

BARRISTERS QUALIFICATION EXAMINATION 2012

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

QUESTION 1

Alex Au (Alex) owned a plot of agricultural land in the New Territories. It appeared to Alex that the plot adjacent to his (the 'adjacent plot') was unused. There was a dilapidated shed on the adjacent plot, but otherwise it was overrun with weeds and the fence enclosing the adjacent plot had fallen down in several places.

In 1997, Alex cleared the weeds from the adjacent plot, removed the broken fence and planted sweet potatoes over the whole of the adjacent plot. In 2002, Alex died leaving all his property by will to Benjamin, who continued to grow sweet potatoes on the adjacent plot. In 2008, Benjamin leased the adjacent plot to Carrie for a term of two years, but at the end of the lease Benjamin resumed cultivation of the adjacent plot.

Grand Estates Limited ('GE'), the owner of the adjacent lot, have now written to Benjamin demanding that he vacate the adjacent plot. GE also say in their letter that they have been planning to build houses on the adjacent plot by building houses since they first bought the adjacent plot in 1996. However, building permission was refused until quite recently when the zoning of the adjacent plot was changed.

Advise Benjamin.

[25marks]

QUESTION 2

In August 2012, Loretta Lee ('Loretta') and Tom Tong ('Tom') negotiated the terms on which Tom would grant Loretta a lease of Tom's Flat 6A Bauhinia Gardens (the 'Flat'). Eventually they agreed orally to enter into a lease starting on 1 November 2012 for a term of four years at a monthly rent of HK\$15,000.00 payable monthly in advance. They also agreed orally that the lease would include 3 window type air conditioners currently installed in the Flat. Tom and Loretta each instructed solicitors to act for them in connection with the lease and on 20 August 2012, Loretta's solicitor sent Tom's solicitor the following letter.

Dear Sirs

We act for Loretta Lee who has agreed to let Flat 6A Bauhinia Court to Tom Tong for a term of four years starting on 1 November 2012. Please confirm that you have instructions to act for Tom Tong.

Loretta's solicitor signed the letter. On 22 August 2012, Tom's solicitor wrote the following letter:

Dear Sirs

We confirm that we have instructions to act for Tom Tong in connection with his proposed lease of Flat 6A Bauhinia Gardens from Loretta Lee at a calendar monthly rent of HK\$15,000. Please send us the draft lease for approval.

Tom's solicitor signed the letter. Neither letter contains any reference to the air conditioners. No lease has been executed.

Can Loretta enforce the oral agreement for lease against Tom?

[25marks]

QUESTION 3

In 2001, Paradise Limited ('PL') developed a multi-storey commercial building known as Paradise Building. The ground floor of Paradise Building consists of a large entrance lobby with escalators leading to and from the first floor ('the Escalators') and three lifts which also give access to the first and upper floors. The first floor consists of shops and restaurants. The upper floors of Paradise Building are used as offices. PL divided Paradise Building into undivided shares and sold all the offices, but retained a number of undivided shares and the right to the exclusive use of the whole of the ground and first floors and the Escalators.

PL entered into a Deed of Mutual Covenant (the 'DMC') for Paradise Building with the first purchaser of undivided shares. The DMC does not contain a definition of the common parts of Paradise Building. The DMC allocates each of the ground and first floors to 10 undivided 1000th shares. The Escalators have no allocation of undivided shares under the DMC.

In 2003, PL leased all the shops and restaurants on the first floor. PL later sold undivided shares together with the right to the exclusive use of the whole of the first floor to Heavenly Limited ('Heavenly'). The sale was subject to the shop and restaurant leases and subject to and with the benefit of the DMC. PL did not grant Heavenly an express right of way over the ground floor and the Escalators, and PL retained undivided shares together with the right to the exclusive use of the ground floor and the Escalators.

Earlier this year, PL constructed shops in the entrance lobby on the ground floor and blocked access to the Escalators. Customers of the first floor shops still have access to the shops and restaurants by means of the lifts, but business on the first floor has suffered a severe downturn because customers cannot use the Escalators.

Advise Heavenly whether it can claim a right of way over the Escalators.

[25marks]

QUESTION 4

On 20 August 2012, Mr. Poon ('the Purchaser') as purchaser entered into a binding Agreement for Sale and Purchase (the 'Agreement') to buy Flat 15A Hibiscus Court, 25 Prince Edward Road, Kowloon and the roof above Flat 15A (the 'Property'). The Vendor under the Agreement is Vicki Vong ('the Vendor'), whose solicitors are Cameron & Co. Completion is due to take place on 14 November 2012. Hibiscus Court was built in 1975. There are 30 flats in the block – two on each floor.

The Purchaser is a first time buyer. He first inspected the Property on 12 August 2012, together with the Vendor. During the inspection the Purchaser went up to the roof via an internal spiral staircase leading from the living room of Flat 15A to the roof above. However, the Purchaser and the Vendor did not discuss the staircase.

The Agreement is substantially in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance Cap. 219. Clauses 12 and 13 of the Agreement provide as follows:

12. The Purchaser has inspected the Property and buys with full knowledge of all alterations and additions made to the Property and will not be entitled to raise any requisition or objection or to rescind this agreement or to annul the sale or to claim any compensation or damages from the Vendor in connection with any title defect caused by any alterations or additions to the Property which might breach the Buildings Ordinance Cap. 123 or the Deed of Mutual Covenant for Hibiscus Court.

13. Subject to Clause 12, the Vendor agrees to give good title to the Property.

Cameron & Co delivered the title deeds to the Purchaser's solicitors on 25 August. The Purchaser's solicitors raised requisitions on 27 August and Cameron & Co replied on 1 September. Later, the Purchaser received a report from his surveyor who advises that the spiral staircase was added after the issue of the Occupation Permit for Hibiscus Court and that it requires the consent of the Building Authority under the Buildings Ordinance (note – assume that the surveyor's report is correct). It seems that the spiral staircase might also breach Clause 23 of the Deed of Mutual Covenant for Hibiscus Court which provides that 'no owner will make any structural alterations to his flat', because in order to build the spiral staircase, the roof slab must have been cut. On 5 September, the Purchaser's solicitor sent the following requisition to Cameron & Co.:

Our client has been advised by his surveyor that the spiral staircase leading from Flat 15A to the roof above was added after the issue of the Occupation Permit for Hibiscus Court. Please send us evidence that the consent of the Building Authority was obtained to the construction of the staircase as required under s 14 of the Buildings Ordinance and that there is no breach of Clause 23 of the Deed of Mutual Covenant for Hibiscus Court.

Question continued on next page

On 8 September, Cameron & Co replied as follows:

Our client relies on Clause 12 of the Agreement. Accordingly we are not obliged to reply to this requisition. However, the Vendor wishes us to point out that he has not made any alterations to the Property since he bought it in 2001.

Advise the Purchaser whether he must complete the Agreement.

[25marks]

PART B: Equity

QUESTION 5

Max was an unknown novel writer who had very limited financial means. Since 2009, he had been cohabiting with his wealthy girlfriend, Winnie, who had all along been very supportive of Max, both emotionally and financially.

In 2010, Winnie transferred HK\$500,000 to Max upon trust on, inter alia, the following terms: 'to provide at his discretion, scholarships for talented literary students in Hong Kong'; and 'further assets may be added to the trust from time to time'. In 2011, Winnie covenanted with Max to transfer to Max, upon the same trust, any property she (Winnie) might subsequently acquire under the will of her mother. One month later, Winnie's mother died, and in her will she bequeathed 5,000 shares in ABC Ltd to Winnie.

Last month, Winnie handed Max a cheque in the sum of HK\$1million which she had made out in Max's favour. At the same time Winnie declared: 'This is to enable you to pay your creditors'. In fact Max's debts at the time amounted to only HK\$300,000. Having paid off his creditors, Max gave the balance of HK\$700,000 to his secret girlfriend, Queenie. When Winnie discovered Max's relationship with Queenie, she was devastated and suffered from a heart attack.

Before Winnie died, she revoked all her previous wills and codicils and made a new will. In her new will, she gave all her property to her niece, Natalie.

Advise Natalie.

[25marks]

QUESTION 6

In 2000, Richman established a trust for the benefit of his children, Chelsea and Dora. The assets of the trust comprised a piece of land on the Peak and HK\$5million cash deposited in Kowloon Bank. Jeff, an accountant, was appointed as the sole trustee and authorized to invest the trust fund in Hong Kong.

In January 2011, Jeff invested HK\$3million of the trust money withdrawn from the bank account in Kowloon Bank, in a trust fund issued and operated in Utopia. A month later, the Utopian fund was restructured and became based in Hong Kong. As the result of the restructuring, the value of the fund fell sharply. The investment made by Jeff is now worth HK\$1million only. Two months later, Kowloon Bank went into liquidation. Depositors can only recover 1% of deposits that exceed HK\$100,000.

In April 2011, because of the booming property market, Jeff decided that the land at the Peak should be developed into a few apartment units for sale. Jeff then sought quotes from a number of construction companies to develop the land. One of the companies which provided a quote, Sammon Constructions Ltd, told Jeff that 'he (Jeff) would get a pleasant surprise' if their bid was successful. It happened that Sammon Constructions provided the best quote, so Jeff engaged Sammon Constructions to build the apartments.

One week later, Jeff found that a luxurious designer watch had been delivered to his home 'with the compliments of Sammon Constructions'. Jeff sold the watch and gave the entire proceeds to his daughter to buy HK\$50,000 worth of shares in Apple Inc. As a result of the launch of a new smartphone, the share price of Apple Inc rose dramatically, and Jeff's daughter's shares in Apple Inc. had tripled in value.

The above facts have just come to light. Jeff is in serious debt and being pursued by his creditors.

Advise Chelsea and Dora.

[25marks]

QUESTION 7

Shawn was a retired businessman. He had three children, Aaron, Ben and Carson.

On his retirement in 2008, Shawn executed a trust (the 'Shawn Family Trust') whereby he transferred all his assets to his childhood friend, Fred, as sole trustee upon trust. The beneficiaries were his three children. The assets comprised: 5,000 shares in PGGW, a publicly-listed company; and HK\$1million cash deposited in Kowloon Bank. The trust deed contained, inter alia, the following terms:-

Clause 3: The Trustee shall hold 5% of my 5,000 shares in PGGW on trust for Aaron.

In January 2011, because of the launch of a new smartphone, Fred saw good investment opportunities in Smart Ltd, a company which was authorized to serve as the smartphone's exclusive carrier in Hong Kong. In breach of trust, Fred paid into his own bank account with Lantau Bank, which had an original balance of HK\$60,000, HK\$100,000 from the Shawn Family Trust. He withdrew HK\$50,000 from his Lantau Bank account to purchase Smart shares. The following day he withdrew a further HK\$10,000 which he gave to his daughter, Daisy, as birthday gift. Daisy used the money (HK\$10,000) to purchase a designer watch which is now worth HK\$40,000.

Fred has now been declared bankrupt. The value of the Smart shares have now tripled.

Advise Aaron.

[25marks]

QUESTION 8

In 2005, Mr Chan set up a trust known as the Chan Family Trust to provide for his family. He appointed Terence, his childhood friend, as the sole trustee of the Trust. Derek is a solicitor acting for the Chan Family Trust.

In 2010, in the course of exploring investment opportunities for the Chan Family Trust, Terence came across an apartment in Happy Valley and considered it to have significant investment potential for the Trust. However, he purchased it himself instead at HK\$15million without informing the Trust. In 2011, he sold it for HK\$18million.

On 1 January 2012, Terence instructed Derek to pay out HK\$100,000 to his (Terence's) daughter, Chloe. Derek did not recall Mr Chan having any daughters but decided not to push further. Had Derek looked at the trust deed (which was kept in his office), however, he would have realised that Chloe was neither a beneficiary under the Trust nor a person entitled to any payment.

The next day, Chloe received a cheque from Derek which was issued from the account of the Chan Family Trust. She was pleasantly surprised by the gift, and did not realise that the sum should not have been paid to her. She spent HK\$40,000 on a holiday to Europe, and the remaining HK\$60,000 to purchase shares in ABC Ltd. On her return from Europe, she noticed that the stock market had crashed and so she sold her ABC shares immediately at HK\$30,000.

The beneficiaries of the Chan Family Trust recently learnt about the Happy Valley property transaction. Had Terence informed them about the property, they would not have purchased it; they would have consented to Terence's own investment in return for a 10% share of the profits. Terence has conceded breach of his duty in respect of this transaction.

Advise the beneficiaries of the Chan Family Trust.

[25marks]

BARRISTERS QUALIFICATION EXAMINATION 2012
PAPER III: CRIMINAL LAW, CRIMINAL PROCEDURE
& CRIMINAL EVIDENCE

QUESTION 1

You represent Albert WONG who, together with Brian TSE the leader of a demolition crew, is charged with ‘Criminal Damage’ under section 60(1) of the Crimes Ordinance, Cap. 200.

The case arose during a ‘clearance operation’ in which Albert contracted Brian to clear a plot of land to which Albert claims himself to be the registered owner. For the last 30 years, the plot has been occupied by Charles TANG and his family. Charles originally paid a small rent as a ‘tenant’ but ceased paying when the landlord stopped visiting around ten years ago. Over the years, the TANG’s have built three sheds and a pig-sty on the plot, all of which were demolished when Brian and his crew arrived.

- (a) **How might Albert and Brian defend themselves? Support your answer by reference to the relevant statutory provisions. (10marks)**
- (b) **How might an argument that pursuant to section 59(2) (a) of the Crimes Ordinance, property should be treated as belonging to a person having custody and control of it *only* if that custody or control is lawful be treated by the Courts? Support your answer with authority. (15marks)**
- [25marks]**

QUESTION 2

Part 1

Daryl SIN is remanded in custody to appear before Fanling Magistrates' Court today charged with 'Burglary' contrary to section 11 of the Theft Ordinance, Cap. 210. Daryl made his first appearance two weeks ago at which time the Duty Lawyer made an application for Bail. The prosecution objected on the grounds that the offence was serious and had been committed whilst Daryl was admitted to Bail for another offence of 'Theft', pending trial in Kowloon City Magistracy. Bail was refused.

You are now instructed to represent Daryl at his second appearance before the Court.

- (a) **What information are you entitled to provide in support of this application for bail?** (5marks)
- (b) **What information may be provided in support of any subsequent application for bail?** (5marks)

Part 2

Eric LEE has pleaded 'Guilty' to stealing a suitcase belonging to someone else from the baggage reclaim hall at Hong Kong International Airport. Eric is a middle-aged family man with an excellent job and an unblemished character. He says he took the bag at random – acting on impulse because it might be an exciting thing to do.

The Magistrate has remanded Eric in custody pending Background, Psychiatric, Psychological and Community Service Suitability Reports. You are instructed to apply for Bail on his behalf.

- (a) **Where might the application for Bail lie?** (5marks)
- (b) **With reference to authority, how might you argue the remand in custody is unjustified?** (10marks)
[25marks]

QUESTION 3

- (a) What are the principal differences between ‘Summary’ and ‘Indictable’ Offences? (5marks)**

 - (b) What is the purpose of an indictment; what form should the indictment take? (5marks)**

 - (c) What is the rule against duplicity? (5marks)**

 - (d) What offences may be joined together in one indictment? (5marks)**

 - (e) When may more than one accused be joined together in one indictment? (5marks)**
- [25marks]**

QUESTION 4

Tony TAN (15) and Wendy WOO (14) are arrested following a fight in the Vocal Box Karaoke, Tsim Sha Tsui, Kowloon. The offence arose from a dispute over the use of the microphone in the 'Chill-Out Lounge' by Vernon TUNG (17) and his girlfriend Sharon WONG (16). Tony and Wendy are alleged to have been part of a group of 8-10 teenagers who assaulted Vernon by pushing him to the floor and Sharon by dragging her from the stage thereby occasioning her actual bodily harm. Most of the alleged assailants fled, but Tony and Wendy were located as Police arrived and 'pointed-out' by Vernon and Sharon as two of the assailants.

Tony and Wendy have each been jointly charged with one count of 'Common Assault' contrary to common law and punishable under s.40 of the Offences Against the person Ordinance, Cap. 212 for the assault on Vernon, and with one count of 'Assault Occasioning Actual Bodily Harm' contrary to s.40 of the same Ordinance for the alleged attack on Sharon.

- (a) Which court should hear the trial of Tony and Wendy? Provide reasons for your answer and cite relevant authority. (5marks)**

Three months later, before the trial of Tony and Wendy, Oscar WU (19) and Percy SHUM (20) were arrested in relation to a fight in another Karaoke. Under caution Oscar and Percy also admit taking part in the assault at the Vocal Box. After investigation, Oscar and Percy are charged with the same two offences in that they, together with Tony and Wendy assaulted Vernon and occasioned actual bodily harm to Sharon.

- (b) In which court should the case now be tried? Provide reasons for your answers and cite any relevant authority. (5marks)**

All four defendants are found 'Guilty' after trial. The court remanded Tony and Wendy in custody and called for background reports on both defendants and a Detention Centre Suitability report on Tony. In the event, Wendy was sentenced to serve a period of 2 months' imprisonment, whereas Tony was sentenced to a period of detention in the Detention Centre.

- (c) With reference to authority as appropriate, advise Tony and Wendy as to any possible ground(s) of appeal against this sentence? State briefly the procedure to be adopted. (7.5marks)**

- (d) The prosecution considers the sentences imposed to be too low. What course of action is open to them if they wish to challenge these sentences.**

(7.5marks)

[25marks]

QUESTION 5

Your lay client Alex Bao was convicted by HH Judge Ho after trial in the District Court on one count of Robbery contrary to s.10 Theft Ordinance, Cap. 210. The charge particularised an attack on Susie Lee at 3am in Stanley Main Road during which Bao had pushed her to the ground and had stolen her handbag and contents.

The two police officers who had arrested Bao as he was fleeing from the scene both testified during the alternative procedure at trial that Bao, upon having been stopped by the officers had said, *“She went down too easily. I only pushed her once with my hand. I only wanted to snatch.”* Bao was then taken to the scene of the incident and was later cautioned in respect of the robbery offence.

In his defence at trial both on the special issue and again on the general issue Bao maintained that he had been kicked on the left shin by the first officer to testify, PC 12345 and that the second officer PC 54321 had told him that if he did not admit the robbery then he would be *“...taught a huge lesson in good manners at the police station.”*

Bao denied having said anything at all to the police, either at the time of his arrest or at the police station. The two officers denied having assaulted Bao and they both denied having made any threat to him at any time.

In dealing with the alleged confession by Bao – in his ruling on the special issue –the trial judge said the following:

“...The accused’s case in relation to the alleged admission of robbery made by him to the arresting officers was that the words attributed to him were not said and that no inculpatory comment of any kind was made.

Even though it is clear that the accused denied having said anything at all, an issue of admissibility was still raised because of the suggestion that the accused had been kicked and subjected to threats by the arresting officers.

There was also an allegation of a breach of the Secretary for Security’s Rules and Directions as the accused should have been cautioned sooner than he was.

I have taken all that I have heard into consideration. I am satisfied as to the credibility of the two police officers who testified. I found them to be reliable witnesses. I am satisfied that the accused did say all the words attributed to him. I say nothing about whether or not what the accused said was true. I am sure in any event that nothing untoward had occurred or had been said at the time of the arrest or at the police station. I am satisfied that the voluntariness of the admission is established.

I am satisfied that the confession statement attributed to the accused was in fact made.

Question continued on next page

In respect of the alleged breach of the Rules and Directions - had any such breach been established the confession would automatically be rendered inadmissible as being involuntary - but there was no such breach here. The accused was cautioned at the scene very shortly after the confession was made. Rule II is clear, 'As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person...before putting to him any questions...relating to that offence.' The officer acted appropriately."

Bao was sentenced two weeks later to five years imprisonment. Your lay client has now approached you to seek advice as to whether or not any arguable ground of appeal is disclosed in the light of this passage from the trial judge's ruling on the special issue.

- (a) What would be your advice to Bao, and why would you give him any such advice?**
- (b) What would be the venue of any such appeal?**
- (c) Would Bao require leave to appeal?**
- (d) Within what period must any such appeal be made?**

[25marks]

QUESTION 6

Your lay client Charles Deng was recently convicted of one count of murder after trial before the Honourable Madam Justice Good and a jury. He was sentenced to life imprisonment. The charge arose from a Triad-related dispute in which the deceased was killed by three men, all of whom later fled to the Mainland.

All three – including your lay client – were eventually arrested and returned to Hong Kong to face trial. One of the prosecution witnesses was the captain of a Hong Kong fishing vessel on which your lay client, together with the other two suspects, had been smuggled out of Hong Kong shortly after the killing.

At trial this witness gave evidence that he had conveyed three men from Hong Kong to China on the night in question and he also testified that he had later, at an identification parade, identified your lay client as being one of the men whom he had taken to the Mainland onboard his boat.

At the time of the identification parade the witness had told the police Superintendent in charge of the parade that the man standing at position No. 4 “...looks very much like one of my customers that night. He is about the same weight. I think I am about 75% sure of it.” It was not disputed that the person thus picked out on the parade was Deng.

At trial there was a considerable volume of other independent evidence pointing to the fact that Deng had been one of the men onboard the fishing boat on the relevant night.

In the part of her direction to the jury relevant to the evidence of this particular identification the trial judge directed the jury in the following terms:

“There is a special need for caution in dealing with identification evidence. You must consider if the circumstances at the time made it difficult for the witness to identify the accused. Was it dark on board the fishing boat? It was nighttime and the boat was far from land. For how long did the witness have the accused in his view? Were there any obstructions to the witnesses’ view of the accused? The witness never had the opportunity of looking directly at the accused’s face, although he did assist him to both board and leave the boat. Although the person looked like one of his passengers on the voyage he did say he could not be sure.

You must at all times approach identification evidence with caution because there is the danger that even an honest witness can be mistaken. A number of honest witnesses may all be mistaken. You must give particular care when deciding how much weight, if any at all, you should attach to this particular witness’ evidence about this identification of this accused. If you are not satisfied by his evidence that he has correctly identified the accused as one of the passengers on the boat that night, then disregard it.”

Question continued on next page.

Deng now wishes to seek your advice as to whether or not there is an arguable ground of appeal in respect of the fact that the trial judge had let this evidence – which Deng describes to you as ‘weak’ go to the jury for consideration.

Deng had also been told by other prisoners that this was ‘only a qualified identification’ which is inadmissible in law.

What would be your advice to Deng on this issue and why would you give this advice? Support your conclusions with relevant authority, if any.

[25marks]

QUESTION 7

Adam Au was arrested by two officers of the Immigration Department when the officers, who were on their way to work, saw him kicking a parked car. The Immigration Officers decided that it was too much trouble to take him back to Immigration Department Headquarters and decided to take Adam to the nearest police station.

- (a) Citing relevant authority, if any, comment on the actions of the Immigration Officers.**

Adam was taken to the police station and his sister Betty later called you and asked you to pay Adam a legal visit together with a solicitor, Charles Chung.

At the police station the officer in charge of the investigation Detective Inspector Wong refuses to let either you or the solicitor see Adam. The officer tells you that this is because a suspect in custody needs to personally instruct their legal advisors. The officer tells you that this is why the police always allow a person in custody to telephone their lawyer.

- (b) Citing relevant authority, if any, comment on the actions and statements of the police officer.**

The police officer eventually lets you interview Adam and Adam tells you that he can provide HK\$5,000 for bail. You approach Detective Inspector Wong and he tells you that he won't be granting Adam bail, as "*...vandals deserve to spend some time in jail to think about the money they cost society.*"

- (c) Citing relevant authority, if any, comment on the actions and statements of the police officer.**

The officer tells you that he will be keeping Adam in the cells for the next 72 hours, as "*... this is an Immigration arrest case and the 48-hour rule therefore does not apply.*"

The officer then provides you with a copy of s. 51 Police Force Ordinance, Cap. 232. (Extract attached)

- (d) Citing relevant authority, if any, comment on the actions and statements of the police officer.**

[25marks]

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| Chapter: | 232 | Title: | POLICE FORCE ORDINANCE | Gazette Number: |
| Section: | 51 | Heading: | Person arrested to be delivered to custody of police officer in charge of police station | Version Date: 30/06/1997 |

Every person taken into custody by a police officer with or without a warrant, except a person detained for the mere purpose of taking his name and residence or detained under section 54, shall be forthwith delivered into the custody of the officer in charge of a police station or a police officer authorized in that behalf by the Commissioner.

QUESTION 8

- (a) Can an accused ever be required to pay for the cost of his own prosecution in court?**
- (b) What are the general principles concerning the award of costs to an acquitted defendant?**
- (c) What are 'positive' reasons for not awarding an acquitted defendant his costs in the Magistracy?**

[25marks]

Barristers Qualification Examination 2012

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

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

QUESTION 1

Mr. Ken Wong is a district councillor. On 8 June 2012, he was convicted in the Kowloon City Magistracy of a charge of acting in a disorderly manner at a public gathering. He was sentenced on 9 June to 4 weeks' imprisonment for the offence. Mr. Wong lodged an appeal against both conviction and sentence, and he obtained bail pending appeal.

Section 20(1)(a) of the Legislative Council Ordinance (LCO) (hypothetical) provides:
“(1) A person is disqualified from being nominated as a candidate at an election, and from being elected as a Member, if the person –
(a) has, in Hong Kong or any other place, been sentenced to death or imprisonment (by whatever name called) and has not served the sentence or undergone such other punishment as a competent authority may have substituted for the sentence.
...”.

Mr. Wong intends to stand for the Legislative Council (LegCo) election early next year. But the nomination period will come to its end by 31 October 2012 and it is unlikely that the appeal can be heard prior to that date.

- (1) Mr. Wong comes to seek your advice on whether he has a good case to challenge the constitutionality of s.20(1)(a) of the LCO on the ground that the section has violated his fundamental human rights under both the Bill of Rights Ordinance and the Basic Law and the reason why. (14marks)**

When the bill on s.20(1)(a) was introduced to the LegCo in 1998, the Hong Kong Government informed the LegCo that “under the old s.20(1)(a) of the LCO, escaped convicts who have been sentenced to death or more than 3-month imprisonment and have not served the sentence or any substituted sentence shall be disqualified. The proposal now is to tighten up the restriction by removing the 3-month ‘threshold’ for disqualification. This is because as a matter of principle, we should not allow any escaped convict to hold a LegCo office, no matter how light or serious his offence is.”

Question continued on next page.

- (2) Mr. Wong wants to know:**
- (a) What approach will Hong Kong courts adopt in interpreting the rights provisions in the Basic Law? (6marks)**
 - (b) What weight would Hong Kong courts give to the above information in interpreting s.20(1)(a) of the LCO? (5marks)**
- [25marks]**

QUESTION 2

Ms. Valerie Banau is a Philippines national born in 1965. She is a single mother with three children. All her children reside in the Philippines and have always done so. She and her children jointly own a residential property and a mini store in the Philippines. She first came to work in Hong Kong as a foreign domestic helper (FDH) in December 1990. Soon after she arrived, she registered for and was issued with a Hong Kong Identity Card. She continued to work as a FDH for the same employer in subsequent years under several contracts and the permission of stay granted to her was extended accordingly. Her permission to stay has been extended to December 2012 or two weeks after the termination of her employment contract, whichever is earlier.

Paragraph 2 of Article 24 of the Basic Law provides:

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

...

(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;

...”

But the term “ordinarily reside” has not been defined in the Basic Law. Section 2(4)(a)(vi) of the Immigration Ordinance (IO) provides that a person shall not be treated as ordinarily resident in Hong Kong for the purpose of the IO during any period in which he/she remains in Hong Kong while employed as a FDH who is from outside Hong Kong.

Ms. Banau comes to seek your advice on the following issues:

- (1) Can she rely on paragraph 2 of Article 24 to apply for permanent residence? And will s.2(4)(a)(vi) of IO limit her chance to get right of abode? And the reason why? (13marks)**
- (2) If the CFA decides that s.2(4)(a)(vi) of the IO is not consistent with Article 24 of the Basic Law, can the NPCSC interpret paragraph 2 of Article 24 to overrule the CFA? May the NPCSC give a different interpretation of the phrase “ordinarily reside”? And why? (12marks)**

[25marks]

QUESTION 3

Solicitors have sent you instructions that show the following salient facts.

- (1) Mr. Lam receives social welfare payments from the Social Welfare Department under the Comprehensive Social Security Assistance (CSSA) scheme. Part of the social welfare payments is a rent allowance, which pays for the rent of the private room in which he lives.
- (2) Mr. Lam complains that the rent allowance has fallen behind the actual rent levels of private rooms in the region of Hong Kong in which he lives. He complained to the Social Welfare Department in January 2012. The Department treated the complaint as an application for the exercise of its discretion for granting a more generous rent allowance. On 6 February 2012, the Department notified Mr. Lam that his case did not fall within any of the categories of cases set out in Guidelines for the exercise of discretion and declined to grant a more generous rent allowance.
- (3) Mr. Lam, on 9 February 2012, then lodged with the Secretariat of the Social Security Appeal Board a notice of appeal against the above decision.
- (4) On 2 April 2012, Mr. Lam received a letter in the post. It was from the Secretary to the Social Security Appeal Board. The letter referred to Mr. Lam's complaint and indicated that the letter of the Social Welfare Department "had stated clearly that your case did not fall within the Guidelines for the Director to exercise his discretion". The letter concluded in these terms: "Since the Social Welfare Department has handled your application for a higher rent allowance in accordance with existing policy, this Board now remits your case to the Cheung Sha Wan Social Security Field Office of the Social Welfare Department to provide you with a detailed explanation."
- (5) Mr. Lam attended the Cheung Sha Wan Social Security Field Office on 10 April 2012. He was told that the letter of the Secretary to the Social Security Appeal Board meant that his appeal had come to an end.
- (6) Mr. Lam was referred to the solicitors by a voluntary organization on 17 July 2012 with a view to apply for leave to apply for judicial review.

Preliminary research conducted by the solicitors has found the following information:

- The aim of the CSSA scheme is to bring the income of such individuals or families up to a prescribed level where basic and special needs can be met. The CSSA scheme is non-contributory and means-tested.
- Rent allowance is payable as a special grant to CSSA recipients to meet the cost of accommodation. Rent allowance is calculated on the basis of eligible members of a family. The amount to be allowed for rent is the actual rent paid or the maximum rent allowance appropriate to the number of eligible members in a family, whichever is less.

Question continued on next page

- Rent allowance above the maximum level can be considered to cover the actual rent if an elderly applicant has been waitlisted for compassionate re-housing or a subvented residential institution. Mr. Lam is not an elderly applicant. He is single.
- Statistical data provided by the Social Welfare Department in January 2011 indicate that in the 2010/2011 year (up to end of December 2010), about 56% of single person households receiving CSSA payments and living in private housing were paying rent at a level higher than the maximum rent allowance.
- The Appeal Procedures of the Social Welfare Appeal Board are that an appeal must be lodged within four weeks immediately following the date of notification of the decision from the Director of Social Welfare. When an appeal is received, the Secretary to the Board will examine the case. If it appears to him that there are sufficient grounds for a departmental review before the case is submitted to the Board, he will ask the supervisor of the Social Security Field Unit concerned to review the case. If the supervisor decides to vary the decision, the appellant will be notified in writing of the new decision as well as his right to appeal against it. If the appellant is satisfied with the new decision, he may withdraw the appeal. If he remains dissatisfied, he may appeal against the new decision. If he chooses not to appeal again, the case will not be referred to the Board. The Board will, after an oral hearing of an appeal, either confirm the decision appealed against or vary that decision provided that such a decision conforms to approved social security policy. The decision of the Board is final.

Please advise on the merits, both substantive and procedural, of the proposed application for judicial review.

[25marks]

QUESTION 4

Andrew Cheung J (as Cheung CJHC then was) stated in *Anderson Asphalt Ltd v Secretary for Justice* [2009] 3 HKLRD 215 at paragraph 57(g) that the “so-called *Hang Wah Chong* principle is no more than a special application of the general principles on the distinction of public/private law to land matters in Hong Kong”.

Discuss:

- (a) **What are the general principles on the distinction of public/private law, as applied in judicial reviews in Hong Kong?**
- (b) **What is the “so-called *Hang Wah Chong* principle”?**
- (c) **Do you agree with the *Hang Wah Chong* principle? Please state your reasons for the answer you give.**

[25marks]

Part B (Company Law)

QUESTION 5

The Big Bang Company Limited (“Big Bang”) was incorporated in Hong Kong as a company limited by shares. It has 4 shareholders, Brian and Bianca, husband and wife and each holding 26% of the issued share capital, and Bruce and Bernese holding 30% and 18% of the issued share capital respectively.

There are 3 directors on the Board of Big Bang, Brian, Bruce and Bernese.

Big Bang carries on the business of distributing and marketing classical music in digital format in Hong Kong. Big Bang owns and provides the infrastructure for distribution via digital means. Each of the labels it distributes is owned by a separate company which is not a subsidiary of Big Bang but has a common shareholding, directorate and office. One such company is Black Hole Limited (“Black Hole”).

The activities of each of these companies are directed and supervised by Big Bang and Big Bang also acts as the financier of the group. Big Bang has facility arrangements with The Bureaucratic Bank Limited.

Bianca was diagnosed with lung cancer in 2010 and since then Brian has devoted his time to her care and treatment, involving frequent trips overseas for medical consultation. He ceased to be actively involved in the business of Big Bang and its associated companies. Although he received notices of Board meetings, minutes of Board meetings and the information which was provided to the directors from time to time (including monthly management accounts and draft audited financial statements), he did not read them nor did he make any effort to participate in the Board meetings.

After receiving chemotherapy in the United States, Bianca’s condition improved and the couple returned to Hong Kong in early 2012. In a chance meeting with an old associate who worked for iTunes at the race course, Brian was informed that iTunes attempted to contact Big Bang for business co-operation earlier in the year but Big Bang never responded to iTunes’ invitation. This led Brian to make inquiries.

Brian then discovered that iTunes did contact Big Bang but such communication was intercepted by Bruce. Bruce, who has a background in music publishing, has incorporated his own company, Black Storm Limited (“Black Storm”), to carry on the business of developing and distributing classical music apps for download without notifying Brian. Upon receiving the communication from iTunes, Bruce procured Black Storm to approach iTunes and managed to reach an agreement with iTunes to distribute and promote apps developed by Black Storm.

Question continued on next page

Brian was shocked by his discovery which caused him to look into the affairs of Big Bang and its associated companies. He then discovered that a number of Big Bang's associated companies have lost their contracts with the classical music labels, and their business operation had effectively come to a halt. Those labels are now being marketed by Black Storm. Despite the shrinkage in business activities, the operating expenses of Big Bang and its associated companies remained at more or less the same level as before.

Brian became deeply concerned and wanted to instruct his own accountant to look into the financial affairs of Big Bang and its associated companies to ascertain what had gone wrong. He instructed his accountant to contact Big Bang for accounts, ledgers and financial documents but the staff in the office claim that they were instructed not to release any such documents without the express approval of the Board. Brian then approached Bernese for assistance but Bernese, who has known Brian and Bruce since university and regarded this as a fall-out between them, did not want to get involved and refused to side with Brian.

Meanwhile, a senior bank officer of Bureaucratic Bank, who has known Brian for many years, informed Brian that Big Bang has not been servicing its loan repayments, and unless a debt restructuring could be agreed upon, the Bureaucratic Bank would have to call in the entirety of the loans advanced to Big Bang to the tune of HK\$120million. Based on the last financial statements available to Brian, it is obvious that Big Bang did not have liquid assets sufficient to discharge such liability. Big Bang has already executed a floating charge over all of its assets in favour of the Bureaucratic Bank.

Brian recalled that Black Hole has a factory premise in San Po Kong which was unencumbered, and he proposed to charge the same to the Bureaucratic Bank for the purpose of the debt restructuring. Brian was unable to contact Bruce, but he appealed to Bernese to save the company and she was eventually persuaded to agree to charging the factual premise for the purpose of debt restructuring.

The debt restructuring having been put in place, Brian begins to consider what should be done to contain the damage done by Bruce's acts. Meanwhile, Bruce re-surfaced and instructed his solicitors to write to Brian to complain about the charge of Black Hole's property to secure Big Bang's debts, and accused Brian for acting in breach of director's duty.

Brian now comes to you for advice. His immediate objectives are to ascertain the true financial position of the companies and to remove Bruce from the Board to prevent him from doing further damage. Big Bang and each of its associated companies' articles of association provides that a special resolution is required to remove directors. Brian also wants to see if any claim can be made against Bruce. He is also concerned about the allegations in Bruce's letter and wants to seek your advice on the same.

[25marks]

QUESTION 6

Hip Hop Electrical Ltd (“Hip Hop”) was incorporated in Hong Kong in 2009. Its founder members were two brothers who, having graduated in computer engineering, decided to set up a business specialising in the provision of stock control systems for small scale, privately owned, restaurants. Hip Hop’s authorised share capital, HK\$150,000, was divided into 1500 shares with a nominal value of HK\$100. The brothers, Bill and Ben, each agreed to take 250 shares and their mother, Vera, agreed to take 1000 shares. Bill and Ben were also registered as the company’s directors and Vera as the company secretary. However it was Ben who had the ideas and the flair for entrepreneurship.

Within 2 years of its incorporation, Hip Hop was employing 55 full time staff and was making good profits and so the brothers decided to expand the company’s stock control systems to include small scale, privately owned bars. Ben drafted a business plan and set out ‘priorities’ including the purchase of property from which to operate Hip Hop’s business and increasing the budget for the purchase of computer equipment and software necessary for the new stock control systems.

Bill approached numerous banks asking for a loan to finance the purchase of premises but was met on nearly all occasions with questions about renting versus purchasing, which Bill found difficult to answer. Vera, however, shared her son’s views on the long term benefits of ownership. Bill eventually found suitable premises and Vera agreed to lend Hip Hop HK\$5million to finance the purchase (with interest at 10 per cent per annum) secured by a fixed charge over the premises. The loan was advanced by Vera to Hip Hop on 15 August 2011 and the purchase was completed on the same day. Hip Hop executed a charge in favour of Vera on 1st September 2011, which was registered at the Companies Registry on 1st October 2011.

Ben spent his time negotiating the purchase of suitable software and equipment. The supplier he preferred was willing to commit to a contract which would provide Hip Hop with software and equipment for the next 2 years at a fixed price but, given the value of the contract, required some assurance of payment. Ben suggested a guarantee, but the company, AP Ltd, who agreed to make an initial delivery of equipment valued at HK\$100,000 on the day of signing of the contract, insisted on a floating charge over all of Hip Hop assets. This contract was signed and the charge created on 31st August 2011 and registered on 30th September 2011.

In 2012 Hip Hop’s turn over and profits rapidly went into decline. This was due, in part, to some of the stock control equipment employed in bars allegedly proving to be defective. Several bar owners threatened to sue Hip Hop. Bill and Ben could not find any fault with the equipment and thought the best way to ‘move on’ from the incident was to offer to settle their claims. Hip Hop also failed to retain its contracts with the restaurants it had supplied since they first went into business. Bill and Ben could only conclude this was due to false rumours concerning Hip Hop’s stock control equipment.

Question continued on next page

Hip Hop then defaulted in paying for equipment and software and failed to pay any overtime wages to its employees. The employees were consoled by a promise from Ben that the situation was 'temporary' and that they would be paid at a later date. Meanwhile, AP Ltd, whose debt amounted to more than HK\$2million, petitioned to wind up Hip Hop on 30th August 2012 on the grounds that Hip Hop was unable to pay its debts. Vera had already assessed Hip Hop's outstanding current liabilities to be in the range of HK\$8-10million and its current assets to be about HK\$6million and suggested to her sons that winding up was inevitable. Ben then consulted a solicitor to learn more about the process of voluntarily winding up Hip Hop.

Ben was sure that Hip Hop was solvent and arranged to meet with Bill and Vera on 1st September but on hearing of the petition neither Bill nor Vera attended the meeting.

- (a) Advise Hip Hop on the grounds, if any, on which they may challenge AP Ltd's petition. (6marks)**
- (b) If the court proceeds to grant an order to wind up Hip Hop, advise the liquidators as to:**
- (i) the validity of the charges created by Hip Hop, and**
 - (ii) the priority in which Hip Hop's debts should be paid.**

(19marks)
[25marks]

QUESTION 7

“Hong Kong can now be regarded as providing extensive protection for minority shareholders, not only for Hong Kong registered companies but also for non-Hong Kong companies.”

Discuss this statement with reference to relevant provisions of the Companies Ordinance and any recent case law, as a means to assess the accuracy of the claim in respect of non Hong Kong companies.

[25marks]

QUESTION 8

Aggro Bus Ltd (“ABL”), a public unlisted company, wanted to expand and ultimately meet the requirements for listing on the Hong Kong stock exchange, but in the short term did not have the funds to finance any large scale expansion. Georger, ABL’s ambitious finance director, had come to know that one of ABL’s apparent rivals, Cute D Ltd (“CDL”), was selling off its assets with a view to downsizing. Ren, the managing director and the holder of 55% of CDL’s shares mentioned the sale to Georger when they happened to meet at a business lunch. Georger was attending on behalf on his managing director, Rusty.

ABL’s board of directors met just a few days after Georger and Ren had met at the business lunch. At the board meeting Rusty proposed that if ABL made a rights issue it may have the funds to ‘go shopping’ for further assets. Given that ABL’s business seemed to be booming, their ambitions to list and Georger’s enthusiasm, ABL’s board of directors decided the time was right to proceed with the rights issue.

ABL’s five directors, who each held 15% of the issued capital, and shareholders generally proved to be very supportive of the rights issue and HK\$4million was raised. Rusty then suggested that given the directors’ financial input into ABL, some of the funds should be used to grant loans to the directors to enable them to own and live in more luxurious apartments. This, she argued, would help to improve the company’s image. The loans were arranged ‘interest free’ repayable in the event of a director leaving ABL and immediately taken up by Rusty and Georger.

Rusty also instructed Georger to find assets which would enable them to expand. Georger immediately contacted Ren and agreed purchases from CDL amounting to more than HK\$4million.

ABL’s board of directors was actually rather lax about compliance, being more concerned to make the financial/size requirements of the Listing Rules. ABL’s board of directors were, according to Reg. 99 of its Articles, required to approve the purchases in excess of HK\$2million, but given that no meeting was scheduled and his fear of losing a ‘bargain’, Georger proceeded to arrange for payment and delivery.

A few weeks later, Zed, a minority shareholder of ABL, and also a former employee and minority shareholder of CDL, received notice from CDL of an extra-ordinary general meeting at which it was proposed that CDL goes into voluntary liquidation. Zed was suspicious of the coincidence of the rights issue and CDL’s liquidation. He decided to investigate and eventually discovered ABL’s purchases from CDL. By his estimate, the purchase price was far in excess of the total value of all CDL’s assets, and yet some assets apparently still remained. Zed also learned that Rusty is Ren’s wife.

Question continued on next page

Zed was outraged by what he learned and sent Georger an email requesting clarification as to the use of the funds raised by the rights issue. Rusty happened to see the email while standing by Georger's desk. The very next day Rusty and Ren departed from Hong Kong.

Zed did not receive a reply from Georger and now seeks your advice in regard of any action he could take if, as he suspects, ABL and/or its directors have broken the law. [Please restrict your answer to company law issues].

[25marks]