

BARRISTERS QUALIFICATION EXAMINATION 2019

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

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

QUESTION 1

Fiona was required to retire from the Hong Kong Civil Service after disciplinary proceedings that found an allegation that she had brought the civil service into disrepute by reason of her non-compliance of the provision of the Civil Service Code that requires civil servants to “serve the Chief Executive and the Government of the day with total loyalty and to the best of their ability, no matter what their own political beliefs are” (paragraph 3.7), in that she posted online a photograph of her civil service staff card showing her department and rank together with her handwritten message criticizing the Chief Executive’s refusal to withdraw the extradition law amendment bill and to appoint a commission of inquiry on public order events in Hong Kong since 12 June 2019.

Fiona has applied for judicial review against the decision to require her compulsory retirement. One of her grounds for review is that the substance of the contravention of the Civil Service Code established against her conduct is inconsistent with the Basic Law of the HKSAR, which enshrines and protects in Article 27 the rights of freedom of speech of Hong Kong residents, and is therefore not a valid basis for alleging a disciplinary offence against her.

The Government has filed in court its response to Fiona’s judicial review. In the response, the Government has denied the ground of review stated in the preceding paragraph, referring in support the following provisions of the Civil Service Code:

‘1.2 Article 99 of the Basic Law [of the HKSAR] states “... Public servants must be dedicated to their duties and be responsible to the Government of the Hong Kong Special Administrative Region”. Article 60 of the Basic Law states “The head of the Government of the Hong Kong Special Administrative Region shall be the Chief Executive of the Region...”. Article 48 provides that the “Chief Executive of the Hong Kong Special Administrative Region shall exercise the ... powers and functionsto appoint or remove holders of public office in accordance with legal procedures...”. Civil servants, being a key component of the public service, have the constitutional role to give their best in serving the Chief Executive and the Government of the day.’

2.1 The Civil Service is a permanent, honest, meritocratic, professional and politically neutral institution. The core values set out below are central to the integrity and probity of the Civil Service. They underpin good governance and help the Civil Service gain and retain the respect and confidence of the public.

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2.2 Civil servants are required to uphold the following core values, which are of equal importance -

- (a) commitment to the rule of law;
- (b) honesty and integrity;
- (c) objectivity and impartiality;
- (d) political neutrality;
- (e) accountability for decisions and actions; and
- (f) dedication, professionalism and diligence.'

Advise Fiona on the following matters:

- (a) What is the established approach of the HKSAR courts in determining whether a decision or measure contravenes a provision of the Basic Law of the HKSAR protecting a fundamental right? (10marks)**
 - (b) Applying the established approach, the merits of the above ground for review in light of the matters raised in the response by the Government. (15marks)**
- [25Marks]**

QUESTION 2

Reuters published on 12 September 2019 a transcript of a talk given by Mrs. Carrie Lam, the Chief Executive of the Hong Kong Special Administrative Region of the People's Republic of China, in late August 2019 to a gathering of businessmen in Hong Kong.

Mrs. Lam stated that the Chief Executive's "political room for manoeuvring is very, very, very limited" (Statement 1) as the Chief Executive "unfortunately, has to serve two masters by constitution, that is the central people's government and the people of Hong Kong" (Statement 2).

- (a) Regarding Statement 2, discuss, with reference to provisions of the Basic Law of the HKSAR, whether Mrs. Lam's understanding of the Chief Executive's constitutional position was correct. (10marks)**
 - (b) Regarding Statement 1, discuss, with reference to provisions of the Basic Law of the HKSAR, whether Mrs. Lam's evaluation of the Chief Executive's powers and functions was correct. (10marks)**
 - (c) Discuss, in relation to your answers in (a) and (b), the causal relationship between Statement 1 and Statement 2. (5marks)**
- [25Marks]**

QUESTION 3

Gilbert's father had been the operator of a pig farm in the same location continuously for 30 years before his death in late 2018 under a livestock keeping licence (LKL) issued by the Agriculture, Fisheries and Conservation Department (the Department) on 31 January 2016 with a period of validity of 3 years. Gilbert submitted documentary proof of the death of his father with the Department together with a formal LKL application form naming him as the successor and new operator on 15 January 2019, having read the following information in the Department's website:

“Change of licensee is allowed under a valid LKL. The current licensee shall submit a Change of Licensee Form at the office of Livestock Farm Licensing Section in person, while the new operator needs to tender a formal LKL application form. The new licensee is required to pay the full licence fee of a newly issued LKL. Upon the new LKL being issued, the old LKL would be correspondingly cancelled. In case of deceased licensee, his family member shall submit documentary proof for the death and the successor is required to tender a formal LKL application form for due processing.”

Gilbert also paid the full licence fee on 15 January 2019 and the Department issued a receipt on the same date.

On 15 February 2019, Gilbert received in the mail a letter dated 13 February 2019 of the Department informing him that: “Your application for a LKL is refused. According to prevailing policy, no keeping of pigs is licensed at a location where there is an existing licensed keeping of pigs at another location within the 1 kilometre radius. Since your application concerns a location that has at least one location of existing licensed keeping of pigs within the 1 kilometre radius, and there are no extenuating circumstances for exceptional treatment, your application must be refused in accordance with this policy.”

Gilbert sought the assistance of the Hong Kong Association of Pig Farmers (the Association) over the refusal of the application.

Staff of the Association informed Gilbert by telephone on 20 February 2019 that it was going to offer assistance to him by writing a letter to the Department urging the Department to treat Gilbert's application as a case of succession and not as a case of fresh application so that in light of the continuous operation of the pig farm for 30 years, special treatment should be given.

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On 13 May 2019, Gilbert received in the mail a letter dated 10 May 2019 of the Department informing him that: ‘We refer to the letter of the Association dated 22 February 2019, which we received on 1 April 2019. To protect public health and the environment, this Department has imposed stringent control and bio-security requirements on local farms. The prevailing policy serves the same objectives. A revision of the prevailing policy was promulgated on 1 February 2019 to combat the threat of the African swine flu virus, which has spread across China, by introducing the specified requirement that no keeping of pigs is licensed at a location where there is an existing licensed keeping of pigs at another location within the 1 kilometre radius. Although the Association has urged us to treat your application specially as “a succession case”, we do not consider that we should accede to this view since doing so would mean a departure from the prevailing policy and this would mean frustrating the objectives of the LKL licensing system and increasing bio-security risk against the public interest.’

Gilbert contacted solicitors on 14 May 2019. Solicitors took instructions from Gilbert and made enquiries on his behalf and learnt that the Association posted the letter on 29 March 2019 because its Chairman put the signed letter on the in-tray after signing it.

Solicitors have briefed you to settle the Notice of Application for Leave to Apply for Judicial Review (Form 86). The instructions of the solicitors are stated in the paragraphs above. Settle the Form 86 by inserting the necessary facts, submissions and authorities under the heading of “*Grounds on which relief is sought (if there has been any delay, include reasons here)*”.

[25Marks]

QUESTION 4

Jason has been the owner of MM Club, a karaoke lounge at 4th Floor of Star Tower (“the Karaoke”) since 2012. Peter has been employed as the manager since then and has been the holder of the liquor licence of the Karaoke.

Jason was also the owner of NN Bar at 3rd Floor of Star Tower (“the Bar”) from 2012 to 2016. In 2015, he applied for a liquor licence for the Bar without success. His application was rejected because of frequent breaches of law in the running of its business at the Bar, including sale of liquor without a licence and employment of underage girls. Jason sold his business at the Bar to a third party in 2016.

In January 2019, Peter applied to the Liquor Licensing Board (“the Board”) for renewal of the liquor licence for the Karaoke (“the Application”). Regulation 17 of Dutiable Commodities (Liquor) Regulations, Cap 109B, provides that:

- “(1) Upon application the Board may grant a liquor licence without conditions or subject to such conditions as it thinks fit, or refuse the application.
- (2) The Board shall not grant a liquor licence unless it is satisfied –
 - (a) That the applicant is a fit and proper person to hold the licence; ...
 - (c) That in all the circumstances the grant of the licence is not contrary to the public interest. ...
- (5) the applicant ... may ... appeal ... against the decision.”

In February 2019, the Board rejected the Application by letter stating the following:

“The Board noted reports from the Police that the Karaoke and the Bar were actually run by the same management. Although the Bar was unlicensed, liquor was found to be provided by the Karaoke to the unlicensed Bar. The Board considered this to be blatant contempt of the law and of the authority of the Board. Further, the Police reported that both the Karaoke and the Bar had a record of employing underage girls. In the premises, the Board decided that you are no longer a fit and proper person to hold a liquor licence and therefore refused your application.

In any event, the Board considered that you are not an eligible applicant for holding the liquor licence for the Karaoke since you are only the manager, not the owner of it.”

In March 2019, Peter appealed to the relevant appeal board (“the Appeal Board”). The Appeal board subsequently heard the appeal, during which Peter submitted evidence that the owner of the Karaoke had ceased to have any interest in the Bar since 2016.

The representative appearing for the Police, on the other hand, stated that in August 2018, during an undercover operation at the Bar, a waitress called Peggy told the undercover policemen that the Bar did not have a liquor licence but that they could go to the Karaoke to buy alcohol and then return to the Bar to drink. Half an hour later, the policemen found customers drinking alcoholic beverages in the Bar and therefore revealed their identity to make an enquiry. Peggy stated that the Karaoke and the Bar were operated by the same owner Jason and that she worked for both clubs at the same time. She was responsible for arranging for the customers to be provided with alcohol from the Karaoke.

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In September 2019, the Appeal Board announced its decision (“the Decision”) to uphold the refusal of the Board, informing Peter that he “is no longer a fit and proper person to hold a liquor licence” and in any event, he as a manager is not the suitable person to hold the liquor licence.

During a meeting with lawyers discussing the Decision, Jason raised the following matters:

- i. He had no knowledge of any unlawful activities by Peter, nor did he consent to such activities taking place;
- ii. He denies that underage girls were employed in the Karaoke, and he does not understand why the Police would make this claim;
- iii. He also denies that there is common ownership and management of the Karaoke and the Bar. He is aware that the Police suspect there is common ownership and management because some other establishments in the area have such arrangements. However, the Police have carried out several raids on the Bar and the Karaoke since 2016, but had never discovered any evidence which would have supported that suspicion.

Jason intends to apply for judicial review. Please advise him on the merits of his intended judicial review application.

[25Marks]

Part B (Company Law)

QUESTION 5

Asian Beverages Ltd (“the Company”) is a private company limited by shares, which operates a business as a supplier of beverages to restaurants and bars, as well as supermarkets and other stores. Danielle holds 40% of the shares in the Company, while Eddie and Fion each hold 30% of the shares. Danielle and Eddie are the two directors.

The Company has adopted the Model Articles for companies limited by shares.

Recently, Danielle wished to extend the Company’s business to other areas, such as importing Japanese food and delicacies. The matter was discussed informally with Eddie but Eddie disagreed. He believed that the Company should remain focused on its core business as beverage supplier.

Danielle persisted and discussed the issue with Fion, who agreed that it is beneficial to explore different business opportunities. Danielle met with Japanese exporters and a proposed distributorship contract was negotiated with Oishi Exports, a food exporter from Nagoya.

Danielle convened a board meeting to formally discuss the new business venture and the proposed contract with Oishi Exports. Eddie refused to meet with Danielle. In his absence, Danielle purported to pass a board resolution, with only herself in attendance at the meeting, authorising herself to enter into the contract with Oishi Exports.

Danielle also convened a general meeting of the members. Fion attended the meeting. However, Eddie did not attend as he did not receive notice of the meeting. On the strength of the votes of Danielle and Fion, a resolution was passed affirming the contract with Oishi Exports.

Subsequently, Danielle signed the contract with Oishi Exports purportedly on behalf of the Company. Copies of the board resolution and general meeting resolution were provided to Oishi Exports before Oishi Exports signed the contract.

Eddie was furious after he discovered what happened in relation to the contract with Oishi Exports.

Eddie now seeks your advice on whether the Company is bound by the contract with Oishi Exports.

Advise Eddie.

[25Marks]

QUESTION 6

Modern Furnishings Pty Ltd (“MF”) is a private company limited by shares which operates a chain of furniture stores in Hong Kong. Janice is the managing director of MF.

Since about the middle of the 2018, MF has been encountering financial difficulties.

In March 2019, MF entered into a re-financing agreement with one of its existing lenders (“the Lender”). The Lender advanced a further sum to MF in return for: (1) MF granting a floating charge to the Lender over the entire undertaking of MF; and (2) Janice providing a personal guarantee in favour of the Lender. The charge and guarantee were given to secure the indebtedness of MF to the Lender both in respect of the new funds provided by the Lender as well as the pre-existing loans previously granted to MF by the Lender.

In April 2019, MF negotiated with a third party, Greg, to inject further funding into MF. Greg had been operating his own furniture business and was considering acquiring a stake in MF. MF agreed to issue a tranche of shares to Greg in return for Greg injecting HK\$2million equity capital. As part of the arrangement, MF bought certain furniture stock from Greg at a price above the normal wholesale price of the stock. Greg used the proceeds of the sale to partly fund the HK\$2million which he paid to MF in return for the new shares issued by MF to him.

In May 2019, MF failed to pay rent at one of its premises in Sheung Wan.

Despite the new funding from the Lender and from Greg, Janice was still concerned that MF may need to be wound up soon on the grounds of insolvency.

Over the period of June and July 2019, Janice, on behalf of MF, ordered significant quantities of furniture stock from various suppliers. The orders were made on the usual terms of payment allowing MF to pay within 60 days after delivery of the stock.

As at August 2019, the rent due to the Sheung Wan landlord from April to August 2019 remained unpaid. The suppliers who delivered stock to MF in June and July have also not been paid.

In August 2019, the landlord petitioned to the court to wind up MF on the ground of insolvency. In October 2019, the court made an order to wind up MF.

The liquidator of MF seeks your advice in relation to the above. Advise the liquidator on what claims or remedies MF or the liquidator may have as against Janice, the Lender and Greg (if any).

[25Marks]

QUESTION 7

Part (a)

Identify the main differences between (i) the common law derivative action and (ii) the statutory derivative action under Division 4 in Part 14 of the Companies Ordinance (Cap.622). (18marks)

Part (b)

A client has come to you for advice. He explains that:-

- (i) He is a minority shareholder (20%) in a Hong Kong incorporated company. The other shareholder (“S”) (80%) controls the board of directors and the day-to-day operation of the underlying business.
- (ii) The Hong Kong company carries out its business through subsidiaries. One such business is carried out through a subsidiary (Hong Kong incorporated, “**Subsidiary**”) which is a joint venture between the Hong Kong company (70%) and a third party (30%). The board of directors of the Subsidiary comprises 3 persons, 2 appointed by S (including S) and 1 appointed by the third party.
- (iii) The client informs you that the Subsidiary has not convened general meetings or prepared accounts and made the same available to shareholders for a few years. He suspects that this is to “cover up tracks” for possible wrongdoing on the part of S – recently a supplier to the Subsidiary has informed the client in a drinks party while inebriated that S had asked him to increase the prices for goods supplied in the invoices issued to the Subsidiary, although he did not mention what was to happen to the increased portion. The client has tried to contact this supplier for more information but has not been able to locate him to date.
- (iv) The client has limited financial means and is unlikely to be able to finance and sustain a significant law suit.

Given the above information, and if client wishes to commence proceedings as soon as possible to redress the wrong done to the Subsidiary, which route would you recommend to him, and why. (7marks)

[25Marks]

QUESTION 8

XYZ Cycles Limited (“XYZ”) is a company incorporated in the People’s Republic of China (“PRC”). It has one class of shares, which are divided into A shares (listed on the Shenzhen Stock Exchange) and H shares (listed on the Main Board of the Stock Exchange of Hong Kong Limited).

The main line of business of XYZ is the production, distribution and leasing of high-performance bicycles for “bike-sharing” in Mainland China, namely, a customer can lease a bicycle for a fixed duration (eg 15 minutes) by making a small payment on a mobile app (eg RMB 2).

The group structure of XYZ is as follows:-

- XYZ
- XYZ HK Ltd (“XYZHK”), a wholly owned subsidiary incorporated in Hong Kong
- XYZ Beijing Ltd (“XYZBJ”), a wholly foreign owned enterprise incorporated in the PRC with XYZHK as its sole shareholder which carries on the business of bike-sharing and is the revenue-generating entity within the group
- XYZ Shanghai Ltd (“XYZSH”), also a wholly foreign owned enterprise incorporated in the PRC with XYZHK as its sole shareholder which owns all manufacturing plants within the PRC and carries on manufacturing of bicycles

All of XYZ group’s manufacturing and business operations take place within Mainland China. All its employees are employed in Mainland China by XYZBJ and XYZSH. All except one of its independent non-executive directors are PRC nationals based in Mainland China.

Although XYZ has identified a registered office and principal place of business in Hong Kong, the premises are in fact owned and used by another company whose owner is a friend of the current Chairman of the Board of XYZ; the XYZ group does not carry out any operations or corporate activities from such premises.

Most of the board meetings of XYZ are held in Mainland China (although occasionally one may be held in Hong Kong at a conference room in a hotel booked specifically for such purpose), and the annual general meetings are also held in a conference room in a Hong Kong hotel booked for such purpose.

XYZ has obtained credit facilities from (i) a Singapore bank and (ii) 2 PRC banks to finance the operations of the group’s business.

In 1 September 2016, Marco, a Singapore-based investor, acquired a 5% stake in XYZ and advanced RMB 20 million to XYZ by way of shareholder’s loan for a term of 3 years, repayable in one lump sum at the end of the 3-year term. The relevant loan agreement is governed by Hong Kong law.

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Since Marco became a shareholder in XYZ, he became concerned that the affairs of the XYZ group had not been conducted with sufficient transparency, and considered that the disclosure made to shareholders and the public was not sufficient to provide sufficient information. In particular, he was unhappy with the conduct of some of the executive directors of XYZ. However, despite his (and other public shareholders) attempts to voice out these issues at successive general meetings, they were not heeded.

There is one more problem concerning XYZ. Its articles of association require that all major decisions (including the appointment of directors) be approved by special resolution, which is contrary to the requirements of the Listing Rules (which prescribe ordinary resolutions), and because of that despite efforts on the part of Marco and other public shareholders to nominate directors for appointment, these attempts all failed since they were unable to marshal sufficient support to pass a special resolution.

Marco's loan fell due for repayment on 1 September 2019, and despite repeated demands including the service of a statutory demand on 5 September 2019, XYZ has failed to repay and has also made clear in a letter to Marco dated 1 October 2019 that whilst it does not dispute the liability owed to Marco, it does not intend to repay the same.

Marco has come to you for advice. He understands XYZ is solvent, but he believes the stock price (which is at a few cents) fail to reflect the true value of the group and his investment. He wants to wind up XYZ as a way to obtain repayment of his loan and for him to exit the same.

Please advise Marco on the various means to seek a winding up of XYZ. For present purposes you are not required to advise on Listing Rules consequences.

[25Marks]