

BARRISTERS QUALIFICATION EXAMINATION 2008

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

QUESTION 1

By an agreement for sale and purchase dated 20 September 2008 Victor agreed to sell to Paul the Ground and First Floors of Better Building (the 'Property') a six-storey shopping centre in multi-ownership. The Agreement is in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance Cap. 219 except that Condition 7(1) of Part A of the Second Schedule to the Conveyancing and Property Ordinance is excluded and the following clause is included:

'Any requisitions or objections in respect of title or otherwise arising out of this Agreement shall be delivered in writing to the Vendor's solicitors within seven days after the date of receipt of the title deeds of the Property otherwise the same shall be considered as waived.'

Completion is due to take place on 20 November 2008.

Paul inspected the Property with Victor on 15 September 2008. At the time the Property was being used as a department store. Victor told Paul that he had bought the Property in 1987 shortly after the Occupation Permit was issued. In addition Victor explained that shortly after the Occupation Permit was issued, he had installed a cockloft between the Ground and First Floors.

Victor's solicitors delivered the title deeds by hand to Paul's solicitors on 4 October 2008 and Paul's solicitors raised requisitions on 6 October 2008. Victor's solicitors answered these satisfactorily on 8 October 2008. On 9 October 2008 Andrew Au, an architect, inspected the Property to advise Paul on renovations. Andrew prepared a report which he sent to Paul's solicitors on 12 October 2008. The report advises Paul that the construction of the cockloft required Building Authority consent. On 15 October 2008 Paul's solicitors sent the following requisition to Victor's solicitors.

'Please send us evidence that the consent of the Building Authority was obtained to the construction of the cockloft between the Ground and First Floors of the Property. Alternatively send us evidence that Building Authority consent was not necessary for this work.'

- (a) Advise Victor whether he must reply to Paul's requisition raised on 15 October 2008. (20marks)
- (b) If Victor is not obliged to reply, should he nevertheless try to do so? (5marks)

Give reasons for all your answers.

[25marks]

QUESTION 2

On 1 October 2008 Vanessa Vong as vendor (the 'Vendor') and Pansy Poon as purchaser (the 'Purchaser') signed a Provisional Agreement in respect of Flat 3A Blue Horizons (the 'Property'). A copy of the Provisional Agreement is attached.

On 2 October 2008 the Vendor's solicitor sent the Purchaser's solicitor a draft formal agreement for sale and purchase and the title deeds to Flat 3A Blue Horizons. The agreement was in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance Cap. 219. The Purchaser's solicitor asked for the following clause to be added to the draft formal agreement.

Completion will take place by way of solicitors' undertakings.

However, the Purchaser refused to include the above clause and as a result refused to sign the formal agreement or pay the further deposit on 10 October 2008. The Vendor's solicitors then wrote to the Purchaser's solicitors informing them that the Purchaser had breached the terms of the Provisional Agreement, that the initial deposit had been forfeited and that the Vendor was treating herself as discharged.

- (a) **Advise the Purchaser whether she can obtain specific performance of the Provisional Agreement.** (20marks)
- (b) **The Purchaser's solicitor conducted a search in the Land Registry on 2 October 2008 and found that the Vendor had entered into an earlier agreement for sale and purchase with Elsie Eu. The Vendor's solicitor advised the Purchaser's solicitor that the earlier agreement had been cancelled by mutual oral agreement. The Purchaser's solicitor insisted that a cancellation agreement should be signed and registered in the Land Registry before the Purchaser would sign the formal agreement. Does this affect your answer to question (a)?** (5marks)

Give reasons for all your answers.

[25marks]

Provisional Agreement for Sale and Purchase

THIS AGREEMENT is made on 1 October 2008

Between the Vendor - Vanessa Vong of Flat 3A Blue Horizons 16 Blue Road, Hong Kong and
the Purchaser - Pansy Poon of Flat 2B Gala Heights, 12 Gala Road Kowloon

The Vendor and the Purchaser agree as follows:

1. The Vendor sells and the Purchaser purchases Flat 3A Blue Horizons, 16 Blue Road, Hong Kong (the 'Property').
2. The purchase price is HK\$15,000,000.00 which shall be paid by the Purchaser in the following manner:
 - (a) HK\$ 150,000.00 to the Vendor on the signing of this agreement as initial deposit,
 - (b) HK\$ 450,000.00 as further deposit to the Vendor on the signing of a formal agreement for sale and purchase on or before 10 October 2008,
 - (c) HK\$ 4,500,000.00 being the balance of purchase price on completion.
4. Completion will take place on 5 November 2008.
5. Should the Vendor after receiving the initial deposit paid hereunder fail to complete the sale in the manner herein contained the Vendor shall immediately compensate the Purchaser with a sum equivalent to the amount of the initial deposit as liquidated damages together with the refund of the initial deposit and the Purchaser shall not take any further action to claim damages or to enforce specific performance.
6. The Purchaser will pay the stamp duty in connection with this transaction.

Victor Vong

Signed _____

Paul Pong

Signed _____

QUESTION 3

On 4 March 2005 Mark Man entered into an agreement to buy a flat at 2A Serenity Gardens (the 'Flat') for HK\$21 million. He financed his purchase from his own savings (HK\$6 million), his wife Marie's, savings (HK\$4 million) and by borrowing HK\$11 million from the Alpha Bank Limited ('Alpha ') which took a first legal mortgage over the Flat. Mark bought the Flat in his sole name. Completion took place on 4 April 2005 and Alpha's mortgage was also completed and dated 4 April 2005. The mortgage was registered in the Land Registry on 24 April 2005. Mark and Marie moved into the Flat on completion on 4 April. They have lived there ever since.

On 6 March 2008 Mark borrowed HK\$15 million from the Beta Bank Limited ('Beta'). Beta made the loan to enable Mark to pay off the loan from Alpha of which HK\$10 million was still outstanding. Mark repaid Alpha's loan on 6 March 2008. Beta took a legal mortgage over the Flat to secure a loan of HK\$10 million. Beta's mortgage was dated 25 March 2008 and registered in the Land Registry on 26 March 2008. Alpha discharged their mortgage on 25 March 2008 and the Discharge was also registered in the Land Registry on 26 March 2008.

Mark agreed to repay each of the loans by equal monthly payments of principal and interest. Alpha's and Beta's mortgages are by deed and are in the form set out in Form 4 of the Third Schedule to the Conveyancing and Property Ordinance Cap. 219. In each case the legal date of redemption is 6 months from the date of the mortgage.

On 10 March 2008 First Loans Limited obtained a charging order nisi against the Flat which it registered in the Land Registry on 18 March 2008.

In October 2008 Mark failed to make the repayments of principal and interest due to Beta.

- (a) **Advise Beta whether it can sell the Flat with vacant possession free from encumbrances? (20marks)**
- (b) **The Deed of Mutual Covenant for Serenity Gardens contains a covenant that each owner of undivided shares will pay monthly management fees. Mark has not paid management charges for the past year. Can the management company recover the arrears from Beta? (5marks)**

Give reasons for all your answers.

[25marks]

QUESTION 4

In 2005 Home Developments Limited bought Lot 987 in DD 123 in Tai Po ('Lot 987'). Lot 987 is agricultural land which, like all land in the immediate vicinity, was at one time used to grow rice. Individual lots in the area have always been unfenced. The vendor was Alec Au. Lot 987 is held under a Block Government Lease granted in 1908 for a term of 75 years from 1 July 1898 with a right to renew for a further term of 24 years less the last three days.

In 1985 Alex Au went to live in the United Kingdom. In 1987 without Alec's consent, Barry Bao started cultivating sweet potatoes on Lot 987. Barry also started storing his tools in a broken down shed on Lot 987. In 1992 Barry was seriously ill and his son Calvin returned to Hong Kong from Canada. Calvin continued cultivating Lot 987 for his father until Barry's death in 1993. Between 1992 and 1995 Calvin carried out repairs to the shed on Lot 987 and after fairly extensive repairs in 1995, Calvin fitted a padlock to the shed door. In 1996 Calvin granted Tony To a licence to use Lot 987 at a monthly fee of HK\$2000. Tony started using Lot 987 to grow vegetables and he constructed a chicken wire fence around Lot 987 to keep out dogs. Tony is still cultivating vegetables on Lot 987.

- (a) **Home Developments wants to recover possession of Lot 987. Calvin wants to recover possession from Tony. Advise Calvin. (20marks)**
- (b) **If Calvin said that he was willing to pay rent to the owner of Lot 987, would this affect your answer? (5marks)**

Give reasons for all your answers.

[25 marks]

PART B: Equity

QUESTION 5

When Annie, a successful spinster, was diagnosed as suffering from terminal cancer, she executed a trust whereby she transferred all her assets, which comprised of a 99 per cent shareholding in ABC Company Ltd., to Kowloon Bank Trustee Ltd. upon trust. The trust deed contains the following clauses:-

- Cls 7 The Trustee may in its absolute discretion pay the whole or any part of the Trust Fund to the Beneficiaries as are living or in existence or apply the Trust Fund for the maintenance, advancement or benefit of any one or more of the Beneficiaries as are living or in existence or in case of the demise of such Beneficiaries to the charities in such manner as the Trustee in its discretion thinks fit.
- Cls 10 The Trustee may, at any time and from time to time, nominate one or more individuals, trusts or companies to be Beneficiaries.

The Hong Kong Red Cross, a registered charity in Hong Kong, was the only named beneficiary under the trust deed.

On the same day the trust was executed, Annie wrote a wish letter to Kowloon Bank Trustee Ltd., saying the following:-

Without any intention to bind you, it is my sincere wish that on my death, you will make a final distribution of the trust assets as follows:-

| | |
|--------------------------------------|-------------|
| Kam Mei Lee (Annie's mother) | 10 per cent |
| Lau Siu Kee (Annie's close friend) | 40 per cent |
| The Utopia Buddhist Association Ltd. | 40 per cent |

Annie passed away a month ago. The trustee exercised its power under Cls 10 to appoint the above-mentioned individuals and company as beneficiaries. It then distributed all the trust assets in the same proportion as stated in the wish letter. Madam Kam was extremely upset. She demanded to see the wish letter, but the trustee refused to disclose it to her, saying that the letter was confidential and its decision was consistent with the wishes of the settlor and the terms of the trust.

Madam Kam now seeks your advice as to whether she had any right to inspect the wish letter.

(15marks)

Question continued on next page

Shortly after the distribution was made, the trustee found out that because of the defective advice of its tax advisor, it distributed the capital to the Utopia Buddhist Association in such a way as to cost the latter a huge tax liability.

The trustee seeks your advice as to whether its exercise of discretion can be declared invalid.

(10marks)

[25marks]

QUESTION 6

You are instructed by those acting for the managing committee of the Chan Shing Yue T'ong.

The Chan Shing Yue T'ong is unincorporated and current membership of the t'ong is unclear, but its objects are clearly defined as the worship of a common ancestor, providing scholarships and other benefits for the Chan Clan of Chiu Chow, as well as carrying out other charitable or benevolent services to the community at large. And there is a committee charged with managing its affairs.

It would be in the interest of the Chan Shing Yue T'ong to sell a pre-war building on Hong Kong Island to the developer who owns all the adjoining sites and who is offering to purchase the property at a price which is well above what the property is worth if valued on its own.

The title deeds show that the property was conveyed in 1934 to a Mr. Lee Kwong Wah, and it simply states that the property was conveyed to Mr. Lee "as trustee for the Chan Shing Yue T'ong". There is no separate trust deed setting out the terms of the trusts. Over the years, there have been various deeds of appointment and resignation of trustees, ending with those who are currently serving as committee members of the Chan Shing Yue T'ong being vested with the legal title to the property. [For the purposes of answering this question, you are to assume that the regularity of the appointment of the committee members and the devolution of title is not in doubt.]

According to your instructions, the money used to purchase the property in 1934 was raised by subscription amongst the mercantile community in Hong Kong and various overseas ports but the records are incomplete and it is not possible to compile a complete list of all the contributors or to identify how much each of them had contributed.

Advise the trustees and draft any necessary application to the Court.

[25marks]

QUESTION 7

Under the terms of the last Will of Jenny's grandmother, a leasehold property ("the Property") was specifically devised to Jenny and her mother as joint tenants. Jenny's mother was also named as Executrix of the Will. Jenny's grandmother died in January 1987 but probate of the Will was not granted until December 1990. Jenny's grandmother's estate is substantial and there is enough cash to pay all debts and expenses.

By a Declaration of Trust executed by Jenny in March 1987, Jenny acknowledged that she and her brother David had agreed that she would sell her interest in the Property to David in consideration of the sum of HK\$5 million paid to her by David and further declared "*that as from the date hereof I hold [full description of the Property] UPON TRUST for [full name of David] as joint tenant with [full name of Jenny's mother] and do hereby agree to assign [the Property] at the request and costs and expenses of [David] to [David] as joint tenant with [Jenny's mother] at such time or times or in such manner as [David] shall direct or appoint*". The Declaration of Trust was registered in the Land Registry.

At about the same time as the Declaration of Trust, Jenny's mother served a notice of severance of the joint tenancy upon Jenny and made a Will in favour of Jenny's half-sister Mary as executrix and the sole beneficiary.

Jenny's mother died in December 1988, followed shortly thereafter by Jenny who died in May 1989.

Jenny had left a Will naming her son Peter as her sole beneficiary and her friend June as Executrix of her Will. Probate of Jenny's Will has been granted to June and June has since executed a vesting assignment dated December 1989. After reciting that Jenny and Jenny's mother held the Property as joint tenants under the terms of Jenny's grandmother's Will and that Jenny held the Property in trust for David under the terms of the Declaration of Trust, June purported to assign the Property to David.

Your instructions are that Jenny's grandmother had told her in the presence of all of the family that the Property would eventually be hers after her mother's death and that as of March 1987, HK\$5 million represented only one-half of the market value of the entire interest in the Property. You are further instructed that until the time of Jenny's mother's death, the Property was occupied by Jenny's mother together with her maid as her home, although all the outgoings were paid for by Jenny during her lifetime and by David after Jenny's death.

Your advice is sought on what at the present time is the extent of the interests of the respective parties and what further steps need to be taken in order to enable David to dispose of his interest in the Property.

[25marks]

QUESTION 8

Randy has for the last 10 years kept a mistress, Bimbo, in a flat which was specifically bought for the purpose and registered in the name of a limited liability company, Lovenest Ltd., which was purchased specifically for the purpose of holding the flat.

The issued share capital of Lovenest Ltd. consists of 2 shares of HK\$1 each. Both shares were paid for by Randy but both he and Bimbo are registered as holders of 1 share each. Randy and Bimbo are also directors.

The purchase of the flat was financed partly by a bank mortgage. The down-payment, legal costs and stamp duties were all paid for by Randy. The mortgage loan was taken out in the name of Lovenest Ltd., but the repayments were in fact all made by Randy.

The annual audited accounts of Lovenest Ltd., which are signed by both Randy and Bimbo, show an amount owed to a director which corresponds to the total amounts of down-payments and mortgage repayments made by Randy from time to time.

Randy has now got bored with Bimbo and has found a younger and more beautiful mistress. He has told Bimbo to move out of the flat, but she has refused, claiming that Randy had made a gift of the flat to her.

Advise Randy.

[25 marks]

BARRISTERS QUALIFICATION EXAMINATION 2008

PAPER III: CRIMINAL LAW, CRIMINAL PROCEDURE & CRIMINAL EVIDENCE

QUESTION 1

Chan (24) is stopped at 0330 hours on Saturday morning (7th June 2008) outside 999 Lockhart Road, Wanchai by PC 5354. The officer searches Chan and finds a bread knife hidden in Chan's jacket pocket. The officer then arrests Chan for possession of offensive weapon and takes him back to Wanchai police station. Chan is interviewed under caution and admits the offence.

The police release Chan on HK\$ 1,000 police bail to appear at Eastern Magistracy the following Monday (9th June 2008) and at his first appearance Chan pleads not guilty. The Magistrate extends Chan's bail on the same terms until the trial date which is set for Thursday 21st August 2008.

Chan fails to attend court for the hearing and the magistrate issues a warrant for Chan's arrest. Chan is arrested on Saturday 30th August 2008 during a routine stop and search operation in Wanchai. He is brought before the court at which time he pleads guilty to the offensive weapon charge and is sentenced to an immediate term of imprisonment of two months. Chan is also discovered to be the subject of a suspended sentence. He had been sentenced to a term of 12 months imprisonment suspended for two years in, May 2008 in respect of a theft offence, committed by him in February 2008.

The Magistrate then tells Chan that he will deal with his failure to attend court on the day set for trial. He tells Chan that he has a duty to inquire into any reasonable excuse that Chan may have and that Chan had better speak up now if he had anything useful to say. Chan explains to the magistrate that he had simply forgotten to attend as he had had many things on his mind at the time and that he meant no disrespect to the court.

The magistrate tells Chan that it is too late to apologise now and that failure to attend court for trial whilst on bail is a serious contempt of court. The magistrate tells Chan that the situation is a simple one, he was bailed to attend court for trial and had failed to do so – so no proof is necessary and that he will now sentence him for failing to appear. The magistrate continued that it might well have been a different matter had the hearing which Chan failed to attend had “simply been a pre-trial review or some administrative hearing of that nature.” However, “it was the actual trial which Chan had failed to attend” and that therefore “this was a much more serious matter.”

The magistrate then sentences Chan to a further period of two months imprisonment to be served wholly concurrently to the sentence on the offensive weapon charge.

Question continued on next page.

He tells Chan that he is very lucky that the breach of bail conditions offence is something that he cannot take into consideration in respect of the operational period of the suspended sentence otherwise Chan would have been in big trouble as the suspended sentence would have been activated.

The magistrate accepts that exceptional circumstances existed in respect of the offensive weapon charge as it 'was only a bread knife – a normal kitchen utensil' and thus does not activate the suspended sentence in respect of the theft charge.

Discuss the issues of criminal law and procedure arising from the above matters (including his arrest), citing authority where appropriate.

If Chan had pleaded not guilty and had been acquitted of the offensive weapon charge should this have made any difference to the magistrate's approach?

[25marks]

QUESTION 2

Wong has been on trial for six weeks before H.H. Judge Ho in the District Court charged with nine counts of theft, five counts of false accounting and six counts of obtaining property by deception. A total of twenty-three prosecution witnesses gave evidence and the accused and three others all gave evidence for the defence. There were some two hundred exhibits and five sets of admitted facts.

In his Reasons for Verdict Judge Ho, after correctly setting out the charges and a chronology of important events, states the following:

“Section 80 of the District Court Ordinance constrains me to give brief oral reasons for my verdict and I now do so. Having heard the evidence of all the witnesses and having had the chance to observe their demeanour in the witness box over a considerable period of time I have formed the view that the prosecution witnesses are trustworthy, credible and totally worthy of belief. I take the contrary view of the evidence of the accused and his supporting witnesses. I have studied their appearance in the witness box and I come to the conclusion that they have not told the full truth in relation to the affairs of the companies involved in these offences. In the absence of a jury, such as was the situation with this trial, a District Court Judge is fully entitled to form his own view as to the credibility of witnesses who appear before him. He has the opportunity of studying them whilst they give evidence and answer the questions of counsel.

Nothing is to be gained by dissecting, with a fine-toothed comb, the evidence which was given by the various parties. Nor is this the time to trawl once more through and set out in detail the evidence in the case. Neither is this the time to dissect the various parts of the offences charged – what they are is made abundantly clear on the charge sheet. I find them all proved and the accused’s evidence, such as it was, failed to establish anything at all to my satisfaction vis-à-vis his lack of culpability on these matters. I am, of course entitled to draw the usual inferences, and I do so in this case.

Suffice it to say that where there were discrepancies in the evidence of the prosecution witnesses as to the times of the various conversations and as to who was present, I find nothing sinister in this as it must be well-nigh impossible to have total recall of such complex events from so many years ago. It is obvious that even the best-intentioned witness will make mistakes from time to time. Having fully weighed the evidence of the prosecution witnesses as a whole I find them to be completely credible. Defence counsel made much of the alleged ‘confusion, internal inconsistency and overt contradictions’ between the accounts of the prosecution witnesses and the defence witnesses in relation to the identification of his client. Let me say that had the witnesses all given evidence which was in perfect agreement with each other I would have found that to have been most suspicious. Suffice it to say on the subject of identification I can safely ignore the conflicts, of which there were admittedly, quite a number, and state that I prefer the evidence of the prosecution witnesses. As a consequence of my belief in the credit of the prosecution case I obviously reject the evidence of the accused and his witnesses in all regards.

Question continued on next page.

The accused is accordingly convicted on all counts as charged.”

Wong now seeks your advice as to the possibility of appealing these verdicts.

In the light of the extract from the Reasons for Verdict as set out above how would you advise him?

Outline the appropriate procedure.

[25marks]

QUESTION 3

Lee has been arrested on suspicion of ‘unlawful wounding’ contrary to section 19 of the Offences against the Person Ordinance, Cap. 212. He is alleged to have attacked the complainant, Ms. Wong during a dispute over a parking space in Lockhart Road, Wanchai. The incident took place at 8:30 pm on 3rd August 2008.

The police allege that when he and the complainant were arguing in the street he suddenly punched her once in the face, breaking her spectacles and causing her to fall over. The complainant struck her head on the pavement and started to scream loudly when she saw blood coming from the back of her head. A number of passersby rushed over to help her.

Lee then got into his car and drove off at high speed, despite the fact that it was raining heavily at the time.

He was arrested five days later at a routine roadblock. Lee was questioned by police and denied the offence. The police have now told Lee that it is intended to have him take part in an identification parade (“ID parade”) to be held next week at Wanchai police station.

Lee told the investigator that he did not want to take part but the investigator replied that the parade would be held and that it was “All o.k. and nothing to worry about” as the police always hold an ID parade as part of “standard police investigatory procedure.”

Lee has two previous convictions for assault – one for Common Assault in 1997 and one for Assault Occasioning Actual Bodily Harm in 2005.

Lee now seeks your advice.

What would you advise him as to when a formal ID parade will be conducted by police investigators? (4marks)

Was the police officer correct in his assertion that it was standard police procedure? (1mark)

Must he take part in an identification parade? (1mark)

What are the consequences, if any, if he does not? (1mark)

What would be your advice to Lee as to his participation, or otherwise in the proposed ID parade? (8marks)

Lee asks you what will happen on the parade. Outline the procedure to him. (6marks)

What safeguards exist to protect Lee’s interests on the parade? (2marks)

Question continued on next page.

What special circumstances might you expect to encounter on an ID parade – not necessarily this one? (1mark)

**If you attend the parade what would be your role and function? (1mark)
[25marks]**

QUESTION 4

Lo (23) has been arrested, on a Saturday evening, for 'Unlawful Wounding' contrary to Section 19 of the Offences Against the Person Ordinance, Cap. 212. He is alleged to have chopped Wong (65) the security guard at an amusement games centre (AGC) in Mong Kok over protection money affairs, according to the officer in charge of the case ("OC Case").

He is questioned by police under caution but denies any involvement in the case. He says he was in the AGC at the time of the incident only because he always goes there to kill time as he does not have much to do. He knows the victim, Wong, because they are always arguing over the amount of time Lo and his group of young male friends spend on the various game machines. They have had many disputes before.

Lo says he has no idea how the fight started but that he had nothing to do with it and that he accidentally got blood on his hands, feet, clothing and shoes when he and his 'boys' went over to help 'the old guy'. The real assailants had run off after the attack. Lo does not know them. He says that Wong has 'set him up' to 'settle old scores between them.' He tells you that he is not worried because he is sure the "whole thing can be settled down as usual, and soon."

The OC Case, Detective Senior Inspector Ho, refuses to grant Lo bail and tells him that he will have to appear in the Magistracy the following Monday to enter a plea to the charge.

You now represent Lo and visit him in the police cells. He demands to know how long the police can keep him locked up.

What would you tell him? (1mark)

Lo also tells you to get him bail from the police station.

What could you do to secure bail for Lo? (2marks)

Lo eventually appears in the Magistracy the following Monday. The court prosecutor tells you that he will not be asking for a plea to be taken and that he needs to seek legal advice on the case. He tells you that the OC Case has objected by memorandum to the grant of bail for Lo.

What information would you seek from the prosecutor? (5marks)

What information would you seek from Lo? (3marks)

Question continued on next page.

Lo now tells you that he wants you to make a bail application for him. He tells you that he is single and lives with his parents in a flat in Wanchai which they rent. He gives them HK\$ 10,000 towards the rent. He has lived there all his life. He earns HK\$ 16,000 per month working for a travel agency in Causeway Bay. He specializes in arranging package tours to Thailand and Japan. His younger sister and elder brother both work in Shenzhen and his elderly grandparents also live there. He sends the grandparents HK\$ 2,000 per month. He has four previous convictions. He was fined HK\$ 500 for shop theft in 1999, fined HK\$ 1,500 for possession of cannabis in 2001 and fined HK\$ 5,000 for Assault Occasioning Actual Bodily Harm in 2006. He was sentenced to three months in jail in 2007 on an Assault Occasioning Actual Bodily Harm charge. He was released in December 2007. He has a girlfriend who is a dancer in a Wanchai nightclub. She gives him about HK\$ 20,000 per month for his expenses. He works between the hours of 2 pm and 10 pm six days a week at the travel agency. The girlfriend, who is 17, is willing to put up some money for his bail as are his group of young friends. He does not want to put up any cash himself but he will do whatever is necessary to get out.

What would you say on Lo's behalf in applying for bail for him? (5marks)

What matters would you take into consideration in respect of your submissions? (7marks)

Can Lo decide in which court his case will be tried? (2marks)

Cite appropriate authority for your answers.

[25marks]

QUESTION 5

At 00:45 on Friday 2nd May 2008 PCs 4424 and 2828 are called to the scene of a suspected 'Robbery' at the corner of Lockhart and Tonnochy Roads, Wanchai. The victim, Ms. Wendy WONG was returning home when she was pushed from behind and forced into an alleyway by a man wearing a blue anorak and dark glasses. It was raining and the man had the hood of his anorak pulled up over his head. Ms. WONG stumbled to the ground and the man snatched her handbag containing cash and other valuables. The assailant then ran off in the direction of Causeway Bay.

You represent Alan AU, a 25 year-old male charged with the robbery of Ms. WONG. AU instructs you he was walking in Lockhart Road about 1:00 a.m. on 2nd May 2008 and wondering whether to go for a drink. It was raining heavily and he was wearing a blue anorak. Because of the rain, he had been hurrying and just stepped into a doorway to light a cigarette. A Police officer approached him and asked him to produce his Hong Kong Identity Card. After asking a few questions about what he was doing – which he answered – the officer told AU he was under arrest. AU claims he had nothing to do with any robbery and made no comment after being told he was under arrest. Despite his objections, the officer searched him, but found nothing other than AU's own property. AU tells you he has several previous convictions for drugs (possession of Ketamine and Ecstasy), but nothing similar to robbery.

Contrary to these instructions, the statement of PC 4424 says that having obtained a description of the suspect from Ms. WONG he went to look for the suspect in the nearby area. At 01:00 a.m. he saw AU cross Lockhart Road and move quickly into a doorway. He approached and saw AU cowering inside. He noted AU to be wearing a blue anorak with the hood pulled up. He says AU was breathing heavily, as if he had been running. PC 4424 asked to see AU's identity card, which was produced. A radio check of AU's particulars disclosed him not to be 'wanted' in connection with any current offence.

The officer then asked AU what he was doing out on such a wet night and AU replied he was thinking of going for a drink. Asked why he was setting-out at such a late hour, AU replied, "*Ah Sir, it's nothing. Give me a chance.*" PC 4424 then arrested and cautioned AU on suspicion of his involvement in Ms. WONG's robbery. When asked whether he understood the caution, AU replied, "*Ah Sir, I needed the money for my habit. I'm sure she'll be all right. Can you give me a chance?*"

- (a) **Comment on the legality of AU's stop, search and arrest. (20marks)**
- (b) **Assuming the issue concerns only the two above-mentioned statements, explain how the Court should approach the issue of alleged 'verbal' statements by AU. (5marks)**
- [25marks]**

QUESTION 6

You are instructed to represent Bobby CHAN, who has been arrested for 'Handling Stolen Goods' and who is detained at Kowloon City Police Station.

You arrive at the Police Station in the company of your instructing solicitor about 4 p.m. The officer-in-charge of the case, (the "OC") tells you that 3 days ago, the wages clerk of the Hop Hing Garment Factory was ambushed en-route to the factory from the Hang On Bank. The clerk was struck to the head from behind and robbed of the cash bag containing HK\$170,000. The clerk's wallet and a gold and jade finger-ring were also stolen.

The OC tells you your client was arrested at home early this morning after a Pawnbroker reported a man using your client's Hong Kong Identity Card pawned a gold and jade finger-ring matching the description of the stolen property. Enquiries disclosed your client to be a former employee of Hop Hing.

You request to see your client, but the OC refuses access on the grounds that enquiries are underway to locate the stolen cash, which has still not been discovered. You reiterate your request and after about an hour you are allowed into an interview room to seek instructions.

Bobby tells you the following: He had nothing to do with the robbery or the pawning. Until about a week ago he had been employed at the factory, but resigned to get a better job. A day before he left, he found his Hong Kong Identity Card to have been taken from his wallet. He made no report to the Police and has not yet applied for a replacement. On the date and time of the robbery he was traveling to an interview for his new job in Lee Ping Industrial estate.

Police officers raided his flat at 6 a.m. this morning. After a search, he was told he had to come along to the station. When he asked why, he was told he "should stop being cute as he knew the reason". He asked to call his sister, but his mobile phone was confiscated. He was only given access to a phone by the Duty Officer at the Police Station after his interviews were completed. At the station a total of 3 plainclothes officers crowded round him in a room and questioned him about the robbery. When he denied being involved, the officers became angry. They spoke to him in a threatening manner and said he had better come clean and tell them where the money was. If not, he was told he should, "know what to expect".

Bobby did not wish to say anything but he was frightened and confused. He has so far told the officers that he worked at the factory and knew the wages clerk. He has confirmed that he is the holder of the relevant Identity Card. Before signing the statement he recorded, "I can't believe it would come to this. Please give me a chance."

- (a) **What advice would you give Bobby concerning the principles governing arrest and rights of persons in custody? What particular considerations arise in this case? (Note: It is not necessary to discuss the procedure with which these issues might later be addressed in Court). (10marks)**

Question continued on next page.

- (b) What advice would you give Bobby concerning his alleged confession?
(Note: It is not necessary to discuss the procedure with which these issues
might later be addressed in Court). (10marks)
- (c) Given your instructions, what other useful advice and/or assistance might
you suggest? (5marks)
- [25marks]

QUESTION 7

Part A

Assume the case of Bobby CHAN, (see Question 2 for details), has been transferred to the District Court for trial.

Describe the procedure most likely to be adopted by the Court in determining the admissibility of the defendant's alleged statements against interest?

(20marks)

Part B

If the Court determines these statements to be admissible, can the defendant seek to exclude them on any other grounds?

(5marks)

[25marks]

QUESTION 8

Alan AU was convicted after trial of 'Robbery' and sentenced to 6 years' imprisonment. The prosecution applied for costs and the learned District Court Judge ruled in their favour stating: "*The law in Hong Kong is that costs follow the event. The defendant was found guilty after trial. I see no reason to deny the prosecution their costs in this case.*"

- (a) **Comment on the correctness or otherwise of the trial judge's ruling in relation to his award of costs to the prosecution. (10marks)**
 - (b) **Had Alan been acquitted after trial would he have been entitled to the costs of his defence? What circumstances would the court take into account? (10marks)**
 - (c) **Does Alan have any right to appeal against the judge's ruling against him on costs? How might this be commenced? (5marks)**
- [25marks]**