

# **BARRISTERS QUALIFICATION EXAMINATION 2018**

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

### **QUESTION 1**

Marina Gardens is a development of 30 residential houses and car parking spaces with a swimming pool built in 2006. Each house owner owns one 30<sup>th</sup> undivided share in the land and in Marina Gardens and has the right to the exclusive use of a single house with a parking space. There is a Deed of Mutual Covenant for Marina Gardens. The owners incorporated in 2010.

In 2016, the tiles covering the floor and sides of the swimming pool were replaced by Blue Pools Ltd and since then there has been serious leakage of water from the pool. A report commissioned by the Management Committee shows that the leakage has arisen due to poor quality workmanship when the tiles were replaced. However, the Management Committee is reluctant to bring proceedings against Blue Pools Ltd and instead proposes to have remedial work (estimated to cost HK\$1,000,000) carried out by Great Contractors Ltd at the cost of the owners.

Jane owns House 3 Marina Gardens which is built at the bottom of a small slope leading from the pool. Water leaking from the pool has damaged Jane's car which is parked in her parking space outside her house. Jane has complained to the Management Committee but, as mentioned, the Management Committee is reluctant to bring proceedings against Blue Pools Ltd.

**Answer the following question giving reasons for your answer:**

**Jane is angry about the Management Committee's refusal to bring proceedings against Blue Pools Limited. She is also concerned about the cost of the remedial work and is refusing to contribute. Several other owners share Jane's concerns. Advise Jane.**

**[25Marks]**

## **QUESTION 2**

On 1 May 2003, Tina was looking for a flat to rent. Her cousin, Oliver, had an empty flat, Flat 3A Pine Court (the “Flat”) which he said Tina could live in. Oliver kept one locked room in the Flat for storage. Tina agreed orally that Oliver could access the locked room provided he gave her reasonable notice. She also agreed to pay Oliver HK\$25,000 per month. Tina moved in to the Flat.

Oliver used to call at the Flat to collect the agreed monthly payment on the first day of each month. His last visit was on 1 December 2005 and that was when Tina made the last payment to Oliver. Tina continued to live in the Flat until her death in 2012. Tina’s adult daughter, Doris, moved into the Flat in 2010 to look after Tina and Doris continued to live in the Flat after Tina’s death.

In June this year, Oliver called at the Flat and explained that he had been abroad, but that he now wanted to move into the Flat. Doris refused to leave and Oliver has now issued proceedings to recover possession.

**Answer the following questions giving reasons for your answers:**

- (a) Doris wants to rely on adverse possession in her defence. Advise Doris. (22marks)**
- (b) Would your answer differ if Oliver owned the flat as trustee for his daughter who was born in 1997? (3marks)**

**[25Marks]**

### **QUESTION 3**

In January 2002, Alpha Ltd (“Alpha”) bought Lot 123 in Yuen Long in the New Territories. In December 2002 Alpha also bought Lot 456 in Yuen Long. The two Lots have a common boundary on the West side of Lot 123. Lot 456 adjoins the main road. The only vehicular access to Lot 123 is over a gravelled road passing through Lot 456. From December 2002 until 2005 Alpha used Lot 123 for container storage and used the gravelled road over Lot 456 to gain access to Lot 123.

In 2004, Alpha created a legal charge over Lot 123 in favour of Easy Bank Ltd (“Easy”). Easy took possession of Lot 123 under its legal charge in 2005. In 2006, Easy exercised its power of sale and assigned Lot 123 to Beta Ltd (“Beta”). In 2006, Beta resumed the use of Lot 123 for container storage. In 2012, Beta assigned Lot 123 to Delta Ltd (“Delta”).

In 2014, Alpha sold Lot 456 to Gamma Ltd (“Gamma”). Gamma has now blocked vehicles from passing over Lot 456.

**Answer the following question giving reasons for your answers:**

**Has Delta acquired an easement over Lot 456 which it can enforce against Gamma?**

**[25Marks]**

## QUESTION 4

On 23 October 2018, Alex (the “Vendor”) signed a binding provisional agreement (the “Agreement”) to sell to Barry (the “Purchaser”) his house No. 8 Green Road (the “Property”) for a consideration of HK\$60million. The Agreement includes the following terms:

1. *The Vendor agrees to sell and the purchaser agrees to purchase the Property.*
2. *The purchase price shall be HK\$60,000,000 to be paid by the Purchaser in the following manner:*
  - 2.1 *An initial deposit of HK\$600,000 shall be paid to the Vendor upon the signing of this agreement.*
  - 2.2 *On the signing of a formal agreement for sale and purchase on or before 7 November 2018 a further deposit of HK\$5,400,000 shall be paid to the Vendor’s solicitors as stakeholders.*
  - 2.3 *The balance of the purchase price in the sum of HK\$54,000,000 shall be paid to the Vendor’s solicitors as agents for the Vendor on completion on or before 6 December 2018.*
3. *If the Purchaser shall fail to pay any part of the deposits or to complete the purchase in accordance with the terms and conditions herein contained, the deposits paid by the Purchaser shall be absolutely forfeited by the Vendor and this agreement shall be terminated and the Vendor shall then be entitled at his absolute discretion to resell the property.*
4. *If the Vendor shall fail to complete the sale in accordance with the terms and conditions herein contained, the Vendor shall immediately refund the deposits paid by the Purchaser and pay to the Purchaser a sum equivalent to the said deposits and the Purchaser shall not claim any damages or specific performance.*

**Answer the following questions giving reasons for your answers:**

- (a) **Assume that on 7<sup>th</sup> November 2018 the terms of the formal agreement have not been finalised and the Purchaser does not pay the further deposit or sign the formal agreement which was sent to the Purchaser’s solicitor on 25<sup>th</sup> October 2018. The vendor has written to the Purchaser to say that he has forfeited the initial deposit and terminated the Agreement. Advise the Purchaser. (10marks)**
- (b) **Assume that on 7<sup>th</sup> November the Purchaser’s solicitor sends the formal agreement signed by the Purchaser and a cheque for the further deposit to the Vendor’s solicitor on his undertaking to return the formal agreement signed by the Vendor within 5 days. The Vendor’s solicitor pays the cheque into his client account. On 12<sup>th</sup> November the Vendor decides not to sell to the Purchaser. On that day the Vendor’s solicitor returns to the Purchaser a cheque for the sum of HK\$6,660,000 representing the sum of the initial deposit, the further deposit and compensation equal to the initial deposit. Can the Purchaser claim specific performance of the Agreement? (15marks)**

**[25Marks]**

## **PART B: Equity**

### **QUESTION 5**

Andy and Betsy have been cohabiting since 2008. In 2016, they purchased a residential unit in North Point that cost HK\$6million. Andy paid the down payment of HK\$3million, which came from his own savings and a loan of HK\$1million from his father to help Andy and Betsy to set up their home. The remainder of the purchase price was paid by a mortgage loan from Lantau Bank taken out by Andy, which was guaranteed by Betsy pursuant to a personal guarantee.

The unit was bought in the sole name of Andy. After Andy and Betsy took possession of the flat, Betsy spent HK\$500,000 renovating it. She also did all the household work.

Since the purchase of the unit, Andy and Betsy have contributed equally to the mortgage repayments. Betsy paid all other household bills.

Andy has recently paid for a new kitchen for the flat. When the new kitchen was completed, Andy told his friends “I would not have been able to pay for this new kitchen were it not for Betsy’s contribution to our general expenses and outgoings”.

Recently, Betsy discovered that Andy had met a new girlfriend, Camille. Betsy also found out that Andy had stolen HK\$200,000 cash from her and used the cash to buy a vintage sports car for Camille. Upon being confronted by Betsy, Andy admitted that he had a relationship with Camille and planned to give the car to Camille on her birthday next week. The car has now doubled in value.

Betsy decided to break up with Andy, only to find out that he was hopelessly insolvent.

**Advise Betsy as to any equitable claims she may have.**

**[25Marks]**

## QUESTION 6

In 2016, Sean set up a family trust (the “Trust”) appointing his long-time family friend, Timothy, as trustee. The beneficiary of the trust was Sean’s daughter Pearl. The trust assets comprised, *inter alia*, 10million shares in Coventry Limited. The trust deed expressly prohibited (i) delegation of the power of investment and (ii) pledging of any part of the trust assets as security for loans.

In 2017, Timothy was convinced that the Trust would perform better if a professional investor were to be engaged to manage the trust assets. Timothy handed the share certificates pertaining to all 10million shares in Coventry Limited to Irene, an investment adviser, so that she could invest them on behalf of the Trust.

In July 2017, Irene pledged all the 10million shares in Coventry Limited (which were worth HK\$8million at the time) to Farming Bank as security for a loan of HK\$8million to the Trust. The loan was to be repaid within 6 months. Irene asked Macy, a solicitor who had previously assisted Sean in setting up the Trust, to come along to the meeting with Farming Bank. At that meeting, before the loan and pledge agreements were executed, Jack, senior manager of Farming Bank, asked Irene about the purpose of the loan. Irene was reluctant to properly answer the question and hesitantly said, “To generate better cashflow”. Jack then asked, “Where did you manage to get these shares?”, to which Irene replied “I am tired of your questions; you had better stop. I am the investment adviser to a family trust.” Jack glanced at Macy hoping to get a proper answer from her, and Macy simply said “Don’t worry, there is no problem with the transaction”. Jack then decided not to ask further, partly because Macy was introduced to him by Irene at the start of the meeting as the solicitor advising the Trust, and also because Irene agreed to an unusually high interest rate for the loan. In fact, Macy gave that answer because she had forgotten the terms of the trust deed but she genuinely thought that there was no issue with the transaction.

The loan and pledge agreements were executed accordingly. The share certificates pertaining to all 10million shares in Coventry Limited were transferred to Farming Bank, and Farming Bank transferred the loan of HK\$8million to Irene as investment adviser of the Trust. Irene gambled away all the money and could not be found.

Three months later, since Farming Bank had not received any repayments on the loan, it realised and sold all the 10million Coventry shares pursuant to the loan and pledge agreements at HK\$3million, the market price at the time.

It was common ground that Irene had neither actual nor apparent authority to enter into the loan and pledge agreements. Coventry Limited has recently gone into liquidation and its shares have become worthless. Timothy has now been declared bankrupt.

**Advise Pearl as to any equitable claims she may have.**

**[25Marks]**

## QUESTION 7

Sam was a retired businessman. On his retirement in 2015, Sam executed a trust (the “**Trust**”) whereby he transferred all his assets to his best friend, Tiger, as sole trustee upon trust. The beneficiaries were his 3 children including Bruce. The assets comprised 5,000 shares in Smart Telecom (a listed company) and HK\$2million cash deposited in Kowloon Bank. The trust deed contains, inter alia, the following:

Clause 3: The Trustee shall hold 20% of my 5,000 shares in Smart Telecom on trust for Bruce.

In January 2017, Tiger saw good investment opportunities in SuperRich Ltd, a company specialising in the trading of crypto-currencies. The following transactions then took place:

- (1) On 1 February 2017, Tiger paid HK\$800,000 from the Trust into his personal bank account (the “**Account**”), which had an original credit balance of HK\$500,000;
- (2) On 3 February 2017, Tiger withdrew HK\$100,000 from the Account and gambled it away;
- (3) On 6 February 2017, Tiger withdrew a further HK\$300,000 from the Account to purchase shares in SuperRich;
- (4) On 10 March 2017, Tiger withdrew another HK\$200,000 from the Account to settle his credit card bill (which had a debit in the same amount). That debit had been incurred when Tiger bought an expensive watch for HK\$200,000 on 11 February 2017.

Tiger has been declared bankrupt. The SuperRich shares are now worth HK\$3,000,000, and the watch is now worth HK\$300,000.

**Advise Bruce.**

**[25Marks]**

## QUESTION 8

In January 2016, Sammy set up a trust (the “**Trust**”) to provide for his family. He appointed Taz as the sole trustee of the Trust. The beneficiaries were Sammy’s 2 children, Xavier and Yanny.

Taz was an accountant with substantial experience in tax matters in Hong Kong and Utopia, a tax haven. The Trust comprised substantial assets in the form of cash, land and shares. The trust deed provides as follows:

Clause 20: The trustee may at any time in his absolute discretion resetttle all or any portion of the trust assets in any manner as he sees fit.

In May 2017, Taz consulted Zee, solicitor advising the Trust, about the tax liability of the Trust. Zee advised that substantial tax would be payable under Hong Kong law on the distribution of the trust assets, but no such tax would be payable upon resettlement of the Trust in Utopia. Taz informed the beneficiaries accordingly and exercised his discretion under Clause 20 to resetttle the trust assets upon a new trust situated in Utopia. The resettlement involved the creation of artificial steps and structures.

Upon completion of the resettlement, it transpired that Zee’s advice was wrong. In fact, no reasonable trustee would have considered it to be correct. Consequently, the Trust is now liable for an additional tax payment of HK\$1million.

In September 2017, without first informing Xavier and/or Yanny, Taz personally bought a residential unit (“**Unit 26A**”). At that time the Trust owned the neighbouring unit, i.e. Unit 26B. Prior to Taz’s acquisition, he already knew that the Trust might be interested in acquiring a further residential unit for investment purposes as Xavier and Yanny had mentioned about the better use of the Trust’s significant idle cash (and such idle cash was amply sufficient to pay for Unit 26A). Taz sold Unit 26A in August 2018 and made a net profit of HK\$500,000. If Taz had informed Xavier and Yanny about his intention to purchase Unit 26A, they would have consented on condition that Taz would share 30% of the net profits from the transaction.

**Advise Xavier and Yanny. There is no need to discuss the liability, if any, of Zee.**

**[25Marks]**

# BARRISTERS QUALIFICATION EXAMINATION 2018

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

### QUESTION 1

You are instructed as Counsel on fiat at Eastern Magistracy, but the accused in your case has not turned up to court and the Magistrate issues a warrant of arrest. When you return to the Prosecution office, the Senior Court Prosecutor asks you to quickly look at a file involving two persons who committed Shoplifting (shop theft) at the same time. They both appear on the same charge sheet, albeit on separate and distinct charges. The two defendants are due to answer bail in court No.1 in 45minutes to enter plea.

The facts are as follows:

X is a 13year old girl who is presently charged with robbery. She entered the Supermarket, took a packet of biscuits from a shelf and, two minutes later, passed the cashiers counter without paying. The plain clothes security guard follows her for another two minutes and intercepts her. Upon doing so X punches the security guard in the face causing him bruises. The security guard subdues her and hands her over to the Police.

Y is 42 years old and has over 40 criminal convictions relating to dishonesty and dangerous drug related offences. He faces a charge of theft relating to the shampoo bottle and a roll of price tags, which occurred at the same time, date and place. An employee stocking shelves saw Y place a bottle of shampoo in his wire shopping basket, which was provided by the supermarket. Then he (Y) enters through a door bearing the sign 'Staff Only'. There, Y takes from the supermarket office a roll of price tags. He removes one tag which bears a price which is \$20 cheaper than the original price tag on the Shampoo bottle. Y uses the new price tag and places it over the original price tag, concealing the original price tag. Inexperienced in legal matters, the employee intercepts Y before he passes the cashiers counter without paying for the shampoo bottle.

With respect to both charges you noticed that the date of the offence was incorrect. The Senior Court Prosecutor asks you to amend the charge.

- (a) **With respect to X: is robbery the appropriate charge? If not, what is the appropriate charge? And why? (4marks)**
- (b) **Can Y be prosecuted for the theft of the Shampoo bottle? If so, on what basis? (2marks)**
- (c) **With respect to Y: is theft the appropriate charge for the two items he took? If not, what is the appropriate charge? (3marks)**
- (d) **Is the Eastern Magistrates' Court the appropriate venue of trial for the two defendants? If not, where? Should they be tried together, and if not, why? (6marks)**

*Question continued on next page.*

- (e) Under what statute can you amend the charges? (2marks)
- (f) How would you amend the charges? (2marks)
- (g) What are the protections and/or safe guards available to the defence at the time you make your application to amend the charge? (6marks)
- [25Marks]**

## QUESTION 2

You represent a 30year old volleyball coach, Mr SIN, who has been charged with two counts of ‘*indecent assault*’.

The prosecution allege that on 25 December 2017 at a Christmas Party, your client kissed one of his female volleyball students, X, aged 15, during which he inserted his tongue into her mouth and pinched her buttocks (charge 1). X immediately told Y about the bottom pinching and the kiss, both of which were against her will (that is, she did not consent to it). Z sees ‘X and Y talking at the party and joins them, but X and Y stop talking. Z then presses X with a number of probing questions and X eventually tells Z that she was kissed against her will.

It is also alleged by the prosecution that on 31 December 2017 at a New Year’s Day Party, your client kissed another 22year old girl volleyball player, Y, during which he inserted his tongue into her mouth after slapping her on the back (charge 2) and Y immediately tells X and Z that she was slapped on the back by their coach, Mr. SIN.

On 1 April 2018, X and Y made a report to the police; and the police officers immediately record the statements of X, Y and Z on video.

At the pre-trial review the prosecution tell the magistrate:

1. That they want to introduce the pre-recorded videos of X and Y as their respective evidence-in-chief.
2. They will rely on recent complaint.
3. As Z is under 14 years of age the prosecution said they would not call her.

**Advise your client:**

- (a) **What is Recent Complaint (also known as early complaint)? Tell your solicitor what are the main factors relating to its admissibility and evidential value.**  
(10marks)
- (b) **With relation to charge 1, which witness(es) can the prosecution rely upon to establish the doctrine of recent complaint? Either way, explain to your client why it can or cannot be relied upon.**  
(6marks)
- (c) **With relation to charge 2, which witness(es) can the prosecution rely upon to establish the doctrine of recent complaint? Either way, explain to your client why it can or cannot be relied upon.**  
(5marks)
- (d) **What authority, prerogative or statute permits the Prosecution to introduce the pre-recorded videos of X and Y?**  
(2marks)
- (e) **Are there any grounds upon which you can object to the prosecution introducing X and Y’s evidence by way of the pre-recorded videos?**  
(2marks)

**[25Marks]**

### QUESTION 3

Your client is charged with murder contrary to common law. The Director of Legal Aid instructs you and asks you to advise your client as to whether he has any possible defences.

You look at the papers and note that in an interview with the Police, the defendant said he was with his two good friends, Jack (the deceased) and Jill.

On 1 March 2017, your client had an argument with Jack whilst they were drinking alcohol in Jill's flat. All three in the flat were drunk. Jill called the defendant an alcoholic who could not hold his drink. This comment upset him. Also when he actually consumed alcoholic drinks, this invariably caused him to act irrationally and slightly crazy. Upset with the comment, the defendant loses his self-control and his anger in turn causes him to "go crazy". Because of the alcohol, the defendant immediately believes that Jill had turned into a Vampire.

The defendant, who had a long history of psychiatric problems, picked up a bottle and tried to hit Jill, whom he thought had turned into a Vampire. Before he picked up the bottle, he thought the vampire wanted to suck the blood from his neck. He missed Jill and hit Jack on the head. The single blow caused Jack's skull to fracture and he eventually dies from brain injuries. Jill is not hurt in the incident and calls the police. The deceased explained to the Police that he was out of his mind and never meant to kill his friend and it was an accident when he hit him.

The solicitor assigned by the Legal Aid Department telephones you and asks you to advise on the possible defences, or partial defences that would reduce the charge to manslaughter. The solicitor himself suggests you run Provocation, Diminished Responsibility, Mistake and Accident. The solicitor also wants to know what other defences are open to the defendant.

- (a) Are the proposed defences of Provocation, Diminished Responsibility, Mistake, and drunkenness realistic defences for you to run? Explain to your Solicitor in detail with reference to the relevant Law, why these proposed defences are applicable or inapplicable. (14marks)**
- (b) Are there any other defences open to the defendant? (6marks)**
- (c) With respect to All the possible Defences you have identified, who has the burden of proof and what do you need to prove the defences. (5marks)**  
**[25Marks]**

## QUESTION 4

Your solicitor's client is charged with Dangerous Driving. One month before the scheduled District Court trial, he received the following letter from the Department of Justice:

*Dear Sir,*

***Re HKSAR v CHAN Fat  
District Court Case no. 1234/2018***

***Notice to Admit Facts under s. 65C of the Criminal  
Procedure Ordinance, Cap. 221***

***and***

***Notice to Tender Written statements in evidence  
under s. 65B of the Criminal Procedure Ordinance, Cap. 221***

*In accordance with the practice direction of the Chief Justice dated 10.6.2016 you are hereby requested to admit the following facts pursuant to s.65C of the Criminal Procedure Ordinance, Cap. 221*

- 1. The chain of evidence in respect of all documentary evidence.*
- 2. Documentary exhibits including sketches and photographs*
- 3. Findings of forensic scientist*
- 4. Contents and accuracy of the Computer records relating to telephone records*

*Take further notice that written statements of prosecution witnesses have already been served upon the defendant. Written statements of the witnesses named below may be tendered in evidence before the court pursuant to s.65B of Criminal Procedure Ordinance, cap. 221.*

*If you require any of the witnesses to give oral evidence, you should inform me as soon as possible. If you do not do so within 14 days of receiving this notice (a) you may need to obtain leave of the court for witnesses attendance; and (b) the witness may not be present in court on the trial date and extra delay and expense would be caused if the witness has/have to then be summonsed.*

*Yours faithfully,*

**The solicitors asks you for advice on the following matters:**

- (a) In accordance with the practice directions, when should the statements be served on the Defendant? (1mark)**
- (b) As it is only Dangerous Driving, is it possible, in order to save costs, for the Defendant to make an application to the District Court to have his case dealt with in the magistrates' court? (1mark)**

*Question continued on next page.*

- (c) What is a section 65C admission? (4marks)  
And who can make a 65C admission? (2marks)  
(Total 6marks)
- (d) What is a section 65B admission? (3marks)  
And what is the crucial evidential difference between a section 65B and 65C admission? (2marks)  
(Total 5marks)
- (e) What are the conditions that have to be complied with before the written statement of a witness can be tendered as evidence during the course of the trial?  
(6marks)
- (f) If you do not admit item 4, (*Contents and accuracy of the Computer records*), how will the prosecution prove the telephone call records? Note: The solicitor believes section 22A(2) of the Evidence Ordinance, Cap. 8 may be relevant. (6marks)  
[25Marks]

## QUESTION 5

At about 05:00 hours on 20 January 2018, there was a traffic accident where a female Susie Wong (35) was run over by a private car with license plate AB1234 at a road junction, where the traffic signal for the car was red. The vehicle did not stop and the driver drove away. Susie Wong died at the scene. Investigation showed that the cause of her death was due to her being knocked over by the car.

At 15:00 that day, Detective Inspector Jack Ho, together with two other officers, went to the registered address of the owner of the car AB1234, Peter Chan (aged 70). They pressed the doorbell and Chan opened the door.

Inspector Ho said to Chan, "*You know why we have come, don't you?*"

Chan nodded his head at which point the Inspector administered the usual caution that "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence." to which Chan replied, "*I am sorry, I jumped the light and I killed her.*"

After a search of the premises during which nothing incriminating was found Chan was taken to the nearest police station for processing.

At the Police Station, Inspector Ho made a post-record in his official police notebook of what had been said at the time of the arrest and asked Chan to sign on the notebook. Chan did so at 23:00. The officer also signed the entry in the notebook.

At 02:00 the following day Inspector Ho interviewed Chan under caution in the Video Interview Room in the police station. During the interview, Inspector Ho explained the surroundings in the Video Interview Room, the reasons for arrest and cautioned Chan. Chan then gave a similar account that he had jumped the red light as he was in a rush, and that although he saw Susie Wong in the middle of the road, he thought she would be able to avoid him. He also admitted that he was the driver of AB1234. The interview concluded at 03:00.

Subsequently, Chan was charged with Causing Death by Dangerous Driving, contrary to section 36 of the Road Traffic Ordinance, Cap.374 The case has been transferred to the District Court for trial. You are Chan's counsel.

- (a) **At a pre-trial conference, your solicitor asked for your opinion on the admissibility of these potential pieces of evidence (namely, the verbal utterance, the post record and the video interview) in the event that the prosecution wishes to adduce them at trial. You may assume that Chan made no allegations against the police of violence, threats of violence, promises, fraudulent misrepresentation or any other prohibited inducement.**

**Is there any basis for the exclusion by the trial judge of any of these items of evidence? Explain with reasons and cite relevant authority in your answer.**

**(15marks)**

*Question continued on next page.*

- (b) Describe the procedure most likely to be adopted by the Court in determining the admissibility of the defendant's alleged statements against interest? (10marks)**  
**[25Marks]**

## QUESTION 6

You represent Dicky Tang, who is charged with 'Indecent Assault'.

Tang was alleged to have placed his right hand on the right buttock of Peter Tu in a moving MTR train. Peter Tu was at the time in front of Tang, with his back towards Tang. Peter Tu turned around and grabbed Tang's right hand which was moving away from his right buttock. Peter Tu shouted at Tang and sought assistance to stop Tang from leaving. Tang was arrested by police at the next station.

Having been arrested and cautioned, Tang is alleged to have replied, "*Ah Sir, he is too handsome, I cannot resist placing my hand there. Give me a chance.*"

At the pre-trial review, Tang's solicitor successfully obtained a 3 months adjournment to permit Tang to locate his friend who was with him on the train, an alleged eye-witness to the offence. At the second pre-trial review, a further adjournment was obtained to ascertain the availability of CCTV footage in the train.

At trial, Tang's defence was that it was an accident as he lost his balance, and the alleged victim Tu was in fact lying, as Tu did not see what actually happened. Further, the police induced him to make the alleged verbal confession.

### Scenario 1

Assume Tang was convicted after trial and the Magistrate ordered that he pay costs in the sum of HK\$20,000 to cover the cost of the prosecution.

- (a) With reference to authorities, describe the circumstances in which a convicted defendant can be required to pay the costs of his own prosecution. (9marks)**

### Scenario 2

Assume Tang was acquitted after trial and applied for costs. In refusing the application, the Magistrate stated that there were positive reasons for refusing Tang's costs in the case.

- (b) What are the principles governing the award of costs to an acquitted defendant? What might constitute the 'positive reasons' for not awarding an acquitted defendant his costs in the Magistracy? Explain your answer with reference to authorities. (16marks)**

**[25Marks]**

## QUESTION 7

Larry Pong (a male aged 17 years) has been convicted in the Magistrates Court of an offence of theft of an “iPhone” mobile phone valued at HK\$9,000. In his reasons for sentence the magistrate, inter alia, stated that the offence for which Larry had been found guilty was both serious and prevalent. The magistrate continued that, “any person, no matter old or young, who steals other peoples’ mobiles phones, containing important personal data, should expect to go to prison”. He sentenced Larry to 9 months immediate 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 Larry is aged 14 years old and 6 months instead? (10marks)**
  - (c) Comment on the magistrate’s reasons for the imposition of an immediate custodial sentence in this case. (5marks)**
- [25Marks]**

## QUESTION 8

Karen Tam has been arrested on suspicion of trafficking in dangerous drugs, being 30 grammes of a powder suspected to have been cocaine, which was found on her (in the left front pocket of her jeans) at a “stop and search” by a police officer in a basketball court at 11pm on a weekday. She has been brought to the West Kowloon Magistrates’ Courts for mention.

You are the duty lawyer today. Karen would like you to make an application for bail on her behalf in the West Kowloon Magistrates’ Courts in her first appearance. She wishes for the case to be adjourned 6 weeks for her to consider her plea. The Prosecution would require the case to be adjourned for 6 weeks as well in order for the Government Chemist’s Certificate to be ready.

Karen is aged 25 years old and is a Hong Kong permanent resident. She is a waitress earning HK\$10,000 a month. She has a previous conviction for possession of dangerous drugs in 2014, where she was sentenced to 18 months’ probation. She currently sleeps under the bridge in Mong Kok train station as she could not afford housing.

- (a) **What rules govern an Accused’s right to apply for and to be admitted to bail? What factors may a Court take into consideration when assessing an Accused’s application for bail?** (5marks)
- (b) **What factors can lead to bail being denied to an Accused?** (5marks)
- (c) **If bail is refused for Karen, what options are available to her if she still wishes to be granted bail?** (5marks)
- (d) **What duties are imposed on a Defendant and/or his surety if bail is granted and what are the consequences of failing to comply with any of the conditions imposed when bail is granted? List some of the usual “conditions” attached to bail.** (5marks)
- (e) **Karen asks you whether it is likely she will get bail? What would be your advice to her and why?** (5marks)

**[25Marks]**

# BARRISTERS QUALIFICATION EXAMINATION 2018

## 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 Hong Kong National Party (HKNP) has caught media attention frequently in 2018. The Assistant Societies Officer has given her recommendation to the Secretary for Security, John Lee Ka-chiu, to make an order for prohibiting the operation of the HKNP under section 8 of the Societies Ordinance, Cap. 151. The Secretary for Security has said that he will only make a decision after receiving and considering submissions from the HKNP as to why the Secretary for Justice should not make such an order.

Andy Chan, the convener of the HKNP, delivered a speech at Foreign Correspondence Club (FCC) in August 2018. Prior to the event, the Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region contacted the FCC and also issued a statement on August 3, saying that it “resolutely opposes any external forces providing a platform for the independence forces to spread their absurd ideas”.

Mr. Zhang Xiaoming, the Director of Hong Kong and Macau Affairs Office of the State Council of the PRC has recently said that the HKNP is an unlawful organization and has engaged in secession activities. He firmly supports any actions to be taken by the Hong Kong Government against the HKNP.

**(a) The Secretary for Security decided to ban the operation of the HKNP on 24 September 2018, after considering the submissions of the HKNP. Assume Mr. Chan intends to challenge the decision by way of judicial review, advise him on the merits of his case; (15marks)**

**(b) If the Central Government wants to ensure that either the issue of constitutionality of banning the HKNP will not be brought to the court of the HKSAR or the HKNP will not win the case, advise it on whether there is anything they can do under the Basic Law. (10marks)**

**[25Marks]**

*Question continued on next page.*

(Section 8 of the Societies Ordinance, Cap. 151 provides:

- “(1)The Societies Officer may recommend to the Secretary for Security to make an order prohibiting the operation or continued operation of the society or the branch—
- (a) if he reasonably believes that the prohibition of the operation or continued operation of a society or a branch is necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others; or
  - (b) if the society or the branch is a political body that has a connection with a foreign political organization or a political organization of Taiwan.
- (2) On the recommendation by the Societies Officer under subsection (1), the Secretary for Security may by order published in the Gazette prohibit the operation or continued operation of the society or the branch in Hong Kong.
- (3) The Secretary for Security shall not make an order under subsection (2) without first affording the society or the branch an opportunity to be heard or to make representations in writing as the society or the branch thinks fit as to why such an order should not be made.
- (4) Subsection (3) shall not apply where the Secretary for Security reasonably believes that affording the society or the branch an opportunity to be heard or to make representations in writing would not be practicable in the circumstances of that case.
- (5) An order made under subsection (2) shall as soon as practicable be—
- (a) served on the society or the branch;
  - (b) (where the society or the branch occupies or uses any building or premises) affixed in a conspicuous manner on any building or premises occupied or used as a place of meeting by the society or the branch and at the nearest police station of the police district in which such building or premises are situated; and
  - (c) published in the Gazette.
- (6) An order made under subsection (2) shall take effect on publication in the Gazette or, if the order specifies a subsequent date for its taking effect, shall take effect on that specified date, notwithstanding that an appeal has been or may be made against the order under subsection (7).
- (7) A society or a branch in relation to which an order is made under this section and any office-bearer or member of the society or the branch who is aggrieved by an order of the Secretary for Security made under this section may appeal to the Chief Executive in Council against the making of the order within 30 days after the order takes effect and the Chief Executive in Council may confirm, vary or revoke the order....”)

## QUESTION 2

The Small House Policy was introduced in December 1972 with the objectives to improve the housing and sanitary standards in the rural areas of the New Territories in Hong Kong. Under the Small House Policy, an indigenous male villager, who is aged 18 or above and descended through the male line from a resident in 1898 of a recognized village in the New Territories, may apply to the Lands Department once during his lifetime for permission to build for himself a small house of a regulated size on a suitable site within his own village.

- (a) **The Hong Kong Government has reviewed the Small House Policy for quite some time. Assuming that the current Chief Executive intends to announce her decision next year to abolish the Small House Policy, please advise her whether or not the abolition of the Small House Policy is consistent with the Basic Law. (12marks)**
- (b) **The Heung Yee Kuk is the statutory advisory body on New Territories affairs. It is of the view that the interest has been enjoyed by the indigenous villagers for many years and therefore should be maintained. It plans to challenge the decision of the Chief Executive and seeks your advice on:**
- (i) **Assuming that the case will eventually come before the Court of Final Appeal (CFA), whether it's likely that the CFA will seek an interpretation from the Standing Committee of the National People's Congress (NPCSC) upon request? Why? (7marks)**
- (ii) **What are the approaches taken by the CFA and the NPCSC respectively with regard to the interpretation of the Basic Law? (6marks)**
- [25Marks]**

### QUESTION 3

Solicitors have delivered you a set of instructions to advise.

The lay client, acting in person, applied for leave to apply for judicial review against a decision of a statutory appeal tribunal. The Court of First Instance refused to grant leave after reading the application and issued a Form CALL-1 with the following observations:

“I have read the Notice of Application (Form 86) carefully. I find that the application was made outside the time limit of 3 months after the decision that is the subject of the application for leave and therefore requires extension of time. I decline to grant extension of time after considering the relevant factors and note particularly that there has been no satisfactory explanation of the delay of 7 days; that the fact the applicant had spent most of the 3 months to seek to obtain legal representation from the Legal Aid Department and to raise money for the purpose of obtaining private legal representation in case that legal aid is not available is not of itself a good reason for extending time; and that any undue delay is prejudicial to good administration in the enforcement of the regulatory regime of which the appeal tribunal is part. While my decision to refuse extension of time is sufficient dispose of this application for leave, I have studied the grounds of application stated in the homemade Form 86 carefully and come to the view that none of the grounds proffered is reasonably arguable. I would not have granted leave to apply for judicial review even if the applicant had made the application within time.”

The instructions include a statement taken by solicitors from the lay client in which she stated: (A) The Legal Aid Department refused her legal aid application. She appealed to the Registrar of the High Court. She was notified of the Registrar’s decision dismissing her legal aid appeal 5 days after the expiry of the 3 month time limit. She then drafted the Form 86 by herself in the following 2 days and then went to the High Court Registry immediately thereafter to file the Form 86. That was why the Form 86 was filed 7 days after the expiry of the 3 month time limit. (B) Because she was drafting the Form 86 by herself in a hurry, she failed to include in the Form 86 and in the documentation sent with the Form 86 a piece of documentary evidence that the tribunal had clearly misread in its decision.

**In the light of the above, advise:**

- (a) On the procedural steps (including applications) that are needed to appeal against the decision of the Court of First Instance conveyed in the Form CALL-1 above. (10marks)**
  - (b) On the prospects of success of the proposed appeal in the light of the matters (A) and (B) in the instructions of the lay client. (15marks)**
- [25Marks]**

## QUESTION 4

Mr. A made an application for a mahjong parlour licence with the Home Affairs Department. When he downloaded the application form from the department's website, the file included a set of policy guidelines for deciding mahjong parlour licence applications in the following terms:

### “1. The Law

Section 22(1)(b) of the Gambling Ordinance (Cap.148) provides, inter alia, that the public officer appointed by the Secretary for Home Affairs (“the public officer”) may license premises for the playing therein of games in which mahjong tiles are used.

### 2. Points for consideration before the issue of a Mahjong Licence

Each application will be considered on its own merits. However, the public officer will consider major factors listed in (i) to (v) below.

- (i) **Cogent need for a lawful gambling outlet.** Government policy is that a mahjong parlour should, as a general rule, be allowed to be set up only if a cogent need for such an outlet is established.
- (ii) **Suitability of the applicant.** The applicant should be found suitable for managing a mahjong parlour.
- (iii) **Suitability of the proposed premises.** The proposed premises should be found suitable for use as a mahjong parlour from structural and means of escape points of view, as well as in terms of the lease of the land.
- (iv) **Suitability of the proposed location.** The location of the proposed premises should be found suitable. As a general rule, the proposed mahjong parlour should not be located within a pure residential neighbourhood or in close proximity to an educational or religious institution or an institution or facility catering to children or youths. Besides, the establishment of the proposed mahjong parlour should not result in an undue concentration of mahjong parlour in the locality.
- (v) **Local reaction.** The public officer would assess the local reaction to the establishment of the proposed mahjong parlour and the potential objection if the application is approved, with the assistance of the relevant District Officer.

The public officer may include in the mahjong licence any other licensing conditions as he considers appropriate.”

Mr. A's application was unsuccessful. The public officer's decision letter informed him that he was not satisfied that there was a cogent need for lawful gambling outlet in the neighbourhood of the proposed premises of the mahjong parlour; that he was satisfied that Mr. A is a suitable person to manage a mahjong parlour since he had managed a mahjong parlour for 10 years in the same neighbourhood without contravening any of the conditions imposed for that mahjong parlour; that he was satisfied that the proposed premises were suitable from the structural and means of escape points of view and the terms of the lease of the land permitted the use of the proposed premises as a mahjong parlour;

*Question continued on next page.*

that he was not satisfied of the suitability of the proposed location because there were one kindergarten for children aged 2 to 6 operating from 8am to 4pm on weekdays and one medical clinic of a paediatrician operating from 10am to 6pm on weekdays and Saturdays within the 100-metre circle from the proposed location; that he was informed of strong local reaction against the proposed mahjong parlour by the District Officer responsible for the neighbourhood who had conducted an opinion survey of the locals within the 100-metre circle.

At the end of the decision letter, the public officer notified Mr A that he refused the application for the reasons that there was no cogent need for lawful gambling outlet in the neighbourhood of the proposed premises of the mahjong parlour; that the proposed location was not suitable for the establishment of a mahjong parlour; and that there were strong local objections to the application.

Mr. A appealed to the Administrative Appeals Board, which dismissed his appeal with a reasoned decision endorsing the approach and reasons of the public officer in spite of the following submissions of Mr. A's lawyers: (a) The proposed mahjong parlour was to be a small scale operation with 8 gaming tables and accommodating a maximum of 36 persons (namely 32 players and 4 staff members); (b) It was unprecedented for the public officer to regard the paediatric clinic as a "facility catering to children or youths"; (c) The proposed mahjong parlour's operating hours would be from 3 pm to 12 am and therefore it would be unlikely to be overlapping with the hours of the kindergarten and the paediatric clinic; (d) The proposed mahjong parlour would not have a shop front facing the street and would only be accessible from an entrance at the back of the premises at a rear lane; (e) Information supplied by the police to the public officer indicated that in the six months before there were three raids of illegal gambling with 70 arrests and about 60% of the arrested gamblers were retirees living in the neighbourhood playing mahjong; (f) The public officer had applied the 100-metre circle inflexibly where the relevant criterion is "close proximity".

This was particularly grievous as the kindergarten was 90 metres away from the proposed location and not facing the premises; (g) The alleged "strong local objections" were vague and unspecified and the District Officer had not produced the opinion survey sheets to explain to the Board the methodology used and the analysis of the results; and (h) Mr. A's case should be given sympathetic consideration because he had been a reputable manager of a mahjong parlour located in the same neighbourhood for 10 years, the previous mahjong parlour closed down 3 years ago because of redevelopment of the building and it took him a long time to find the proposed premises.

The Administrative Appeals Board is required to have regard to a statement of policy of the respondent that the appellant was or could reasonably have been expected to be aware of at the time of the making of the decision that is the subject of the administrative appeal.

**Solicitors acting for Mr. A have asked you to advise on the grounds for applying for judicial review and to provide a succinct analysis of the reasoning supporting each of the grounds included in the advice.**

**[25Marks]**

## Part B (Company Law)

### QUESTION 5

Pickard Ltd (“the Company”) is a private company limited by shares, which is in the business of manufacturing textiles. Angie is the sole shareholder and director of the Company.

In 2015, Angie met Bill. The two became involved in an intimate relationship, and soon, Bill also became involved in the business of the Company.

Bill dealt with both suppliers and purchasers on behalf of the Company. He had a name card printed, stating that he is the chief financial officer and a director of the Company. This was done with the knowledge and consent of Angie. However, Bill was never formally appointed as a director of the Company.

In July 2016, Angie discussed with Bill the need for the Company to raise finance, possibly through the obtaining of loans. However, no concrete decision was made by Angie as to the amount to be borrowed and on the identity of any proposed lender.

In August 2016, Bill convinced a friend, Chris, to provide a loan to the Company of HK\$10million. Chris wished to have security for the loan, and Bill prepared a charge agreement for the Company to grant a charge to Chris over the entire undertaking of the Company to secure the loan. Bill signed the charge agreement on behalf of the Company. However, the charge was not registered.

Angie only found out about the loan and charge transactions with Chris after the charge agreement was signed and after the Company had received the HK\$10million funds. Although Angie was upset that Bill did not discuss the transactions with her beforehand, she nonetheless accepted the funds for use by the Company.

In February 2017, Bill obtained a further loan purportedly on behalf of the Company. The loan was for the amount of HK\$20million and the lender was a finance company, Easy Finance Ltd.

The loan was secured by a fixed charge over certain specified fixed assets of the Company and a floating charge over the Company’s book debts and stock-in-trade. The charge agreement contained a clause providing that the floating charge will automatically crystallise upon the occurrence of various stipulated events, including where a petition is presented for the winding up of the Company.

Bill affixed the Company’s seal to the loan and charge agreements with Easy Finance Ltd and signed next to the seal in the agreements, purportedly as a “director” of the Company. Bill produced to Easy Finance Ltd a copy of a document purporting to be a resolution of the board of the Company approving of the loan and charge agreements and authorising Bill to affix the Company’s seal to the agreements.

The charge granted to Easy Finance Ltd was also not registered.

*Question continued on next page.*

Angie was unaware of the transactions with Easy Finance Ltd. She had not passed any board resolution for the transactions, nor had she authorised Bill to use the Company's seal. The copy of the board resolution was forged. The signature on the resolution was purportedly that of Angie's, but that signature was forged by Bill.

Article 25 of the articles of association of the Company provides as follows:

“(a) The Seal of the Company shall be kept by the Board of Directors and shall not be used except with their authority.

(b) Every document required to be sealed with the Seal of the Company shall be deemed to be properly executed if sealed with the Seal of the Company and signed by the Chairman of the Board, or such person or persons as the Board may from time to time authorise for such purpose.”

The HK\$20million obtained by Bill was used for his own purposes.

In March 2017, Angie found out about the loan and charge transactions with Easy Finance Ltd. At that time, she broke up her relationship with Bill and also did not allow Bill to be involved in the business of the Company anymore.

The Company was solvent at all times up to March 2017. However, the company's financial position deteriorated significantly by mid-2017.

In June 2017, a petition was presented for the winding up of the Company on the ground of insolvency. In September, an order was made by the court for the Company to be wound up.

**Your advice is sought on each of the following:**

- (a) **Would Chris and Easy Finance Ltd be able to enforce their respective charges against the Company and the liquidator of the Company? Would your answer differ if the charges were duly registered? (17marks)**
- (b) **Assuming that the charges in favour of both Chris and Easy Finance Ltd are enforceable against the Company and the liquidator, what is the order of priority between Chris and Easy Finance Ltd in respect of their charges? (8marks)**
- [25Marks]**

## QUESTION 6

Kam is the managing director and majority shareholder of a private company, Kam Supplies Ltd (“KSL”). KSL was incorporated in 2010. The company is in the business of selling home renovation and interior decorating materials both as a wholesaler and as a direct retailer to end-users.

KSL is the lessee of certain premises on Lockhart Rd in Wan Chai, and operated its business out of those premises. Kam employed two administrative staff at the Lockhart Rd premises.

In January 2015, Kam incorporated a new company, Kam Electrical and Plumbing Ltd (“KEPL”). Kam is also the managing director and majority shareholder of KEPL. Kam formed the new company, KEPL, to provide electrical and plumbing services for home and office renovations.

KEPL also operated out of the same Wan Chai premises as KSL. While new tradesmen were employed by KEPL for its business, KEPL did not hire any office or administrative staff. Kam required the two administrative staff of KSL to also handle KEPL’s business and affairs. KSL continued to pay the wages to those two staff members (in the amount of HK\$15,000 per month each).

In the period between 2010 and 2015, KSL purchased timber and wood products from a mainland supplier, Zhao. After the incorporation of KEPL, the staff at the Lockhart Rd premises continued to purchase products from Zhao. However, sometimes the letterhead and company chop of KSL were used to make purchase orders by the staff, while at other times, the letterhead and company chop of KEPL were used for the orders.

The goods purchased, whether on KSL’s or KEPL’s letterhead, were used interchangeably for the businesses of both KSL and KEPL. Payments were also made to Zhao out of the bank accounts of both KSL or KEPL, irrespective of whether the orders were made using the letterhead and chop of KSL or KEPL.

Between January and March 2018, the Lockhart Rd staff made a series of orders for wood products from Zhao, using the letterhead and chop of KEPL.

At that time though, both KSL and KEPL were in financial difficulties and Zhao did not receive payment from either KSL or KEPL for the goods that had been sold and delivered to the Lockhart Rd premises. The total sum owed to Zhao under those orders amounted to HK\$5million.

By 1 April 2018, KEPL had become insolvent. In the period from April 2018 to June 2018, all receipts by KEPL of amounts paid by customers of KEPL were paid into the bank account of KSL. Those amounts were in the sum of HK\$20million.

Kam wrote up a receipt from KSL to KEPL for those amounts, stating that the sums were due for provision of administrative services provided by KSL to KEPL from January 2015 to June 2018.

*Question continued on next page.*

On 2 July 2018, Zhao presented a petition to the court for the compulsory winding up of KEPL.

On 15 July 2018, the Inland Revenue Department (“IRD”) sent a letter to KEPL stating that certain tax refunds (in the sum of HK\$500,000) were payable to KEPL. Kam wrote back to the IRD requesting the amounts be paid into KSL’s bank account. The IRD did so accordingly on 20 July 2018.

In October 2018, the court made an order to wind up KEPL on the ground of insolvency.

**Your advice is sought on the following:**

- (a) Advise Zhao on whether he could sue KSL to recover any of the HK\$5million in the event that he is unable to recover the amounts from KEPL in the winding up of KEPL. (6marks)**
  - (b) Advise the liquidator on whether the HK\$20million received by KSL in the period April to June 2018 can be recovered from KSL for the benefit of the creditors in the winding up of KEPL. (12marks)**
  - (c) Advise the liquidator on whether the tax refund of HK\$500,000 can be recovered from either KSL or the IRD for the benefit of the creditors in the winding up of KEPL. (7marks)**
- [25Marks]**

## QUESTION 7

Fintech Platform Holdings Limited (“**Fintech**”) is the holding company within the Fintech group which carries on the business of developing and exploiting different forms of digital financial solutions in particular electronic payment platforms. Fintech Development Limited (“**FDL**”), Fintech Research Limited (“**FRL**”), Bright Ideas Limited (“**BIL**”) and Cloud Solutions Limited (“**CSL**”) are associate companies within the Fintech group all of which are ultimately owned (directly and indirectly, as the case may be) by Fintech. All of the companies within the Fintech group are incorporated in Hong Kong.

As part of Fintech’s business expansion strategy, Crypto-Surge Limited (“**Company**”) was incorporated in Hong Kong on 26 October 2016 to launch Fintech’s crypto-currency business. The Company has a paid up share capital of HK\$100 divided into 100 shares. At the time of incorporation FDL and FRL each held 50 shares in the Company. Thereafter in March 2017, a strategic investor, Aggressive Strategies Fund (“**ASF**”), a venture capital fund, was brought in and FDL and FRL each transferred 4 shares in the Company to ASF. ASF does not have any board representation, or pre-emption, drag-along or tag-along right with respect to its shareholding in the Company.

Since its incorporation, the Company has been developing its own blockchain technology with a view to creating a crypto-currency that could rival bitcoin and ethereum. Its operations have been funded by loans from Fintech (totaling HK\$100M by August 2018); the Company has no revenue so far and has negative net asset value since its technology is still at the embryonic stage and is untested and unvalidated. The Company also has no reserves.

Due to pressure from Fintech’s noteholders for Fintech to improve its balance sheet in preparation for its intended listing, Fintech wants to divest its investment in the Company which is a serious drain of its capital but is not generating any return in the meantime. It enters into discussions with Moobaba Inc (“**Moobaba**”), a technology conglomerate, to sell the shareholdings of FDL and FRL in the Company to Moobaba.

Moobaba takes the view that the Company’s blockchain technology, though still under development, has very good prospects of success, and is confident that it will achieve a “unicorn” valuation<sup>1</sup> soon. Nevertheless, Moobaba is not prepared to incur substantial financial exposure in acquiring the majority shares in the Company.

In the negotiations between Fintech and Moobaba, two options for the acquisition have been tabled for discussion.

*Question continued on next page.*

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<sup>1</sup> A privately owned company start-up company valued at over US\$1B

The first option is that FDL and FRL are to sell their shares in the Company to Moo Limited (“Moo”), a wholly owned subsidiary of Moobaba, for HK\$80M, which consideration is to be raised by Moobaba/Moo from third party funders and fully guaranteed by Fintech, and Fintech would waive the HK\$100M loans advanced to the Company<sup>2</sup>. Fintech and the Company will also provide an information warranty to Moo, which is vital to Moobaba/Moo’s carrying out due diligence and evaluation on the viability of the Company’s blockchain technology.

The second option is that (a) FDL and FRL would enter into a sale and purchase agreement to sell their shares in the Company to Moo for HK\$2; and (b) Fintech would enter into a loan assignment to assign to Moo the outstanding HK\$100M loans owed by the Company to it at a consideration of HK\$80M, which consideration is to be satisfied by 8 instalments payable at 2-month intervals, which in respect of the last 4 instalments, at the option of Moo and up to a cap of HK\$40M, could be satisfied in the following manner:-

- (i) BIL and CSL, associate companies with the Fintech group, owe substantial trade debts to Moobaba to the tune of HK\$32M. BIL also owes inter-company loan of HK\$8M to the Company.
- (ii) Those sums due from BIL and CSL to Moobaba and the Company would be treated as being paid directly to Fintech to reduce the indebtedness owed by Moobaba to Fintech under the loan assignment.
- (iii) Fintech would then release Moo from an equivalent sum outstanding under the loan assignment.

Fintech and the Company would provide the same information warranty identified above to Moobaba/Moo.

These discussions have proceeded without the involvement or knowledge of ASF. Its sentiment on Fintech’s proposed divestment of its interests in the Company is unknown.

**Fintech is coming to you for advice.**

- (a) **Please advise Fintech on whether either of the options canvassed would amount to financial assistance. (16marks)**
  - (b) **In the event that the second option is pursued:**
    - (i) **Please advise Fintech if there is anything that can be done to ensure the transactions will not be open to challenge. (6marks)**
    - (ii) **What are the consequences if Fintech proceeds with the transactions regardless? (3marks)**
- [25Marks]**

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<sup>2</sup> For present purposes it is assumed that Fintech has means to address this such that it will not affect its overall financial position for the purpose of listing, but such means would incur considerable efforts on the part of Fintech such that it is presented as an option for consideration but it will require very considerable persuasion for Fintech to agree to adopt the same.

## QUESTION 8

Sinopeck Limited (“**Sinopeck**”) is a company incorporated in the British Virgin Islands. It has two wholly owned subsidiaries:

- HK Co – a company incorporated in Hong Kong which carries on the business of trading in palm oil and related products; and
- Macau Co – a company incorporated in Macau SAR, which is sole shareholder in a Wholly Foreign Owned Enterprise incorporated in the PRC that holds and operates a palm oil refinery plant in Yunnan, PRC (“**WFOE**”). The current valuation of the palm oil refinery is RMB70M.

The WFOE and HK Co has entered into a cooperation agreement whereby no less than 60% of the outputs of WFOE must be sold to HK Co, and they constitute the most substantial source of palm oil products traded by HK Co. Sinopeck carries out treasury function for all its subsidiaries in Hong Kong, maintain numerous bank accounts in Hong Kong to that end, obtains loans from banks in Hong Kong to finance the business activities of the group, and has its own staff and office premises in Hong Kong, adjacent to the office of HK Co.

Sinopeck has four shareholders:

- Andrew – 40%
- Bernardine – 20%
- Clifford – 20%
- Dave – 20%

Under:-

- (a) their shareholders agreement, it is expressly provided that if any shareholder wishes to sell his/her shares in Sinopeck, the other shareholders have a right of veto;
- (b) the bye-laws of Sinopeck:
  - (i) 7 days’ notice in writing must be given for any special general meeting;
  - (ii) all notices must be served at the residence of the shareholder as stated in the register of members; and
  - (iii) the quorum of any general meeting is 2.

The board of directors of Sinopeck consists of 7 directors – three nominated by Andrew (including Andrew himself), and Bernardine, Clifford and Dave.

Andrew and Bernardine are the only directors of HK Co and Macau Co, and Andrew is also the legal representative<sup>3</sup> of WFOE.

Other than Sinopeck, Andrew and Bernardine also engage in another line of business – manufacturing LED light bulbs – with Edward. Edward has previously expressed an interest in investing in Sinopeck and initiated discussions with shareholder of Sinopeck, but due to the objection of Dave the discussions fell through.

*Question continued on next page.*

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<sup>3</sup> For present purposes, please assume that legal representative under PRC law is the sole person with authority to represent and bind a PRC company.

In 2017, disputes arose between Andrew and Bernardine on one hand and Edward on the other with respect to their LED business. This resulted in Edward commencing an action against Andrew and Bernardine making a series of allegations including breach of confidence and conspiracy and seeking substantial damages to the tune of HK\$80M.

As part of the settlement negotiations with Andrew and Bernardine, Edward proposed that he should be given a substantial stake in Sinopeck's palm oil refinery. As Dave had made clear that he did not want Edward as a shareholder, a transfer of Andrew's and Bernardine's shares in Sinopeck to Edward is not possible.

Instead, Andrew, as legal representative of WFOE, entered into an agreement on behalf of WFOE with Edward for WFOE to sell the palm oil refinery to Edward for RMB50M ("SPA"). Macau Co was named guarantor under the SPA and provided a guarantee to Edward for WFOE's due performance of its obligations thereunder.

Andrew and Bernardine, in their capacities as sole directors of Macau Co, passed a resolution to (a) approve the SPA and (b) approve Macau Co acting as guarantor thereunder.

None of the above was disclosed to Dave, who only found out about the same when one of the staff in the palm oil refinery laid off by Edward reached out to Dave. Dave immediately sought PRC law advice and was informed that upon good cause shown, WFOE can bring a claim before the PRC court within a period of one year to set aside the SPA.

Dave then demanded that a board meeting be convened to discuss this matter, hold Andrew and Bernardine liable and take steps to reverse the SPA. However, before any board meeting could take place, Andrew purported to give notice to convene a special general meeting on a day falling 8 days after the giving of notice, which notice Andrew claimed to have been served on Dave's residence but which Dave had never received. Accordingly, Dave did not attend the special general meeting and he was removed as a director by the unanimous resolution of Andrew, Bernardine and Clifford at that meeting.

**Dave has come to you for advice. Please advise him on the options he has. He prefers to remain a shareholder in Sinopeck, because HK Co has substantial goodwill which is highly valuable, and he would only want to be bought out as a last resort.**

**[25Marks]**

***\* For the purpose of this question, please assume that (1) BVI law is the same as Hong Kong law; and (2) Macanese and PRC law do NOT have any of the reliefs and remedies equivalent to those available under statute or the common law in Hong Kong***

# BARRISTERS QUALIFICATION EXAMINATION 2018

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

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

#### QUESTION 1

Sze Li Wei is a Mainland resident who is employed as a cross-border coach driver by Lux Limos Limited (“Lux”), a Hong Kong company. Sze must hold both Hong Kong and Mainland driver’s licences to drive buses and carry passengers.

Sze earns a salary of HK\$30,000 per month. His terms of employment also include free accommodation and meals in Hong Kong. He can keep tips, which are approximately HK\$6,000 per month. His route usually required driving long distances on the Mainland arriving in Hong Kong late at night. Lux has a staff hostel to accommodate Mainland drivers overnight and on compulsory rest days in Hong Kong. The hostel includes a canteen which provides meals for drivers and other specified persons.

On 3 April 2018, Sze was walking into the Kowloon Lux bus depot when another Lux employee Lao Ying Jie drove a Lux bus recklessly at speed out of the depot knocking Sze down causing him injury to his back. Sze’s new iPhone that cost HK\$8,800 was smashed. Sze has been granted sick leave, requires further treatment and at least 9months of physiotherapy. He is in constant pain and has occasional leg spasms. Sze was not able to renew his Mainland bus driver’s licence when he turned 60 on 10 September 2018 because of the back injury and leg spasms. He does not have to renew his Hong Kong licence until September 2019. His Hong Kong doctor advised Sze that he may never be fit to drive buses carrying passengers, or perhaps, drive any vehicle again. He is now seeking expert reports on his condition.

Sze wants to stay in Hong Kong throughout his sick leave because he prefers living in Hong Kong, is receiving treatment and physiotherapy in Hong Kong and intends to seek compensation in Hong Kong. Lux has been telling Sze he cannot stay in the hostel indefinitely and should go home to the Mainland to convalesce until he is fit to return to work.

Lao was charged with reckless driving but recently pleaded guilty to careless driving and was fined. Lux has been charged with offences relating to the poor condition of the bus, including the tire tread and a broken indicator light. Lux has pleaded not guilty but has no apparent defence. The trial is set down in December 2018.

- (a) **Advise Sze of any claim he may have, against whom, on what bases, where and for what? (6marks)**
- (b) **Sze does not want to take any action against Lux until March 2019 after he has received his Lunar New Year bonus in February 2019. Advise Sze on the timing of any claim. (3marks)**

*Question continued on next page*

- (c) **Advise Sze on what should be done before commencing proceedings. (8marks)**

- (d) Advise on all the documents Sze must file before and in order to commence proceedings. (9marks)
- (e) There is incomplete information in your instructions to draft all necessary documents to institute the claim. Your instructing solicitor has no experience in this area. You are to draft the skeleton pleadings including title and intituling, then set out in your draft the further instructions you require. You must refer your solicitor to the relevant rules and provisions that explain what must be done. (14marks)
- (f) Sze is seeking expert reports. Advise him on issues pertaining to adducing expert evidence. (6marks)
- (g) Would your advice on any matters be any different if Lux is convicted of offences relating to the accident? What other advice would you give? (4marks)

Answers should include relevant jurisdictional and procedural provisions and if deemed necessary be supported by authorities.

[50Marks]

## QUESTION 2

The defendant, Silverlining Co. Ltd, is a Hong Kong company owned and operated by [a businessman] Pedro Prata. In 2016, the defendant bought linen from the plaintiff, Natural World Limited to manufacture soft furnishings for Pedro's biggest client, an international furniture retailer ("the Client"). The linen was delivered in four shipments. The defendant used the first three shipments of the linen to make sofa covers under a contract with the Client. The fourth linen shipment was delivered late but the defendant had already cut the linen when the Client complained that the linen sofa covers delivered did not comply with contractual quality requirements, refusing to pay the defendant. The defendant had already paid the plaintiff for the first shipment of linen. The defendant then stopped payment to the plaintiff for the three subsequent shipments.

The plaintiff commenced an action in 2016 to recover the price for the last three shipments. The defendant denied liability and counterclaimed US\$532,000. Pleadings were closed and the parties filed Timetabling Questionnaires in 2017. The plaintiff filed a List of Documents, but the defendant did not. In 2017 the plaintiff took out a summons seeking judgment. Both parties filed evidence in respect of the summons. That summons first came on for argument before Wong J on 16 March 2018 (the "March Hearing"). At the March Hearing, both parties appeared by counsel and solicitors were present. The court heard and rejected the defendant's summons seeking leave to file further evidence to oppose the plaintiff's summons. The defendant's application took up all of the time reserved, so it was necessary to adjourn the plaintiff's summons, which the judge immediately re-fixed for hearing on 5 October 2018 ("the October Hearing").

Since the March Hearing, Master Fung made an order dated 9 April 2018 that the defendant's former solicitors cease to act for the defendant. The defendant did not file a notice of appointment of a new solicitor.

After the March Hearing, notice of the date and time of the October Hearing was sent by the Registrar to parties' solicitors before the defendant's former solicitors ceased to act.

On the day prior to the October Hearing the plaintiff filed an affirmation stating that the hearing bundles, skeleton submissions and authorities, had been served by the plaintiff's solicitors on the defendant by leaving the same at the defendant's registered office. The defendant was absent at the October Hearing. The plaintiff was represented by counsel who made submissions.

On 22 October 2018, court documents relating to the October Hearing were delivered to the defendant's office which included the following extract of a document signed by the judge ("the Extract"):

*"For the above reasons, I considered it appropriate to grant conditional leave to defend.*

*Question continued on next page.*

### *Disposition*

*I made an order that unless the defendant pays the sum of US\$290,000 (or the Hong Kong dollar equivalent at the time of payment) into court within 60 days from the date of the order:*

- (a) *the plaintiff may enter final judgment against the defendant for the amount set out in the plaintiff's summons dated 19 April 2017 with interest thereon as claimed, and costs; and*
- (b) *the costs of the plaintiff's application for summary judgment be to the plaintiff to be taxed if not agreed.*

*I further made orders as to the costs consequences and directions for further conduct of the main action, in the event that the defendant complies with the condition imposed."*

Pedro was shocked and went to a solicitor friend Albert Lau for help. Pedro has many questions which Albert cannot answer. Albert does not have a litigation practice but agreed to act for Pedro for the limited purpose of instructing you to deliver a written Opinion to advise Pedro what he should do. Albert will not act for Pedro in the proceedings. Pedro wants detailed advice from you because he is considering conducting the proceedings himself. You are instructed to:

- (a) **Advise how the former solicitors could have stopped acting? (6marks)**
- (b) **Advise how the judge could have made any order at the October Hearing in Pedro's absence? (8marks)**
- (c) **Advise what the Extract is and what it means? Explain each order and direction, including the legal bases. (12marks)**
- (d) **Advise on the options now available and the consequences that may follow if such options are adopted. (16marks)**
- (e) **Advise on any other matter that you may think appropriate, including your views on any matter you have not covered in answering the preceding questions. (8marks)**

**Answers should include relevant jurisdictional and procedural provisions and if deemed necessary be supported by authorities.**

**[50Marks]**

## Part B (Professional Conduct)

### QUESTION 3

**Discuss all issues of professional conduct arising from these facts in respect of Bev's conduct with reference to the Code of Conduct of the Bar Association of Hong Kong.**

**In addition, state how you would conduct the handling of this matter.**

Bev was called to the HK Bar on 18 August 2000. To save on staffing and capital costs, she recently moved to a shared office environment called "Hong Kong Professional Legal Services" with a couple of solicitor friends.

On 17 February 2008 Chan, the Senior Manager of Operations at the Insurance Institute of Hong Kong and Tsui, a clerk under Chan's supervision were both arrested and charged for insurance fraud in connection with their work at the Institute: Chan on one count and Tsui on three counts. This created quite a stir in the media as Chan had a high public profile since he was standing for LegCo.

On 19 February 2008 Chan, who was referred to her by Bev's sister, and Tsui together attended Bev's office. No qualified representative of a solicitor's firm was present at the meeting. At this meeting Bev told Chan that she would be pleased to appear on his behalf for the taking of his plea for which they could agree an appropriate fee later.

Bev then said to them both that, should Chan decide to engage her, she could also attempt a plea bargain with the prosecution for both himself and for Tsui. She suggested that she could attempt to bargain that the charge against Chan be dropped provided Tsui admitted to the three charges against him. She suggested that Chan ought to offer some sort of financial advantage to Tsui in exchange for his pleading guilty. She then discussed with and advised Tsui about possible defences she could raise on his behalf. After this she advised both Chan and Tsui generally on the matter of likely sentences.

Bev's intern, Zach had recognised Chan when he arrived at Bev's office. At the time he was on the phone to his friend, Jay who worked at Orange Daily and exclaimed out loud '*You'll never guess who just walked in ... it's that Chan guy, the one they have accused of big fraud and it looks like it must be big trouble judging by the worried look on his face. I'll bet there's a story there.*' To which his friend replied "*you get me a scoop and there's a fee in it just for you.*'

Zach laughed and said '*I'm not about to eavesdrop their meeting but send over the photographers – the photos alone will get you a front page headline*'. Taking him at his word, Jay mobilised a crew and rushed over to Bev's office. They took photos of Chan and Tsui leaving Bev's office and crowded Chan until he gave an angry statement about how it was all a mistake. The photos and statement were published in that day's edition of the newspaper under the sensational headline "Political hopes dashed in wake of fraud".

*Question continued on next page.*

Following their meeting, Bev sent an email to Chan enclosing a letter of commitment and a fee note bearing the title “Legal Invoice”. The invoice stated “*attached is the Fee Note for my professional attendances including legal conference for taking instructions, legal advice and court appearance for initial plea*”. Chan returned the signed letter of commitment and as directed, deposited the quoted HK\$60,000 legal fee to Bev’s nominated personal account with HBC bank.

Ten days later Bev also sent Tsui a separate email enclosing a letter of commitment. In her email she encouraged Tsui to finalise his ‘arrangement’ with Chan. In her email she said “*I advise you to arrange a good deal with Chan. I am now aware of his extensive and lucrative business dealings because he has sent me some of his confidential files connected to this insurance fraud business. Let me know what you two agree, Chan can then pay it through my account and I will transfer the balance to you after deducting my fees in respect of your case.*’ Tsui signed and returned the letter and told Bev that he and Chan had agreed on the amount of HK\$750,000 including her fee of HK\$250,000. The next day Chan deposited the full HK\$750,000 into Bev’s HBC account.

**[50Marks]**

## QUESTION 4

Benson But (“**Benson**”) is a barrister of 3 years’ call at ABC Chambers, a small civil set in Central formed in early 2017 with 5 members and headed by Harriet Ho SC (“**Harriet**”).

Benson has throughout his practice primarily worked on personal injury and matrimonial matters. He otherwise has had very limited practical experience in other areas of civil law and no practical experience in criminal law after completion of his pupillage.

With a view to raising the profile of ABC Chambers, Harriet decided in late 2017 that it was time for chambers to have a website. Given its size, ABC Chambers did not have a resident IT consultant and that the chambers administrator was only working on a part time basis and would not have spare time to assist on the project. As such, Harriet, who herself maintained a very busy chancery practice with a special focus on trusts, probate and real property work, approached Benson in early January 2018 and suggested that he should go and find an external IT company to construct a website for chambers and that Benson should work with the company and be fully in charge of the project. Harriet told Benson that she wanted the website to be up and running by early April 2018. Although Benson was then heavily engaged in a long personal injury trial which would only finish in late March 2018, he thought that he could not say no to the head of chambers and therefore agreed to take on the task.

Since then and up until late March 2018, Benson spent significant amounts of time after court hours and on the weekends to work with his chosen IT company on the design and contents of the website. He also drafted the profile descriptions of chambers as well as its 5 individual members.

With a view to painting chambers in a good light, Benson described ABC Chambers in the “About Us” section of the website as “*a big set of barristers chambers in Hong Kong with a long history and which houses specialists in both the civil and criminal fields*”.

When it came to the individual profiles of the members of chambers, Benson wrote the following description of Harriet on her profile page:

*“Harriet Ho SC is the head of ABC Chambers. She is a top billing barrister with a high success rate in trusts, probate and real property litigation. Chambers & Partners (2017) praises Harriet as a ‘sharp and highly respected advocate with a strong reputation in chancery work’”.*

As regards his own profile, Benson described himself as a “*highly regarded practitioner who is well experienced in all areas of civil and criminal litigation and is head and shoulders above other junior barristers in the market*”. He also included in his profile a photograph of him wearing his wig and gown, thinking that this would project a more professional look to viewers.

*Question continued on next page.*

Having drafted the contents pages of the website, Benson approached Harriet in early April 2018 and suggested that she should review the contents before they were published. However, she told him that she was far too busy at the time and that he should just arrange for the website

to go live as soon as possible without her vetting its contents. The website, which contained the descriptions as drafted by Benson, went live in April 2018.

The website has since been visited by many solicitors. One of them is Sharon Sin (“**Sharon**”), a sole practicing solicitor with an office in Tsim Sha Tsui, Kowloon. Sharon recently received instructions in early September 2018 from Desmond Dong (“**Desmond**”), a former financial controller and director of a Hong Kong listed company (“**Listco**”), to represent him in a civil suit brought by Listco in the High Court against him for a substantial amount of compensation and/or damages arising from a massive and complex commercial fraudulent scheme allegedly perpetrated by Desmond on Listco whilst he was its financial controller/director. The 20 day trial in this High Court action was due to commence on 3 January 2019.

Attracted by the profile write up of Benson on the website and in particular his purported experience in both civil and criminal laws, Sharon telephoned Benson on 5 September 2018 to see if he could represent Desmond at the trial. Having heard Sharon’s brief outline of the case, Benson felt that Desmond sounded like a crook and was reluctant to act for him against Listco of which Benson was a small shareholder. Benson was also concerned that he did not have sufficient experience to handle a large matter involving complex issues of company, commercial and criminal law and that in any event he would not have enough time to prepare for the trial properly given his other work commitments for the remainder of the year. Despite these concerns and reluctance (which were not shared with Sharon), Benson nevertheless agreed to take on the case for its profile and the financial reward which would come with a 20 day trial.

After engaging Benson, Sharon told him that Desmond would like to meet Benson in a conference and to hear his views on the merits of his case and the strategy that he should adopt. Sharon requested the conference to be held in her office in Kowloon because this would be more convenient for her. Although Benson’s room in chambers was big enough to hold the conference, he agreed to attend Sharon’s office in order to please her.

During the conference held on Monday 10 September 2018, it quickly became apparent to Desmond and Sharon that Benson was not on top of the issues at hand and was unable to provide any useful input into the case. Desmond’s frustration boiled over and he started yelling at Benson, calling him a “*useless idiot*”. After calming Desmond down, Sharon ended the meeting and suggested all to come back to her office the following Monday (ie 17 September 2018) for another meeting and warned Benson to be more prepared next time.

Benson felt very insulted by Desmond’s tantrums. After going home that evening, Benson logged on to his Facebook page and shared with his friends the details of the meeting and called Desmond a “*rude, arrogant crook*”. Benson further decided that he did not want to work on the matter anymore and therefore did not show up at the conference on 17 September 2018 without giving prior notice to Sharon.

**Discuss all issues of professional conduct, which arise on the above facts in respect of Benson’s and Harriet’s conduct, with reference to the Code of Conduct of the Bar of the HKSAR. [50Marks]**

**BARRISTERS QUALIFICATION EXAMINATION 2018**

**PAPER V: Civil Procedure and Civil Evidence;  
Professional Conduct and Advocacy**

**PART C:ADVOCACY**

**The following documents are attached:**

- (a) Examination Brief; and**
- (b) Notes to Candidates on Assessment Criteria**

*Please note: The following brief is based on instructions for an urgent ex-parte application to be heard on Friday, and you should make submissions on that basis. It is only for the purpose of this examination that you are given 4 days to prepare.*

IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE

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BETWEEN

CHRISTINE LOUIS SINCLAIR

Applicant/  
Intended Plaintiff

and

MELVIN FAN

Respondent/  
Intended Defendant

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**Instructions to Counsel for the Applicant**

Counsel is instructed on an urgent basis:

- 1) To appear *tomorrow* on Friday 2 November 2018 in the Court of First Instance for the Applicant in an *ex parte* on notice application for the grant of an injunction restraining Fan for a period of six months until 1 May 2019 from working as a chef in any restaurant in Hong Kong. The Applicant has learned that Fan intends to open his new restaurant 'Ego' in Stanley on Friday evening.
- 2) To prevent Fan from publishing a book of recipes. Such publication is scheduled for 1300 hours on Saturday during the course of a book signing by Fan. Instructing solicitors have ascertained that this event is to take place at Staunton's Booksellers in Queen's Road Central, after which the recipe book will be on sale in all of Staunton's outlets in Hong Kong. Free copies of the book are to be given to those patrons of Fan's new restaurant who spend more than HK\$2,000 per meal.
- 3) To apply for costs as appropriate.

Counsel is to prepare a skeleton argument in support of the application and a draft minute of the Order sought.

No affidavit has yet been drafted due to the extreme urgency of the matter. Counsel therefore should make reference, if appropriate, in the course of oral submissions to the required undertakings.

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

The facts are set out below.

## **Summary of Facts Known to Instructing Solicitors**

Instructing solicitors were approached last night by Ms. Christine Louis Sinclair, the renowned Chef at 'CLS Café' on the Peak, who is also a Director of 'Christine's Chef's Apprentice Academy' of Pokfulam.

She believes that a former employee, Mr. Melvin Fan, who until last month worked in her establishment as a demi-chef, has stolen all her secret recipes and is now on the point of publishing these. She fears that her business will be destroyed as she relies on the exclusivity of the dishes she prepares in her restaurant to secure her client base and thus her profitability. The recipes for the dishes are a rather unusual admixture of Nicoise; Southern Italian and Szechuan cooking styles and have proved to be immensely popular amongst late-night revellers.

Her fears arise from her having seen a leaflet distributed by Staunton's Booksellers advertising an upcoming book signing by, 'Top Chef Melvin Fan of CLS Café'. The book appears to contain a set of recipes described by Staunton's as 'Fan's famous Italian-with-a-Szechuan Twist starlight specials.'

She claims that these recipes are in fact her family's secret recipes handed down over generations and that she has never given Fan, or anyone else, permission to use these, or to divulge their ingredients or preparation methods.

Fan was summarily dismissed by the applicant two months ago on 31 August 2018 after a disastrous evening when, in her view, he was responsible for causing food-poisoning to a delegation of World Health Organisation officials during an Administration-hosted banquet at the former Government House.

Apparently Fan had used poor quality seafood and had failed to employ accepted standards of hygiene during the preparation of the food. She was not present at the banquet as she was catering a high society wedding between a barrister and an international journalist at the Foreign Correspondent's Club at the time. She had, however, heard reports from her staff that Fan's laxity had been deliberate and had been an attempt by him to destroy her reputation, as she and Fan had recently been locked in a series of disputes concerning the opening of her new restaurant Café-by-the-bay in Stanley.

Fan had wanted to manage the new restaurant but she did not think that he was experienced enough to do so and had told him this in no uncertain terms. She believes that Fan was intending to set up in business for himself and that he was removing her as effective competition in the trade by sabotaging such a high-profile Government event. The story had made front page news worldwide and diners had recently taken to showing her media photographs of WHO members being stretchered off to waiting ambulances, whilst a distraught Chief Executive looked on.

The dispute had grown acrimonious and she finally lost her temper and sacked Fan without notice. She had, however paid him one week's salary: HK\$5,500. She thought that she had been highly generous in this regard, especially in view of the fact of his gross misconduct and that she is having severe financial problems at present as a result of a series of poorly-advised forays into the Hong Kong stock market.

The Applicant has shown instructing solicitors Fan's employment contract, clause 59 of which reads:

59. *Termination and Covenants*

'The employee shall not for a period of five calendar months following termination of his employment (however caused) and whether or not such termination is lawful, be employed in any capacity as a chef in any restaurant or similar undertaking in the territory of Hong Kong.'

Clause 73 of the contract reads:

73. *Confidentiality*

*The employee shall take all steps to safeguard the employer's legitimate interests in respect of trade secrets and shall not without the express permission of the employer divulge; disseminate; reveal; make public; publish; disclose; sell; trade or otherwise use any recipe or cooking process made known to him in the course of his employment as a chef at CLS Café or at the Academy'.*

Clause 102 reads:

102. *Termination*

*Either party may terminate this contract by providing the other party not less than three month's written notice to that effect or by paying to the other the basic salary (tips excluded) in respect of such period in lieu of such notice. Any material breach of the conditions of this contract may result in summary dismissal.'*

The Applicant, who is an Italian national, claims that when Fan was first employed by her three years ago he had very limited cooking skills and had to be taught from scratch. She had employed him because he possessed a pleasant manner and was a willing worker who was eager to learn. She had first met Fan, who hails from Szechuan, as a regular customer and he had started assisting her to cook from time to time on an unpaid basis, as a means to improve his own culinary skills.

Over the years she had taught him the secret recipes and he had become highly proficient in producing the dishes; often adding an ingredient or two of his own or utilising a new cooking method. All such innovation had to be approved by the Applicant before the dishes were cleared for public consumption.

She had also taught him how to clearly and comprehensively set out the recipes in written form so that he could in future teach them to other chefs in proposed cooking courses to be held at the Applicant's cooking academy. No such courses had yet taken place as the Applicant was still weighing the advantages of the extra income against the disadvantages of losing her monopoly on that particular cooking style.

Although she has not yet seen Fan's recipe book she is convinced that it contains her secret recipes and that he has been able to publish these complex culinary formulations only because of her painstaking training of him. This suspicion is strengthened by the fact that several weeks ago she had found several discarded photocopies of some of her recipes in the wastebasket in her office. She believes that Fan has been copying the recipes for his own purposes. She has no idea, however, how he obtained access to the safe in which the recipes are stored.

She is concerned that if the book gets into the hands of the general public both her restaurant business and the profitability of the Academy will be destroyed overnight.

The Applicant also wants to prevent Fan operating his new restaurant in Stanley, which is in the premises next to her own proposed second restaurant. She has been unable to open the second restaurant because, amongst other reasons, she has been as yet unable to find a chef for it.

She phoned Fan last night and told him that she was taking him to court to stop him 'selling her out'. She also told him that she would make sure that he never worked in this town again. Fan told her that he had no idea what she was talking about and that she was always welcome in any of his restaurants if she wanted to taste 'some real food.' He also told her that he thought her 'secret recipes' were highly overrated and that Hong Kong would be taken by storm by his new flavours which were all a thousand times better than her old rehashed and bland items from the last Century.

Fan said that he wouldn't dream of using any of her recipes in his book as he didn't want to poison his customers and added that 'if she could show that he had been stupid enough to use any of her inedible rubbish he would gladly tear that page from his book and publicly eat it himself.' He enraged her by suggesting that she invite the 'Fab Five' from a popular television series to come to Hong Kong to renovate her restaurant and to teach her how to cook modern food. He added that they could also help her with her dress sense.

She hung up at that point and immediately called instructing solicitors who tried to contact Fan but were unable to do so as he failed to return their calls. Continuing attempts are being made to contact him. Attempts are being made to contact 'Books-for-Cooks Ltd' the publishers of the recipe book to obtain a copy of the book pre-launch to examine the contents.

The Applicant demands that Fan be stopped as a 'matter of principle' and that she does not care how long it takes nor how much it costs to do so.

## 11. Useful Research Information

Listed below is information which it is hoped will be of some use to candidates in their preparation for the Barristers Qualification Examination.

### Hong Kong Law Reports

### Hong Kong Law Publications

Sweet and Maxwell Asia  
16/F Cityplaza 3  
Taikoo Shing, HK  
Tel: (852) 3762 3227  
Fax: (852) 2520 6646  
Website: [www.sweetandmaxwell.com.hk](http://www.sweetandmaxwell.com.hk)

### Hong Kong Law related websites

#### *Legal Information sites:*

- World Legal Information Institute (**WorldLII**): <http://www.worldlii.org/>
- Hong Kong Legal Information Institute (**HKLII**): <http://www.hklii.org/>
- Australasian Legal Information Institute (**AustLII**): <http://austlii.edu.au/>
- British and Irish Legal Information Institute (**BAILII**): <http://www.bailii.org/>
- Pacific Islands Legal Information Institute (**PacLII**): <http://www.paclii.org/>

Access to all these Legal Information Institutes is free: they are independent, non-profit and University-based.

#### *Professions:*

Hong Kong Bar Association  
[www.hkba.org](http://www.hkba.org)

Law Society of Hong Kong  
[www.hklawsoc.org.hk](http://www.hklawsoc.org.hk)

#### *Law Schools:*

Hong Kong University  
<http://www.hku.hk/law/>

City University  
[www.cityu.edu.hk/slw/eng/index/](http://www.cityu.edu.hk/slw/eng/index/)

Chinese University  
<http://www.cuhk.edu.hk/law/>

***Government:***

HKSAR Government homepage  
[www.info.gov.hk](http://www.info.gov.hk)

Department of Justice  
[www.doj.gov.hk](http://www.doj.gov.hk)

Judiciary  
[www.judiciary.hk](http://www.judiciary.hk)

Legal Aid Department  
[www.lad.gov.hk](http://www.lad.gov.hk)

Legislative Council  
[www.legco.gov.hk](http://www.legco.gov.hk)

Law Reform Commission  
[www.hkreform.gov.hk](http://www.hkreform.gov.hk)

Securities and Futures Commission  
[www.sfc.hk](http://www.sfc.hk)

Privacy Commissioner for Personal Data  
[www.pcpd.org.hk](http://www.pcpd.org.hk)

Monetary Authority  
[www.hkma.gov.hk](http://www.hkma.gov.hk)

***Hong Kong Legal Resources:***

Basic Law of HKSAR & Related Judgments  
[www.basiclaw.gov.hk](http://www.basiclaw.gov.hk)

Hong Kong e-Legislation  
[www.elegislation.gov.hk](http://www.elegislation.gov.hk)

Court of Final Appeal Judgments  
<http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp?L1=FA#H1>

HKSAR Government Gazette  
[www.gld.gov.hk/cgi-bin/gld/egazette/index.cgi?lang=e&agree=0](http://www.gld.gov.hk/cgi-bin/gld/egazette/index.cgi?lang=e&agree=0)

***General Legal Resources:***

[www.findlaw.com](http://www.findlaw.com)  
[www.lexisnexis.com](http://www.lexisnexis.com)

## **Hong Kong Bookshops**

### **Bloomsbury Bookshop**

Rm 1202, 12/F, Chung Sheung Building  
9-10 Queen Victoria Street  
Central, Hong Kong  
Tel: (852) 2526 5387  
Fax: (852) 2877 0755  
Website: [www.bloomsbury.com.hk](http://www.bloomsbury.com.hk)

## **Hong Kong CPD Providers**

### **Courses and Seminars Limited**

Rooms 201 & 203, 2/F, Prosperous Building,  
48-52 Des Voeux Road Central, Hong Kong  
Tel: (852) 2901 1383  
Website: [www.courses-seminars.com](http://www.courses-seminars.com)

### **Lex Omnibus Limited**

Room 302,  
3/F, Printing House  
6 Duddell Street  
Central, Hong Kong  
Tel: (852) 2801 7628  
Website: [www.lexomnibus.com](http://www.lexomnibus.com)

## **Providers of Preparatory Courses for the Law Society's Overseas Lawyers Qualification Examination**

### **Lex Omnibus Limited**

Room 302, 3/F, Printing House  
6 Duddell Street  
Central, Hong Kong  
Tel: (852) 2801 7628  
Website: [www.lexomnibus.com](http://www.lexomnibus.com)

### **IP Learning**

9/F  
12-13 Jubilee Street  
Central, HK  
Tel: (852) 2858 1000  
Website: [www.ip-learning.com](http://www.ip-learning.com)

### **Paul Kent Legal Training**

Tel: (852) 9425 8363  
Email: [enquiries@pskent.com](mailto:enquiries@pskent.com)  
Website: [www.pskent.com](http://www.pskent.com)