

BARRISTERS QUALIFICATION EXAMINATION 2016

PAPER II: Property, Conveyancing; and Equity

PART A: Property and Conveyancing

QUESTION 1

ABC Ltd ('ABC') owns a plot of land in Tsuen Wan. In 1995, ABC erected a block of residential flats on the land. ABC leases individual flats in the block to tenants. Behind the block, but within ABC's land, is a lane leading from the back door of the block to a public road. Residents of the block use the lane to gain access from the back door of the block to the public road. In 1998, Mr. Fung constructed a small permanent shop on one side of the lane from which he sold soft drinks. Mr. Fung's shop did not prevent the use of the lane by residents of the block, and ABC took no action to evict him.

In 2002, Mr. Fung fell ill and was in hospital for about 10 months. During this time his wife, Mrs. Fung, ran the shop. By 2003, Mr. Fung had fully recovered and he continued to work in the shop without Mrs. Fung. In 2007, Mr. Fung died suddenly and Mrs. Fung took over the shop, which she has run ever since.

Answer the following questions, giving reasons for your answers:

- (a) Earlier this year, Mrs. Fung received an eviction notice from ABC. Advise Mrs. Fung whether she has acquired possessory title to the shop. (20marks)**
- (b) How would your answer differ, if at all, if Mr. Fung had originally been in possession of the shop paying a monthly rent to ABC but that after the first few months ABC had stopped demanding or collecting any rent? (5marks)**

[25marks]

QUESTION 2

In 1995, Valerie bought a house on a small development of 10 houses known as 'Green Garden Villas' (the 'Villas'). The assignment in Valerie's favour assigned to her 10 equal undivided 100th shares of and in the lot on which the Villas is built, together with the right to the exclusive use of House number 10 and the yard to the rear of the house which is accessed through the kitchen. In July 2016, Valerie entered into a binding agreement for sale and purchase to sell her house including the yard to Paul for HK\$50million. The agreement was signed by both parties and is substantially in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance.

Valerie has erected a small prefabricated structure in the yard which she uses for storage. The structure rests on its own weight on concrete blocks. It is connected to the house by an electric cable through which electricity is supplied to the structure. The agreement for sale and purchase between Valerie and Paul refers to a plan of the property attached to the assignment to Valerie. The plan shows the house and open yard, but does not show the structure in the yard.

Paul saw the structure when he inspected the house before signing the agreement for sale and purchase, but neither he nor Valerie said anything about it.

The Villas is held under Conditions of Sale dated 1991, which contain plot ratio and site coverage restrictions, and there is a Deed of Mutual Covenant (the 'DMC') binding the owners of all ten houses in the Villas. The DMC requires owners not to breach the Conditions of Sale.

Valerie plans to dismantle the structure on completion of the sale of the house. The structure can easily be dismantled, moved and rebuilt at Valerie's new home in the New Territories.

Answer the following questions, giving reasons for your answers:

- (a) According to the agreement, which Valerie and Paul have signed, is Valerie entitled to remove the structure on completion of the sale and purchase?
(11marks)
- (b) Whether or not Valerie is entitled to remove the structure, does the structure affect Valerie's ability to give good title?
(14marks)
[25marks]

QUESTION 3

Victor owns Flat 3B Ming Gardens, which is subject to a Deed of Mutual Covenant (the 'DMC') which provides for owners for the time being to contribute to expenses in connection with managing Ming Gardens and repairing and renovating the common parts in proportion to the number of undivided shares owned by them. The DMC also provides that the building manager may register a charge against the undivided shares of any owner who fails to pay within one month of payment becoming due. Ming Gardens is managed by a management company and the owners of Ming Gardens have established an owners' corporation.

On 28 September 2016, Victor entered into a binding agreement to sell his flat to Peony for a consideration of HK\$28million subject to the Conditions of Sale of the lot on which Ming Gardens is built and subject to the DMC. Completion will take place on 30 November 2016. The agreement is substantially in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance. The following problems have arisen since Peony signed the agreement for sale and purchase and she requires advice in connection with them.

Answer the following questions, giving reasons for your answers:

- (a) Victor has not paid management charges for 20 months because of an ongoing dispute with the management company. Altogether, Victor owes arrears of HK\$180,000. No charge in respect of unpaid management charges is registered in the Land Registry and Victor proposes that on completion he will undertake to pay the arrears when his dispute with the management company is settled. Is Peony obliged to accept this arrangement? (9marks)**
- (b) A workman engaged by the owners' corporation was seriously injured when working on the repair of the external wall of Ming Gardens due to the negligence of the corporation. There is a doubt as to whether the corporation's insurance policy will cover the damages awarded to the workman. Is this something that should be of concern to Peony? (8marks)**
- (c) A search in the Land Registry against Flat 3B Ming Gardens reveals a Dangerous Hillside Order registered by the Buildings Department on 1st October 2016, requiring owners of Ming Gardens to investigate and carry out certain works on a slope behind the land on which Ming Gardens is built. The incorporated owners have calculated the cost of complying with the order and the contribution to be made by Victor which is HK\$50,000. The work will be completed by 31st December 2016. Victor agrees that on completion he will undertake to pay the contribution required from the owner of Flat 3B Ming Gardens. Is Peony obliged to accept this arrangement? (8marks)**

[25marks]

QUESTION 4

Answer all of the following questions, giving reasons for your answers:

- (a) On 10 July 2016, Pelham Property Ltd ('Pelham') entered into a binding agreement for sale and purchase with Vanguard Ltd ('Vanguard') to buy Vanguard's office premises in Wanchai. Pelham paid a deposit of 10% of the agreed price and registered its agreement in the land Registry on 1 August 2016. On 15 July, First Bank Ltd ('First') obtained a charging order against Vanguard's office premises, which First registered against the office premises on 16 July 2016.

(i) Advise Pelham whether it should complete its purchase. (8marks)

(ii) Would your answer to (i) differ if Pelham had registered its sale and purchase agreement on 1 September 2016? (4marks)

- (b) In 2010, Alex bought a residential flat in Sheung Wan. He borrowed HK\$6million from the Goodwill Bank Ltd ('Goodwill'), and gave Goodwill a first legal mortgage over the flat which was dated 4 May 2010 and registered in the Land Registry on 20 May 2010. In 2015, the sum of HK\$5million was outstanding under Goodwill's mortgage. Alex decided to refinance the loan and he agreed to borrow HK\$6million from Second Bank Ltd ('Second'). Alex's agreement with Second was that part of their loan to him would be used to redeem the Goodwill mortgage so that Second would become the first mortgagee.

Alex executed a mortgage to secure HK\$6million in favour of Second on 1 June 2015, and on the same day Second redeemed the Goodwill mortgage. Goodwill executed a discharge of its mortgage on 1 June 2015. Second registered the discharge and its mortgage against the flat on 10 July 2015. Lucky Chips Ltd obtained a charging order against Alex on 1 July 2015, which it registered against the flat on 2 July 2015.

Who has priority over the proceeds of sale if the flat is sold? (13marks)
[25marks]

PART B: Equity

QUESTION 5

Donald is a businessman. On 2 January 2015, he purchased a unit in Drump Tower for HK\$5million using an overdraft facility in his personal account (the “Account”). The balance in the Account was zero before the transaction.

On 14 February 2015, Donald reserved a table for dinner with his long-time friends and business mentors, Benny and Clint. Benny and Clint were thinking of retiring to Panama. Upon Donald’s persuasion, they thought it was a good idea to entrust Donald with some of their assets for the benefit of their children. Unbeknownst to them, Donald was at the time suffering from a serious cash flow problem due to his various business ventures.

After dinner, Clint left a vintage pocket watch at the restaurant. Donald learnt from the restaurant (because Donald was the person making the reservation) that a watch had been found, and the next day he instructed his assistant to retrieve it. The assistant did so and gave the watch to Donald. However, after Clint told Donald that he (Clint) must have left his watch at the restaurant, Donald told Clint that he had checked and the watch could not be found.

On 1 March 2015, Benny settled HK\$5million on trust with Donald as the sole trustee in favour of his (i.e. Benny’s) daughter, Karen. The next day, Clint also settled HK\$10million on trust with Donald as the sole trustee in favour of his (i.e. Clint’s) son, Lincoln. Upon Donald’s receipt of their funds, he immediately caused the same to be credited (in the order of their receipt) to the Account.

On 1 April 2015, Donald injected HK\$2million (his personal funds) into the Account. On the next day, he withdrew HK\$1million to purchase a gold ring.

In October 2015, Donald sold the vintage pocket watch in the black market for HK\$2million and put the entire sale proceeds (as cash) into a private safe in his bedroom. The buyer of the watch could not be traced.

Donald was declared bankrupt in April 2016. The Drump Tower unit is now worth only HK\$3million and the gold ring is now worth HK\$2million.

Advise Clint, Karen and Lincoln.

[25marks]

QUESTION 6

Damian has been a director of Care for Babies Limited (the “Company”) since 2013. The Company is a world-renowned manufacturer of plastic baby products including walking aids and toys. Damian’s usual scope of work involves (1) liaising with material suppliers worldwide over the latest developments in “plastic science” (i.e. the development of new plastic materials that are safe for babies); and (2) making recommendations to the Company as to what materials and which suppliers should be engaged to supply plastic for the Company’s forthcoming products.

The other directors of the Company have typically endorsed and followed Damian’s recommendations without any independent judgment, because the other directors are more focused towards marketing strategies and they have no special knowledge over plastic science. It is in fact an open secret in the industry that Damian is the “person to please” in order for any plastic supplier to be selected for the Company’s forthcoming products.

On 1 November 2015, Jeremy, managing director of Mediocre Plastics Limited (“MPL”), approached Damian in respect of MPL’s newly-developed plastic known as PAA. After hearing Jeremy’s briefing, Damian was sceptical about PAA being used in baby products, because it did not pass the relevant safety standards in the US (although it managed to pass the less stringent tests in Europe). The only attraction of PAA is its very competitive pricing. Jeremy very soon realised that Damian was not really interested, so he offered a commission of HK\$5million to Damian if he managed to persuade the Company to use PAA in its forthcoming products. Damian accepted the suggestion and said he would try his best, but added that it might not be appropriate for the commission to be paid to him directly so he would rather receive it through his sister Mona.

On 10 November 2015, in the Company’s board meeting, Damian recommended that PAA should be used in the forthcoming products. Damian gave a thorough and honest comparison of PAA with other similar plastics in the market (including one known as PCQ), and duly informed the board that while PAA did not pass the US tests, it managed to pass the European standards so it remains attractive because of the competitive price and it would allow the Company to benefit significantly in the European markets. The other directors accordingly endorsed Damian’s recommendation. Damian made no disclosure of the fact that he would receive a commission from MPL.

On 1 December 2015, a supply contract was signed between MPL and the Company. On 20 December 2015, MPL transferred HK\$5million to Mona’s account as agreed. Damian told Mona that the credit to her account was from his friend and requested her to receive the funds on his behalf. Mona was harbouring suspicions about the transfer because Damian never made similar requests, but she did not bother to ask further.

Question continued on next page.

The above came to the Company's knowledge on 1 January 2016. If Damian had made the requisite disclosure, the Company would have allowed him to keep half of his commission, and it would still have engaged MPL to supply PAA for its products.

Because of an unforeseeable economic downturn in Europe in early 2016, and since the Company was unable to sell its PAA products in the US due to its failure to meet the safety standards, the Company suffered a loss of HK\$30million which would not have happened if it had chosen PCQ for its products.

Advise the Company.

[25marks]

QUESTION 7

On 1 March 2015, Susan set up a trust appointing Tony, a very close family friend and a solicitor specializing in family trust matters, as her trustee. The trust assets comprise HK\$5million worth of shares in Lantau Bank (the “Shares”) and a plot of land on the Peak (the “Land”). Benny is the only beneficiary under the trust. The trust deed contains the following terms:

Clause 3: The trustee shall be entitled to convert any or all of the trust assets into cash at any time as he sees fit, and shall be entitled in his absolute discretion to hold on to such cash or alternatively to invest any part thereof in any assets in Hong Kong as he sees fit.

Clause 12: Insofar as permitted by law, the trustee shall be indemnified by the trust fund for any loss arising from any breaches of his duties.

In May 2015, in anticipation of a lethal virus epidemic in Hong Kong, Tony’s investment adviser urged him to sell all Hong Kong assets. Tony followed the advice and converted all the Shares into cash (HK\$5million). Tony immediately utilised the cash to buy a house in the UK with a genuine intention that it represented the best investment opportunity for the trust. The house is now only worth HK\$2million because of an unforeseen economic downturn in the UK.

At around the same time in June 2015, when Tony was attempting to sell the Land, one of his clients Richie (who is a major property developer in Hong Kong) told him at a cocktail party that Richie’s company just acquired a plot of land adjoining the Land and was hoping to purchase the Land so that the 2 plots could be developed together. Richie told Tony the following:

“I know from the land search that you are the legal owner of the Land holding it on trust for someone else. Probably you know the market is going down soon, so why don’t you tell your beneficiary that the market is looking bad, it is better to sell the Land, and I will buy it from you at market price? The Land is now worth HK\$50million. I think if the Land is developed and sold with my adjoining plot it is going to be worth HK\$70million on its own even in a bad market. You know I won’t treat you badly, I will give you HK\$5million as commission if you successfully persuade your beneficiary to sell it to me at HK\$50million within 2 weeks.”

The next day, Tony told Benny that the market was falling and it was better to sell the Land at HK\$50million, and Benny agreed. Tony did not inform Benny that Richie was the buyer, nor did he tell Benny that he was receiving a commission.

In August 2015 after the completion of the formalities, Richie duly paid HK\$5million into Tony’s bank account. Tony used all the HK\$5million to buy shares of Kowloon Telecom and they are now worth HK\$8million. As Richie forecasted, notwithstanding the gloomy Hong Kong property market, the Land is now worth HK\$70million.

Advise Benny of possible claims against Tony. There is no need to discuss the liability, if any, of Richie.

[25marks]

QUESTION 8

Aston was a wealthy businessman. Upon invitation from his close friends, in January 2013, he invested in Chill Out Ltd (a private company) that runs a cigar and wine bar. The bar was hugely successful and has frequently attracted celebrities because of its privacy and restricted membership. The financial year-end of Chill Out Ltd falls on 31 December every year.

In January 2015, Aston fell in love with Giselle, a leading cigar critic and commentator, when she was invited to attend an event at the bar. He decided to make a special gift for her birthday in July 2015. Over her birthday candlelight dinner, Aston told Giselle the following:

“Chill Out Ltd’s performance is well beyond expectation in 2015. I am expecting to receive a significant number of bonus shares from the company by the end of this year. You are so well known in the cigar world that I want to give you a stake in the company as your birthday gift. Whatever number of bonus shares that I may receive, once I receive those shares, I will transfer them all to my lawyer Olivier who will hold them on trust for you. I will make sure the share transfer is sorted very soon after the New Year public holidays and you need to do nothing, and afterwards you will become a stakeholder in my famous bar.”

Having heard what Aston told him, Giselle resigned from her job the next day, believing that she would be able to sustain her living from the bonus shares.

On 31 December 2015, Chill Out Limited declared 1million bonus shares in favour of Aston. On 5 January 2016, Aston executed the relevant share transfer forms in favour of Olivier but then kept the executed forms in a safe in his bedroom.

Aston has always been settling his repayments of a personal loan towards Kowloon Bank in the monthly amount of HK\$500,000 by auto-pay on the 1st day of each month. On 1 February 2016, because of a computer error, the amount was automatically debited twice from Aston’s account.

On 1 March 2016, Aston purchased a second-hand sports car from Bad Motors Ltd (“BML”) for HK\$200,000. BML represented in the promotional materials that the car only had a mileage of below 20,000 miles. Aston was subsequently informed by his garage that the car in fact had a mileage of over 100,000 miles and the meter had been wrongfully altered. This fact was known to BML when it put up the promotional materials.

Aston was killed in a traffic accident on 31 March 2016 and Adam is now his executor. Adam subsequently discovered the aforesaid mistaken payment but Kowloon Bank had already gone into insolvent liquidation on 1 March 2016 and it did not know of the mistaken payment before then. The share transfer forms remained in Aston’s safe upon his death. BML had also gone into insolvent liquidation on 1 March 2016.

Advise the parties.

[25marks]

BARRISTERS QUALIFICATION EXAMINATION 2016
PAPER III: CRIMINAL LAW, CRIMINAL PROCEDURE
& CRIMINAL EVIDENCE

QUESTION 1

Esther Moore (EM,) a 23 year old Tanzanian National, arrived in Hong Kong on a flight from Singapore. EM was stopped as she made her way through the green “Nothing to Declare” channel. In her left front trouser pocket Customs Officers found 5.25 grammes of a crystalline solid containing 5 grammes of methamphetamine hydrochloride.

A further search of EM’s hand luggage revealed two hidden compartments which, when opened contained more dangerous drugs. These drugs were examined by the Government Chemist who determined that the drugs were in fact 1,155 grammes of a crystalline solid containing 1,095 grammes of methamphetamine hydrochloride.

EM’s case was committed for trial, before the Judgment of the Court of appeal in CACC 418/ 14 & CACC 327/ 15 was delivered on 2nd September 2016.

- (a) What charge(s) is EM likely to face, and what sentence is EM likely to face if she is convicted after trial? In which Court will the trial take place? Make reference to any appropriate sentencing authorities and/or principles. (10marks)**
- (b) What sentence is EM likely to face if she were to plead guilty at any stage before the first day of trial? (2marks)**
- (c) What difference to sentence (on a not guilty plea and a guilty plea) would there be, if any, if the drugs were in fact ketamine and not methamphetamine hydrochloride? (3marks)**

EM has indicated that she has information to provide to the authorities. As a result of the information provided by EM, the authorities were able to arrest and charge Peter Ng (PN) for the offence of conspiracy to traffic in a dangerous drug.

- (d) With reference to appropriate authority what discount, if any, can EM expect and what principles govern discounts over and above the normal discount from sentence for a guilty plea? (10marks)**
[25marks]

QUESTION 2

At 16:00 hours on 1st September, Terry Lam (TL,) a 15 year old student, whilst in school uniform was stopped outside his school by PC58500, who was in police uniform. In his rucksack, the officer found a knife (6 inches in length). Before the search took place, PC58500 asked for and was given TL's ID card which showed TL's date of birth as being 1st July 2001. PC 58500 checked over the beat radio that TL was not a wanted person and that TL had a clear record.

When the knife was found, PC 58500 asked TL why he had the knife in his rucksack. TL responded "I've been bullied by my classmates so I kept the knife for self defence." TL was never arrested or cautioned at the scene. This admission was recorded in PC 58500's notebook and signed by TL.

TL has been charged with one count of possession of an offensive weapon contrary to s.33 of the Public Order Ordinance, Cap 245. The Secretary for Justice has given his consent to prosecute.

- (a) Advise on the admissibility, or otherwise, of the verbal admission and the notebook entry procured by PC58500. (10marks)**
- (b) What sentence would TL expect to receive if he were convicted after trial and why? (3marks)**

In the same scenario as above, TL is 21 years old and in full time employment. When questioned he states "I found the knife and was going to hand it into the police station when I had time."

- (c) Is the verbal admission admissible at trial? What sentence would TL expect if he were convicted after trial, or if TL pleads guilty, and why? (3marks)**
- (d) You represent TL. TL has indicated that he wishes to plead guilty but wants to know if he can be fined or maybe be the subject of a Probation Order or a Community Service Order? Before trial, are there any steps that can be taken which might result in a sentence in accordance with the wishes of TL? If yes, what should TL's legal representatives do? (9marks)**
[25marks]

QUESTION 3

Peter Lee (PL) aged 15 years and 6 months, was charged with one count of theft contrary to s.2 of the Theft Ordinance. The count alleged that PL stole a mobile phone from a rucksack belonging to a Betsy Wu as they were waiting at the traffic lights in Carnarvon Road in Tsim Sha Tsui. The offence took place in the early evening as people were leaving work and the area was very crowded.

The mobile phone was brand new and valued at HK\$7,500. The Magistrate commented that these “pick pocketing” offences were extremely serious and had become all too prevalent, especially in busy hubs such as Tsim Sha Tsui. He stated that a deterrent sentence was required to send a message.

- (a) **What considerations, if any, does the Magistrate have to comply with when it comes to sentencing PL, and what would be the most likely sentence PL would receive?** (20marks)
 - (b) **Would your answer to (a) be different, and why, if PL was in fact only 13 years and 6 months old at the time of conviction?** (3marks)
 - (c) **If PL was a person of clear record and aged 25, what likely sentence would he receive if he was convicted after trial?** (2marks)
- [25marks]**

QUESTION 4

At a trial on Indictment before the Court of 1st Instance, if the Defendant pleads not guilty a jury must be empaneled to try the case:

- (a) Who selects the jury panel and who selects those members of the jury from that panel? (2marks)**
 - (b) How many jurors normally sit on a jury in a criminal trial in the Court of 1st Instance? Make the appropriate references to the appropriate Ordinance. (3marks)**
 - (c) Who may be exempted from jury duty? (5marks)**
 - (d) Explain peremptory challenges, and who may make use of peremptory challenges? What other methods are there to challenge a juror? (5marks)**
 - (e) Explain what a majority verdict is? (10marks)**
- [25marks]**

QUESTION 5

Part 1

You represent Mr. Kareem SHAH, who is remanded in custody to appear before Kowloon City Magistrates' Court tomorrow for Pre-Trial Review. SHAH is charged with a single count of 'Burglary' committed on 1st August this year and made his first appearance some six weeks' ago, at which time the Duty Lawyer made an application for bail. The prosecution objected on the grounds that the offence was serious, and had in any event been committed whilst SHAH was admitted to bail for an offence of 'Theft' which is pending trial at Shatin Magistracy on 1st December. The application for bail was declined. SHAH instructs you to renew the application tomorrow.

- (1) What information (if any) are you entitled to provide in support of the application? (5marks)**
- (2) What information (if any) may be provided in support of any subsequent application? (5marks)**

Part 2

Peter KWONG has pleaded 'Guilty' to stealing a rucksack belonging to a student from the library of the University of Hong Kong. KWONG is a middle-aged adjunct professor of 'Ethics' at the University. He has an excellent job, a fine reputation and an unblemished character. He says he took the bag at random – acting on impulse because it might be an exciting thing to do.

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

- (3) Explain where and how such an application for bail might be made? (5marks)**
- (4) Is the current remand in custody justified? Support your answer with relevant authority. (10marks)**
[25marks]

QUESTION 6

You represent Eric TANG who, together with Ernest WONG is charged with 'Criminal Damage' contrary to s.60(1) of the Crimes Ordinance, Cap. 200.

The case arose from a 'clearance' operation in which TANG contracted WONG to clear a plot of New Territories' land of which TANG claims to be the registered owner. For the last 20 years, the land has been partially occupied by Ronald SO and his family. SO says he originally paid a small rent as a 'tenant', but stopped paying when the landlord's representative stopped visiting over 10 years' ago. SO had built 3 chicken sheds and a pigsty on the land, which were demolished when WONG and his crew arrived.

- (a) Advise TANG and WONG as to possible defences to the charge. Support your answer by reference to the relevant statutory provisions. (10marks)
 - (b) With reference to authority, how might the defences advanced by TANG and WONG be treated by the Courts? (10marks)
 - (c) With reference to authority, determine whether pursuant to section 59(2) of the Crimes Ordinance, property may be treated as belonging to a person having custody and control of it only if that custody and control is lawful? (5marks)
- [25marks]**

QUESTION 7

Your client Raymond SHIU was convicted after trial in the District Court of one count of Robbery, contrary to s.10 of the Theft Ordinance, Cap. 210. The charge particularized an attack on Mary TSE at 2a.m. on Wyndham Street, during which SHIU allegedly pushed TSE to the ground and stole her handbag.

Two police officers arrested SHIU as he ran from the scene. Both testified as part of the alternative procedure adopted by the court that when he was stopped, SHIU said, “*Don’t know why she fell. I only pushed her once. I just wanted to snatch.*” SHIU was arrested and taken from the scene. He was later interviewed under caution.

In his defence, both on the special issue and again on the general issue, SHIU alleged that on the way to the station in the van he had been punched on the stomach by the first officer, PC12345, and that at the police station the second officer, PC 54321 had told him that he had better co-operate, or he could expect much worse.

SHIU denied having said anything at all to the police, either at the time of his arrest or at the police station. The two officers denied any assault and denied that he had been threatened and induced to co-operate.

In his ruling on the special issue, the trial judge said:

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

“Even though the defendant denied having said anything at all, an issue of admissibility was still raised because of the suggestion that the accused had been punched by the arresting officers and induced to co-operate.”

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

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

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

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

Question continued on next page.

SHIU was sentenced two weeks later to five and a half years' imprisonment. He has approached you to seek advice as to whether or not any arguable grounds of appeal exist in the light of the extract of the judge's ruling on the special issue.

- (a) What would be your advice to SHIU and why would you give him that advice? (10marks)**
 - (b) What would be the venue of any such appeal? (5marks)**
 - (c) Would SHIU require leave to appeal? (5marks)**
 - (d) Within what period should any such appeal be made? (5marks)**
- [25marks]**

QUESTION 8

You represent KO, LO and MO who are charged with ‘Burglary’ before the District Court. The charge reads:

Statement of Offence

Burglary contrary to section 11 (1) (b) of the Theft Ordinance, Cap. 210

Particulars of Offence

KO Sze-dan, LO Pak-go and MO Man-tai you are charged that on divers days between 12th January 2016 and 19th May 2016 in Hong Kong you entered flats ‘A’, ‘C’ and ‘E’ on the 3rd floor and flat ‘B’ on the 5th floor of a building situate at No. 27 Kennedy Town New Praya, Hong Kong and stole a gold ‘Platini’ wristwatch valued at HK\$47,000.00, one diamond finger ring valued at HK\$44,000.00, one gold necklet chain valued at HK\$75,500 and one jade pendant valued at HK\$25,000.00, the property of June WONG, Karl KWOK, Lucy LAW and Monty MAN.

- (a) Comment on the charge and, with reference to authority, advise your clients of the appropriate remedy. (5marks)**

You represent Mandy MATABELE, a Nigerian asylum seeker charged with ‘Unlawfully and Maliciously Administering a Poison with intent to Aggrieve’ etc. contrary to s.23 of the Offences Against the Persons Ordinance, Cap. 212, and ‘Theft’ before the District Court. The prosecution case is that Mandy stole a wallet, cash and credit cards from an Australian businessman - (PW1) to whom she had administered a drugged drink and escorted from Howler’s Bar in Wanchai to the nearby Yat Chi Gau Deem Love Hotel. PW1’s statement is that he had a couple of drinks with Mandy in the bar, before accepting her invitation to go to the hotel. He can only remember placing his wallet on the bedside table before falling unconscious under the effect of the drug. He woke, some 3 hours later, when a cleaner entered the room. Mandy and the wallet were gone. Mandy denies any wrongdoing and says she left the room after PW1 fell asleep and it became clear that, “*nothing was going to happen.*”

For the prosecution, the cleaner (PW2) states that when she entered the room to change the towels PW1 was asleep but woke-up when she switched-on the light. She did not notice any wallet. PW3, the manager of the hotel, testified that after receiving the complaint, he called the Police. In cross-examination, he stated that there were 12 staff on duty that night, including 6 cleaners – all of whom were provided with ‘pass-keys’. CCTV video confirms Mandy to have left the room about 30 minutes after she ‘checked-in’ with PW1. Blood and urine toxicology tests reveal PW1 to have been administered a heavy dose of barbiturates – commonly referred to as a ‘Date-Rape’ drug.

At the close of the prosecution case, you make a submission of ‘No Case to Answer’.

Question continued on next page.

- (b) With reference to authority, what is the appropriate test to be adopted by the Court in determining whether there is a case to answer in the case in question? (5marks)**

The learned Judge rules Mandy has a 'Case to Answer'. She gives evidence and is unshaken in her story during cross-examination. At the end of the trial, Mandy was convicted. In his reasons for verdict the learned Judge stated (inter alia):

"At the halfway point I found there was a case to answer as there were clearly inferences of guilt which could be drawn against the defendant. I accepted the evidence of all prosecution witnesses and believed them. I find that the inferences can be taken to their logical conclusion and am satisfied beyond reasonable doubt that the defendant drugged PW1 and stole the victim's property."

- (c) With reference to authority, comment on the Judge's reasons for verdict in this extract? (5marks)**

Consequent upon her conviction, Counsel for the Prosecution made an application for costs against Mandy. In his reasons for costs, the learned Judge stated:

"This was a crime made all the more insidious by the dishonest conduct of the defendant. Persons such as she take advantage of honest visitors and in doing so bring the justifiably proud and hard-won reputation of Hong Kong as a 'World City' into disrepute".

- (d) Comment on the Judge's reasons for costs and support your answer with authority, where appropriate. (5marks)**

- (e) Advise Mandy, who wishes to appeal against the award of costs to the prosecution. (5marks)**

[25marks]

BARRISTERS QUALIFICATION EXAMINATION 2016

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

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

QUESTION 1

Joshua has been a teacher of liberal studies in a secondary school in Hong Kong for the last five years. Part of the curriculum of liberal studies has involved critical discussions on topics of rule of law and socio-political participation in Hong Kong.

On 23 August 2016, the Chief Executive of the Hong Kong Special Administrative Region announced that measures would be introduced in schools in Hong Kong to combat the spread of ideas relating to “Hong Kong independence”. He stated that ideas relating to “Hong Kong independence” must not be “planted in the minds of innocent schoolchildren” and that “educators in Hong Kong schools have the sacred duty to safeguard the sovereignty, territorial integrity, security and development interests of the People’s Republic of China and the stability and prosperity of the Hong Kong Special Administrative Region of the People’s Republic of China”.

By written direction to all schools, the Permanent Secretary for Education announced on 23 August 2016 the policy, to be implemented in the new school year starting on 1 September 2016, pursuant to regulation 98(2) of the Education Regulations (Cap. 279 sub leg A) that all registered teachers shall not continue to serve in schools in Hong Kong unless and until he or she shall have taken and subscribed an oath or affirmation that he/she will uphold the Basic Law of the HKSAR of the PRC and pledge allegiance to the HKSAR of the PRC.

Joshua was asked to take the above oath/affirmation by the school principal on 1 September 2016 but he declined to do so, saying that he “conscientiously object” to the above policy. The school principal suspended Joshua from his teaching duties and reported the matter to the Education Bureau on the same date.

The Permanent Secretary for Education decided on 9 September 2016 to exercise her power under section 47 of the Education Ordinance (Cap. 279) to cancel the registration of Joshua as a teacher. In the letter of the same date to Joshua, the Permanent Secretary indicated that, having taken advice of the Department of Justice, by reference to his conduct of not taking the oath/affirmation and raising “conscientious objection” to the policy, he had behaved in a manner which, in the opinion of the Permanent Secretary, constituted professional misconduct and in a manner which appears to the Permanent Secretary to be prejudicial to the maintenance of good order and discipline in the school in which he teaches, so that the grounds for cancellation under section 47(d) and (e) apply respectively.

Question continued on next page.

Section 47 of the Education Ordinance states:

“The Permanent Secretary may cancel the registration of a teacher –

...

(d) if it appears to the Permanent Secretary that the teacher has behaved in any manner which, in the opinion of the Permanent Secretary, constitutes professional misconduct; or

(e) if it appears to the Permanent Secretary that the teacher has behaved in any manner which, in the opinion of the Permanent Secretary, is prejudicial to the maintenance of good order and discipline in the school in which the teacher teaches.”

Regulation 98 of the Education Regulations states:

“(1) No instruction, education, entertainment, recreation or activity of any kind which, in the opinion of the Permanent Secretary, is in any way prejudicial to the welfare of the pupils or to their education generally shall be permitted upon any school premises or upon the occasion of any school or classroom activity.

(2) The Permanent Secretary may give directions in writing or other guidance to the management authority of any school as to the dissemination of information or expression of opinion of a political nature in that school, so as to ensure that that information or opinion is unbiased.”

Joshua lodged an appeal to the Appeal Board under Part V of the Education Ordinance. At the request of the Appeal Board made under section 59(4) of the Education Ordinance, the Secretary for Justice appointed a barrister in private practice to act as legal advisor to the Appeal Board.

At the hearing of the appeal on 14 October 2016, Joshua was represented a barrister in private practice as his authorized representative and the Permanent Secretary was represented by a legal officer of the Department of Justice as her appointed representative. Joshua gave oral evidence explaining his conduct, emphasizing that: (1) Students should be informed of the variety of views of the various political organizations in Hong Kong across the political spectrum; (2) He objected to giving the oath/affirmation under the policy because he genuinely considered that the oath/affirmation had nothing to do with ensuring that dissemination of information or expression of opinion of a political nature in schools is unbiased; he believed that the policy would hinder his freedom in the teaching of liberal studies and dampen and not sharpen the students’ ability to critically assess matters of importance to their future lives in Hong Kong; and lastly the policy was imposed without due consultation of teachers; (3) He had discharged his teaching duties professionally in the last five years in liberal studies; and (4) Since the principal had suspended him from teaching after he had declined to take the oath/affirmation and he had complied with the principal’s decision, the good order or discipline of the school could not have been prejudiced in any possible way.

Having heard the submissions of the parties to the appeal, the Appeal Board and the legal advisor retired in private to consider the decision.

Question continued on next page.

After concluding the deliberations, the Appeal Board announced orally in the presence of the parties that upon receiving the legal advice of the legal advisor, the Appeal Board is of the unanimous view that the Permanent Secretary's decision should be confirmed and therefore the appeal must be dismissed. Joshua's barrister demanded the Appeal Board to state the legal advice it had received but the Appeal Board refused.

On 17 October 2016, the secretary of the Appeal Boards Panel served on Joshua a notice in writing of the decision of the Appeal Board together with the record of the said oral announcement of the Appeal Board under the heading "reasons for decision pursuant to section 64 of the Education Ordinance". Section 64 states, inter alia, that an Appeal Board on the hearing of an appeal shall state its reasons for its decision and that the secretary shall serve on the appellant and the Permanent Secretary notice in writing of the decision of the Appeal Board together with its reasons for decision.

Joshua would like to apply for judicial review of the decisions made against him or in respect of him. Advise Joshua on the grounds for review and the remedies he should seek by way of judicial review.

[25marks]

QUESTION 2

You have been assigned on legal aid to act for a Bangladeshi asylum seeker Mr. X to challenge the decision of the Torture Claims Appeal Board (TCAB) to dismiss Mr. X's appeal against the rejection of his non-refoulement claim that if he were returned to Bangladesh from Hong Kong, he would be persecuted on the ground of his religious belief and killed by Muslim radicals who had beaten him up severely 1 month before he fled from Dhaka, Bangladesh, to Hong Kong; that although he went to the police station to report the beating, the police officers at the police station refused to record his complaint in a First Information Report unless he paid them bribes; and that he could not relocate to another place in Bangladesh because he was told by his journalist friend that the Muslim radicals had put his name on a 'kill list' that had been distributed across the country. Your instructing solicitors have sent you the following letter from the Clerk of the Judge in charge of the Constitutional and Administrative Law List:

- "1. The Court has read the Notice of Application for Leave to Apply for Judicial Review (Form 86) filed in the case.
2. The Court notes that the Form 86 was filed after the expiry of the three month period beginning from the date of the decision of the TCAB.
3. Before the Court proceeds to consider whether leave to apply for judicial review should be granted, the Court would like to receive a succinct written submission from the Applicant on the related issues of delay and extension of time, which appear to have been inadequately addressed in the Form 86."

Your instructing solicitors have provided you with the following instructions:

Mr. X was devastated by the decision of the TCAB. He slashed his wrists and was discovered by a flatmate who alerted the police and sent him to hospital. The doctors at the Accident & Emergency Department of the hospital had concerns over his mental wellbeing and referred him to the Psychiatry Department of the hospital. The psychiatrists of the Psychiatry Department certified that he was in need of compulsory treatment. Hence he was committed to be in psychiatric treatment for 1 month.

After 1 month of psychiatric treatment, Mr. X was certified to be stable and discharged from hospital. At the discharge interview, he told the social worker at the hospital that he had "legal problems" and the social worker referred him to see a duty lawyer of the Free Legal Advice Scheme. Mr. X was then told that the Free Legal Advice Scheme could only arrange a duty lawyer to see him in 4 weeks' time.

When he met the duty lawyer 4 weeks later, the duty lawyer told him, after reading the TCAB's decision, that the only way to challenge it was by lodging an application for judicial review and then signed a reference letter to the Legal Aid Department.

Mr. X was concerned about the costs of litigation and did not go to the Legal Aid Department until he was persuaded by his flatmate to "give it a try" 10 days later.

Question continued on next page

At the office of the Legal Aid Department, Mr. X was told by the staff that the processing of his application for legal aid would take at least 2 months and since the 3 month period was about to expire, he should lodge on his own an application for leave to apply for judicial review to preserve his position.

However, Mr. X did not lodge an application for leave to apply for judicial review on his own with the High Court because he did not know how he should argue against the TCAB's decision.

Four months thereafter, the Legal Aid Department made an offer of legal aid that Mr. X promptly accepted. The solicitors assigned by the Legal Aid Department interviewed Mr. X a week later and Mr. X handed over copies of the TCAB's decision and the appeal bundle before the TCAB.

The solicitors took 2 months to read the papers provided by Mr. X, to take instructions from him, and to review the drafts of the notice of application for leave to apply for judicial review and the verifying affirmation. Then the solicitors were of the view that counsel should be assigned to review on the merits of Mr. X's case and requested assignment of counsel from the Legal Aid Department.

A further 4 weeks passed before you were assigned. A week then passed before you were sent the papers. It took you 5 days to read the papers, revise the notice of application for leave to apply for judicial review and the verifying affirmation, and have the revisions clarified and cleared by Mr. X. The solicitors eventually filed the notice of application for leave to apply for judicial review with the High Court 7 days later due to an intervening long holiday weekend.

Your instructing solicitors have asked you to draft the written submission required by the Judge, citing all relevant statutes, rules of court and cases.

[25marks]

QUESTION 3

Mr. Leung Tin Kei, a member of a local political group in favor of Hong Kong independence, intended to run for the 2016 Legislative Council (LegCo) election. The Electoral Affairs Commission decided that each candidate nominated must submit to the relevant Returning Officer (“the RO”) a duly signed Confirmation Form, which contains the following:

1. In respect of the above election, I have, in accordance with section 40(1)(b)(i) of the Legislative Council Ordinance (Cap. 542), already declared in the nomination form that I will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region
2. I understand that to uphold the Basic Law means to uphold the Basic Law including the following provisions:
 - i. Article 1
The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China.
 - ii. Article 12
The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.
 - iii. Article 159(4)
No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong.
....
3. ...
4. I hereby confirm that I understand the content of paragraph 2 above and, in particular, the reference to Article 1, Article 12 and Article 159(4) of the Basic Law, and, on that basis, I have declared in the nomination form that I will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region.

In addition, a candidate also needed to submit to the relevant Returning Officer (“the RO”) a Nomination Form during the prescribed nomination period. The RO must decide as soon as practicable whether the candidate’s nomination is valid or not according to the relevant regulations. In Mr. Leung’s case, the RO disqualified him on the ground that he did not change his previous stance for Hong Kong independence.

In the case of *Lau San Ching* [1995] 2 HKLR 95, the Court of Appeal held that the proper and usual remedy for an aggrieved elector whose nomination has been declared invalid by the RO is by way of an election petition lodged after the end of the election, and also emphasized by majority that the court could not entertain any intermediate judicial proceedings seeking to challenge the various intermediate stages of an election before the end of the election.

Question continued on next page.

Now the LegCo election is over. Before bringing an election petition and possible judicial review application, provide Mr. Leung with a discussion of and your advice on the following issues:

- (a) He is now afraid that, if he challenges the constitutionality of the new requirement that a candidate must submit to the RO a duly signed Confirmation Form, whatever decision the HKSAR courts come, the HKSAR government will not respect that decision. He asks whether there will be finality in the Court's decision? (15marks)**
- (b) He is concerned that China may push forward Article 23 legislation after the 2016 LegCo election. If LegCo still refuses to pass it, he worries that the Chief Executive may issue an executive order to fill in the legislative gap. Will it be constitutional for the Chief Executive to do so? (10marks)**

[25marks]

(Section 40 of the Legislative Council Ordinance provides:

“(1) A person is not validly nominated as a candidate for an election for a constituency unless-

...

(b) the nomination form includes or is accompanied by-

(i) a declaration to the effect that the person will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region;

...”

Article 23 of the Basic Law provides:

“The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.”

Article 48 of the Basic Law provides:

“The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

...

(4) To decide on government policies and to issue executive orders;

...”

QUESTION 4

In the case of *Leung Lai Kwok Yvonne v. The Chief Secretary for Administration and Others* (HCAL31/2015), Ms. Leung sought to challenge three decisions of the HKSAR Government: (a) the decision to commence public consultation on the method of selecting the Chief Executive of Hong Kong in the form of the consultation document (“the Consultation Document”) issued on 7 January 2015, (b) the decision to issue the Consultation Document itself, and (c) the decision to issue the Consultation Report and Proposals on the “Method for Selecting the Chief Executive by Universal Suffrage” dated 22 April 2015 (“the Consultation Report and Proposals”). She failed to get leave for judicial review.

After losing the case, she has done more research on the Basic Law. She is still unclear about two issues. The first is about the inconsistency between Article 7 of Annex I to the Basic Law and the 2004 Interpretation of the Basic Law made by the NPCSC.

Article 7 of Annex I provides:

“If there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People’s Congress for approval”.

The 2004 Interpretation states:

“3 ... The Chief Executive of the Hong Kong Special Administrative Region shall make a report to the [NPCSC] as regards whether there is a need to make an amendment; the [NPCSC] shall, in accordance with the provisions of Articles 45 and 68 of the [Basic Law], make a determination in light of the actual situation in [Hong Kong] and in accordance with the principle of gradual and orderly progress. The bills on the amendments to the method for selecting the Chief Executive and the method for forming the Legislative Council and its procedures for voting on bills and motions and the proposed amendments to such bills shall be introduced by the Government of the Hong Kong Special Administrative Region into the Legislative Council.

...”

Article 7 of Annex I contains three steps while the 2004 Interpretation has added two additional steps. There seems to her to be obvious inconsistency between the two.

Question continued on next page.

The second query is relating to the 8.31 Decision of the NPCSC. In her case, her Counsel made the following submission:

“Pursuant to the 2004 Interpretation, after receiving the CE’s report submitted under step 1 in recommending the need to amend the method for selecting the CE, the NPCSC can only under step 2 decide whether or not to confirm that there is a need to amend the said method. It cannot, in confirming the need to amend, also decide on the “contents” of the amendments, that is, what the proposed amendments or the terms of the amendments should be. This is so as in the 2004 Interpretation, it is stated (in its original Chinese text) that the CE shall submit the report for the NPCSC to (in accordance with BL 45 and 68 and in light of the actual situations of Hong Kong and in accordance with the principles of orderly and gradual progress) “確定”. The Chinese words “確定” can mean only “confirm” or not alone but nothing else.”

She is of the view that the above argument is convincing and in line with the treatment of the NPCSC’s 1999 Interpretation of the Basic Law by the Court of Final Appeal in the case of *The Director of Immigration v. Chong Fung Yuen* ([2001] 2 HKLRD 533; (2001) 4 HKCFAR 211).

Prepare an advice on the following issues:

- (a) The differences in interpretation approaches adopted by Hong Kong courts and the NPCSC; (8marks)**
 - (b) Whether Ms. Leung has an arguable case on unconstitutionality of the 2004 Interpretation; and (7marks)**
 - (c) Whether, as a matter of case law to date, the opinion of Ms. Leung’s Counsel is correct? (10marks)**
- [25marks]**

(The 8.31 Decision states effectively the following:

At Paragraph I: “Starting from 2017, the selection of the CE of the Hong Kong Special Administrative Region may be implemented by the method of universal suffrage” (“the Confirmation Statement”);

At Paragraph II: “When the selection of the CE of the Hong Kong Special Administrative Region is implemented by the method of universal suffrage:

(i) A broadly representative nominating committee shall be formed. The provisions for the number of members, composition and formation method of the nominating committee shall be made in accordance with the number of members, composition and formation method of the Election Committee for the Fourth CE.

(ii) The nominating committee shall nominate two to three candidates for the office of CE in accordance with democratic procedures. Each candidate must have the endorsement of more than half of all the members of the nominating committee.

...”)

Part B (Company Law)

QUESTION 5

Qiaoyang Limited (“Qiaoyang”) is a company incorporated in Hong Kong carrying on the business of OEM manufacturer of soft toys for the purpose of major European sporting events, including World Cup 2016. Qiaoyang has a wholly owned subsidiary incorporated in Hong Kong, Qiaoyang DiEr Company Limited (“DiEr”), which owns the manufacturing plant in Guangxi Province, PRC.

Qiaoyang has a share capital of 100 ordinary shares of HK\$1 each which are fully paid up. It has 4 shareholders, Ron (60%), Roger (20%), Raymond (10%) and Reginald (10%). They were all members of the Sunrise Secondary School Singing Club. After they graduated from university, Roger, Raymond and Reginald started the business of Qiaoyang. They were later joined by Ron, who came from a wealthy family of indigenous villagers in the New Territories who emigrated to the UK in the 1960s and have since acquired a large portfolio of real estate in Central London. Each contributed their respective expertise and contacts to the business.

The board of directors of Qiaoyang and DiEr consist of Roger, Raymond and Reginald respectively. Ron declined a seat at the board on the basis that he is mostly based in the UK. The articles of association prescribe that quorum for board meetings is 2. The articles also provide that notices for board meeting and shareholders meeting must be sent to the registered residential addresses of the director and shareholder (as the case may be) maintained with Qiaoyang.

The production and sales of toys are carried out by DiEr and the bulk of the profits of the business is made by DiEr and reflected in the accounts of Qiaoyang on a consolidated basis.

The business has grown to become successful. In its audited financial statements (consolidated) for the year ended 31 December 2015, Qiaoyang recorded profit of HK\$30,000,000, total assets of HK\$100,000,000, total liabilities of HK\$40,000,000, and total equity of HK\$60,000,000 in respect of which HK\$59,999,000 is reserves.

Over the years the shareholders have advanced loans to Qiaoyang respectively, in Ron’s case the principal as at 1 September 2016 stood at HK\$20,000,000.

Question continued on next page.

Ron is a staunch supporter for the “leave” camp in Brexit. After the Brexit vote in favour of leaving the European Union, he decided to pull all his investments outside of the UK and to re-invest only in the UK. He is particularly concerned that he does not wish to have ongoing dealings with Qiaoyang because it supplies almost exclusively to European clients.

Ron raises the issue of his proposed exit from Qiaoyang with Roger and Raymond, whom he is closer to, and knowing that Reginald is in a detox boot camp in Niue and is not readily reachable. He wants to sell his interests in Qiaoyang to the existing shareholders as soon as possible, and for that he is prepared to sell at a substantial discount of HK\$2,000,000, provided the transaction can be concluded quickly and he can recover his shareholder’s loans with interest at the same time.

Since there is no pre-emption provision in the articles of association of Qiaoyang, after discussion Roger and Raymond offer to buy Ron's shares at the substantially discounted price offered by him, with Roger taking 29 shares and Raymond taking 31 shares, and they will arrange for Ron's loan to Qiaoyang to be repaid. Ron agrees to their offer on 5 October 2016.

On the following day (6 October 2016), Roger and Raymond:

- (1) being 2 of the 3 authorized signatories of DiEr, draw a cheque of HK\$20,000,000 in favour of Ron; and
- (2) obtain a loan in their own names for the share sale consideration, secured on their respective shareholdings in Qiaoyang, and procure Qiaoyang to covenant with the lending bank that Qiaoyang would maintain NAV of no less than HK\$60,000,000.

The share transfer is then completed on 7 October 2016.

On 8 October 2016, Roger sends an email to Reginald (i) informing him that Ron has decided to sell his shares in Qiaoyang to him (Roger) and Raymond; (ii) Ron demanded repayment of his shareholder's loans and has been repaid accordingly; (iii) he is of the view that Qiaoyang has the means to repay Ron and it is best for the company to do so; and (iv) asks Reginald to confirm that he agrees with the above, and that unless he hears from Reginald within 3 days, he would take it that Reginald has so agreed such that there will be unanimous shareholders consent.

Reginald has not been able to check his email until he returns to Hong Kong on 16 October 2016, and upon reading the same he immediately comes to you for advice. He is extremely aggrieved by Roger and Raymond's behaviour in going behind his back, and takes the view that given they have now acquired a majority interest, it is likely that they will sideline him. He wishes to exit from Qiaoyang it at all possible.

Please advise Reginald on the possible courses open to him in redressing the sale and transfer of shares from Ron to Roger and Raymond.

[25marks]

QUESTION 6

Critically compare and evaluate (i) the common law derivative action and (ii) the statutory derivative action under Part 14 Division 4 of the Companies Ordinance (Cap. 622). Which in your view is the better option from the plaintiff's point of view?

[25marks]

QUESTION 7

In 2012, Adam, Bruce and Connie agreed to form a company together to operate a seafood restaurant under the trading name of “Blue Ocean”. That year, they incorporated a company in Hong Kong, Zacharia Ltd (“Z Co”), for that purpose.

Adam, Bruce and Connie each held 10 shares in Z Co. Adam was appointed as the sole director.

Following incorporation, Z Co proceeded to establish and operate the Blue Ocean in Wanchai.

At the time when Z Co was incorporated, Adam and Bruce informally agreed with each other that if the Blue Ocean restaurant was successful and if expansion of the business to include a chain of similar seafood restaurants was desirable, then they would do so through establishment of new companies to operate each new restaurant in the chain. Accordingly, under this agreement, Z Co was only to operate the Blue Ocean restaurant in Wanchai. However, Connie was not aware of this agreement between Adam and Bruce.

By 2013, the Blue Ocean restaurant became quite popular. Although Adam was the only director appointed to Z Co, Bruce helped out significantly in the management of the restaurant business. Adam only made business and management decisions with the agreement of Bruce.

In 2015, Adam and Bruce decided to set up a new branch restaurant for Blue Ocean in Tsim Sha Tsui on their own. They did so by incorporating a new company in Hong Kong, Yulamba Ltd (“Y Co”).

Adam and Bruce were each issued 10 shares in Y Co. Both Adam and Bruce were appointed as directors of Y Co.

After its incorporation, Y Co established and operated a seafood restaurant in Tsim Sha Tsui, also under the name Blue Ocean.

At that time, Connie was constantly overseas and did not know about the opening of the new Tsim Sha Tsui restaurant.

Also in 2015, Adam and Bruce incorporated a third company in Hong Kong, Xavier Ltd (“X Co”). Adam and Bruce were each issued 10 shares in X Co. Both Adam and Bruce were appointed as directors of X Co.

X Co established and operated a new restaurant in Central under the name “Riviera”. The Riviera was operated as a French fine dining restaurant.

Question continued on next page.

After the establishment of the Riviera restaurant, Adam devoted most of his time to the running of the new restaurant. For the most part, Adam left the running of the Blue Ocean restaurants to Bruce and allowed Bruce to make management and business decisions for Z Co and Y Co on his own without the need for consultation with Adam.

In August 2015, Bruce ordered seafood for the Blue Ocean restaurants from a different supplier than the usual one, for a significantly lower price compared with the previous supplier. The seafood from the new supplier was from waters off Japan that were still contaminated with radiation due to the Fukushima nuclear disaster. It was because of this reason that the seafood could be purchased at such low prices.

In October 2015, the press reported that the Blue Ocean restaurants were using contaminated seafood. After widespread publicity, the two Blue Ocean restaurants lost most of their customers.

In December 2015, a creditor of Z Co petitioned for the winding up of Z Co and a court order for winding up was subsequently made against Z Co.

The liquidator of Z Co seeks your advice on each of the following:

- (a) Liabilities (if any) of Adam and Bruce to Z Co in relation to the establishment of the Blue Ocean restaurant in Tsim Sha Tsui by Y Co. (11marks)**
 - (b) Liabilities (if any) of Adam and Bruce to Z Co in relation to the establishment of the Riviera restaurant by X Co. (4marks)**
 - (c) Liabilities (if any) of Adam and Bruce to Z Co in relation to the use of the contaminated seafood in the Wanchai Blue Ocean restaurant. (10marks)**
- [25marks]**

NB for the purpose of this question, it is unnecessary to discuss contract law, intellectual property law or food safety laws.

QUESTION 8

Asia Fitness Ltd (“AFL”) is the holding company of 2 subsidiaries in a corporate group. The group operates a chain of fitness and yoga centres in Hong Kong. AFL owns the fitness centres. The 2 subsidiaries each own a yoga centre. AFL and the subsidiaries are all incorporated in Hong Kong.

Recently the corporate group began facing serious financial difficulties. As at 1 November 2015, AFL and the 2 subsidiaries were insolvent.

The directors of AFL are aware that a number of creditors of AFL are intending to file a petition to wind up AFL.

A board meeting of AFL is proposed to be held urgently to consider a number of matters:

- (1) The sales and marketing staff of AFL were continuing to market membership subscriptions to new customers. AFL’s management is proposing to introduce new long-term contracts of 48-months with discounted fees for new customers. The contracts would require customers to pay upfront for the entire 48-month period. If approved by the board, the marketing manager will issue a memo to its staff to promote the new 48-month membership contracts for new customers. The fitness membership contracts would be entered into between the customer and AFL; while the yoga membership contracts would be entered into between the customer and the subsidiary that owns the yoga centre concerned.

- (2) Jax Ltd (“Jax”) is a major lender to AFL. The directors of AFL are concerned about Jax withdrawing its credit facilities. To forestall such a withdrawal of credit by Jax, Emmanuel, one of the directors of AFL, is proposing that AFL should grant fixed charges to Jax over the fixed assets of AFL and a floating charge over all the other property of AFL.

Emmanuel proposes that the charges be granted to secure all existing and future debts owed by AFL to Jax. Emmanuel believes that as long as Jax continued to provide credit to AFL, then AFL would be able to trade out of its present financial difficulties.

- (3) The directors of AFL have also been negotiating with a potential white knight to inject capital into AFL. Felicity, another director of AFL, has been leading the negotiations on behalf of AFL. Felicity believes that with an injection of capital and with suitable compromises entered into with the creditors of AFL and its subsidiaries, it would be possible for the companies in the corporate group to avoid being wound up.

Question continued on next page.

Presently, the following are the creditors of AFL:

- (i) Jax (which is presently still an unsecured creditor).
- (ii) Various unsecured trade creditors.
- (iii) Employees of AFL who are owed outstanding wages.
- (iv) The subsidiaries of AFL which previously provided unsecured loans to AFL.

Under Felicity's proposed rescue scheme:

- (i) the employees of AFL would be paid the amount of their statutory preferential claims in full and would be treated as ordinary unsecured creditors in respect of any balance;
- (ii) the subsidiaries of AFL would give up their claims; and
- (iii) Jax and all other unsecured creditors would receive dividends consisting of a mixture of cash and new shares in AFL.

Each of the 2 subsidiaries of AFL would also enter into identical schemes with their creditors.

The directors of AFL seek your advice on each of the following:

- (a) What are the possible legal liabilities (if any) for AFL's directors under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) in relation to the proposal by the management of AFL for the company to enter into long-term membership contracts with customers? (5marks)**
- (b) Whether the proposed charges in favour of Jax could be set aside by the court under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) if AFL subsequently entered into liquidation in April 2016? In your answer, assume that the charges would be duly registered. (10marks)**
- (c) How the rescue scheme proposed by Felicity could be implemented under the Companies Ordinance (Cap. 622), including the legal requirements which need to be met for the scheme to come into effect and whether the proposed rescue scheme could be defeated by creditors seeking to wind up AFL or its subsidiaries? (10marks)**

[25marks]

BARRISTERS QUALIFICATION EXAMINATION 2016

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

Part A (Civil Procedure and Civil Evidence)

QUESTION 1

You are briefed to represent the Plaintiff to oppose the Defendant's summonses dated 12th November 2014 and 4th March 2016. A Chronology prepared by your instructing solicitors is attached.

The Plaintiff's claim is for a debt of USD300,000 for the purchase of jade sold and delivered by the Plaintiff to the Defendant. The Plaintiff sent an invoice dated 19th October 2011, which despite repeated demands, the Defendant has never paid nor returned the jade. The Plaintiff issued a writ and proceedings have progressed as set out in the Chronology. The Defence pleads that the Defendant is a jade retailer who did not purchase the jade, rather it was on consignment for sale to customers and he was entitled to return unsold jade without payment, referring to emails and invoices in support. Despite requests the Defendant failed to disclose the emails and invoices and to file a timetabling questionnaire.

The Plaintiff served a CMS but the Defendant failed to attend the CMC. The Defendant did not comply with the 17th March 2014 Unless Order ("the Unless Order") and default judgment was entered.

The Defendant admits he had notice of the CMS, CMC and Unless Order. His solicitors Lau & Lau repeatedly advised him of his discovery obligations which he disputed so they came off the record. The Defendant's correspondence, court documents and affirmations are in English, with no interpretation endorsement. His affirmation dated 4th March 2016 says he could not find reliable new solicitors until 5th September 2014 and his English is poor so he considers it most unfair that simply because he did not provide a few documents in time he now has to pay for the jade. He knew he was required to comply with the Unless Order by filing, serving and exchanging his list of documents but decided to wait until he found new solicitors.

- (a) **Identify and explain the applicable procedure and bases for the Defendant's 1st summons and 2nd summons?** (6marks)
- (b) **By when should the Defendant have:**
- (i) **Filed, served and exchanged lists of documents pursuant to any rules or Court Orders?**
 - (ii) **Applied for any extensions of time?**
 - (iii) **Applied for any relief?**

(6marks)

Question continued on next page

(c) What are you required to do before the hearing and why? (6marks)

**(d) Draft the Skeleton Argument of the Plaintiff. Do not draft the heading.
The Defendant has not served a Skeleton Argument. (32marks)**

Your answers should include all relevant jurisdictional and procedural provisions and be supported by authorities.

[50marks]

Chronology on next page.

Chronology

<u>Date</u>	<u>Event</u>
23.1.2012	P demand payment. D did not reply.
25.7.2012	Writ of Summons together with its Statement of Claim
1.8.2012	D acknowledged service of the Writ of Summons
28.9.2012	D filed and served Defence
10.10.2012	P requested discovery and served a notice for the emails and invoices
4.10.2013	D's then solicitors Lau & Lau applied to cease to act
31.10.2013	Lau & Lau ceased to be D's solicitors
16.1.2014	P issued CMS
20.1.2014	P letter informed D of CMC
17.3.2014	Case Management Conference D failed to attend. Unless Order: Unless D do file, serve and exchange his list of documents within 7 days of service of this Order, the Defence be struck out and P be at liberty to apply to enter judgment. (1) Any application for extension of time for compliance with any orders, directions or procedures shall be made not more than 7 days after the date of non-compliance. (2) The parties shall comply with all requirements in relation to preparation for the CMC. (3) Adjourned to 30.7.2014 for CMC.
3.4.2014	Unless Order served on D
9.5.2014	P applied for Judgment against D
27.6.2014	P obtained Judgment – Adjudged that D do pay P USD300,000 with interest and costs
27.8.2014	P served the Judgment on D
5.9.2014	P instructed new solicitors Glass & Co.
12.11.2014	D filed the 1 st Summons for orders that: (1) Judgment dated 27.6.2014 be set aside; (2) Defence dated 28.9.2012 be restored; (3) D do file, serve and exchange D's List of Documents within 14 days from date of the Order.
15.9.2015	Consent Summons: Hearing of D's Summons dated 12.11.2014 be adjourned for argument before a judge with 2 hours reserved
6.10.2015	Order granted by Master Lin: (1) D's Summons dated 12.11.2014 be restored and adjourned to a date to be fixed for argument before a judge. (2) D pay wasted costs.
9.12.2015	Hearing of P's Bankruptcy Petition against D (adjourned due to D's belated response)

Continued on next page.

19.2.2016	<p>Hearing before Master Kwok Order:</p> <p>(1) Unless the D do issue a summons seeking relief against sanctions and file and serve with a supporting affirmation on or before 4.3.2016 the D's Summons dated 12.11.2014 be dismissed.</p> <p>(2) Costs to the P</p>
4.3.2016	<p>D filed the 2nd Summons for orders that:</p> <p>(1) Time be extended for D to apply for relief from sanction for failure to comply with Unless Order dated 17.3.2014 and to file, serve and exchange D's list of documents within 14 days of the Order hereon;</p> <p>(2) D's Defence be reinstated;</p> <p>(3) Default Judgment be set aside.</p> <p>D filed an affirmation exhibiting a draft 1st List of Documents</p>

QUESTION 2

Madam Fung started a traditional Chinese bakery, which she grew to a chain of shops. Wishing to invest in a factory to expand her wholesale and export business she sold her Shatin bakery shop and business (“the Bakery”) to Mr. Pang. Under the sale agreement she warranted that a “*Proforma Shatin Bakery Statement 2014*” (“the Statement”) prepared by her accountant Mr. Goodman CPA:

- (i) *does not contain any material errors,*
- (ii) *whilst not giving a complete picture, does not present a view of the business which is materially misleading”.*

After operating at a loss Mr. Pang filed an action against Madam Fung alleging the Statement contained material errors and presented a view of the business that was materially misleading about profitability in that: (i) the revenues shown were overstated; (ii) inventory was overstated with no provision for slow moving stock items; (iii) the Overhead and Administration Costs were understated; and (iv) depreciation costs were incorrectly omitted, so understating costs. Therefore, Net Profitability in the Statement was grossly overstated. If properly prepared the Statement would have shown the business was making a loss. Madam Fung filed a bare denial Defence. The parties Timetabling Questionnaires and CMS were silent on expert evidence. At the CMC they realized they may need expert evidence. The Master directed any application had to be taken out within 14 days. They are not able to agree anything. Madam Fung wants to rely on Mr. Goodman, and Mr. Pang on Mr. Chan CPA as their experts.

Next to the Bakery is Delightful Decor selling festival decorations. For Mid-Autumn Festival it displayed lanterns outside obstructing foot traffic and preventing customers seeing and entering the Bakery. This caused the Bakery mooncake sales to suffer. Mr. Pang got into a dispute with the salesman Ah Wong, police were called and Mr. Pang was arrested. He is furious. He wants to obtain an immediate *ex parte* injunction to prevent display of Christmas and Lunar New Year decorations outside Delightful Decor. He does not want sales of cakes, cookies and sweets to suffer over the coming holiday seasons. Mr. Pang also wants to join Delightful Decor and Ah Wong in the action because they have caused the Bakery to suffer loss of profits and are also responsible for its poor performance. Madam Fung objects.

- (a) **Advise Mr. Pang on the proper procedure and the expert evidence in this case.** (8marks)
- (b) **Draft the application for expert evidence.** (10marks)
- (c) **Advise Mr. Pang on the injunction.** (12marks)
- (d) **Advise Mr. Pang on parties, and joining each of them to the action.** (20marks)

Your answers should include all relevant jurisdictional and procedural provisions and be supported by authorities.

[50marks]

Part B (Professional Conduct)

QUESTION 3

Mr Silas Chung (“**Silas**”), a junior barrister of 15 years’ standing, was instructed by Mr Stone Wong (“**Stone**”), sole proprietor of Stone Wong & Associates on 3 October 2015, to peruse a set of papers for a new civil case. The papers related to a claim that was proposed to be brought by Stone’s client (**Functional Co. Ltd**) against its supplier (**Distress Ltd**) for failure to supply 25,000 (Guangzhou sourced) plastic Christmas trees on 31 July 2015, in time for the U.S. Christmas 2015 market.

Silas was formally instructed to advise in conference but was told client “expected a sure win” if he wanted to remain in the case. Perusing the papers, Silas recalled that he had acted for Distress Ltd when he first joined the Bar but he was sure it was a small brief and he could not remember the details. He did not tell anyone about this.

On 3 May 2016, Silas Chung was appointed Senior Counsel, together with 3 other junior counsel. After the formal ceremony, the new “Silks” hosted a cocktail party at the Hong Kong Club for members of the Judiciary, Law Society as well as friends and family. Silas invited Stone as well as a number of heads of law firms (who he did not know but wished to meet) to drink and eat with him. Stone was unable to attend due to other commitments but he sent along his litigation clerk, Terence Lam, in his place. Silas had only met him once before.

Over a couple of glasses of champagne Terence invited Silas, who was by then slurring his words, to “*up his rates*” for the Functional matter to mark his new status as a Leading Counsel. Terence also proposed a brief fee, as instructed by Stone, for the upcoming hearing which Terence remarked as being a fee that “you deserve” and which Silas duly accepted.

Silas also told Terence that he wished to have a junior from his chambers to be brought into the case but had to be paid “at least 75%” of his fees. Terence said that he would have to bring this up with Stone. They continued to drink for most of the afternoon. Silas’ memories of that afternoon are sketchy.

Apart from receiving a congratulatory bottle of Japanese Whiskey from Stone the following Monday, Silas did not speak to Stone until the hearing of the summons for summary judgment in *Functional Ltd v Distress Ltd*, which had been fixed to be heard on Tuesday 8 July 2016 before Master A. Sung in the High Court (estimated time: 3 hours).

On 25 June 2016, after having filed and served his submissions in court Silas was sent a backsheet Brief from Stone on 27 June 2016 with “Fee as Discussed” marked on the Brief. Unfortunately, Silas was on his way to the airport when the Brief was delivered to his chambers and he did not read the document. Even though his secretary had scanned a copy of the backsheet to his email address, it ended up in his “Junk” mail folder which constantly gave him problems.

Question continued on next page

When Silas returned to chambers on Monday 7 July 2016 he reviewed his notes, telephoned opposing Counsel to discuss some housekeeping issues that would arise the following morning and had an early night. His bundles, together with backsheet Brief, were delivered to the Master's court by messenger the following morning.

The hearing proceeded on 8 July 2016. During the morning break, officers appointed by the Bar Council entered the Court to make a random check of backsheets. Silas was not able to locate his Brief. A note was made by the Bar Council representative. The case duly concluded. At the end of the hearing judgment was reserved.

The following day when preparing his fee note to be issued to Stone Wong & Associates, Silas noticed the "Fee as Discussed" marking on his backsheet. Clearly puzzled, he telephoned Stone Wong to make enquiries. In a casual tone Stone stated that there was "nothing wrong" and reminded Silas that he had agreed with Terence at the Silks' cocktail that he would not accept any fee should client not succeed at the hearing. Insisting that this had never happened (but also embarrassed for having put himself in such a position), Silas said that if he was not paid, that he would "sue him for every penny that he has" and "bring down your pathetic excuse of a law firm."

Silas proceeded to issue a fee note in the sum of HK\$1,000,000, feeling that this was a fee that he deserved after his recent humiliation. Upon receipt of the fee note, Stone sent Silas an email and told him that he would never pay it.

Silas approaches you, his pupil master, and explains the entire situation as described above. He asks for your advice in recovering his fee from Stone and how the joint tribunal would likely assess his grievance.

Identify the relevant issues; explain these to Silas 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

Part 1

Terence, a junior barrister at Harbourview Chambers, is instructed by Cedrick Chan (“**Cedrick**”) to act for Russell Brank (“**Russell**”), who is engaged in a legal dispute with his business partners over a takeover bid involving a major financial institution, CKM Holdings Ltd.

Russell, a Hong Kong socialite, is the managing director of Northwest Securities Ltd. (“**Northwest**”), which is a Hong Kong listed company in the IT Cybersecurity sector.

Cedrick arranges an initial conference for Terence to meet with Russell and his financial advisors. Terence calls Cedrick just before the scheduled start of the conference and asks whether it could be held at Northwest as “it is just next door to my chambers.” Seeing that this might please Russell, Cedrick makes the necessary arrangements.

Terence then telephones his friend who works as the gossip columnist for the China Times and tells him to send some photographers to the offices of Northwest for photographs that “will be worth your while.” He asks, as a favour, that they take some pictures of him with Russell’s secretary, a Page 3 model from the UK, as he arrives at the Northwest office lobby. He also says to take whatever photographs they want of Russell, who will likely be walking with his mistress just before lunch.

After the conclusion of the conference at Northwest, Cedrick tells Terence, as an aside, that Russell is willing to pay both of them “very worthwhile fees.” But the catch is that Russell has suggested that half of the fees be payable to them by way of shares in the soon to be formed ‘Northwest-CKM Financial Ltd’. This will be done as soon as the takeover has been completed. Terence tells Cedrick that “I am booking my Hawaiian cruise asap.”

Two weeks later Cedrick calls Terence and tells him that the takeover has run into some SFC regulatory issues. To compensate for the trouble, Russell has offered to pay triple the originally agreed fees to both Cedrick and Terence, by way of installments if the takeover goes ahead but that they agree to accept only a \$100 nominal fee for work done to date if the whole deal fails to materialise. Terence says that he would be fine with this and accepts.

Sensing the deal imminent, Terence tells his clerk Kevin to buy some shares in Northwest as they are bound to “fly through the roof.” He tells Kevin that he has good information as he is acting for Russell of Northwest – he also tells him that once he has made his money to buy him a nice bottle of Burgundy.

Question continued on next page.

Discuss all issues of professional conduct which arise on the above facts in respect of Terence's conduct, with reference to the Code of Conduct of the Bar Association of Hong Kong

Additionally provide your own opinion as to how you would have conducted yourself in each of the factual situations set out above.

(25marks)

Part 2

John is instructed to defend Roberta Payne in a District Court trial on a charge of wounding (s.19). Roberta is charged jointly with two other persons, Chan and Sung, with a single count of Wounding. All accused plead not guilty to the charge.

On Day 1, Chan's barrister takes issue with the Record of Interview obtained by the police (which purported to evidence a confession made by his client). He objects to the admissibility of the alleged confession on the ground of involuntariness and coercion by the police to obtain the confession. The trial judge informs counsel to submit written objections, which John hands up to court (having already prepared this beforehand, on instructions). The judge then informs counsel that he would be adopting the alternative procedure to determine the special issue. The first witness to be called for the prosecution will be the arresting and cautioning officer of Chan.

Having expected the judge to call for a voir dire instead, counsel asks for a 1 hour adjournment to take instructions. John goes with his solicitor Stephen Wong and Payne, who is on bail, to Wong's office in Central to discuss the alternative procedure and also whether Payne should give evidence in her own defence on the special issue first.

During the meeting, John then tells Payne that, although this part of the trial is not really his concern, if she does not give evidence she will 100% be convicted - to have any hope at all she must let the court have her side of the story. Payne says that she is far too nervous to be able to offer a convincing version of events, but Payne says that she has no choice in the matter. Payne is then required, as is Wong's practice, to sign an "election to give evidence" form, which she does.

After the discussion, Wong hands John an envelope which he says contains his backsheet Brief which "had already been discussed with your clerk". In a hurry, John puts the envelope in his pocket without checking it.

Wong then notices that court is due to reconvene in five minutes and suggests that they go back to the court building, but John tells him that as there is a voir dire going on at present in respect of another accused, and that their client Payne is not affected by this, there is no need for counsel to be present for that part of the trial. Wong agrees that this is correct, and John sends Payne back to court. John and Wong continue to discuss the case and they eventually make their way back to court an hour later.

Question continued on next page.

During this session, John checks the details on the backsheet and notes that it has not been signed by Wong (the handling solicitor) and does not have the correct dates of the hearing marked. Nonetheless, the backsheet instructs John to represent Payne at trial for the duration of the prosecution case. He confronts Wong with the missing information who tells him that the properly itemized backsheet will be sent to him once the Defence case begins as “this is how we have operated all along”. Wong continues that the litigation clerk must have told John this when he gave him his initial instructions, which John vaguely recalls.

When John and Wong return to court, he is surprised to find that there no voir dire took place as believed. When the judge returns to court he is livid because John was late and “half a day’s costs are wasted.” John lies to the court and tells the judge that he had been stopped for speeding on the way back from Central. The judge tells John that he was on his final warning. John apologises profusely although Payne does not seem amused.

Before John has started his cross-examination of PW1, court adjourns for the day. After court John, Wong and Payne go back to John’s chambers to discuss the next steps.

John asks Payne again about testifying. Clearly stressed, Payne tells him that he is a dishonest man and she thinks that the judge does not like him, having seen that episode in court. John tells Wong, when Payne has gone to the toilet, that he cannot continue to act for an untrusting client and that he will be informing the judge, first thing tomorrow morning, that he is withdrawing from any further representation. Wong says that is fine and will inform Payne. John’s clerk then arranges to return the papers to Wong’s office. John goes to the bar for a drink, then goes out for dinner.

Discuss all issues of professional conduct which arise on the above facts in respect of John’s conduct, with reference to the Code of Conduct of the Bar Association of Hong Kong.

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**

PART C (ADVOCACY)

CACC 1234 of 2016

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CRIMINAL APPEAL No. 1234 of 2016
(ON APPEAL FROM DCCC No. 334 of 2015)**

HKSAR

Respondent

v

Wong Luk Sang

Applicant

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

Counsel is hereby instructed to act on behalf of the Applicant in the above appeal.

Counsel is instructed to draft perfected grounds of appeal against both conviction and sentence and to attend the hearing in the Court of Appeal at **17:00 hours on the Friday 28th October 2016**.

Counsel is directed to the following documents which are attached:

- (1) Reasons for Verdict delivered by HH Judge Ho on 11 November 2015;
- (2) Reasons for Sentence delivered by HH Judge Ho on 11 November 2015.

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 **10:00 hours on Friday 28th October 2016**.

Dated this 24th day of October 2016.

Lai, Lam and Luk
Solicitors for the Applicant

Reasons for Verdict

1. The accused, Wong Luk Sang, faced a single charge of Robbery, contrary to s.10 of the Theft Ordinance, Cap. 210. The charge arose from the robbery, at knife point of the victim, Michael Mok, at 03:00 hours on 1 January 2015 outside No. 99 Albert Lane, Kowloon.
2. The prosecution case was that the accused followed the victim and his family, his wife Moley and 12 years old son Moses, from the car park adjacent to No. 99 and, as they approached the door of their residence at No. 99, the accused thrust a knife at the face of Michael Mok, and demanded that he hand over his wallet. When the victim did so, the accused took HK\$2,000 from it and ran off into the night discarding the wallet in the process.
3. The victim's family cried for help and these calls were heard by PW 4, police constable Horace Ho, who chased the accused and apprehended him some 500 metres from the scene of the attack. The accused made no admission and the stolen property was not recovered. There was no forensic evidence in the case.
4. There were four important prosecution witnesses in this case, viz., the victim, his family members and the arresting officer.
5. Unsurprisingly, in view of the serious allegation against him and the fact that there were three witnesses to the actual robbery, the accused refused to take part in an identification parade. He was however positively identified by all three of the Wong family at trial and Mrs. Wong strengthened her identification by telling us that she had seen the accused on many occasions at his newspaper stall in nearby Alice Street. I am satisfied that the accused was the man.
6. During his very able submission of no case to answer Defence counsel focused on what he described as 'pivotal points'. He noted that the victim had said in evidence that the robber shouted, "Don't move. Money or life.", but that Mrs. Wong had said the robber spoke quite softly and had said, "Robbery. Give the wallet quickly.", whereas the son testified that the man had said nothing at all but had just pointed the knife at his father. Defence counsel belaboured the point that the three family members had variously

described the weapon as “Long and sharp” – the victim, “About 20 cm long and silver coloured” – the wife, and “50 cm long and very bright” – the son. The weapon actually recovered from the inside pocket of the accused was a black-coloured pen knife with a blade of 5cm.

7. Defence counsel described this evidence as inconsistent and self-contradictory and so weak that no jury, properly directed, could convict upon it. With respect that is not the test at that stage of the trial. Had the prosecution produced some evidence of each element of the offence? Had they produced *prima facie* evidence of robbery by the accused? I found that they had. I therefore found that there was a case to answer.
8. The accused testified and the thrust of his evidence was that he had nothing to do with the robbery. He works near to where the victim family lives, he knows them and he would never commit a robbery. His arrest was a case of mistaken identity. All very well, what else could he be expected to say? The police officer PW 4 was adamant that this was the person he had arrested walking quickly away from the place where the robbery had taken place a few short seconds before.
9. A trial judge is in a unique position to judge the veracity and accuracy of a witness’ testimony – he has seen and heard them in the witness box, sometimes for days on end. This is why an appellate court cannot interfere with a judge’s findings of fact. That is the wisdom of our law. I discounted everything the accused said. I simply did not believe him. On the other hand, I accepted all the prosecution witnesses as evidence of truth. One of them was even an experienced police officer.
10. The fact that the money was not found is a neutral fact – the accused could have thrown it away. As to the knife, commonsense dictates that in the immensely stressful circumstances of a sudden and violent attack, victims cannot be expected to be fixated by the weapon brandished by an accused to the exclusion of all else. It is not surprising that there were minor discrepancies in their descriptions. The same stress could have resulted in the slightly varied recall of the witnesses as to the word used by the robber.

11. If the accused was the robber, would he have been in the nearby vicinity, close to the time of the robbery? Yes – and he was. Would he have been leaving the scene? Yes – and he was. Would he have been walking quickly? Yes – and he was. Would the victims have identified him given the opportunity? Yes – and they did.
12. I have recited above that I did not accept defence counsel's submissions on the so-called 'weakness' of this evidence at half-time. I have accepted the evidence of the prosecution witnesses in total – they are honest and truthful - and I accordingly find that the inferences of guilt, which I drew at the half-way stage of this trial in rejecting the submission of no case to answer, must now all be taken to their logical conclusions in finding the accused guilty of the offence as charged.

Dated this 11th day of November 2015

Ho DJ

Reasons for Sentence

1. I take the view that the proper range of sentence for this heinous offence, before any discount I award in the light of the very able mitigation by defence counsel, exceeds the District Court's jurisdiction.
2. This was a robbery, at knife point, of a family with a young child.
3. The victim's dignity was shattered when he was made to hand over his personal possessions and further violation of his self-esteem occurred when he was forcibly deprived of his hard-earned cash. Violent street robberies of this kind must be deterred.
4. I take a starting point of around eight years' imprisonment and, in the light of the accused's continuing denials of having had any part in this offence, I do not feel that he warrants the normal one third discount even if he had pleaded guilty on the first day of trial.
5. Accordingly, I sentence the accused to a period of imprisonment of 6 years and 11 months.

Dated this 11th day of November 2015

Ho DJ