HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

This document and its attachments comprise your instructions for the two parts of the practical assessment. The following are attached:

1. Instructions in relation to the Interim Application (including copy case law)

2. Instructions in relation to the Mini-Trial

3. Trial bundle for Interim Application and Mini-Trial

In the accompanying email you have been advised which party you are representing.

Dress

You will be expected to dress appropriately, that is, as a solicitor would dress when appearing in open court in the High Court: you should therefore where a gown and bands.

Getting to the heart of the matter

It is important to note that, with each candidate given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court or to the jury must be structured and succinct, getting to the heart of the matter without delay.

- It is to be assumed that the court or jury have a very good understanding of the background facts and accordingly, while arguments must of course be put into factual context, there is no need for long, time-consuming recitations of the background facts.

- Remember, in addressing the jury it is not the role of a solicitor-advocate to instruct them on the law, that is the function of the judge.

Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Interim Application

Please assume that this opposed application is being made by the Defendant, Cranberry Industrial Limited, for the trial judge to recuse himself. Candidates, either making the application for recusal or opposing it, will address the member of the Examining Panel who sits in the middle on the basis that he is Mr Justice Felix Chan, the allocated trial judge.

In respect of this application, candidates are to assume the following:

a. that litigation was commenced by the Plaintiff, Dixie Toys Incorporated, in the Court of First Instance on 3 December 2012;

b. that a number of different judges have presided over earlier interlocutory proceedings in the litigation, including the allocated trial judge who, just two months earlier, had presided at a hearing at which, first, by consent, it was agreed that the 4 days allocated for the hearing of the trial should be reserved for the determination of liability only, the issue of quantum to be held over to a date to be agreed should it be required and, second, after argument as to the amount of security only, the Plaintiff, a company incorporated in the United States, was ordered to pay security for costs in a sum of HK$1.5 million.

For the purpose of the application, you may refer to the following, all of which will be available to the Judge and your opponent at the hearing:

i. The statements of case in the trial bundle,

ii. Facts in the witness statements in the trial bundle,

iii. The following case authority, a copy of which is attached:

Deacons v White & Case LLP & Ors [2003] 3 HKC 374

iv. Hong Kong Civil Procedure (the Hong Kong White Book).

The evidential material

(Please note that this evidential material is to be used in the opposed application only and is not to be used in the mini trial.)

Please refer to the following evidential material for the purpose of the application:

a. affirmation of Terence Li, CEO of Cranberry Industrial Limited, in support of the application for recusal;

b. letter to the parties from the judge's clerk;

c. letter from Defendant's solicitors to the judge's clerk and to the Plaintiff's solicitors; and

d. affirmation of Mr Rae White for the Plaintiff in opposition.

A. The affirmation of Terence Li, CEO of Cranberry Industrial Limited, in support of the application for recusal

I, Terence Li, do hereby affirm as follows:

I am the Chairman and Chief Executive Officer of Cranberry Industrial Limited, the Defendant in this matter.

Three days ago I was informed by my solicitors that the judge allocated to preside over the trial of this matter (at which liability only will be determined) is Mr Justice Felix Chan.

While I have no doubt that Mr Justice Chan, who has had an illustrious career at the Bar before being elevated to the High Court in March 2014, will attempt to judge the matter professionally and without bias, I confess to being deeply concerned that, because of our shared history, he may be susceptible to an unconscious bias against me. Moreover, because of that shared history, to which I make reference below, I am concerned that there may be a perception of bias on the part of reasonable observers with knowledge of the matter.

I appreciate that Mr Justice Chan presided over a recent directions hearing in this matter and that I did not seek his recusal at that time. The truth is that, as the hearing was set to deal with two matters, first, a matter already agreed between the parties and, second, a matter in which the only issue to be argued was the amount of security for costs to be paid by the Plaintiff, Dixie Toys Incorporated[1], I did not enquire as to the identity of the judge before the hearing nor was I informed by my solicitor as to that identity. However, outside

[1] Candidates are to assume that Cranberry sought security for costs in the sum of HK$2.5 million, Dixie offering HK$1.25 million.

the court, when I learnt that Mr Justice Chan was to preside, I felt a deep sense of discomfort. I considered whether to inform my solicitor and seek an adjournment so that another judge could be secured but on basis that it was a directions hearing only and could not affect the outcome of the trial I decided not to say anything.

As to the issue of our shared history, 20 years ago Mr Justice Chan and I were in the same class at Saint Ignatius Loyola. For both of us it was our final year at school. There were about 30 of us in the class and we did not mix socially. I am happy to admit that Mr Justice Chan was a member of what we called the 'egghead set' – very intellectual, aiming to be admitted to Oxford or Cambridge or Harvard. I belonged to the set that was not so ambitious. Other than that broad distinction, I knew very little about Mr Justice Chan and I presumed he knew very little about me.

However, 3 years ago, when Mr Justice Chan was still at the Bar, I appeared as appellant before the Tax Review Appeal Board[2] *in respect of another company of which I am the majority shareholder, Peter Pan Holdings Limited. The Board was chaired by Mr Chan SC (as he then was) and two lay members. It was clear to me that Mr Justice Chan thought little of the arguments being advanced by my barrister. Matters got heated and in the later afternoon Mr Justice Chan made a sudden outburst of a personal nature against me. He said to my barrister: "Your client has been like this since school, always trying to wriggle out of things."*

Mr Justice Chan immediately admitted that what he had said was out of order and apologized. As it happened, my appeal was successful so I had nothing to complain about at the time. Later, after the judgment in the matter, he even wrote a short letter to my lawyer, asking him to pass on his apologies to me. He said in the letter that he had been under great stress that day as a very close friend of his from school days, a person who had apparently been in our class and had become a professor of history at Oxford University, had committed suicide after a long struggle with depression.

While I fully accept that Mr Justice Chan had been under stress that day, I am concerned nevertheless that he should make such a derogatory mark about my character, a remark based on his view of me some 20 years earlier.

I confess that I was deeply concerned as to the matter and mentioned it to my wife, Mary (Wong Mei-ling). She was the one who reminded me that about 14 years ago, when we were first seeing each other romantically, she had been attempting to disentangle herself from a relationship with another man. It had been a difficult time as, according to my wife, the other man was very persistent, saying that he could promise her a good future while I could not. My wife reminded me that the other man had been Mr Justice Chan.

I believe that this, at least to a reasonable observer, must go a long way to explaining the reason for the very personal remark made against me in the Tax Review Appeal Board and create the real perception that Mr Justice Chan harbours a personal dislike of myself.

[2] Candidates are to assume that such a Board, an administrative tribunal exists.

If the matters to be determined in the forthcoming trial were entirely 'impersonal', I would not be so concerned but that is not the case. Evidence will no doubt be led of certain remarks made by me which were said in the heat of the moment and were unfortunate and I am deeply concerned that such remarks may further alienate Mr Justice Chan.

B. The letter to the parties from the judge's clerk

The affirmation of Mr Terence Li has been considered by his Lordship.

His Lordship does remember his unfortunate remark made when he was sitting as Chairman of the Tax Review Appeal Board. However, as Mr Li has accepted, an immediate apology was made and a later explanation for the remark was given. Nor has any suggestion been made of actual bias resulting in an outcome contrary to Mr Li's interests.

Whatever may have been the differences in character and interests of the parties in their last year at school, His Lordship accepts that Mr Li has been successful in commerce.

His Lordship further recalls having a brief romantic relationship with Ms Wong Mei-ling (as she then was), just as, as a young man, he had a number of such relationships. None of those relationships now mean anything to His Lordship (who is happily married with two children). He considers them to be part of 'growing up'.

His Lordship wishes it to be made clear that he harbours no ill will, conscious or unconscious, towards Mr Li. His Lordship is satisfied that, if he hears the trial, he will be able to do so with empathy to all the witnesses and in a professional, objective and entirely unbiased manner.

In other circumstances, his Lordship admits that he may have recused himself simply to avoid bringing into the already complex litigation another unwarranted complication. In the present case, however, His Lordship has caused enquiries to be made and, despite his overtures, has been informed by the Chief Judge that it is impossible to find a replacement judge for him. Should he recuse himself, therefore, the forthcoming trial will have to be put back in the list, the earliest available date in the list being 12 months hence. The delay is naturally of concern to his Lordship.
However, his Lordship accepts that the issue of a perception of bias is not one that can be dismissed out of hand and if both counsel for the Plaintiff and the Defendant think its best that he recuse himself then he will do so.

If, however, counsels are at odds on the issue, to assist His Lordship in making a difficult decision, he would like to hear argument at the commencement of the trial. In this event, skeleton arguments should be filed three days before the hearing of argument.

C. Letter from Defendant's solicitors to the judge's clerk and to the Plaintiff's solicitors.

This is to inform you that the Defendant wishes to proceed with the application for recusal. The affirmation of Mr Terence Li will be used in support of the application.

D. Affirmation of Mr Rae White for the Plaintiff in opposition.

While obviously it is not for me to advance matters that may be considered matters of law, I wish to stress that the Plaintiff is very concerned as to the true motive behind this application for recusal.

This litigation was commenced in December 2012, close to three years ago. With respect, it is not a matter of the greatest complexity nor a matter weighed down with volumes of evidential material. Despite this, this matter has not yet come to trial and, if the application is granted, there will be a further delay apparently of one year before this Court can even begin to prepare a judgment to determine issues of liability.

Should the Defendant be successful, as it anticipates, it means that there will be a further delay thereafter before the issue of the extent of damages can be determined.

The Plaintiff's solicitors have carried out a check of the inter-solicitor correspondence generated during the course of this litigation and have identified a total of 23 requests made by the Defendant's solicitors for extensions of time to meet their obligations under the rules governing the progress of the litigation. A copy of each request is attached hereto marked 'Bundle A'. By contrast, the Plaintiff's solicitors have only identified one application made on behalf of the Plaintiff for an extension and that was when Mr Chuck Allard, the Plaintiff's CEO, suffered a heart attack. A copy of the correspondence in that regard is attached as 'Bundle B'.

It should be said that the Plaintiff's solicitors have identified three occasions when applications for extension of time have been made to court by the Defendant's legal representatives, one being successful and two unsuccessful (with costs awarded against the Defendant).

I am further informed by the Plaintiff's solicitors that the trial (to determine both liability and damages) was originally set down for just 4 days at the insistence of the Defendant although the Plaintiff asked that 8 days be set aside. It was then, later, the Defendant company that initiated correspondence to determine the issue of liability only at trial because – "on reconsideration" - 4 days would not be sufficient to determine both issues[3].

The Plaintiff, upon receipt of legal advice from senior counsel, sees no danger of actual or perceived bias in this matter. The Plaintiff is ready to proceed to trial and is firmly of the believe that the interests of justice require that there be no further delay.

BEFORE the Interim Application

[3] Candidates are to assume that the assertions made by Mr Rae White in his affirmation as to the fact of applications for extensions of time are correct.

You must prepare a skeleton argument in relation to the application supporting the position of the party you are representing. You will have been advised separately which party this is.

The skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12 font, single spaced).

You may refer to the attached case authority as you think appropriate. You do not need to attach it to the skeleton; the Judge will have a copy of it at the hearing. You may also refer to the White Book as you think appropriate.

Please note that your arguments must be limited to this case authority and the White Book.

It is very important that you email your skeleton argument in MS Word format to the Secretariat of the Higher Rights Assessment Board at info@hrab.org.hk by no later than 3pm of the Wednesday prior to the day of the assessment. Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. You will therefore understand that, if you submit your skeleton late, it may not be marked and will place you at real risk of failing the assessment.

THE CONDUCT of the Interim Application

i. You will argue the application from the perspective of the role you have been assigned. You will have a maximum of 15 minutes to make your submissions.

ii. No reply to submissions will be conducted.

iii. You should be prepared to deal with Judge interventions and questions in relation to your submissions.

iv. You should be prepared to address the court on the issue of costs as a matter of principle.

DEACONS v WHITE & CASE LIMITED LIABILITY PARTNERSHIP & ORS

APPEAL COMMITTEE OF THE COURT OF FINAL APPEAL
MISCELLANEOUS PROCEEDINGS (CIVIL) NOS 22 & 23 OF 2003
BOKHARY, CHAN AND RIBEIRO PJJ
1, 6 AUGUST 2003

Civil Procedure – Leave to appeal to Court of Final Appeal – Judge – Bias – Whether trial judge and Court of Appeal misapplied 'reasonable apprehension of bias' test – Whether question of great general or public importance as to proper test – Hong Kong Court of Final Appeal Ordinance (Cap 484) s 22(1)(b)

Administrative Law – Natural justice – Judge – Bias – Test for determining apparent bias

民事訴訟程序 – 申請於終審法院上訴 – 法官 – 偏袒 – 主審法官與上訴法庭有否誤用「偏袒的合理見解」測試 – 適當的測試對重大廣泛的或關乎公眾的重要性 – 《香港終審法院條例》(第 484 章) 第 22(1)(b) 條

行政法 – 自然公義 – 法官 – 偏袒 – 釐定表面偏袒測試

The plaintiff and the second defendant were both firms of solicitors in Hong Kong. The second defendant was associated with the first defendant, an international law firm based in New York. The third and fourth defendants left the plaintiff to join the defendant firms after discussions for merger with the latter firms failed. The plaintiff commenced proceedings against the defendants for breach of agreement under which the parties agreed not to solicit lawyers from each other's firms for a period of 12 months if no merger ensued. On 13 March 2003 a deputy judge granted an order at the instance of the plaintiff to exclude discovery in respect of various paragraphs of the defence on the ground that they were not relevant to the cause of action (HCA 2433/2002). The paragraphs deleted concerned complaints by the third and fourth defendants as to how the plaintiff firm operated. The defendant's application for specific discovery was also dismissed. On 1 April the deputy judge granted orders to strike out those paragraphs.

At the start of the trial, the deputy judge announced that he was a friend of a Mr David Zee whom he understood to be a salaried partner of the plaintiff. He was requested on 5 June 2003 to recuse himself from the proceedings on the ground that Mr Zee was in fact an equity partner of the plaintiff, meaning that he had a personal interest in the outcome of the proceedings. This request was acceded to on 9 June. The defendants sought to challenge the earlier orders and applied for leave to appeal out of time, which was refused by Ma JA (HCMP 2591/2003). The defendants then appealed against the earlier orders as well as Ma JA's decision, contending that the earlier orders made by the trial

judge should be set aside on the ground of bias. The appeal was dismissed by the Court of Appeal after reviewing authorities on the 'reasonable apprehension' test for bias (CACV 178/2003). The defendants now applied for leave to appeal to the Court of Final Appeal, contending that in dismissing the appeals, the Court of Appeal had in effect propounded a test which differed materially from the test generally accepted in other relevant jurisdictions. It was argued that the correct test was a question of great general or public importance which ought to be decided by the Court of Final Appeal.

Held, refusing the application:

(1) It was accepted by the English and other jurisdictions that, in applying the test for apparent bias, the court must first ascertain all the circumstances which had a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger that the tribunal was biased. The view of the fair-minded and informed observer as to whether a reasonable apprehension of bias arose might differ from the reviewing court's own view, but it would be through the prism of such an observer's perception that the court should consider whether the case was one of apparent bias. *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 and *Porter v Magill* [2002] 2 WLR 37 applied (at 381C-G).

(2) It was generally accepted that the reviewing court must first ascertain the facts relevant to the challenge and then apply the reasonable apprehension test to those facts. In relation to the state of the judge's knowledge, the material circumstances which ought to be taken into account would include the explanation given by the judge under review as to his knowledge or appreciation of those circumstances. The court did not have to rule whether the explanation should be accepted or rejected. Rather, it had to decide whether or not the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced. *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 applied. *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 considered (at 381H-382G).

(3) In the present case, it was not arguable that the Court of Appeal sought to propound any competing test. In his ruling leading to his recusal, the trial judge undoubtedly applied the 'reasonable apprehension of bias' test based on *Medicaments* and *Porter v Magill*, which was adopted and approved by the Court of Appeal. There was accordingly no question of great general or public importance dividing the parties or the court below as to what the proper test was. *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 and *Porter v Magill* [2002] 2 WLR 37 considered (at 383C-384D).

(4) In any event, the defendant's application, taking it to its highest, related to whether there was any misapplication of the test in the present case. The applicable issues would not be in issue on the proposed appeal and were academic as between the parties (at 384E-385A).

(5) Further, there was no reason to believe that if, upon the applicants succeeding on the proposal appeal, the applicants had any prospect of establishing the relevance and viability of that pleading or any entitlement to discovery in question. Success in the appeal would therefore not have any impact

whatsoever on the scope of discovery or on any other procedural or substantive aspect of the action. There would be no impact on persons other than the parties. Save in exceptional circumstances, a question which was wholly lacking in any practical impact would not be regarded by the Appeal Committee as one which 'ought to be submitted to the Court for decision' (at 385B-D).

Cases referred to

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451, [2000] 1 All ER 65, [2000] 2 WLR 870 (CA)

Medicaments and Related Classes of Goods, Re (No 2) [2001] 1 WLR 700, [2001] ICR 564 (CA)

Millar v Dickson [2002] 3 All ER 1041, [2002] 1 WLR 1615, 2001 SLT 988 (PC)

Phoon Lee Piling Co Ltd v Hong Kong Housing Authority (CACV 303/2002, 20 May 2003, unreported) (CA)

Porter v Magill [2002] 2 AC 357, [2002] 1 All ER 465, [2002] 2 WLR 37 (HL)

R v Gough [1993] AC 646, [1993] 2 All ER 724, [1993] 2 WLR 883 (HL)

Legislation referred to

Hong Kong Court of Final Appeal Ordinance (Cap 484) s 22(1)(b)

Application

This was an application by the defendants for leave to appeal to the Court of Final Appeal on grounds that there arose a question of great, general or public importance as to the proper test of bias. The facts appear sufficiently in the following determination.

Michael Bunting SC and Ashley Burns (Herbert Smith) for the applicants/third and fourth defendants.

Alistair McGregor QC and Anderson Chow (Clifford Chance) for the respondent/plaintiff.

Ribeiro PJ: 1. On 1 August 2003, we dismissed the application of the third and fourth defendants for leave to appeal to the Court of Final Appeal, with reasons to be given later. We now hand down our reasons.

The action

2. The action which underlies the present application arose out of unsuccessful merger negotiations involving the plaintiff and the first two defendants. The plaintiff and the second defendant are both firms of solicitors in Hong Kong. The latter is associated with the first defendant, an international law firm based in New York.

3. Some time after the negotiations had terminated, five lawyers resigned from the plaintiff firm and agreed to join the first two defendants. They included the third defendant, who was, at the time of giving notice

of his resignation, a partner described as a 'capital partner', with the plaintiff. They also included the fourth defendant, who was, when he resigned, an employee, described as a 'salaried partner' of the plaintiff.

4. On 24 June 2002, the plaintiff started proceedings against the defendants. It claims that it had entered into certain agreements with the defendant firms whereby the parties undertook mutual duties of confidentiality in respect of materials disclosed in the course of the merger negotiations and also undertook not to solicit lawyers from each other's firms during the discussions and for a period of 12 months after discussions had terminated if no merger ensued. The plaintiff contends that the defendant firms, by recruiting the third and fourth defendants, and that those defendants, by joining the defendant firms, were each in breach of the agreements and of certain alleged equitable obligations and/or had induced or participated in such breaches by other defendants.

5. Among the reliefs sought against the third and fourth defendants in the amended statement of claim is a final injunction restraining them from 'entering into partnership and/or employment with or being engaged in any other capacity by' the first two defendants 'until in the case of the fourth defendant, the end of September 2003 and in the case of the third defendant, 1 January 2004' or 'for such period as the Court shall deem just'. Damages, including exemplary damages, and an account of profits and equitable compensation are also sought.

6. The third and fourth defendants deny the plaintiff's allegations and reject its entitlement to the relief claimed on various grounds. One section of the defence filed by them was headed 'Background to the third and fourth defendants' decisions to resign' set out in paras 9-16. In that section, they listed complaints as to how the plaintiff firm was operated and contended that certain named partners in the plaintiff firm, among them a Mr David Zee, were, for a variety of reasons, in breach of their duties as partners. Those are matters which were said to have motivated and led to their decision to resign.

Deputy Judge Poon's orders in March and April

7. In October last year, directions were given for a speedy trial and for the trial to be split between liability and quantum. In January this year, Deputy Judge Poon was designated as the trial judge and became generally seised of the proceedings.

8. The plaintiff applied to the deputy judge for an order to exclude discovery in respect of paras 9 to 16 of the defence on the grounds that they were irrelevant to any cause of action being asserted in the claim. That application was granted on 13 March 2003 (HCA 2433/2002) and, pursuant to a consequential application by the plaintiff, the deputy judge ordered those paragraphs to be struck out on 1 April 2003. Another order made on 13 March 2003 by the deputy judge related to an application for

specific discovery made by the third and fourth defendants. After the plaintiff had consented to discovery in relation to certain items sought, with the exception of a single item, the residue of the application was dismissed by the deputy judge on the grounds of irrelevance to matters arising in the action. In this determination, these applications and orders are referred to as 'the earlier applications' and 'the earlier orders' respectively.

Recusal of Deputy Judge Poon

9. On 2 June 2003, at the start of the trial and before dealing with certain outstanding interlocutory applications, Deputy Judge Poon decided to inform the parties 'perhaps out of an abundance of caution' that he and Mr David Zee, described by the deputy judge as 'a salaried partner' of the plaintiff, had been close friends when at university together and for some time thereafter, but that they had only very infrequently been in contact since the deputy judge joined the bench in 1993. The court then adjourned to allow the outstanding interlocutory applications to be got in order.

10. When it resumed sitting on 5 June 2003, all the defendants invited Deputy Judge Poon to recuse himself, pointing out that Mr Zee was, contrary to the deputy judge's belief, in fact a 'capital partner' with the plaintiff, having assumed that status in January 1998. Mr Zee was therefore effectively a party with a personal interest in the outcome of the proceedings. After reviewing the recent authorities and applying a 'reasonable apprehension of bias' test to his circumstances, the deputy judge acceded to the application and recused himself by a ruling dated 9 June 2003 (HCA 2433/2002, 9 June 2003).

11. Deputy Judge Gill was designated trial judge in place of Deputy Judge Poon and commenced dealing with the outstanding interlocutory applications on 19 June 2003. However, the applicants decided to challenge the earlier orders made by Deputy Judge Poon with a view to arguing that, having recused himself from the trial, he ought equally not to have dealt with the earlier interlocutory applications so that those orders should be set aside.

Application before Ma JA

12. As two of the earlier orders, namely, those resulting from the plaintiff's applications to limit discovery and to strike out paras 9 to 16 had been perfected, the deputy judge was *functus officio*, and, being out of time for appealing, the applicants had to seek an extension of time for appealing from the Court of Appeal. This they did by taking out a summons before Ma JA, sitting as a single judge of the Court of Appeal, on 17 June 2003. No extension of time was needed in relation to the third of the earlier orders.

13. On 20 June the application for an extension of time came before Ma JA (HCMP 2591/2003). He dismissed it on two grounds. First, he held that there had been unacceptable delay in bringing the application. Although the delay was relatively slight, it was held to be unacceptable given that there had been an order for a speedy trial and given the recusal of Deputy Judge Poon and the impending trial before Deputy Judge Gill. Secondly, the extension of time was refused on the ground that the appeal would be pointless or academic in nature, since no grounds had been advanced for believing that if it were to be successful, leading to the earlier applications being re-argued before Deputy Judge Gill, there was any prospect of obtaining orders in any way different from the earlier orders made by Deputy Judge Poon.

In the Court of Appeal

14. The applicants sought to challenge Ma JA's decision before the Court of Appeal by a summons issued on 20 June 2003 seeking to reverse Ma JA's decision. That application was heard at the same time as the appeal, brought within time, against the third of the earlier orders, namely, that concerning the specific discovery which had been refused by Deputy Judge Poon. Rogers VP (with whom Le Pichon JA agreed) dismissed both the application for time and the substantive appeal (HCMP 2591/2003 and CACV 178/2003, 11 July 2003, Reasons 15 July 2003).

15. After having considered certain authorities and the arguments advanced by Mr Edward Chan SC, then appearing for the applicants, his Lordship concluded that an attack upon the earlier orders could not 'be challenged on the basis that there was a reasonable apprehension of bias'. He also upheld Ma JA's exercise of discretion in refusing a time extension on the grounds of delay and, having apparently been addressed by Mr Chan SC on the underlying merits of the earlier applications, upheld Deputy Judge Poon's view that the relief sought was irrelevant.

The application before the Appeal Committee

16. The application for leave to appeal is brought under s 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance (Cap 484) which is in the following terms:

> An appeal shall lie to the Court … at the discretion of … the Court, from any other judgment of the Court of Appeal in any civil cause or matter, whether final or interlocutory, if, in the opinion of … the Court … the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court for decision.

17. In the notice of motion and the applicants' skeleton argument, questions variously formulated were advanced as having the requisite importance and as being deserving of reference to the Court of Final Appeal for decision. At their core, and at the forefront of the submissions advanced by Mr Michael Bunting SC, appearing with Mr Ashley Burns for the applicants, was the proposition that the correct test for determining whether a judge's decision should be regarded as vitiated by apparent bias had been rendered doubtful by the manner in which the Court of Appeal had disposed of the appeal below. It was submitted that the Court of Appeal had applied a test whereby the court ascertains for itself whether the judicial conduct under review gives rise to a real risk of bias, without any consideration being given as to how that question might be answered by a fair-minded and informed observer. In so doing, the applicants argued, the Court of Appeal had propounded a test which differs materially from the test now generally accepted in other relevant jurisdictions. Whether the correct test in Hong Kong is that advanced by the Court of Appeal or that adopted in such other jurisdictions was submitted to be a question of great general or public importance which ought to be decided by the Court of Final Appeal.

The test for apparent bias

18. In 1993, the law on this topic was as set out by the House of Lords in *R v Gough* [1993] AC 646. Lord Goff (at p 670) thought it 'unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man.' Instead, the proper approach was for the reviewing court,

> … having ascertained the relevant circumstances, … [to] ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him …

19. As Lord Hope was subsequently to point out in *Porter v Magill* [2002] 2 WLR 37 at 100, the *Gough* approach was at odds with the approaches adopted in Australia, Scotland and in the jurisprudence of the Strasbourg Court:

> The 'reasonable likelihood' and 'real danger' tests which Lord Goff described in *R v Gough* have been criticised by the High Court of Australia on the ground that they tend to emphasise the court's view of the facts and to place inadequate emphasis on the public perception of the irregular incident: *Webb v The Queen* (1994) 181 CLR 41, 50, per Mason CJ and McHugh J. There is an uneasy tension between these tests and that which was adopted in Scotland by the High Court of Justiciary in *Bradford v McLeod* 1986 SLT 244. … the High

> Court of Justiciary adopted a test which looked at the question whether there was suspicion of bias through the eyes of the reasonable man who was aware of the circumstances: see also *Millar v Dickson* 2001 SLT 988, 1002-3. This approach, which has been described as 'the reasonable apprehension of bias' test, is in line with that adopted in most common law jurisdictions. It is also in line with that which the Strasbourg court has adopted, which looks at the question whether there was a risk of bias objectively in the light of the circumstances which the court has identified: *Piersack v Belgium* (1982) 5 EHRR 169, 179-180, paras 30-1; *De Cubber v Belgium* (1984) 7 EHRR 236, 246, para 30; *Pullar v United Kingdom* (1996) 22 EHRR 391, 402-3, para 30. In *Hauschildt v Denmark* (1989) 12 EHRR 266, 279, para 48 the court also observed that, in considering whether there was a legitimate reason to fear that a judge lacks impartiality, the standpoint of the accused is important but not decisive: 'What is decisive is whether this fear can be held objectively justified.'

20. However, recent English authority has resulted in a convergence between the English test and the test in other relevant jurisdictions. Such convergence was considered necessary in consequence of the Human Rights Act 1998, as the Court of Appeal explained in *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 at para 85 (CA), (although the court also pointed out (at paras 64-66) that steps in the direction of convergence had already been taken in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 477-478). Having considered the 'reasonable apprehension of bias' test developed in Strasbourg, Lord Phillips MR (giving the judgment of the court) formulated the test applicable in England and Wales as follows (at para 85):

> The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

21. This shift away from the *Gough* test was endorsed by the House of Lords in *Porter v Magill* (above), which slightly amended its formulation to drop reference to 'a real danger' (per Lord Hope at para 103). This marked an acceptance in England and Wales, as in the other jurisdictions mentioned, that the view of the fair-minded and informed observer as to whether a reasonable apprehension of bias arises may differ from the reviewing court's own view, and that it is through the prism of such an observer's perception that the court should consider whether the case is one of apparent bias.

22. A refinement relevant to the present application was also considered in the recent authorities. As is generally accepted, the reviewing court must ascertain the facts relevant to the challenge. After those facts are found, the reasonable apprehension test is applied to those facts. However, a difficulty sometimes arises as to whether one or more of

the relevant facts should be taken as established. Since it is generally accepted that it is insufficient simply to accept in all cases the tribunal's declaration regarding the fact in question at face value (eg, as to whether it knew of an allegedly disqualifying connection) and also that the tribunal should not be subjected to cross-examination, how is the court to deal with a fact that may be highly relevant, but which is controversial? In the present case, this is said to be relevant to Deputy Judge Poon's declaration that when he made the earlier orders, he had been unaware of Mr Zee's status as a 'capital' partner, the acceptability of that assertion having been put in issue by the applicants.

23. The importance of the judge's knowledge of a key fact to the existence of any apparent bias was acknowledged in *Locabail (UK) Ltd v Bayfield Properties Ltd* (above, at p 477):

> When applying the test of real danger or possibility (as opposed to the test of automatic disqualification under the *Dimes* case, 3 HL Cas 759 and *Ex parte Pinochet (No 2)* [2000] 1 AC 119) it will very often be appropriate to inquire whether the judge knew of the matter relied on as appearing to undermine his impartiality, because if it is shown that he did not know of it the danger of its having influenced his judgment is eliminated and the appearance of possible bias is dispelled. As the Court of Appeal of New Zealand observed in *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142, 148, if the judge were ignorant of the allegedly disqualifying interest: 'there would be no real danger of bias, as no one could suppose that the judge could be unconsciously affected by that of which he knew nothing …'

24. In the *Medicaments* case, the proper approach, applying the reasonable apprehension of bias test to such contested questions of fact, especially questions relating to the state of the judge's knowledge, was explained as follows (at para 86):

> The material circumstances will include any explanation given by the judge under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced.

The test applied by the Court of Appeal in the present case

25. It is argued for the applicants that if the correct test had been applied, notwithstanding what may well have been an honest oversight on the part of the deputy judge, the fact that the pleadings made it patent that Mr Zee was an equity partner, ought inevitably to have caused the Court of Appeal to hold that a fair-minded and informed observer would have had genuine difficulty accepting the deputy judge's statement that he was

unaware of Mr Zee's status as partner. Accordingly, it was suggested, the Court of Appeal should have taken the deputy judge to have known that fact and to have held that this inevitably gave rise to a reasonable apprehension of bias.

26. The applicants contend that Rogers VP (at paras 16-19) applied instead a test which eschews the views of the fair-minded and informed observer in favour of the court's own views. In other words, he propounded a test similar to the *Gough* test and different from the converged 'reasonable apprehension of bias' tests mentioned above, giving rise to a question of great general or public importance as to what the correct test in Hong Kong is.

27. In our view, it is not arguable that Rogers VP sought to propound or is capable of being taken as propounding any competing test. In the ruling leading to his recusal, Deputy Judge Poon undoubtedly applied the 'reasonable apprehension of bias' test based on *Medicaments* and *Porter v Magill*. In para 7, he stated:

> Recently, the real danger test has been 'modestly adjusted' by the English Court of Appeal in *Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 and the House of Lords in *Porter v Magill* [2002] 2 WLR 37 to take into account the jurisprudence of the European Court of Human Rights and to bring it in harmony with what is known as 'the reasonable apprehension of bias test', which has been applied in most common law jurisdictions. The test, now modified, may be formulated thus. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased: see *Medicaments and Related Classes of Goods (No 2)*, para 85 at pp 726 and 727; *Porter v Magill*, para 103 at pp 83-84

28. Moreover, in the same paragraph, the deputy judge cited the recent decision of Rogers VP in *Phoon Lee Piling Co Ltd v Hong Kong Housing Authority* (20 May 2003, unreported) (CA) where, at p 20, Rogers VP stated:

> The law relating to judicial bias has been considered recently in the case of *Porter v Magill* [2002] 2 AC 357. Lord Hope considered the various authorities in relation to judicial bias and in particular *R v Gough* [1993] AC 646 and what had been said in *Webb v The Queen* (1994) 181 CLR 41 and what had been said in the Court of Appeal in the case then under appeal. At page 494, Lord Hope summarized his conclusions. The test which emerged would be phrased along the following lines: The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased.

29. When, some three weeks or so later, Rogers VP handed down the Court of Appeal's reasons for judgment in the present case, he had plainly not changed his view as to the applicable test. At para 16, he referred to pp 7-9 in the deputy judge's ruling, commenting: 'It seems to me that the deputy judge in paras 7-9 of his ruling of 9 June 2003 set out the judicial approach to the matter correctly', following this immediately with a reference to a point made in *Medicaments*. He was therefore clearly adopting as correct the reasonable apprehension of bias test approved in *Medicaments* and *Porter v Magill*.

30. It is unnecessary for us to comment definitively on the applicable test. It suffices for present purposes to note that both the applicants and the respondent agree that the test in Hong Kong is the reasonable apprehension of bias test developed as aforesaid and that the Court of Appeal was of a like mind. There is accordingly no question of great general or public importance dividing the parties or the court below as to what the proper test is. At the highest, it may be arguable that Rogers VP *misapplied* the proper test, but not that the Court of Appeal had sought to propound a different test or that its judgment casts doubt on the test considered applicable. Whether there was any such misapplication in the present case — and we are not to be taken to be suggesting that there was — is not a question of great general or public importance.

The Appeal Committee's discretion and the earlier orders

31. Mr Bunting's stance was that in principle, whenever a decision was shown to have been tainted by a reasonable apprehension of bias, it had to be set aside, it being perfectly irrelevant whether the impugned tribunal had made the correct decision or whether some other tribunal was likely to arrive at exactly the same decision. Accordingly, although invited to do so, he declined to advance any arguments with a view to showing that the paragraphs in the defence which had been struck out or that the discovery which had been excluded or refused were capable of being resuscitated as relevant to some issue in the action.

32. In our view, Mr Bunting's position on principle may be well-founded if the submission were being made to a court having to determine whether a particular decision below was tainted by a reasonable apprehension of bias. It would not be an answer in that context to say that the orders made should be upheld because they were right, even if tainted.

33. However, that is not the context of the present application. Here, the applicants are seeking permission to raise the question of apparent bias before the final appellate court where an appeal is not as of right. Section 22(1)(b) provides that an appeal shall lie to the Court at its discretion (exercised by this Appeal Committee):

> … if, in the opinion of the … Court, … the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court for decision.

34. The Appeal Committee has on many occasions made it plain that leave to appeal will not be granted where the question said to arise, however important it may appear in its formulation, is academic as between the parties.

35. In the present case, we have no reason to believe that if, upon the applicants succeeding on the proposed appeal, the Court of Appeal's decision and Deputy Judge Poon's orders were to be set aside and the discovery and striking out issues re-argued before Deputy Judge Gill or any other judge, the applicants have any prospect of establishing the relevance and viability of that pleading or any entitlement to the discovery in question. Success in the appeal would therefore not have any impact whatsoever on the scope of discovery or on any other procedural or substantive aspect of the action. Unlike the situation in *Millar v Dickson* [2002] 1 WLR 1615, involving a test case, there would be no wider impact on persons other than the parties. The applicable principles would not be in issue on the proposed appeal and the debate would merely be as to whether they were correctly applied in the present case. Save in highly exceptional circumstances, a question which is wholly lacking in any practical impact would not be regarded by the Appeal Committee as one which 'ought to be submitted to the Court for decision'.

36. A further discretionary consideration weighs against the grant of leave. As noted above, part of the relief claimed involves final injunctions of limited duration against the third and fourth defendants. All aspects of the injunctive relief claimed, including the duration of any maintainable injunctions, are of course highly controversial as between the parties. However, if leave to appeal is granted, the further adjournment this would entail would render the injunctive relief claimed nugatory in any event, giving rise to possible prejudice to the plaintiff. Given that even victory on appeal would not result in any countervailing benefit to the applicants in any practical terms, the infliction of such possible prejudice on the respondent is hard to justify.

37. For the foregoing reasons, the application for leave to appeal fell to be dismissed.

38. We make the following orders:

(a) An order *nisi* that the costs of and occasioned by this application be paid forthwith by the third and fourth defendants to the plaintiff, such costs to be taxed if not agreed.

(b) Representations with a view to varying this order nisi should be made in writing and filed with the Registrar of the Court and served on the

other side within 14 days of the date when this determination is handed down.

(c) In the event that any representations are filed, the other party should file and serve any representations in reply within 14 days of being served.

(d) If representations are filed and if the Appeal Committee should be desirous of hearing oral argument, the parties will be notified accordingly.

(e) If representations are made and oral arguments not required, the Appeal Committee will hand down in its written determination as to costs.

(f) In the event that no representations are filed within 14 days of handing down as aforesaid, the order as to costs shall automatically become an order absolute.

Reported by Kennis Tai

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Mini-Trial

These instructions ask you to make certain assumptions about the witnesses who will appear at trial. Please note that, for the mini trial conducted at the assessment, only 1 witness for each party will actually be physically present for examination purposes.

Claim

The claim is for liability for alleged breach of express and implied terms of a contract.

Witnesses

The witnesses for the two parties are described below.

You will be informed which two witnesses will appear at the mini trial on the day of assessment itself when you arrive and register.

Plaintiff's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Plaintiff:

1. Rae White

2. Carl Black

3. Dr Abraham Fisher (an expert)

You can assume:

i. the witnesses will give evidence at trial in the order listed above

ii. the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Defendant's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Defendant:

1. Terence Li

2. Jason Ng

3. Dr Peter Ma (an expert)

You can assume:

i. the witnesses will appear at trial in the order listed above

ii. the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Further, you can assume that the Judge/Assessor's finding on the interim application does not affect the evidence available for the purpose of the trial.

DURING the Mini-Trial

You will be required to:

- make an opening speech (max 5 minutes)

- examine in chief (max 10 minutes) the witness who will give 'live' oral evidence at trial on behalf of your client. You should conduct a full examination in chief of the witness on the basis that their statement does not stand as evidence in chief

- cross-examine (max 15 minutes) the opponent's witness who is attending at trial to give 'live' oral evidence. Please note that the opponent's witness may be un-cooperative at times. The witness' statement does not stand as evidence in chief

- deal with any interventions made by the advocate representing the opposing party

- make any interventions, as you think appropriate, to the questioning of witnesses by the advocate representing the opposing party

- deal with any Judicial interventions/questions as and when they arise