

BARRISTERS QUALIFICATION EXAMINATION 2011

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

QUESTION 1

In 1972 Orient Limited ('Orient') bought a plot of land in the New Territories (the 'Plot') from the Hong Kong Government intending to use it for the development of 12 detached houses. Orient delayed development until the Government constructed a planned road adjacent to the Plot. The road was not constructed, however, and the Plot remained undeveloped. Two directors of Orient visited the Plot several times. On one occasion in 1977 they met Mr. Man, a villager who owned land adjacent to the Plot, and they told him about Orient's future development plans.

In 1978 Mr. Man started to plant vegetables on a small part of the Plot. By 1980 Mr. Man was using the whole of the Plot for growing vegetables and this continued until Mr Man's death in 2004. Mr. Man's daughter, Maria, continued to grow vegetables on the Plot after Mr. Man's death. In 2005 she leased the Plot to Organic Limited for two years but at the end of the lease she continued to grow vegetables on the Plot.

Earlier this year Orient wrote to Maria saying that she must vacate the Plot immediately as the Government has approved plans for the construction of the road and they are about to start development of the Plot.

Advise Maria whether she must vacate the Plot.

[25marks]

QUESTION 2

In August 2011 Victor Vong ('Victor') agreed orally with Paula Poon ('Paula') that Victor would sell his flat known as Flat 3A Pine Court, Pine Road, Hong Kong to Paula for the sum of HK\$5million with completion on 1 September 2011. Victor agreed to include in the sale some furniture on the verandah. Victor and Paula also agreed that the sale would be with vacant possession and that Paula would pay a 10% deposit to be held by Victor's solicitor as stakeholder. Victor and Paula each instructed solicitors to act for them. Victor told his solicitor all the terms that had been agreed.

On 3 August Paula's solicitor wrote to Victor's solicitor as follows:

Dear Sirs,

I enclose a cheque for HK\$500,000 drawn on the Red Bank Limited by my client Paula Poon and payable to your firm as stakeholder in respect of the sale and purchase of Flat 3A Pine Court, Pine Road, Hong Kong. This sum is 10% of the agreed price for the property and is paid as a deposit to be held by your firm as stakeholder pending completion of the sale on 1 September 2011. Please send us a receipt for this sum together with the draft agreement for sale and purchase.

Paula's solicitor signed this letter.

Victor's solicitor did not reply immediately, but on 5 August 2011 he sent Paula's solicitor a receipt for the deposit which reads as follows:

Received from Paula Poon the sum of HK\$500,000 being the 10% deposit on Flat 3A Pine Court, Pine Road, Hong Kong agreed to be sold by Victor Vong to Paula Poon.

Victor's solicitor signed this receipt, but subsequently Victor refused to proceed with the sale and he returned the deposit to Paula.

Advise Paula whether she can enforce the oral agreement against Victor.

[25marks]

QUESTION 3

In 1999 Grand Contractors Limited ('Grand') developed a block of 24 residential flats known as Spring Gardens. Spring Gardens has 12 floors with two flats on each floor. Grand notionally allocated each flat in Spring Gardens to one equal undivided 26th share in the land and the building and also allocated each roof space above the two flats on the top floor of Spring Gardens to one equal undivided 26th share in the land and the building. Grand then sold one such share to Alan together with the right to the exclusive use of Flat 1A. Grand and Alan entered into a Deed of Mutual Covenant ('DMC') which was registered in the Land Registry.

Later Grand sold 4 equal undivided 26th shares to Boris together with the right to the exclusive use of flats 12A and 12B and the roof spaces above those flats. The sale was 'subject to and with the benefit of the DMC'. Grand eventually sold all its remaining undivided shares and flats in Spring Garden. All sales were made 'subject to and with the benefit of the DMC'. The owners of the undivided shares then incorporated under the Building Management Ordinance Cap. 344.

In 2006 Boris sold 2 equal undivided 26th shares to Ricky together with the right to the exclusive use of Flat 12A and the roof space above Flat 12A. Boris retained 2 equal undivided 26th shares together with the right to the exclusive use of Flat 12B and the roof space above Flat 12B. Boris and Ricky entered into a Sub-Deed Mutual Covenant (the 'Sub-DMC') affecting Flats 12A and 12B and the roof spaces above. The Sub-DMC contains the following covenant:

No owner will erect any advertising signs on the roof of Spring Gardens.

The Sub-DMC was registered in the Land Registry.

- (a) Alan mortgaged his flat to the Goodwill Bank Limited ('Goodwill') which has entered into possession.

Advise Goodwill whether the Incorporated Owners of Spring Gardens can enforce the following DMC covenant against Goodwill:

To employ only Grand Contractors Limited to carry out any repairs, redecorations or renovations to any part of Spring Gardens including any exclusive use areas.

(13marks)

- (b) Ricky has erected an advertising sign on the roof of Spring Gardens in breach of the Sub-DMC.

Advise the Incorporated Owners of Spring Gardens whether they can enforce the Sub-DMC against Ricky.

**(12marks)
[25marks]**

QUESTION 4

On 1 September 2011 V Ltd ('V') as vendor and P Ltd ('P') as purchaser entered into an Agreement to sell P's House Number 12 Celestial Villa, Pineapple Road, Sai Kung (the 'House'). Celestial Villa is a development of 12 houses. The Agreement is substantially in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance Cap. 219. The completion date is 3 October 2011. The price is HK\$10million and P paid V a deposit of HK\$1million when the Agreement was signed. The House is held under Conditions of Sale dated 1 July 1996 and has a floor area of 2250 square feet.

Before entering into the Agreement, the directors of P inspected the House. They particularly liked the living room on the ground floor which was spacious and bright. At one end of the living room and forming part of it was an area of about 150 square feet covered by a glass roof which extended about 12 feet beyond the external wall of the floors above the living room and looks over a communal garden on the development. The living room has a total area of 350 square feet. The directors of P told V that they wanted the House for investment purpose and they considered the living room to be a big attraction for potential tenants.

On 2 September V's solicitor sent P's solicitor the title deeds which included a prior assignment of the property with a plan. P's solicitor raised requisitions which V's solicitor answered on 4 September. On 25 September P's solicitor raised the following additional requisition:

Our client's surveyor has inspected the House and advises us that the area in the living room which is covered by a glass roof is an extension to the original building and that consent to the extension is required under the Buildings Ordinance Cap. 128. Please send us evidence that the necessary consents have been obtained.

V's solicitor replied that it was not obliged to answer the additional requisition because it had been raised out of time, but V did offer to remove the extension and estimated that this would take approximately 2 weeks. P refused to complete on 3 October and requires the return of the deposit.

Advise P whether V has breached the agreement for sale and purchase.

[25marks]

PART B: EQUITY

QUESTION 5

Jamie, an accountant, was the trustee of the Apple Family Trust (AFT). The assets of the Apple Family Trust comprised, inter alia, an apartment on the Peak (the “Peak apartment”) held for the benefit of Xavier and Yannis in equal shares.

In October 2010, Jamie paid a cheque of HK\$1million representing a payment of income due to the AFT, into his personal bank account at Kowloon Bank. Before doing so, his Kowloon Bank account had a credit balance of HK\$1million. The next day, Jamie went to Kowloon Bank and withdrew HK\$1million to purchase a designer watch. The bank account did not record any further activities.

Jamie was also a compulsive gambler, and lost a huge sum of money in December 2010. Feeling desperate, and being urgently in need of HK\$2million to pay his gambling debts, Jamie put up the Peak apartment for sale in January 2011. Jamie identified two potential purchasers, Pansy and Queenie, both of whom had been informed by Jamie of his representative capacity as trustee. Pansy offered the price of HK\$50million, whereas Queenie offered HK\$60million. Upon being told by Jamie of Queenie’s offer, Pansy paid and Jamie accepted HK\$3million to withhold information about Queenie’s offer from the trust. As a result, the Peak apartment was sold to Pansy for HK\$50million.

On receiving the HK\$3million from Pansy, Jamie spent HK\$2million to pay for his gambling debts. He then invested the balance (HK\$1million) in the purchase in his own name of shares in PGGW Ltd. The value of these shares is now doubled.

The above facts have just come to light. Jamie has just been declared bankrupt. Pansy has emigrated to Utopia and cannot be found after selling the Peak apartment to Raymond who had no knowledge of any of the above facts. The designer watch is valued at HK\$3million.

Advise Xavier and Yannis.

[25marks]

QUESTION 6

In 2000, Sam set up a family trust known as the Sam Family Trust appointing his long-time school friend, Terry, as trustee. The beneficiary of the trust was Sam's son, Ken. The trust assets comprised, inter alia, 1million shares in ABC Limited. The trust deed expressly prohibited delegation of the power of investment and pledging of the trust assets as security for loans.

In 2010, Terry met Bob, a well-established stockbroker and investment advisor. Terry was impressed by Bob's excellent track record in investments and became convinced that the trust would perform better if a professional investor managed the trust assets. Since Terry was not a professional investor, upon obtaining Ken's consent, he handed the share certificates pertaining to all 1million shares in ABC Limited to Bob so that he could invest them on behalf of the trust.

In May 2011, Bob pledged all the shares in ABC Limited (which were worth HK\$5million at the time) to Lantau Bank as security for a loan of HK\$5million to the trust to be repaid within three months. At the meeting whereby the loan and pledge agreements were executed, Eve, senior manager of Lantau Bank, asked Bob about the purpose of the loan. Bob said, "Ask me no questions, and I will tell you no lies." Eve then asked, "Where did you manage to get these shares?" Bob replied, cryptically, "Didn't you know? I am the investment advisor to the Sam Family Trust." Eve did not insist when Bob agreed to an unusually high rate of interest.

The agreements were executed accordingly. The share certificates were transferred to Lantau Bank, and Lantau Bank transferred the loan of HK\$5million to Bob as investment advisor of the trust. Bob gambled away the money and could not be found.

Three months later, since Lantau Bank had not received any repayments on the loan, it sold the shares, pursuant to the loan agreement, at HK\$3million, the market price at the time.

It was common ground that Bob had neither actual nor apparent authority to enter into the loan and pledge agreements. ABC Limited has recently gone into liquidation and its shares have become worthless.

Advise Ken as to any equitable claims he might have.

[25marks]

QUESTION 7

Aaron was a senior manager of Best Electronics Limited (“Best Electronics”), which was in the business of designing and distributing electronics products. Aaron was in charge of the development of a new tablet personal computer known as the “Best Pad” to be released to the market.

At a board meeting in January 2009, Aaron urged all the other directors to press ahead with manufacturing a “Best Pad” with mobile phone functions as soon as possible. However, the board resolved to manufacture one without such functions to be released in 2010, and possibly one with mobile phone functions in 2012. Aaron was assigned to take charge of the production and marketing of the 2010 model. Aaron immediately hired an advertising agency, Creative Limited, to launch a large-scale promotion campaign for the Best Pads. Aaron strongly supported engaging Creative Limited, even though it quoted a considerably higher price than the other tenderers. Unbeknown to the other directors, Aaron had a majority shareholding (60%) in Creative Limited. A week later, Creative Limited declared dividends in the amount of HK\$100,000 to be paid to its shareholders in proportion to their shareholding.

In June 2009, Aaron gave four months’ notice (as required under his contract with Best Electronics) to leave Best Electronics. Over the next four months (ie June to September 2009), he set up a new company called Excellent Electronics and developed tablet computers that have mobile phone functions, using a new operating system developed by himself. Best Electronics was kept in the dark throughout.

In April 2010, Excellent Electronics’ tablet computer known as the “Super Pad” was released into the market. In 2010, Excellent Electronics made a net profit of HK\$15million from selling the “Super Pads”. Forecast for future sales was extremely positive.

On 5 May 2010, the Board of Best Electronics received advice that they should not release the 2010 model of their “Best Pads”. Best Electronics had already invested HK\$20million in producing and marketing this model.

Advise Best Electronics, which has recently become aware of Aaron’s actions.

[25marks]

QUESTION 8

Tony, an accountant, was the trustee of the Unlucky Family Trust. The trust assets comprised, inter alia, HK\$8million worth of shares in Soogle. The trust deed provides as follows:

Clause 5: The trustee shall have absolute discretion to invest the trust assets in whatever properties in Hong Kong as he thinks fit.

Clause 9: In so far as permitted by law, the trustee is not liable for any loss howsoever arising.

Clause 20: The trustee may at any time in his absolute discretion resettle upon trust in any manner, the whole or any portion of the trust assets.

In January 2011, having taken great care in consulting financial advisors, all of whom suggested that the Hong Kong stock and property markets would crash in the near future, Tony sold all the shares in Soogle, and used the proceeds to purchase a house in Utopia. He believed that this course of action was in the best interest of the trust.

In May 2011, Tony made a telephone inquiry with Calvin, solicitor of the trust, about the tax liability of the trust fund. Upon hearing advice from Calvin, Tony exercised his discretion under Clause 20 to resettle the trust assets upon a new trust situated in Utopia, a tax haven. It transpired that because of the poor telephone connections, Tony mistakenly heard that no additional tax would be payable upon resettlement. Consequently, the trust assets are liable for an additional tax payment of HK\$1million.

Last month, a few unexpected terrorist attacks broke out in Utopia. As a result, property values in that country plummeted suddenly. The Utopian house is now only worth HK\$100,000.

The beneficiaries of the Unlucky Family Trust have just found out the above.

Advise Tony.

[25marks]

BARRISTERS QUALIFICATION EXAMINATION 2011

PAPER III: CRIMINAL LAW, CRIMINAL PROCEDURE & CRIMINAL EVIDENCE

QUESTION 1

Consider the following alternative fact patterns and advise as requested:

- (a) Your lay client pleaded guilty yesterday in Eastern Magistracy to one count of Breach of Condition of Stay, contrary to s. 41 of the Immigration Ordinance, Cap. 115 in respect of his having overstayed in Hong Kong for a period of ten years after his permission to remain had expired. [Extract provided.] He was convicted of the offence upon his plea of guilty and his admitting the Brief Facts of the case.

The Magistrate noted his clear record and the rather unusual fact that your lay client had voluntarily gone to the Immigration Department and surrendered himself to them, despite the Department having had no knowledge of his whereabouts, and not having been actively looking for him at the time. The Magistrate also noted that your lay client had voluntarily made a statement under caution implicating himself and admitting his guilt.

The Magistrate in his Reasons for Sentence said, *inter alia*:

“It is my duty to take into consideration everything which has been said in mitigation and all the attendant circumstances of this case in arriving at the appropriate and just sentence. I note the voluntary surrender to the authorities by the defendant and I take that into full account in arriving at a starting point of twelve months imprisonment. This to be immediate imprisonment.

This is a very long period of overstaying and, despite the plea of guilty, I will not give any discount of sentence in this case because it was such a flagrant disregard of the law of Hong Kong. A clear record attracts no discount in these courts. The defendant is sentenced to one year in prison.”

Your lay client is dissatisfied with this sentence and wishes to appeal against it. With reference to relevant authorities, if any, what would be your advice as to any potential grounds of appeal against sentence and as to the relevant procedure? (9marks)

s.41 Immigration Ordinance, Cap. 115

Any person who contravenes a condition of stay in force in respect of him shall be guilty of an offence and shall be liable on conviction to a fine at level 5 and to imprisonment for 2 years.

Question continued on next page.

- (b) Your lay client was convicted of one count of theft in the District Court, having pleaded guilty to stealing property valued at HK\$2,000 from a domestic premises into which he had tricked his way, having pretended to the elderly occupant that he needed to use the telephone to make an emergency call. Once inside he had stolen jewellery and cash from a drawer. The case was adjourned for background reports and during that time the accused repaid the full amount of HK\$2,000 to the victim of the theft. This fact was then brought to the attention of the judge.

In his Reasons for Sentence the trial judge made, *inter alia*, the following comments:

“I note the repayment of the stolen money. This was done only after conviction. Restitution after conviction is no restitution at all. It is but a blatant attempt to buy freedom. It counts as nothing towards mitigation and such a cynical attempt to influence the court so late in the day should, in my view, attract a harsher penalty, but that is out of my hands unfortunately.

If it had been done shortly after the crime, then of course it would have resulted in a reduced starting point. A starting point always reflects the offence coupled with the mitigating factors and early restitution would have been a powerful mitigating factor. But, it is simply too late now.

I take a starting point of thirty months and reduce that by one third to reflect the plea of guilty. The sentence is one of twenty months imprisonment.”

Your lay client is dissatisfied with this sentence and wishes to appeal against it. With reference to relevant authorities, if any, what would be your advice as to any potential grounds of appeal against sentence and as to the relevant procedure? (8marks)

- (c) Your lay client was stopped by the police for routine questioning and, during the same, he told the police that he had burgled a residential premises some six months earlier. The police, because of lax procedure, did not record this admission either at the scene or in the police station. Police enquiries later revealed that this burglary had in fact occurred and that there was no identification or other evidence linking your lay client to the crime.

Your lay client, however, insisted on pleading guilty to the offence and was sentenced in the District Court to two years imprisonment. In his Reasons for Sentence the Judge said, *inter alia*:

“For burglaries committed at domestic premises, the starting point is one of three years as set out in HKSAR v Ng Wai Hing [2003] 2 HKLRD 338. This is a guideline case.

Question continued on next page.

The accused is a man of previous good character. I take account of his early plea of guilty and reduce the sentence by one third. The total is one of two years imprisonment.”

Your lay client is dissatisfied with this sentence and wishes to appeal against it. With reference to relevant authorities, if any, what would be your advice as to any potential grounds of appeal against sentence and as to the relevant procedure?

(8marks)

[25marks]

QUESTION 2

Your lay clients Jordon Michael and Johnson Majeek were arrested, in the course of a police Narcotics Bureau surveillance operation, for trafficking in heroin. The police made the arrests at their hotel in Wanchai, after information had been received from an informant that several members of a basketball team which was visiting Hong Kong were involved in the supply of narcotics to local drug syndicates.

At their trial in the Court of First Instance they faced a charge of conspiracy to traffick in a dangerous drug. They were jointly charged with another member of the suspected drug trafficking syndicate on whom the narcotics had been found at the time of his arrest.

The evidence at trial was that no identification parade had been held for the two accused because they were both over two metres tall, and the Officer in Charge of the Case did not think it possible that the company which supplied the actors for police identification parades would have actors of this height available.

No alternative method of identification was attempted, as the officer considered that these alternatives would be unfair to the accused. The officer also claimed that because this had been an ongoing surveillance of specific premises, and specific persons connected to those same premises, over a substantial period of time, and because all the officers involved in the surveillance exercise had been present when the accused had been arrested, it would have been a waste of time and money to have held an identification parade. He had regarded the situation as being akin to one where a witness recognised an accused person whom he knew. The officer justified these decisions as 'operational matters'.

At trial both accused were identified in the dock of the court by the police surveillance officers, PW 1, 2, 3 and 4. This was the first formal identification of either accused. The officers gave evidence that the accused were two of a number of men whom they had followed from the arrivals hall of the airport to their hotel in Wanchai, and whom they had observed on occasion over a period of two days in various locations in Wanchai. They had observed the two accused hold a number of meetings with suspected drug traffickers, including the co-accused, in restaurants, on public basketball courts and at bars during that period.

They gave evidence that they had directed the arrest team to the accused's hotel rooms when the surveillance officers had been informed by radio that the illicit narcotics had been found in the possession of the co-accused upon his arrest.

This person had been observed to have met with the two accused on three occasions over the two day long surveillance operation. All the surveillance officer witnesses had been present at the arrests of the two accused.

Question continued on next page.

In respect of the identification issue, the prosecution case was that this was simply a case of recognition of the two accused by all of the surveillance operatives. The defence objected that the dock identification was objectionable, as it was a first time identification in court. The trial judge had, however, allowed the dock identifications to proceed.

At the conclusion of the evidence and after submissions by counsel the trial judge had directed the jury, *inter alia*, that as this was a simple case of recognition they could rely on the dock identifications made by the surveillance operatives. He had told the jury that the four officers were trained surveillance personnel who had specifically targeted these two accused over a period of two days, and therefore the jury could attach more weight to the identification of the accused by these four witnesses as compared to, for example, an identification made by an untrained member of the public - a 'civilian's identification'.

He had directed the jury that the evidence of a police officer, in these circumstances, was more reliable and creditworthy than the evidence of a civilian, and that the evidence of each surveillance officer was capable of supporting the evidence of the others in respect of the identifications which each had made.

The trial judge had gone on to direct the jury that even generally speaking (i.e. not limiting to quality of identification evidence), they could safely regard the evidence of a police officer as more creditworthy than that of a civilian, simply by virtue of his position as a member of the police force.

The judge had also directed the jury on the special need for caution in respect of cases of challenged identification, had told them that even honest witnesses could be mistaken and that a number of honest witnesses could all be mistaken in respect of an identification made by them. The judge had then reminded the jury to consider all the circumstances of the observations made by the surveillance officers, including the length of the observations, the lighting, whether or not there were any obstructions, the distances involved and any other relevant matters when arriving at their decisions as to the reliability of the identifications made by the officers.

The two accused were convicted by the jury and now wish to appeal against conviction.

What would be your advice to them, in relation to a potential appeal in respect of the identification issue?

Advise the accused in respect of both the police actions and the course which the trial took. Refer to relevant authorities, if any.

[25marks]

QUESTION 3

- a. Your lay client was convicted after trial in the District Court on three counts of conspiracy to defraud and four counts of false accounting. He was sentenced to a total of three years in prison.

He appealed against all of these convictions to the Court of Appeal on the grounds that material evidence had not been considered properly at trial and that inconsistencies between the evidence given by the various prosecution witnesses had not been properly resolved by the trial judge.

The Court of Appeal dismissed the appeal and affirmed the convictions.

Your lay client now wants you to appeal to the Court of Final Appeal on the same grounds, as he is adamant that he is the victim of a ‘degree of injustice’.

He seeks your advice as to the procedure involved, his chances of success and on any other relevant matter. With reference to relevant authorities, if any, what advice would you give him in respect of these issues?

(13marks)

- b. In the event that you do eventually take the case on appeal to the Court of Final Appeal your lay client requests that you adduce new evidence at the appeal hearing.

He believes that the new evidence, in the form of statements, will show that he did not enter into any of the conspiracies charged.

This evidence was not available to the trial judge or to the Court of Appeal, and its existence was confirmed only after the Court of Appeal’s decision dismissing the appeal had been delivered.

Your lay client now seeks your advice as to the likelihood of this evidence being accepted by the Court of Final Appeal. Making reference to relevant authorities, if any, what would you tell him and why?

(8marks)

- c. **Your lay client seeks your advice on the issue of costs awards in the event that his application for leave to appeal to the Court of Final Appeal is rejected by the Appeal Committee. With reference to relevant authorities, if any, what would you tell him?**

(4marks)

[25marks]

QUESTION 4

- a. Police Constable 1234 Chan Faat is on patrol in Queen's Road Central when he sees two men rushing out of the Golden Jewellery Shop situated at 999 Queen's Road Central.

The men are wearing face masks and each is carrying a knife.

PC Chan runs over and, after a brief struggle, he succeeds in knocking both men to the ground. He disarms them and handcuffs them to each other.

He then uses his beat radio to call for assistance and later takes the men to Central Police Station, where he cautions them for the offence of Robbery of the Jewellery Shop, in the following terms:

"You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

Discuss with reference to relevant authorities, if any, the appropriateness and completeness of the actions of PC Chan. (15marks)

- b. At the police station one of the men, Wong, whilst under caution for the Robbery offence, is asked a series of questions by the investigator, Detective Constable Ho. The caution was given in the following terms:

"You have been arrested for Robbery of the Golden Jewellery Shop No. 999 Queen's Road Central at 10 am today. Now you are not obliged to say anything unless you wish to do so but whatever you do say I will make a note of in writing and it may be given in evidence. Do you understand?"

Wong said that he understood.

Ho then asked Wong, *"Where did you get the knife which you used in the shop?"*

Wong answered, *"I bought it years ago...I knew I should have thrown it away after last time, it's brought me bad luck, like I knew it would."*

Ho then said, *"Last time? What last time?"*

Wong answered, *"Look let me tell you why I had it in the first place. I bought it to stab a man in the Lucy Wong Bar in Lockhart Road. He was asking for it. I meant to just cut him, but I killed him. I stabbed too often. I never intended to rob with it...that's the truth."*

Ho then asked, *"When was this?"*

Wong answered, *"Last Mid-autumn Festival."*

Ho asked, *"What time?"*

Wong answered, *"Just before closing time, at 2 am."*

Question continued on next page.

Ho asked, *“Where is the bar?”*

Wong answered, *“999 Lockhart, 3rd Floor.”*

Ho asked, *“How many times did you stab him?”*

Wong answered, *“Over a dozen blows.”*

Ho asked, *“Where did you hit him?”*

Wong answered, *“On the head, and chest..I knew I had done him.”*

Ho asked, *“What did you do?”*

Wong answered, *“I ran out. Got a PLB, and went to my flat in Portland Street. I washed up. Cleaned the knife. Threw my stuff away in a litter bin. I knew I should have dumped the knife but I was too stupid to keep it. Now look what it has brought. That’s why I had it, honestly, not for robbery.”*

Ho asked, *“Who was the guy?”*

Wong answered, *“David Lee, the barman.”*

Ho then showed Wong the knife and asked, *“Is this the knife you used to kill him?”*

Wong answered, *“Yes that’s it. I had no plan to rob with it. I was just carrying it, and pulled it out in panic when the shop guy chased me. It’s not for robbery, honest.”*

The interview continued and upon its conclusion Wong read over the statement, agreed that it was all correct, and then signed it, as did Ho.

Wong was later charged with the murder of David Lee.

As his counsel, what action, if any, would you take in respect of this statement made by Wong if the prosecution proposed to rely on it at trial?
(4marks)

What grounds appear to exist for such action? (3marks)

What would be the relevant procedure? (3marks)
[25marks]

QUESTION 5

- a. With reference to the appropriate Ordinance, how many jurors normally sit on a jury in a criminal trial in the Court of First Instance? (5marks)**
 - b. Who may be exempted from sitting on a jury? (Candidates are to provide five examples) (5marks)**
 - c. What is a peremptory challenge, and by whom may it be made? (5marks)**
 - d. What is a majority verdict? (10marks)**
- [25marks]**

QUESTION 6

Aaron Chan is remanded in custody to appear before Kwun Tong Magistrates Court today, charged with robbery, contrary to Section 10 of the Theft Ordinance, CAP 210. He made his first appearance before the Magistrate two weeks ago, at which time the prosecution made a number of objections to his being admitted to bail. Aaron's lawyer at that time made a bail application on his behalf. Bail was refused on the grounds that having regard to his previous convictions, (two convictions for theft), there were substantial grounds for believing that he would commit an offence while on bail.

You are now instructed to represent Aaron at this second appearance before the Magistrate.

- a. **What rules govern an accused person's right to be admitted bail? What are the factors a court may take properly into account in refusing to admit a person to bail?** (5marks)
 - b. **Give five examples of circumstances in which an accused person need not be admitted to bail.** (5marks)
 - c. **What terms and conditions might the court impose before granting bail?** (5marks)
 - c. **What information might Aaron's counsel provide in support of his application for bail on this occasion?** (5marks)
 - d. **What information would Aaron's counsel need not provide in support of any subsequent application?** (5marks)
- [25marks]**

QUESTION 7

Bobby Fung (aged 16 years and 9 months) has been convicted in the Magistrates Court of an offence of theft of a mobile phone valued at HK\$4,800. In his reasons for sentence the magistrate, inter alia, stated that the offence for which Bobby had been found guilty was both serious and prevalent. The magistrate continued that, “any person whose conduct flew in the face of the government’s efforts to promote awareness of the evils of mobile phone theft should expect to go to prison”. He sentenced Bobby to 9 months imprisonment.

- a. What considerations should the magistrate have given to sentencing in this case, and what information should he have required? (10marks)**
 - b. How would these considerations differ if Bobby had been aged below 16 years? (10marks)**
 - c. Comment on the magistrate’s reasons for the imposition of an immediate custodial sentence in this case. (5marks)**
- [25marks]**

QUESTION 8

Carol Fung faces a single charge of trafficking in dangerous drugs before Judge Wise of the District Court. The charge stipulates that she was in possession of 44.4 grams of methamphetamine hydrochloride. Although Carol intends to plead guilty to the charge and admit the prosecution Summary of Facts, it is her contention that a substantial quantity of the narcotics was to be used for self consumption. Having entered plea and admitted the facts Carol's counsel informs the court of the basis upon which her plea is entered. Judge Wise interrupts and states that in his view the evil of narcotics abuse is so pervasive that he declined to accept Carol's contention. His Honour continued, "making fine distinctions between different forms of trafficking or the motive behind them undermines the core policy of providing consistent levels of sentencing for traffickers based on the weight of the narcotics being trafficked."

- a. **Discuss the judge's comments. With reference to the appropriate authority, what are the issues to which the court should address itself in these circumstances? (10marks)**
- b. **Having sentenced Carol to a term of six years imprisonment, His Honour went on: "The crime for which you have been convicted is a blight on the face of the Hong Kong community. By failing to cooperate and provide the particulars of the persons behind this evil scheme, your conduct has necessitated that the police and the prosecution have been put to considerable extra effort. I therefore award costs to the prosecution."**

Under what circumstances is the court entitled to order costs in favour of the prosecution? (10marks)

- c. **How might Carol appeal against the award of costs to the prosecution? (5marks)**
[25marks]

Barristers Qualification Examination 2011

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 Legislative Council Ordinance (LCO), Cap. 542, establishes two forms of constituencies for the purpose of returning members to the Legislative Council (LegCo). One is geographical constituencies, the other functional constituencies. Section 19 provides that 35 members are to be returned to the LegCo at a general election for all geographical constituencies. Sections 20 and 21 establish 29 functional constituencies to return 35 members. One of the functional constituencies listed under s. 20(1) of the LCO is the Transport Functional Constituency.

Section 20(2) of the LCO provides that the functional constituencies are constituted as provided by ss. 20A and 20ZC, of which the consequence is that electors in some functional constituencies are exclusively bodies (either incorporated or unincorporated), some exclusively individual natural persons, and some a mixture of the two.

Section 25 provides that only persons so specified in ss. 20A to 20ZC are eligible to be registered as electors for the functional constituencies. If the person so specified is a natural person, he must be registered as an elector for a geographical constituency. Only a natural person who is a permanent resident of HK is eligible for registration as an elector for a geographical constituency.

Section 26 sets out the mechanism by which a corporate elector is required to cast its vote at an election. In summary, a corporate elector is required to select an eligible person to be its authorized representative for the purpose of casting its vote at an election and the authorized person must be a permanent resident and have special connection with the corporate elector.

Mr. Wong, a permanent resident in the HKSAR, is a taxi driver. The taxi association to which he belongs is not a body specified as part of the Transport Functional Constituency to which he believes his occupation is by its nature suited. Because ss. 25 and 26 of the LCO enable certain specified corporate bodies to be electors for functional constituencies, he is of the view that such arrangements violate a fundamental principle of electoral law which is generally accepted internationally, namely that only natural persons should be eligible to participate in election.

Question continued on next page

Advise Mr. Wong on the following two constitutional issues:

- 1. Is the establishment of functional constituencies, especially the provisions of ss. 25 and 26 of the LCO, in violation of Article 26 or any other Articles of the Basic Law? (15marks)**
 - 2. Can he make use of the phrase “as applied to Hong Kong” in Article 39 of the Basic Law to argue that the HKSAR should follow international practice in this respect? (10marks)**
- [25marks]**

Some relevant Articles of the Basic Law are as follows:

Article 26

Permanent residents of the HKSAR shall have the right to vote and the right to stand for election in accordance with law.

Para. 1 of Article 39

The provisions of the ICCPR, the ICESCR, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.

Article 68

The Legislative Council of the HKSAR shall be constituted by election.

The method for forming the LegCo shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the LegCo by universal suffrage.

The specific method for forming the LegCo and its procedures for voting on bills and motions are prescribed in Annex II”

QUESTION 2

BK is a British-incorporated company with its registration office in London. It has a subsidiary in Hong Kong called BT. BK together with BT entered into a contract with the Government of the Republic of Lydia (hypothetical), an African country, in 2009 in the HKSAR under which BT agreed to build an oil refinery for the Republic of Lydia for the price of US\$200million. The project had been completed by the end of August 2011. But the Republic of Lydia now refuses to pay.

BK and BT intend to bring a case to sue the Republic of Lydia for breach of contract in the HKSAR. They are aware that before the change sovereignty in 1997, Hong Kong followed the restrictive immunity doctrine as contained in the British State Immunity Act 1978. But after the change of sovereignty in 1997, the British State Immunity Act 1978 is no longer applicable in the Hong Kong Special Administrative Region.

They are also aware that China subscribes to the doctrine of absolute immunity. Before they decide whether to bring the case before the Court of First Instance in the HKSAR, they come to see your advice on two legal issues:

- (1) Whether under the Basic Law the courts in the HKSAR shall apply China's policy on state immunity; and (15marks)**
- (2) Whether the courts in Hong Kong will have a final say on the question above. (10marks)**
[25marks]

Two relevant Articles of the Basic Law are as follows:

Article 13

The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.

The Ministry of Foreign Affairs of the People's Republic of China shall establish an office in Hong Kong to deal with foreign affairs.

The Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law.

Article 19

The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.

The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

QUESTION 3

You have been asked on 10 October 2011 to advise on the merits, both substantive and procedural, of the proposed application for judicial review by Mr. Chan.

The instructions taken by the solicitors show the following salient facts:

- (1) Mr. Chan moved into a public housing rental unit in 2000 with his wife and children.
- (2) In respect of the public housing rental unit, Mr. Chan entered into a tenancy agreement with the Housing Authority, a statutory body managing the public housing stock of Hong Kong.
- (3) The tenancy agreement contains the following clauses:
 - Clause II(10) provides that the tenant may only use the rental unit for residence purposes for himself and his family members but not for, inter alia, business purpose.
 - Clause IV(2) provides that it shall be lawful for the Housing Authority as landlord to re-enter the rental unit if the tenant, inter alia, fails to observe or perform any of the terms of the tenancy agreement.
 - Clause IV(7) provides that for the purposes of the agreement, any neglect or default of any member of the tenant's family or any servant of his shall be deemed to be the act, neglect or default of the tenant.
- (4) The Housing Authority, after investigation, concluded that the rental unit had been used for business purpose in providing tutorial services. The housing managers observed that school children visited the rental unit after school hours for durations of 2-3 hours on weekdays when they were kept together sitting at desks and on chairs in the living room by Mr. Chan's wife. The eldest son, who was understood to be a university graduate, was at the rental unit on weekdays to answer questions from the school children about their homework and to prescribe exercises. The wife also made snacks for the school children.
- (5) The Housing Authority issued a letter to Mr. Chan on 6 July 2011 stating that the Authority had found that the wife and eldest son had used the rental unit for business purposes and that was in breach of the tenancy agreement; and that the Authority thereby sent him a notice to quit, to terminate the tenancy agreement. The letter required Mr. Chan and his family to move out of the rental unit by 31 August 2011.

Question continued on next page

- (6) The Housing Authority's letter of 6 July 2011 reminded Mr. Chan that he had a right to appeal to an appeal tribunal under section 20(1) of the Housing Ordinance (Cap 283) not later than 15 days after the date on which notice to quit has been given. The Chairman of the panel of the appeal tribunal has the power to permit an appeal to be made on behalf of the tenant by a person authorized under the tenancy agreement to occupy the rental unit if he is satisfied that the tenant is unable to appeal by reason of ill-health, absence or other cause he thought sufficient. According to section 20(3) of the Ordinance, the appeal tribunal, in determining an appeal against a termination by notice to quit may confirm, amend, suspend or cancel the notice to quit. According to section 20(4), the decision of the appeal tribunal shall be final.
- (7) Mr. Chan says that he works as a cross-border truck driver and was driving his truck in the remote provinces of Mainland China most of the time in the first half of 2011. He was not aware of the Housing Authority's investigation and the allegations made in the investigation report. He became aware of the letter of 6 July 2011 only on 20 August 2011 when he came home from Mainland China. He spoke to the housing estate manager immediately thereafter and after some negotiations, the housing estate manager said that Mr. Chan and his family would not be evicted without 14 days' notice. There was no such notice until 8 October 2011, when a written notice was hand delivered stating that eviction action will take place on 22 October 2011. Mr. Chan then rushed to find the instructing solicitors.
- (8) Mr. Chan also says that he has asked his wife and eldest son what the matter was all about. The wife told him that the school children were the children of neighbours in the same tower block entrusted by the neighbours for her to look after between the end of school hours and their parents returning home from work. The wife received some money from the parents as expenses for the preparation of the snacks, as well as an appreciation for looking after the children. The eldest son said that he had an arrangement with a publishing company for the writing of teaching materials and had been trying out some of the exercises in the draft teaching materials on the school children for feedback. He would also answer questions from the school children as a matter of courtesy.
- (9) Mr. Chan further says that his wife and eldest son had never been questioned by the Housing Authority regarding their activities in the rental unit and that the only mention of the investigation report was in the letter of 6 July 2011 of the Housing Authority which set out the matters in (4) above.

Discuss.

[25marks]

QUESTION 4

Chief Justice Andrew Li considered in paragraph 65 of his judgment in *Town Planning Board v The Society for the Protection of the Harbour Ltd* (2004) 7 HKCFAR 1, CFA that: “With the dynamic development of the common law, whilst the courts' jurisdiction on judicial review remains a supervisory one, a real question exists as to whether there is a sliding scale of review, with the intensity of review depending on the subject matter of the decision.”

Discuss on –

- (a) Whether there is now a sliding scale of review on judicial review under the common law of Hong Kong;**
- (b) What criteria should inform and be determinative of the intensity of review the courts of the HKSAR should adopt in exercising their jurisdiction in judicial review;**
- (c) Whether having a sliding scale of review is consistent with the supervisory jurisdiction of the courts of the Hong Kong Special Administrative Region in judicial review.**

[25marks]

Part B (Company Law)

QUESTION 5

AB (Holdings) Ltd. (“ABH”) was incorporated in Hong Kong in 1960 and is a private company. ABH is owned and managed by the Goo family. AB Trading Ltd (“ABT”) is a subsidiary of ABH, it was incorporated in Hong Kong in 2000 and its shares have been listed on the Hong Kong Stock Exchange since 2003. ABT trades globally. AB Ltd. (“AB”) is also a subsidiary of ABH. It was incorporated in Bermuda in 1997 and is a private company specializing in the sourcing of ecologically friendly (i.e. ‘green’) products. Numerous other companies, incorporated in various jurisdictions, are part of the ABH group.

The Goo’s business strategy in the late 1990’s focused on diversification and globalization. However in the present economic climate Goo senior, the majority shareholder and Chairman of ABH, is looking to consolidate the family’s businesses in Southern China. Some businesses are in the process of being sold while others are being relocated.

Goo senior is also the Chairman of ABT. He has proposed to the board of ABT that ABT’s share capital be reduced and that ultimately ABT be privatized. ABT is solvent; its share price is presently stable but low as compared with the price in 2007/08 and dividends are also relatively low.

- (a) Goo senior may however meet opposition from certain family directors and shareholders and therefore seeks your advice as a means to be well informed as to the provisions of the Companies Ordinance concerning the reduction of ABT’s issued share capital and, ultimately, ABT’s reversion to being a private company. (15marks)**

Goo senior has also proposed that AB establishes its head office in Hong Kong with a view to focusing and expanding its business in Southern China. He reckons that the green market will be the next success story and he envisages floating AB in Hong Kong in the next 4 or 5 years. This expansion needs to be managed carefully so as to associate green products with quality products and so Goo intends to take up the roles of managing director and chairman of AB.

Goo’s eldest daughter, Faye, showed an interest in the green movement in the late 1990’s. She persuaded Goo to form AB and is now AB’s managing director. She is totally opposed to Goo’s proposal to move AB’s head office. She is looking to Europe to source quality products and sees China’s reputation in relation to consumer products as damaging to AB’s prospects. Faye is also fed up with Goo’s autocratic style of managing the AB group. She had found that attending ABH’s, ABT’s and AB’s board meetings is a complete waste of time because Goo will always dominate in the discussions and his views always become the decisions.

Question continued on next page

- (b) Faye is the registered holder of 5 per cent of ABH's shares, 1 per cent of ABT's shares and 10 per cent of AB's shares. She would like to sell all her shares and set up a new green company and seeks your advice in relation to the relevant company law and legal issues.**

(10marks)

[25marks]

QUESTION 6

BC Ltd (“BC”) was incorporated in Hong Kong in 2001 as a private company limited by shares with authorised share capital of HK\$10,000 divided into 10,000 shares of HK\$1 each. It adopted Table A as its Articles of Association. BC was originally set up to manufacture miniature lens for use in satellites. BC has since expanded and diversified to include a range of highly specified lens products. BC’s founder members, Bon and Cax, met at university and were originally its only shareholders and directors, each of them held one of its 2 issued shares. The working capital required by BC was financed by funds provided by Bon and Cax in the form of shareholders’ loans to BC as to 50% each.

In the audited accounts for the year ended 30 September 2007, the total amount of shareholders’ loans owed by BC to Bon and Cax were HK\$10,000,000 and the accumulated profits were HK\$5,000,000. At the AGM held on 30 November 2007, BC declared a dividend of HK\$4,000,000. The dividends declared remain unpaid and were treated as shareholders’ loans advanced by Bon and Cax to BC.

In 2008, Bon and Cax were approached by a venture capitalist, Xen, who having become familiar with their products, offered to finance a new research laboratory by subscribing for new shares equivalent to 26% of the enlarged issued share capital of BC for HK\$20,000,000. Bon and Cax accepted the offer and 3,699 new shares were allotted to each of Bon and Cax and 2,600 new shares were allotted to Xen, all of which were issued at par. The balance of the consideration paid by Xen was recorded as share premium. The new capital raised was used by BC in its business, and the amounts owed to Bon and Cax remained unpaid.

At the same time Ga, Ho and Jay, who were formerly senior employees, were invited to join the board and to deal with the day-to-day running of BC thereby leaving Bon and Cax free to concentrate on research and developing new lens products.

Ga, Ho and Jay were initially reluctant to take up the responsibilities of directorship in part because BC employs nearly 200 full time employees. Each of them was finally persuaded by the offer and accepted a 4% shareholding in BC in return for their commitment to take up the day-to-day management of BC and to act as its directors. Further, BC gave an option to Ga, Ho and Jay to subscribe for new shares in pro rata to their shareholding at par, in the event of BC going public. Shortly afterwards, each of Bon and Cax transferred 6% of his shareholding in BC, to Ga, Ho and Jay as to 4% each.

BC’s research and development unit has recently created a material which is being described as ‘revolutionary’ in terms of lenses. This development has created a huge amount of publicity.

Question continued on next page.

In the draft audited accounts for the year ended 30 September 2011, BC's accumulated profits increased to HK\$20,000,000. The shareholders' loans owed to Bon and Cax remain unpaid. BC did not obtain any other loan from any person or entity.

Ho, whose role includes overseeing BC's finances, has reviewed the fund raising options and favours large scale expansion which requires raising additional funds of about HK\$30,000,000, to be financed by bank loans secured by charges over BC's assets. Ga and Jay are broadly in support of Ho's proposal.

BC needs to hold its annual general meeting ("AGM") in 2011. At BC's last AGM Xen was critical of BC's slow rate of expansion and made clear that, if he was in-charge, he would look to borrowing in order to finance BC moving to bigger and better premises as a matter of the utmost urgency.

Bon and Cax, whilst in favour of expanding BC's business and agree with Ho's estimate on the amount of funds require to be raised, they believe that it is too risky to raise all the funds by way of bank loans. They consider that it is more appropriate to raise HK\$20,000,000 by issuing new shares and borrowing the HK\$10,000,000 from banks to be secured on BC's assets. Bon and Cax also believe that it is only fair if they can apply the shareholders loans owed by BC to them to pay for the new shares to be allotted by BC to them.

A board meeting is scheduled to be held on 1 November 2011 to consider and approve the draft audited accounts for the year ended 30 September 2011 and Ho's proposal for expansion and fund raising. This will be followed by an AGM to be held on 30 November 2011 at which the draft audited accounts and the expansion proposal will be put to the shareholders for consideration and approval.

Ho is the incumbent Chairman of the board and is responsible for chairing the forthcoming board meeting and the AGM. Ho seeks your advice on:

- (a) What are the likely scenarios and available alternatives on the fund raising proposal in light of Bon's and Cax's view?**
- (b) What needs to be done at the board meeting and the AGM in relation to (i) approval of the draft audited accounts for the year ended 30 September 2010 and (ii) the fund raising proposal, to ensure that all the requirements of the Articles of Association and the Companies Ordinance governing the board meeting and the AGM can be complied with?**

[25marks]

QUESTION 7

Epona Limited was incorporated in Hong Kong in 2003 as a company limited by shares. It has 2 shareholders, Apollo and Bacchus, holding 55% and 45% of the issued share capital respectively. Apollo and Bacchus are the only directors on the board of Epona.

Epona was established for the purpose of manufacturing chariot parts and ancillary equestrian equipment for sale. It carries on such business through its wholly-owned subsidiary, Fortuna Limited, also incorporated in Hong Kong. The 2 directors of Fortuna are Apollo and Bacchus. The business of Epona and Fortuna, which is managed by a team of highly-skilled recruited chariot-wrights, is highly successful and profitable. Bacchus has always been more hands-on in overseeing the business.

From its incorporation up to 2006, Epona had physical annual general meetings (“AGMs”). Since 2006, to relieve themselves from the hassle of travelling, it was agreed between Apollo (who resides in the floating island of Delos) and Bacchus (who resides in Mount Nysa) that they would replace the physical AGM of Epona with written resolution under section 116B of the Companies Ordinance. For 2007 and 2008, Apollo and Bacchus signed written shareholders’ resolutions for Epona. Written shareholder’s resolutions for Fortuna were also prepared and signed.

In 2009 and 2010, following the practice in 2007 and 2008, written shareholders’ resolutions for Epona and Fortuna, together with their draft audited financial statements, were prepared and forwarded to Apollo and Bacchus for consideration and signing. Bacchus did not sign and return any of them. At the time Apollo thought that Bacchus might have been in a prolonged state of intoxication and in any event it was just a procedural matter which would ultimately be regularized, so he did not take any objection or press for the signed documents.

In late 2010, the relationship between Apollo and Bacchus took a turn for the worse. Apollo discovered that Bacchus has, through his company, Glycon Limited, acquired a piece of land at the foot of Tai Mo Shan from Discordia, who has previously approached Apollo in early 2008 to offer that land to Epona for a new chariot-manufacturing plant.

Although Apollo and Bacchus thought that they did not want to expand Epona’s operations at the time, they agreed to revisit the matter later. Yet when Bacchus found out in early 2009 that Discordia was in financial straits from over-exposure to accumulators and mini-bonds, he approached her direct and offered to purchase her Tai Mo Shan land at a much reduced price to build a vineyard and bed-and-breakfast for Glycon.

Question continued on next page

Apollo then began to look closer into the affairs of Epona. He noted that although Fortuna has very substantial distributable profits, no dividends have been paid to Epona since 2007, contrary to the previous practice of regular dividend payment on an annual or biennial basis. Instead, he noted from the draft financial statements that Fortuna has, without his knowledge, advanced a number of substantial loans on an interest-free basis to Glycon. More alarmingly, he noted from the draft audited financial statements of Fortuna for the year ended 2010 that there was a proposed write-off of some of these loans, again without his knowledge.

Apollo is concerned about the state of the affairs of Epona and Fortuna and has come to you for advice:

- (a) in relation to the lack of AGM; and**
- (b) in relation to the Tai Mo Shan land, the failure to pay dividends and the unauthorized loans and proposed write-off.**

He wants to know whether he could commence any proceedings, and if so what, to protect the interests of the companies and his own interests. He is keen to preserve Epona and Fortuna as they are profitable trading companies with a substantial goodwill, and he wants to continue to carry on their business.

[25marks]

QUESTION 8

“In the event of a compulsory liquidation the avoidance of transactions is the key to ensuring fairness in terms of amassing funds to pay a company’s unsecured creditors. The avoidance provisions contained in the Companies Ordinance are drafted in such a way that they are easy to understand, relatively simple to enforce and will swell the funds available to pay the company’s unsecured creditors.”

Critically analyse this statement and comment on the need, if any, for reform of the relevant provisions.

[25marks]

BARRISTERS QUALIFICATION EXAMINATION 2011

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

Part A (Civil Procedure and Civil Evidence)

QUESTION 1

Interpleader proceedings were commenced pursuant to the provisions of Order 17 of the Rules of the High Court (Cap. 4A). The disputed issue concerns 10 containers of plastic toys (“the toys”) manufactured on the Mainland in the custody of the 1st defendant being the Commissioner of Police. The parties asserting entitlement to or rights of ownership over the toys are respectively, Playtime Plastics Company Limited (“the plaintiff”) and Brilliant Babies Company Limited (“the claimant”).

The claimant was the importer of the toys. It contracted to sell the toys to Playday Company Limited (“Playday”). The order was placed by Playday employee Alex Kwan.

The contract stipulated payment was to be made to the claimant by cheque within 7 days of delivery. Alex Kwan dishonestly processed the order and took delivery of the toys without Playday’s knowledge. The plaintiff purchased the toys from Playday through Alex Kwan. The toys were delivered by Alex Kwan to the plaintiff. The plaintiff accepted the toys and was to pay the purchase price to Alex Kwan. The claimant was never paid for the toys. Playday knew nothing of the earlier contracts. Alex Kwan was arrested and the toys seized by the Police.

Proceedings were commenced and directions given to determine the issue of entitlement to the toys. By consent the dispute between the plaintiff and the claimant was heard by Master Lane sitting in court. The hearing lasted 7 days. Affirmation evidence was relied upon but deponents were subject to cross-examination. On 25th September 2011 the Master handed down judgment, holding that the plaintiff had the entitlement to or rights of ownership over the toys. He also awarded costs against the claimant.

The Master found that the property in the goods was passed to Playday and all that remained to be performed under the claimant/Playday contract was payment to the claimant within 7 days. However, the contract price for the toys remained unpaid. Further, the claimant had parted with possession so had no unpaid sellers’ lien over the toys. The Master was satisfied that the plaintiff’s contract for the toys was properly evidenced by relevant invoices, delivery orders and deposit slips evidencing at least some payment for the toys sold and delivered to the plaintiff.

Question continued on next page

The Master rejected the allegation by the claimant that the plaintiff may have colluded with Alex Kwan to defraud the claimant because there was no evidence at all to establish the plaintiff acted in concert with Alex Kwan. The Master held that there was a “genuine contract for sale and purchase” properly made by the plaintiff, the goods were duly delivered and the price was not low so as to render the transaction questionable. The Master concluded that the plaintiff was entitled to retain the toys as against the claimant.

Since the judgment Mr So, a disgruntled employee of the plaintiff, has approached Mr Chan of the claimant with further information that may have been of assistance to the claimant at the hearing before the Master to defeat the plaintiff’s claim to the toys at least in part. Mr So says that the plaintiff always delayed making payment on all invoices. The plaintiff would often take delivery and fail to pay the price when due. The usual excuse given by the plaintiff was that it wanted more time to inspect the goods delivered even if the contract provided for cash on delivery. Mr So also says that the books and accounts of the plaintiff are always in a mess. He thinks that the plaintiff might not yet have paid for the toys. He is sure that at least part of the sum due for the toys would still be outstanding.

Mr Chan is a forceful personality and wants to go to the Court of Appeal as soon as possible. He is sure that the Court of Appeal would be outraged and immediately overturn the decision.

You have been instructed by the claimant to appeal the Master’s decision. However, you are not to advise on any substantive grounds or the merits as Mr Chan intends to appeal whatever the prospects of success. Your instructing solicitors rarely get involved in litigation so rely on you to give detailed advice on everything from the proper procedure to the documents that must be drafted, filed and served.

- (1) Advise the claimant upon jurisdiction with reference to any material legislative provisions, rules, practice directions and authorities. (35marks)**
 - (2) Advise the claimant upon the proper procedure and the steps that must be taken to appeal including on any relevant time periods and documents. (5marks)**
 - (3) Advise the claimant on whether, and if so how, it may make use of the information provided by Mr So. (10marks)**
- [50marks]**

QUESTION 2

On 10th September 2011 in DCCJ 51/2010, the court handed down judgment in favour of the Plaintiff for the sum of HK\$700,000 as claimed with interest at half the judgment rate from the issue of the Writ on 3rd March 2010 until judgment, and at judgment rate thereafter until payment. The Defendant's Counterclaim was dismissed. An order *nisi* was made that the Defendant pay the Plaintiff's costs of the main action and the Counterclaim, to be taxed if not agreed ("the Judgment"). The judgment rate has remained 8% per annum throughout to date.

The parties had been ordered to file a Joint Expert Report on quantum and liability by 1st August 2010. The Judge found that the Defendant's conduct in relation to directions and preparation of expert evidence was an affront to the court. The Defendant repeatedly breached court ordered expert directions, including delaying instructing its expert, failing to inform the expert to attend scheduled without prejudice joint experts meetings, thereafter insisting on its solicitors and counsel attending and recording all without prejudice joint expert meetings, delaying by 7 months the preparation of the Joint Expert Report. This prevented any meaningful offer being made by the Plaintiff. The Joint Expert Report was finally filed on 9th March 2011.

The Judge made further adverse findings on the conduct of the Defendant. The Defence was amended 4 times to plead changing defences. The amendments variously withdrew admissions and abandoned defences, which were subsequently reinstated. The Judge found it was unreasonable for the Defendant to pursue various allegations, issues and defences. The Judge rejected the evidence of the main Defence witness on essential points and found that he had tampered with documents proffered to the court as genuine. The final defence was dismissed as being founded on a lie. The trial could have been much shorter and conduct of the case simplified if the Defendant had not advanced false claims. Another pleaded defence was only abandoned on the 6th day of the trial. The Plaintiff was obliged to incur costs which should never have been incurred including to prepare evidence to meet the ever changing allegations and abandoned defences.

On 5th May 2010 the Plaintiff made a Sanctioned Offer to accept the sum of HK\$880,000 in settlement of the entirety of its claim which was stated to have taken into account the whole of the Defendant's Counterclaim and to include interest. On 10th March 2011 the Plaintiff made a 2nd Sanctioned Offer proposing to accept the sum of HK\$720,000 in settlement of its claim having taken into account the whole of the Defendant's Counterclaim and including interest. On 27th June 2011 the Plaintiff made a 3rd Sanctioned Offer proposing to accept the sum of HK\$680,000 in settlement of its claim taking into account the Defendant's Counterclaim and including interest.

Question continued on next page

The Plaintiff is dissatisfied with the Judgment because it will be left with very little after paying all its costs. The Plaintiff is a small company owned by Mr Lee. During the trial Mr Lee had to work all night so that he was free to attend court each day but still keep the company afloat. He considers the result is most unfair to him because even though he has won on all issues he has not been compensated for having to go to court to bring proceedings and for all the inconvenience, anxiety, distress and disruption to his business. The trial was fixed for 4 days but the Defendant's reprehensible conduct unnecessarily prolonged the trial, which eventually took 13 days, heard with adjournments over a 3 month period. The Plaintiff had to keep topping up costs on account to cover the extended trial costs for its solicitors, counsel and expert.

The Defendant knows that its failure to pay and the proceedings have put the Plaintiff under financial pressure. Mr Lee fears that the Defendant will delay payment of the judgment debt in the hope that eventually the Plaintiff will not have the resources to pursue it and will just have to give up or even be wound up.

The Plaintiff wants to recover as much as possible. Every cent counts. You are instructed by the Plaintiff to pursue every available basis to increase the sum recoverable.

- (1) (a) Advise the Plaintiff what to do including upon any Summons or other court document that has to be filed first; (3marks)**

(b) Set out precisely all orders or the judgment sought including giving full particulars of all material dates and rates. (7marks)
- (2) (a) Explain the jurisdictional basis of the orders or the judgment sought referring to any material Ordinances, rules and authorities; (18marks)**

(b) Advise upon the orders or the judgment that the Plaintiff seeks, on a best case basis, including particulars of all material dates and rates and the arguments that will be advanced for the Plaintiff at the hearing. (22marks)

[50marks]

Part B (Professional Conduct)

QUESTION 3

Ben Ho is a barrister with over twenty year's call in Hong Kong. He is defending Chan in the District Court on a charge of handling stolen goods, viz., two stolen cars. Chan is one of five accused in the case and the others are all separately represented.

During the examination-in-chief by the prosecutor David Wong, of one of the prosecution witnesses who is a Detective Constable, the trial judge makes the following comment:

“Officer, Mr. Wong, counsel for the prosecution has asked a perfectly simple question, it was, ‘How far were you from the black car at the time?’ Mr Wong could not have made it any easier for you to answer. Now, please answer that simple question.”

Later, during the examination-in-chief of another prosecution witness, the trial judge commented:

“Listen Sergeant, Mr. Wong may have infinite patience, but I do not, and we must move this case along. Please listen to the question and answer it. Mr. Wong is doing his best, but neither he nor I were in the carpark that night, whereas you were. Please try to be helpful. This case is already overrunning.”

Later in the trial, when Ben is cross-examining a different prosecution witness, the trial judge intervenes and says:

“Mr. Ho, please think about what it is you are trying to elicit from the witness, then formulate your question properly. This is now the third or fourth time you have asked a question which is not easy for the witness to understand. Remember, only one fact per question in cross-examination, just as you were taught in your trial advocacy lessons at University.”

At a later stage of the cross-examination by Ben the judge says:

“Mr Ho. Mr Ho. What are you trying to establish here? What is the possible relevance of that question? Please think about what you are going to ask, and keep the questions short. We are going round in circles here. I have a duty to move the case along.”

At the conclusion of the prosecution case the trial judge invited submissions from the parties on the question of whether or not there was a case to answer.

When his turn came, Ben stood up and addressed the court in the following terms:

“I don't know if I should even bother to trouble your Honour with a submission, as it is clear that the court is clearly deferring to and is in favour of the prosecution side of the case. If I fail to show that there is actually no case to answer it is because I have been repeatedly stopped from asking my questions, and from putting my case to the prosecution witnesses.”

Question continued on next page

The court has put unnecessary pressure on me to cut short my questions by pretending that the case is overrunning, but we are only two days behind, and that is nothing compared to how long some cases overrun by. You are clearly in favour of Mr. Wong, he of the 'infinite patience' and clearly favour his case, whilst I am accused of wasting Government money by dragging you 'round in circles.' I am forced not to represent my client properly by being restricted to one fact per question. This is unconstitutional behaviour by this court – there is freedom of speech in Hong Kong.

Mr Wong, in your words asks 'perfect' questions and is 'the best' here in court, whilst the defence counsel cannot formulate proper questions. This is unfairness to the defence and favouritism to the prosecutor, your ex-colleague in the Department of Justice. Some would say it was partiality or bias too, or at least a misplaced sense of loyalty and improper considerations.

It is obvious to anyone who actually listens to the evidence here that there is no case to answer. With my twenty years experience at the Bar, this case is in my view impossible of proof – my experience tells me that my lay client must walk out of here a free man. The prosecution cannot possibly have proved beyond any or all reasonable doubt, or even on a balance of probability as is required at half-time in this case, that it was possible for the police officers to have seen the stolen cars from the observation post as described by them. I have been to that car park, and there is a tall tree which blocks the line of sight. Nothing can be seen from that place.

The police evidence is a total fabrication, and thus an element of the offence has not been proved beyond reasonable doubt, as is set out in Galbraith which is the leading Hong Kong authority on missing evidence at the no case stage. My lay client must be acquitted.

That is all I am going to say - my time is valuable, at least to me it is."

The trial judge finds that there is a case to answer and the trial proceeds. All accused are eventually convicted of the offences charged.

Ben then goes to see his client in the court cells, and says to him:

"Well, win some lose some. I tried my best. Good job, he didn't go to the car park with that prosecutor, eh? He might have seen that there was no tree at all. I've never been either, but who knows that?"

With reference to relevant authority, if any, discuss any issues of professional conduct which arise from the extracts of the trial transcript as set out above.

[50marks]

QUESTION 4

Bjorn, a barrister with two year's call, reads an article in the local press about a contested probate case involving a famous and very wealthy actress, who is contesting her late father's will. Bjorn remembers that he once acted for her in a criminal prosecution arising out of a road traffic accident.

He contacts her, reminds her of the earlier case and makes enquiry about the probate case. She tells Bjorn that she is terrified of losing the case, then gives Bjorn some details of the issues involved. Bjorn then tells her that he thinks he can see one sure way of winning the case, but he needs to meet with her 'somewhere quiet' for a fuller discussion. She tells him that she has a flat in Yau Yat Chuen and gives him the address.

Later that week Bjorn arranges to meet her and they go to the flat together. Bjorn discusses the case with her and gives her some advice on the case.

She tells Bjorn that she will pass this on to her legal team headed by Ho Yau Chin SC, but Bjorn says: "Look, this is between you and me. Tell him nothing about me, because I beat him in a case six months ago. He was really hopeless, nothing prepared, I kicked him all over the courtroom and, let me be a bit modest here, I win all of my cases. 100% success rate so far. Keep me out of it or he will walk out on you. I can advise behind the scenes, as it were, and I'll take only 3% of anything you get, because so much is involved. If you get nothing then so do I.

Although I do only the biggest criminal cases in court, you can be sure that I do know what I am doing here - because I recently advised Nona Wing, the shipping tycoon, about a will. Nobody knows that yet, as it hasn't made the news. Keep that to yourself for the time being."

The actress tells Bjorn that his terms are acceptable and then sets out three specific issues on which she needs advice.

At the conclusion of the meeting she gives Bjorn HK\$5,000 for his 'taxi fare' and Bjorn promises to call her in a few days with the requested advice.

The following day, whilst he is at home, Bjorn receives a set of case papers from the actress. He provides the advice sought five days later by email.

With reference to relevant authority, if any discuss any issues of professional conduct which arise on the above facts.

[50marks]

BARRISTERS QUALIFICATION EXAMINATION 2011

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

PART C (ADVOCACY)

**HCMA5354 of
2010**

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MAGISTRACY APPEAL No. 5354 of 2011
(ON APPEAL FROM ESS No. 1234 of 2011)**

HKSAR

Respondent

v

HO HO GO CONSTRUCTION COMPANY LTD Appellant

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

Counsel is hereby instructed to act on behalf of the Appellant 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 First Instance at 17.30 hours on the 28th day of October 2011.

Counsel is directed to the following documents which are attached:

- (1) Statement of Findings setting out the Reasons for Verdict of E. Wong Permanent Magistrate dated 3 January 2011;
- (2) Reasons for Sentence delivered by E. Wong Permanent Magistrate 3 January 2011.

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

Please provide a copy of the skeleton argument, and authorities if any, to instructing solicitor by 10.00am on 28 October 2011.

Dated this 24th day of October 2011

Chin, Cheung and Chan
Solicitors for the Appellant

Reasons for Verdict

1. At trial the defendant corporation Ho Ho Go Construction Company Limited (“the defendant”) faced one summons, ESS 1234/2011 alleging that on 1 November 2010, on the construction site at the Sky High Residential Tower, in Room 5354, 88/F, 9999 Queen’s Road Central, Hong Kong it, being the contractor responsible for a construction site, failed to take adequate measures to prevent a workman falling from a height of two metres or more. This was contrary to Regulation 38B of the Construction Sites (Safety) Regulations Cap. 59I, which reads, where relevant:

(1) *...the contractor responsible for any construction site shall take adequate steps to prevent any person on the site from falling from a height of 2 metres or more.*

(2) *For the purpose of paragraphs (1)... "adequate steps" shall include the provision, use and maintenance of one or more of the following-*

- (a) *working platforms;*
- (b) *guard-rails, barriers, toe-boards and fences;*
- (c) *coverings for openings;*
- (d) *gangways and runs.*

The Prosecution Case

2. The prosecution evidence of the worker PW 1 Chan Faat (53) was that he had been tasked at 1630 hours on the day in question with installing a lightbulb into a fitting on the roof of room 5354 at the location. He was provided with a tubular steel working platform fitted with guard rails, barriers, toe-boards and safety fencing, as was shown in the photograph Exhibit P1, the platform floor of which reached a height of 2.5 metres above the floor. The light fitting was at a height of 3 metres. This was the 25th time that day that he had performed the same procedure using this particular equipment.
3. Chan (PW 1) gave evidence that when he was on the platform at a height of about 2.5 metres and, as he was inserting the light bulb, he sneezed and lost his footing. He had then fallen against the safety fence on the side of the platform, bounced off it and then sat down heavily on the platform, with no injury sustained. He had then stood back up and fitted the lightbulb. It was later that day when he mentioned to his supervisor that he had fallen on the platform, and had nearly gone through the fencing, that Labour Department became involved and the charge was laid against the defendant company.

4. PW 2 Ms. Susannah Wong an Occupational Safety Officer of the Labour Department gave evidence in an expert capacity. There was no dispute raised as to her expertise and I found that in the light of her qualifications and vast experience that she was qualified to testify before this court as an expert on occupational safety matters.
5. She testified that although the use of a working platform as described by PW 1 was standard industry practice, in her considered opinion the use of this type of platform was not sufficient to comply with the law. She said that she thought it would have been a 'lot better' to have used the tubular steel safety platform, with guard rails, barriers, toe boards and fences, together with additional safety nets and with a safety harness and lanyard looped through a fixed and anchored safety line. She said that this would have provided 'total safety' in the event that the worker had slipped through the safety fences on the platform. She was of the opinion that this was why the regulation used the word 'includes' and why she considered that the mere provision of the platform and its ancillaries was a non-compliance with the law.

The Defence Case

6. This was simply that the working platform was perfectly adequate for the job undertaken. DW 1 Ho Kan Lik the site foreman testified that the platform was brand new, was in perfect condition and had been safely used by PW 1 on numerous occasions that day for the purpose of screwing in light bulbs. The defence expert DW 2 Dr. Ho Chung Ming of Safe Site Consultants was of the opinion that the use of such a working platform for this task was standard industry practice. He did not, however, go so far as to say that its use that day meant that the defendant had discharged its responsibilities under the law and was therefore in compliance with the regulation.

Consideration

7. I remind myself that the prosecution brings the charge and that they have the burden of satisfying me that the defendant is guilty to the requisite standard. This means that if there is a reasonable possibility that the defendant is not guilty then I must acquit. Where, as here, a defendant testifies I will look at all the evidence and if it appears that what the defence says is true or may be true then I will not find that issue against the defendant.
8. I consider that the steps the defendant company took that day to prevent the possibility of a fall from a height of two metres or more were adequate. The provision of the working platform and its ancillaries was sufficient to stop the worker falling to the ground, and he did not fall. That is not the end of the matter, however, as the prosecution case is that adequate measures to prevent a potential fall from the platform had not been taken. It had been mere good

fortune that PW 1 had not gone through the safety fencing. Had he done so, then the additional measures advocated by PW 2 would have prevented that fall from height. My finding that the measures were adequate is, of course, only my commonsense view of the situation in this case. Commonsense, however is not enough where, as here, we have clear evidence from a qualified expert to the contrary. PW 2 was adamant that the use of the platform was not sufficient compliance with the law, and that the defendant therefore had breached the regulation. She opined that the failure to supply the additional safety measures was in contravention of the regulation.

9. It is trite that, in cases in which an expert witness testifies on an issue, a judge is not simply entitled to determine that he is not assisted on that issue by the expert evidence and that he can then go on to determine the matters himself by the application of commonsense. The expert evidence from the prosecution is on the record and it must be accorded its due place. PW 2 explained her view of the meaning of the regulation and concluded that it had been breached by the defendant. The defence expert did not undermine this evidence from PW 2 in any way by any testimony to the effect that the law had actually been complied with by the defendant. This is a telling factor.

Conclusion

10. I accordingly find that the provision of the working platform as described was insufficient to comply with the defendant's duties under the regulation and therefore that the defendant did not take adequate steps. I find the defendant guilty of the charge as laid.

...

Reasons for Sentence

1. Unsurprisingly no mitigation was offered by the defence. The purpose of these safety regulations is the protection of society. They are drafted so as to ensure that principal contractors such as the defendant supervise and control work on construction sites so as to ensure that public safety is ensured by ensuring that the regulations are observed. These are common offences, and to protect the public, deterrent sentences are required. The Legislature, in its wisdom, has made clear how seriously this type of offence is to be viewed by the courts who are tasked with the protection of workers. Regulation 68 reads:

(1) ...

(2) A person guilty of an offence under paragraph (1) shall-

(a) ...

(g) in respect of a contravention of regulation ...38B(1) ... be liable ... to a fine of \$200000.

2. The defendant has a total of nine previous convictions for similar offences.
3. It is time a message was sent to contractors that they must do more to protect their vulnerable workers.
4. The defendant is fined HK\$ 200,000. I allow three weeks to pay.

E. Wong

Dated this 3rd day of January 2011