

# **BARRISTERS QUALIFICATION EXAMINATION 2014**

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

### **PART A: Property and Conveyancing**

#### **QUESTION 1**

Larry Estates Ltd ('Larry') was developing a shopping mall to be known as 'Central Shopping Mall'. In April 2014 Larry started negotiations with Tasty Foods Ltd ('Tasty') for Tasty to lease a supermarket space in Central Shopping Mall. The parties did not say that negotiations were subject to contract. Larry and Tasty discussed the rent, rent free period for fitting out, service charges, and duration of term and they orally agreed that Tasty would take a lease of the supermarket space at a monthly rent of HK\$1million with a rent free period of 3 months for fitting out and that Tasty would pay monthly service fees of HK\$50,000. Larry and Tasty also agreed a 10 year term. The precise starting date of the term was not agreed at that time.

The parties continued to negotiate the starting date for the term and in May Larry instructed solicitors who prepared a draft agreement for lease which they sent to Tasty. This contained the agreed terms and stated that the term of the lease would start 14 days after the date of issue of the Occupation Permit. Neither party signed the agreement for lease.

Tasty gave Larry a cheque for an agreed initial deposit of HK\$500,000 and Tasty gave Larry a signed receipt saying 'received from Tasty HK\$500,000 as initial deposit in connection with a proposed lease of a supermarket space in Central Shopping Mall for a term of 10 years'. In June, before the issue of the OP, Larry allowed Tasty's contractor to start fitting out the supermarket space and Tasty spent HK\$200,000 on fitting out.

The OP for the Central Shopping Mall was issued in August 2014, but Tasty has told Larry that it is no longer interested in taking the lease.

- (1) Is there a valid agreement for lease which Larry can enforce against Tasty?  
(20 marks)**
- (2) Assume that the 10 year lease was validly executed by Larry and Tasty, dated 3 August 2014 and registered in the Land Registry against Central Shopping Mall on 6 September 2014. On 2 August 2014 Larry executed a mortgage of the Central Shopping Mall in favour of Goodwill Bank Ltd. The mortgage was registered in the Land Registry against Central Shopping Mall on 7 September 2014. Who has priority, Goodwill Bank Ltd or Tasty?  
(5marks)  
[25marks]**

## QUESTION 2

On 1 August 2014 Venus (the 'Vendor') and Peter (the 'Purchaser') signed a binding provisional agreement for sale and purchase of Flat 6A Rose Court and the Purchaser paid the Vendor an initial deposit of 3% of the price. The provisional agreement provides that the parties will sign a formal agreement, but the parties have not done so. Neither party alleges a breach for this reason. Completion was due to take place on 20 September 2014.

The provisional agreement does not contain any terms regarding the Vendor's obligation to give and show title.

On 7 August 2014 the Vendor's solicitors sent the title deeds to the Purchaser's solicitors. The deeds include the following:

- A Power of Attorney dated 12 January 1996 by Adam Au authorising Boris Bing to sell Flat 6A Rose Court on such terms as he thinks fit.
- An Assignment dated 13 March 1996 under which Boris Bing as attorney for Adam Au assigned Flat 6A to Carmen Kong by way of gift. This Assignment contains a recital that the Power of Attorney dated 12 January 1996 authorises Boris to assign Flat 6A by way of gift.
- An Assignment dated 15 June 1998 by Carmen Kong in favour of the Vendor.

On 18 August 2014 the Purchaser's solicitors sent the following requisition to the Vendor's solicitors:

*It appears that the Power of Attorney dated 12 January 1996 does not authorise Boris Bing to make a gift of the donor's property. Please give us evidence that Adam Au authorised the Assignment by way of gift to Carmen Kong dated 13 March 1996.*

The Vendor's solicitors refused to reply to the requisition on the grounds that it related to a pre-intermediate root defect in title and that the Vendor was not required to produce the Power of Attorney because the Assignment executed under the Power of Attorney is more than 15 years old. Completion did not take place on 20 September and the Vendor alleges that the Purchaser has repudiated the provisional agreement.

**(1) Has the Vendor breached the provisional agreement for sale and purchase?  
(18marks)**

**(2) Assuming that the Vendor fails to give good title on the day of completion, can the Purchaser terminate the provisional agreement and claim damages? If so, how would damages be assessed?  
(7marks)**

**[25marks]**

### QUESTION 3

Good Estates Ltd ('Good Estates') developed Goodland, an apartment block consisting of 20 apartment and 20 car parking space. In 1989 Good Estates sold to Alpha Ltd ('Alpha') one equal undivided 20<sup>th</sup> share of and in the land on which Goodland is built and of and in Goodland together with the right to the exclusive use, occupation and enjoyment of Apartment 6B and Car Parking Space 6. Good Estates and Alpha then entered into a Deed of Mutual Covenant (the 'DMC'). The DMC was registered in the Land Registry. Due to an oversight, the common seal of Good Estates was not affixed to the DMC.

After completing its purchase, Alpha enlarged the bedroom windows of Apartment 6B by cutting the external walls.

Later Good Estates sold the remaining apartments in Goodland. Every assignment was of undivided shares and exclusive use rights and was made 'subject to and with the benefit of the DMC'.

The DMC contains details of exclusive use areas and their allocation between undivided shares and in particular allocates one apartment together with a car parking space to one equal undivided 20<sup>th</sup> share. The DMC contains no definition of common parts.

Beta Ltd ('Beta') bought Apartment 3C and Car Parking Space 3 from Good Estates subject to and with the benefit of the DMC. Earlier this year Beta sold the exclusive use of Car Parking Space 3 to Alpha without any undivided shares.

Alpha has entered into a formal agreement to sell to Delta Ltd ('Delta') one equal undivided 20<sup>th</sup> share of and in the land on which Goodland is built and of and in Goodland together with the right to the exclusive use of Apartment 6A and Car Parking Spaces 6 and 3. Alpha has agreed to give good title.

**Explain how the following affect Alpha's ability to give good title to Delta:**

- (1) The lack of the seal of Good Estates on the DMC; (10marks)**
  - (2) The cutting of the external walls to enlarge the windows. (9marks)  
and**
  - (3) The sale by Beta to Alpha of the exclusive use of Car Parking Space 3. (6marks)**
- [25marks]**

## QUESTION 4

Steve, a farmer, is the Government lessee of Lot A in the New Territories. Steve has owned Lot A since 1940 and holds it under a Block Government lease for a term of 75 years from 1898 with a right of renewal for a further term of 24 years less the last three days. In 1941 Steve started to use unleased Government land adjoining Lot A (the 'adjoining land'). In 1949 Government granted Steve a permit to use the adjoining land for 2 years. In 1951 when the permit ended, Steve applied to renew the permit, but Government refused. However, Steve continued to use the adjoining land. Steve did not offer to pay for the use and Government did not demand any payment.

Steve has always cultivated Lot A and used the adjoining land to store tools and seeds. In 1952 Steve enclosed the adjoining land with a fence. In 1960 Steve went overseas for one year to study organic farming. When Steve returned to Hong Kong he continued to cultivate Lot A and to use the adjoining land for storage.

The Government now wants possession of the adjoining land but Steve claims that he has acquired possessory title to it.

**Advise Steve whether the Government can evict him from the adjoining land.**

**[25marks]**

## **PART B: Equity**

### **QUESTION 5**

On his retirement in January 2014, Alfie executed a trust whereby he appointed a professional investment manager, Taye, as trustee. The beneficiary was Alfie's wife, Belle.

The trust assets comprised, inter alia, HK\$5billion of shares in Prosperous Land Development Limited ('PLD'), a local property developer. The trust deed gave the Trustee a general power of investment, and contained the following clause:-

Clause 9        Unless caused by his own actual fraud, the Trustee shall not be liable for any losses howsoever arising.

Alfie died in an accident in February 2014.

Since his appointment as trustee, Taye relied exclusively on recommendations in a monthly tabloid magazine to make investment decisions. According to the magazine, the share price of Shoddy Ltd would rise sharply. Taye then sold all of the PLD shares (for HK\$5billion) and invested the entire amount in high-risk warrants with shares in Shoddy Ltd as the underlying securities ('Shoddy warrants') in March 2014.

The Shoddy warrants were issued by Conman Sacks, a private bank in Hong Kong. The stock market slumped recently and the Shoddy warrants became worthless. Between March and August 2014, the share price of PLD was halved as the property tycoons of PLD were embroiled in a legal battle over control of the company.

Taye admitted that he had been grossly negligent in investing the trust assets. It also transpired that Taye had a 20% interest in Conman Sacks, and had just received a dividend payment of HK\$50,000 from the bank due to record profits in its warrants business.

**Advise Belle.**

**[25marks]**

## QUESTION 6

Xavier and Yvonne have been cohabiting since 2005. A few years ago, they purchased a small flat in Wanchai. The flat cost HK\$5million. Xavier paid the down payment of HK\$4million, which came from his own savings and a loan of HK\$2million from his mother to help Xavier and Yvonne to set up their home. The rest of the purchase price (HK\$1million) was paid by a mortgage loan from Kowloon Bank taken out by Yvonne, which was guaranteed by Xavier.

The flat was bought in the sole name of Xavier. After Xavier and Yvonne took possession of the flat, Yvonne spent HK\$100,000 renovating it. She also did all the household work.

Since the purchase of the flat, Xavier and Yvonne contributed equally to the mortgage repayments. Yvonne paid all other household bills, which enabled Xavier to pay the mortgage. Shortly after the purchase of the house, they opened a new joint bank account (while each of them still kept a bank account in their own name only), into which they occasionally deposited some joint bingo winnings for their annual overseas holiday.

Xavier has recently paid for a new kitchen for the flat. When the new kitchen was completed, Xavier told his neighbour "I would not have had the means to pay for this were it not for Yvonne's contribution to our general outgoings."

Recently, Yvonne discovered that Xavier had met a new girlfriend, Daisy. Yvonne found out that Xavier had stolen HK\$50,000 in cash from her, and used the cash to buy a diamond ring from a jewelry shop. The jewelry shop had no knowledge of the theft. Upon being confronted by Yvonne, Xavier admitted that he had a relationship with Daisy and planned to give the diamond ring to Daisy on her birthday next month. The diamond ring has now doubled in value.

Feeling devastated, Yvonne decided to break up with Xavier, only to find out that he was hopelessly bankrupt.

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

**[25marks]**

## QUESTION 7

In 2013, Smith set up a family trust known as the Smith Family Trust appointing his long-time school friend, Terry, as trustee. The beneficiary of the trust was Smith's son, Peter. The trust assets comprised, inter alia, 1 million shares in Amaryllis Limited. The trust deed expressly prohibited delegation of the power of investment and pledging of the trust assets as security for loans. After setting up the trust, Smith told his solicitor, Harold: "I don't know how to thank you other than to give you all my shares in Dandelion Limited. I've signed the share transfer form, and will ask my accountant to do everything to enable you to get the shares."

Smith died shortly afterwards before he had a chance to give any further instructions to his accountant. Harold learnt about Smith's death last month, and wanted to take ownership of the Dandelion shares now.

In 2014, Terry was convinced that the trust would perform better if a professional investor managed the trust assets. Terry handed the share certificates pertaining to all 1 million shares in Amaryllis Limited to Jimmy, an investment adviser, so that he could invest them on behalf of the trust.

In May 2014, Jimmy pledged all the shares in Amaryllis Limited (which were worth HK\$5million at the time) to Flower Bank as security for a loan of HK\$5million to the trust to be repaid within three months. At the meeting whereby the loan and pledge agreements were executed, Flora, senior manager of Flower Bank, asked Jimmy about the purpose of the loan. Jimmy said, "Ask me no questions, and I will tell you no lies." Flora then asked, "Where did you manage to get these shares?" Jimmy replied, cryptically, "Didn't you know? I am the investment adviser to the Smith Family Trust." Flora did not pursue further when Jimmy agreed to an unusually high rate of interest.

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

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

It was common ground that Jimmy had neither actual nor apparent authority to enter into the loan and pledge agreements. Amaryllis Limited has recently gone into liquidation and its shares have become worthless. When Terry learnt of the above events, he felt very guilty and committed suicide.

**Advise Peter.**

**[25marks]**

## QUESTION 8

Pineapple Ltd launched a promotion campaign whereby customers who sent a text message to a designated number “6006” would be able to purchase a ‘Pineapple Phone 6’ at the price of HK\$6,006 ahead of its launch in December 2015. The amount would be automatically debited from the customers’ pre-authorised bank accounts. Pineapple also pledged to donate 10% of each customer’s payment – as and when it was received – to a special fund established at Save the Kids, a charity.

Within one week after the campaign was launched, Pineapple collected HK\$100million from customers through direct credit into its general trading account. The following week, it transpired that Pineapple had neither established the special fund nor made any donation. Many disgruntled customers asked Pineapple to refund their payments, saying they would rather not buy the new phone. A week later, before Pineapple was able to respond to these requests, it went into liquidation.

John, one of the customers who demanded refunds, had paid a total of HK\$600,600 upon sending 100 such text messages, as Pineapple had not imposed any limit on each customer’s purchases.

Two months ago, John handed HK\$500,000 to Mary asking her to buy shares in ThreeSung Ltd. Mary lied to John that she had purchased shares in ThreeSung. Instead she deliberately purchased shares in Pineapple instead, and they are now worthless. In contrast, ThreeSung shares have now tripled in value.

The above facts have just come to light.

**Advise John.**

**[25 marks]**



**BARRISTERS QUALIFICATION EXAMINATION 2014**  
**PAPER III: CRIMINAL LAW, CRIMINAL PROCEDURE**  
**& CRIMINAL EVIDENCE**

**QUESTION 1**

You are assigned to prosecute Tanya Ling, who is charged with trafficking in 37.60 grammes of a crystalline solid containing 36.50 grammes of methamphetamine hydrochloride, contrary to section 4 (1) (a) and (3) of the Dangerous Drugs Ordinance, Cap. 134. Venue of trial is the Court of First Instance.

- (a) With reference to appropriate authority, what sentence might the accused expect to receive if convicted of this offence after trial? (5marks)**

Tanya is a 34 year-old local lady with 8 previous convictions for narcotics offences. Prior to the trial, her Counsel contacts you on the basis that Tanya claims half the drugs were for her own consumption. If this proposition were acceptable to the prosecution, Tanya offers to plead 'Guilty' to 'Trafficking' in half the drugs, and be sentenced on the basis that the remainder was in her possession for self-consumption. There is no evidential basis to support this proposition.

- (b) With reference to authority, advise the prosecution whether or not there is any basis to accept Tanya's proposal? (5marks)**

The Department of Justice confirms that the offer is not acceptable to the prosecution and the matter proceeds to trial. Tanya elects to plead 'Guilty' as charged. By way of mitigation, Tanya's Counsel re-asserts that half the drugs were in her possession for her own consumption.

- (c) Under these circumstances, what is the appropriate procedure to be adopted in determining sentence? Support your answer with authority. (7.5marks)**

- (d) If the mitigation were accepted, what effect would this have on sentence? Support your answer with authority. (7.5marks)**  
**[25marks]**

## QUESTION 2

You represent Usman Hossain who, together with his Uncle faces a charge of possessing for sale goods to which forged trade marks have been applied contrary to **section 9(2) of the Trade Descriptions Ordinance, (TDO) Cap. 362.**

**Section 9(2)** provides: *“Subject to the provisions of this Ordinance, any person who sells or exposes or has in his possession for sale or for any purpose of trade or manufacture, any goods to which a forged trade mark is applied.....commits an offence”*

**Section 26(4)** of the TDO provides a statutory defence in that: *“In any proceedings for an offence under section 9(2), it shall be a defence for the person charged to prove that he did not know, had no reason to suspect and could not with reasonable diligence have ascertained that a forged trade mark had been applied to the goods*

- (a) With reference to appropriate authority, explain how the statutory defence under Section 26(4) is applied so as not to derogate from the constitutionally protected presumption of innocence? (10marks)**

The facts state that on the date of the charge, two undercover plainclothes police officers were posing as tourists in a busy shopping area in Tsim Sha Tsui, Kowloon. After being approached on the street by Usman’s Uncle and asked *“Do you like copy watch, copy handbags?”* the two officers were led to a flat in which a large quantity of counterfeit goods were on display. Having initially rejected the Uncle’s offer for sale of a number of items, the Uncle made a phone call. Within minutes, Usman arrived with 3 counterfeit ‘GUCCI’ trade mark handbags in clear plastic wrapping. In Usman’s presence, his Uncle then negotiated the handbags for sale at HK\$500 per piece.

Usman is a 24 year-old unemployed Pakistani male. He has lived in Hong Kong for 6 years. Usman’s defence is that he had merely delivered goods at his Uncle’s request and, as per section 26(4), he did not know, had no reason to suspect and could not with reasonable diligence have ascertained that a forged trade mark had been applied to the goods.

- (b) With reference to authority, explain how the court should approach the issue of reasonable diligence as set out under the section 26(4) defence? (10marks)**

- (c) Assuming the Court was satisfied that there was some evidence to support the defence, what is the appropriate burden and standard of proof? (5marks)**

**[25marks]**

### QUESTION 3

You represent Eric MAN, who is charged with Ernie WONG with ‘Conspiracy to Rob’ contrary to section 10 of the Theft Ordinance, Cap. 210 and sections 159A and 159C of the Crimes Ordinance, Cap. 200.

The facts allege that Eric, Ernie and a third conspirator, Andre PANG, conspired to lure a gemstone dealer (Mr. SHEK) to premises in Nanking Mansions, Kowloon on the pretext of a lucrative sale. Once inside a room on the 10<sup>th</sup> floor, it is alleged Eric and Ernie robbed SHEK of precious gems valued at HK\$1.44 million.

Your perusal of the list of ‘un-used material’ discloses a statement by PC 2424 in which it states, “acting on information” the officer was deployed at the management office of Nanking Mansions on the day in question to view the CCTV monitors. In his statement, PC 2424 states that at the relevant time he saw Mr. SHEK enter the lift with a group of local male persons, one of whom “resembled” a description he had been given of Ernie WONG.

No CCTV footage was listed for production as a prosecution exhibit and following your request for disclosure, the prosecution informs you that:

- a) The CCTV tape was not seized; and
- b) The relevant tape was automatically erased by the security system 48 hours after the recording was made.

Eric’s defence is that he was not present at Nanking Mansions at the relevant time. You consider that the contents of the missing CCTV recording to be vital in establishing Eric’s defence and consider making an application to permanently stay the proceedings.

- (a) With reference to authority describe the basis upon which such an application may be brought? (5marks)**
  - (b) Describe the procedure to be adopted in making such an application? (5marks)**
  - (c) With reference to authority, list 5 key principles applicable to the grant of an application to stay proceedings. (5marks)**
  - (d) By reference to authority, describe how your application might be structured? (10marks)**
- [25marks]**

## QUESTION 4

FONG, SZE and CHOW are jointly charged with obtaining property by deception contrary to section 17 of the Theft Ordinance, Cap. 210. The facts allege that they together set-up a false company from which they persuaded persons to invest in Tibetan precious metals, before abruptly shutting-down the operation and keeping the investment capital. In addition, FONG is individually charged with making a false tax return.

At trial, FONG pleads guilty to making a false statement in his tax return and all defendants plead not guilty to the joint 'deception' offence.

FONG states that there was no joint enterprise to set-up a company together at all.

SZE testifies that there was a jointly set-up company which was used to defraud the customers but that he had nothing to do with it. He said in an interview that he believed the only reason he had been charged was because the officer in charge of the case had a grudge against him.

CHOW rigorously denies the offence.

FONG is previously of good character; SZE has previous convictions for driving offences and CHOW has three previous convictions for deception offences, all of which involved the setting-up of companies and fraudulently taking investment money from clients.

**With reference to the relevant statute and authority, discuss the issues of character evidence which arise from these facts.**

**[25marks]**

## QUESTION 5

At about 06:00 hours on 20 January 2014 the body of a female Susie Wong (30) was found in a field in the New Territories. Investigation showed that the cause of death was strangulation with a rope.

At 21:00 that day, acting on information, Detective Chief Inspector Ho arrested the boyfriend of the woman, one Chan Faat (32), at his residential address in Kowloon.

At the time of the arrest Chief Inspector Ho said to Chan, *"You know why we have come, don't you?"*

Chan nodded his head at which point the Chief Inspector administered the usual caution to which Chan replied, *"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 Chief Inspector made a post-recording in his official police notebook of what had been said at the time of the arrest and asked Chan to read over the entry and to sign on the notebook if he agreed with the contents. Chan did so at 23:00. The officer also signed the entry in the notebook.

Chan then said to the Chief Inspector, *"I want to tell you about it."*

The police officer then cautioned Chan and handed his notebook to Chan who, at 23:30, wrote in it the following account of the events:

*"This morning the Gods told me to send Susie to heaven. She was an evil spirit. So I took her in a taxi to the portal to the underworld and I shot her. We were in the field and the Gods directed me. I did it all with the knife following the music. I forgot to untie the rope on her neck. She is safe now. No more sins."*

The officer read the written entry back to Chan who agreed with the content and then both signed the notebook.

At 02:00 the following day the officer interviewed Chan under caution in the Video Interview Room in the police station. Chan, under questioning, gave a full account of the murder by him of Susie. The interview concluded at 05:00.

At 16:30 that day Chief Inspector Ho took Chan to the scene of the murder in the field.

The officer cautioned Chan in the usual terms and asked Chan if he was willing to recreate the killing. Chan agreed to do so.

The Chief Inspector then took him to various locations selected by the Chief Inspector in the field whilst Chan's actions and locations were video-recorded by another officer.

*Question continued on next page*

Chan was eventually charged with the murder at 23:00 hours that evening.

**Comment on the admissibility of these potential pieces of evidence 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? Cite relevant authority in your answer.**

**[25marks]**

## **QUESTION 6**

PC 5354 who is on duty in uniform sees a taxi driving towards him in Queen's Road Central from the direction of Pedder Street, at 04:00 hours. As the vehicle approaches him he receives a message on his beat radio that there has been a robbery in Pedder Street a short time previously. Two male suspects are said to be wanted for questioning in connection with the robbery. The officer notices that there are two male passengers in the back seat of the taxi.

**What can the officer do in relation to investigation of this offence? Cite relevant authority, if any, in support of your answer.**

**[25marks]**

## QUESTION 7

You represent David Ho (23) who was arrested yesterday by the police as he is suspected of having robbed Suzie Wong(44).

He is alleged to have suddenly pushed her to the ground as she was alighting from an elevator in the residential block where she lives.

The alleged offence took place at 02:00 hours, as she was returning from a party at which she had been drinking alcohol. As the elevator door opened she stood for a moment surprised that the lighting in the hallway had been switched off.

As she was coming to terms with this the suspect ran in and quickly knocked her to the floor of the elevator. The suspect then snatched her handbag, kicked her once in the face, and ran off. The handbag was not recovered.

Detective Inspector Lee has now told you that he will place Ho on an Identification Parade, *“as is the norm”*, after which he will consider whether or not to release him on bail. The officer tells you that, *“if Ho makes our life easy then we will make his easy.”*

When you ask the officer to explain this remark he says to you, *“Look it’s simple. Do the ID parade - get bail. No ID Parade No bail!”*

**With reference to relevant authority comment on the appropriateness of the police action, proposed action and the comments of the Detective Inspector.**

**What would be your advice to David Ho and why would you give this advice?**

**[25marks]**



## QUESTION 8

You represent Alex Lo who faces a charge of shop theft and an additional charge of assaulting a police officer in the due execution of his duty.

When you telephoned the prosecutor five days before trial she told you that Lo allegedly stole a watermelon from a supermarket and when he was being questioned by police following his arrest by the store detective he punched the police officer in the eye causing bruising to the officer's face.

When you asked the prosecutor to make full disclosure to you she said: *"How long have you been in practice? This is a Magistrate's case. Lee Ming-tee does not apply. That's enough information for you already. See you in court."*

Lo, who denies the offence, told you that the police interviewed two store detectives and a passer-by who had witnessed Lo's questioning by the officer outside the store. Lo also told you that he knows that the officer in question PC 5354001 had previously been disciplined by his senior officers for dishonesty.

**Citing relevant authority, if any, comment on the actions and comments of the prosecutor.**

**[25marks]**

# **BARRISTERS QUALIFICATION EXAMINATION 2014**

## **PAPER IV: HONG KONG LEGAL SYSTEM, CONSTITUTIONAL AND ADMINISTRATIVE LAW; AND COMPANY LAW**

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

#### **QUESTION 1**

James and Betty are a married couple living in Hong Kong. They have three sons already. They wish to have a baby girl. They consult their family doctor with respect to sex selection of the embryo to achieve their wish.

The family doctor tells them that doctors in Hong Kong are prohibited by section 15(3) of the Human Reproductive Technology Ordinance (Chapter 561, Laws of Hong Kong) from using any reproductive technology procedure to cause the sex of an embryo to be selected, whether directly or indirectly (including by the implantation of an embryo of a particular sex in the body of a woman), except where the purpose of such selection is to avoid a specified sex-linked genetic disease (such as haemophilia, spinal muscular atrophy and hereditary thrombocytopenia) which may prejudice the health of the embryo (including any foetus, child or adult which may arise from the embryo) and not less than two medical doctors each state in writing that such selection is for that purpose and such disease would be sufficiently severe to a person suffering it to justify such selection.

The family doctor also advises them that since James and Betty are both healthy and not carrying any genetic flaws that may give rise to one of the prescribed sex-linked genetic diseases, the legislative provision will bar them from seeking and receiving sex selection of the embryo treatment from medical doctors in Hong Kong.

James and Betty find this statutory prohibition unreasonable and infringement of their rights and approach you for advice to challenge this provision in the HKSAR courts.

**You have been asked to advise on:**

- (1) Whether James and Betty may make an application to the HKSAR courts to invalidate the statutory prohibition and the legal basis for the court to make the invalidation. (5marks)**
- (2) If James and Betty can make such an application, what will be the rights that they can rely on as the grounds for the court to make the invalidation? (5marks)**

*Question continued on next page*

- (3) What is the test that the HKSAR courts shall apply to consider whether the above legislative provision is invalid because of infringement of rights?  
(5marks)
- (4) Applying the answers to the above questions to the case of James and Betty, give an opinion on the merits of their proposed challenge to the statutory prohibition.  
(10marks)  
[25 marks]

## QUESTION 2

The Information Office of the State Council (ie the Central People's Government) released on 10 June 2014 a White Paper on the Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region. Section V of the White Paper, entitled 'Fully and Accurately Understanding and Implementing the Policy of "One Country, Two Systems"', has this to say:

*3. The Hong Kong People Who Govern Hong Kong Should Above All be Patriotic*

There are lines and criteria to be observed in implementing "Hong Kong people governing Hong Kong," that is what Deng Xiaoping stressed, Hong Kong must be governed by the Hong Kong people with patriots as the mainstay, as loyalty to one's country is the minimum political ethic for political figures. Under the policy of "one country, two systems," all those who administrate Hong Kong, including the chief executive, principal officials, members of the Executive Council and Legislative Council, *judges of the courts at different levels and other judicial personnel*, have on their shoulders the responsibility of correctly understanding and implementing the Basic Law, of safeguarding the country's sovereignty, security and development interests, and of ensuring the long-term prosperity and stability of Hong Kong. In a word, loving the country is the basic political requirement for Hong Kong's administrators. If they are not consisted of by patriots as the mainstay or they cannot be loyal to the country and the HKSAR, the practice of "one country, two systems" in the HKSAR will deviate from its right direction, making it difficult to uphold the country's sovereignty, security and development interests, and putting Hong Kong's stability and prosperity and the wellbeing of its people in serious jeopardy. (emphasis supplied)

Lawyers in Hong Kong subsequently organized a silent march on 27 June 2014 from the High Court to the Court of Final Appeal in protest against the above statements which were regarded as touching on the separation of powers, the rule of law and the independence of the judiciary, fundamental safeguards as guaranteed under the Basic Law that should not be open to renewed interpretations by the Central People's Government (see *Newsletter of the Hon. Dennis Kwok, Member of the Legislative Council* (June 2014)).

Later, Dr Tim Summers, a Senior Consulting Fellow of the Asia Programme for Chatham House, wrote to the *Financial Times* stating that "this section reads as a reiteration of Beijing's longstanding policy positions, not an attempt to redefine its relationship with Hong Kong" and explaining that the sentence in question 'actually refers to the executive, legislature and the judiciary as those who "run Hong Kong"'. The confusion has arisen because the verb in the original Chinese has been mistranslated as "administrate" (sic) in the English version of the White Paper; it is the same word used in "Hong Kong people running Hong Kong", a phrase used by Deng Xiaoping to assert Hong Kong's high degree of autonomy after 1997' (Letter to Editor, published on 18 July 2014).

*Question continued on next page*

**Discuss, in the light of the above debate, the following questions:**

- (1) What are the tenets of the principle and policy of “One Country, Two Systems”?** (5marks)
- (2) What are the manifestations of the implementation of the principle and policy of “One Country, Two Systems” in relation to judicial power and the Judiciary of the Hong Kong Special Administrative Region?** (5marks)
- (3) How are the rule of law, the separation of powers and judicial independence guaranteed under the Basic Law of the HKSAR?** (7marks)
- (4) Comment on whether and to what extent the above statements in the State Council’s White Paper above are consistent with the guarantees of the rule of law, the separation of powers and judicial independence in Hong Kong under the principle and policy of “One Country, Two Systems”. (8marks)**  
**[25marks]**

### QUESTION 3

The LGBTI Association organized an event to celebrate the CFA's judgment in the W case, around the Clock Tower at Tsim Sha Tsui in the afternoon of 1 January 2014.

The organizer notified the Commissioner of Police of the intended event and provided relevant information. It received a Notice of No Objection in accordance with the Public Order Ordinance but was told that it might need a temporary license under the Places of Public Entertainment Ordinance (PPEO) from the Director of the Food and Environmental Hygiene Department (FEED).

The LGBTI didn't apply for such a license because it didn't think it is necessary.

Jason Tam is a permanent resident of Hong Kong and gay by orientation. He participated as a dancer at the event. When he was dancing on the temporary stage, a police inspector came and told the organizer that what they were doing required a license under the PPEO and involved committing an offence. Jason stopped dancing immediately.

On 30 September 2014, Jason came to seek your advice on whether he can bring a case for judicial review to challenge the position taken by the Police in requiring the dance performance to be halted for want of a PPEO License.

**Advise Jason on:**

- (1) Whether he is likely to get leave for judicial review; (8marks)**
  - (2) The possible grounds upon which he can rely on to challenge the Commissioner's decision through judicial review; (12marks)**
  - (3) What remedies he should ask for. (5marks)**
- [25 marks]**

(Section 4(1) of the PPEO provides "No person shall keep or use any place of public entertainment without a licence granted under this Ordinance".

Three definitions are relevant to that duty:

"entertainment" includes any event, activity or other thing specified in Schedule1;

"public entertainment" means any entertainment within the meaning of this Ordinance to which the general public is admitted with or without payment.

"place of public entertainment" means -

- (a) so much of any place, building, erection or structure, whether temporary or permanent, capable of accommodating the public; and
- (b) any vessel, in or on which a public entertainment is presented or carried on whether on one occasion or more;...

## QUESTION 4

Mohan Ali, a national of Pakistan, came to Hong Kong at the age of 15 on 1 October 2006 as a dependent of his father. His permission to remain on that basis was extended from time to time, last expiring on 20 March 2014.

In November 2013, he was arrested for two offences and was remanded in custody pending trial.

On 1 February 2014, when he was in custody awaiting trial, he wrote a letter to the Director of Immigration, seeking an extension stay or an unconditional stay in order to apply for Hong Kong permanent ID, and requested the Director to send him a form for that purpose. He further said in the letter that he needed advice from the Director.

The Information and Liaison Section of the Immigration Department replied him on 1 March 2014, informing him of only the standard answer on procedures for a foreigner to obtain extension of stay. After receiving the reply, he took no further steps.

On 6 March, he was convicted after trial and sentenced to 3 years' imprisonment. By letter dated 10 March 2014, the Director notified Mohan that he was considering applying for his deportation because the conviction led him to conclude that his continued presence in Hong Kong posed a threat to law and order.

Mohan thought he was entitled to the right of abode and wrote to the Director on 15 March 2014, asserting that his period of ordinary residence in Hong Kong was 1 October 2006 to November 2013.

Disregarding an internal memo saying that it would be a weak case not to treat Mohan's letter dated 1 February 2014 as an application for Hong Kong permanent ID card, the Director, by letter dated 19 March 2014, informed Mohan of his decision that Mohan had not established seven continuous years of ordinary residence in Hong Kong immediately prior to his application in March 2014 without giving any reasons.

On 1 April 2014, the Permanent Secretary for Security made the deportation order.

**Advise Mohan on the following legal issues:**

- (1) Whether he has standing to bring a case for judicial review; (5marks)**
  - (2) Possible grounds for him to rely on in judicial review and why; (13marks)**
  - (3) What remedies he should apply for. (7marks)**
- [25marks]**

## Part B (Company Law)

### QUESTION 5

TDH Ltd (“TDH”) is a private company which was incorporated in Hong Kong in 2009. The founding members of the company, Tom, Dick and Harrie, met when they were studying to be accountants and decided that trading textiles offered more lucrative returns and greater opportunities than professional practice.

Being fresh graduates and having little capital to invest in TDH they invited friends and relatives to invest and included a pre-emption clause, requiring members to offer their shares to existing members before selling to non-members, in TDH’s articles. Tom, Dick and Harrie each subscribed for 17 per cent of TDH’s issued share capital and the invitation resulted in the remainder being subscribed, and paid for, by ten of their friends. There has been no change in its shareholders since that time.

Tom, Dick and Harrie were TDH’s first directors and they agreed to rotate in the position of managing director on a two year cycle. The plan was to use the textile business as a means to travel the world with two of them largely absent from Hong Kong at any one time and the one other being in Hong Kong throughout a period of two years and being the managing director. Whoever was managing director would also be responsible for all of TDH’s administrative matters.

The capital raised from friends was used in part to purchase a small run-down factory building in the New Territories. One floor of the factory was refurbished as office premises and two full time staff were employed. The capital was also used to finance Tom setting up a business in India, and Dick in the USA. They both immediately began to buy textiles and arrange imports to Hong Kong. Harrie spent most of her time net-working with local garment manufacturers in the hope of their buying the textiles and soon identified a small group of companies that had remained and prospered in Hong Kong, albeit most of the industry had moved to Mainland China.

TDH proved to be very successful and a cash dividend was paid to its shareholders after just 2 years of trading. At about the same time, Tom and Dick both announced that they would like to stay where they were. Harrie was annoyed by this change of plan but she was persuaded to stay in Hong Kong and to act as managing director for 2 more years.

In March 2013, Harrie was approached by Jonie, a fashion designer, with a view to TDH setting up a workshop, to make the garments she designed, using the textiles imported by TDH. Harrie thought this would be a brilliant way to expand TDH’s business and, in the long term, to improve its cash flow. She had come to notice that its bank balance was ‘not healthy’ but did not dwell on the issue and proceeded to devote all her time to working out the cost of setting up such a workshop.

*Question continued on next page*



She originally considered renting nearby premises but then realized that the ground floor of TDH's factory could be used more efficiently and could accommodate the workshop. The workshop machinery was however looking to be rather expensive, and Harrie estimated that the setting up costs were close to HK\$2million.

Harrie approached D Bank for a loan of HK\$2million and offered the imported textiles as security. D Bank was willing to lend, but only HK\$1.5million, and insisted on taking a legal charge on the factory premises as security. Jonie had no understanding of finance but was so pleased at the prospect of having a workshop, and given Harrie's assurances that a fixed and a floating charge over TDH's textiles would give her good security, she agreed to lend HK\$0.5million. The loan agreements and security documents were processed at great speed in June and signed on 1 July. D Bank registered its charge on 30 July. Harrie actually leased rather than purchased, the required machinery because leasing assured almost immediate delivery. The workshop was up and running on 1<sup>st</sup> September 2013.

At this time orders for Jonie's garments looked promising but she was not pleased with the quality of the fabrics which were arriving at the factory. Jonie wanted to raise this issue with Harrie but she was not spending any time at the factory or responding to calls.

Harrie was not at the factory because she felt exhausted and increasingly worried about TDH's finances. Given that only part of D Bank's loan had been utilized, she decided to 'borrow' some of the loan fund to finance a cruise. TDH's office employees told Jonie about Harrie being on a cruise and also mentioned that she would be taking her turn overseas at the end of the year. This made Jonie feel uneasy and prompted her to appoint a solicitor to review her arrangements with TDH.

Her solicitor advised that the charges had not been registered. Jonie left a note for Harrie asking her to register, which the office staff passed it on to TDH's solicitor. Realizing his oversight, the solicitor proceeded with an application for an extension of time to register.

Meanwhile, and unbeknown to Harrie, Tom and Dick had established a new business exporting fabric from India to the USA, and had decided not to return to Hong Kong or be involved with TDH. They had also been manipulating TDH's funds, purporting to buy good quality fabric for TDH but instead buying 'rubbish' fabric and retaining the balance of the price to finance their new business.

Harrie learnt of their deception in early December 2013. She had just returned from the cruise when D Bank alerted her as to a shortfall in funds to meet repayment of its loan. Harrie consulted with TDH's lawyers. They advised her to call a general meeting and to try to establish whether TDH was solvent. But on 3 January 2014, before such a meeting was even called or solvency established, D Bank petitioned to wind up TDH.

*Question continued on next page*

**Provisional liquidators have been appointed and suspect that TDH is insolvent. They have also uncovered a number of issues on which they seek your advice:**

- (a) Whether Jonie's charges are effective, the criteria for an extension of time to be granted and if such an extension is granted prior to the hearing of the winding up petition, whether it may subsequently be challenged? (12marks)**
  - (b) Assuming that a winding up order is subsequently granted, whether D Bank's fixed charge is valid? (6marks)**
  - (c) Assuming that a winding up order is subsequently granted, as to the priority of the competing claims and whether the liquidators could recover their costs and expenses from the proceeds of selling the factory because they suspect that there will be no free assets to meet them. (7marks)**
- [25marks]**

## QUESTION 6

EK Ltd (“EK”) was incorporated in Hong Kong in September 2009, and is carrying on business in Mainland China as a full accounting service. The company has two issued shares, one of which was subscribed by E Effort Ltd (“EE”) and the other by KK (a firm). When the company was formed its founding members, Earl and Ko, orally agreed that each shareholder would be equally represented on EK’s board of directors and that in the first five years they would both be appointed as EK’s only directors .

EE is incorporated in Hong Kong and owned by Earl and Lady, who are husband and wife. Earl is EE’s sole director.

KK comprises two partners, Ko and Kim. They set up in partnership to provide accounting and secretarial services on the basis of 50:50 responsibilities, but agreed that Kim would also continue with her teaching job until the partnership had a sizable client base and proved to be profitable.

Earl and Ko first met in 2008, and it was Earl who posed the idea of setting up EK. There was then stiff competition for accounting services in Hong Kong and so Ko jumped at the opportunity to establish a business in the Mainland. Ko agreed to KK’s investment in EK and to his representing the partnership on EK’s board of directors.

EK was subsequently incorporated and Earl and Ko were duly registered as the company’s directors. Thereafter, Earl and Ko met together at monthly intervals to discuss EK’s business. But it was Ko who set up EK’s offices, employed staff and took on the role of general manager. Ko quickly established a very successful company and increasingly tried to exclude Earl from having any role in managing EK.

Ko was, however, rather lax at dealing with some of EK’s formalities, general meetings were never formally convened and dividends were not paid. Earl confronted Ko on these issues and after several months of heated exchanges Ko transferred HK\$250,000 to Earl’s personal bank account.

Earl was also increasingly frustrated by Ko’s failure to give him copies of EK’s accounts. As an apparent act of their settling their differences, Earl then agreed to submit an application to register EK as a trademark but, despite Earl’s requests, they had no further meetings.

Earl did register EK as a trademark but had applied for the trade mark in his own name and then assigned the trade mark to another company owned and run by his wife, Lady.

*Question continued on next page*

At this time, Ko had no knowledge of the fact that Earl had set up another firm providing full accounting services in competition with EK through his nominee or that Earl had appointed a service company, MS, to represent him on EK's board of directors. MS is owned and run by Lady. Earl sent notice of this change to Companies Registry in September 2012.

Ko continued to manage EK and improved its administration. He received numerous requests from MS, for information about EK, but not recognising the name or knowing of the appointment, he ignored them. In August 2013, Ko sent notice of EK's forthcoming general meeting to Earl. The only item of business proposed at the meeting was a resolution to remove Earl as director of EK. Neither Earl nor MS attended that meeting. Subsequent attempts to contact Earl were met with silence. MS, acting on Earl's instructions then applied to the Court for an order for inspection of EK's accounting records.

In July 2014, Ko was feeling increasingly frustrated by Earl's silence and on learning of the application to the Court, appointed Kim as a director of EK. Ko also arranged to meet with his (Hong Kong) solicitor for advice on KK buying EE's share in EK.

At much the same time Kim, who was thinking of resigning as a partner, decided to investigate a backlog of administration in relation to KK which had accumulated at its offices in Hong Kong. She also found some accounting records and tried to reconcile them with KK's bank statements but was struck by the fact that, whilst Ko spent nearly all his time dealing with EK's affairs, there was no record of any income from EK.

**Your advice is sought in regard of –**

- (a) the extent to which Earl and Ko may have acted in breach of their duties to EK, (6marks)**
  - (b) Ko or KK buying EE's share in EK and obtaining damages for the loss resulting from Earl's breach of duties, (12marks)**  
**and**
  - (c) Kim's resignation as a partner and her claim on the KK's income from EK. (7marks)**
- [25marks]**

## QUESTION 7

Jose and Carlos are cousins. They both dropped out of school at an early age and apprenticed with their great uncle, who was a famous chef. The cousins working together as a team perfected the art of roasting Peking duck, which became their specialty. In the 1980s, they opened a small shop in Sheung Wan selling Peking ducks, which attracted long queues outside on a daily basis. With the growth in their fame and business they decided to expand and opened a restaurant under the name “Happy Duck” in the 1990s. “Happy Duck” was a huge success and became a landmark in the local F&B industry.

As their business grew, Jose and Carlos took advice and decided to organize their business on a more formal footing. To that end, they incorporated:

1. Happy Duck Limited (“**Happy Duck**”) in the British Virgins Island, with each of them holding one of the two issued shares and appointed a director;
2. HD2 Limited (“**HD2**”) in Hong Kong as the wholly owned subsidiary of Happy Duck, again with the two of them as directors.

The restaurant business was injected into HD2. HD2 became the lessee of the restaurant premises in Hong Kong, the employer of employment agreements with all the staff, and the party contracting for supplies and other expenses for the restaurant. All its corporate activities (general meetings, board meetings etc) are carried out in Hong Kong.

Happy Duck does not have any office premise in Hong Kong and is not registered under Part XI of the former Companies Ordinance (Cap. 32) or Part 16 of the Companies Ordinance (Cap. 622). It has obtained credit facilities from 2 banks in Hong Kong (secured by its directors’ personal guarantees) to finance the restaurant business. Some of its annual general meetings and board meetings were held in Hong Kong at the restaurant premises.

The restaurant business has all along been managed and operated by Jose and Carlos (with the help of experienced staff) in Hong Kong, where the cousins reside.

Over the years, Jose has advanced HK\$8million to Happy Duck for the operation of the restaurant business. Those sums were booked in Happy Duck’s accounts as shareholder’s loan. Although Carlos has promised to contribute financially to support the business, he has a gambling habit and has never been able to set aside sufficient funds to honour his promise.

Last year, Jose had fallen seriously ill, and Carlos was left in charge of the restaurant business. However, Carlos stopped going to this Gamblers Anonymous meetings and relapsed into his gambling habit; he spent his days in casinos in Macau and completely ignored the restaurant business. For some time, the staff tried to manage the business on their own, but seeing that Jose was seriously ill and Carlos had become a pathological gambler, many of the staff left and the restaurant business became largely unattended to.

*Question continued on next page*

Fortunately, Jose managed to recover early this year, and when he returned to work he discovered the restaurant business in disarray. Many of the experienced staff had left, the landlord had threatened to re-enter as HD2 had been in arrears of rent for the past month, the reputation of the restaurant had dwindled significantly and the bankers were concerned and chasing for updates on the business and its financial performance. Jose tried to contact Carlos to put things in order, but Carlos avoided his calls and went incommunicado. Jose then discovered that Carlos had taken the lock box in the restaurant (where substantial cash generated by the restaurant is stored) and had purported to give instructions to Happy Duck's and HD2's bankers cancelling Jose's signatory rights over the companies' bank accounts.

Based on his recollection and the information provided by the remaining staff, Jose believes that there should still be some cash in Happy Duck's bank accounts, probably to the tune of at least a few million, although he is not sure as to the exact amount. Jose is aware that the outstanding obligations of the business include arrears of rent, some account payables to a handful of suppliers, salaries to the few remaining staff (all incurred by HD2) and bank loans of around HK\$400,000 (the borrower being Happy Duck). In the absence of access to the accounts, Jose is not sure whether the remaining cash would be sufficient to discharge all those obligations, although there is a possibility that they would suffice.

As there is some concern about the sufficiency of funds, Jose wants to make sure he recovers the HK\$8million he has advanced to the business. Since he no longer has access to the bank accounts, he has decided to write a demand letter to Happy Duck addressed to Carlos and posted to the restaurant as well as Carlos' residential address. Jose has not received any response from Carlos.

**Jose has come to you for advice. He wants to put an end to the Happy Duck restaurant so that he can start afresh by opening a new restaurant in his own name. He wants no further association with Carlos whom he considers to have betrayed him. He thinks there is some value in the restaurant's equipment although he is not sure how much they are worth.**

**Please advise Jose on the options open to him, and any steps that he may have to take to that end.**

**[25marks]**

## QUESTION 8

Go Boom Limited is a company incorporated in Hong Kong in 2000. It has 3 shareholders, Todd, his wife Nancy, and a long time friend of the couple Matthew. Each of them is also a director of Go Boom.

Go Boom engages in the business of manufacturing and distributing fireworks. Its production lines are located in the Mainland, which Matthew is responsible for supervising. As a result, Matthew spends most of his time in the Mainland, and has moved his entire family to Beijing since 2009. Todd and Nancy are responsible for the sales and distribution side of the business, and are based in Hong Kong.

Both Todd and Matthew have a CPA background, and not long after they incorporated Go Boom and commenced business, they decided to refine the corporate structure by incorporating 2 wholly owned subsidiaries in Hong Kong – Sparkle Limited, which holds the manufacturing plants in the Mainland, and Glitter Limited, responsible for sales and treasury functions. Todd and Matthew are also directors of Sparkle and Glitter.

Go Boom, Sparkle and Glitter engaged WonderfulSec Limited to provide secretarial services to them. WonderfulSec would be responsible for all the corporate filings as well as engaging an auditor to audit the accounts of the companies.

Business of Go Boom began to prosper from around 2007, and Todd, Nancy and Matthew were very busy in their respective roles. Meanwhile, in 2008, there was a change of shareholding in WonderfulSec, following which there was a deterioration in the quality of services provided – there were occasions when there was delay in filing annual returns, and since 2009 WonderfulSec has not arranged for an auditor to audit the companies' accounts.

However, since Todd and Matthew have CPA backgrounds and Go Boom's accounts staff were trained by them to keep and prepare detailed accounts, neither thought there was an issue. The accounts prepared by the accounts department were circulated to Todd, Nancy and Matthew, who would give their comments (if any) to the accounts department.

WonderfulSec also failed to prepare shareholders' resolutions for the annual general meetings of the companies as it used to do. However, as it was just a matter of routine for Todd, Nancy and Matthew to sign them in the past, and they were all very busy with the business, none of them noticed the omission on the part of WonderfulSec.

*Question continued on next page.*

The business of Go Boom took an upward turn in 2012 and it became the leading supplier in the Asian market. Many investors expressed interest in investing in Go Boom and others suggested to Todd, Nancy and Matthew that they should list their business. Todd and Nancy were attracted by the idea, but Matthew had reservations as he had become tired of living in Beijing with its very serious air pollution and he wanted to return to the US where he and his family came from. He told Todd that he wanted to exit the business and retire in Seattle with his family.

Todd and Nancy were keen to buy out Matthew so that they could explore the possibility of listing. The parties agreed that Matthew's interests in Go Boom should be valued at HK\$80million, but Todd and Nancy lacked the liquid resources to fund the acquisition, and in light of their other financial commitments they were not able to obtain a loan to that end.

Glitter was cash-rich, for although it had made very substantial profits over the years, the shareholders decided that out of an abundance of caution, they should retain as much cash as possible for the business, and so, save for 2 occasions, Glitter had never declared a dividend to Go Boom (and hence Go Boom had only declared dividends to its shareholders on those 2 occasions). As a result, Go Boom had accumulated realized profits far in excess of the needs of the business, which could have been used for the purpose of declaring dividends.

As for Sparkle, it had substantial assets in the form of the Mainland manufacturing plants, which were unencumbered. Like Glitter, it has some accumulated realized profits in excess of its needs.

Having regard to the above, Todd decided that he should (with the consent of Nancy and Matthew) (i) procure Glitter to declare a dividend to Go Boom and Go Boom to declare a dividend to its shareholders, and use his and Nancy's shares of the dividends to fund 50% of the purchase price; and (ii) procure Sparkle to proffer its manufacturing undertakings as security for a loan taken out by Todd from ABC Bank to fund the remaining balance of the purchase price.

Todd and Nancy then bought out Matthew and the transaction was completed in late 2013.

Thereafter, Todd and Nancy turned their attention to the possible listing of Go Boom. They consulted financial advisers, and in the preliminary due diligence carried out it was discovered that Go Boom, Sparkle and Glitter had not had annual general meetings and had not prepared or laid accounts before such general meetings since 2009.

**Todd and Nancy come to you for advice in anticipation of potential listing. Please advise them on any default or problems in the companies' affairs, how they should go about addressing those issues, and the prospects of those issues being resolved prior to listing. *[Answers do not need to deal with the listing/disclosure requirements.]***

**[25marks]**



# **BARRISTERS QUALIFICATION EXAMINATION 2014**

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

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

#### **QUESTION 1**

Mr. To owns five lots of land in the New Territories (“the Site”). He intends to build houses on the Site. He had allowed neighbouring villagers to park on Lot 4 which was vacant pending development.

Villagers objected to the Site being cleared for the development. They protested at the Site. Police were called to disburse the crowd.

Brothers David and Robert Lau own lots adjoining the Site (“the Lau Lots”). They complained Mr To’s construction vehicles drove over their land causing damage to a fence. They then parked their cars at the Site entrance to prevent construction vehicles gaining access. Police intervened so the Lau moved their cars. The Lau and other villagers then resumed parking their cars on Lot 4 owned by Mr To. The Lau also arranged for a lorry to dump rubble and 3 vans to park on the narrow road to the Site to obstruct access by the large construction vehicles.

Mr. To instructed Mr Fok of Fok & Partners. Mr Fok conducted property searches and obtained plans and maps that show Mr To does own Lot 4 and that the Site does adjoin the Lau Lots. The route to the Site used by the construction vehicles appears to pass over a small corner of the Lau Lots.

Fok & Partners have written to the Lau brothers demanding that they stop parking on Lot 4, remove the rubble and vans within 24 hours and that they cease and desist their campaign to obstruct and interfere with the Site development, failing which Fok & Partners have instructions to apply to Court for an ex parte injunction without further notice.

That 24-hour period has expired. The cars remain on Lot 4 while the rubble and vans continue to obstruct the road access to the Site.

**You are instructed to make an urgent application to get an immediate Order as the construction work is being delayed causing Mr To great financial loss.**

- (1) Advise Mr. To what action he may take and how to proceed, giving the relevant statutory and procedural provisions and setting out all necessary steps including the materials required and papers to prepare. (15marks)**

*Question continued on next page*

- (2) Set out what should be contained in the affidavit in support and the facts you would include giving reasons. If you require any further instructions to complete the draft set out the further information you require and why.  
(15marks)
- (3) At the hearing you produced a new vehicle search that showed David Lau owned the lorry and you orally disclosed to the Court that Robert Lau controlled the company that owned two of the vans. Assume an Order was granted on your application. Draft the Order.  
(15marks)
- (4) Advise what follow up action must be taken by Fok & Partners and the next steps in the proceedings.  
(5marks)  
[50marks]

## QUESTION 2

In HCA 723/2013 the Plaintiff claims HK\$12million for breach of contract against the Defendant Ada Chow. Ada made a Sanctioned Payment of HK\$80,000. At the PTR the judge ordered that *“the Plaintiff shall lodge with the Court and serve hearing bundles the contents of which shall be agreed between the parties”*.

Two weeks before the trial Ada increased her Sanctioned Payment to HK\$150,000 and notified the Plaintiff’s solicitors by letter.

The Plaintiff’s solicitor sent the draft index for the hearing bundles to the Defendant’s solicitor listing all correspondence between the parties. The draft index was agreed without either firm noticing that it included without prejudice correspondence that referred to the Sanctioned Payments. The lodged hearing bundles included that correspondence.

At the start of the 8 day trial the judge raised the matter of the status of the without prejudice correspondence referring to the Sanctioned Payments, in the hearing bundles which he had already read because of the prior Order directing that the contents of the hearing bundles be agreed.

Ada’s counsel made an application for the judge to recuse himself and to adjourn the trial to be re-fixed before a different judge with 8 days reserved. The Plaintiff’s counsel opposed.

- (1) Advise Ada on the effect of her increased Sanctioned Payment if the trial is to proceed on the dates originally fixed without an adjournment, citing relevant rules and authorities. (10marks)**
  - (2) What is the Court’s approach into dealing with improper disclosure of without prejudice correspondence? Apply the principles and any relevant rules, provisions and authorities to this case. (15marks)**
  - (3) Assume the judge considered both parties’ solicitors were at fault and granted the recusal application, adjourning the trial to be re-fixed before a different judge. Advise on the proper procedure the judge should follow in respect of costs citing and applying the relevant rules and authorities. (18marks)**
  - (4) Advise on the proper order for costs as between the parties giving reasons. (2marks)**
  - (5) Advise on the procedure for an appeal if the judge refused to recuse himself. (5marks)**
- [50marks]**

## **Part B (Professional Conduct)**

### **QUESTION 3**

Clifton Orlando Chan who is a businessman attends with his solicitor Stephen Preston So to a conference with Bayley Billar who is a practising barrister in Hong Kong. During the conference Clifton tells Bayley that he is embroiled in a contract dispute with a customer and he seeks her advice on resolving several issues related to that dispute.

Towards the end of the conference Clifton mentions to Bayley that he has heard of something called alternative dispute resolution and asks Bayley for her opinion on this means of resolving the dispute. Bayley then tells Clifton that the only way to resolve a contractual dispute is to pressurise the other side, and that the best way to do that is by using litigation and by "dragging them through the courts".

When the conference has ended and as Bayley is escorting Clifton to the door of Chambers, she remarks on his expensive wristwatch. She says to him that if she is successful in her practice one day she too might be able to afford such a watch. Five days later a gift card addressed to Bayley arrives. The card is from Clifton and it contains a voucher which can be exchanged at a well-known jewellers for a wristwatch of the same make and model is that worn by Clifton.

The gift card contains a note from Clifton to Bayley saying: "See - you are successful already. Thanks for your help."

A few days later Bayley takes the voucher to the jewellers and exchanges it for the wristwatch which she keeps.

Eventually the matter approaches the trial date and Bayley is tied up in several other matters. She starts preparation for the case two days before the first hearing is due. It dawns on her that the case is more complex than she anticipated and will probably ask some pupils and junior members in her chambers to assist.

As a goodwill gesture she may consider taking them out for a meal or giving them an honorarium or stipend – she hasn't decided. In any event she decides to ask for an increase of 50% in addition to the fee originally agreed with the instructing solicitor, Stephen.

When Stephen expresses his disquiet at this demand Bayley says to her, "Look, it is so close to the trial now that Clifton will have to agree, this case is more complex than I first thought. Just tell him that is my fee – take it or leave it."

*Question continued on next page*

- (a) Bayley approaches you, her chamber mate, and has explained the situation as described above. She now asks for your advice.**

**Identify the relevant issues; explain these and advise her on her past and future actions with respect to the Code of Conduct of the Bar of the HKSAR, citing relevant authority if any. Additionally provide your own opinion as to how you would have conducted yourself in each of the factual situations set out above. (26marks)**

Bertie Barron is a practising barrister in Hong Kong. Whilst he is at a party he meets Clifton Orlando Chan. Clifton eventually tells Bertie that he (Clifton) has recently been prosecuted for dropping litter in the street. Bertie tells him that Clifton is fortunate that a fixed penalty system applies to most littering offences and therefore Clifton will be spared the trouble and expense of a court appearance if he pays the fixed penalty within the time limit. Clifton thanks Bertie for the information.

Sometime later Bertie is asked by his friend Doris who works for the North China Evening Gazette newspaper to write an article about the forthcoming proposal by a political party to occupy Tuen Mun in protest against government policies.

Bertie writes the article which is later published in an edition of the newspaper. In the article Bertie advises persons taking part in the protest to obey all pedestrian crossing signals at road junctions to avoid leaving themselves open to prosecution for jaywalking. Bertie also advises them not to drop any litter in the street or else they will face a fixed penalty fine of HK\$1,500.

Bertie later attends District Court to represent Clifton who has been charged with one count of robbery. Inspectors from the Hong Kong Bar Association ask to see Bertie's backsheet. Upon examination it becomes clear to them that there is no fee marked on the backsheet.

- (b) Bertie approaches you, his chamber mate, and has explained the situation as described above. He now asks for your advice.**

**Identify the relevant issues; explain these and advise her on her past and future actions with respect to the Code of Conduct of the Bar of the HKSAR, citing relevant authority if any. Additionally provide your own opinion as to how you would have conducted yourself in each of the factual situations set out above. (24marks)**  
**[50marks]**

## QUESTION 4

Bella Brown is a practising barrister in Hong Kong who specialises in civil work. One night as she is walking home from Chambers she sees a bus crash into a car in Queen's Road Central. She rushes over to the vehicles and assists other passers-by in administering first-aid to the drivers. Upon the arrival of the emergency services Bella continues to offer assistance and later makes a police statement about her actions at the scene.

Some weeks later she is approached to represent one Susanna Sung and Bella recognises her as being the driver of one of the vehicles involved in the traffic accident. Susanna informs Bella that she is being prosecuted for careless driving as a result of the collision.

Bella takes full instructions from Susanna and agrees to represent her at trial.

When Bella studies the case papers she realises that she is unfamiliar with the road traffic legislation in question. Upon checking her diary she realises that she will be too busy to be able to spend much time familiarising herself with the legislation and the relevant criminal court procedures before the start of the trial in 14 days time. She therefore decides to decline the instructions and makes a note to phone the instructing solicitor informing them of this fact.

However, because of pressure of work, Bella forgets to make the phone call.

- (a) Bella approaches you, her chamber mate, and has explained the situation as described above. She now asks for your advice.**

**Identify the relevant issues; explain these and advise her on her past and future actions with respect to the Code of Conduct of the Bar of the HKSAR, citing relevant authority if any. Additionally provide your own opinion as to how you would have conducted yourself in each of the factual situations set out above. (26marks)**

Samuel So is attending a conference in Central at the chambers of Tony Tang, a barrister practising in Hong Kong. The conference ends at 1:45 pm and as Sammie is leaving the Chambers he realises that he has forgotten to bring his wallet with him.

Sammie tells Tony that he urgently has to travel from Central to the New Territories to represent a client in Tuen Mun magistracy at 2:30 pm that day. Tony immediately volunteers to lend Sammie HK\$ 500 so that Sammie can take a taxi to the court and fulfil his professional commitment. Sammie takes the money and rushes off.

*Question continued on next page.*

Two weeks later whilst Tony is appearing in court he receives a text message from Sammie inviting him to come to Sammie's office to have the HK\$500 returned to him. The text message also informs Tony that there is a 'post-renovation drinks party' taking place from 3pm to 6pm that day in the office of Sammie's solicitors' firm.

Tony decides to go at about 5:30pm after court and he texts Sammie in reply telling him this.

Unexpectedly, however, court adjourns at 3:30pm and Tony decides to go to Sammie's office earlier than planned. On his way to the robing room to get changed after court Tony tries to send Sammie a text message explaining this change in plan, but he has difficulty in obtaining a signal on his mobile phone.

He eventually manages to obtain a signal on his phone by standing just outside the court building on the pavement. He succeeds in sending the text message and on his way back into the building Tony is photographed by two press photographers who had been waiting outside court in relation to an unconnected court case.

The following day Tony's photograph - in which he appears in wig and gown - is published prominently in several local newspapers in connection with a story about the increased use of digital technology by members of the legal profession. As a result of the publication of the photograph Tony later receives instructions from several technology companies.

**(b) Tony approaches you, his chamber mate, and has explained the situation as described above. He now asks for your advice.**

**Identify the relevant issues; explain these and advise her on her past and future actions with respect to the Code of Conduct of the Bar of the HKSAR, citing relevant authority if any. Additionally provide your own opinion as to how you would have conducted yourself in each of the factual situations set out above.**

**(24marks)**

**[50marks]**

**BARRISTERS QUALIFICATION EXAMINATION 2014**

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

**PART C (ADVOCACY)**

**HCMA 9999 of 2013**

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
MAGISTRACY APPEAL No. 9999 of 2013  
(ON APPEAL FROM KTCC No. 1234 of 2013)**

**HKSAR**

**Respondent**

**v**

**CHAN FAAT, Freddie**

**Appellant**

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

Counsel is instructed to act on behalf of the Appellant in the above Appeal on Notice (the Alternative Procedure).

Counsel is hereby instructed to draft Perfected Grounds of Appeal against both conviction and sentence and to attend the hearing in the Court of First Instance at 14.00 hours on the 31<sup>st</sup> day of October 2014.

Counsel is directed to the following documents which are attached:

- (1) Magistrate's Statement of Findings together with Reasons for Verdict of Ms Susan Wong, Permanent Magistrate sitting at the KwunTong Law Courts dated 7 October 2013;
- (2) Trial Magistrate's Reasons for Sentence delivered on 7 October 2013.

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

Please provide a copy of the skeleton argument, and authorities if any, to instructing solicitor by 10.00am on Friday 31<sup>st</sup> October 2014.

Dated this 27 day of October 2014

Ho, Ho and Ho  
Solicitors for the Appellant



## Reasons for Verdict

1. The defendant faced one charge of Indecent Assault contrary to s.122 Crimes Ordinance Cap. 200.
2. The trial lasted one day and there were three prosecution witnesses: the victim Miss Verity Ho (PW 1) her friend Lily Lai (PW 2) and the arresting and cautioning officer PC 1234 (PW 3).
3. There was one set of Admitted Facts (Exh P1) which dealt with uncontested matters.

## Prosecution Case

4. At about 11:30 on 6 July 2013 PW 1 and PW 2 had boarded the MTR at Kowloon Bay MTR Station intending to travel to Central to do some shopping. They boarded carriage A 5354 - which unusually for the time of day was almost empty - and stood in the centre of the carriage at the vertical pole between the doors on either side of the carriage. PW 1 and PW 2 were facing each other.
5. When the train arrived at the next station which was Ngau Tau Kok the Defendant boarded the train and stood behind PW1, facing towards PW 2. When the train left the station PW1 felt a hand touch her buttocks three times. She turned round to stare at the defendant. PW 1 then gestured to PW 2 who looked over the left shoulder of PW 1 and saw the defendant standing closely behind PW 1 on PW 1's left.
6. According to PW 2 the defendant was standing about a metre behind PW1 on her (PW 1's) left side and was looking agitatedly at the Route Map on the frame of the door above PW 2's head. He was repeatedly shaking his head and was muttering "*foolish, foolish*" to himself.
7. PW 1 stated that when she turned round to look at the defendant he was standing directly behind her right shoulder and with his body pressed tightly against her. PW 1 described the defendant's demeanour as "*calm, cold and focussed directly on me*". She did not know the defendant and certainly did not consent to him touching her.
8. When the train arrived at the next station, Kwun Tong, the defendant quickly left the carriage. PW1 then pointed to the defendant and told PW 2: "*He just groped me.*" The defendant was then followed onto the platform by both PW1 and PW 2. PW 2 shouted "*Help! Indecent assault*".
9. PW 3, who was on duty in uniform came over and PW 1 told him that the defendant had assaulted her. PW 3 then arrested and cautioned the defendant for the offence. Upon being cautioned the defendant said, "*What assault? I never hit anybody. I am on the wrong line - I'm late.*"

## **The Defence Case**

10. The defendant testified - as he had to in a case of this nature - to avoid an inevitable conviction in the absence of his version of events being placed before the court.
11. He stated that he had intended to travel by MTR on the day in question from Ngau Tau Kok to Kowloon Bay to deliver a parcel for his employer. As he was distracted with his heavy workload he had accidentally boarded the train going in the direction opposite to his intended direction of travel.
12. As the train left Ngau Tau Kok Station heading towards Kwun Tong he immediately realised his error and was looking at the Route Map, shaking his head and telling himself how stupid he had been to board the wrong train when he was in a hurry. As soon as the train stopped at Kwun Tong he had run off to catch the train for Kowloon Bay but had been stopped by a policeman who had accused him of hitting someone. He immediately told the police he had not assaulted anyone.
13. He had not been aware of any women on the train and vehemently denied having indecently assaulted anyone. He did not know either PW 1 or PW 2.
14. The defendant was married with one child aged three and had a clear criminal record. He had never seen either PW 1 or PW 2 before. The defendant was aged 36 and was born in Hong Kong. When I asked, he stated that he had worked for his employer based in Ngau Tau Kok for three years as a messenger and when working he used the MTR about 20-30 times a day on average for five days a week.
15. The reason he had stood where he did inside the carriage was that he quickly realised he had boarded a train going in the wrong direction and that he wanted to look at the lights on the Route Map to confirm his error and needed to be near the door to be able to quickly alight from the train at the first stop. That's why he had stayed near the doors and had not gone further into the almost empty carriage.

## **Analysis of the Evidence**

16. I keep in mind that the prosecution choose to bring the charge against the defendant and that they have the *onus* of proving each and every element of the offence to the required standard of proof. I cannot convict on a mere whim or on speculation. In a case such as this where there is clear conflict between two versions of events - the version given by the prosecution witnesses and the version provided by the defendant - I have to make a choice between those versions. If, having carefully scrutinised all of the evidence in the case, I do not positively believe the defence evidence that concludes the matter.

17. Suffice to say I found both PW 1 and PW 2 to be credible and honest witnesses. The evidence each of them fully supported that of the other. There was also no dispute as to the evidence of PW 3 concerning the arrest, caution and the defendant's immediate reply to the officer. Identification was not in issue having been set out in the Admitted Facts (P 1).
18. I find as a fact that the defendant did stand immediately behind PW 1 and did use both his hands to touch her buttocks. There was no consent given by PW 1 to this action by the defendant, so this was an assault in circumstances of indecency - an indecent assault as charged.
19. I am entitled to draw inferences from the established facts and I do so. The defendant is intimately familiar with the MTR system, therefore it is simply incredible that he boarded what he claims to be the wrong train. Experienced travellers so not make that mistake in this town. The signs in MTR stations are clear and easy to read and to understand. Not only that but he claimed that he stood where he did within the carriage to look at the Route Map. He must have known the layout of the MTR system - he used it all the time. He did not need to look at the Route Map. He also chose to stand right behind PW 1 in an almost empty carriage. If an inference is not obviously impossible to draw then a court of law is entitled to draw that inference if it accords with basic commonsense and I draw the following inferences:
  - a) the defendant did not board the wrong train - he was familiar with the MTR system;
  - b) he did not choose his position to be able to look at the Route Map - he knew the Route Map. He stood there to be able to touch PW 1;
  - c) he was agitated as described by PW2 because of a clear realisation of his guilt and that he had been caught. That's why he was saying "*foolish*". He realised the game was up;
  - d) he ran from the train to avoid arrest - this is commonsense. It is conduct after the crime – fleeing the scene and amounts to an admission of guilt;
  - e) his denial to PW 3 upon arrest was a well-planned and carefully-constructed attempt to avoid the consequences of his actions.
20. I disbelieve everything the defendant says and accept in its entirety the wholly-consistent account of events provided by PW 1 and PW 2.
21. The defendant is convicted of the charge.

## **The Defence Submission**

22. I should add that it was rather ill-conceived of Ms Lee for the defence to make a half-time submission in this case that I should find No Case to Answer because the prosecution witnesses PW 1 and PW 2 gave evidence that was as she claimed, *"inconsistent and self-contradictory"*. Ms Lee tried to convince me by referring to the evidence on the distances involved and the descriptions of the actions and demeanour of the accused. She even rather boldly described the evidence of PW 1 PW 2 as being *"out of all reason"* and *"not according with commonsense"*.
23. I found these submissions unhelpful. I did so for the very simple reason that a submission of No Case to Answer will succeed only if it is demonstrated that evidence proving an essential element of the offence is missing at the close of the prosecution case. Issues of witness credibility are wholly-irrelevant at that stage of the proceedings. I therefore had no need to determine the issue of a case to answer.

Dated this 7th day of October 2013

Susan Wong  
Magistrate

### **Reasons for Sentence**

1. Having heard all that has been said on the defendant's behalf by Ms Lee I am of the opinion that this matter can be best dealt with by the imposition of a short sentence of imprisonment suspended for a suitable period.
2. I therefor sentence the defendant to a period of imprisonment of 3 months and I suspend the activation of that sentence for a period of 6 months.
3. It will be obvious to the defendant what that means: "Behave in future!"

Dated this 7th day of October 2013

Susan Wong  
Magistrate