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By fax: 2509 9055
19 April 2005

Mrs Percy Ma,
Clerk to Bills Committee,
Legislative Council,
Legislative Council Building,
8 Jackson Road, Central,
Hong Kong.

via Mr Michael Scott, SASG/GLP

Dear Mrs Ma,

Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2005 (the "Bill")

Follow-up meeting on 31 March 2005

I refer to your letter of 6 April 2005 addressed to Mr. Stephen Wong and our recent telephone conversations regarding the issues raised by members of the LegCo in respect of the Bill. Our response (which is in the same order as that in your letter) is set out below.

Proposed amendments to transfer power to determine appeals under the Medical Clinics Ordinance (Cap. 343) from the Chief Executive (CE) in Council to the Administrative Appeals Board (AAB)
(Clauses 6 – 7 in Division 3, Part 2 of the Bill)

(a) ***The nature of the appeals dealt under the MCO, the grounds for the proposed transfer of power, and whether the relevant parties such as the medical profession had been consulted on the proposal.***

Nature of appeals

Appeals to be dealt with under the MCO are related to decisions made by the Director of Health, as the Registrar of Clinics as defined under section 3 of the MCO, on matters concerning registration of clinics, such as the

refusal of an application for registration or de-registration.

The grounds for the proposed transfer of power

The AAB is a general appeals board. It handles a wide range of statutory appeals against certain administrative decisions. In view of the fact that the appeals to be dealt with under the MCO are relatively minor and administrative in nature, and do not have important socio-political or economic implications, we consider that the proposed transfer of power would be desirable.

Whether relevant parties had been consulted

Since the proposed change is considered a technical issue and will not compromise the right to appeal as provided for in the MCO, no consultation has been conducted.

(b) ***The composition of AAB, and the differences between the procedures in handling appeals by the CE in Council and AAB.***

The composition of AAB

The Board is established under the Administrative Appeals Board Ordinance (Cap. 442) (AABO), and currently consists of one Chairman, two Deputy Chairmen and a panel of 46 members. The membership list is attached at **Annex**. Under section 6 of Cap. 442, the Chairman or Deputy Chairman of the AAB shall be persons who are qualified for appointment as District Judges under section 5 of the District Court Ordinance (Cap. 336).

The procedure in handling appeals under the MCO by the CE in Council

The CE in Council is currently responsible for determining appeals by way of petition submitted under the MCO.

The authority for processing the paperwork in connection with the appeals under the MCO is the Secretary for Health, Welfare and Food (SHWF). On receipt of an appeal, SHWF will direct the respondent Department i.e. Department of Health (DH) to produce relevant information such as the facts relating to the case, the departmental policy

on the matter being contested, the reasons for arriving at the decision being contested etc. SHWF will then forward the information mentioned above to the appellant and invite him to comment in writing on them, within a prescribed period.

On receipt of further written comments from the appellant, SHWF will prepare for the consideration of the CE in Council a submission of the case, which will include a summary of the original appeal and of any further comments received from the appellant, together with a brief summary of the arguments behind the original decision against which the appeal is lodged. After consideration by the CE in Council of the appeal, SHWF will inform the appellant the decision of the CE in Council.

The procedures in handling appeals by the AAB

To lodge an appeal, an appellant should complete the appeal form and forward it to the Secretary to the AAB within the time limit specified in the AABO under which the right of appeal exists, or within 28 days after receiving notice of the decision in the case where no such time limit is prescribed.

After an appeal has been accepted by the AAB, the respondent (i.e. the deciding authority whose decision has been appealed against) will be required to lodge with the Board and the appellant within 28 days a statement setting out the reasons and policy for the decision. The appellant can make representations on the statement to the Board within a specified period.

The AAB will normally conduct a hearing. An appeal board comprising the Chairman or the Deputy Chairman together with two panel members will be formed to consider each appeal. Parties to the appeal will be invited to make representations or be represented by a barrister or a solicitor at the hearing. They may request the Board to call witnesses to give evidence if needed. Parties to the appeal will be informed of the Board's decision in writing and of the reasons of its decision.

Brief comparison of the two channels in respect of their procedures

- The deliberation of appeals by the CE in Council is not open to the public. The hearing of an appeal to the AAB shall be in public

except in special circumstances provided for in Cap. 442.

- For appeals to the CE in Council, neither officials of the DH nor the appellant will be present during the consideration of the appeals. For appeals to the AAB, parties to an appeal may appear and be present at the hearing of the appeal and may make representations or be represented either by a barrister or a solicitor or, with the approval of the Secretary of the Board, by any other person authorized by any of the parties in writing. The respondent may be represented by a legal officer within the meaning of the Legal Officers Ordinance (Cap 87).

Proposed amendments to transfer of chairmanship of certain rules committees from the Chief Justice to the Chief Judge of the High Court (Clauses 8 to 10 in Division 4, Part 2 of the Bill)

(c) **Background**

At the 1st Bills Committee meeting held on 31 March 2005, the administration was requested to respond/provide information in relation to a number of issues. Insofar as the amendments initiated by the judiciary are concerned, the Administration is requested to provide information on the grounds for proposing the amendments in clauses 8 to 10 of the bill to transfer the chairmanship of certain rules committees from the Chief Justice (CJ) to the Chief Judge of the High Court (CJHC).

Judiciary's response

The grounds for proposing the above amendments are set out below -

(i) Section 55(1) of the High Court Ordinance (HCO) (Cap. 4) provides that the Rules of the High Court shall be made by the High Court Rules Committee (HCRC). The HCRC is at

present chaired by the CJ. As the Rules of the High Court regulate and prescribe the procedures to be followed in the High Court, it is considered more appropriate for the CJHC, as the court leader of the High Court, to chair the HCRC;

(ii) Section 9(1) of the Criminal Procedure Ordinance (CPO) (Cap. 221) provides for the making of rules and orders regulating the practice and procedure under the Ordinance by the Criminal Procedure Rules Committee (CPRC), which shall be chaired by the CJ. As the rules and orders made by the CPRC govern criminal proceedings mainly in the High Court (and in some cases may also apply to the District Court and the Magistrates' Court), following the same reasoning as in (i) above, it is considered more appropriate for the CJHC to chair the CPRC; and

(iii) Section 17(1) of the District Court Ordinance (DCO) (Cap. 336) provides for the establishment of the District Court Rules Committee (DCRC) and its Chairman shall be the CJ. As the Rules of the District Court follow largely the Rules of the High Court, it is considered that for the same reasons as in (i) and (ii) above, the chairmanship of the DCRC should likewise be transferred to the CJHC.

Proposed amendments to change the name of the Convocation of the Chinese University of Hong Kong from "評議會" to "校友評議會"
(Clauses 16 to 26 in Division 1, Part 3 of the Bill)

(d) Amongst the local universities, at present only the Chinese University of Hong Kong and the University of Hong Kong (HKU) have established a Convocation in accordance with their governing legislation. The Chinese name of HKU's Convocation is "畢業生議會".

Proposed amendments to the Firearms and Ammunition Ordinance (Cap. 238) to make the possession of imitation firearms an indictable offence
(Clause 34 in Division 6, Part 3 of the Bill)

(e) to (g) As discussed by telephone on 11 April 2005, we propose to move Committee stage amendments to withdraw/or to amend the present amendments to section 20 for the reasons stated below.

In HKSAR v. LAM Kwong-wai and Another C.A. 213/2003, it was held that section 20(1) of the Firearms and Ammunition Ordinance, Chapter 238 was inconsistent with the Bill of Rights, as and when read with section 20(3)(c). The Court of Appeal has certified a point of law. We are applying for leave to appeal to the Hong Kong Court of Final Appeal. The application will be heard by the Appeal Committee on 26 April 2005.

Section 20 will have to be amended in some other way in the light of the decision on final appeal. If the Appeal Committee grants leave, we may need to wait several months for the final appeal to be heard and we do not want the Bill to be delayed. If the Appeal Committee does not grant leave, we will need to amend s. 20 in the light of the Court of Appeal's decision. In either case, we need to reconsider how section 20 should be amended.

Proposed amendments to the Prevention of Bribery Ordinance (Cap. 201) to prohibit a person who is required to surrender his travel document from leaving Hong Kong
(Clauses 35 and 36 in Division 7, Part 3 of the Bill)

(h) ***The objective of the proposed amendments, and how the proposed amendments and other enforcement measures could ensure that a person who is the subject of a notice under section 17A(1) of the Prevention of Bribery Ordinance (POBO) (Cap. 201) to surrender his travel document would be prevented from leaving Hong Kong while such a notice is in force. As members have pointed out, an individual could be arrested if he fails to surrender his travel document. However, when he uses his Hong Kong identity Card (not being a travel document) to leave Hong Kong, he would be allowed to leave under section 17A(1) of the POBO.***

We propose to amend the Prevention of Bribery Ordinance (POBO) to achieve two objectives. First, to prohibit a person who has been required by notice under section 17A(1) of the POBO to surrender his travel documents from leaving Hong Kong. Second, to clarify that Police officers and persons appointed by the Commissioner of the Independent Commission Against Corruption ("ICAC") have the power to arrest a person who has failed to comply with the notice under section 17A(1) of the POBO to surrender his travel documents.

If amended, section 17A(3) of the POBO will read "a person on whom a notice under subsection (1) is served shall comply with such notice forthwith and shall not leave Hong Kong while the notice is in force". Such a person will then be prohibited by statute from leaving Hong Kong. He will be placed on the Immigration Watch List. Should he attempt to leave Hong Kong, he will be stopped by Immigration officers at the immigration control point and his departure from Hong Kong denied. The Government's intention is to stop such person from leaving Hong Kong. There is no need to give additional power of arrest to the Immigration officers.

Under the existing section 17A(4) of the POBO, if a person on whom a s.17A(1) notice has been served fails to comply with the notice to surrender all his travel documents, he "may thereupon be arrested" and taken before the magistrate. The magistrate may commit him to prison to be safely kept until he surrenders all his travel documents. However, section 17A(4) does not specify clearly that both the Police and ICAC officers may arrest the person. Our proposed amendment makes it clear that the two law enforcement agencies have the power to arrest a suspect who fails to surrender his travel documents.

Proposed amendments to repeal provisions in Ordinances providing that a decision of the Court of Appeal on an appeal is final
(Clauses 39 to 121 in division 9, Part 3 of the Bill)

(i) The judgment of the Court of Final Appeal in A solicitor v The Law Society of Hong Kong & SJ, which held that section 13(1) of the Legal Practitioners Ordinance (Cap. 159) was unconstitutional is attached.

Proposal to remove a discrepancy in meaning between the English and Chinese texts of section 4(28) of the Summary Offences Ordinance (Cap. 228)
(Clause 189 in Division 2, Part 6 of the Bill)

(j) The basis for the proposal is the court case HKSAR v Lau San Ching & Others. The proposed amendment is to effect a technical amendment to the Chinese text of section 4(28) of the Summary Offences Ordinance (which is identified in the case to be inconsistent with its English text), so that it will better tally with the English text, which the Court of First Instance has ruled to take precedence. The brief facts of the case and the relevant judgement made by Lugar-Mawson J are as follows –

(1) The defendants were convicted of causing an obstruction in a public place, contrary to s.4(28) of the Summary Offences Ordinance (Cap. 228). A ceremony took place outside the Hong Kong Convention and Exhibition Centre at a flagpole twice a day. In the afternoon in question, the defendants chained themselves to the flagpole where the flag-raising ceremony took place and displayed banners bearing political messages. They refused to leave peacefully when asked to do so by the police, despite being warned that they were trespassing and that a breach of the peace was likely to occur. Later, police officers removed them from the area. The defendants were convicted in the Magistracy as charged and they appealed to the Court of First Instance against the conviction.

(2) The Court of First Instance held that, because the word "may" is omitted from the Chinese text, there was a clear conflict between the English and the Chinese texts of section 4(28) of Cap. 228. The

English text creates an offence when any person does any act whereby obstruction *may accrue* to a public place. On the other hand, the Chinese text creates an offence when any person does any act whereby obstruction *actually accrues* to a public place. The offence, therefore, is given a narrower meaning in the Chinese text.

(3) Section 4 creates a long list of offences for certain acts or omissions designed to protect the interests of the general public at large. Many of the offences the section creates are there to ensure that acts of the individuals do not encroach upon the rights of others to use and enjoy, without obstruction, discomfort, interference or the risk of injury, areas that are public places.

(4) Section 4(28) is preventive in nature. It is designed to prevent the obstruction of public places, the seashore or the adjacent waterways.

(5) The Court agreed with the Magistrate who dealt with this case, that the offence was made out once the defendants, without lawful authority or excuse, did an act whereby an obstruction, whether directly or consequentially, may naturally have resulted in a public place. The issue of whether obstruction may naturally result should be judged objectively. It was not necessary for the prosecution to prove knowledge on the defendants' part that they might have obstructed the flag-lowering ceremony had they remained chained to the flagpole. The obstruction would accrue, and the offence was complete at the very moment they chained themselves to the flagpole.

(6) The Court concluded that as the English text of the Ordinance was the original official text, which had existed since 1932, from which the Chinese text was subsequently prepared and declared authentic in 1992, the meaning borne by the original official English text, should take precedence over the authenticated Chinese text.

With best regards,

Yours sincerely,

(Ms Stella Chan)
Government Counsel
General Legal Policy/Legal Policy Division
19 April 2005

#316130

Annex 附件

Administrative Appeals Board

行政上訴委員會

Chairman 主席

Mr LEONG Shiu-chung, G.B.S. 梁紹中先生

Deputy Chairmen 副主席

Her Honour Judge Maggie POON 區域法院法官潘敏琦

Her Honour Judge Mary YUEN 區域法院法官源麗華

Panel Members 小組成員

1. Professor Alfred CHAN Cheung-ming, J.P. 陳章明教授
2. Mr. Paul CHAN Kam-cheung, J.P. 陳錦祥先生
3. Mr. CHAN Kin-por 陳健波先生
4. Mrs. Rosalind CHAN 陳璐茜女士
5. Mr. Jimson CHAN Wing-tai, J.P. 陳永泰先生
6. Dr. Anissa CHAN WONG Lai-kuen 陳黃麗娟博士
7. Mrs. Lina CHENG TANG Ho-kuen 鄭鄧荷娟女士
8. Mr. Hector CHEUNG Yuk-kwan 張玉崑先生
9. Ms. Ann CHIANG Lai-wan 蔣麗芸女士
10. Ms. Sansan CHING Teh-chi 程德智女士
11. Mr. Nicholas CHIU Sai-chuen, J.P. 趙世存先生
25. Mrs. Mary LEUNG LING Tien-wei 梁林天慧女士
26. Mr. Frederick LUI Lai-cheung, J.P. 呂禮章先生
27. Mr. Willie LUI Pok-shek, J.P. 呂博碩先生
28. Mr. Francis LUI Yiu-tung 呂耀東先生
29. Ms. Gidget LUN Kit-chi 倫潔芝女士
30. Miss Winnie LUN Pong-hing 倫龐卿女士
31. Mr. Stephen NG Chi-wing, J.P. 吳志榮先生
32. Mr. Almon POON Chin-hung, J.P. 潘展鴻先生
33. Ms. Elle SHUM Mun-ling, J.P. 岑敏玲女士
34. Mrs. Dianthus TONG LAU Mui-sum 唐劉梅心女士

12. Miss Anna CHOW Suk-han 周淑嫻女士
13. Ms. Wailee CHOW, J.P. 周蕙禮女士
14. Mr. Hanson JAY Wang-kit 謝宏傑先生
15. Professor JIM Chi-yung, J.P. 詹志勇教授
16. Mr. Lester KWOK Chi-hang, J.P. 郭志桁先生
17. Mr. KWONG Chi-keung 鄺志強先生
18. Mr. Daniel LAM Chun, B.B.S., J.P. 林濬先生
19. Mr. David LAM Tai-wai 林大偉先生
20. Dr. Teresa LAM LEUNG Yin-ting
    林梁燕婷博士
21. Mr. LAU Chi-keung, J.P. 劉智強先生
22. Mr. Stephen LAU Man-lung, J.P. 劉文龍先生
23. Mrs. LAU YU Po-kwan, J.P. 劉余寶堃女士
24. Ir. Edmund LEUNG Kwong-ho, J.P.
    梁廣灝工程師

35. Dr. TSE Tsun-him 謝俊謙博士
36. Mr. Thomas TSUI Chun-man 徐振文先生
37. Mr Vincent WAN Shui-tong 尹樹棠先生
38. Mr. Christopher WONG Ching-lok 汪整樂先生
39. Mr. Ronny WONG Fook-hum, S.C., J.P. 黃福鑫先生
40. Mrs. WONG MAK Kit-ling 王麥潔玲女士
41. Ms. WONG Mee-chun, J.P. 黃美春女士
42. Miss. Mary Teresa WONG Tak-lan 黃德蘭女士
43. Dr. Philip WU Po-him, J.P. 伍步謙博士
44. Mr. YAU Chung-wan 丘頌云先生
45. Mr William YIP Che-man 葉次文先生
46. Mrs. Kathleen YIP HO Tsang-yue, J.P.
    葉賀曾愉女士

Secretary 秘書

Ms Anna CHAN 陳念才女士

FACV No. 7 of 2003

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 7 OF 2003 (CIVIL)
(ON APPEAL FROM CACV NO. 2 OF 2001)

Between:

A SOLICITOR	**Appellant**
- and -	
THE LAW SOCIETY OF HONG KONG	**Respondent**
SECRETARY FOR JUSTICE	**Intervener**

Court:	Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Lord Scott of Foscote NPJ
Dates of Hearing:	25-27 November 2003
Date of Judgment:	19 December 2003

J U D G M E N T

Chief Justice Li:

Introduction

1. The statutory framework for the regulation of the solicitors profession is provided for by the Legal Practitioners Ordinance Cap. 159, ("the Ordinance") and the rules made thereunder by the Council of the Law Society with the prior approval of the Chief Justice: section 73. Such rules are revised from time to time to meet changing needs and circumstances.

2. Since 1992, consistently with developments in other jurisdictions, the Solicitors' Practice Rules ("the Rules") have permitted solicitors to promote their practice in accordance with the Solicitors' Practice Promotion Code ("the Code") made by the Council with the Chief Justice's prior approval: Rule 2AA of the Rules. The Code specifies general principles which any practice promotion should comply with. These include the principle that "practice promotion shall be decent, legal, honest and truthful and shall not be likely to mislead or deceive, whether by inclusion or omission": paragraph 6(a) of the Code.

3. The appellant is a solicitor and is the principal of his firm. In 1998, the Housing Authority launched a scheme giving its tenants in a number of public housing estates the opportunity to purchase the flats they were occupying. Tenants who decided to purchase would require conveyancing services. The firm used promotional materials, including circulars to households in the public housing estates covered by the scheme, to publicise its conveyancing services. The Law Society brought complaints against the appellant alleging that the firm's promotional materials were in breach of the Code and the Rules.

The Tribunal's Order

4. In December 2000, the Solicitors Disciplinary Tribunal established by the Ordinance ("the Tribunal") held that the appellant had committed a breach of para. 6(a) of the Code in relation to two of the firm's circulars to households. In 1996, the firm had been awarded an ISO (International Organization for Standardization) 9001 certificate by the Hong Kong Quality Assurance Agency ("the Agency"). This is a quality management standard and the firm was the first solicitors firm to be awarded such a certificate. The Tribunal found that the firm's circulars to households in question gave the misleading impression to members of the public that in awarding the certificate, the Agency had assessed the quality of the firm's legal work whereas what had been assessed was the firm's management system. Further, solely on the basis of its finding of breach of para. 6(a) of the Code, the Tribunal held that the appellant had also committed a breach of r. 2(d) of the Rules which provides that a solicitor shall not do anything which compromises or impairs his own reputation or the reputation of the profession or is likely to do so. Having found such breaches of the Code and the Rules, the Tribunal made an order that the appellant be fined $10,000, be censured and pay one third of the costs of the disciplinary proceedings.

Section 13

5. Section 13(1) of the Ordinance provides that an appeal shall lie to the Court of Appeal against any order of the Tribunal (except an order for the payment of instalments or for the deferring of payment). A person subject to the Tribunal's order has a right of appeal. Where the Council of the Law Society wishes to appeal, leave of the Court of Appeal has to be obtained: section 13(2A). Section 13(1) includes the

provision that "the decision of the Court of Appeal on any such appeal shall be final".

6. The appellant exercised his right of appeal under s. 13(1). In June 2002, the Court of Appeal by a majority (Mayo VP, Stock JA, Cheung JA dissenting) dismissed the appeal with costs. That Court (by the same majority), dismissed the appellant's application for leave to appeal to this Court. This appeal was heard pursuant to leave granted by the Appeal Committee.

The questions

7. Two questions arise in this appeal:

(1) Does the Court have jurisdiction to entertain this appeal ("the jurisdiction question")?

(2) If the answer is no, that would be an end of the matter. But if the answer is yes, was the Court of Appeal right in dismissing the appeal against the Tribunal's order ("the merits question")?

The jurisdiction question

8. The debate on the jurisdiction question turns on whether the provision in s. 13(1) that the decision of the Court of Appeal on an appeal against an order of the Tribunal "shall be final" has any legal effect. I shall refer to it as "the finality provision".

Secretary for Justice as Intervener

9. The jurisdiction question is a matter of considerable public importance since a similar finality provision is found in many statutes which provide for the regulation of many professions. These statutes confer a right of appeal to the Court of Appeal against an order of the

disciplinary tribunal established by statute but provide that the decision of the Court of Appeal on such an appeal "shall be final". Having regard to the public importance of the jurisdiction question, the Secretary for Justice sought and was granted leave to intervene to make submissions on it. The Court is indebted to counsel for the appellant (Mr Martin Lee SC and Ms Wing Kay Po) and the respondent (Mr Kerr) as well as counsel for the Secretary for Justice (Mr Michael Blanchflower SC) for their helpful submissions on this important question.

The issues

10. The issues that arise on the jurisdiction question are:

(1) Whether the finality provision was part of the laws of Hong Kong on 1 July 1997 ("the first issue").

(2) Whether the finality provision is inconsistent with the Basic Law ("the second issue").

If the finality provision was part of the laws of Hong Kong on 1 July 1997, then the issue of whether it is inconsistent with the Basic Law must be addressed. But if the finality provision was not part of the laws of Hong Kong on 1 July 1997, there would strictly be no need to address the second issue.

The first issue: Whether the finality provision was part of the laws of Hong Kong on 1 July 1997?

11. The continuity of existing laws is a most important theme of the Joint Declaration and the Basic Law. Article 8 of the Basic Law (in Chapter 1: General Principles) provides:

> "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and

> subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

Article 18(1) provides that the laws in force in the Region "shall be this Law, the laws previously in force in Hong Kong as provided for in art. 8 of this Law, and the laws enacted by the legislature of the Region". The courts shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in art. 18: Article 84. By virtue of art. 160, upon the establishment of the Region on 1 July 1997, the laws previously in force in Hong Kong were adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declared to be in contravention of the Basic Law.

12. It is clear from these articles of the Basic Law that the laws previously *in force* in Hong Kong, including ordinances, have been maintained and are part of the laws in force in Hong Kong on and after 1 July 1997. Obviously, a law which was previously not in force does not qualify.

13. The critical question is whether the finality provision was a law previously in force in Hong Kong within the meaning of the Basic Law. If it was not, it would under the Basic Law have no effect on 1 July 1997 and could not preclude an appeal to this Court. But if it was a law previously in force, its effect prior to 1 July 1997 was to preclude an appeal to the Judicial Committee of the Privy Council ("the Privy Council" or "the Judicial Committee"). And its effect on becoming part of the laws of Hong Kong on 1 July 1997, including the issue of whether it is inconsistent with the Basic Law, would have to be addressed.

The Judicial Committee Acts

14. Originally, the power of the Privy Council to entertain appeals from colonial courts was a prerogative power of the Crown.

After the enactment of the Judicial Committee Act 1833 and the Judicial Committee Act 1844 ("the Judicial Committee Acts"), that power was recognised to have become "in substance statutory, being regulated by the Judicial Committee Acts, with a vestigial and purely formal residue of the old prerogative powers". *De Morgan v. Director-General of Social Welfare* [1998] AC 275 at 285 A-B. See also *British Coal Corporation v. The King* [1935] AC 500 at 510-512. The Judicial Committee Acts in effect established the Judicial Committee of the Privy Council as a court of law with an independent legal status. In form, the appeal was to the Queen in Council. But in substance, it was an appeal to the Judicial Committee as a court of law. In form, it was the Order in Council which gave effect to the report of the Judicial Committee in a particular appeal. But in substance the Order in Council was a judicial act: *Ibralebbe v. The Queen* [1964] AC 900 at 918-922.

The Orders in Council

15. The Judicial Committee Act 1833 provided that Orders in Council may be made for regulating appeals from a particular jurisdiction: section 24. Appeals from Hong Kong were regulated by the Order in Council of 1909 as amended in 1957 (S.I. 1957 No. 2059) and the Order in Council of 1982 (S.I. 1982 No. 1676) ("the Orders in Council"). The latter was expressly stated to have been made under s. 24. As regards the former, as Parliament had already established the statutory framework in the Judicial Committee Acts, it should, in my view, be presumed that it was made pursuant to statute. These two Orders in Council provided that appeals from Hong Kong would lie (1) as of right, from any final judgment of the Court of Appeal where the matter in dispute amounted to more than a specified monetary amount, or at the discretion of the Court of Appeal or (2) by special leave of the Privy Council.

The Colonial Laws Validity Act

16. The Colonial Laws Validity Act 1865 applied to Hong Kong prior to 1 July 1997. Section 2 provided:

> "Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, … shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative."

17. Prior to 1 July 1997, was the finality provision repugnant to the Judicial Committee Acts and the Orders in Council? The concept of "repugnancy" in s. 2 is equivalent to "inconsistency" or "contrariety": *The Union Steamship Co. of New Zealand Limited v. The Commonwealth* [1925] 36 CLR 130 at 148. Plainly, the finality provision is inconsistent with the Judicial Committee Acts and the Orders in Council. And this was not seriously contested in argument. Whereas, the Acts and the Orders allowed appeals to the Privy Council from a decision of the Court of Appeal on an appeal from the Tribunal under s. 13(1) of the Ordinance, with leave from the Court of Appeal or the Privy Council, the finality provision, in providing that the decision of the Court of Appeal shall be final, bars any possibility of an appeal to the Privy Council.

18. Section 2 prescribed that the consequence of repugnancy was that the finality provision shall be read subject to the Judicial Committee Acts and Orders in Council and "shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

"Law previously in force"

19. Having regard to the consequence of repugnancy, was the finality provision a law previously in force in Hong Kong within arts. 8 and 18(1) of the Basic Law? Counsel for the Secretary for Justice, supported by counsel for the respondent, submitted that it nevertheless was a law previously in force within the meaning of these articles. His primary argument ran as follows: As long as a statutory provision had not been repealed and had not been declared by a court to be invalid, it was a law previously in force within the meaning of the Basic Law and would form part of the laws of Hong Kong on 1 July 1997. After that date, the Colonial Laws Validity Act was no longer relevant and the statutory provision could only be attacked on the ground of inconsistency with the Basic Law.

20. This argument must be rejected. The Colonial Laws Validity Act of course ceased to apply to Hong Kong on 1 July 1997. But under the relevant articles of the Basic Law, only laws previously *in force* in Hong Kong form part of our laws on 1 July 1997. The words "in force" must be given their proper meaning. The effect of repugnancy was provided for in the plainest terms by the Colonial Laws Validity Act. The repugnant finality provision was and remained absolutely void and inoperative. Such a provision simply had no force at all prior to 1 July 1997 and could not be a law previously in force in Hong Kong. This conclusion is consistent with the observation by Lord Diplock in *Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong* [1970] AC 1136 at 1161A that under the Colonial Laws Validity Act, a repugnant law "will be void and inoperative and will not be the law of Hong Kong".

Void and inoperative for the time being

21. Counsel for the Secretary for Justice advanced an alternative argument in support of the contention that the finality provision was part of the laws of Hong Kong on 1 July 1997. It was argued that the finality provision was only void and inoperative for the time being, that is, only during the period when the Colonial Laws Validity Act applied to Hong Kong. And as soon as that Act ceased to apply on 1 July 1997, the finality provision became effective and formed part of Hong Kong laws.

22. Again, the clear terms of s. 2 of the Colonial Laws Validity Act as to the effect of repugnancy render this argument unsustainable and it must be rejected. Section 2 makes plain that the repugnant finality provision could not be void and inoperative merely for the time being when the Colonial Validity Act applied. Under s. 2, the repugnant finality provision was not merely void and inoperative. It was *absolutely* so and this would be and *remained* the position. The effect of s. 2 was to kill off the repugnant finality provision and it would simply not be part of the laws of Hong Kong.

Conclusion on the first issue

23. Accordingly, the finality provision was not part of the laws of Hong Kong on 1 July 1997. Section 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance, Cap. 484 applies to an appeal to the Court from a decision of the Court of Appeal on an appeal against an order of the Tribunal. Under this provision, such an appeal lies at the discretion of the Court of Appeal or the Court if the court concerned is satisfied that the question involved is one "which, by reason of its great general or public importance or otherwise" ought to be submitted to the Court for

decision. The Court, having granted leave, has jurisdiction to entertain this appeal.

The second issue: Whether the finality provision is inconsistent with the Basic Law

24. Having regard to the above conclusion, it is strictly unnecessary to decide whether the finality provision is inconsistent with the Basic Law. However, the appellant relied on inconsistency with the Basic Law as an independent ground on the jurisdiction question and the matter was fully argued by the parties and the Secretary for Justice. It is of course an issue of considerable public importance. In these circumstances, the Court should in my view decide it.

Vesting of the power of final adjudication in the Court of Final Appeal

25. Upon the resumption of the exercise of sovereignty by China, the Privy Council ceased to be Hong Kong's final appellate court. In accordance with the one country two systems principle, the power of final adjudication vested not in the Mainland but in the Hong Kong Special Administrative Region. The vesting of this power in the Region and the establishment of the Court as its final appellate court was a fundamental change resulting from the change of sovereignty and the establishment of the Region.

26. In accordance with China's basic policies regarding Hong Kong as set out in the Joint Declaration (clause 3(3) and Annex I Part III), the Basic Law vested independent judicial power, including that of final adjudication in the Region: Articles 2 and 19(1). In accordance with the doctrine of the separation of powers, the courts exercise the judicial power of the Region: Article 80. Article 81(1) provides that different levels of courts shall be established, namely, the Court of Final Appeal at

the apex and below it, the High Court (comprising the Court of Appeal and the Court of First Instance), district courts, magistrates' courts and other special courts. The judicial system previously practised shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal: Article 81(2). Article 82, the crucial article in this part of the appeal, vests the power of final adjudication in the newly established Court of Final Appeal in these terms:

> "The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal."

The structure, powers and functions of the courts at all levels shall be prescribed by law: Article 83.

Nature of the Court's power of final adjudication

27. The function of the Court of Final Appeal is to exercise the power of final adjudication vested in it by art. 82. The crux of the matter is the proper interpretation of the Court's power of final adjudication vested by this article. But the nature of the power of final adjudication must first be appreciated.

28. As has been stated, the purpose of the Court's establishment is that it would replace the Privy Council as the final appellate court in the new order after 1 July 1997. The nature of its power of final adjudication must be considered in the context of the hierarchy of courts established by the Basic Law itself. This structure, in essence, is similar to that of the previous judicial system which the Basic Law requires to be maintained except for the Court replacing the Privy Council at the apex.

29. Having regard to the purpose of the Court's establishment and the context of the hierarchy of courts, it is clear that the Court's

power of final adjudication, as contemplated by the Basic Law, is by its nature, a power exercisable only on appeal and indeed on final appeal. The Court's function as envisaged by the Basic Law is not merely to exercise an appellate power, but a *final* appellate power which, by its nature, is usually exercisable upon appeal from an intermediate appellate court, such as the Court of Appeal. The Court's function is similar to the previous role of the Privy Council in relation to Hong Kong and is consistent with the role of final appellate courts in a number of common law jurisdictions.

Limitation of the power of final adjudication

30. That being the nature of the power of final adjudication vested in the Court of Final Appeal by art. 82, it is obvious that the intent of the Basic Law was not to give every party to every dispute a right to have the dispute resolved by final adjudication by the Court. By its very nature, the Court's power of final adjudication vested by art. 82 calls for and indeed requires regulation, which may include limitation. Such limitation is permitted by implication, having regard to the nature of the power. It may be dealt with by the enactment of statutes by the legislature or it may be dealt with by rules of court made by the rules committee exercising subordinate legislative powers.

The proportionality test

31. Courts do not have inherent appellate jurisdiction. Appeals are creatures of statutes, whether they be appeals from statutory tribunals to the courts or appeals from lower courts to higher courts. (In this case, one is not concerned with and need not discuss the right to seek judicial review from the courts). The legislature in providing for appeals in statutes may limit recourse to the Court for final adjudication and thus,

may limit its power of final adjudication to appeals permitted by such statutes. But limitation cannot be imposed arbitrarily by the legislature. The limitation imposed must pursue a legitimate purpose and there must be reasonable proportionality between the limitation and the purpose sought to be achieved. These dual requirements will be referred to collectively as "the proportionality test".

32. In the exercise of their independent judicial power, it is the duty of the courts to review any legislation enacted which seeks to impose any limitation on the power of final adjudication vested in the Court by art. 82 and to consider whether the limitation satisfies the proportionality test. If the courts decide that it does not satisfy this test, the limitation must be held to be unconstitutional and hence invalid. The limitation imposed would have exceeded the parameters of proper limitation of the Court's power of final adjudication vested by art. 82.

33. In applying the proportionality test to a particular limitation, the purpose of the limitation must first be ascertained. In ascertaining its purpose, matters such as the subject matter of the dispute, whether it concerns fact or law, whether it relates to substantive rights and obligations or only procedural matters, what is at stake, the need for speedy resolution and the cost implications of dispute resolution, including any possible appeals, will have to be considered. The legitimacy of any proposal will depend on whether it is consistent with the public interest, which of course has many facets, including the proper administration of justice. Then, in considering whether the limitation is reasonably proportionate to the legitimate purpose, it will be necessary to examine the nature and extent of the limitation.

34. Whether a particular limitation imposed by statute satisfies the proportionality test will depend on an examination of all the

circumstances. There may be instances where a statutory limitation providing that a decision of the Court of Appeal or the Court of First Instance on appeal, whether from a statutory tribunal or a lower court, shall be final may be able to satisfy that test.

Court of Final Appeal Ordinance

35. The Court of Final Appeal Ordinance regulates and limits appeals to the Court. The Court's power of final adjudication is limited to appeals permitted by its provisions. Appeals in civil cases are limited to appeals from the following judgments of the Court of Appeal: (a) final judgments where the matter in dispute amounts to $1 million or more, appeals from such judgments being as of right and (b) other judgments where the Court of Appeal or the Court has exercised its discretion to grant leave on being satisfied that the question involved is one "which by reason of its great general or public importance, or otherwise", ought to be submitted to the Court for decision: section 22(1). Appeals in criminal cases are limited to appeals from final decisions of the Court of Appeal or of the Court of First Instance from which no appeal lies to the Court of Appeal, where the Court has exercised its discretion to grant leave on being satisfied that a point of great and general importance is involved or that substantial and grave injustice appears to have been done: sections 31 and 32(2).

36. It has not been suggested in argument that the limitations on appeals imposed by the Court of Final Appeal Ordinance are impermissible. They are plainly valid. The limitations serve a legitimate purpose namely, to prevent the Court at the apex of the judicial system from being unduly burdened with appeals so as to enable it to focus on appeals, the judgments on which will be of importance to the legal system. And it is clear that the limitations are reasonably proportionate to that

purpose. Indeed, it could be argued that further limitation may be valid; for example, not only by increasing the monetary threshold for civil appeals as of right from final judgments of the Court of Appeal but even by abolishing such appeals as of right altogether. But as these matters do not arise, it would not be appropriate to express any view on them.

The finality provision

37. Does the finality provision in s. 13(1) of the Ordinance satisfy the proportionality test? If it does not, it would be inconsistent with the Basic Law and would be unconstitutional and invalid.

38. Section 13 provides for a statutory right of appeal from a decision of the Tribunal to the Court of Appeal. Having been entrusted with the task by statute, the Tribunal's decision on matters of professional discipline of solicitors carries considerable weight and the Court of Appeal will only interfere if satisfied that the Tribunal was plainly wrong. *Re a Solicitor* [1988] 2 HKLR 137 at 144 A-E.

39. In the absence of the finality provision, any further appeal to the Court from a judgment of the Court of Appeal under s. 13 is already limited by s. 22(1)(b) of the Court of Final Appeal Ordinance. Such an appeal is only permitted where the Court of Appeal or the Court in its discretion grants leave on being satisfied that the criteria set out in s. 22(1)(b) are satisfied, namely, that the question is one "which, by reason of its great general or public importance or otherwise" ought to be submitted to the Court for decision. Thus, the finality provision constitutes a *further* limitation. The limitation is an absolute one and precludes any appeal to the Court, even where such criteria are satisfied.

40. But, as stated above, s. 22(1)(b) permits an appeal from the Court of Appeal only in narrowly defined circumstances: where the

question is one which should be submitted to the Court by reason of its great general or public importance, or otherwise. The total ban imposed by the finality provision where questions of this order of importance arise cannot, in my view, be said to be reasonably proportionate to any legitimate purpose which may underlie the finality provision.

Conclusion on the second issue

41. Accordingly, the finality provision is inconsistent with the Basic Law and is unconstitutional and invalid. The appeal to the Court from a decision of the Court of Appeal given on an appeal from the Tribunal is governed by s. 22(1)(b) of the Court of Final Appeal Ordinance.

42. It should be noted that although the validity of the finality provision had to be tested against different instruments before and after 1 July 1997, that is, the Colonial Laws Validity Act and the Basic Law respectively, the same result is reached.

Conclusion on the jurisdiction to question

43. Accordingly, the Court has jurisdiction to entertain this appeal, leave having been granted by the Court under s. 22(1)(b).

The merits question

44. I have read the judgment of Mr Justice Chan PJ on the merits question and agree with it.

Mr Justice Bokhary PJ:

45. Access to the courts, including this Court where appropriate, is in practical terms the most important right conferred by the Basic Law on persons in Hong Kong. It is an arterial right, being the avenue through which all their other fundamental rights and freedoms are enforced by an

independent judiciary giving effective remedies in real life cases. A good illustration of the limits that can be constitutionally placed on access to a court of final appellate jurisdiction like this one is to be found in the discretionary criteria laid down by the Hong Kong Court of Final Appeal Ordinance, Cap. 484, for leave to appeal to this Court. Those criteria spare the Court from being overburdened, but do not seek to bar matters of high importance from the Court's purview. Accordingly they are constitutional as being consistent with the axiomatic nature and function of a court of final appellate jurisdiction like this one. The same cannot be said for the purported limit in question, namely the one in s. 13(1) of the Legal Practitioners Ordinance, Cap. 159. I agree with the Chief Justice that, for the reasons which he gives, this Court has jurisdiction to hear this appeal. And I agree with Mr Justice Chan PJ that, for the reasons which he gives, the appeal should be allowed in the terms which he proposes.

Mr Justice Chan PJ:

46. I agree with the judgment of the Chief Justice on the jurisdiction question. In this judgment, I shall deal with the merits question.

Events leading to the inquiry

47. The appellant's firm ("the firm") was one of the solicitors firms which offered its legal services to tenants of several public housing estates in connection with the Government's Tenants Purchase Scheme introduced by the Housing Authority in January 1998.

48. On 16 February 1998, the firm sought guidance from the Law Society on the propriety of its practice promotion, namely the publication of two advertisements which the firm intended to place in the

newspapers and the distribution of three household circulars which it intended to distribute to tenants in the housing estates concerned. Correspondence ensued between the Guidance Committee of the Law Society and the firm. While this was going on, the firm commenced its promotion by publishing the advertisements in the newspapers and distributing its household circulars to tenants of these housing estates between February and June 1998.

49. In respect of these advertisements and household circulars, a total of five complaints were originally laid by the Council of the Law Society ("the Council") against the appellant for having breached the Solicitors' Practice Promotion Code ("the Code") and the Solicitors' Practice Rules ("the Rules"). Having considered the relevant materials submitted by the Council, the Solicitors Disciplinary Tribunal ("the Tribunal") took the view that three of the five complaints were not substantiated. The remaining two complaints were amended and contained a number of allegations.

50. The allegation which is relevant to the present appeal concerns two of the household circulars, HC-2 and HC-3 which were distributed to tenants of the housing estates on 3, 5 and 8 June 1998. It related to the use of a logo ("the ISO 9001 logo") in these circulars indicating that the appellant had been awarded an ISO 9001 certificate by the Hong Kong Quality Assurance Agency ("HKQAA"). Immediately below the ISO 9001 logo was the following statement:

> "The legal services for conveyancing of our solicitors firm was assessed by the HKQAA to be up to the service standard of the ISO 9001."

51. It was alleged by the Council that the use of the logo together with this statement in HC-2 and HC-3 was misleading or confusing or was likely to be misleading and confusing because it might

have led the recipients into believing that the HKQAA was able to and did certify the quality of the firm's legal work in conveyancing. This, it was said, constituted a breach of paragraphs 6(a), 6(b), 6(c) and 6(l) of the Code.

52. It was also alleged by the Council that this breach was likely to compromise or impair the reputation of the firm or the solicitors' profession, thus constituting a breach of rule 2(d) of the Rules.

53. Before the hearing, on 25 April 2000, pursuant to paragraph 10 of the Code, the Law Society issued a circular, Circular 00-118 (SD) (which was later extended by Circular 00-208 (SD)), to its members in relation to the use of ISO logos in their promotional materials in the following terms:

> "2. The Standing Committee on Standards and Development has resolved that where a firm has been awarded ISO 9000 or 9002 Certification by the Hong Kong Quality Assurance Agency in relation to an area of its practice, the ISO 9000 or 9002 Certification Logo may be used on promotional material provided that the area of the firm's practice to which the certification relates is clearly stated, as follows:
>
> (a) on the letterhead and leaflets introducing the firm, provided that if the certification only relates to a particular area of the firm's practice, this is stated immediately beneath the logo … the words "Certified Company" which appear within the logo;
>
> (b) …
>
> (c) on the firm's promotional material and advertisements subject to the qualifications set out in paragraph (a) above, and provided that it otherwise complies in all respects with the Solicitors' Practice Promotion Code.
>
> 3. Breach of these guidelines may incur disciplinary sanctions."

54. One of the points raised by the appellant at the hearing was that his promotional materials, HC-2 and HC-3, had complied with this Circular, although they were distributed two years before the issue of this Circular.

Tribunal's finding

55. Of the many allegations made in the two complaints against the appellant, the Tribunal found only one aspect of the second complaint proved, that is, the statements in HC-2 and HC-3 were misleading. It upheld

> "… the one element of the Second Complaint in respect of the commentary applied by the (appellant) to the second and third household circulars, these circulars being part of the exhibit "RAH 1", to the effect that the Hong Kong Quality Assurance Agency had assessed the conveyancing work undertaken by the (appellant's) firm to be up to the services standard of ISO 9001. In our view, the (appellant) failed to make clear to readers of the household circulars that ISO certification can only ever relate to quality of management systems and is not any form of endorsement or statement about the quality of legal services provided by any practitioner. In our view, this commentary gave a misleading impression to members of the public that the quality of the (appellant's) firm's legal work had been assessed and approved by the Hong Kong Quality Assurance Association, rather than the quality of the (appellant's) firm's management system."

56. The Tribunal thus found that there was a breach of paragraph 6(a) of the Code and rule 2(d) of the Rules. It ordered the appellant to pay a fine of $10,000 and to be censured. It also ordered him to pay one third of the costs and disbursements of and incidental to the proceedings.

57. In its statement of findings, the Tribunal also criticized Circular 00-118 (SD) saying that:

> "… this does not identify the risk of confusing quality management systems with quality legal work and, therefore, does not go far enough in our view in protecting the interest of the public from the possibility that they will be misled into believing that ISO 9000-9002 is an index of quality of legal services."

Court of Appeal's decision

58. The appellant appealed to the Court of Appeal pursuant to s. 13(1) of the Legal Practitioners Ordinance ("the Ordinance"), Cap. 159. On 14 June 2002, the Court of Appeal (Mayo VP and Stock JA, Cheung JA dissenting) dismissed the appeal. The majority upheld the Tribunal's

finding, drawing a distinction between the operation of a quality management system and the provision of quality legal services. The Court of Appeal also commented adversely on Circular 00-118 (SD).

59. Subsequent to this judgment, the Law Society withdrew Circular 00-118 (SD) and replaced it by Circular 03-7 (SD) to which I shall refer later.

Appellant's main contention on the merits

60. In this appeal, Mr Martin Lee SC leading Ms Wing Kay Po for the appellant raised 3 main contentions:

(1) the use of the ISO 9001 logo together with the statement in question in HC-2 and HC-3 was not misleading;

(2) even if it was misleading, it did not constitute a breach of paragraph 6(a) of the Code or rule 2(d) of the Rules; and

(3) even if it was a breach of paragraph 6(a) of the Code or rule 2(d) of the Rules, it did not, in all the circumstances of this case, call for any order of sanction or penalty.

Relevant regulatory provisions

61. The Council has the statutory power and duty to supervise and regulate the practice and conduct of solicitors. Under s.73 of the Ordinance, the Council may make rules providing for, among other things, the professional practice, conduct and discipline of solicitors. Such rules as may be made by the Council shall be subject to the prior approval of the Chief Justice.

62. Pursuant to s. 73, the Solicitors' Practice Rules were made. Rule 2(d) provides that

> "a solicitor shall not, in the course of practising as a solicitor, do or permit to be done on his behalf anything which compromises or

> impairs or is likely to compromise or impair his own reputation or the reputation of the profession".

63. Prior to 1992, a solicitor was not allowed to publicise or promote his practice. This prohibition was relaxed in that year by an amendment to rule 2AA which now provides:

> "(1) Subject to subrule (2), a solicitor shall not publicise or otherwise promote his practice or permit his practice to be publicised or otherwise promoted.
> (2) Subrule (1) does not apply to anything done in accordance with the Solicitors' Practice Promotion Code as made from time to time by the Council with the prior approval of the Chief Justice."

64. Pursuant to rule 2AA(2), the Code was promulgated by the Council with the prior approval of the Chief Justice taking effect on 20 March 1992. The following paragraphs are relevant to the present appeal:

> "4. All practice promotion must have regard to the Solicitors' Practice Rules and other professional obligations and requirements, and nothing in this Code shall be construed as authority for any breach of those Rules, obligations or requirements.
>
> 6. Practice promotion shall be decent, legal, honest and truthful and shall not:
> (a) be likely to mislead or deceive, whether by inclusion or omission;
> (b) contain any adverse remark or implication concerning any other solicitor or solicitors, in particular in any comparison of services, practice or fees;
> (c) make any claim or imply that the solicitor is, or that his practice is or includes an expert in any field of practice or generally. It is permissible, however, to refer to his knowledge, qualifications, experiences or area(s) of practice provided that such a claim can be justified;
>
> (l) be in any manner which may reasonably be regarded as having the effect of bringing the solicitors' profession into disrepute.
>
> 10. The Council may from time to time by resolution published to the profession draw attention to examples of practice promotion which in the opinion of the Council constitute breaches of the general principles and intent of this Code. Any practice promotion effected or continued after the promulgation of such advice would be regarded by the Council as a breach of this Code."

65. Pursuant to paragraph 10 of the Code, the Council has from time to time issued circulars to its members giving examples of cases which amounted to breaches of the Code. Circular 00-118 (SD) and Circular 03-7 (SD) were issued pursuant to this paragraph.

66. It is clear from the above provisions that while a practice promotion which is in breach of a circular issued pursuant to paragraph 10 of the Code would be regarded as a breach of the Code, the converse may not be true: a practice promotion which does not constitute a breach of the circular may still be in breach of the Code.

Whether HC2 and HC3 misleading

67. The Tribunal found that the use by the firm of the ISO 9001 logo together with the statement in question in HC-2 and HC-3 was misleading. Before the Tribunal, the appellant argued that the statement was a statement of true fact in that "with regard to (his) firm's conveyancing services, the *commitment to provide a quality service* in this practice area *was assessed and certified* by the HKQAA to satisfy ISO 9001 quality standards." (Emphasis provided) This argument was rightly rejected by the Tribunal. The statement was plain and unequivocal: it was the firm's legal services of conveyancing which were assessed by the HKQAA. To this extent, the statement was, subject to the other submissions raised by the appellant, clearly incorrect and misleading to the public.

68. Before the Court of Appeal and this Court, the appellant, while maintaining that the statement in question was true, has put forward two main arguments. The first argument, which appears to have been accepted by Cheung JA in his dissenting judgment, is that the dichotomy drawn by the Tribunal between quality management system and legal

services is fundamentally flawed; and that since the objective of having a quality management system is to ensure the provision of quality legal services, a certification on the firm's management system would necessarily involve an assessment of its legal services because the former was an integral part of the legal services.

69. The second argument is that as a matter of fact, what was actually assessed by the HKQAA was not only the firm's management system, but also its legal services. It is pointed out that the HKQAA auditors in their visits to the firm's office had in fact checked a number of clients' files and documents including the firm's conveyancing checklists, time record sheets, clients instruction sheets, reminders for completion dates, and had recorded in their internal files that the services provided by the firm to particular customers had indeed been assessed and were found to be satisfactory.

70. In my view, the first argument is irrelevant and the second argument is not supported by the facts.

71. The question we have to decide is not whether a distinction between a management system and the legal services provided under that system is justified. Nor whether a certification on the management system would inevitably include a certification on the legal services provided. It may be that a quality management system would, or even should, ensure quality legal services. But that is not the point. The question we have to decide is whether in this case, the HKQAA in their certification process had in fact assessed the firm's legal services. In my view, the answer to this question must be in the negative. This is clear from the facts of this case.

72. In Hong Kong, ISO 9000 certification is governed by the Hong Kong Quality Assurance Certification Scheme which is operated by

the HKQAA, a government-subvented body established by the Industry Department. The ISO 9000 (including ISO 9001) is a series of international standards set by the International Organization of Standardisation prescribing requirements for quality management and quality assurance for the manufacture of products and provision of services. A business organization which has attained such standards would be awarded a certificate.

73. In the materials issued by the HKQAA, it is stated that their certification is an

> "audit of the quality system of a company by a competent, independent agency. The audit is carried out according to the company's documented quality management system that is assessed against the requirements of for example, ISO 9001. Audits are performed on site and companies under assessment must show the practical application of the quality system and procedures written down in their quality documentation. The integrity of the quality system is then checked by subsequent unannounced continuing assessment visits."

This is what they say they would assess in their certification exercise.

74. The certificate issued to the firm by the HKQAA states that at their certification audit, it was established that the quality management system of the firm conformed fully to the requirements of the international standard (ISO 9000) for quality management and quality assurance. This is what they certify in their certification. Nothing is mentioned with regard to the quality of the firm's legal services.

75. In a publication which was relied on by the appellant: "Quality: A Briefing for Solicitors (BS5750 Code of Quality Management for Solicitors)" issued by the Law Society in England with regard to the issue of a certification according to the BS5750 which is the equivalent of the ISO 9000, it is recognised that it is not practical to set standards for the quality of legal advice and the relevant organization does not seek to set any such standards.

76. Mr Leung Wing Nang who was a former Council member of the HKQAA and who made an affirmation on behalf of the appellant stated that the ISO 9001 mark "is no more than a proof on the part of the mark holder of commitment and pledge to provide a quality service" and that "it is well-known that the ISO marks are not awarded on the basis of the excellence of any particular services. Rather, they relate to standards of management within a company or firm."

77. It is therefore quite clear that the HKQAA have been at pains in asserting that they do not assess and do not certify the services of an enterprise, only the management system which provides the services. They have disavowed any assessment of the services provided by the system they have assessed.

78. Even the appellant in his first affirmation accepted that

> "the only function of an ISO 9000 accreditation body, including the HKQAA, is to assess and certify whether the commitment to a quality management system of the business entity established in line with ISO 9000 quality standards can be demonstrated …"
>
> "So far as the conveyancing services of my law firm are concerned, including the conveyancing services for the Tenants Purchase Scheme, the HKQAA would and could only assess and certify whether the commitment to a quality service in respect of this practice area against the firm's quality management system could be demonstrated, and whether the results thereof are satisfactory. *At no point* and *in no way would and could the HKQAA* certify and *assess the quality of* a trade, and in this case, *conveyancing services* …" (Emphasis provided)

79. However, in his fourth affirmation, the appellant alleged that in their surveillance visits to his office, the HKQAA had examined not only his management system, but also individual files and checklists and were satisfied that they met the required ISO standards. It is submitted that in a straightforward conveyancing transaction, the HKQAA's certification demonstrated that the legal services provided by the firm were also found to have met the required standards. Further, the firm's

pamphlets (which presumably included the household circulars in question) were considered by the HKQAA as "OK". It is argued that this showed that the firm's legal services had in fact been assessed and approved.

80. I cannot accept this argument. Notwithstanding the steps taken by the auditors, their Report referred to the visits being a review of the quality management system of the firm and commented only on the system and the ISO 9001 certificate issued to the firm only stated that the firm's quality management system had satisfied the relevant ISO standards. This was what the HKQAA were prepared to certify and what they actually certified. This is also evident from the conditions imposed by them for the use of the ISO logo by a business enterprise which has been awarded such a certificate. One of the conditions is that the logo "may not under any circumstances be used directly on or closely associated with products or by reference to the services provided by a Business in such a way as to imply that the products or services themselves are certified by HKQAA".

81. The argument that a quality management system would ensure quality services and that such a system is an integral part of the services provided is beside the point. As Stock JA succinctly summarized in his judgment:

> "… the (HKQAA) was in no position whatsoever to assess the practitioner's knowledge and skills in the field, …
>
> But even if one were to accept that a quality management system was part of the service itself, it still remains but part of the service; and a representation which implies, or is likely to be read as saying, that there has been an assessment of the whole, whereas there has in fact been an assessment of a part, which assessment did not include a very important part, is a representation that is likely to mislead."

82. There was, in my view, ample evidence to support the finding that the statements in the household circulars HC-2 and HC-3 were inaccurate and misleading.

Whether in breach of para. 6(a) of the Code

83. The appellant submits that even if the use of the ISO 9001 logo together with the statement in question in HC-2 and HC-3 was misleading, this did not amount to a breach of paragraph 6(a) of the Code. He relies on Circular 00-118 (SD) issued by the Law Society 2 years after the complaints had been lodged against him. As mentioned earlier, this Circular permitted the use of the ISO 9000 or 9002 Certification logo on promotional materials provided that the area of practice to which the certification related was clearly stated immediately beneath the logo, and provided that it otherwise complied in all respects with the Code.

84. This Circular was regarded by the Tribunal as also misleading and confusing. The majority of the Court of Appeal took the same view. Both the Tribunal and Stock JA also considered that HC-2 and HC-3 went further than this Circular.

85. The appellant's argument runs as follows. Whether this Circular was also misleading is irrelevant. There was practically no difference in substance between what was contained in the household circulars and what was permitted by this Circular. Although this Circular was issued well after the distribution of the household circulars by the appellant, it reflected the Law Society's standard of what was and what would be regarded as acceptable. As the appellant's professional conduct was to be judged by his peers, if his peers, the Standing Committee on Standards and Development of the Law Society, considered (albeit 2 years later) what he had done was permissible, there was no breach on his

part of paragraph 6(a) of the Code. Furthermore, the Council should not have laid any complaint against him with regard to the household circulars he had distributed or should have withdrawn the complaint before the hearing.

86. With respect, I do not think this argument is sustainable. First, Circular 00-118 (SD) expressly stated that any promotional material must "otherwise (comply) in all respects with the Solicitors' Practice Promotion Code". And paragraph 6(a) of the Code says that practice promotion shall not be likely to mislead. If HC-2 and HC-3 contained statements which were likely to mislead, that is a breach of the Code. This is so even if any promotional material which is permitted by this Circular is also misleading.

87. Secondly, it is the Tribunal, not the Standing Committee on Standards and Development, which is entrusted with the statutory duty to determine what is and what is not a breach of the Code and the Rules.

88. Thirdly, although what the Standing Committee considers to be acceptable to the profession carries a lot of weight in determining what is or is not a breach of the Code or the Rules, there is the public interest that members of the community have the right to be served by lawyers of a very high standard of competence and integrity. The Tribunal has the duty to decide what is and what is not acceptable as a standard of competence and integrity for the public. It is clear from the Tribunal's criticism of Circular 00-118 (SD) in the passage quoted in paragraph 57 above that the protection of public interest was very much in the mind of the Tribunal. (See also the comments of Stock JA in paragraph 97 of his judgment on the need to maintain a very high standard.) In my view, the Tribunal is perfectly entitled in the public interest to set a higher standard than the Council would for its members.

89. It is to be noted that subsequent to the Court of Appeal judgment, the Law Society withdrew Circular 00-118 (SD) and replaced it by Circular 03-7 (SD) which permits the use of ISO logos provided that the area of practice certified by the HKQAA appears in the promotion materials with a statement to the following effect :

> "This ISO [area of practice] Quality Certificate is awarded for the quality of the system of management of our [area of practice] department/practice. It is not awarded for, and makes no representation as to, the quality of our legal services."

90. This highlights the importance of accuracy in promotional materials in order not to mislead the public.

Whether in breach of rule 2(d) of the Rules

91. While the statements contained in HC-2 and HC-3 were in breach of paragraph 6(a) of the Code, did they also infringe rule 2(d) of the Rules? I do not think so. A breach of paragraph 6(a) of the Code no doubt results in a breach of rule 2AA of the Rules which prohibits practice promotion generally except in accordance with the Code. But it does not follow that the same conduct without more would also constitute a breach of rule 2(d) which governs the general conduct of a solicitor in the course of his practice. On the facts of this case, I cannot see how the statements in HC-2 and HC-3, even though misleading, would have compromised or impaired the appellant's own reputation or the reputation of the profession or would likely have such an effect.

92. The Tribunal held that these statements were also in breach of rule 2(d) and this was affirmed by the majority of the Court of Appeal. But neither the Tribunal nor the Court of Appeal gave any particular reason for taking such a view, apart from the conclusion that they were in breach of paragraph 6(a) of the Code. I do not think this finding can be upheld.

Was the order made by Tribunal correct?

93. Section 10 of the Ordinance, apart from conferring the power on a Solicitors Disciplinary Tribunal to inquire into and investigate the conduct of a solicitor (or persons related to his practice), further empowers the Tribunal, on the completion of its inquiry and investigation, to make a variety of orders. These orders are in the nature of sanctions ranging from striking that person off the solicitors' roll to ordering him to pay the costs and disbursements of the proceedings. But whether or not to make any order under this section and if so, what order to make is a matter within the discretion of the Tribunal, taking into account the conduct in question and the circumstances of each case. Section 10 itself does not give any clue as to what type of conduct would attract any of these sanctions and the criteria for imposing such sanctions. It would seem that before the Tribunal can exercise its powers under this section, it has to be satisfied and make a finding that the conduct complained of has been proved to be in breach of the Rules or the Code. Since the Rules and the Code cover a very wide range of activities in a solicitor's professional practice, the sanction to be imposed in each case must depend on the nature and seriousness of the conduct and the circumstances of the breach. As with anything in the nature of a sanction, it must be proportionate to the blameworthiness of the person responsible for the conduct. Matters such as the effect of the conduct on the persons affected and on the confidence of the public in the legal profession are also relevant.

94. In my view, the appellant's conduct in this case cannot by any standard be regarded as serious and there are clearly special circumstances to justify taking an exceptional view of the matter.

95. As the HKQAA say in their materials, maintaining an effective and quality management system which satisfies the ISO standards would normally provide an assurance to customers that the services provided would conform to the customer's specifications. The demarcation between a management system and the services it produces is often not very clear, particularly with certain types of services. In the present case, it is not disputed that the appellant's management system had indeed been assessed and found to have met ISO standards. In view of the rather detailed audit conducted in the firm by the HKQAA in their certification process, it was understandable that the appellant fell into the error of drawing the conclusion that his legal services were also the subject of the assessment.

96. Apart from the misleading statements in question, the way in which the appellant made use of the ISO 9001 logo in HC-2 and HC-3 was not very much different from that in which ISO logos were permitted to be used in promotional materials by Circular 00-118 (SD). The other main objection raised by the Council was that since the firm's certification did not relate to any particular area of practice, the household circulars should not have referred only to conveyancing services. But as the Tribunal and the Court of Appeal held, Circular 00-118 (SD) was also likely to be misleading in that any promotional material complying with this Circular would also give an impression to the recipients that the HKQAA had assessed the legal services provided by the holder of the ISO certificate.

97. The fact that Circular 00-118 (SD) was also misleading of course does not absolve the appellant in making the misleading statements contained in HC-2 and HC-3. However, it is fair to say that this Circular reflected the thinking of the Standing Committee on

Standards and Development at the time when it attempted to set an acceptable standard for members of the profession in publishing their promotional materials. What the appellant did in this case did not fall below that standard, albeit a standard which the Tribunal in effect held not sufficient for the protection of the public. Although the appellant could not claim to have been misled by Circular 00-118 (SD) since it was issued long after the appellant's distribution of HC-2 and HC-3, this Circular and its subsequent replacement by Circular 03-7 (SD) show that practice promotion, in particular the contents of promotional materials, can sometimes be quite controversial. This is especially so where one is concerned with something new as in this case, that is, ISO certification in relation to solicitor firms.

98. Paragraph 6 of the Code, quite properly in my view, casts a wide net against improper practice promotion. As Stock JA said in paragraph 60 of his judgment: "the Code goes wider than mere technical truth, but requires that even a statement which might, on some literal construction, be said strictly speaking to be true, should nonetheless not carry a likelihood of misleading." The appellant's promotional material in the form of HC-2 and HC-3 cannot be considered as improper practice promotion. What the appellant did was, as found by the Court of Appeal, failing to "take the care which ought to have been taken in what he said to the recipients of thousands of his circulars" (see Stock JA in paragraph 98 of his judgment); and he "was only guilty of an error of judgment. He was not guilty of dishonesty or serious misconduct" (see Mayo VP in paragraph 140 of his judgment). I agree with these remarks.

99. In my view, given the special circumstances in this case, although the appellant was in breach of paragraph 6(a) of the Code, it was a breach which is at the bottom end of the scale. It was conduct which

was not very much different from conduct which the Standing Committee on Standards and Development had for a while permitted and would not have considered to be improper. There is no evidence of any recipients of the appellant's household circulars having actually been misled or confused. There is also no question of any compromise or impairment of the reputation of the profession. The appellant's conduct does not call for any sanction. Nor would any sanction serve any useful purpose. The order made by the Tribunal is in my view wholly disproportionate to the gravity of the conduct. It is plainly wrong.

Conclusion

100. For the reasons given above, I would allow the appeal and set aside the entire order of the Tribunal (including that part of the order relating to costs). I would also make an order nisi that the appellant have the costs of the appeal in this Court and in the Court of Appeal against the respondent and that there be no order as to costs as far as the Intervener is concerned. Any party wishing to challenge it should send in written submissions within 14 days with copies to the other parties.

Mr Justice Ribeiro PJ:

101. I agree with the judgment of the Chief Justice on the jurisdiction question and the judgment of Mr Justice Chan PJ on the merits question.

Lord Scott of Foscote NPJ:

102. I agree with the judgment of the Chief Justice on the jurisdiction question and with the judgment of Mr Justice Chan PJ on the merits.

Chief Justice Li:

103. The Court unanimously allows the appeal and sets aside the entire order of the Tribunal (including that part of the order relating to costs). Further, the Court makes the order nisi on costs set out in the concluding paragraph of the judgment of Mr Justice Chan PJ.

(Andrew Li)	(Kemal Bokhary)	(Patrick Chan)
Chief Justice	Permanent Judge	Permanent Judge

(R.A.V. Ribeiro)	(Lord Scott of Foscote)
Permanent Judge	Non-Permanent Judge

Mr Martin Lee, SC and Ms Wing Kay Po (instructed by Messrs J. Chan, Yip, So & Partners) for the appellant

Mr John Kerr (instructed by Messrs Nasirs) for the respondent

Mr Michael Blanchflower, SC (instructed by the Department of Justice) for the intervener