

BARRISTERS QUALIFICATION EXAMINATION 2009

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

QUESTION 1

Richly Limited developed a block of 20 residential flats on Lot 123. The block is called 'Rich Gardens'. Anna bought one equal undivided 20th share of and in Lot 123 and of and in Rich Gardens together with the right to the exclusive use of Flat 1.

Richly Ltd and Anna then executed a Deed of Mutual Covenant for Rich Gardens (the 'DMC'). The DMC contains, in addition to other terms, covenants by all owners of undivided shares:

- that they will not allow their exclusive use areas to fall into disrepair; and
- that they will not obstruct the common parts of Rich Gardens; and
- that they will not employ any contractor other than Richly Ltd to carry out any repairs, improvements or decorations to their exclusive use areas.

The DMC also provides that each owner has the right to the exclusive use of the flat allotted to their parcel of undivided shares. The DMC was registered in the Land Registry.

Anna then sold Flat 1 to Boris who bought Anna's one 20th equal undivided share together with the right to the exclusive use of Flat 1. Richly Ltd sold the remaining 19 flats to individual purchasers who each bought one equal undivided 20th share of and in Lot 123 and of and in Rich Gardens together with the right to the exclusive use of a particular flat.

Answer the following questions giving reasons for your answers:

- (a) **Can the DMC covenants be enforced against Boris? (15marks)**
- (b) **If Boris grants a lease of Flat 1 to Tony, can the DMC covenants be enforced against Tony? (5marks)**
- (c) **Can Richly Ltd enforce the DMC covenants against any of the present or previous flat owners? (5marks)**

Give reasons for all your answers.

[25marks]

QUESTION 2

Vanessa Vong ('Vanessa') agreed orally to sell Flat 6 Peony Court, 16 Western Road, Hong Kong to Paul Poon ('Paul') for HK\$5 million with completion on 1 November 2009. Vanessa also agreed to give vacant possession on completion. Vanessa then instructed a solicitor to act for her and Vanessa's solicitor wrote the following letter to Paul's solicitor.

I act for Vanessa Vong who has agreed orally to sell Flat 6 Peony Court, 16 Western Road, Hong Kong to Paul Poon for HK\$5 million with completion on 1 November 2009. I enclose a draft agreement for sale and purchase.

The letter is not marked 'subject to contract'. Vanessa's solicitor signed the letter. However, neither Paul nor Vanessa signed the agreement for sale and purchase and Vanessa has now refused to sell to Paul.

(a) Can Paul enforce the oral agreement against Vanessa? (15marks)

On 1 August 2009 Victor entered into a binding agreement to sell his flat to Peter for HK\$2 million. The sale is expressly subject to a written lease in favour of Tommy for a term of two years starting on 1 February 2009 at a calendar monthly rent of HK\$20,000 and also a written option to renew the lease for a further term of two years at a market rent at the start of the renewal term. Neither the lease nor the option is registered in the Land Registry. However, before signing the agreement, Peter told Tommy that he regarded himself as bound by the lease and the option to renew. Peter completed his purchase last week when Victor assigned the legal estate in the flat to him.

(b) Is Peter bound by the lease and option to renew in favour of Tommy? (10marks)

Give reasons for all your answers.

[25marks]

QUESTION 3

In 1946 Mr. Wong and his family occupied a piece of Government land in the New Territories and began to farm that land. Mr. Wong planted fruit trees on the land and in 1948 erected a low fence around the land with a gate to allow access. Not all the enclosed land was under cultivation and on occasions Mr. Wong allowed his fellow villagers to enter the land to enjoy the shade of his trees. In 1965 Mr. Wong leased a small portion of this land to his neighbour, Mr. Ho at a small annual rental. Mr. Ho used the leased land to grow his vegetables for more than 30 years. Mr. Wong died in 1993 leaving all his property to his son Simon. In 1996 Mr. Ho terminated his lease over the land which was returned to Simon.

Simon was living in Australia from 2002 until 2008, during which period the land was not cultivated and was allowed to become overgrown. Simon's wife, however, continued to pick fruit from the fruit trees. When Simon returned, he cut down the overgrowth and began again to plant vegetables on the land. In late 2008 he received an eviction notice from the Lands Department of Government alleging that Simon had no title to the land and giving notice that the land was going to be used by Government for the construction of a new school.

- (a) **Can the Government recover the land from Simon?** (20marks)
- (b) **Would your answer differ if the evidence shows that Mr. Wong and Simon would have been willing to pay rent for the land if asked by the Government?** (5marks)

Give reasons for all your answers.

[25marks]

QUESTION 4

By an agreement for sale and purchase dated 5 August 2009 (the 'Agreement') Valerie agreed to sell to Pansy Flat 6A Better Building (the 'Property'). The Agreement is in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance Cap. 219 and Valerie is selling as beneficial owner. Completion is due to take place on 1 November 2009. Before signing the Agreement, Pansy had inspected the Property with Valerie. During the inspection Valerie drew to Pansy's attention that the kitchen had been extended into a light well in Better Building.

Valerie's solicitors delivered the title deeds to Pansy's solicitors on 8 August 2009. The first assignment of the Property from the developer included a plan of the Property. Pansy's solicitors raised requisitions on 9 August 2009. Valerie's solicitors answered these satisfactorily on 10 August 2009. On 25 October 2009, after receiving advice from a building surveyor who had inspected the Property, that the construction of the extension required Building Authority consent, Pansy's solicitor sent the following requisition to Victor's solicitors.

Please send us evidence that the consent of the Building Authority was obtained to the extension of the kitchen of the Property into the light well in Better Building.

Valerie's solicitor refused to reply because the requisition was raised out of time.

- (a) **Has Valerie breached the Agreement?** (20marks)
- (b) **Assume that Pansy's purchase has been completed by an assignment from Valerie to Pansy, but that Pansy later discovers that the extension of the kitchen breaches the site coverage restrictions in the Government Lease for Better Building. Does Pansy have any remedies against Valerie or anyone else?** (5marks)

Give reasons for all your answers.

[25 marks]

PART B: Equity

QUESTION 5

Tyrant has 4 sons, Rebel (born 1977), Docile (born 1978), Proud (born 1979) and Idle (born 1980).

In 1978, Tyrant set up a limited company, Treasure Trove Limited, to hold the substantial portfolio of real properties previously held in his own name. Treasure Trove Limited issued 6 shares in total (which were all paid for by Tyrant), with 1 share issued to Woolly. The remaining 5 shares were issued to Tyrant.

Around late 1983, Tyrant decided to settle the shares of Treasure Trove Limited upon his children. For this purpose, he transferred (free of payment) 3 of the 5 shares held in his name to Tardy and the remaining 2 shares to Woolly, and gave them oral instructions to carry his wishes into effect.

Pursuant to the directions of Tyrant, Woolly promptly executed a written Declaration of Trust dated 14th December 1983 constituting himself trustee of the 3 shares of Treasure Trove Limited held in his name for Rebel and Docile as beneficial tenants-in-common.

Tardy did nothing until the middle of 1985, when he was reminded by Woolly of Tyrant's instructions. Tardy then spoke to Tyrant, who confirmed his previous instructions, whereupon Tardy executed a written Declaration of Trust dated 14th July 1985 constituting himself trustee of the 3 shares of Treasure Trove Limited held in his name for Idle and Proud as beneficial tenants-in-common.

Tyrant remained throughout as chairman and executive director of Treasure Trove Limited and he dealt with the assets of the company as if they belonged to him personally. Treasure Trove Limited has never declared any dividends.

Rebel has been cut off altogether by his father because of his fast women and slow horses. Rebel is bitter about the way Tyrant has treated him. He thinks he can get even with Tyrant by calling him to account for the way in which he dealt with the assets of Treasure Trove Limited. He has asked Tardy to take action against Tyrant, but Tardy took the view that Tyrant is within his rights to have acted as he did and told Rebel not to be so ungrateful to his father.

Idle refuses to get himself a job and is thus short of money. He knows that Treasure Trove Limited has a substantial rental income from its valuable property and he has told Woolly it is time for him to get to enjoy some of this money. But Woolly told him he cannot help and sent him away empty handed.

Question continued on next page.

Docile has told Rebel that although he is sympathetic, he will not take Rebel's side since he has been given stern warnings by his father not to do anything foolish. Proud is a successful businessman in his own right and is sick of the family squabbles. In an endeavour not to get involved, he has executed a Deed of Renunciation to disclaim his interest under the Declaration of Trust dated 14th July 1985.

Rebel wants to know whether there is any way he can force Woolly to bring proceedings against Tyrant for breaches of director's duties. Idle wants to get his hands on some money urgently. He has explored the possibility of selling his beneficial interest under the trust but no one would buy it.

Advise Rebel and Idle.

[25marks]

QUESTION 6

Ah Ding is a male indigenous villager of the New Territories. He does not own any land of his own and he has no intention of building a house under the Small House Policy for his own use.

Sharp & Co. is a developer specialising in Small House developments in the New Territories. It is related to Land Bank Ltd., which has a stock of agricultural land suitable for housing development.

An arrangement was entered into whereby Land Bank Ltd. would transfer a piece of agricultural land (free of payment) into the name of Ah Ding to enable him to apply for a Free Building Licence under the Small House Policy. Sharp & Co. would finance the development of the house and upon completion, Land Bank Ltd. would pay the premium and the house would be sold to a third party. Ah Ding would not receive any of the proceeds from the sale which would be split between Land Bank Ltd. and Sharp & Co., but he was paid a fixed sum of money upon the Building Licence being granted.

As part of the arrangement, Ah Ding was required to execute a document acknowledging Land Bank Ltd to be the “real owner” of the piece of land transferred to him. In that same document, Ah Ding also promised to deal with the land as Land Bank Ltd. shall direct. But in order to conceal the facts from the Government for the purposes of enabling Ah Ding to apply for a Free Building Licence, the document was not registered.

Some 18 months later, when the building of the house was nearing completion, Land Bank Ltd. entered into an agreement with Innocent for the sale and purchase of the house. The agreement did not contain any provision which would preclude the parties from seeking specific performance.

Unbeknown to Land Bank Ltd. and Sharp & Co., Ah Ding had on the previous day entered into a similar agreement with Clueless.

Both the agreement between Land Bank Ltd. and Innocent and the agreement between Ah Ding and Clueless were subsequently registered with the Land Registry under the Land Registration Ordinance within 30 days after the date of agreement.

In the meantime, Land Bank Ltd. has paid the necessary premium to remove the restrictions against alienation with a view to enabling Land Bank Ltd. to complete its agreement with Innocent.

Ah Ding has disappeared after receiving the deposit paid to him by Clueless. There are rumours that he is hiding in the Mainland after sustaining heavy gambling losses in Macao.

Advise Clueless.

[25marks]

QUESTION 7

You are instructed to advise members of the Shum Yau Tsin T'ong in connexion with the conduct of its affairs by its managers, Ah Kau and his brother, Ah Wat.

The matter concerns the sale of land belonging to the T'ong in the early 1990's. The land in question was held from the Government in the name of the T'ong, with Shum Ah Kau and Shum Ah Wat registered as the managers of the T'ong under section 15 of the New Territories Ordinance, Cap.97.

The land was sold to Middleman Ltd. for the sum of HK\$10 million, together with adjoining land belonging to Ah Kau personally which was also sold for HK\$10 million. 2 months later, Middleman Ltd. resold both the land it had acquired from the T'ong and the land it had acquired from Ah Kau to a developer for HK\$25 million. If the land belonging to the T'ong had not been sold together with the land belonging to Ah Kau, the fair market value of T'ong's land at the material time would have been HK\$9 million only and the fair market value of Ah Kau's land at the material time would have been HK\$8.5 million only.

All of the shares in Middleman Ltd. are registered in the name of Ah Wat's 18year old son, who holds the title of Managing Director. Ah Wat was fully aware of all the material facts.

The members of the T'ong want to know what (if any) action could be taken against Ah Kau and Ah Wat.

[25marks]

QUESTION 8

Pious' grandfather has transferred all of his property to his son, Greedy, during his lifetime. After his death a document in these terms was discovered amongst his papers:

"I have had frequent discussions with my wife on how our property is to be dealt with after our deaths and we now set out our wishes as follows:

- (A) I appoint my elder son, Greedy, as executor who has absolute power to carry out the wishes I have expressed during my lifetime. No one else should interfere with his decisions.*
- (B) My property which consists of holdings in various family companies is to be dealt with in the following manner:*
 - 1. What is due to me is to be transferred into the name of Greedy or his nominee.*
 - 2. After my death, I give to Greedy absolute discretion to manage the above-mentioned property, including the power to hold, give, distribute, make charitable donation, grant subsidies and invest. Subject to future circumstances prevailing from time to time, I direct Greedy to try his best to implement the following broad principles:*

Divide the interest due to me into 2 equal parts for the following objects:

- (a) For subsidies and rewards to descendants of the family when they should need to escape from hardship or when they have outstanding achievements. Greedy has absolute discretion to decide on the amount of such subsidies, its duration and whether to charge interest and if so at what rate. Outstanding achievements include academic and professional achievements as well as any commendable behavior which deserve encouragement because of financial difficulties.*
- (b) For charity and assistance. Charity includes not only charitable organizations recognized by the Hong Kong Government but includes free schools founded by our family, hospitals and almshouses; relief of distress caused by natural disasters anywhere in the world. Assistance is to be given to those in need, including past, present, and future employees, relatives and friends, to help them to obtain education, to set up in business, to obtain medical care, to get married, to emigrate, to raise children and to purchase property.*

My wife fully agrees with the above and she will dispose of her property in like manner."

Question continued on next page.

The document bears the signature of Pious' grandfather and 2 witnesses, but there is no attestation clause in the form which one would expect to find in a testamentary document.

Greedy claims that the holdings in the various family companies were given to him by his father to be dealt with as he pleases, and he intends to keep all of the profits for his own enjoyment without carrying out any of the stated objects. But Pious thinks that is a travesty of his grandfather's wishes.

Advise Pious.

[25marks]

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PAPER III: CRIMINAL LAW, CRIMINAL PROCEDURE & CRIMINAL EVIDENCE

QUESTION 1

Chan Faat is brought before Eastern Magistracy on 9 September 2009 by way of summons for an offence against s. 4(1) of the Noise Control Ordinance Cap. 400. The summons alleges that he made a noise at 0300 hours to the annoyance of other residents of his domestic premises.

The alleged offence took place on 1 January 2009 during New Year celebrations hosted by Chan. A neighbour called the Environmental Protection Department which then sent a team of inspectors to the scene. The officers recorded the loud music coming from Chan's flat and then went to his home and informed him of the offence.

The information which led to the issuance of the summons was dated 27 August 2009.

At the hearing, Chan's counsel informs the court that s. 31 of Cap. 400 reads:

A complaint or information in respect of an offence against this Ordinance shall be made or laid, as the case may be, within-

- (a) 6 months from the time the matter of such complaint or information respectively first came to the knowledge of the Authority or an authorized officer; or*
- (b) 1 year from the time of the commission of the offence, whichever is the earlier.*

Counsel submits that the prosecution is thus time-barred and that Chan should be discharged. Chan's counsel also points out that the information has not been signed by the Magistrate and has been signed and dated only by a clerk at the court.

The Magistrate notes the tardiness of the Department but informs counsel that s. 27(1) of the Magistrates Ordinance compels him to amend the information by changing the date on it to 2 July 2009, to meet the six month limitation period.

The Magistrate then reads out the relevant part of this section to counsel:

- (1) Where it appears to the adjudicating magistrate that there is-*
 - (a) a defect in the substance or form of any complaint, information or summons; or*
 - (b) a variance between the complaint, information or summons and the evidence adduced in support of it,*

Question continued on next page.

he shall, subject to subsection (2)-

- (i) amend the complaint, information or summons if he is satisfied that no injustice would be caused by that amendment; or*
 - (ii) dismiss the complaint, information or summons.*
- (2) The adjudicating magistrate shall amend the complaint, information or summons where-*
- (a) the defect or variance mentioned in subsection (1) is not material; or*
 - (b) any injustice which might otherwise be caused by an amendment would be cured by an order as to costs, an adjournment or leave to recall and further examine witnesses or call other witnesses.*

Chan's counsel then accepts that the amendment must be made and applies for costs, in accordance with subsection (2)(b).

Over the objections of the prosecutor the Magistrate awards Chan costs of HK\$ 40,000.

The Magistrate comments that, "...this sum should send a message to the relevant Department to get things done on time in future."

Chan then pleads guilty, and after hearing mitigation by his counsel, which stresses Chan's clear record, the Magistrate imposes a fine of HK\$10,000, which is the maximum penalty.

Comment on what has happened in this case and advise Chan as to possible courses of action open to him in respect of this conviction and fine.

[25marks]

QUESTION 2

Wong (42) appears in the District Court charged with trafficking in 10 grammes of Methamphetamine Hydrochloride ('Ice'). Wong, who has a clear record, is convicted after trial and the judge, noting that he must apply the guideline tariff as laid down in R v Lau Tak-ming [1990] 2 HKLR 370, sentences Wong to three years immediate imprisonment.

Wong's counsel who is unhappy that the judge had earlier allowed Wong to be cross-examined by the prosecution as to whether or not Wong knew of any reason why the main prosecution witness would fabricate evidence against him, tells the judge that he will be lodging an immediate appeal against this conviction.

Counsel then applies for bail pending appeal and, after hearing objections from the prosecution, the judge grants bail to Wong on the following terms:

- Reside at the address on the charge sheet;
- Undertake not to leave Hong Kong;
- Surrender all travel documents and Hong Kong Identity card;
- Self-recognizance of HK\$ 100,000;
- Cash bail of HK\$ 100,000.

When granting bail the judge tells Wong that he is not pleased that he has to grant bail to a convicted criminal but that as 'bail is a right under the Criminal Procedure Ordinance, and not simply a matter of discretion, my hands are tied.'

Two days later the trial judge receives a letter from Wong's counsel which states that the judge has applied an incorrect guideline tariff in the case. The letter (correctly) informs the judge that the proper tariff for cases of trafficking in ice is not Lau Tak-ming but is in fact A-G v Ching Kwok Hung [1991] 2 HKLR 125.

The following day, the judge reopens the case and 'revisits' the sentence. He then, using the Ching Kwok Hung guidelines, sentences Wong to five years immediate imprisonment.

Discuss this sequence of events and advise Wong.

[25marks]

QUESTION 3

Lee (26) is being defended by his counsel Wong on a single count of Handling Stolen Goods (a motorcycle), contrary to s. 24 of the Theft Ordinance, Cap. 210.

The trial is taking place in the District Court during September 2009.

As the trial progresses it is apparent to the judge that Wong has not properly prepared for the trial. Wong confuses the names of the prosecution witnesses, is unsure of which witness is to produce which exhibit, makes frequent errors as to the law and procedure, and is quite properly, reprimanded on many occasions by the judge for asking improper, repetitive and irrelevant questions of the witnesses.

On the 24th day of the trial Wong is due to make his closing submission to the court, but brings the incorrect bundle of authorities with him. After complaint from his opponent, the case is adjourned until the following day so that the correct bundle of authorities can be retrieved from Wong's Chambers.

When court eventually resumes Wong explains to the judge that it was the fault of his chamber's clerk that the wrong bundle was sent to court the previous day. The trial then continues.

The judge eventually convicts Lee on the charge, and having reviewed the antecedent statement handed in by the prosecutor and Lee's lengthy criminal record, he asks Wong if he wishes to say anything in mitigation.

Wong tells the judge that he cannot proceed immediately as he had prepared mitigation on the basis that his lay client had a clear criminal record. He admits to the judge that he had forgotten to review the criminal record upon its receipt from the prosecutor.

The judge then says the following to Wong:

"I am appalled at the lack of professionalism you have demonstrated from the start of these proceedings. If I had the power I would make a wasted costs order against you. Fortunately for you I could do so only if you had been late or had failed to appear at these proceedings - and you have been a model of punctuality at all times. I am therefore powerless, but I advise you to sharpen up. The legislation in this regard has been properly described as a 'charade' and as not reflecting 'any serious concern for the public purse'."

Wong then says to the judge that it would have been unfair to have made any order against him, in any event, as he would have been unable to give an explanation of his conduct due to "the constraints of legal professional privilege", and therefore would have been unfairly disadvantaged as his lay client refuses to waive his privilege.

Comment on the judges' words and Wong's reply in the light of the events at trial. If the judge did have the power to make a wasted costs order against Wong what should be the procedure?

[25marks]

QUESTION 4

Ho (12) is arrested by officers of the Western District Anti-triad Squad in the playground of the Ho Chung Ming School in Stanley. He is told that there was a gang fight in a nearby amusement games arcade the previous evening and that a lot of local schoolboys were involved. The arresting officer DPC 12345 Ho Kan Lik tells him, “We are really sick of you kids causing so much trouble, you know what happens now.”

Ho is taken in an unmarked van to Western Police Station and is placed in a store room where he is handcuffed to a chair. The officer leaves him there for an hour and when he returns the policeman writes out a statement in his official police notebook. He reads it over to Ho and tells him to sign the bottom of each page and to initial some corrections made to several Chinese characters. Ho, who does not understand most of the characters used, signs and initials as directed.

The officer leaves and returns after 45 minutes. He gives Ho a statement made by a Lee Kwan Wah (9) which identifies Ho as the ‘415 White Paper Fan’ office bearer of the Luen Ying She triad society of Stanley Village, and as the one who led the attack on the other boys. The officer says to Ho, “Now you are in big trouble, he has pointed you out as the Daai Lo.” Ho has absolutely no idea what these Triad terms mean and asks the officer to explain. The officer says “Never mind, just tell us what you did.”

The officer leaves again and comes back two hours later with Madame Ho Ho Lo (84), who is Ho’s grandmother. She shouts at Ho and blames him for causing the entire family to be embarrassed and “lose face”. She tells him that his “Granddad is watching him from up above in heaven” and that he “better tell the truth to the policeman”. Ho bursts into tears and starts shaking.

DPC 12345 then, in the presence of Madame Ho, interviews Ho and accurately writes out all the questions posed by him and the answers given by Ho on a record of interview form (Pol 857). In the course of the interview Ho admits having been involved in the fight in the games centre and having stabbed another boy with a fruit knife.

Ho has now been told that he will be prosecuted for unlawful wounding.

Advise Ho.

[25marks]

QUESTION 5

HO (76) is an elderly man with failing eyesight. Six months ago, he fell victim to a typical “fake coin” fraud. Having taken morning tea with his friends, HO was approached by a woman outside the restaurant. Speaking in HO’s own native ‘Fukien’ dialect, the woman told him that she had overheard him talking in the restaurant and realized he was, like her, a native of Fukien.

The woman told HO that she and her husband were humble farmers but that her husband had discovered some ‘tomb treasure coins’ whilst excavating a ditch on their farm. She told HO she should have to turn the treasure over to the authorities but she was poor and she and her husband had a sick daughter. She came to Hong Kong to try to sell the coins, but had not been successful and was preparing to travel home. In order not to disappoint her husband she wondered if HO, a fellow clansman, might wish to buy the coins. She showed him a small bag of apparently aged ‘Ching’ Dynasty coins and told him she would be happy to sell them to an “elder brother” for a special price of HK\$1,000, although she knew them to be far more valuable than that.

Believing the coins to be genuine, HO agreed and paid HK\$1,000 to the woman. The next day, he took the coins to his nephew, who recognised them to be worthless base-metal fakes.

HO reports the case to the Police. He gives a statement in which he describes the woman as “medium build, black-haired Chinese woman speaking Fukienese who I never met before.” HO is taken back to the location of the restaurant in a Police car which drives around the block a few times. On the third pass, HO spots and points to a woman in the street outside the restaurant and tells Police she is the woman who sold him the coins. HO is then taken to the Police Station where a statement to that effect is recorded from him

The woman is arrested. She denies the offence. She is a visitor from the Mainland, entitled to remain in Hong Kong for two weeks. She speaks Cantonese with a heavy Mainland accent. No coins of any similar description are found in her possession. She is not invited to participate in any formal Identification Parade. She is charged with fraud and appears in the Magistracy.

At the trial before the Magistrate, the prosecution leads HO in his evidence and invites him to identify the accused in the dock. Defence counsel objects.

- a) **Under what circumstances might such an identification be permitted and what factors should be taken into account? (20marks)**

Question continued on next page.

In the instant case the learned Magistrate convicts the accused. Having reviewed the evidence, the Magistrate concludes: “This is a simple case. It is really all a question of credibility. Although an old man, I nonetheless found PW1 HO to be in full control of his faculties. He was an honest and credible witness. When he told me the accused was the woman he dealt with, I believed him. I am therefore satisfied she is guilty as charged.”

- b) The accused wishes to lodge an appeal against her conviction. Comment on the Magistrate’s reasons. (5marks)
[25marks]**

QUESTION 6

Mr. WONG is charged with Assault Occasioning Actual Bodily Harm contrary to section 39 of the Offences Against the Person Ordinance, Cap. 212, Laws of Hong Kong. Mr. WONG is a security guard at Ho Gwai Villas, a private residential development, whom the Police allege slapped Alec, a child of 10, who was riding his bicycle in the 'sitting-out-area' of the Villas. Alec sustained a 2 x 2 cm bruise to his left ear and multiple superficial abrasions to his left and right knees arising from his having crashed his bicycle following the alleged assault.

Alec went home and told his mother. The pair returned to the Security Post, where Alec identified Mr. WONG to her. The Police were called and Mr. WONG was arrested. He made no response to the allegation under caution.

Later that evening, Alec was interviewed by a police social worker who recorded the interview on video. A copy of the video has been provided to the defence.

You represent WONG and have just been served with a letter from the Department of Justice giving notice that the prosecution intends to apply to the Court for an order allowing Alec's evidence to be given via the pre-recorded videotape and for his cross-examination to be conducted via closed-circuit television (CCTV).

- a) **Can the prosecutor make these applications and if so, what is the basis upon which the court can grant or refuse such applications? (20marks)**

Mr. WONG insists he did not assault Alec and wants Alec to face him in court. He tells you Alec is a naughty child whom he has warned about riding his bicycle in the sitting-out area on numerous previous occasions. Mr. WONG has seen the video tape, which relates only to this incident and feels he will be prejudiced because the court will not get, "the full picture"

- b) **Advise Mr. WONG (5marks)**
[25marks]

QUESTION 7

“Ah B” is charged with Theft contrary to section 9 of the Theft Ordinance, Cap. 210 and is on trial in the Magistracy. When the prosecution closes its case, Ah B’s Counsel notes that there has been no evidence as to the ownership of the alleged stolen property. There are no admissions to this effect.

Ah B’s counsel decides to make a submission of ‘No Case to Answer’.

- a) **Set out the basis upon which this submission can be made? What test will the Magistrate apply? (10marks)**

“Ah C” is charged with “Possession for any purpose of sale or manufacture, goods to which a false trade description is applied” contrary to section 7(1) (b) of the Trade Descriptions Ordinance, Cap. 362. He is a warehouse manager in a warehouse in which Customs and Excise officers discovered a large quantity of forged Christian Dior trade-mark clothing. The prosecution case depends substantially upon the inference that Ah C must have had the necessary knowledge that the garments were fake.

Ah C’s counsel decides to make a submission of ‘No Case to Answer’

- b) **Set out the basis upon which this submission can be made? What test will the court apply? (10marks)**

“Ah D” is charged with Unlawful Wounding contrary to section 19 of the Offences Against the Persons Ordinance, Cap 212. He is on trial in the Magistracy. The offence took place at 8:30 p.m. in Shanghai Street, a busy shopping and recreational area in the heart of Kowloon.

The prosecution case is that Ah D was standing, about 20 meters from the victim, when Police arrived. On initial enquiry with the victim at the scene, the victim pointed to Ah D and identified him as one of approximately 5 – 10 men who had earlier attacked the victim with punches, kicks and metal pipe.

There is no formal identification parade. The defence case is one of mistaken identification. Following the close of the prosecution case, Ah D’s counsel decides to make a submission of ‘No Case to Answer’.

- c) **Set out the basis upon which this submission can be made? What test will the court apply? (5marks)**
[25marks]

QUESTION 8

Part 1

‘Ah Fung’ (aged 20 years) has been arrested for ‘loitering with intent to commit an arrestable offence’ contrary to section 160 (1) of the Crimes Ordinance, Cap. 200. The Police say he was observed acting suspiciously between 1:15 and 1:27 a.m. in the side lane of No. 47 Canton Road, Kowloon. The allegation is that Fung was hiding in the shadows, glancing up at windows on the 1st and 2nd floors. There have been a number of burglary and attempted burglary cases in the area. In each case, the modus operandi of the burglar was to enter via a rear window. Once inside, he is believed to have removed his shoes and socks before ransacking the premises. In each case, the burglar helped himself to food and drink from the victims’ fridge, thus attracting a certain notoriety in the local press as the “barefoot burglar”.

At the Police Station, a detective officer tells Fung he is going to take his photograph and fingerprints. He also wants to take prints of Fung’s feet!

1. **What authority does the officer have to do this?** (5marks)

Part 2

‘Ah Fung’ is detained overnight at the Station. The next day he is brought from the cells and told he will be required to provide a sample of head and pubic hair. Fung thinks this is all a bit excessive and is not too happy.

2. (a) **What authority does the officer have to do this?** (5marks)
(b) **What happens if Fung refuses?** (5marks)

Part 3

‘Ah Fung’ is charged with a ‘holding charge’ of ‘loitering’. He is taken before the Magistrate. No plea is taken and he is remanded in Police custody for 3 clear days pending further enquiry into the spate of unsolved burglaries in Canton Road. Whilst languishing in the court cells, a police officer brings a kit containing test tubes and cotton swabs and tells him he is going to take a DNA sample from him.

3. (a) **What authority does the officer have to do this?** (5marks)
(b) **What happens if Fung refuses?** (5marks)
[25marks]

Barristers Qualification Examination 2009

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

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

QUESTION 1

The Court of Appeal decided in the case of *Keung Siu Wah v. Attorney General* [1990] 2 HKLR 238 that a decision of the Secretary for Justice (then the Attorney General) on whether or not to bring criminal proceedings was not subject to judicial review.

Fuad VP said at p. 255:

“In my judgment it is a constitutional imperative that the Courts do not attempt to interfere with the Attorney General’s discretion to prosecute, but once the charge or indictment comes before a Court for hearing, it can consider whether the prosecution should be allowed to continue if grounds amounting to an abuse of process are raised.”

Article 63 of the Basic Law of the HKSAR provides for prosecutorial independence. It reads:

“The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.”

Discuss, with reference to decided cases, whether Article 63 of the Basic Law has made the power of the Secretary for Justice to control criminal prosecutions amenable to judicial review.

[25 marks]

QUESTION 2

Peter Ng is an American-born Chinese. He obtained his JD degree from a famous US law school and had worked in a top law firm in New York for 5 years before he was transferred to the HK office of the same law firm in 2006. One night last week, he and some friends went to a pub in Wan Chai. While drinking and chatting with his friends, he noticed the news broadcast on TV that many babies had become sick in Mainland China as a result of drinking formulae milk powder which had been contaminated. He got very excited and expressed the view that it was all due to the dictatorship of the Communist Party of China. He saw a mini Chinese national flag hanging on the wall, which was put there during the period of Beijing Olympic Games. He took down the flag and wrote with a felt pen the words 'Communist Party of China' and drew a big cross on the flag. He then took the flag out of the pub and burned it in the street outside, shouting that 'the Communist Party of China should be removed from its leadership in Mainland China'.

He was later charged by the Police under section 7 of the National Flag and National Emblem Ordinance, which provides:

“A person who desecrates the national flag ... by publicly and willfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 years.”

This section incorporates Article 19 of the PRC Law on National Flag, which provides:

“Whoever desecrates the national flag of the PRC by publicly and willfully burning, mutilating, scrawling on, defiling or trampling upon it shall be investigated for criminal responsibilities according to law;”

The PRC National Flag Law is one of the national laws listed in Annex III of the Basic Law of the HKSAR.

Article 27 of the Basic Law of the HKSAR provides:

“Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.”

Article 19 of the ICCPR provides:

“1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Question continued on next page

- (1) **Mr. Ng believes he has the constitutional right under Article 27 of the Basic Law and also under Article 19 of the ICCPR to express his views by writing on and burning the flag because he enjoyed that right in the US. He is of the view that section 7 of the National Flag and National Emblem Ordinance is unconstitutional. Advise Mr. Ng on the issue of constitutionality of section 7. (15marks)**
- (2) **Mr. Ng is also worried about whether the NPCSC might be asked to interpret Article 27 of the Basic Law because he knows that the NPCSC gave an interpretation of Article 24 several years ago. Advise Mr. Ng on the mechanism to seek interpretation from the NPCSC and also the likelihood for the NPCSC to interpret Article 27. (10marks)**
[25 marks]

QUESTION 3

Benny, a senior civil servant, was tasked to oversee the organization of a major music festival financed by the Government in the aftermath of SARS. The object of the festival was to attract international publicity of the most positive kind.

In the wake of the festival, which was generally considered to be a failure in terms of the object it was designed to achieve, disciplinary proceedings were commenced against Benny for misconduct in the discharge of his duties. If found guilty of the misconduct, and the finding accepted by the Government, one of the potential penalties was discharge from the public service.

The relevant rules and regulations conferred a discretion upon the Secretary for Civil Service to allow legal representation. Prior to the commencement of the disciplinary proceedings, Benny sought permission from the Secretary to have legal representation at the forthcoming hearing. There was in existence at the time an established policy that legal representation would only be allowed if “compelling reasons” could be shown by an applicant. As the Secretary found that no compelling reasons were shown, legal representation was denied. Benny represented himself at the disciplinary hearing which was informal and inquisitorial in nature but during which complicated factual and legal issues were canvassed. He was subsequently found guilty of the misconduct charged and was discharged from the public service. The finding of misconduct was subsequently accepted by the Government.

One of the members of the Tribunal was Bjorn, also a senior civil servant. Bjorn was the subject of an application made by his department for his re-employment but the application was not submitted until after Benny was found guilty of the misconduct and the finding accepted by the Government. It was also the case that the merits of the application for re-employment had to be considered by an independent statutory body before any decision thereon can be made by the Government.

Three and a half months have lapsed since the Government has accepted the finding of misconduct by the disciplinary tribunal.

Advise Benny of his rights, including what procedural hurdles he may have to overcome should he decide to pursue an application for judicial review.

[25 marks]

QUESTION 4

What role does proportionality play in the court's assessment of cases concerning:

- (1) fundamental rights, and**
- (2) non-fundamental rights?**

[25 marks]

Part B (Company Law)

QUESTION 5

Fatty Pie Limited (“**Fatty Pie**”) was a company incorporated in Hong Kong. Prior to its liquidation, it carried on the business of selling specialty meat pies under the brand “Fatty Pie”. It was the first company to introduce meat pies into the Hong Kong market, which created quite a sensation, and it soon acquired substantial goodwill in the market.

Fatty Pie has an authorized share capital of HK\$1,000 divided into 100 shares of HK\$10 each. It has 3 shareholders, Gerald, Howard and Isaiah, with Gerald and Howard each holding 33 shares, and Isaiah holding 34 shares. All 3 shareholders were also directors of Fatty Pie.

The specialty meat pies were made using (amongst other things) yak meat, which had to be sourced from Tibet. To that end, Gerald, through his sole proprietorship, Lotus Meat Company (“**Lotus Meat**”), sourced and supplied yak meat to (amongst others) Fatty Pie. The supply contract entered into between Lotus Meat and Fatty Pie was approved by the board of directors of Fatty Pie, upon full disclosure of Gerald’s ownership of Lotus Meat. Lotus Meat supplied goods to Fatty Pie on credit.

The other shareholders of Fatty Pie advanced personal loans to Fatty Pie from time to time, with Howard advancing loans totalling HK\$200,000 and Isaiah HK\$300,000.

Spurred by the success of Fatty Pie, competitors soon began to appear, each selling their own special brand meat pies. By early 2009, Fatty Pie began to lose its competitive edge and its business started to dwindle.

By January 2009, Fatty Pie had outstanding liabilities totalling HK\$2,200,000, HK\$1,000,000 of which were due to Lotus Meat, HK\$500,000 personal loans owed to Howard and Isaiah, and HK\$700,000 debts due to other trade creditors. Some of the debts owed to the trade creditors were months overdue and the trade creditors had been pressing for payment.

At that time, Fatty Pie’s assets consisted of a shares portfolio valued at HK\$800,000 and cash in the sum of HK\$200,000.

By a resolution passed on 15 January 2009, the board of directors of Fatty Pie resolved to liquidate its shares portfolio and to apply HK\$300,000 of the proceeds to repay part of the debts owed to Gerald, and HK\$100,000 each to repay part of the debts owed to Howard and Isaiah respectively. The payments were effected on 16 January 2009. The balance of the sale proceeds in the sum of HK\$300,000 was not recorded in the accounts of Fatty Pie and was unaccounted for.

Meanwhile, Fatty Pie’s trade creditors intensified their demands for repayment, and proceedings were threatened.

Question continued on next page

By a written resolution signed by all shareholders of Fatty Pie dated 1 March 2009, a special resolution was passed to place Fatty Pie into voluntary liquidation as it could not repay its debts.

The first creditors' meeting was attended by the following persons claiming to be creditors:-

<i>Creditor</i>	<i>Amount claimed</i>
Lotus Meats	HK\$700,000
Howard	HK\$100,000
Isaiah	HK\$200,000
Other trade creditors	HK\$700,000

The trade creditors nominated Joseph, an independent insolvency practitioner, to be the liquidator. Gerald, Howard and Isaiah nominated Ken, Gerald's brother-in-law, as liquidator. The matter was put to a vote, Gerald's camp succeeded and Ken was appointed liquidator. It was also resolved that there would be no committee of inspection.

Thereafter, the trade creditors repeatedly urged Ken to take action to investigate into the affairs of Fatty Pie, including the payments made to Gerald, Howard and Isaiah in January 2009 and the whereabouts of the balance of the proceeds from the shares sale. For a period of 6 months, Ken had not taken any action and had ignored the trade creditors' demands to take action.

On 1 October 2009, the trade creditors presented a petition for the compulsory winding-up of Fatty Pie and applied under sections 252 and 255 of the Companies Ordinance (Cap.32) to remove Ken as liquidator.

Please comment on:

- (1) The prospect of success of:**
 - (a) the trade creditors' petition, and (8marks)**
 - (b) application to remove the liquidator; and (7marks)**

 - (2) What actions, if any, could the liquidator have taken in respect of the payments made to Gerald, Howard and Isaiah? (10marks)**
- [25marks]**

QUESTION 6

In 2000, Freda, Geraldine and Helen, then senior employees in a Hong Kong company, Intimate Limited (“**Intimate**”), specializing in the manufacturing of high-end lingerie for export to the United States, were offered the opportunity to acquire the business at a very low price as the then owner of Intimate wanted to retire. They agreed to acquire the business of Intimate by incorporating another Hong Kong company, Jesserie Limited (“**Jesserie**”), to hold Intimate. They would be shareholders and directors of Jesserie. To that end, they entered into an agreement which provided, inter alia, that they would deal in good faith for the interests of the shareholders of Jesserie.

Jesserie was thus incorporated in 2000 in Hong Kong, with Freda, Geraldine and Helen each holding 33 of the 100 issued shares, and the remaining 1 share held by Kola Limited on trust for them. Freda, Geraldine and Helen were appointed directors of Jesserie. Jesserie adopted Table A of the First Schedule to the Companies Ordinance (Cap.32) as its articles of association.

Jesserie had no business of its own and everything was carried out through Intimate. Freda, who had had most experience, was appointed managing director, and her sister Laura was appointed director, of Intimate by the board of Jesserie. Freda and Laura were in control of the operation and management of Intimate.

Geraldine passed away in 2007. The sole beneficiary of her estate was her daughter, Miranda. Probate was granted to Miranda, but she as executrix was yet to be registered as a shareholder of Jesserie.

As Miranda was making inquiries into the affairs of Jesserie and Intimate, it came to light that Freda and Laura had since 2004 been diverting business and customers of Intimate to Nocturnal Limited (“**Nocturnal**”), a Hong Kong company owned by them. The diversion was done discreetly at the beginning, when Freda and Laura tried to poach only the smaller or one-off customers. But with Geraldine’s death, they intensified their activities, and the business of Intimate and Jesserie dwindled substantially, with Freda and Laura succeeding in diverting even the major customers. To date, the business of Intimate and Jesserie has ground to a halt, and the companies are severely in debt.

Miranda approached Helen for assistance, but Helen, who was in advanced age, expressed little interest in these matters and told Miranda that she could not help her.

Please advise Miranda of the options open to her.

[25 marks]

QUESTION 7

Paul and Petty are presently partners in a firm, trading as 'Fabulous Flames', which specializes in selling scented ornamental candles from a small shop in Lan Kwai Fong. They buy the candles from various overseas manufacturers. In each of the last five years they have expanded their customer base and have made substantial profits.

Paul and Petty are now looking to buy business premises on Hong Kong island which are large enough not only to sell, but also to make candles and so to establish their own brand. They are looking for a warehouse style of premises in Sheung Wan, preferably an old building with interesting features, but they have some concerns about the cost of renovation. They are also concerned about the recent increase in the cost of the equipment they will need to get the manufacturing business started.

Given these plans, and their concerns, Paul and Petty are considering whether they should incorporate Fabulous Flames and invite their relatives, friends and employees to invest in the company. **In this regard, they seek your advice in respect of the following questions:**

- (a) **What advantages, and disadvantages, would incorporating their business as a private company offer, as distinct from remaining as partners?**
(10marks)
- (b) **Given their desire to remain in control of the business, and to remain in the foreseeable future as a private company, what restrictions/requirements should they include in the company's constitution?**
(15marks)
[25marks]

QUESTION 8

Wilde Beastie Ltd ("WB") is a public company incorporated in South Africa which specializes in the export of exotic meats and sausages.

In recent times WB has seen a huge increase in the demand for its products from customers in Mainland China, Japan and Hong Kong. WB's board of directors is now considering whether to set up a regional office in Hong Kong but is not sure if this office would handle orders from customers or just deal with promoting its products.

One of WB's policies when setting up any new business is to buy whatever premises they require, as opposed to renting or leasing. This policy has served WB very well, indeed its property portfolio now forms a substantial part of its business.

WB's board of directors seeks your advice as to the following:

- (a) The need to register WB in Hong Kong, the essential requirements of such registration and the major consequences of so doing; (10marks)**
 - (b) Whether WB could issue a prospectus in Hong Kong and the essential requirements in terms of the Companies Ordinance for so doing; (10marks)**
- and**
- (c) Assuming that WB could obtain a bank loan from a Hong Kong Bank for the purchase of property in Hong Kong, whether the Bank's security would be registered in Hong Kong and whether your answer would be different if the property concerned was located in Mainland China. (5marks)**
- [25marks]**

BARRISTERS QUALIFICATION EXAMINATION 2009

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

Part A (Civil Procedure and Civil Evidence)

QUESTION 1

On 1st March 2008 Plenty Co Ltd (“Plenty”) entered into a fixed price contract with Royal Co Ltd (“Royal”) to purchase 24 containers of Thai rice to be supplied by installments over a 12 month period (“the Contract”).

Terms of the Contract include that Royal shall deliver the rice to Plenty’s warehouse upon Plenty giving Royal one day’s written notice of its requirements. Payment is within 30 days of delivery and the expiry date 28th February 2009.

On 20th March 2008 Plenty gave written notice that it required 1 container load of rice to be delivered on 1st April 2008 but Royal did not deliver the container until 14th April 2008.

Plenty gave written notice on 27th April 2008 for delivery of 1 container load on 1st May 2008 and a further notice on 15th June 2008 for delivery of 4 container loads on 20th June 2008. However, Royal only delivered 1 container on 30th May 2008 and failed to deliver the further 4 containers or any further rice.

Royal alleged it could not purchase any rice to satisfy Plenty’s orders because unforeseeable weather conditions in Thailand ruined the harvest halting supply. Plenty knows rice was available and believes the real reason for the non-delivery was that the market price had risen making the Contract less profitable for Royal.

Royal tried to get out of the Contract and then tried to renegotiate a higher contract price. Plenty did not actually need the rice at that time but the market price was rising so refused to release Royal and cancel the Contract and would not increase the price. However, Plenty did allow Royal to delay delivery. By February 2009 Royal had delivered 3 more container loads of rice.

Plenty is one of many companies owned by a prominent businessman Mr Pang. He employs Mr Sin to run Plenty.

When the Contract expiry date was approaching, Mr Sin asked Mr Pang to step in and telephone Mr Wang of Royal to push for delivery of the balance 19 containers of rice before 28th February 2009.

Mr Wang offered Mr Pang a new contract in place of the Contract for future supply. Mr Pang said Mr Sin could consider a proposal for future supply but insisted Royal must still deliver the balance 19 containers of rice under the Contract.

Question continued on next page

Mr Wang assured Mr Pang that if they did not reach mutually acceptable terms for a new contract, Plenty could place the order for the balance under the Contract later but delivery would be after 28th February 2009.

They failed to agree terms for a new contract. So on 28th February 2009, Plenty gave written notice for delivery of the balance 19 containers of rice under the Contract. Royal refused any further delivery on the basis that Plenty was in breach of the Contract in failing to give one day's written notice of delivery before the Contract expired on 28th February 2009.

Plenty has brought an action against Royal for breach of the Contract for failure to deliver the rice. Royal defends on the basis that Plenty failed to give one day's notice in time and has counterclaimed the price for the last 3 containers of rice delivered that Plenty failed to pay for plus interest.

The Timetabling Questionnaires of both Plenty and Royal confirmed that they did not intend to amend their pleadings and that there were no outstanding applications.

Royal confirmed it was not willing to try to settle the case by ADR and did not intend to adduce expert evidence at trial. They took out a Case Management Summons in agreed terms. At the 1st Case Management Conference, the Master by consent ordered that the parties exchange witness statements within 21 days and expert reports (if any) on the market price of Thai rice within 28 days. The Master adjourned the Case Management Conference for 2 months to the trial judge.

Neither party has filed a Listing Questionnaire.

You are instructed on behalf of Plenty. You received the papers yesterday, and today hold a conference attended by your solicitor, Mr Pang, Mr Sin and Mr Webb the expert.

Mr Pang and Mr Sin explain what happened. You need time to fully consider the facts and law but it is apparent that the Statement of Claim is not entirely accurate. It wrongly pleads 6 containers of rice were delivered. The conversation between Mr Pang and Mr Wang has not been pleaded whether as an oral agreement, variation or at all.

You consider it may alternatively constitute waiver or raise an estoppel, but Plenty has not filed a Reply and Defence to Counterclaim. Your solicitor explains there is no defence to the Counterclaim as Plenty accepted all the rice delivered but has not paid for the last 3 containers.

Question continued on next page

Plenty has filed one witness statement from Mr Sin. You think Mr Pang would be the crucial witness to prove what he agreed with Mr Wang. He has not given a proof of evidence. He has a high public profile and is far too busy to provide a witness statement. He is going straight to the airport from the conference and will be out of Hong Kong for several weeks.

Plenty has not served or filed its expert report. Mr Webb's draft Report is ready but Plenty decided it was best to let counsel review the Report and advise before disclosing it to Royal. You are also instructed that Plenty really does not want to go through a public trial. You notice there is an arbitration agreement in the Contract.

Mr Sin believes Royal did have rice in stock to deliver to Plenty but when the market price went up Royal instead sold it to others at a higher price than the Contract price for a bigger profit. Your Solicitors have filed Interrogatories asking a director of Royal to answer whether (1) it had any rice available to deliver from June 2008 to March 2009 and if so, what quantity; (2) whether it purchased or sold any rice from June 2008 to March 2009 and if so, the purchase price and sale price; (3) and if any answer is affirmative to supply all documents in support including stock records, contracts, purchase and delivery orders, receipts and payment documentation.

You are instructed to appear for Plenty on its application for interrogatories tomorrow at the 2nd Case Management Conference before the Judge.

Advise Plenty:

- (1) How it could avoid a public trial and save costs. (10marks)**
 - (2) What to do about the pleadings. (12marks)**
 - (3) Whether it can adduce evidence from Mr Pang and Mr Webb and if so how. (12marks)**
 - (4) On the application for interrogatories. (10marks)**
 - (5) On any other matter necessary for the 2nd Case Management Conference. (6marks)**
- [50marks]**

QUESTION 2

In 2001, Power Builders Co. Ltd (“Power”) entered a construction contract with Mighty Developments Co. Ltd. (“Mighty”) to carry out building works at Mighty’s biggest development.

Power received various advanced payments on account from Mighty to purchase materials. As works progressed Mighty failed to make interim payments for completed works so Power stopped work.

On 4th January 2002, Mighty terminated the contract alleging defective works and delay by Power. Power instructed solicitors Nil & Partners (“Nil”) after prolonged negotiations broke down, to claim the value of work done and loss of profit.

Nil failed to issue a Writ until 15th January 2008. That was 11 days after the expiry of the 6 year limitation period. Mighty issued a summons to strike out the Statement of Claim and action pursuant to Order 18, rule 19 RHC and the inherent jurisdiction.

Power tried to rely on section 23(3) of the Limitation Ordinance to extend the limitation period alleging Mighty had acknowledged a debt of HK\$11million due to Power by an Audit Confirmation Form dated 11th May 2005 (“the Form”).

The affirmation of Bernard Wong, a Director of Mighty, explained the Form was mistakenly completed and signed, and exhibited the books and accounts of Mighty. These showed the facts to the contrary, namely, that HK\$11million was then due to Mighty from Power. He affirmed that:

“When our auditor Axe & Partners conducted the annual audit the accountant Alice Tong checked the accounts, filled out and signed many Audit Confirmation Forms, got us to sign and then sent them to each company doing business with Mighty for it to confirm Mighty’s books showed an accurate statement of the account between that business and Mighty. I am advised and verily believe that Alice Tong mistakenly inserted the figure HK\$11million into the ‘due from’ Mighty box when she should have put it in the ‘due to’ Mighty box on the Form. She then gave the Form to Mighty and an employee of Mighty simply followed her instruction and signed without checking the content of the Form before returning it to her and then Axe sent the Form to Power.

I exhibit hereto marked BW-1 a letter duly signed and chopped by Axe & Partners stating that the auditor Alice Tong mistakenly inserted ‘HK\$11million’ in the wrong box on the Form. Whereas the books of Mighty showed that sum was due from Power to Mighty not vice versa.”

The day before the strike out hearing Mighty took out a summons for leave to adduce a 2nd Affirmation of Bernard Wong which exhibited an expert report of Mr Beatty to show that the works carried out by Power were defective.

At the hearing Fung J refused leave to adduce the 2nd Affirmation saying it was irrelevant to the issue and filed too late. Fung J struck out the Statement of Claim and Writ holding, inter alia, that:

Question continued on next page.

“I am satisfied that it is plain and obvious there was an error. Power’s counsel said there was a lot of suspicious circumstances and it was surprising that the primary witnesses who prepared and signed the Form have not provided their own affidavits to explain their mistakes and that I should see and hear the oral testimony of the witnesses before concluding that the Form was not an acknowledgement by Mighty of a debt due to Power. However the affirmation of Mr Wong and the exhibited documents make it clear the figure was mistakenly inserted in the wrong box and that both people signed the Form in that state inadvertently signed in that state and the accounts do show that the sum was due to Mighty not to Power. Power is not entitled to an extension of the limitation period under section 23(3). The primary limitation period of 6 years remains in place. The action is statute-barred and is struck out under Order 18, rule 19 and the inherent jurisdiction.”

Power is furious with Nil for issuing the Writ late. Nil had no time to apply for leave to appeal but did serve a Notice of Appeal before Power dismissed them. The ground of appeal is:

“That the learned judge erred in accepting what Mr Wong said as true when in all the circumstances there was insufficient evidence of mistake.”

Power has now instructed Chan & Chan (“Chans”) for the appeal and to sue Nil for negligence. Chans are extremely concerned that all proper procedures are followed in time for the appeal and have instructed you for the appeal on 1st November 2009.

On 30th October 2009 counsel for Mighty sent you and the Court of Appeal his Skeleton Argument and a letter saying at the hearing he intends to rely on the enclosed Respondent’s Notice to set aside Fung J’s Order dismissing Mighty’s application to rely on the 2nd Affirmation of Mr Wong.

The Respondent’s Notice states:

“The judge was wrong in law to dismiss the Respondent’s summons for leave to adduce the 2nd affirmation of Mr Wong and not allowing the Respondent to rely on it as additional evidence in support of the strike out summons.”

Answer each of the following 3 questions:

Chans instruct you to:

- 1. Advise what should be done before the appeal hearing to rectify any Nil errors. (15marks)**
 - 2. Draft the skeleton argument for Power for the appeal. Do not set out the brief nature of the proceedings in the court below or statement of the facts but start with the issues. (25marks)**
 - 3. Advise Power upon the letter dated 30 October 2009 including what should be done and why. (10marks)**
- [50marks]**

Part B (Professional Conduct)

QUESTION 3

PART A

Benjamin, a barrister, is instructed by the Department of Justice to prosecute Alex Chan who has been charged with ‘Assault Occasioning Actual Bodily Harm’ contrary to s. 39 of the Offences Against the Person Ordinance, Cap. 212, in relation to an alleged attack by him on his former girlfriend, Veronica. Veronica had been attacked whilst walking with her brother Eric in the street in Central. As the witness statements leave a number of questions unanswered, Benjamin arranges to meet with Veronica and her brother to seek further instructions.

At the conference held at Eric’s solicitors, Messrs. Wang & Wang, Benjamin meets Veronica, the victim of the assault and her brother who saw the attack take place.

Whilst discussing the evidence it becomes clear to Benjamin that the brother’s evidence differs in many respects to that of Veronica. He therefore calls the police station and arranges to meet with the members of the police team which conducted the investigation. He later meets all seven members of the team, (the Detective Inspector, the two Detective Sergeants, three Detective Constables and the uniformed constable who was the driver) and after discussion is able to form a clear picture of what happened during the incident.

Benjamin then calls Veronica and tells her that he thinks the assault was a “vicious, unprovoked attack” and that he is glad that he is acting for Veronica and that he will “do everything he possibly can to ensure that Chan goes to jail for the longest possible time.”

Benjamin continues his preparation for the case and notes that the statement of a newspaper vendor who saw the incident sets out a description of the attacker which differs from that provided by both Veronica and Eric. Benjamin makes a note to call Veronica about this discrepancy but through pressure of work forgets to do so. He also reviews two statements made by passers-by which are neutral as to the sequence of events and decides not to call either of them as witnesses. He discards the statements.

The case eventually comes to trial and Chan is eventually convicted as charged.

Benjamin hands up the criminal record of the accused and tells the judge that the fact that the accused has one previous conviction for ‘common assault’ two years earlier (which is accurate) “shows that Chan is the type of criminal who does not learn from his mistakes and who therefore should be punished by the imposition of the maximum sentence, otherwise vulnerable women like Veronica will not feel safe to be on the streets of Hong Kong.”

Question continued on next page

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

Additionally provide your own opinion as to how you would have conducted yourself in each of the factual situations set out above. (25marks)

PART B

Yung (21) has been charged with one count of indecent assault is scheduled to stand trial in the Magistrates Court at Eastern. Brian, a barrister is instructed by Messrs. Chin & Chin to represent him at trial.

On the day of the trial Mr. Chin, the solicitor, telephones Brian and tells him that he has an urgent matter to attend to in Fanling Magistracy and that he will go there first and get to Eastern as soon as possible. Brian tells Mr. Chin that this will pose no problem as the charge is a very minor one and the facts are simple and that, he can "guess what the instructions would have been, anyway." Brian assures Mr. Chin that he will "let the client know where you are as soon as he sees him at court."

Brian arrives at court at 09:30 and tells Yung to follow him into court. The case is called on and Brian introduces himself and asks that plea be taken.

The Magistrate tells Brian that he sees that the instructing solicitor has not signed the attendance form yet. Brian tells the Magistrate that the solicitor is in the washroom and will sign it when he comes back into court in a moment or two.

Yung is told by the police officer in court to stand at the microphone. When the charge is read out Brian turns to Yung, nods his head towards him and says "Guilty". When the court interpreter asks Yung "How do you say, guilty or not guilty?", Yung repeats 'Guilty'. The brief facts are read out and Brian whispers to Yung to say "admitted." Yung does so and the Magistrate enters a conviction against Yung upon his plea of guilty and his admission to the facts.

The prosecutor hands up the criminal record of Yung and tells the court that Yung has one previous for common assault but no similar convictions. Brian leans over to Yung and asks if that is correct. Yung tells Brian that he has been convicted of indecent assault before, sometime last year, and was sentenced to two months in jail. Brian then stands up and tells the court that "in the interests of justice" he feels bound to disclose that Yung has, in fact, "a previous similar conviction for which he served jail time last year."

Question continued on next page

Brian then mitigates for Yung and tells the Magistrate that “the whole incident is the fault of Yung’s uncle – one Stephen Aloysius Yung”, a chartered accountant with Yung, Yung & Yung CPA, of Room 5354, Mega Building, 999 Des Voeux Road Central, who “encourages Yung to watch pornography on the internet”. If it had not been for “his uncle’s malign influence”, continues Brian, “this young man would not be in the situation he finds himself in today.”

The Magistrate then says that the previous conviction is an aggravating factor and remands Yung in jail custody for three weeks for pre-sentence reports. Brian then asks to be excused, goes down to the taxi rank in the street outside and calls Mr. Chin, telling him not to bother to come over as the case is finished. Brian then returns to chambers to send out his fee note.

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

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

**(25marks)
[50marks]**

QUESTION 4

PART A

Borat the barrister is instructed by his friend Sasha to defend the lay client Clive who is to stand trial, in two weeks, in the Court of First Instance. Clive has been charged with 35 counts of obtaining property by deception, 16 counts of False Accounting and 30 counts of obtaining pecuniary advantage by deception. The charges arise out of Clive's alleged involvement in a complex pyramid selling scheme involving the purchase and sale of bearer shares in offshore companies.

Borat, who was called to the bar last year, thinks that the case is a bit complicated but tells Sasha that he will take the case on because of the 'cab rank rule.'

Borat prepares the case as best he can and holds several conferences with solicitors and the lay client. Clive instructs him that the defence is to be one of lack of any dishonesty on Clive's part as he had believed throughout the entire series of transactions that the whole scheme was legitimate. His business partner Ronnie, who now lives in Brazil, had assured him repeatedly that this was the case.

At trial Borat cross-examines the prosecution's forensic accountant and suggests to him that had he done his job properly and not in a totally amateurish fashion it would have been clear that the real culprit in the case was Ronnie. Borat suggests to this witness that the forensic analysis of the company accounting documents was slipshod and haphazard and that "crooked Ronnie must be laughing into his cocktails as he sits on the verandah of the mansion he bought with the stolen property." Borat continues that "the accountant is to blame for letting the real fraudster go free."

Borat also asks the accountant if he has recently been convicted of driving his car with excess blood alcohol. The trial judge intervenes and tells the witness that he need not answer that question.

The case is adjourned to the following day whilst the accountant is still being cross-examined. As he is travelling down in the elevator Borat tells the accountant, who is also going to the ground floor that he should not take Borat's questions personally as they are all just "for show" for the client.

At the conclusion of the trial the jury convicts Clive by an 8 – 1 majority and Clive is sentenced to 10 years imprisonment.

Borat and Sasha go to the Correctional Services Cells in the High Court to meet with Clive before he is taken to prison to start his sentence. Borat tells Clive not to worry as he has a sure fire winning point on appeal as the trial judge had made no less than three serious errors during his summing up to the jury.

Question continued on next page

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

Additionally provide your own opinion as to how you would have conducted yourself in each of the factual situations set out above. (25marks)

PART B

Barry the barrister is instructed by Susan a solicitor to act for Colin, who is engaged in a legal dispute with his business partners over a takeover bid involving a major financial institution, Overseas Finance Ltd.

Colin is the managing director of Mega Finance Ltd ("Mega") a Hong Kong listed company which specialises in high value corporate acquisitions. Colin is a very high-profile individual and is well known on the local cocktail and celebrity circuit.

Susan arranges a conference for Barry with Colin and his financial advisors. Barry calls Susan just before the scheduled start of the conference and asks that it take place in the Boardroom of Mega Finance as "this would be more convenient." Susan makes the necessary arrangements.

Barry then telephones his friend who works as a financial reporter for the North China Evening Post and tells him to send some photographers to the offices of Mega to get some 'hot photographs'.

Barry makes sure that the photographers are able to take several shots of him as he is greeted in the reception area of Mega by Colin's secretary – a former Miss Hong Kong.

At the conclusion of the conference Susan tells Barry that she has agreed very lucrative fees with Colin for both of them and that Colin has suggested that half of the fee be payable to them by way of shares in the soon to be formed 'Mega-Overseas Financial Ltd'. This will be done as soon as the takeover has been completed. Barry tells Susan that she "really is too kind."

Two weeks later Susan calls Barry and tells him that the takeover has run into some problems with the regulatory bodies and that Colin is now suggesting that he pay double the originally agreed amount to both Susan and Barry, by way of installments, if the takeover goes ahead and that they agree to accept only a nominal fee for work done to date if the whole deal fails to go through. Barry accepts this proposal.

Barry tells his chambers clerk Alfredo to buy some shares in Mega as they are bound to "go way up in value soon." He tells Alfredo that he has good information as he is acting for Colin of Mega and he tells Alfredo to get him a bottle of good champagne with some of Alfredo's profits.

Question continued on next page

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

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

(25marks)

[50marks]

BARRISTERS QUALIFICATION EXAMINATION 2009

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

PART C (ADVOCACY)

CACC 007 of 2009

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

**CRIMINAL APPEAL No. 007 of 2009
(ON APPEAL FROM DCCC No. 5354 of 2008)**

HKSAR

Respondent

v

CHAN HO YAI

Applicant

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

Counsel is hereby instructed to act on behalf of the Applicant in the above appeal. Counsel is instructed to draft perfected grounds of appeal against both conviction and sentence and to attend the hearing in the Court of Appeal at 18.00 hours on the 30th day of October 2009.

Counsel is directed to the following documents which are attached:

- (1) Reasons for Verdict delivered by HH Judge Jeffreys on 2 April 2008;
- (2) Reasons for Sentence delivered by HH Judge Jeffreys on 2 April 2008.

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 to instructing solicitor by 10.00am on 30th October 2009.

Dated this 10th day of October 2009

Law, Lee & Lo
Solicitors and Notaries

Reasons for Verdict

“There is no requirement at law for any written reasons for verdict so I will deliver this judgment orally, please make a note.

This was a trial in respect of two charges. One of wounding with intent to cause grievous bodily harm contrary to s.17 of the Offences against the Person Ordinance, Cap. 212, and one of assaulting a police officer in the due execution of her duty contrary to section 36(b) of the Offences against the Person Ordinance, Cap. 212.

The accused Chan Ho Yai, who was 67 and living on public assistance at the time of these offences, hit the victim with a folding metal stool on the back of her head when she asked him to lower the volume on his transistor radio in Wanchai public gardens at midnight on 31st December 2007. The victim Susan Wong, aged 56, suffered a 3 cm long laceration to the top of her head as a result. That was count 1 on the charge sheet. Count 2 was in respect of the accused’s attack on WPC 12345 Lee Ho Ying who was punched in the face when she tried to arrest the accused at the scene.

Both Ms. Wong and the officer gave evidence as did WDPC 5354 Ho Mei Mei as to the interview of the accused at Wanchai police station later the following morning.

Ms. Wong described the attack upon her by the accused in the clearest of terms in a moderate and unbiased fashion and she was equally clear in her evidence about having identified the accused later at the police station when she saw him sitting amongst a group of actors in the CID office. Ms. Wong is a housewife and through long experience in these courts I have found that such people are truthful and can be believed. This identification corroborated her identification of him at the scene at the time of the arrest and put the fact that she had got the correct man beyond doubt.

WPC Lee also took a very neutral stand when she described the attack upon herself. She clearly remembered the events and was precise in her recollection. It goes without saying that a trained observer such as a police officer will have such evidence accepted without question by these courts.

WDPC Ho gave evidence that she had cautioned the accused at 04:45 hours on 1 January 2008, at the police station after his return from hospital where he had been treated for the after effects of the pepper spray which WPC Lee had quite properly used on him during the arrest, and for numerous dog bites sustained by him on his face when her dog, ‘Ah Ngaau’ quite properly performed its duty in the finest traditions of the Police Dog Unit and attacked her assailant.

She recorded his reply in her official police notebook and would have made reference to the same when she testified, had it not been lost from the police store. She said that the accused had confessed to her in the following terms, after she had asked him if he wanted to go home soon: “I’m sorry, I have really ruined the New Year celebrations. Most sorry. Very, very sorry.”

I accepted this evidence of the confession from WDPC Ho as being accurate although the accused had denied having said anything at all to the police. He, of course would

say that when confronted with a clear admission of his guilt. The alternative procedure contended for by defence counsel was inappropriate in the light of the clear denial by the accused of having made any confession at all.

There was no breach of the 1992 Rules and Directions, as it is clear that the officer was acting in the best interests of the accused when she said to him, as she quite properly told this court, that it would be better if he told the truth about what had actually happened. Honesty is a virtue and the officer was perfectly correct to remind him of this fact. Her consideration for others is clearly demonstrated by the fact that she was unwilling to awaken his solicitor at that ungodly hour of the morning. She contacted the solicitor at 10:30 on the 1st and the accused was given immediate access to competent legal advice.

No submission of 'no case' was made by defence counsel at the halfway stage so this was not an issue.

The accused gave evidence in his own defence. This, naturally amounted to a simple denial of having done anything wrong. He said he had been sitting in the park with his headphones on listening to music on his radio when he was suddenly pushed from behind. He told this court that he thought it was a robbery so had jumped up and lashed out behind his back with his stool without looking. When he had realised he had hit an elderly lady he had bent down to help her up but had then been attacked by the dog and when he tried to push it away he had accidentally struck the officer. He had then been 'gassed' as he put it.

He had the temerity to suggest that he was the victim and described at great length his painful treatment at hospital for burns to his eyes and the numerous anti-rabies shots he had had to endure. He was clearly trying to elicit the sympathy of this court and for that reason I had no difficulty in discounting all of his evidence.

I find him guilty as charged on both counts.

Reasons for Sentence

As the accused is so elderly there is nothing to be achieved by sending for background or other pre-sentence reports. He has a clear record but that is neither here nor there as every criminal must commit their first offence at some time in their lives.

I have listened to the mitigation by defence counsel. There is nothing else that can usefully be said on his behalf.

This was a vicious and unprovoked attack on a defenceless and elderly lady at night. His plea of not guilty in the face of a full confession statement is a serious aggravating factor and can only mean that the sentence is severe.

I therefore sentence the accused on the first charge of wounding s. 17 to an immediate term of imprisonment of 7 years.

Our police officers deserve the full protection of the law and on the second charge of assaulting a police officer I sentence him to an immediate term of imprisonment of three years, which is the maximum in the magistrates court – as this is after all merely a summary offence. The sentences are to be served concurrently.

This is not an appropriate case to take into account the time he has been remanded in jail custody since his arrest in December 2007.

I also award full prosecution costs against him in view of his plea of ‘not guilty’ when he had admitted his guilt in the confession and had signed the detective’s notebook to this effect – although the prosecution chose not to produce that.

I award the sum of HK\$55,000 to the victim as compensation payable by the accused.

Unfortunately I am forced to return the folding stool to the accused, but I warn him not to use it again other than for a legitimate purpose.

Thank you.”