the security documents on behalf of ABC Ltd. The loan transaction was duly completed: Kowloon Bank advanced a loan of HK\$4million to Carter, which loan was secured by the Peak apartment.

Two months later, Carter managed to sell his Lamma Island apartment. Upon receipt of the sales proceeds and discharge of the mortgage, Carter immediately repaid the Kowloon Bank loan with interest.

It was common ground that John was in breach of his fiduciary duty to ABC Ltd in diverting the Peak apartment as security for the loan to Carter, and that neither John nor Carter would in the normal course of events be entitled to benefit from the use of the Peak apartment.

John has recently been declared bankrupt. Carter’s Lamborghini car was crashed in an accident last week and is now worthless.

**ABC Ltd now comes to you for advice on the possible equitable claim(s) against Carter. Identify any additional facts that may be required in order for the claim(s) to succeed.**

**[25marks]**

## QUESTION 7

Nina Wong was a wealthy spinster. In 2000, she met Victor Chan, an unknown feng-shui master with very limited financial means, and quickly fell in love with him. Since 2009, they had been cohabiting, and Nina had all along been very supportive of Victor, both emotionally and financially.

In 2010, Nina transferred HK\$500,000 to Terence as trustee upon trust for the benefit of Victor, with 'further assets to be added to the trust from time to time'. In 2011, Nina covenanted with Terence to transfer to Terence, upon the same trust, any property she (Nina) might subsequently acquire under the will of her mother. One month later, Nina's mother died, and in her will she bequeathed 5,000 shares in ABC Ltd to Nina.

When Nina informed Victor of the above arrangements, Victor felt very excited and financially more secure. Soon afterwards, in January 2012, Victor purchased an antique Ming vase from Genuine Antiques Ltd, a small shop on Hollywood Road, upon representation from the shop owner that the vase was genuine, at HK\$1million. He paid the sum by credit card. The next day, he intended to sell the vase on to Sotheby's, but was told that the vase was merely a fake replica.

Feeling very disappointed, Victor told Nina that he had been deceived by Genuine Antiques and did not have sufficient money to pay off his credit card bill. Nina handed Victor a cheque in the sum of HK\$1.5million which she had made out in Victor's favour. At the same time Nina declared: 'This is to enable you to pay your creditors'. In fact Victor's debts at the time amounted to only HK\$1 million. Having paid off his creditors, Victor gave the balance of HK\$500,000 to his secret girlfriend, Sweetie. Sweetie used the entire sum to purchase a designer watch which has now doubled in value. When Nina discovered Victor's relationship with Sweetie, she was very angry and demanded the return of HK\$1.5 million from Victor. Victor refused and broke up with Nina. Nina was devastated and suffered a heart attack.

Before Nina died, she revoked all her previous wills and codicils and made a new will. In her new will, she gave all her property to her niece, Natalie. It was common ground that Genuine Antiques had made a fraudulent misrepresentation in relation to the Ming vase purchased by Victor. However, Genuine Antiques went into liquidation last week.

**Advise Victor and Natalie.**

**[25marks]**

## QUESTION 8

When Danny was diagnosed with terminal cancer in August 2013, he executed a will containing the following provisions:

- (1) To my executors, my cash in Kowloon Bank amounting to HK\$10million upon trust for such talented artists in Hong Kong as they shall select having regard to their knowledge of my personal interests in art.
- (2) To my executors, all of my ten 'The Queen's Diamond Jubilee Memorial Gold Coins' upon trust, one of which for my son, Sunny, with the remainder to be divided amongst my three daughters, Abby, Bella and Cara.
- (3) To my executors, HK\$100,000 upon trust for such of my nephews as my favourite football coach, Fred, may in his discretion appoint, and in default of appointment, to my daughters, Abby, Bella and Clara equally.

Danny also told his mistress, Melissa, about his illness, and that he intended to transfer all his 200 shares in ABC Ltd to her immediately so that she would be well-provided for after his death. Danny completed the share transfer form. But before he took any further action, he passed away after an unsuccessful operation in the hospital last week. He was survived by his son and three daughters. The share transfer form was found amongst his papers in his bedroom.

**Discuss the validity of the above dispositions.**

**[25 marks]**

# **BARRISTERS QUALIFICATION EXAMINATION 2013**

## **PAPER III: CRIMINAL LAW, CRIMINAL PROCEDURE & CRIMINAL EVIDENCE**

### **QUESTION 1**

Police Constable Wong is on patrol in uniform in Queens Road Central at 2 am. He hears a female voice shouting "robbery" and a few seconds later he sees a man later identified as John Chan running very quickly towards him. As Chan draws level with him the police officer jumps on top of him and wrestles Chan to the ground.

Chan then shouts at the police officer asking why the officer has attacked him. The police officer then tells Chan, "Because I am a police officer and I am on duty."

The officer then takes Chan to a nearby police station for enquiry.

**Comment on the actions taken and the words spoken by police constable Wong. Discuss police power of arrest. Include in your answer an outline of steps the police officer should take if any, prior, during and after the arrest. Cite relevant authority, if any, in your answer.**

**[25marks]**

## QUESTION 2

Police constable Chan is patrolling in Nathan Road at 4 o'clock in the morning when he sees two men in a rear lane. One of the men later identified as Wong was seen to be standing on the shoulders of the second man later identified as Lee. At the time Lee was looking all around.

Wong was seen to very briefly put his head in through the partially-opened window of a clothing shop at the location. Wong kept his head in that position for approximately five seconds at which time Lee spotted the police constable and shouted a warning to Wong who instantly withdrew his head.

Both men then ran off but were chased by police constable Chan who managed to arrest both of them nearby.

Wong and Lee were later jointly charged with one count of Burglary contrary to section 11(1)(a) of the Theft Ordinance, Cap. 210. [Extract attached]. Both were convicted after trial in the District Court - the trial judge finding that all the elements of the offence had been established to the required standard of proof. Wong and Lee were sentenced to four years immediate imprisonment.

Wong, who was 22 at the time of the offence and who has a clear criminal record, now wishes to appeal against both conviction and sentences, as he claims that he "hadn't gone in and nothing was taken".

**Set out your advice to Wong as to the merits of his proposed appeal, citing relevant authority. This should include reference to the procedure and any applicable time limits. It should also address any adverse consequences that might flow from the court regarding the appeal as being without merit.**

**[25marks]**

Chapter: 210 Title: **THEFT ORDINANCE** Gazette  
Section: 11  Number:  
Heading: **Burglary** Version Date: 30/06/1997

(1) A person commits burglary if-

(a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2); or

(b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.

(2) The offences referred to in subsection (1)(a) are-

(a) stealing anything in the building or part of a building in question;

(b) inflicting on any person therein any grievous bodily harm or raping any woman therein; and

(c) doing unlawful damage to the building or anything therein.

(3) References in subsections (1) and (2) to a building shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is.

(3A) The reference in subsection (2)(c) to doing unlawful damage to anything in a building includes-

(a) unlawfully causing a computer in the building to function other than as it has been established by or on behalf of its owner to function, notwithstanding that the unlawful action may not impair the operation of the computer or a program held in the computer or the reliability of data held in the computer;

(b) unlawfully altering or erasing any program, or data, held in a computer in the building or in a computer storage medium in the building; and

(c) unlawfully adding any program or data to the contents of a computer in the building or a computer storage medium in the building. (Added 23 of 1993 s. 6)

(4) Any person who commits burglary shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 14 years.

### QUESTION 3

Mega construction Company Limited, the corporate defendant, was on trial in the magistrates court facing a single count of failing to provide a safe system of work for its employees on a construction site in Hong Kong. The incident related to a worker who was not using a safety harness whilst climbing a platform five feet above the ground.

The matter was set down for one day. However, at the start of the trial the Defence Counsel put the prosecution to strict proof requiring them to prove all elements of the charge including such matters as the location of the construction site, proof of the contractual relationship between the main contractor and sub-contractor.

The prosecution then arranged for ten additional witnesses to be called.

During the prosecution case and after ten prosecution witnesses had been called to testify as to, amongst other things, the exact address of the construction site, the names of the relevant workers, the registered Hong Kong address of the defendant corporation, the content of various Codes of Practice in relation to work on construction sites as published by the Labour Department, and whether or not the day of the accident had been a Gazetted Public Holiday, the trial Magistrate addressed both the prosecutor and defence counsel and asked if it would be possible that a formal admission could be made in respect of the contractual relationships between the various parties who were operating on the construction site at the time of the offence as proving the above matters had already taken up one and a half days and no evidence with respect to the main issue of failing to provide a safe system of work had been heard yet.

After consultation between the parties, a set of admitted facts was drawn up outlining the various contractual relationships. The defence counsel explained the procedure to the authorised representative Mr. Tony Munroe, the manager of Mega Construction Company Limited. He then discussed the content of the admitted facts with him and he agreed with the facts.

The Defence counsel did not request Mr. Tony Munroe to sign the admitted facts as the authorised representative, but signed it himself. The prosecutor signed it as well.

The trial proceeded and eventually around 5:00pm on day two of the hearing the defendant corporation was convicted of the offence and a small fine was imposed by the magistrate.

- (a) In the light of what happened during this trial, was the course of action adopted by the two counsel in respect of the formal admission appropriate? If not, provide reasons for your decision, citing appropriate authority, if any. (8marks)**

*Question continued on next page.*

- (b) Was there any other way in which the length of this trial could have been reduced? Discuss formal admissions and the doctrine of judicial notice. Cite any relevant authority which supports your conclusion. (7marks)**
- (c) Might the defendant have been at risk of suffering any further detriment in respect of its conduct of the trial in this manner? Discuss costs. Cite relevant authority, if any. (10marks)**
- [25marks]**

## QUESTION 4

Susan Wong is on trial in the magistracy facing a single count of dangerous driving. One of the prosecution witnesses, Mr Chan (61) who is a bus driver, is giving evidence in the witness box. He says, amongst other things, the following:

*"At the time of the accident the road surface was dry, the weather was rather warm, it was not raining, the sky was relatively cloud-free, and a light wind was blowing from the north north east. The defendant's car, a green Porsche, was travelling at about 65 km/h in the inside lane. When her car veered to the left and hit the lamp post I was approximately 45.2 m behind it. When the defendant got out of the wrecked car she stood beside it and she was hysterical. I stopped my bus ran over to her and asked if she was okay. She replied to me in a shaky voice: "Look at what I have done now. That's my husband's car. I am in deep trouble. I was going far too fast."*

*During the 10 minutes I stood talking to her she looked to me as if she was drunk, she was also shaking and trembling uncontrollably. It was obvious she was in a deep state of shock."*

- (a) Comment on the admissibility of this evidence given by Mr Chan. Cite relevant authority, if any, in support of your conclusions. (8marks)**

As part of the defence case Susan wishes to call Mrs Lee to testify on her behalf. In her witness statement Mrs Lee describes herself as being a 'self-trained' expert in the 'certainties concerning chromatography of crystalline crystals' and her expert report provides an opinion on, *inter alia*, the 'deleterious effect of recent exposure to red and purple crystal-light emissions on the cognitive functioning and spatial awareness of drivers involved in high-speed accidents.'

Mrs Lee had concluded that Susan lost control of the car because her ability to drive it properly had been affected by the fact that she had been looking at a red crystal for twenty minutes shortly before the accident as part of her New Age therapy programme.

- (b) Comment on the admissibility of this proposed evidence to be given by Mrs Lee. Cite relevant authority, if any, in support of your conclusions. (8marks)**

One of the police officers, PC 1234, who investigated the accident, and who also possesses proper and relevant qualifications, is to be called by the prosecution to give expert evidence on the subject of the braking ability of the vehicle involved in the accident.

Before he is called to testify, however, the trial Magistrate, at the invitation of defence counsel, makes a ruling that this officer's evidence is inadmissible on the basis that, "this witness was a member of the investigating team."

*Question continued on next page.*

The trial Magistrate rules that this is a clear matter of admissibility holding that "...his obvious and close connection with the investigators..." makes any such evidence automatically inadmissible. The magistrate states that the law is clear on this point.

- (c) **Comment on the correctness or otherwise of the trial Magistrate's ruling on this issue, citing relevant authority if any.** (9marks)

**[25marks]**

## QUESTION 5

**With reference to statute and relevant authority, explain where the burden and standard of proof lies in the following examples?**

- (a) AU Wing-fat (AU) is charged with murder. His defence is insanity. **(5marks)**
- (b) CHAN Chun-ho (CHAN) is charged with ‘Assaulting a Police Officer’ contrary to section 63 of the Police Force Ordinance, Cap. 232. The prosecution case is that the driver of a Public Light Bus found CHAN asleep on the back seat when the bus reached the Kennedy Town terminus. Unable to rouse him, the driver called out to a passing Police Constable to assist. When the officer shook CHAN by the shoulder, CHAN lashed-out, punching the officer to the nose. CHAN lapsed back into unconsciousness. He only regained consciousness in the Ambulance. CHAN claims to have taken a traditional Chinese herbal remedy for the flu earlier before setting-off to visit his grandmother in Western. He says he “*completely blacked-out on the light bus*” and remembers nothing of the offence. **(7.5marks)**
- (c) FAN Chi-wing (FAN), is charged with ‘Possession of Arms Without a Licence’ contrary to section 13(1) and (2) of the Firearms and Ammunition Ordinance, Cap 238. The prosecution case is that during a search under warrant of FAN’s flat for drugs, a ‘stun gun’ was found in a plastic bag under FAN’s bed. FAN claimed to have found the stun gun near a rubbish bin outside his home some months ago. He thought it was a torch. He brought it home but could not get it to work. He placed the stun gun into a bag under his bed and forgot about it. **(7.5marks)**
- (d) KWAN Kwok-ping (KWAN) is charged with removing the serial number of a firearm contrary to section 48 of the Firearms and Ammunition Ordinance, Cap. 238. Section 48 states:  
Any person who without lawful authority-
- (a) alters, defaces or removes a serial number on any arms or ammunition; or
- (b) alters, defaces or falsifies a licence or an exemption under section 4(3), commits an offence and is liable to imprisonment for 2 years.

**(5marks)**

**[25marks]**

## QUESTION 6

LAM Kwok-ki, (LAM) and MAN Hon-wing, (MAN), are charged with ‘Burglary’ contrary to section 11(1)(b) of the Theft Ordinance, Cap. 210. The prosecution alleges the two burgled a flat in Cityview Apartments, Hung Hom, and stole a number of watches, items of jewellery and cash. No property has been recovered.

**Analyze the admissibility of the evidence of identification arising from the following scenarios and what, if any, special considerations apply?**

- (a) A ‘CCTV’ video was recorded by a camera in the lift depicting two men entering the floor to the apartment on the relevant date and time. The image was ‘burned’ onto a DVD from the apartment’s security computer. The DVD was watched by PC HO Sze-wong who recognized LAM and recorded the fact in his official Police Notebook. PC HO was escorting the DVD to Court when he died in an accident on the Eastern Highway. The DVD was destroyed and there is no copy. **(5marks)**
- (b) Clara is a domestic helper employed by the owners of the burgled flat. Her employers were away and she was sleeping in the maid’s quarters when two men broke in. Alerted by the noise, she watched the men ransack the living room through the peephole in the connecting door. She was too afraid to intervene. She described the men as, “*One wearing a dark tracksuit top with a hood, about 5’6” tall and another wearing a light-coloured anorak about 6’ tall.*” Following their arrest, Clara was invited to attend an Identification Parade at which she picked-out LAM as the man in the tracksuit and MAN as the man in the anorak. LAM is 5’9” tall and MAN is 5’4” tall. **(5marks)**
- (c) When she testified, Clara could not recall the number at which LAM or MAN had been standing on the parade. **(5marks)**
- (d) Wincy WONG was returning to her flat in the apartments after parking her car in the car-park. She saw two men running away up the ramp from the basement and gave a description to the Police. Her description was used to make an ‘identikit’ using facial re-construction and mapping computer software. **(5marks)**
- (e) Wincy has not attended an Identification Parade, but based on her clear description she identified LAM and MAN in Court. **(5marks)**  
**[25marks]**

## QUESTION 7

Ah Ming is a delivery driver for Kan Lik Baby Formula Products Hong Kong Limited (Kan Lik). Having loaded his van, Ah Ming was leaving the depot when he shouted to Ah Fei the doorman, *“Tell the foreman I’ve got 250 kilos for Park n Pay”*. Ah Fei repeated the message to the foreman who compiled an entry in the Kan Lik Delivery Book.

Ah Ming delivered a load of milk formula to Park n Pay Supermarkets. On his return to Kan Lik, Ah Ming’s van went out of control on the Tuen Mun Highway and he was killed.

A week later, Park n Pay telephoned Kan Lik to say that according to their stock records, only 150 kilos of formula were delivered by Ah Ming.

Ah Kwai is a friend of Ah Ming. At Ah Ming’s funeral he told Ah Ming’s girlfriend, *“Don’t worry, I made a killing on Ah Ming’s last load and I’ll make sure you are all right”*. The girlfriend made a statement to the Police to this effect.

Ah Kwai is found in possession of 50 kilos of baby formula in clean plastic bags and arrested. He claims to have purchased the formula from a hawker stall in Wanchai, but neither the hawker nor the stall can be located. The formula cannot be conclusively identified as originating from Kan Lik but Ah Kwai is nonetheless charged with Theft. Police try to contact Ah Ming’s girlfriend but she has emigrated to Mongolia and will not return to testify.

In his defence, Ah Kwai wants to tell the Court that Ah Ming had three previous convictions for theft from his employers.

Ah Kwai has one previous conviction for Theft (shoplifting) for which he received a fine of HK\$500 some eight years’ previously. At trial he testifies he knew nothing about the theft. He alleges Ah Ming’s girlfriend fabricated the evidence as he and Ah Ming *“were like brothers. She’s never liked us hanging-out and always had it in for me.”* Ah Kwai called his parish priest to testify that Ah Kwai was an upstanding member of the congregation.

**Advise the prosecution who wish to adduce the following:**

- (a) **The Kan Lik Delivery Book** (5marks)
- (b) **The Stock Record of Park n Pay – which is a computer print-out** (5marks)
- (c) **The girlfriend’s statement to the Police** (5marks)

**Advise Ah Kwai as to whether:**

- (d) **He can adduce evidence of Ah Ming’s previous convictions; and** (5marks)
- (e) **Under what circumstances would Ah Kwai bring his own convictions into evidence** (5marks)

**[25marks]**

## QUESTION 8

You represent LAM, MAN and NG who are charged with ‘Burglary’ and face trial before the District Court. The single count against them reads:

### Statement of Offence

Burglary contrary to section 11 (1) (b) of the Theft Ordinance, Cap. 210

### Particulars of Offence

LAM Ho-chun, MAN Kam-to and NG Ming-bat you are charged that on divers days between 12<sup>th</sup> February 2013 and 17<sup>th</sup> February 2013 in Hong Kong you entered flats ‘A’ and ‘C’ on the 3<sup>rd</sup> floor and flat ‘B’ on the 7<sup>th</sup> floor of a building situate at No. 13 Old Park Road, Kowloon, Hong Kong and stole a gold ‘Rolex’ wristwatch valued at HK\$67,000.00, one diamond finger ring valued at HK\$40,000.00 and one jade pendant valued at HK\$25,000.00, the property of June WONG, Karl KWOK and Lucy LAW.

- (a) Comment on the charge and, with reference to authority, advise your clients of the appropriate remedy. (5marks)**

You represent KAM Tin-mui a nightclub hostess charged with ‘Theft’ before the District Court. The prosecution case is that she stole a wallet, cash and credit cards from a ‘client’ – a Nigerian businessman - (PW1) whom she escorted from the Big Bang Nightclub to the Fai Fai Dei Budget Hotel for a massage. PW1’s statement is that he placed his wallet on the bedside table before falling asleep during KAM’s massage. He woke, some 3 hours later, when a cleaner entered the room. KAM and the wallet were gone. KAM says she left after PW1 fell asleep and did not steal anything.

For the prosecution, the cleaner (PW2) states that when she entered the room to change the towels PW1 was asleep but woke-up when she switched-on the light. She did not notice any wallet. PW3, the manager of the hotel, testified that after receiving the complaint, he called the Police. In cross-examination he stated that there were 14 staff on duty that night, including 6 cleaners – all of whom were provided with ‘pass-keys’. PW3 confirms KAM to have left the room about 30 minutes after she ‘checked-in’ with PW1.

At the close of the prosecution case, you make a submission of ‘No Case to Answer’.

- (b) With reference to authority, what is the appropriate test to be adopted by the Court in determining whether there is a case to answer in the case in question? (5marks)**

*Question continued on next page.*

The learned Judge rules KAM has a 'Case to Answer'. KAM gives evidence and is unshaken in her story during cross-examination. At the end of the trial, the Judge convicted KAM. In his reasons for verdict he stated (inter alia):

*“At the halfway point, I found there was a case to answer as there were clearly inferences of guilt which could be drawn against the defendant. I accepted the evidence of all prosecution witnesses and believed them. I find that the inferences can be taken to their logical conclusion and am satisfied beyond reasonable doubt that the defendant stole the victim’s property.”*

- (c) With reference to authority, comment on the Judge’s reasons for verdict in this extract? (5marks)**

Consequent upon her conviction, Counsel for the Prosecution made an application for costs against KAM. In his reasons for costs, the learned Judge stated:

*“This was a crime made all the more insidious by the dishonest conduct of the defendant. Persons such as she take advantage of honest visitors and in doing so bring the justifiably proud reputation of Hong Kong as a ‘World City’ into disrepute”.*

- (d) Comment on the Judge’s reasons for costs and support your answer with authority, where appropriate. (5marks)**

- (e) Advise KAM, who wishes to appeal against the award of costs to the prosecution. (5marks)**  
**[25marks]**

## **Barristers Qualification Examination 2013**

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

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

#### **QUESTION 1**

Sir Anthony Mason, former Chief Justice of Australia and the longest serving Non-Permanent Judge of the Hong Kong Court of Final Appeal, wrote in 2011 that:

“In so far as concerns have been expressed about the rule of law in Hong Kong, these concerns, as might be expected, spring from the presence of art 158 [of the Basic Law of the HKSAR] and its vesting of the power of authoritative interpretation, not in the courts, but in the Standing Committee. By so providing, art 158 departs from an important element of the common law conception of the rule of law. Because art 158 is a central element in the rule of law in Hong Kong, it follows that, to this extent at least, there is a difference between the rule of law in Hong Kong and the common law conception. This difference translates into a modification of judicial power by entrusting to another body outside the national and local court systems the power of authoritative interpretation.

This modification of judicial power excites two questions:

- (a) What are the consequences of the difference?
- (b) To what extent does the difference erode the values which the traditional conception of the rule is designed to support, for example, public confidence in the system of government and the law, including the judiciary and the legal system?”

(Sir Anthony Mason, *The Rule of Law in the Shadow of the Giant: The Hong Kong Experience* (2011) 33 *Sydney Law Review* 623 at 642-643)

**Discuss, with reference to the terms of Article 158 of the Basic Law, the interpretations of the Standing Committee of the National People’s Congress of the Basic Law, and the case law of the HKSAR courts, the two questions posed by Sir Anthony Mason above.**

**[25 marks: 10 marks allocated for discussing question (a) and 15 marks for discussing question (b)]**

## QUESTION 2

Alan and Kevin are HKSAR permanent residents who have undergone a same-sex marriage in a foreign jurisdiction.

Alan made an application for allocation of public rental housing managed by the Hong Kong Housing Authority under the “Ordinary Families” category, stating that he and Kevin form one single household.

The Housing Authority replied to Alan that his application was summarily rejected and would not be put on the waiting list for allocation of public rental housing because their application failed to satisfy this specific condition:

“The relationship between the Applicant and other family members must be either husband and wife, parent and child, grandparent and grandchild, a person and his/her unmarried sibling or a person and his/her dependent relative who is willing to live with the Applicant.”

The Housing Authority’s reply further explained that it could not be satisfied that Alan and his claimed family member, Kevin, are in a relationship of “husband and wife”, giving the phrase its ordinary and natural meaning.

Alan and Kevin applied for judicial review of the decision of the Housing Authority contained in the reply, contending that the decision violated their guaranteed right to equality before the law under Article 25 of the Basic Law of the HKSAR and right to freedom of marriage under Article 37 of the Basic Law.

The Court of First Instance dismissed the application for judicial review. Alan and Kevin appealed to the Court of Appeal. By a majority of two to one, the Court of Appeal dismissed the appeal. Although the judges of the Court of Appeal were unanimous in their views that the requirement of a relationship of “husband and wife” in the specific condition connotes a relationship of heterosexual marriage, they were divided over the question of whether this requirement is in violation of the guaranteed rights under the Basic Law.

The majority judges considered that the Hong Kong public authorities enjoy a margin of discretion in the formulation of policies for the allocation of limited public resources; that there is no international, constitutional or statutory obligation to accord recognition to a same-sex marriage contracted in a foreign jurisdiction; and that there are no strong and compelling reasons for the HKSAR courts to depart from what have been generally understood to be the law on a matter as fundamental as the marriage institution which has its basis in the social attitudes of the community. It is not within the province of the courts to make a new policy on a social issue.

*Question continued on next page*

The minority judge considered that the Housing Authority has failed to justify the denial in its public rental housing allocation policy of homosexual relationships as a familial relationship, particularly where the relationship has been solemnized through a legal procedure, albeit abroad. The judge held that he would apply a remedial interpretation to construe “husband and wife” in the specific condition to refer also to the parties of a same-sex marriage lawfully celebrated in a foreign jurisdiction.

Alan and Kevin have come to you for advice on the prospects of success of their intended appeal to the Court of Final Appeal.

**Advise Alan and Kevin.**

**[25marks]**

### QUESTION 3

Ferry service is the only means of public transport between Cheung Chau and Hong Kong Island and is operated under a licence granted by the Commissioner for Transport under s.28 of the Ferry Services Ordinance. The licence shall be subject to such conditions as the Commissioner shall specify. Since it is a means of public transport, the Commissioner must ensure the quality of the service. He is given the statutory power under s.28(3) to specify the minimum frequency of a licensed service “after consultation with a licensee and having regard to the financial circumstances of the licensee.” He is also given the statutory power under s. 33 to determine the maximum fares that may be charged.

Though there is no statutory duty to consult the public, the Commissioner had in the past always consulted the public before he exercised his statutory power under s.28. But in 2013, he only wrote to three main interest groups in Cheung Chau, including an NGO to which Mr. Winston Chan, a resident in Cheung Chau, used to belong. In response to the NGO’s request, the Commissioner replied by a letter dated 1 April 2013 that he had already informed the Legislative Council in a meeting in December 2012 that in the next tender process the Government would bring the difference between the fares charged on weekdays and holidays within 20%. But Mr. Chan left the NGO before it made its request to the Commissioner.

By Gazette Notice of 3 June 2013, the Commissioner determined that the maximum fares to be charged for the Cheung Chau services as from 1 October 2013. Under the new tariff the holiday fares exceed the weekday fares by 35%.

1. **Advise Mr. Chan whether he is likely to get leave for judicial review;**  
(7marks)
  2. **Advise Mr. Chan of the possible grounds upon which he can rely on to challenge the Commissioner’s decision through judicial review;**  
(9marks)
  3. **Would your advice be different if the Commissioner made a clear representation to all those present at a public consultation meeting held in April 2013 in Cheung Chau that the Government will definitely reduce the price difference below 20% in the next tender process?**  
(9marks)
- [25Marks]**

## QUESTION 4

Under the Medical Registration Ordinance (MRO), the Medical Council (Council) is the governing body responsible for the registration of medical practitioners in HK. Under s.21(1) of the MRO, the Council has power to hold a disciplinary inquiry in relation to a registered medical practitioner in respect of an allegation of professional misconduct. Under s.20BA, the Council may establish such committees for the better performance of its duties and exercise of its powers as it thinks fit, and the Education and Accreditation Committee (EAC) and the Preliminary Investigation Committee (PIC) are two of them.

Doctor Peter Cheung was a registered doctor in HK. In December 2012, he was subject to a disciplinary inquiry in respect of certain disciplinary complaints against him. The PIC, consisting of the 7 members of whom two must be members of the Council, conducted a preliminary investigation and submitted a report to the Council. In July 2013, the Council approved the report and found Doctor Cheung guilty of professional misconduct and ordered that his name should be removed from the General Register (GR) for 3 months. On 1 August 2013, Doctor Cheung's name was removed from the GR for a period of three months. On 1 September 2013, the EAC recommended the removal of Doctor Cheung's name from the Specialist Register (SR) as only medical practitioners were entitled to be included in the SR.

On 5 September 2013, Doctor Cheung appealed from the EAC recommendation to the Council and on 10 October 2013, his appeal was dismissed. The appeal was heard by the Council consisting of 7 members, two of whom were also members of the PIC who took part in the preliminary investigation of the complaints against him. On 17 October 2013, the Council adopted the recommendation of the EAC and removed his name from the SR.

**Advise Doctor Cheung on the following issues:**

- 1. Whether he has any possible ground(s) to challenge the Council's decisions through judicial review; (9marks)**
  - 2. What remedies he should apply for; (7marks)**
  - 3. Whether your advice would be different if the MRO provides that an aggrieved doctor may further appeal to the Court of First Instance (CFI) and the procedure of the CFI would be by way of rehearing? (9marks)**
- [25Marks]**

## Part B (Company Law)

### QUESTION 5

CC Ltd (“CC”) was formed in 2005 by members of the Go family and adopted Table A as its articles of association. Go senior was a shoe mender and inspired his sons and daughters to learn about the design and manufacture of shoes. The family combined their various skills and on forming the company it was decided they would focus on the production of canvas shoes.

CC initially out-sourced its production to various factories in SE Asia and concentrated on selling to shoe shops in the same region. This strategy proved to be highly profitable and resulted in a substantial increase in production, year on year. It also prompted the setting up of a subsidiary company (CCS Ltd) to run its own chain of shoe stores across SE Asia. Success was such that in 2009 CC listed on the Hong Kong Stock Exchange. After listing, 25% of the shares were held by the public, 75% by the Go family.

A large portion of the proceeds arising from CC’s floatation were used to establish its own mega factories. The Go family members were divided as to the location of the factories but it was eventually decided that one would be in Indonesia and the other in Thailand. Production was initially on target in both countries but was then severely hampered in Indonesia because of religious differences among its workers and in Thailand by flooding.

In 2011, Jo, who was not a family member and who had been educated in the USA, was appointed as a member of the board of directors with responsibility for CC’s expansion. Jo compiled an impressive feasibility study in respect of moving all of CC’s production to China. CC’s board of directors, and Go in particular, was impressed by his research, the apparent benefits of moving and by his profit forecasts. The board voted unanimously to move.

At much the same time (late 2012), demand for CC’s products fell. This was due in part to the worldwide recession but also to reports in fashion magazines suggesting that canvas shoes offer no support to a person’s feet and could ultimately lead to their feet being deformed.

A ‘crisis’ meeting of CC’s board was summoned and Jo then suggested that CC recruit Kin and Kith as ‘Turnaround specialists’. Both had experience in the US but were new to SE Asia and China. Kin and Kith proposed establishing a new range of shoes combining canvas with fake leather. This led to massive costs in terms of new machinery and raw materials. The rushed designs and preparation for the new shoes eventually resulted in numerous customer complaints and a lot of bad press but CC somehow managed to make a small profit. However, CC’s share price has fallen to an all time low.

*Question continued on next page.*

Go senior is extremely disappointed by the current state of CC's business. He wonders why they moved production to China given that production costs are higher there than SE Asia. There were problems in Indonesia but they were not insurmountable and overall the labour force was reliable. The flooding in Thailand could be better managed by new drainage. Go senior then did some probing into Jo's background and discovered that his family were influential in the town where CC's factories are now located and were the land owners of CC's factory site. Kin and Kith, he discovers, are Jo's cousins. Go senior also fears for the future of the business and would like the family to regain total control.

**Go seeks your advice:**

- (a) in the short term, whether there are grounds on which Jo may be removed from CC's board and, if so, the required procedures, and (10marks)**
- (b) in the longer term, as to the ways in which the Go family may regain 100% ownership of CC. (15marks)**

*[Answers do not need to discuss any requirements of the HK Stock Exchange or the Takeover Code.]*

**[25marks]**

## QUESTION 6

XYZ Ltd (“XYZ”) was incorporated in the Cayman Islands in 1997 by Zia, Yan and Xo who had been friends throughout their time at university in Hong Kong and who had planned to set up in business together on graduation. They had heard from relatives that it was cheaper and easier to incorporate in the Caymans, as opposed to HK, and signed the relevant forms on the day of their graduation ceremony. They each agreed to subscribe for 100 shares and were equally enthusiastic and committed to their business venture.

However, Zia, Yan and Xo spent the next few years as graduate trainees in separate multi-national companies as a way of amassing funds to set up their business and also learn more about actually running a business. It was not until 2004, when Zia happened to find suitable business premises for rent, that Yan and Zia resigned from their posts and committed themselves full time to XYZ. It was agreed that Xo would continue to be employed by a multi-national because he had the largest salary and if XYZ was slow in returning a profit or was otherwise in need of funds, he would be in a position to lend funds to XYZ.

In 2007, the owner of XYZ’s business premises asked if XYZ was interested in buying the premises from him. The price was HK\$10million. Xo agreed to lend XYZ HK\$2million towards the purchase and the BB Bank agreed to lend the remainder secured by a floating charge over XYZ’s general undertaking. At that time Zia, who dealt with most of the administrative matters, believed that their overseas status meant there was no requirement to register or otherwise record either the ‘friendly loan’ or the charge.

As time passed, Yan and Zia did establish a very profitable business. They occasionally met with Xo but increasingly Xo was difficult to get hold of by telephone. Xo had actually been promoted to a senior position in the multi-national, was working very long hours and for the time being was happy. He was aware that his work commitments increasingly meant that he had little time for XYZ but did not realize that Yan and Zia were deliberately excluding him from involvement in the day to day activities of XYZ. He had however heard through other friends that XYZ was very profitable. Xo still thought that maybe one day he, Yan and Zia would actually run XYZ together and that the business would then be even more successful.

In 2012, while thinking that the time may be right to buy an apartment, Xo remembered his HK\$2million loan to XYZ and also wondered how much dividend he might have amassed. He then realized that it had been a long time since he had seen or heard from Yan and Zia about the running of XYZ, been summoned to a meeting (albeit he had never attended any formal meeting), or seen any accounts. These thoughts prompted him to contact Yan and Zia but they did not respond to his calls.

**Xo is wondering whether he could bring about the winding up of XYZ and thereby obtain his ‘monetary share of the business’ and seeks your advice as to his legal rights.**

**[25marks]**

## QUESTION 7

Andrea and Bertha are childhood friends. During their teens they set up a business under the style “Daisy” through their Facebook accounts and their blog to sell matching handmade clothes for young children and their mothers. On their blog the girls put up a “pledge” to the effect that their mission is to dress and create beautiful mother and children.

After graduating from university, they decided to pool their resources to formalize their clothes making business. Andrea and Bertha also asked their father and boyfriend respectively to contribute financially to their business.

Upon the advice of Andrea’s father, Tom, who is a chartered accountant, they established (a) Daisy (BVI) Limited (“**Daisy(BVI)**”), a company incorporated in the British Virgin Islands as the holding company, and (b) Daisy (HK) Limited (“**Daisy(HK)**”), a company incorporated in Hong Kong which is the wholly-owned subsidiary of Daisy(BVI). The reason for adopting this structure was the advice from Tom that it is preferable to use a local vehicle to deal with landlords and suppliers. The intention at all times was that Daisy(BVI), in which the shareholders are directly interested, would be directing the business and affairs of Daisy(HK).

The shareholders of Daisy(BVI) are:-

Andrea	- 30%
Bertha	- 30%
Tom, Andrea’s father	- 15%
Mike, Bertha’s boyfriend	- 25%

The shareholding reflects their respective financial contributions to the business.

Andrea, Bertha and Mike are appointed directors of Daisy(BVI) and Daisy(HK).

Daisy(HK) adopts Table A as its articles of association. The Bye-laws of Daisy(BVI) provide that directors can only be removed at a special general meeting by special resolution.

To reflect their pledge and commitment to each other and to their common goal, Andrea and Bertha prepared a modified version of the “pledge” on their blog stating that the mission and purpose of the Daisy companies was to become the most famous mother-and-child clothing line so that mother and children everywhere will be well-dressed and good-looking. Each of the shareholders was asked to and did sign this statement.

*Question continued on next page.*

Daisy(HK) took a lease of premises in Central for the first “Daisy” shop, from which the clothing range was launched. Daisy(HK) was responsible for all the operations of the business, entered into tenancy agreements with landlords, supply contracts with suppliers, and also employment agreements with staff. Daisy(BVI) did not have any office or staff, but used Daisy(HK)’s premises and staff in Hong Kong. All management and operation decisions were taken at the Daisy(BVI) level and in Hong Kong.

The first “Daisy” shop was a success and soon the second and third “Daisy” shops were opened in Causeway Bay and Taikooshing. The “Daisy” brand became a local brand of repute, queues were often spotted outside its shops, and featured articles were written on it in promotional materials published by the Hong Kong Trade Development Council and other organizations promoting Hong Kong trade.

The practice of Daisy(HK) was that each year it would declare a dividend out of its distributable profits in favour of Daisy(BVI), which would in turn declare a dividend in favour of its shareholders. Consolidated accounts were prepared for Daisy(BVI) and Daisy(HK).

Six months ago, Mike (who is now married to Bertha) proposed that Daisy should branch out of clothing into the development and promotion of early learning kit and apparatus for young children, utilizing its goodwill to capture the ever-expanding market of early learning and education. Andrea opposed the idea as she was only interested in making clothes and did not want to branch out into an area in which she has no knowledge or experience.

Mike, however, was adamant that this was a viable and profitable business opportunity, and with the support of Bertha began to change the business focus of Daisy to early learning, by hiring a new team of staff to develop educational kit and entering into negotiations with kindergartens and nurseries to promote this new line of business.

Andrea opposed this course of action vehemently, claiming that the change was never agreed upon by the shareholders, and questioned Mike’s authority to take this new direction and incur the costs of the new business on behalf of the Daisy companies. She also raised queries concerning the costs proposed to be expended, as she recognized some of the staff proposed to be hired to be relatives or close friends of Mike.

In response, Mike gave notice to hold a board meeting on 30 March 2013, at which meeting Andrea was purportedly removed as director of Daisy(HK) and Daisy(BVI) by Mike and Bertha voting in favour of such resolution.

*Question continued on next page.*

Thereafter, Mike informed all the staff that Andrea was no longer a director, and prohibited the staff from providing any documents or information of the Daisy companies to her.

After the companies' year-end on 30 March 2013, Andrea discovered that contrary to previous practice, no dividend was declared by Daisy(HK) or Daisy(BVI). She then questioned Mike, who replied that since the companies needed funds to develop their new business, all the profits had to be reserved for business development and no dividend would be declared for some time to come.

**Andrea and Tom are now coming to you for advice. Andrea is concerned that she is kept in the dark as to how the companies' funds are being expended. She does not want to continue to do business with Bertha and Mike in this new venture. She wants to know what legal proceedings are open to her to redress the wrongs done by Bertha and Mike and generally to exit from the Daisy business. Please advise her on the options and steps available to her and Tom.**

**[25marks]**

## QUESTION 8

ITSolutions Limited is a company incorporated in Hong Kong. It adopts Table A as its articles of association. Sam is its majority shareholder and the person in control thereof. ITSolutions provides IT consultancy services to corporations. It has a team of expert IT consultants, who operate from 2 office premises in Central and Admiralty owned by ITSolutions. Apart from these premises and some computer equipment ITSolutions has few fixed assets of value. It has substantial current assets, consisting of bank balances and account receivables. Among them is a substantial account receivable of HK\$7million due from CorporateWhiz, a long-time customer of ITSolutions.

In 2012 Brandon, a well-known investor, was approached and invited by Sam to become a strategic investor in ITSolutions. Brandon believed the company had good prospects, and agreed to invest in ITSolutions.

To that end, Sam, Brandon and ITSolutions entered into a shareholders' agreement on 30 March 2012 containing the following key terms:-

- (1) Brandon would acquire 30% of the issued share capital from Sam and his nominees. Thereafter Sam and a nominee of his would hold 70% of the issued share capital;
- (2) The board of ITSolutions would be re-organized such that Brandon would be appointed director together with 3 other directors nominated by Sam (including Sam himself);
- (3) Brandon would be appointed Investment Manager of ITSolutions with a monthly salary of HK\$80,000 under a separate contract of employment; and
- (4) Sam warranted that ITSolutions would recover the account receivable due from CorporateWhiz within the period of one year from the date of completion of the shareholders' agreement.

Completion took place on 30 July 2012, whereupon Brandon made all the payments due, became registered as 30% shareholder of ITSolutions, and was also appointed director thereof. ITSolutions also entered into a service agreement with Brandon to appoint him Investment Manager, which appointment is determinable by either party on one month's written notice or payment in lieu of notice.

The business of ITSolutions did not turn out to be as good as expected in 2012 and 2013, affected by the uncertainty in the global financial markets, corporations adopting cost-cutting tactics and reducing "non-core" consultancy services like those offered by ITSolutions.

*Questions continued on next page.*

By mid 2013, the business of ITSolutions was quite hard-hit. At around the same time, Brandon noticed from the financial reports submitted to the board from time to time that ITSolutions has been making quite a few substantial payments – often to the tune of HK\$500,000 or more – to entities whose names he did not recognize. He made inquiries with the Finance Department and was told that these were for acquisition of new equipment to upgrade the company’s services. Brandon was not satisfied with this explanation and instructed his lawyers to make searches on these entities, and discovered in early August 2013 that they are companies incorporated in the BVI with no information on their shareholding or directorship.

A week later, the staff of ITSolutions mistakenly delivered some of the mail of Sam to Brandon, which contained a demand note from the BVI registered agent of one of the aforesaid BVI companies to Sam for payment of the outstanding service fee.

Meanwhile, Brandon noticed when he was looking into the accounts of ITSolutions that the company has yet to recover the HK\$7million account receivable from CorporateWhiz. There are rumours in the market that Sam has been negotiating with CorporateWhiz to start a new business venture together.

Brandon then raised these issues with Sam. Sam claimed that Brandon was over-suspicious, and denied that there was any wrongdoing on his part. Brandon then approached the other directors for support but they sided with Sam and accused Brandon of being over-suspicious for no good cause.

Notice has been given for ITSolutions to hold its annual general meeting on 30 September 2013. On 13 September 2013, Sam claimed to give notice on behalf of the board to add a resolution to be considered at the AGM, namely removal of Brandon as director. Brandon opposed such a course and attended the AGM on 30 September 2013 to protest, but despite that he was purportedly removed as director by Sam voting in favour of that resolution.

Immediately thereafter, ITSolutions terminated the appointment of Brandon as Investment Manager by payment in lieu of notice.

At the same time, Sam made a without prejudice offer to Brandon to buy back his shares. However, Sam claims that he has no liquid cash, and would instead procure ITSolutions to assign one of its 2 office premises to Brandon in return for his transferring his 30% shares to Sam.

**Brandon has come to you for advice. Please advise him on the courses of action open to him.**

**[25marks]**

# BARRISTERS QUALIFICATION EXAMINATION 2013

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

### Part A (Civil Procedure and Civil Evidence)

#### QUESTION 1

Your instructing solicitor Mr Fung acts for Mr Leung whose employment as a manager with Bizbank was terminated on 1 June 2012. Mr Leung is claiming against Bizbank for breach of contract in not paying him a full 8% annual performance bonus for the years 2006 to 2011 and failure to pay him any bonus for the year 2012. There is no dispute over his statutory claims and the action was properly transferred by the Labour Tribunal to the CFI. Bizbank's Defence is a bare denial save that paragraph 7 pleads:

*“The bonus claim is denied. Alternatively, the annual bonus was entirely discretionary. The Defendant will refer to the contract of employment at trial”.*

The Defence does not plead any written or oral terms or Bizbank's 8% bonus policy. The witness statement of Mr Drew a director of Bizbank states that managers were only eligible for the annual discretionary bonus at the end of a full year and Bizbank did not have to pay Mr Leung any bonus. Mr Leung has lost his original contract of employment but he recalls there were some clauses about bonuses. During the course of his employment Bizbank made some announcements and sent employees letters about allocation of their bonus. Mr Leung did not keep any of these. Mr Leung says he joined Bizbank because it was well known that Bizbank paid managers an annual performance bonus of 8% of business they generated. At Mr Leung's job interview Mr Drew confirmed the 8% bonus policy. He was told that all interviews were recorded. Mr Leung wants the recordings of all employee interviews and their remuneration records, including bonus allocation letters, from 1999 when Bizbank first opened in Hong Kong. He is sure they will show all other managers have and to this day still receive an 8% annual bonus.

There was a CMC in May 2013. Mr Leung wants to set the case was set down for trial as soon as possible. Mr Fung is considering appearing without counsel at the 2<sup>nd</sup> CMC next week. Mr Leung must be fully advised on all outstanding matters including the ramifications of any action. He is very concerned about costs.

**1. Advise Mr Leung on how he may obtain all the records or documents he wants. Your answer should give reasons and include advice upon:**

- (i) Any application, the relevant rules and the procedure to follow;**  
**(4marks)**

*Question continued on next page*

- (ii) The merits of all applications; (10marks)
- (iii) The likely orders the Court would make. (4marks)
2. Advise Mr Leung on the Defence. Your answer should include advice upon:
- (i) The bare denial in the Defence; (4marks)
- (ii) Any applications that may be made to clarify the Defendant's case including the relevant rules and procedures to follow and the merits; (8marks)
- (iii) The likely orders the Court would make on the advised application. (2marks)
3. Draft the substantive paragraphs of the application advised in answer 2(ii) above. Do not draft the intituling or heading and backsheet. (8marks)
4. The Defendant has taken out a summons to applying for leave to adduce expert evidence on bonus practice in the industry setting out proper directions for the exchange of without prejudice expert reports within 28 days, expert meetings 14 days thereafter, a Joint report 14 days thereafter and then for each side to file a final report within 21 days. Advise upon:
- (i) The Defendants summons including the merits;
- (ii) The likely orders the Court would make on the Defendant's application. (4marks)
5. Instructing solicitors would like to serve interrogatories. Advise upon:
- (i) Any relevant application, the relevant rules and procedure to follow;
- (ii) The merits of any application;
- (iii) The likely orders the Court would make. (6marks)
- [50marks]

## QUESTION 2

You are instructed on behalf of the Defendant Mr Ip. He has operated his business through a complicated structure of off-shore companies, without incurring personal liability for years. The various companies have entered into imprudent agreements and obtained substantial loans from the Plaintiff. In 2002 Mr Ip had to provide a personal guarantee for one of his companies. The Plaintiff has commenced 6 sets of proceedings against the various companies in an effort to recover huge sums due.

On 12 August 2004 the Plaintiff also issued a Writ against Mr Ip to enforce the guarantee. The Writ was served on 3 August 2005. The Statement of Claim was served on 28 September 2005. Mr Ip applied for Further and Better Particulars of the Statement of Claim in November 2005 and discovery in January 2006 arguing he was unable to serve a Defence unless and until the claim was better particularized. The Plaintiff provided the Further and Better Particulars by letter on 3 February 2006. Mr Ip served a bare denial Defence on 25 February 2006. Mr Ip sought Further and Better Particulars of the Statement of Claim again on 18 November 2006. The Plaintiff refused to provide the particulars so Mr Ip gave notice he would take out a summons to compel the Plaintiff to answer, but Mr Ip failed to do so.

During 2008 the parties tried but failed to negotiate a settlement. In that correspondence Mr Ip foolishly acknowledged the sum due in an effort to reach better terms. Therefore time started to run again under sections 23 to 25 of the Limitation Ordinance, Cap.347. The Plaintiff really wanted judgment against Mr Ip's companies that own property in Hong Kong so was warehousing the claim and would only proceed against Mr Ip if the other actions failed. Mr Ip thought it was better to let sleeping dogs lie. No further action was taken until 22 July 2010 when the Plaintiff issued a notice of intention to proceed. The Plaintiff changed solicitors blaming the former solicitors for causing delay. On 21 July 2011 the Plaintiff took out a case management summons. Thereafter the Defendant filed a Timetabling Questionnaire. The Defendant confirmed in his TQ that he did not intend to take out any interlocutory application and has not taken out any summons. No witness statements have been filed. Mr Ip's former employee Mr Lai witnessed Mr Ip signing the guarantee. Mr Lai now refuses to give a witness statement or return to Hong Kong for a trial. Mr Ip has been advised by leading counsel that he has no defence to the claim. He wants to put an end to the proceedings brought against him personally.

**Advise Mr Ip upon:**

- (1) Any application he can make to stop the proceedings, including the relevant jurisdiction and procedural steps he must follow. (6marks)**
- (2) The merits of the application advised in question (1). You should cite relevant authorities, principles and rules. (30marks)**
- (3) The likely Court orders after hearing of the application. (6marks)**

*Question continued on next page*

- (4) Other steps or applications Mr Ip could take to secure his position and put pressure on the Plaintiff in the event that the application to dispose of the entire proceedings fails. (8marks)**  
**[50marks]**

## Part B (Professional Conduct)

### QUESTION 3

Simon who is a solicitor contacted Barry, a Hong Kong Barrister who used to be a chiropractor. Simon and Barry were roommates when they were both studying at the University of Mong Kok

Simon seeks Barry's advice on a negligence action involving Donald who is a chiropractor. Barry and Donald were formerly in partnership together operating their chiropractic practice. Simon seeks Barry's advice because of Barry's expertise in respect of the operation of the "Laurie Lumbar Lengthener" a type of chiropractic equipment. Simon knows that Barry had both devised and wrote the operating protocol for the equipment which is now alleged to have caused injury to the patient, Veronica. She is suing Donald.

Barry is aware of the circumstances as he was still working as a chiropractor at the time of the incident. In fact he was present at the chiropractic office dealing with some administrative matters at the time Veronica was being treated. He heard the nurse shout out that there was a problem. He then offered immediate assistance by quickly shutting down the equipment and then providing first aid to Veronica.

Barry agrees to assist Simon by providing the sought after advice.

Barry agrees to write a short advice on the evidence in the negligence action and tells Simon that there will be no charge as "it is important to protect the reputation of one's friends."

Simon later calls Barry and instructs him to defend Donald in the action. Simon tells Barry that an expert witness will be called by the Plaintiff and that the expert, Professor Ho, must not be asked any 'difficult' questions in cross-examination as Donald is fearful that if the professor is embarrassed then he might not grant Donald a higher certification. The professor is chairman of the certification body. Barry tells Simon, "Well we are in the client's hands. He runs the case." Barry then drafts the defence to the claim.

Barry has been invited by Jenny Lam the coordinator of the Legal Writing course at the University of Mongkok to run the course for one term. He is required to design the course materials and conduct large group sessions. He is due to teach later this month. Barry has known Jenny for many years, they are close friends and she is his former chamber mate.

*Question continued on next page*

At the conclusion of the case Barry sends the papers to Jenny, with instructions to "photocopy all of these". There is also a handwritten note to Jenny which reads:

*"Dearest Jen, hope all is well I have been swamped. Sorry for not getting back to you earlier. Can you please arrange copies of these as course materials. I am sure the students will find them interesting. I have run out of time to produce new materials. I know something has to be produced to justify the fee. Please add my full title Barrister-at-law, Chambers address and contact details on the cover page in English and Chinese Thanks Cheers, B"*

**In relation to the professional conduct of Barristers in Hong Kong, comment on the actions of Barry.**

**[50marks]**

## QUESTION 4

Beatrice is a barrister accepts instructions from a family friend who recently qualified to practice in Hong Kong. She is instructed to represent Charlie Chan who faces a charge of wounding with intent. The trial has been set down in the High Court two weeks from now. She is currently briefed in a civil matter in the District Court trial which has already overrun by 6 days. She hopes it will end soon so she can prepare the case for Charlie Chan as this will be the first time she has been instructed to appear in the High Court in a criminal matter. She is keen to make a good impression on the solicitor and judge. Eventually the District Court case further overruns and it ends at noon the day before the High Court Trial.

Beatrice only manages to arrange to meet the lay client, Charlie Chan outside the High Court at 09:25 on the day of the trial, but on the day in question she is late and when she sees Chan at the doorway of the courtroom she tells him that she *"...better get started, so as not to upset the Judge."*

As they enter the court room the instructing solicitor, Rajesh Sharma Singh who is a foreign lawyer who recently passed the OLQE (Overseas Lawyers Qualification Exams) and has limited criminal trial experience, passes Beatrice two box files of additional documents disclosed by the prosecution. He also asks her if she would like to discuss the client's instructions as the client has changed some pertinent facts from his original instructions. She replies *"Are you serious? The DOJ expect me to go through this now? I'll quickly read it during the prosecution case. About the client's instructions just make a note on a post-it and highlight the parts and I'll try and read it during the morning break. There is another sentencing matter so we have a bit of time to catch up. "*

The trial commences and later, during Beatrice's cross-examination of a police officer who had taken part in the investigation, Beatrice makes reference to an internal memorandum written by the officer's supervisor. Beatrice frames one question to the officer as follows: *"You see officer I used to be in the Police as well. I was a Detective Chief Inspector and I know exactly how the system works. The court can take judicial notice of this. I am of the view that you were not acting properly during this arrest. In my opinion you should not have arrested the suspect so quickly. I personally would have asked a few more questions of the suspect. I think that you have breached the Rules and Directions. Unluckily for you, just before court convened this morning I found a memo on the floor under the prosecution side of the Bar table. It says that you had had two complaints made against you for unjustifiable arrests. I have it here. In my expert opinion that is clear evidence that you always fail to comply with the Rules and Directions for the Questioning of Suspects. What do you say about that?"*

*Question continued on next page.*

Later during the trial, whilst Beatrice is conducting the examination-in-chief of her lay client Chan, a number of her Summer ‘Pupils’ come into the courtroom. They sit – facing the jury – and behind Chan who is testifying from the witness box. One of the ‘pupils’ is seen to be eating a biscuit and the others laugh and pull faces whilst Chan is describing the events of the night of the alleged attack in his evidence.

Eventually the trial judge asks both counsel who these people are, and Beatrice tells him that they are law students and are her “Summer Pupils. The judge criticises their behaviour and directs Beatrice to take “appropriate measures”.

Beatrice then tells the judge that she is, “*too busy conducting my case*” and that there is nothing she can do. She also comments loudly to her opponent that the students’ reaction to the evidence of her lay client is just the same as the trial judge’s will be when he sums up the defence case to the jury.

During the luncheon adjournment Beatrice takes Chan aside and says to him, “*Sorry about the students – they are just youngsters. Don’t let it put you off when you continue your evidence this afternoon. I will warn them to behave, by the way you’re doing really well. You don’t look nervous at all. Keep it up.*”

**In relation to the professional conduct of Barristers in Hong Kong, comment on the actions and words of Beatrice.**

**[50marks]**

**BARRISTERS QUALIFICATION EXAMINATION 2013**

**PAPER V: CIVIL EVIDENCE, CIVIL PROCEDURE,  
PROFESSIONAL CONDUCT AND ADVOCACY**

**PART C (ADVOCACY)**

**CACC 1234 of 2013**

**IN THE COURT OF APPEAL OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
CRIMINAL APPEAL No. 1234 of 2013  
(ON APPEAL FROM DCCC No. 9999 of 2013)**

**HKSAR**

**Respondent**

**v**

**SUSIE WONG (32)**

**Appellant**

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

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Counsel is hereby instructed to act on behalf of the Appellant – the second accused at trial – 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 **XX:XX hours on the 9th day of November 2013**.

Counsel is directed to the following documents which are attached:

- (1) Reasons for Verdict of His Honour Judge Good dated 14 August 2013 insofar as they relate to the conviction of the lay client.
- (2) Reasons for Sentence in respect of the lay client delivered by His Honour Judge Good dated 21 August 2013.

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 8th November 2013**.

Dated this 5<sup>th</sup> day of November 2013

Chin, Chin and Chong  
Solicitors for the Appellant

## Reasons for Verdict

1. The two accused, Chan Faat (A1) and Susie Wong (A2) were tried before me in a trial lasting six days on a charge of conspiring together and with persons unknown to unlawfully traffic in a dangerous drug, namely Ketamine, this being contrary to s. 4 Dangerous Drugs Ordinance, Cap 134 and sections 159A and 159C Crimes Ordinance, Cap. 200.

### The Charge

2. The charge arose out of the detection at the airport cargo handling facility, by officers of the Police Narcotics Bureau, of packets of Ketamine weighing 50 grammes. The drugs were concealed in ceramic statues of cocker spaniel dogs which had just been flown into Hong Kong from Indonesia. The police allowed the drugs to be removed from airport to a flat in Portland Street, Mongkok where they allowed a controlled delivery to take place on the day particularised in the charge. The first accused received the goods from the police 'delivery men', and this receipt at the front door of the flat was witnessed by the police officers PWs 1, 2, 3 and 4. At the time of the delivery the second accused was seen to have been in the kitchen of the flat – which was out of the direct line of site of the front door – making tea.

### The Events Leading to the Charge

3. At about 20:00 hours on 2 January 2013 Flight AB 1234 delivered a wooden crate to Hong Kong. This was unloaded from the aircraft and was taken to the HKIA cargo-handling facility. Officers of the Narcotics Bureau intercepted the crate and inspected its contents. Inside two ceramic statues of dogs were found 30 transparent polythene zip-lock bags containing a white powder which, on being tested with a chemical reagent *in situ*, was confirmed to be Ketamine. The powder weighed 210 grammes. Subsequent analysis by the Government Laboratory confirmed that the powder in fact contained 50 grammes of Ketamine which is classified as a Dangerous Drug under the Schedule to the Dangerous Drugs Ordinance, Cap. 134.

### Delivery of the Ketamine

4. The police 'delivery men' PW's 3 and 4 arrived with the crate containing the dog statues at the flat situated at Room 5354, 54/F, 999 Portland Street about 22:30 hours the same day and were met there at the front door by the first accused. The second accused was in the adjacent kitchen at this time. The first accused paid PW 3 HK\$1,100 for the delivery charge and PW 4 then gave the first accused the delivery invoice which was an exhibit in this case.

### **The Police Raid**

5. Ten minutes later the police raided the flat and arrested the two accused. At the time of his arrest the first accused had the keys (exhibit P 99) to the flat in his right front trouser pocket.
6. The wooden crate (exhibit P 100) was in the lounge of the flat surrounded by tools (exhibits P 101 – 102) which were arranged on a mat (P103). The tools comprised a wire cutter, a pair of pliers and a hammer. A pair of white working gloves was found in the first accused's left front trouser pocket (p 104) and a chisel (P 105) was found in his right rear trouser pocket. A tenancy agreement for the rental of the flat from PW5 Madam Ho was found in the first accused's bag (P 106). Nothing of note was found on the second accused. Both accused remained silent when cautioned upon their arrest. No fingerprint nor DNA evidence was found linking either accused to the crate, the tools or to the flat.
7. The first accused participated in a video interview record which was adduced as part of the prosecution case (P107 & 107A). In this he admitted his role in the offence. He also gave evidence at trial and called two defence witnesses. In contrast the second accused remained silent after her arrest and declined to give or call any evidence, as was her right.
8. Consequently the only additional evidence which I had before me at trial concerning the role and involvement of the second accused came from the first accused.
9. CCTV recorded in the lobby and elevator of the building showed that the two accused arrived in a taxi at about 20:30 hours that day and that the accused entered the flat together at 20:35 – (P108).

### **The Submission of No Case to Answer**

10. At the close of the prosecution case counsel for the second accused made a submission of no case to answer. The only evidence against her was:
  - (a) She was found in the flat;
  - (b) The statues were delivered to the flat;
  - (c) The statues had been delivered to the flat shortly after she had arrived there with the first accused;
  - (d) She was present together with the first accused when the latter received delivery of the statues containing the Ketamine;
  - (e) When the goods were delivered, and prior to the arrest of the two accused, the evidence was that she was behaving passively and was not appearing to take any active part in the receipt of the goods.
  - (f) She was in the kitchen making tea at the time of the delivery. There was no evidence proving that the second accused knew that Ketamine was concealed in the statues. The only evidence linking her to the statues and the Ketamine therein was her presence together with the first accused. There was no other evidence at all linking her to the flat.
11. I ruled that the second accused had a case to answer.

## **The Defence Case**

12. The testimony of the first accused provided further evidence against the second accused. He placed her firmly at the scene of the delivery and at the very time of that delivery. He indicted clearly that she was in the kitchen making tea at the time of the delivery. He admitted to being a tea drinker. He was about to drink the tea which she had made for him. He had proposed to do so whilst unpacking the crate.
13. The first accused testified that he first met the second accused around a year before the delivery. They had become casual friends and she often helped him when he had goods to deal with. She usually helped him unpack the goods and reship them to customers in Hong Kong. She was paid by him on a casual basis – usually a few hundred dollars on each occasion.
14. There was no evidence from the first accused that the second accused had been told – or indeed knew – anything about the contents of the particular crate that day. The first accused had called her around 19:00 hours on the day in question and had told her that there was money to be made.
15. They had met in Shamshuipo and had travelled together in a taxi to the location. The second accused had been asked to make tea by the first accused and was in the process of so doing when the ‘delivery men’ arrived at the flat with the drugs.

## **Consideration**

16. The evidence in this case was largely circumstantial and much of the prosecution case was not disputed. There was no dispute that the statues contained dangerous drugs.
17. I was invited to draw inferences of guilt primarily from the proven association between the two accused and the fact of their joint presence when the statues containing the dangerous drugs were delivered to the flat, by police officers (PW’s 3 and 4) posing as workers of the transportation company.
18. In order to establish to my satisfaction that the two accused were both in possession of the statues containing the drugs I was able to draw an inference of joint possession. I relied on the second accused’s presence in the flat at the exact time of the delivery of the crate containing the drugs.
19. The second accused was also closely linked to the first accused – the evidence being that he had called her shortly before the delivery and had travelled together with her in a taxi to the very location to which the drugs were delivered.
20. She was facilitating his activities that night by ensuring that he had refreshments for the task at hand – the unpacking of the drugs using the tools found beside the crate. That is obviously why she was making the tea at the precise time he was taking delivery of the drugs.

21. In drawing an adverse inference against the second accused I am well aware that in order to be able to draw an inference against an accused it must be an available one – in the sense that it is possible for me to draw it having regard to the evidence. There is no need for it to be substantial or conclusive or reasonable. The question is – and it is the only question – “Can I draw an inference based on the evidence I have heard in this trial?”
22. I conclude that I can, and I am supported in my view by these questions which I pose to myself: “As drug traffickers are so sophisticated why on earth would she – or anybody else – be allowed to have been in that flat at the very time of the delivery of dangerous drugs if she was not there for the purpose of meeting those drugs? Why would she have been there at all if she was not involved in a conspiracy to traffick those drugs?”
23. The second accused has not given evidence. She did not have to. Woolmington lives on in Hong Kong. However, her unexplained and surprising failure to do so has at least two consequences. Firstly it leaves the prosecution case uncontradicted by evidence from the accused and secondly – and for that very reason – makes it inevitable that I draw the inferences set out immediately above.
24. I am left in no doubt whatsoever about the guilt of the second accused – the prosecution have established their case to the required standard – and I accordingly find her guilty of the charge as laid. I, of course, did not rely on the presumption in s. 47 of the Ordinance in arriving at this conclusion.

...

## Reasons for Sentence

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2. The sentencing guidelines for trafficking in Ketamine were set out in *Secretary for Justice v Hii Siew-cheng* [2008] 3 HKC 323 and I am bound to follow them.
3. Conspiracy attracts the same penalty as the substantive offence. There were 50 grammes of Ketamine involved in this offence. The sentence for that amount is six years imprisonment. I note that the Road Traffic (Amendment) Ordinance 2010 became operational on 17 December 2012 – long after the Hii guidelines were issued.
4. This amendment provides for harsher penalties if circumstances of aggravation exist and these circumstances include the presence in a driver's blood or urine of any amount at all of Ketamine.
5. The Legislature has clearly taken cognizance of the increasingly deleterious effect of this particular drug on society and has categorised the use of it as 'aggravating'.
6. I therefore take a starting point of nine years and reduce it by a period of three years to take into account the mitigating circumstances to which I have been alerted. I impose a sentence of six years immediate imprisonment.

...

11.