

BARRISTERS QUALIFICATION EXAMINATION 2015

PAPER II: Property, Conveyancing; and Equity

PART A: Property and Conveyancing

QUESTION 1

On 1 July 2015 Sam Sung entered into a binding sale and purchase agreement (the 'Agreement') to sub-sell his residential flat at 3A Bauhinia Court, 3 Bauhinia Road, Kowloon (the 'Property') to Pansy Poon with completion on 15 September 2015.

The Agreement is in the form of agreement set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance Cap. 219. The consideration is HK\$25million and Pansy Poon has paid Sam Sung a deposit of HK\$3.75million

The Agreement is the last in a series of sales. Alice, the legal owner of the Property, entered into a binding agreement dated 1 March 2015 to sell the Property to Betty for HK\$18million also with completion on 15 September 2015. Betty entered into a binding agreement for sub-sale dated 1 June to sell the Property to Sam Sung for HK\$20million also with completion on 15 September 2015. A deposit equivalent to 10% of the price was paid under each of these agreements.

- (1) Assume that Pansy Poon tenders the balance of the purchase price to Sam Sung on 16 September 2015. Explain whether Sam Sung can treat himself as discharged and forfeit Pansy's deposit of HK\$3.75million. (13marks)**
- (2) Assume that Pansy Poon has breached the Agreement by paying the balance of purchase price on 16 September 2015 instead of on the completion date of 15 September 2015. The result is that Sam Sung is unable to complete his agreement with Betty who has forfeited Sam's deposit of HK\$2million. The value of the Property is now estimated to be HK\$21million. Explain how the damages due to Sam Sung from Pansy Poon will be assessed? (12marks)**

[25marks]

QUESTION 2

On 1 September 2015, Sally So (the 'Vendor') entered into a binding agreement (the 'Agreement') to sell her flat 4A Hibiscus Court (the 'Property') to Barry Bau (the 'Purchaser') for a consideration of HK\$15million with completion on 10 October 2015. Barry Bau inspected the Property before signing the Agreement. The Agreement is substantially in the form of agreement set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance Cap. 219 but it also includes the following clause which is Clause 12 of the agreement:

The Property is sold on an 'as is' basis. The Purchaser has inspected the Property and shall not raise any requisitions or refuse to complete on the grounds that there are any unauthorised or illegal alterations additions or structures on the Property. If any demolition order or repair order is issued by any government department the expense for complying with such an order shall be borne by the Purchaser.

On 20 September 2015 the title deeds were delivered to the Purchaser's solicitors. The Deed of Mutual Covenant ('DMC') for Hibiscus Court does not include a definition of common parts and it includes the following clause which is Clause 8:

No owner will make any structural alterations to his flat.

The deeds include a plan of the Property showing the layout of the Property and a comparison of the Property with the layout plan indicates that the living room of the Property has been extended into a light well. The Purchaser was not aware of this during his inspection. After seeing the layout plan, the Purchaser inspected Hibiscus Court again and when he went up to the roof to view the light well, he could see that a platform leading from the Property has been built out into the light well. The platform is supported by trusses fixed to the wall of the light well. In addition part of the wall separating the light well from the Property has been demolished. On 22 September 2015, the Purchaser's solicitor sent the following requisition to the Vendor's solicitor:

Requisition

Please send us evidence that the extension of the living room into the light well does not breach the Buildings Ordinance or the DMC.

The Vendor's solicitor refused to reply to the Requisition. The Purchaser did not complete on 10 October 2015.

Explain whether the Vendor has breached the Agreement.

[25marks]

QUESTION 3

In May 2015, Lee Estates Ltd ('Lee') were in negotiations with Tang Restaurants Ltd ('Tang') concerning the proposed grant of a lease of Unit 10 in the Palazzo Shopping Centre for a term of ten years starting on 1 August 2015 with a rent free period.

At a meeting on 5 May 2015, Alex Lai of Lee and Terry Tang of Tang had a meeting at which they agreed terms for the letting including the precise area of the property to be leased, the duration of the term and starting date and the rent to be paid. Alex Lai and Terry Tang had authority from their boards to sign a contract once agreement had been reached, but nothing was signed at that meeting.

The next day, 6 May, Tang's solicitor wrote to Lee's solicitor confirming the terms that had been agreed. Tang's solicitor signed the letter. Lee's solicitor replied on 7 May as follows:

7 May 2015

Dear Sirs,

We confirm that we act for Lee Estates Ltd which has agreed to grant a lease of premises at the Palazzo Shopping Centre to Tang Restaurants Ltd for a term of ten years starting on 1 August 2015 at a monthly rent of HK\$100,000.

Lee's solicitor signed this letter. Neither letter was marked "subject to contract".

By 10 July 2015, relations between Lee and Tang had soured and Lee told Tang that it no longer intended to grant the lease.

- (1) Is there an agreement for lease, which Tang can enforce against Lee?**
(15marks)
- (2) Would your answer to question (1) differ if Lee had given Tang access to the premises and Tang had started fitting them out?**
(10marks)
[25marks]

QUESTION 4

Candy owns Flats 10A and 10B Bauhinia Court and is seeking advice regarding several problems.

When Candy bought Flats 10A and 10B in 2000, she immediately demolished the internal partition wall separating the two Flats. At the same time Candy created a new entrance door to Flats 10A and 10B and incorporated a part of the corridor on the 10th Floor outside Flats 10A and 10B into the Flats. The incorporated owners of Bauhinia Court have now asked Candy to reinstate the internal partition wall separating Flats 10A and B and to restore the entrance door to its original position and stop encroaching into the corridor on the 10th Floor.

There is a Deed of Mutual Covenant for Bauhinia Court ('DMC'). The DMC does not contain a definition of common parts. The owners of Bauhinia Court have formed an owners' corporation.

A further problem is that defects in the pipes located in Flat 11B Bauhinia Court mean that water is leaking through into the 10th Floor and has damaged various parts of the 10th Floor of Bauhinia Court.

Candy would like your advice on the following matters:

- (1) Can the owners' corporation of Bauhinia Court require Candy to reinstate the internal partition wall dividing Flats 10A and 10B? (10marks)**
 - (2) Can Candy claim adverse possession of that area of the corridor which she has incorporated into Flats 10A and 10B? (5marks)**
 - (3) Who can take action in respect of the defects in the pipes in Flat 11B and against whom can the action be taken? (10marks)**
- [25marks]**

PART B: Equity

QUESTION 5

In January 2015, Mr Lee set up a trust known as the Lee Family Trust to provide for his family. He appointed Tony, his childhood friend, as the sole trustee of the Trust. The beneficiaries were his two children, Aaron and Benson.

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

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

Clause 30: The trustee is not liable for any loss howsoever caused by his own gross negligence.

In May 2015, Tony consulted Sam, solicitor of the trust, about the tax liability of the trust fund. Sam advised that substantial tax would be payable under Hong Kong law on the distribution of the trust assets, but that no such tax would be payable upon resettlement of the trust. Tony informed the beneficiaries accordingly and exercised his discretion under Clause 20 to resettle the trust assets upon a new trust situated in Utopia, a tax haven. The resettlement involved creation of artificial steps and structures.

Upon completion of the resettlement, it transpired that Sam's advice was wrong. In fact, no reasonable trustee could have considered it to be correct. Consequently, the trust assets were liable for an additional tax payment of HK\$1million.

Advise Aaron and Benson. There is no need to discuss the liability, if any, of Sam.

[25 marks]

QUESTION 6

Pacific Country Club ('PCC') is one of the most sought-after private sports and recreation clubs in Hong Kong. It grants corporate membership at a joining fee of HK\$1million, and has engaged Adrian, a club membership broker, to solicit corporate members on its behalf. PCC agrees to pay Adrian HK\$100,000 for every corporate member secured.

Unbeknownst to PCC, for the last four years a number of companies have paid Adrian significant bribes to incentivise him to put them forward to PCC. Most of these payments were made directly to Adrian, and he has invested all these funds (HK\$2million) in Kowloon Bank shares. However, three payments were not made directly to Adrian, but were made, at his direction, to his daughter, Connie, after Adrian told her that she would get a surprise birthday present very soon. Connie immediately spent all the funds on a luxury cruise with her friends.

Earlier this year, PCC planned to upgrade the sports equipment in its club. Zac, director of PCC, purchased new sports equipment from Majestic Sports Equipment Ltd. valued at HK\$2million. It transpires that Zac was director and majority shareholder of Majestic Sports Equipment, and was paid HK\$500,000 for arranging the transaction. On receipt of the money, Zac used it to pay off the loan from Lantau Bank on his car.

These facts have just emerged. Adrian has gone into bankruptcy recently. The Kowloon Bank shares have now quadrupled in value.

Advise PCC.

[25 marks]

QUESTION 7

Stephanie handed HK\$3million to Teresa to be held on trust for Stephanie and her two children absolutely. The terms of the trust granted Teresa investment powers over the trust fund, subject to a duty to follow Stephanie's investment instructions as and when they are given.

Soon after the trust was established, Stephanie instructed Teresa to purchase 30,000 shares in China Star Inc. at HK\$50 per share. Teresa executed the instructions accordingly. One month later, when the price of China Star shares fell to HK\$40 per share, Stephanie instructed Teresa by phone to buy another 30,000 shares. Over the phone, Teresa expressed agreement to do so.

Earlier this year, Stephanie's husband, Harry, asked Teresa to pay money from the trust fund to provide the start-up capital for his new business venture, Excellent Prospects Ltd. Teresa consulted the trust solicitor, Gary, about Harry's request. Gary told Teresa that she should "wise up to whose money it really is" under the trust. "Anyway", he said, "there's an exemption clause so you needn't worry". Teresa paid HK\$1million from the trust to Excellent Prospects Ltd. A month later, the business failed, and Harry absconded to Macau to avoid being chased by his creditors and cannot be found.

Last month, when news about a new business venture of China Star was released, the value of China Star shares shot up to HK\$80 per share. Stephanie immediately instructed Teresa to sell all 60,000 shares she believed to be held in the trust, only to discover that Teresa in fact had all along been lying to her that she would purchase another 30,000 shares (at HK\$40 per share). Instead, Teresa had used HK\$1.2million from the trust fund to purchase China Moon shares. Two days ago, the stock market in China collapsed, and the shares of both China Star and China Moon shares are now worthless.

Gary was paid an annual fee of HK\$30,000 for his services to the trust. The facts revealed that he spent all of his 2014 fees on shares which are now worth HK\$60,000.

Stephanie died recently.

Advise Stephanie's children of their equitable claims against Teresa and Gary.
[25 marks]

QUESTION 8

On 1 January 2010, Alan executed the Nala Trust, appointing Ted as his trustee. The trust deed provided that Ted may, at his absolute discretion, invest the trust assets. The trust assets comprised, inter alia, HK\$10million cash deposited with Kowloon Bank and three antique Ming vases. Alan's two children, Xavier and Yuna, were named as beneficiaries of the Nala Trust.

The terms of the trust provided the trustee with a general power of investment, except that he is expressly prohibited from investing more than half of the cash in the trust fund in biotechnology companies.

Clause 7: The Trustee may in his absolute discretion pay the whole or any part of the trust fund to anyone in the world in such proportions as the Trustee thinks fit, and in default, to my children equally.

On the same day as the trust was executed, Alan wrote a letter to Ted, saying that "...with no intention to bind you, it is my wish that you distribute my three antique Ming vases to my mistress, Michelle."

In June 2015, Ted invested all the cash from the trust fund (HK\$10million) in Super Biotechnology Limited, which was then developing a new drug to cure an epidemic disease. When the new experimental drug failed, the share price of Super Biotechnology plummeted. A month later, Super Biotechnology went into liquidation, and the trust's investment in this company is now worthless.

Xavier and Yuna found out last week that Ted decided to transfer the three antique Ming vases to Michelle, claiming that it was Alan's wish. Xavier and Yuna did not believe that this was Xavier's wish, and threatened to take legal action to challenge the proposed transfer.

Advise the beneficiaries.

[25 marks]

BARRISTERS QUALIFICATION EXAMINATION 2015

PAPER III: CRIMINAL LAW, CRIMINAL PROCEDURE & CRIMINAL EVIDENCE

QUESTION 1

Sai-Chai **WONG** (15years) and his girlfriend Ko-Mui **CHING** (14years and 11months) were arrested following a dispute in the Day-and-Night Video Games Centre, Kennedy Town, Hong Kong. The offences arose over the use of the 'Hamilton F1 Racer' game which the victim, Fai-Lo **CHAN** (17years) and his brother Pau-Che **CHAN** (16years) were alleged to have monopolized for over two hours.

WONG and CHING were alleged to have been among a group of about 10 angry male and female teenagers who assaulted Fai-Lo by dragging him bodily from the game cockpit. When Pau-Che attempted to intervene, he was slapped in the face and elbowed to the midriff. He suffered tenderness and contusion to the left and right face and bruising to the right midriff.

Most of the assailants fled the scene, but WONG and CHING loitered across the street and were pointed-out as two of the assailants by the CHAN brothers when the Police arrived.

WONG and CHING are jointly charged with one count of 'Common Assault' contrary to common law and punishable under section 40 of the Offences Against the Person Ordinance, Cap. 212 for the alleged assault on Fai-Lo CHAN and with one count of 'Assault Occasioning Actual Bodily Harm' contrary to section 40 of the same Ordinance for the alleged attack on 'Pau Che CHAN'.

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

Six weeks later, before the trial of WONG and CHING, Ma-Lau **POON** (18years) and Pai-Geuk **SHUM** (19years) were seen by the CHAN brothers at another local Games Centre. The police were called and POON and SHUM were arrested.

Under caution they admitted taking part in the earlier assault at the Day-and-Night Video Games Centre. They are charged with the same two offences in that they, together with WONG and CHING assaulted Fai-Lo and occasioned actual bodily harm to Pau-Che.

- (b) Which court should hear the trial of WONG, CHING, POON and SHUM? Provide reasons for your answer and cite any relevant authority. (5marks)**

Question continued on next page.

All four defendants are found guilty after trial. The court remanded WONG and CHING in custody and called for background reports on both defendants, together with a Detention Centre Suitability Report on WONG. In the event, CHING was sentenced to 2 months' imprisonment whereas WONG was sentenced to detention in the Detention Centre.

- (c) With reference to authority, advise WONG and CHING as to possible grounds of appeal against sentence. State briefly the procedure to be adopted. (7.5marks)**
 - (d) The prosecution considers the sentences imposed to be too lenient. What course of action is open to them if they wish to challenge these sentences? (7.5marks)**
- [25marks]**

QUESTION 2

Able WONG is charged with 'Possession of a Dangerous Drug'. He was arrested following a simple 'stop and search' by PC HO Kan-lik at 1:30a.m. on 10th March 2015. The officer allegedly found one small re-sealable plastic bag containing 0.6grammes of a solid containing 0.57grammes of Ketamine inside the front right pocket of Able's jeans. Having been arrested and cautioned, Able is alleged to have replied, "*Ah Sir, the 'K Chai' is for my own consumption. Please give me a chance.*"

At the pre-trial review hearing in April 2015, Able's Counsel successfully obtained a 3month adjournment to permit Able to locate an acquaintance, an alleged eye-witness to the offence. At the 'Mention' date in July 2015, Able sought a further adjournment to canvass the availability of CCTV footage in the area of his arrest.

At trial, Able's defence was that PC HO was lying, the drugs were 'planted' by the officer and his alleged verbal confessions were beaten out of him.

Scenario 1

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

- (a) **With reference to authority, describe the circumstances in which a convicted defendant can be required to pay the costs of his own prosecution. (7.5marks)**
- (b) **If Able had won his case, what are the principles governing the award of costs to an acquitted defendant. Explain your answer with reference to authority. (10marks)**

Scenario 2

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

- (c) **With reference to authority, explain what might constitute 'positive reasons for not awarding an acquitted defendant his costs in the Magistracy. (7.5marks)**
[25marks]

QUESTION 3

PC TUNG is on patrol in uniform in Canton Road Tsim Sha Tsui at 1:45a.m. He hears a voice shouting “*Save life - robbery*” and a few seconds later sees a man later identified as Roger WONG running quickly towards him. As WONG draws close to him, the officer tackles him and wrestles him to the ground.

WONG struggles and shouts at the officer, “*Why did you attack me?*” PC TUNG tells him, “*Because I am a Police Officer and I am on duty – don’t move!*”

PC TUNG then escorts WONG to Tsim Sha Tsui Police Station for enquiries.

Examine the action taken and the words used by PC TUNG. Discuss the Police power of arrest including whether, in this case, an ‘arrest’ has been effected.

Include in your answer an outline of the steps a Police Officer should take, if any, prior to and after an arrest. Address the following questions:

- (a) Did PC TUNG have reasonable suspicion?**
- (b) Was PC TUNG justified in using force to affect the arrest?**
- (c) Has the officer complied with the duty to give reasons for the arrest?**
- (d) Was PC TUNG empowered to escort WONG to the police station?**

Cite relevant authority, if any, in your answer.

[25marks]

QUESTION 4

LEE Tai-wok is charged with Theft. LEE is employed by Gigantic Godowns Limited (GGL) as a warehouseman. Following a surprise stock-taking, GGL have found stock of 'Triple X' Chicken Essence and pre-packed 'Premium' Dried Birds' Nest had gone missing during LEE's duty shift. Despite a search of LEE's locker and home, none of the suspected stolen goods have been recovered.

The prosecution seeks to rely on delivery records compiled by the records clerks of 'Triple X' and 'Premium' respectively to demonstrate the goods were delivered to GGL on the relevant dates. Unfortunately, the 'Triple X' clerk who compiled the record cannot now recall how he came by the information he wrote in the record as he handled hundreds of such requests per day; the 'Premium' clerk has emigrated to New Caledonia.

The prosecution will further seek to rely on the computerized stock records of GGL to demonstrate stock taken-on in accordance with delivery on those dates.

- (a) How might the prosecution adduce the evidence of the delivery records and the stock records? (12.5marks)**

In the course of their enquiries, the prosecution are told that, on other dates and times relevant to LEE, the records of the GGL computer had apparently been 'altered' so as to falsely 'balance' the record and show, for example, that 500 cases of goods were held in stock when in fact only 490 cases were held. The prosecution seeks to adduce this evidence on the basis that the computer records had been falsified to cover the deficit.

- (b) With reference to authority discuss what issues arise over evidence of these records? (12.5marks)
[25marks]**

QUESTION 5

You are assigned by the Legal Aid Department to represent Monica Lau who faces a single charge of trafficking in a dangerous drug, namely 30grammes of a crystalline solid containing 28grammes of methamphetamine hydrochloride (commonly referred to as Ice) contrary to S4(1)(a) of the Dangerous Drugs Ordinance, Cap. 134. The venue of trial is the Court of First Instance.

Monica is a 40year old Hong Kong resident with 10 previous convictions, all for possession of dangerous drugs. On each occasion Monica pleaded guilty at the earliest opportunity. Monica's instructions are that half the drugs that were seized from her were for her own consumption. When Monica was denied bail she underwent a screening test for drugs. The results showed the presence of amphetamines.

- (1) With reference to appropriate authorities what sentence would Monica receive if she were convicted after trial and what sentence would she expect to receive if she were to plead guilty before a jury is empaneled? (5marks)**
 - (2) With reference to authorities advise what steps you should take in correspondence with the Prosecution and whether or not the Prosecution is likely, or not, to accept Monica's proposal that half the drugs were for her own consumption? Would your answer differ if Monica Lau did not have any previous convictions for dangerous drugs and/ or the test for drugs came back negative? (5marks)**
 - (3) If the Prosecution declines to accept that half the drugs were for self-consumption what would you advise Monica to do if she insists that half the drugs were for her own use? (5marks)**
 - (4) Monica's instructions are that she wishes to assist the authorities by providing information about drug trafficking activities in her neighbourhood, especially the names of people who employed her to deliver drugs. With reference to authority, what procedure should be adopted and how much reduction in sentence would Monica be entitled to if her information was "useful" to the authorities? (10marks)**
- [25marks]**

QUESTION 6

Adam and Brian are jointly charged with one count of burglary contrary to S11(1)(b) of the Theft ordinance, Cap. 210. The allegation is that the two men burgled Flat A, 22nd Floor Bauhinia Heights, 66 Bonham Road and stole watches, jewelry and cash. None of the stolen items have been recovered.

- 1. Assess the admissibility and/or strength of the evidence in the following scenarios:**
 - (a) A security guard on patrol saw two males breaking into the burgled premises. He saw the faces of the two men for about 20 seconds from a distance of about 30 feet. (5marks)**
 - (b) The security guard attended an identification parade and picked out Adam and Brian. At trial, some 9 months after the identification parade, he becomes confused and mistakes Adam for Brian and fails to pick out Brian at all. (2marks)**
 - (c) Another security guard also saw the same as his colleague in question (1). He did not attend a formal identification parade before trial. However, this security guard knows Adam and Brian as they play football together on alternate weekends. (3marks)**
- 2. Adam and Brian raise alibi as their defence. What issues regarding alibi could arise at trial and what provisions need to be satisfied by the lawyers representing the accused? (5marks)**
- 3. The value of the stolen items have been valued at HK\$150,000. Both Adam and Brian have extensive convictions for dishonesty related offences. Advise on venue of trial and possible sentences that Adam and Brian may receive if they were to plead not guilty but be found guilty after trial. Both Adam and Brian are over 24 years of age. (10marks)**
[25marks]

QUESTION 7

Victor Lam has been arrested on suspicion of raping Madam X. He is represented by the Duty Lawyer Service on his first appearance at the Kwun Tong Magistrate's Court. He applied for bail but his application was refused.

- (1) What rules govern an Accused's right to apply for and to be admitted to bail? What factors may a Court take into consideration when assessing an Accused's application for bail? (10marks)**
 - (2) What factors can lead to bail being denied to an Accused? (5marks)**
 - (3) If bail is refused what options are available to an Accused if he wishes to be granted bail? (5marks)**
 - (4) What duties are imposed on a Defendant and/or his surety if bail is granted and what are the consequences of failing to comply with any of the conditions imposed when bail is granted? List some of the usual "conditions" attached to bail. (5marks)**
- [25marks]**

QUESTION 8

David Ho is arrested for an offence of theft. There is no direct evidence that David stole a watch as alleged by the Prosecution. The only evidence against David is a verbal admission that he stole the watch, a notebook entry detailing the alleged verbal admission and a video-recorded interview conducted the same day as David's arrest.

Advise on the following scenarios:

Before the admissions were made PC 510 told David that the matter was trivial and that if he signed the notebook entry and participated in the video-recorded interview then he would be released immediately. He was also told that he would only receive a fine. Conversely, if he did not co-operate then the police would arrest David's elderly parents and detain them at the police station.

- (1) What would your advice be to David in anticipation of trial and what procedure(s) would be adopted to ensure that the admissions be excluded? What safeguards are there to ensure improperly obtained admissions/confessions are excluded from evidence? (10marks)**
 - (2) How would your answer differ if David was only 14 years old at the time of his arrest and he was arrested at school in full view of his classmates. Further, during the notebook taking and the video-recorded interview there was no guardian present? (5marks)**
 - (3) What sentencing options are available to a court if David pleaded guilty to the charge of theft bearing in mind David is 14years old with a clear record? (10marks)**
- [25 marks]**

Barristers Qualification Examination 2015

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

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

QUESTION 1

Bokhary PJ began his dissenting judgment in *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* (2011) 14 HKCFAR 95 with these words: “It has always been known that the day would come when the Court has to give a decision on judicial independence. That day has come. Judicial independence is not to be found in what the courts merely say. It is to be found in what the courts actually do. In other words, it is to be found in what the courts decide.”

Discuss:

- (1) Generally, the constitutional, institutional and other guarantees of judicial independence in the systems of the Hong Kong Special Administrative Region. (10marks)**
 - (2) Specifically, in relation to the *Congo* case, the reasons for Bokhary PJ to make the statement that he did. (7marks)**
 - (3) Is judicial independence in Hong Kong under threat? Please state your opinion with reasons and examples. (8marks)**
- [25 marks]**

QUESTION 2

In *Leung Lai Kwok Yvonne v Chief Secretary for Administration & Ors* (HCAL 31/2015), the applicant applied for leave to apply for judicial review against the Hong Kong Special Administrative Region Government's consultation between January and April 2015 on the method of selecting the Chief Executive of the HKSAR in 2017 and on the Government's Proposal to the Legislative Council on the method of selecting the Chief Executive of the HKSAR by universal suffrage in 2017.

The primary ground for review of the applicant was that the HKSAR Government misdirected itself on the law as the responsible officials had wrongly regarded the Decision made by the Standing Committee of the National People's Congress on 31 August 2014 in setting out the framework for the political reform in the HKSAR in the Chief Executive election by universal suffrage in 2017 ("the NPCSC Decision of 31 August 2014") to be legally binding in the HKSAR.

The Court of First Instance, in refusing leave to apply for judicial review, indicated that the applicant "has at least impliedly accepted (and I think rightly so) that the [the NPCSC Decision of 31 August 2014], being a decision of the NPCSC, is not subject to review by the court in Hong Kong, as the court simply has no jurisdiction to do so."

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

- (1) What are the extent and limitations of the constitutional jurisdiction of the courts of the HKSAR? (10marks)**
 - (2) Discuss whether the acceptance on the part of the applicant, which was endorsed by the Court of First Instance, that the NPCSC Decision of 31 August 2014 is not subject to review by the court in Hong Kong is justified, whether on the reasons stated by the Court of First Instance or on some other reasons. (15marks)**
- [25marks]**

QUESTION 3

In 1998, Hong Kong Government carried out a major review of television policy and announced thereafter its decision to open up the domestic free television (“FTV”) market. It stated publicly and to the Legislative Council (“LegCo”) that under the new licensing regime, there would be no limit on the number of domestic FTV licences to be issued. As a result, the Broadcasting Ordinance (Cap 562) (“BO”) was enacted in 2000.

Under s.5 of the BO, any person who provides domestic FTV programme services in Hong Kong without a licence commits an offence. The licensing regime set out under the BO contains two steps. Firstly, the Communication Authority (“Authority”) shall consider applications for a domestic FTV and make recommendations thereon to the Chief Executive in Council (CEIC). Secondly, the CEIC may, after considering the recommendations, grant a licence subject to such conditions as he thinks fit.

To facilitate any interested party to apply for a FTV licence, the Authority has since 2002 promulgated a “Guidance Note for Those Interested in Applying for Domestic Free Television Programme Service Licences in Hong Kong” (“the Guidance Note”). The Guidance Note sets out, among others, the various criteria for assessment of a licence application that the Authority will look at before making a recommendation to the CEIC.

In 2012, the Authority received 3 new FTV applications of which KKTV was one. The Authority had processed these applications and assessed each of them. In addition to a public consultation exercise, the Authority also engaged a consultant to provide a report on the competition implications on new entrants to the local FTV market. The Consultant’s report ranked KKTV the second. The Consultant was of the opinion that the market might not be able to sustain a total of five players, including the two incumbent licensees.

In June 2015, the Authority submitted its recommendations to the CEIC for his consideration. The Authority recommended that approval-in-principle (“AIP”) be given for the grant of FTV licence to all the applicants.

The CEIC considered and discussed the applications and the recommendations at various Executive Council meetings. At the meeting on 15 September 2015, after deliberation, the CEIC decided to adopt a gradual and orderly approach in considering FTV licence applications, and grant license to the other two applicants but rejected KKTV’s application.

Question continued on next page

KKTV is not happy with the decision and comes to seek your advice on the following issues:

- (1) Before KKTV can proceed to the substantive hearing to challenge the decision of CEIC through judicial review, what does KKTV have to first obtain, and what does it have to show to obtain the same? (5marks)**
 - (2) What are the possible grounds on which the KKTV can rely for judicial review, and the likelihood of success? (14marks)**
 - (3) What remedies the KKTV should apply for? (6marks)**
- [25 marks]**

QUESTION 4

Jason Wong is a qualified Chinese medicine practitioner in Hong Kong. But he is very interested in law and has become a qualified barrister since 2014 and is a full tenant in X chambers. On 5 September 2015, Mr. Wong applied to the Bar Council under paragraph 23(3)(a) of the Code of Conduct (Code) for permission to engage in Chinese medicine practise as his supplementary occupation.

The Code is a set of norms or rules that the Bar Association has resolved to issue. Paragraph 23(3)(a) of the Code provides:

“A practising barrister who wishes to engage in a supplementary occupation should do so only in accordance with the general or special permission of the Bar Council.”

On 5 October 2015, Mr Wong received a letter from the Chairman of the Bar Council, which stated:

“I regret to inform you that the Bar Council is not satisfied that your engagement as a Chinese medicine practitioner would be compatible with your practice as a barrister and had come to the view that permission should not be granted to your proposed work as Chinese medicine practitioner.”

Article 33 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China provides “Hong Kong residents shall have freedom of choice of occupation”. Mr Wong is of the view that his constitutional right under Article 33 of the Basic Law has been infringed by the Bar Council.

Advise him on the following legal issues:

- (1) Whether the decision of the Bar Council is reviewable; (7marks)**
 - (2) Whether a concern group of Chinese medicine practitioners has standing to bring a case for judicial review; and (4marks)**
 - (3) Assuming the decision of the Bar Council is reviewable, what ground(s) the concern group can rely on for judicial review, and the likelihood for the concern group to win the judicial review case. (14marks)**
- [25marks]**

Part B (Company Law)

QUESTION 5

Happy Living Listco is a company incorporated in Bermuda and listed on Main board of the Stock Exchange of Hong Kong Limited. Serious Capital is a strategic investor in Happy Living Listco holding 24% of its total issued share capital. The board of directors of Happy Living Listco has 7 directors – 5 executive directors namely Charlie (Chairman and majority shareholder), Chester (Deputy Chairman and minority shareholder), Carl, Calvin and Ceasar, and 2 non-executive directors appointed by Serious Capital. Charlie and Chester together held 42.8% of Happy Living Listco's issued shares.

After Serious Capital's investment, Happy Living Listco entered into a joint venture arrangement with Dream Home Listco in 2014 whereby:

- (1) A joint venture vehicle ("**Shanghai JV**") was incorporated in Shanghai, PRC, with equal shareholdings between Happy Living PRC, a PRC wholly owned subsidiary of Happy Living Listco, and Dream Home PRC, a PRC wholly owned subsidiary of Dream Home Listco) but unequal board control (Happy Living PRC 2 directors¹, Dream Home PRC 3 directors). Shanghai JV holds interests in 15 PRC project companies holding various real estate developments in the PRC.
- (2) Another joint venture vehicle ("**Cayman JV**") was incorporated in the Cayman Islands, which likewise has equal shareholdings between Happy Living Listco and Dream Home Listco and unequal board control (Happy Living Listco 2 directors², Dream Home Listco 3 directors). The Cayman JV holds Elegant Residence Limited, a Cayman company which holds interests in 2 PRC project companies holding various other real estate developments in the PRC.

Neither the Shanghai JV nor the Cayman JV had established any place of business, or carried on any business, in Hong Kong.

In February 2015, Charlie and Chester entered into an agreement to sell to Dream Home Listco an equivalent number of shares in Happy Living Listco to that held by Serious Capital (ie 24%) ("**Shares Sale**"). A condition precedent of the Shares Sale (which was not waivable) was absence of indication from the Securities and Futures Commission ("**SFC**") that the Dream Home Listco would have to make a general offer ("**GO**") under the Takeovers Code.

Meanwhile, it was agreed between Charlie and Chester and Dream Home Listco that notwithstanding Charlie and Chester continued to hold 18% of the Happy Living Listco shares, control of Happy Living Listco would be handed over to Dream Home Listco, and in fact management of Happy Living PRC, the key PRC subsidiary of Happy Living Listco, had been handed over to the Dream Home personnel in March 2015.

Question continued on next page.

¹ Charlie and Chester

² Charlie and Calvin

Further, even though the SFC had yet to make a decision on the GO and the Shares Sale had not yet been completed, Charlie and Chester had already received full payment of the consideration from Dream Home Listco in March 2015.

Pending the SFC's decision, Charlie and Chester regretted their decision to sell and indicated that they wanted to renege from the Shares Sale, citing the uncertainty concerning the GO as excuse.

Dream Home Listco then engaged in negotiations with Charlie and Chester (attended by Carl and Calvin but without the knowledge or participation of the Serious Capital directors) in June 2015, during which:

- (1) A proposal was raised for the Cayman JV and the Shanghai JV to sell their respective interests in the PRC project companies to Dream Home Listco;
- (2) Draft agreements to that effect were prepared and discussed;
- (3) During the discussions, a clause originally appeared in the draft agreements to the effect that the transactions should be subject to approval of Happy Listing Listco, but was later removed apparently "for the sake of simplicity", and such removal was consented to by Charlie and Chester and their legal advisers; and
- (4) On 30 June 2015, Charlie, Chester and Calvin signed various undated documents including (i) board and shareholders' resolutions consenting to the sale by the Cayman JV and the Shanghai JV of their interests in the project companies; (ii) sale and purchase agreements in respect of the project companies' shares, which were all governed by Hong Kong law.

Also on 30 June 2015, Charlie, Chester and Dream Home Listco entered into a termination agreement to terminate the Shares Sale upon refund of the sale consideration without interest, and with a waiver of all claims against Charlie and Chester ("**Termination Agreement**"). Dream Home Listco issued an announcement to the effect that the Shares Sale had been aborted on 2 July 2015.

On 14 July 2015, the company secretary of Happy Living Listco circulated to the directors notice of board meeting together with a recommendation to sell Happy Living Listco's interests in the Cayman JV and the Shanghai JV to Dream Home Listco at a total consideration of HK\$100million.

At the board meeting of Happy Living Listco held on 24 July 2015:

- (1) Caesar stated that the co-operation with Dream Home Listco could not continue and the only way to part company would be to sell to Dream Home Listco; he was supported by Calvin and Carl.
- (2) The Serious Capital directors opposed the sale, and proposed that the company should consider other options.

Question continued on next page.

- (3) Carl pushed for a resolution to approve the proposed sale, which was objected to by the Smart Capital directors, and in the end the board resolved to consider the proposed sale but requested that Dream Home Listco should provide a written offer, and the management should explore and report on other options.
- (4) There was no mention of any documents having been signed by Charlie, Chester and Calvin.

On 27 July 2015, Dream Home Listco made an announcement stating that:

- (1) On 30 June 2015, the Cayman JV had entered into an agreement with Dream Home Listco to sell its interests in Elegant Residence at a consideration of HK\$40million (“**Cayman SPA**”), and the Shanghai JV had entered into an agreement with Dream Home Listco to sell its interests in 15 PRC project companies at a consideration of HK\$60million (“**Shanghai SPA**”);
- (2) Happy Living Listco and Happy Living PRC, as the respective shareholders of the Cayman JV and the Shanghai JV, had already approved the Cayman SPA and the Shanghai SPA; and
- (3) Completion of the Cayman SPA and the Shanghai SPA will be announced at a later date.

At the board meeting of Happy Living Listco held on 28 July 2015, Charlie, Chester and Calvin admitted to signing various resolutions and agreements, but claimed that they were signed in escrow on condition and under an understanding that the documents would only be dated and become effective after the board of Happy Living Listco had considered and approved the transactions. Happy Living Listco then issued an announcement to that effect, denying that any legally binding agreement existed. This was denied by Dream Home Listco in a further announcement issued on 29 July 2015.

Advice Sought:

Serious Capital has approached you for advice. It wants to remain in Happy Living Listco and does not want to wind it up (assuming possible), and wants to see what legal proceedings and remedies are available to it in Hong Kong in the event that Dream Home Listco successfully enforces the Cayman SPA and the Shanghai SPA. It also instructs you that the total consideration under the Cayman SPA and the Shanghai SPA was a gross undervalue in that the real estate developments held under the Cayman JV and the Shanghai should have a total worth of HK\$1billion.

NB(1) for the purpose of this question, please assume that Cayman law is identical to Hong Kong law in all respects, while PRC law does not have provisions concerning or of a nature similar to derivative actions and unfair prejudice petitions.

NB(2) for the avoidance of doubt, all Happy Living Listco and Dream Home Listco directors reside in Hong Kong, and all the discussions referred to above took place in Hong Kong.

[25marks]

QUESTION 6

Prosperous Development Limited (“**Company**”) was incorporated in Hong Kong in 2000. It holds a valuable commercial building in Pudong, Shanghai, PRC.

The Company has paid-up capital of HK\$1,000,000, divided into 1,000,000 ordinary shares of HK\$1 each. No share certificate has ever been issued. According to its register of members (“**Register**”), it currently has 3 shareholders:

Jessica	30,000 shares
John (deceased 10 August 2014)	30,000 shares
Joan	940,000 shares

According to the Register, the previous shareholders of the Company were:

1. At the time of incorporation, there were 2 shareholders, Jessica (holding 999,999 shares) and Joachim (holding 1 share). They are respectively the sister and brother of John;
2. On 21 March 2002, Joachim transferred his 1 share to John;
3. On 26 October 2002, John transferred his 1 share to Jeremy, his other brother;
4. On 18 November 2002, Jessica transferred 949,999 shares to Jeremy and 25,000 shares to John;
5. On 27 March 2004, Jessica transferred her remaining 25,000 shares to John;
6. On 10 February 2007, John transferred 20,000 shares to Jessica;
7. Also on 10 February 2007, Jeremy transferred 940,000 shares to Joan and another 10,000 shares to Jessica;
8. On 1 October 2010, Joan transferred 940,000 shares to Jessie (“**2010 Transfer**”);
9. On 1 June 2013, Jessie transferred 940,000 shares to Joan (“**2013 Transfer**”).

The current directors of the Company are Jessica and Joachim.

The Company adopted Table A of the former Companies Ordinance (Cap. 32) as its articles of association, which included regulation 22 under “Transfer of Shares”:

“The instrument of transfer of any share shall be executed by or on behalf of the transferor and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof.”

In respect of the 2010 Transfer:

1. John delivered to the Company an instrument of transfer and bought and sold notes for 940,000 shares (with stated consideration of \$940,000), signed by Joan as transferor and Jessie as transferee, which were stamped.
2. Upon receipt of the same, the Company entered Jessie’s name in the Register as the holder of 940,000 shares.

Question continued on next page

In respect of the 2013 Transfer:

1. John again delivered to the Company an instrument of transfer and bought and sold notes for 940,000 shares (with stated consideration of \$940,000), signed by Jessie as transferor and Joan as transferee, which were stamped. The signatures appear to be the same as that in the 2010 transfer documents.
2. Upon receipt of the same, the Company entered Joan's name in the Register as the holder of 940,000 shares.

As to Jessie and Joan:

1. Jessie claimed to have been married to John pursuant to an aboriginal wedding ceremony in Bali in 2004, the legality of which is suspect.
2. Joan claimed to have been married to John pursuant to a wedding ceremony of a little known religious sect in 2005, the legality of which is also open to doubt.
3. Until John's death, neither Jessie nor Joan knew that the other was supposedly married to John, and they each claim to be the lawful spouse of John.

John passed away on 10 August 2014.

On 30 August 2015, Jessie commenced proceedings seeking rectification of the Register to remove the name of Joan and replace with her name on the grounds that:

1. John had always been the beneficial owner of the Company, and save for the 2010 Transfer, all shareholders were his nominees and all share transactions were carried out on his direction without operating to change the beneficial ownership in the shares (which allegedly vested in John).
2. The 2010 Transfer was valid. Although she never personally execute any instrument of transfer or bought and sold notes in respect of the 2010 Transfer, John intended to gift those shares to her, and she authorized John to handle all documentation and formalities for effecting the 2010 Transfer.
3. Alternatively, even if the 2010 Transfer were invalid, she had become the beneficial owner of the shares because John had taken all steps exclusively within his power to perfect the gift to her.
4. The 2013 Transfer was not valid. She never had knowledge of, did not execute and did not authorize the execution of any documents relating to the 2013 Transfer, and did not receive any consideration.

Joan does not dispute that she never paid Jessie in respect of the 2013 Transfer. Her position is that:

1. The Company has since incorporation been beneficially owned by John, and Jessica, Joachim and Jeremy were nominees holding the shares for John.
2. The 940,000 shares were gifted to her by John in 2007.

Question continued on next page

3. In 2010, John informed her that for then prevailing tax reasons, she should not remain the registered holder of the shares but should place the shares in the name of a nominee, and that he would arrange the same for her. Joan agreed to John's suggestion, signed the instrument of transfer and bought and sold notes (in blank) relating to the 2010 Transfer, and handed them over to John for processing.
4. In 2013, John informed her that the relevant tax regime had been relaxed and she could be the registered holder of the shares again, and arranged for the 2013 Transfer. She signed the instrument of transfer and bought and sold notes prepared by John and returned them to John for handling. She saw the name of Jessie on those documents and understood her to be the nominee arranged by John. She never paid any consideration for those shares since her understanding was Jessie had been holding the shares on trust for her at all times and no question of payment of consideration arose.

Joan has come to you for advice. She wants to know:

- (1) What is the nature of the rectification proceedings commenced against her and whether Jessie is entitled to commence such proceedings;**
- (2) Having regard to the arguments advanced by Jessie, whether there are any ways to attack the 2010 Transfer so that she could short-circuit Jessie's claim.**

Please advise Joan.

[25marks]

QUESTION 7

CC Ltd ('CC') was incorporated in Hong Kong in April 2013. Its three directors, Tom Dick and Harry, were previously partners in a trading company. They were not overly ambitious but thought they had identified a good business opportunity and decided to incorporate as a means, not only to protect their investment, but also to cautiously expand their business.

At the time of incorporation, Tom, Dick and Harry each held 25 per cent of CC's issued share capital, the remaining 25 per cent was held by family, friends and some of CC's employees. All of the shares were fully paid up and the capital thereby raised was used to purchase the partnership's assets and goodwill. Those assets comprised three delivery vehicles, a computer system, various items of office machinery and office furniture. CC also purchased seven new delivery vehicles.

Owning a godown in Hong Kong was also a key part of Tom, Dick and Harry's business plan but CC did not have sufficient funds to make such a purchase. CC's request to the B Bank for mortgage funding to purchase a godown on Lantau Island was first met with the response that personal guarantees by each of its three directors would be required to cover the loan. After lengthy negotiations, it was finally agreed that the B Bank would lend HK\$10million secured by a fixed charge over the godown and a fixed charge over all of CC's vehicles. CC agreed to pay interest on the loan on a monthly basis and to repay the loan over ten years commencing 2018. The sale of the godown was completed on 1 May 2013 and B Bank registered its charges on 2 June 2013.

CC's first year of trading proved to be chaotic but fairly successful. Its distribution network included all of Hong Kong and southern China. Further expansion seemed inevitable but the prospect caused several arguments and the relationship of Tom, Dick and Harry as 'partners' was strained. Expansion would necessitate a second godown and they were divided as to its location. Tom's and Harry's preference was Zuhai whereas Dick argued that premises next to its existing godown would be better suited to their distribution system and be a less 'risky' venture.

Harry, who was nominally CC's finance director, was reluctant to seek further funding from a bank and approached XB, a venture capitalist who he had met at a conference, and explained CC's needs. XB was very keen to become involved in CC's business, he could see massive opportunities for expansion and offered funding (HK40m) to purchase both of the godowns. The injection of this funding was however subject to the board of directors of CC confirming that the following conditions precedent would be met or complied with, so that the injected funds would be used to (a) repay the loan owed to B Bank and to obtain the discharge of the fixed charges created in favour of B Bank, which then amounted to HK\$11million (b) to acquire the godown in Zhuhai which amounted to HK\$20million and to procure a valid registration of security against that godown in favour of XB, (c) to retain the balance as working capital of CC.

Question continued on next page.

The agreement between XB and CC provides that if it is subsequently discovered that any of the conditions precedent have not been complied with or that any of the acts carried out by CC in purported compliance with the conditions precedent are invalid, XB is entitled to declare an event of default whereupon CC shall be obliged to repay the entire \$40 million to XB together with interest from the date CC received the money to the date of repayment at 20% pa.

Tom and Harry discussed the proposal of XB with Dick including the conditions precedent and Dick did not raise any objection as he thought the matter would be put to the board for consideration and approval.

As it turned out, Tom and Harry prepared and signed the “minutes” of a board meeting of CC at which a resolution was passed to approve (a) admitting XB as a new investor of CC, (b) issuing new shares equivalent to 50% of the enlarged issued capital of CC to XB, (c) accepting the conditions precedent for XB’s injection of HK\$40million, (d) approving the fixed and floating charges to be created in favour of XB over the godowns in Lantau Island and in Zhuhai, (e) confirming that CC would comply with each of the conditions precedent imposed by XB and (f) appointing XB’s nominee (Chris) as director of CC.

The “minutes” was not shown to Dick, nor was he asked to sign on them. The “minutes” were then given to XB and in reliance on such “minutes”, XB transferred HK\$40 million into CC’s bank account. Upon Chris becoming a director of CC, the authorised signatories of the bank account of CC was changed in which any 2 out of the 4 directors could withdraw fund from CC’s bank account.

After XB injected HK\$40m into CC, all the withdrawal of funds were handled and approved by Tom and Harry and they used the funds as follows:

- (1) They used HK\$20m to acquire the Zhuhai godown but did not complete any registration of the security in Hong Kong.
- (2) As the loan advanced by B Bank was not due for repayment until 2018 and they did not want to retain any idle fund at CC, they decided to use the balance of HK\$20million injected by XB to buy a property in the name of CC for investment purpose.

A fixed charge was created by CC in favour of XB over the godown in Lantau and was registered within time on 1 April 2014. A floating charge was also subsequently created by CC in favour of XB dated 12 September 2014 and this was registered on 1 October 2014.

A series of typhoons and severe delays on the roads in Hong Kong and southern China through the months of June and July in 2015 resulted in CC losing a great deal of business. Its office systems were also in a complete mess due, in part, to a breakdown of its out dated computer system.

Question continued on next page.

Full utilization of the godown in Zuhai was also proving difficult because neither Tom, Dick nor Harry had any experience of actually running a business on the mainland. XB had assumed otherwise and is now dismayed by his decision to get involved with the three of them. Chris thought that a sensible solution may be to employ a manager to run the mainland side of the business but he, and XB, first wanted to review CC's accounts. Harry and Tom explained that the books were all in disarray because of the computer breakdown but would be available 'soon'.

But before Chris, or XB, could conduct a review of CC's finances the B Bank petitioned to wind up CC. The B Bank had not received any interest payments from CC since a payment on 1st June 2015, reminders had been sent to CC but it had not responded. The petition was issued on 1st September 2015.

Tom and Harry have disappeared, taking two of CC's newer vehicles, and there are rumours that they sabotaged CC's computer system because they suspected that CC was insolvent and wanted some time to plan their departure. Dick is now trying to work out CC's financial position. He was not aware of CC's failure to pay B Bank but did notice that income from customers was considerably less in July and August than in previous months.

Dick and Chris, on behalf of CC, seek your advice as to the following:

- (a) Whether the bank could apply for the appointment a provisional liquidator and the consequences of so doing. (5marks)**
- (b) The validity of the various charges over CC's assets and their priority. (12marks)**
- (c) The liability of the 4 directors of CC in relation to (i) the agreement made between CC and XB and the subsequent arrangements concerning the charges and the use of the HK\$40million and (ii) generally if CC is wound up by the court. (5marks)**
- (d) Assuming that provisional liquidators or liquidators are ultimately appointed and CC has assets which can be realized, out of which assets can those provisional liquidators/liquidators be paid and what is their priority. (3marks)**

[25marks]

QUESTION 8

RCBI Ltd was incorporated in the BVI in 2005. It is the holding company of R Ltd, C Ltd and BI Ltd. Each of these three subsidiary companies was incorporated in Hong Kong in the 1980's as vehicles for the Wan family to carry on various restaurant and catering businesses.

Peter and his sister, Mary, were the founder members of R Ltd. and of C Ltd. R Ltd was established to run restaurant businesses and C Ltd to run a chain of cafes. Their brother, Paul and his wife were the founder members of BI Ltd, which established a bakery and a business importing food stuff. The restaurants quickly established a reputation for good quality food and the cafes a reputation for reasonable prices.

R Ltd and C Ltd purchased all their food stuff and bakery items from BI Ltd. Paul, especially, was happy with this arrangement because it saved him, and his small work force, the time and effort of selling to fickle customers. Reliable sources of food stuff were quickly identified and much of BI Ltd's business was conducted on the basis of repeat orders. Paul had always been the least ambitious and least industrious of the three siblings but they were all good friends and generally happy to support one another's businesses.

Peter, Paul and Mary all had families and over time some of their children came to work in the family businesses. In 2004 they began to consider how their businesses might be arranged as a means to ensure that they and their future generations could all benefit from the business. After a considerable amount of advice and deliberations they decided to set up RCBI Ltd Ltd as a holding company with RCBI Ltd owning all the issued shares of each of its three subsidiaries and with Peter, Paul and Mary as its directors and its only shareholders. RCBI Ltd does not conduct any business, but has invested in a number of companies in the BVI and in Hong Kong.

Peter and Mary have since died, and Paul has retired, but their children continue to run the various Hong Kong businesses. Each of their eldest children have replaced them as directors on the board of RCBI Ltd and they each hold 25% of the company's shares. The remainder of RCBI Ltd's shares are split between all their other siblings.

Paul's eldest child, Sonny, has also taken on the role of chairman of RCBI Ltd. He deals with all the paperwork associated with this role from his office at BI Ltd and also keeps RCBI Ltd's register of members at his office. RCBI Ltd's Board meetings have also been held in his office but Lizzy and Charlie have never been in attendance.

In recent times there has been increasing concern about the performance of BI Ltd. Sonny, is rather like his father. He is not very ambitious – just happy to let the importing and the bakery to 'tick over' relying on his siblings for business and his managers and employees to run BI's businesses. He is rarely seen in his office and is increasingly elusive. His income (fees and dividends) from RCBI Ltd enables him to maintain a comfortable standard of living.

Question continued on next page.

Mary's eldest child, Lizzy, now runs C Ltd and she has expanded the business to include a chain of delicatessens and has remodeled the cafés to include a bakery with a mini-deli section so that customers can have 'tailor made' sandwiches and the like. She mentioned this expansion to Sonny but he did not seem bothered by the development. Sonny did not even ask about her suppliers, he assumed it was all being done through BI Ltd. But Lizzy had been careful and had maintained business with BI Ltd at more or less the same volume as her father.

Peter's eldest daughter, Charlie, now runs R Ltd and she keeps a very tight control over its managers as a means to ensure that the restaurants maintain their reputation. She has increasingly approved the purchase of required food stuff from a variety of sources, rather than from BI Ltd. She is more concerned with quality and price, than with the Wan's family business.

Lizzy and Charlie met up on a regular basis to talk about their ideas for new businesses. They also talked over the fact that RCBI Ltd's profits seemed to be dwindling, despite their considerable efforts in running R Ltd and C Ltd. They decided that large salaries from their respective businesses would, at least in the short term, keep them happy and to worry about the wider family business issues at a later stage. They also agreed to gradually phase out their dealings with Sonny and BI Ltd.

But Lizzy and Charlie now see BI Ltd as serving no purpose, potentially affecting the reputation of the Wan family and as hindering the expansion of both R Ltd and C Ltd. They have written to Sonny demanding that he sets in motion the winding up of both BI Ltd and RCBI Ltd. Sonny is outraged and sees Lizzy's and Charlie's actions as contrary to the understanding of their parents, namely that RCBI Ltd should benefit the entire family and that in no circumstances it be wound up or otherwise cease to exist.

Sonny seeks your advice in regard to each of the following questions:

- (a) What steps he may take to protect his, and the Wan family's, interests?**
(16marks)
- (b) Whether Lizzy and Charlie could by some lawful scheme, re-arrange the companies that make up the Wan family business and thereby oust BI Ltd from the group?**
(9marks)
[25marks]

BARRISTERS QUALIFICATION EXAMINATION 2015

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

Part A (Civil Procedure and Civil Evidence)

QUESTION 1

Mr. Kwok, the Plaintiff has brought an action against Premier Company Limited for breach of contract claiming damages of HK\$2.1million. His previous solicitors have come off the record. He has just instructed Lee & Partners who have briefed you for the four day trial commencing next week. After reading the agreed hearing bundles for the trial you realise there are outstanding matters that need to be addressed urgently.

There is no Chronology or Opening Submission and List of Authorities for the Plaintiff. Mr. Kwok has given instructions that if the Defendant's alternative defence on quantum were to succeed it should still be liable but on a different basis for the lesser sum of HK\$870,000. However, the alternative lesser sum has not been pleaded. Mr. Kwok would need to file a witness statement on this point and produce a few more documents in support. The quantum expert witnesses have not given their opinion on this alternative lesser quantification of the claim in their expert reports. Now Mr. Kwok disputes one of the quantum documents in the agreed trial bundles. It appears to be a facsimile signed by one of his employees but the employee says he does not recall ever signing or sending it on behalf of the Plaintiff.

You are also concerned because the trial is only fixed for 4 days and you estimate it would take at least 9 days. Even if all the factual witnesses on liability could complete their evidence within the 4 days fixed there is no realistic prospect of calling the quantum witnesses including the 2 quantum expert witnesses and completing their evidence or making closing submissions.

- (1) Advise Mr. Kwok on his present position and the consequences. (8marks)**
- (2) What further information and additional documents in respect of the proceedings or interlocutory matters and further instructions do you require to advise? (10marks)**
- (3) What could Mr. Kwok do? What applications do you advise Mr. Kwok make and why? What procedure and steps do you have to follow? (20marks)**
- (4) Advise Mr. Kwok on the matters the Court would have regard to in determining the applications you advise? Advise what Orders or directions the Court may make? (12marks)**

In your answers refer to all relevant jurisdiction, procedural provisions and cite authorities. [50marks]

QUESTION 2

The Court of Appeal handed down judgment 7 days ago dismissing your client Mr. Fung's appeal against the judgment of Lau J in the Court of First Instance ("the CFI Judgment"). The CFI Judgment held Mr. Fung liable as purchaser for breach of a long term contract for the purchase and supply of bananas from the Philippines and for damages in the sum of HK\$35million.

The CFI Judgment dismissed his defence that the contract was really for bananas from Brazil not the Philippines. It held that upon a proper construction of the contract the "goods" term "*bananas Asia (Philippines)*" meant the contract was for bananas from the Philippines. Mr Fung's evidence that the Plaintiff assured him that it would deliver bananas from Brazil was rejected. The CFI Judgment held that previous correspondence between Mr. Fung and the Plaintiff on purchase of Brazilian bananas, the Plaintiff's price lists in respect of Brazilian bananas and previous drafts of the contract that showed the bananas had to be from Brazil were inadmissible in construing of the contract. The Court of Appeal upheld all the CFI findings when dismissing Mr. Fung's appeal.

Mr. Fung wants to appeal to the Court of Final Appeal. He is sure that the five judges in the Court of Final Appeal will see the grave injustice in the decision holding him liable for such a huge sum when all along the Plaintiff knew he would only purchase bananas from Brazil not the Philippines. Mr. Fung insists on having his day in Court.

- (1) Advise Mr. Fung on an appeal including jurisdiction. (24marks)
- (2) Advise on the proper procedure in detail giving all relevant provisions, rules and practices to follow. (18marks)
- (3) The Plaintiff had made demand for the HK\$35million. Mr. Fung refuses to pay at this stage. Can anything be done to prevent the Plaintiff enforcing the judgment? (4marks)
- (4) Mr. Fung has already paid substantial costs bills and previously had to pay security. He does not want to pay security again. Advise. (4marks)

Your answers should set out all relevant provisions and procedures that client, the solicitors and counsel should follow at each stage, citing authorities.

[50marks]

Part B (Professional Conduct)

QUESTION 3

Perry Chow, a barrister of three years' call was at a monthly drinks' gathering of solicitor's clerks in Soho. Roger Ma, a clerk for a sole practitioner law firm was seated next to Perry when Roger received a phone call from the assistant of Ruby Tsang, a barrister and the chamber mate of Perry. The secretary informed Roger that Ruby unfortunately had a clash of commitments on the days which Roger had asked for her diary to be marked. Therefore she could not confirm the dates for a criminal trial in the Court of First Instance fixed in December 2015.

In spite of the loud music, Perry overheard this conversation and upon conclusion of the call he offered his services to Roger. Perry did not ask what the subject matter of the trial was and all that Roger told him was that it was a 'big case'. Roger agreed to brief him and they agreed the brief fee of HK\$200,000.

Perry later learned that the case was a criminal one and the charge was **Dangerous Driving Causing Death**, involving 15 Mainland tourists at a bus terminus in 2014. At the same time, Roger 'suggested' a revised fee structure, which Perry accepted. The terms were that if the client was convicted, he need not pay anything other than Perry's 'reasonable' daily expenses; if fully acquitted, the full fee would be payable; and if convicted of careless driving, only 50% of the fee would be payable.

To secure his brief Perry also agreed that the fees could be paid by installments, with the first installment being paid on the last day of the case. The hearing was set down for four weeks starting on 1st December 2015.

In November 2015, Perry accepted a brief to appear in Kwun Tong Magistrates' Court defending a charge of **Common Assault**. The trial was set down for two days, namely 30th November and 1st December 2015.

At a conference with the lay client, Tony Wong, in the Common Assault case, which Perry attended with a pupil from Chambers (as the assigned solicitor was late), Tony Wong explained that he had been drawn into a pushing and shoving match with his neighbour who had tried to hit Tony's child. Tony had stood in front of his child to protect her and the neighbour, whilst trying to hit his child, had lost his balance, slipped and hurt his neck. Tony was shocked that he was charged for Common Assault as he maintained that the neighbour "started it all and should be arrested". He was resolute that the matter "must go to trial" in order for him to clear his name as he had never been in trouble with the law before - he indeed had a clear record.

After the conference Perry was of the view that the best course of action would be to approach the prosecution and enquire whether they might offer no evidence to the charge of Common Assault upon Tony's agreement to accept an order to be bound over to keep the peace for a period of 12 months.

Question continued on next page

It was not lost on Perry that a bind over order would free him from having to conduct the scheduled trial at Kwun Tong Magistrates' Court before M.R. Chan Esq (who was known as being meticulous and whose trials always overran) and free his diary on both days. He was conscious that the second day clashed with day one of his High Court trial. He later approached the prosecution and asked them to consider offering no evidence. After taking instructions, the prosecution eventually accepted.

Perry then telephoned Tony and informed him of the news. He said that his only way of avoiding a prison term was to accept the bind over order as Common Assault led to a mandatory imprisonment term. Tony succumbed to Perry's recommendation reluctantly agreeing to this course of action despite continuing to deny any guilt whatsoever in respect of the alleged assault.

Perry had told him that there would be no criminal conviction and a Bind Over order was 'a mere technicality with no legal relevance and certainly no moral stigma.'

The case was called on the appointed date and the bind over proceeded as planned. As part of the procedure, Tony was required to admit the facts of the Common Assault in open court, which he reluctantly did. After the hearing he told Perry that he was very dissatisfied at having to admit to assaulting the neighbour when the latter was solely responsible for hurting his own neck by accident. He said that he only agreed because after all he did not want to go to prison.

The **Dangerous Driving Causing Death** trial commenced in the Court of First Instance with Perry acting as Defence counsel. The trial proceeded without incident up to the time of the trial Judge's summing up to the jury.

During the summing up Perry noticed that the court interpreter was not translating the Judge's words (which were in the English language) to the accused in the dock. The accused did not understand a word of English and was seen to be very concerned during the summing up.

Perry decided to say nothing to the Judge, secure in the knowledge that he could keep this irregularity to himself and raise it later as a ground of appeal, if his client was convicted.

Later in the summing up the Judge told the jury that the prosecution had to prove the accused's guilt 'beyond reasonable doubt' and that he did not need to explain this term any further as it should be common sense to them. Upon hearing this, Perry interrupted the judge and submitted curtly that he should use clearer wording when directing the jury on the standard of proof. Perry then stood and told the Judge that the modern practice was to tell the jury that 'beyond reasonable doubt' meant that they 'had to be satisfied so that they were sure.' Perry said that this would avoid confusing the jurors and was fairer to the accused. Perry submitted that if the judge did not use the suggested wording then Perry would lodge an appeal on this point.

Question continued on next page.

The Judge, by now visibly embarrassed, agreed to use the longer form suggested by Perry and the trial concluded without further incident. The accused was convicted and sentenced to 10years' imprisonment.

The solicitor in the **Common Assault** case has recently received a complaint from the lay client Tony Wong who has seen his own name in a local magazine Eastside under the headline 'Tony Wong - Convicted of Serious Assault'. His complaint to the solicitor is that he had been forced into admitting a crime which he did not commit.

Perry approaches you, his chamber mate, and explains the entire situation as described above. He asks for your advice in respect of both the Common Assault case and the Dangerous Driving Causing Death trial.

Identify the relevant issues; explain these to Perry and advise him on his past and future actions with respect to the Code of Conduct of the Hong Kong Bar Association. Additionally provide your own opinion as to how you would have conducted yourself in each of the factual situations.

[50marks]

QUESTION 4

Samantha Chan is a practising barrister in Hong Kong who specialises in civil work. One night as she is walking home after dinner she witnesses a minibus crash into the back of a 7 seater van on Pedder Street in Central. She rushes over to the vehicles and assists other passers-by in administering first-aid to the drivers. Upon the arrival of the ambulance Samantha continues to offer assistance and later gives a police statement as to what she witnessed and her involvement at the scene.

Eight weeks later she is approached to represent a new client, John Tong, and Samantha recognises him as being the driver of one of the vehicles involved in the traffic accident. John informs Samantha that he is being prosecuted for careless driving as a result of the accident.

Samantha takes full instructions from John and agrees to represent him at trial.

When Samantha studies the brief she realises that she does not know anything about road traffic legislation and has only “skimmed” through the 2006 (1st edition) of Road Traffic Offences in Hong Kong. Upon checking her diary she also sees that she will not have sufficient time to “read up” on the legislation and relevant criminal court procedures before the start of the trial in 10 days’ time. She therefore decides to decline the instructions and makes a note to telephone her instructing solicitors informing them of this fact. When she is out of the office the next day, and her secretary is off sick, the Brief is delivered and left in her “IN” tray by the messenger. The Brief immediately gets buried under that day’s post.

Due to work pressure Samantha forgets to make the phone call until she notices the Brief at 6:30pm on the evening before the trial by which time the solicitors’ office is closed and will only open again at 9:00am.

- (a) Samantha approaches you, a member of chambers, and has explained the situation as described above. She now asks for your urgent advice.**

Identify the relevant issues; explain these and advise her on her past and future actions with respect to the Code of Conduct, 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.
(25marks)

Joseph Mak, a solicitor, is attending a conference in Central at the chambers of Roy Tang, a barrister practising in Hong Kong, in relation to new instructions involving a contract dispute between Joe’s client and a Hong Kong listed company. The conference ends at 1:45 pm and as Joe is leaving chambers he realises that he has left his wallet in the taxi and has no money.

Question continued on next page.

Joe tells Roy that he urgently has to travel from Central to the New Territories to represent a client in Fanling magistracy at 2:30pm that day. Afraid it would leave a bad impression, Roy immediately volunteers to lend Joe HK\$800 so that Joe can take a taxi to the court in order to reach in time. Joe takes the money and rushes off.

Two weeks later whilst Roy is appearing in court he receives a text message from Joe inviting him to come to Joe's office to collect the HK\$800. The text message also informs Roy that there is an '**End of the Month Mixer**' taking place from 3pm to 6pm that day at Joe's solicitors' firm. He adds that he should bring his business cards with him.

Roy decides to go to the party after court hours, at about 5:00pm, and he texts Joe to tell him this. Unexpectedly, however, court adjourns at 3:30pm and Roy decides to go to Joe's office earlier than planned. On his way to the robing room to get changed after court Roy tries to send Joe a text message explaining this change in plan, but he has difficulty in obtaining a signal on his mobile phone.

He proceeds to leave the court building and stands outside court, close to the main road, where he is able to obtain a signal after which he sends the text message. On his way back inside the building to change out of his robes, Roy is photographed using his Apple iPhone by two press photographers who had been waiting outside court in relation to an unconnected court hearing.

The following day Roy's photograph - in which he appears in his wig and gown appearing to pose into the camera - is featured in a number of local tabloids in connection with a story about social media and the courts. As a result of the publication of the photograph, solicitors acting for Apple Technologies Limited send instructions to Roy to advise in relation to a trademark dispute, which Roy knows nothing about. The handling solicitor adds: "Client thanks you for plugging Apple!"

(b) Roy 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, 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.

(25marks)

[50marks]

PART C:ADVOCACY

The following documents are attached:

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

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

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

BETWEEN

CHRISTINE LOUIS SINCLAIR Applicant/
Intended Plaintiff

and

MELVIN FAN Respondent/
Intended Defendant

Instructions to Counsel for the Applicant

Counsel is instructed on an urgent basis:

- 1) To appear *tomorrow* on Friday 6 November 2015 in the Court of First Instance for the Applicant in an *ex parte* on notice application for the grant of an injunction restraining Fan for a period of five months until 5 May 2015 from working as a chef in any restaurant in Hong Kong. The Applicant has learned that Fan intends to open his new restaurant 'Ego' in Stanley on Friday evening.
- 2) To prevent Fan from publishing a book of recipes. Such publication is scheduled for 1300 hours on Saturday during the course of a book signing by Fan. Instructing solicitors have ascertained that this event is to take place at Staunton's Booksellers in Queen's Road Central, after which the recipe book will be on sale in all of Staunton's outlets in Hong Kong. Free copies of the book are to be given to those patrons of Fan's new restaurant who spend more than HK\$2,000 per meal.
- 3) To apply for costs as appropriate.

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

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

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

The facts are set out below.

Summary of Facts Known to Instructing Solicitors

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

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

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

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

Fan was summarily dismissed by the applicant two months ago on 31 August 2015 after a disastrous evening when, in her view, he was responsible for causing food-poisoning to a delegation of World Health Organisation officials during an Administration-hosted banquet at the former Government House.

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

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

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

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

59. *Termination and Covenants*

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

Clause 73 of the contract reads:

73. *Confidentiality*

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

Clause 102 reads:

102. *Termination*

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

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

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

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

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

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

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

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

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

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

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