

1.03 Firstly, professional ethics have been said to be a set of standards above the minimum legal requirement, underpinning the basic values and related regulations of the practice of the profession in issue. This appears to be a benchmark to judge whether an occupation could be said to be a profession.

1.04 In *R v General Medical Council, ex parte Coleman*² Ralph Gibson LJ cited Lord Upjohn's judgment in *Pharmaceutical Society of GB v Dickson* (restraint of trade)³:

"A profession is a vocation of the highest standing; it calls on its members to serve (no doubt for reward) the public by offering to them highly technical and always confidential advice and services which require a different standard of conduct from the tradesman. Its members stand in a different relationship altogether from the man doing ordinary business. So much so that in many cases they are presumed to exert an undue influence upon the client. No close definition can be given, for bodies are always, rightly, breaking into the professional area and the pharmaceutical profession forms a very welcome example of it.

But the professional code must be different by the nature of its calling and the reliance placed upon it by the public from those carrying on trade and commerce. Those seeking the advice of a professional man are entitled to expect of him the highest standards of ethical conduct."

1.05 Secondly, traditionally it is common for the enforcement of professional discipline to be entrusted to disciplinary tribunals composed mainly of members of the profession concerned. Such self-regulation has been widely considered appropriate.⁴

1.06 In recent years there is a trend towards transparency and participation by non-members. This gives rise to both confidence from, and transparency to the public in respect of the disciplinary process.

(2) APPROACH OF THE COURT TO DISCIPLINARY PROCEEDINGS

1.07 The approach of the Court in recognising the self-regulatory aspect of the professions is reflected in a number of ways:

- (a) The Courts normally consider professions are best judged by their peers.
- (b) The Court does not consider that it is disgraceful not to follow the majority views.
- (c) Professional Codes of Conduct normally serve as benchmarks to which the professional should follow.
- (d) In deciding which way the balance is to be drawn between (b) and (c), the Court will not adopt an overzealous approach and would defer to the wisdom of the tribunal.
- (e) However, in relation to sophisticated regulatory regimes, such as financial regulation, the Court would appear to take a more meticulous and principled approach.

² [1990] 1 All ER 489, at p 508 b-e.

³ [1970] AC 403 at 436, in the context of whether a professional (a pharmacist) should be restricted to his right to advertise.

⁴ *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248 [29] (Bokhary PJ).

(a) Professions are best judged by their peers

1.08 Traditionally, it has been said that the professions are best judged by their peers⁵ and this justifies the composition of disciplinary tribunals of professional bodies to consist mainly of members of the profession.

(b) It is not disgraceful to disagree with the majority view unless he bound himself to accept that view

1.09 It is not disgraceful to disagree with the views of the majority. It is only if someone has bound himself in honour to accept that view and to act according to the code that a deliberate breach of the code for his own profit can be called disgraceful.⁶ The principle is that there is the right of every person to earn a living in whatever way he chooses, unless prevented by law or he has elected to pursue it in a particular way.⁷

1.10 On the other hand, a professional may decline to follow certain codes of conduct, or orders, if he has a material interest in "disobeying" that code or order.⁸ Two examples are given below.

1.11 The first example is in *Dickson v Pharmaceutical Society of Great Britain*.⁹ The Pharmaceutical Society of Great Britain, a society incorporated by Royal Charter and recognised by statute as representing all registered pharmacists who were required to be members, and limited companies employing registered pharmacists and carrying on chemists' businesses in premises registered under the Pharmacy Acts were also brought within the society's jurisdiction. The society's governing body was a council with power to make by-laws in furtherance of the objects. Its disciplinary body was an independent statutory committee which could inquire into charges of misconduct against a member and strike off the register a particular pharmacist or company premises. In considering misconduct, the statutory committee had regard to the code of ethics laid down by the society for guidance on professional conduct. The code of ethics, though said to be binding only in honour, had practical force and normally 90% of the membership complied with its provisions. There was a right of appeal from the statutory committee to the High Court.

The Society proposed a new rule for inclusion in the code of ethics and submitted it in the form of a motion to a specially convened meeting of the members. The effect of the rule would be that, save with the approval of the council, new pharmacies would have to be situated in physically distinct premises and their trading activities confined to pharmaceutical and traditional goods as defined in the report of a committee on

⁵ *Tong Pon Wah v Hong Kong Society of Accountants* [1998] 3 HKC 82 (CA), 98 (Liu JA).

⁶ *Devlin J in Hughes v Architects' Registration Council of the United Kingdom* [1957] 2 QB 550, 561. In 1934, H, who had been in practice as an architect, surveyor, land and estate agent and valuer since 1922, became registered as an architect under the Architects (Registration) Act, 1931. In 1936 the Architects' Registration Council drew up a code which provided that it was not permissible for a registered architect to also practise as a surveyor, land or estate agent or valuer. The discipline committee of the council found H guilty of disgraceful conduct in his capacity as an architect, on the ground that he refused to confine his practice to architecture. His appeal succeeded.

⁷ *Hughes v Architects' Registration Council of the United Kingdom* [1957] 2 QB 550, 563 (Devlin J).

⁸ *Buckoke and Others v Greater London Council* [1971] Ch 655.

⁹ [1970] AC 403.

Society;⁴² *The Law Society of Hong Kong v A Solicitor*;⁴³ *Twinsectra Ltd v Yardley*;⁴⁴ or

- (b) a purely objective test (ie whether according to the ordinary standards of reasonable and honest people what was done was dishonest): see *Barlow Clowes International Ltd v Eurotrust International Ltd*;⁴⁵ *Peconic Industrial Development Ltd v Chio Ho Cheong*.⁴⁶

3.28 In this respect the matter may have to be reconsidered again by the highest court. It is therefore instructive to rehearse the combined test set out originally in the case of *Twinsectra*.

Essentially, in that case the House of Lords explained that there were two limbs to dishonesty, the first objective and the second subjective. The first limb raised the question of whether the professional (in *Twinsectra* the professional was a solicitor) had acted dishonestly by the ordinary standards of reasonable and honest people; the second limb raised the question of whether the professional had himself been aware that by those standards he was acting dishonestly. Lord Hoffmann⁴⁷ emphasised that these principles required more than knowledge of the facts which made the conduct wrongful: "...They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour."

3.29 It is a fundamental principle of fairness that a charge of dishonesty should be unambiguously formulated and adequately particularised.⁴⁸

(8) INQUIRY FOR RESTORATION

3.30 An inquiry for restoration of a member to the relevant register is not necessarily disciplinary proceedings. This is true in the case of dentists.⁴⁹

(9) PRACTICE OF OTHER TRIBUNALS

(a) Little guidance from other tribunals' practices

3.31 On the question of whether expert evidence should be adduced in addressing whether certain practices have met the required professional standards, the Courts have decided that the practice of other tribunals is of little guidance. In *The Hong Kong Institute of Certified Public Accountants v Disciplinary Committee*,⁵⁰ Reyes J

42 [2009] 1 WLR 163 at 201D-F.

43 [2004] HKCU 544 (CACV 213/2003, 19 May 2004, unreported) (CA) [17].

44 [2002] 2 AC 164 (HL).

45 [2006] 1 WLR 1476 (PC) [10, 12-16].

46 [2005] HKCU 1504 (HCA 16255/1999, 1 June 2006, unreported) [184].

47 [2002] 2 AC 164 (HL) [20].

48 *Dr Wu Daniel Yiang v Medical Council of Hong Kong* [2014] HKCU 2886 (CACV 162/2013, 15 December 2014, unreported) (CA) [39], following the Privy Council in *Osama Hassan Salha & Anor v The General Medical Council* [2003] UKPC 80, [2004] ECDR 12 (PC), page 158 [14] per Lord Hoffmann.

49 *Jeremy Tung v Dental Council of Hong Kong* [2012] HKCU 1674 (HCAL 35/2011, 14 August 2012, unreported).

50 [2005] HKCU 1601 (HCAL 135/2005, 11 November 2005, unreported).

explained that while members of a solicitors' disciplinary panel may be comfortable to apply the professional standards adopted in other solicitors' disciplinary tribunals applicable to solicitors, this may not be true in the case of accountants. Accountants may not be comfortable to judge whether other accountants have complied with the Statements of Auditing Standards which may be regarded as well-known and accord with common sense. It is better to defer the discretion to the particular tribunal in question.⁵¹

3.32 Ultimately, the standards may all depend on the issues in a case.

(10) CURRENT ISSUES

3.33 Professional standards can change with time. This section highlights certain current trends.

(a) Advertising

(i) Meaning of advertising

3.34 The meaning of advertising is not precise.

3.35 There is a long-standing tradition that certain professional practitioners (such as lawyers, medical doctors, dentists, and the like)⁵² should refrain from self-advertisement has long been accepted by those professions. The reasons given against advertising are various, for one, advertising is incompatible with principles which should govern relations between members of the profession, and could be a source of danger to the public.⁵³ Exaggerated statements in advertising of safety of new medical procedure, for example, may tend to mislead the public and the misrepresentations on safety of those medical procedures are likely to be a source of danger to the unwary.

(ii) Dividing line

3.36 What is the test to determine whether advertising is acceptable? The best way to draw the dividing line is "between properly giving information to the public and wrongful self-advertising".⁵⁴ The location of this dividing line is particularly a matter for the Disciplinary Committee. Within the profession, the line between the kind of publication that is objectionable and the kind that is unobjectionable should be recognised with little difficulty by any reasonable practitioner.⁵⁵

51 *The Hong Kong Institute of Certified Public Accountants v Disciplinary Committee* [2005] HKCU 1601 (HCAL 135/2005, 11 November 2005, unreported) [38-39] (Reyes J).

52 For issues concerning individual professions please refer to the relevant chapters on those professions below.

53 Eg Dental Council warning notice (1995 Edition). See *Rocket v Royal College of Dental Surgeons of Ontario* (1990) 71 DLR (4th) 68 (Can SC), where the Canadian Supreme Court held at pp 81h-82b that the professional rules relating to practice promotion by dentists breached the proportionality test.

54 *Tarnesby v General Medical Council* (PCA 21/69, unreported) (PC) (Lord Pearson).

55 *Tarnesby*, *ibid* per Lord Pearson citing Lord Morris in *Gardiner v General Medical Council* (PCA 35/60, unreported) (PC).

there had been a failure to hold "due inquiry" was devoid of substance and had been rightly rejected by the Supreme Court of Hong Kong.

In this case, counsel for the appellant in the course of his address to the Board submitted that: "...it was desirable in the interests of natural justice that there should be a summing-up by the legal adviser to the board in the presence of the parties." After an adjournment, the Board ruled that the legal adviser was not to be compared to a legal assessor or a judge advocate because by section 5(2) of the Buildings Ordinance, 1955 his status was that of a full member of the Board like any other member of the Board. The Board pointed out that their procedure in the past had not involved that the legal adviser, before the retirement of the Board, should give legal advice to the Board in the presence of the parties. They stated that he had of course joined in their deliberations and had done so with particular reference to any legal aspects of a case. They did not propose to depart from their practice.

4.37 This case may be explained on the basis that the appellant's application for leave to apply for an order of *certiorari* was based upon the grounds that the Board had failed to hold a due inquiry. In breach of the rules of natural justice, the legal adviser (who had the conduct of the inquiry) did not give, within the hearing of the parties, any or sufficient legal advice to the Board of which he was a member, on the many points of law arising in the course of the said inquiry, or in such a manner that his advice could form part of the record or be ascertained from the record for the purposes of the parties either at the hearing before the Board, or on appeal. In addition, it was contended that any communication to the Board by the legal adviser should, as a matter of obligation have been made in the presence of the parties in a manner comparable to that laid down by regulation 33⁴⁴ of the Medical Practitioners (Registration and Disciplinary Procedure) Regulations, 1957.⁴⁵ The Court however did not accept these contentions and held that:

- (a) The absence in the Buildings Ordinance of any provision comparable to that of the then Medical Practitioners Regulations serves to show the contrast between the roles of the two respective legal advisers.

44 Regulation 33 provides that: "(1) When the legal adviser advises the council on any question of law as to evidence, procedure or any other matter, in any inquiry under section 20 of the Ordinance he shall do so in the presence of every party to the proceedings or the person representing each party or, if the advice is tendered after the council has commenced to deliberate as to its findings, every such party or persons as aforesaid shall be informed of the advice that the legal adviser has tendered. (2) In any case where the council does not accept the advice of the legal adviser on any such question as aforesaid, every such party or person shall be informed of this fact." The current version is section 8 of Medical Registration (Miscellaneous Provisions) Regulation (Cap 161D): "(1) When the Legal Adviser to the Council advises the Council on any question of law as to evidence, procedure or any other matter, in any inquiry under section 21 of the Ordinance, an appeal hearing from a decision of a committee or a meeting of the Council pursuant to an election petition under the Medical Practitioners (Electoral Provisions) (Procedure) Regulation (Cap 161B), he shall do so in the presence of every party to the proceedings or the person representing each party or, if the advice is tendered after the Council has commenced to deliberate as to its findings, every such party or person as aforesaid shall be informed of the advice that the Legal Adviser has tendered."

45 Which were made in the exercise of the powers conferred by section 31 of the Medical Registration Ordinance, 1957 (No 25 of 1957).

- (b) The legal adviser in the present case was a full member of the board and the board had no obligation to repeat what was said in private deliberations.
- (c) The Court also treated the question as a matter of statutory interpretation and drew a distinction with the situation in *Medical Council*.

4.38 The position of the legal adviser in the context of the Medical Council and Dental Council is different from that of the Building Authority.

4.39 In *Dr Mu Lie Lian v Medical Council of Hong Kong*,⁴⁶ a doctor was charged with canvassing. The Court of Appeal stated that the duties of the legal adviser included that to advise on the essential ingredients of the charge. This is particularly the case when it is necessary to keep the balance, as, for example, where counsel acting for the Secretary had, in his submissions to the Medical Council, gone "wide off the mark and has failed to direct the Council's mind to the essential ingredients of the charge which had to be proved."⁴⁷ The Court went on: "... the function of the legal adviser is a difficult one and he or she may be called upon to give advice at short notice. But in the circumstances of a case like this the legal adviser should not have been caught by surprise. He should have realised that the charge as such was formulated in an obtuse fashion, and that the essential ingredients which had to be established in order to constitute professional misconduct might not readily have emerged by simply reading the charge. He should accordingly have been fore-armed." Thus the legal adviser is expected to prepare himself well before the hearing to avoid making wrong advice or giving rise to any unnecessary delay or adjournment.

4.40 Then in *Lam Kwok Pun v Dental Council of Hong Kong*⁴⁸ the Court held that the legal adviser should have made her submissions in public and thus have afforded the dentist's counsel an opportunity of commenting upon it. It would not appear to be a satisfactory procedure for a legal adviser to adjourn with the Board when it is deliberating upon the material which has been placed before it.

The Court of Appeal's concern was not with the fact that the legal adviser had been present at the tribunal's deliberations. It was mainly with the fact that she had advised the tribunal in private so that the dentist's counsel had no opportunity to address the tribunal on the accuracy or otherwise of such advice. As it turned out, the advice was in error. And it was for the error that the dentist's appeal was allowed.

4.41 In *Wu Hin Ting v Medical Council of Hong Kong*,⁴⁹ the Court of Appeal accepted that the legal adviser may retire with the Medical Council to give advice, but such advice should be available to the parties. Here, the Legal Adviser told the parties that while the Council was in deliberation, she was also present not to take part in the deliberation, but to be available should any legal questions arise. She explained to the parties that following the decision of the Court of Appeal in *Lam Kwok Pun* where Mayo VP observed, obiter, that while it was not advisable for a legal adviser to retire with a disciplinary tribunal when it was deliberating, the Medical Council had adopted the following procedure. The legal adviser would if possible provide any legal advice in front of the parties before the Medical Council retired, but when

46 [1994] 3 HKC 8 (CA)

47 Ibid, [18].

48 [2000] 4 HKC 181, 184I-185A (Mayo VP).

49 [2004] 2 HKC 367 (CA)

(i) Duplicity may be cured by amendment

6.20 In more modern statutes,²⁴ the corresponding regulations give specific powers to the disciplinary body to amend the charge.²⁵

6.21 The point is that even in criminal proceedings, a defect arising from duplicity can be cured by amendment.²⁶ This was also iterated by the English Court of Appeal:

“Generally, the question of whether the issue of a document in a manner or at a time which fails to comply with the requirement of a statute, a statutory instrument, or rules of court, renders the document void (in which case it is wholly ineffective) or irregular (in which case it can, but not necessarily will, none the less be valid) inevitably depends upon the language used and the purpose of the document and the requirement, and the provisions of which the relevant provisions form part.”²⁷

6.22 In *Lo Shing Kei v Medical Council of Hong Kong*,²⁸ there was an amendment by the Medical Council of a charge formulated by the Secretary.²⁹ On appeal, it was contended that the Council has no power to amend the charge. It was held that by construing the Medical Registration Ordinance and the Regulations thereunder broadly and liberally, the powers of amendment exist, to the extent that is to facilitate the due inquiry of the case as referred by the Preliminary Investigation Committee.

6.23 The same point was taken in the case of *Cheung Sau Yi v Medical Council of Hong Kong*³⁰ where the Court said obiter that a “matter” should be amended might be merely a reference of general subject matter of the complaint, rather than some formulation of a proposed charge:

“... a question not debated by counsel before me, which is whether there was in fact a decision by the PIC that “the matter indicated to the defendant under regulation 9(2) (b) should be amended.” (see regulation 11(6)). It might be suggested that what is envisaged by that phrase is the general subject matter of the complaint, rather than some formulation of a proposed charge, and that so long as there is no change to the subject matter of the complaint, the mere crystallisation of a further “charge” arising from the same facts does not constitute an amendment for the purpose of regulation 11(6).”

(h) Altering basis of the Case is possible

6.24 In the context of an inquiry by the Medical Council, it has been said that it is always possible that in response to new evidence or to changes in circumstances the prosecution may wish to alter the basis of its case or the Council may wish to pursue, of its own accord, a different view of the evidence which is adverse to the defendant. This must be permissible, indeed it may be necessary, if the Council is to properly perform its function. But it cannot be done in a way which deprives the defendant of

24 Eg the Dentists Registration Ordinance (Cap 156), the Midwives Ordinance (Cap 162) and the Enrolled Nurses Ordinance (Cap 164).

25 See *Chau Chin Hung v Market Misconduct Tribunal* [2008] HKCU 1463 (HCAL 123/2007, 124/2007, 22/2008, 22 September 2008, unreported) [78(i)], in respect of a Market Misconduct Tribunal.

26 Archbold Hong Kong 2007 [1-138].

27 *Bell v Tuohy* [2002] 3 All ER 975 [23] (Neuberger J).

28 [1994] HKCU 42 (CACV 89/1993, 3 February 1994, unreported) (CA).

29 Pursuant to Regulation 14 of the Medical Practitioners (Registration and Disciplinary Procedure) Regulations (Cap 161E).

30 [1998] HKCU 2718 (HCAL 16/1998, 23 July 1998, unreported) (Stock J (as he then was)).

a fair hearing.³¹ Where this happens then it may, depending on the circumstances, be appropriate to adopt one or more measures, such as amending the charge, recalling witnesses, granting an adjournment, allowing the defendant a further opportunity to testify or call other witnesses or, in an extreme case, declaring a mistrial and starting again, in order to ensure procedural fairness to the defendant. At the very least the defendant has to be informed by the prosecutor or the Council that the basis of the prosecution case is changed, that new and different allegations are to be made and that a more prejudicial view of the defendant’s culpability is to be alleged.

(2) THE HEARING ITSELF**(a) Master of its own procedure**

6.25 As a general proposition, all administrative and domestic tribunals are, within limits, the “master of its own procedure”:³²

(a) Within limits, a body like the Medical Council is, in the words of Viscount Simon LC in *General Medical Council v Spackman*,³³ “master of its own procedure”

(b) As pointed out by Ribeiro PJ in *Lam Siu Po v Commissioner of Police*,³⁴ this is also generally true of all administrative and domestic tribunals.

(c) Another way of putting it is that, generally speaking and within limits, they are entrusted with “not only the making of the decision but also the choice as to how the decision is made”. That is how the point was expressed by Lord Mustill in *R v Home Secretary, ex parte Doody*.³⁵

(d) The relevant limits are set by law. And the relevant law may be found in: (i) legislation whether primary or subsidiary; (ii) the common law particularly as to the rules of natural justice; and (iii) the constitution.

6.26 In respect of medical doctors, the procedure is in essence adversarial.³⁶ This conclusion was because Regulation 12A(1) of the then Medical Practitioners (Registration and Disciplinary Procedure) Regulations (Cap 161E) provides that the Secretary who puts the complaint before the Preliminary Investigation Committee and the Committee then “sits back to consider that together with any statutory declaration received therewith, any explanation submitted by [the respondent] and any other document or matter in the nature of evidence relevant to or in support of the complaint or information and which is available.”³⁷

31 *Dr Wu Daniel Yiang v Medical Council of Hong Kong* [2014] HKCU 2886 (CACV 162/2013, 15 December 2014 unreported) (CA) [41].

32 See *Medical Council of Hong Kong v Helen Chan* (2010) 13 HKCFAR 248 [32] (Bokhary PJ).

33 [1943] AC 627 (HL), 634 (Viscount Simon LC).

34 [2009] 4 HKLRD 575 (CFA) [138], 623.

35 [1994] 1 AC 531 (HL), 561A (Lord Mustill).

36 *Leung Kam Chung Kenneth v Medical Council of Hong Kong* (1996) 6 HKPLR 409 (CACV 33/1996, 25 July 1996, unreported).

37 *Ibid*, at [27].

proceedings. It is only confined to the rights in so far as they relate to the meaning of the "Courts".¹²⁵

(6) ARTICLE 82

(a) *Right of final adjudication vested in the Court of Final Appeal*

6.81 Article 82 of the Basic Law provides that the Court of Final Appeal has the power of final adjudication:

"The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region ..."

(b) *Limitation of right of appeal*

6.82 Limitation of a right to the Court of Final Appeal has been held as invalid and to be of no legal effect. This was the case for the Solicitors Disciplinary Tribunal¹²⁶ because the relevant provisions had unduly limited the power of final adjudication vested in the Court of Final Appeal.

6.83 However, the Court of Final Appeal had also acknowledged¹²⁷ that even though the limitation cannot be imposed arbitrarily by the legislature, it may properly be placed on the right of appeal to the Court of Final Appeal. 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 are referred to as 'the proportionality test'.

6.84 The courts also have a duty to review any legislation which seeks to impose any limitation on the power of final adjudication vested in the court by Article 82 of the Basic Law, and the proportionality test should apply.

(c) *Principles on access to Court of Final Appeal*

6.85 The extent of limitation on the right to final adjudication by the Court of Final Appeal had been clarified in *Mok Charles Peter v Tam Wai Ho*,¹²⁸ where Chief Justice Ma stated two principles:

- (a) Firstly, the Court is not unrestricted under Article 82 and access to Court can be and is regulated. In other words, there may be restrictions or limitations on the power of final adjudication by the Court. One

125 *Stock Exchange of Hong Kong v New World Development Co Ltd* (2006) 9 HKCFAR 234 (CFA).

126 Section 13(1) under the Legal Practitioners Ordinance (Cap 159) in *Solicitor v Law Society of Hong Kong and Secretary for Justice (Intervener)* (2003) 6 HKCFAR 570 (CFA). This case was applied in *Mok Charles Peter v Tam Wai Ho* [2010] 1 HKLRD 261 (CA).

127 *Solicitor v Law Society of Hong Kong and Secretary for Justice (Intervener)* (2003) 6 HKCFAR 570 [31].

128 [2011] 2 HKC 119 (CFA) [25]–[26].

such limitation is section 22 of the Hong Kong Court of Final Appeal Ordinance (Cap 484).

- (b) The second principle was that any limitation has to satisfy the proportionality test.

6.86 In *Solicitor v Law Society*,¹²⁹ Li CJ referred to the existence of restrictions or limitations as being implied under the power of final adjudication of the Court:

"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."

Chief Justice Ma clarified that the words "a right to have the dispute resolved" should be clearly understood in its context: Chief Justice Li was not referring to Article 82 as providing any constitutional right as such, but as setting out the function of the Court of Final Appeal. The reference to "a right" in this passage means no more than that and further, that the power of final adjudication vested in the Court and therefore a party's access to it, may be restricted.

6.87 Appeals are creatures of statutes. Courts do not have inherent appellate jurisdiction. The legislature may limit recourse to the Court for final adjudication and thus, may limit its power of final adjudication to appeals. 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.

6.88 The proportionality test has to be satisfied when there is a restriction or limitation on the power of final adjudication.¹³⁰

- (a) The following analysis, that such any restriction or limitation:
 - (1) must pursue a legitimate aim;
 - (2) must also be rationally connected with that legitimate aim;
 - (3) must also be no more than is necessary to accomplish that legitimate aim.
- (b) In considering the 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.

129 (2003) 6 HKCFAR 570 (CFA).

130 *Ibid.*, at [31]–[34], 584–5 (Li CJ).

(b) Fair balance

6.215 On top of the basic principle that there is no right to remain silent, there is the rule of fair balance between the general interest of the community in realising the legislative aims, and the protection of the fundamental rights of the individual. It would go too far to deny that the principles which, as 'common law rights', weigh against self-incrimination and compellability in criminal proceedings may not have their place in certain civil proceedings too.²⁶⁹ The right to a fair hearing is a constitutionally protected right.

6.216 It may be noted that in the case of the Securities and Futures Ordinance (Cap 571) there were inroads in the Ordinance into the rights against self-incrimination and compellability but those inroads are ringed with measures which ensure that such inroads are restricted to proceedings before the Tribunal.²⁷⁰

6.217 Apart from striking a balance of fundamental rights, the Court has also to consider that the sanctions that a tribunal may apply may be protective in nature. This is the case of the Market Misconduct Tribunal,²⁷¹ whose purpose is not to punish: "They are protective of the financial services industry in Hong Kong, an industry of inestimable importance to the Territory."

The Court of Appeal also held that a fair balance has been struck. Accordingly, if a specified person is compelled to give evidence before the Tribunal which may tend to incriminate him, he is not thereby, on either count, denied a fair hearing.

(5) UNUSED MATERIALS

6.218 The question of whether there is an obligation on the Securities and Futures Commission as to the disclosure of unused material which ought to be equivalent to that of a prosecutor in criminal proceedings was left open in Securities and Futures Appeals Tribunal disciplinary proceedings.²⁷²

269 *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133 (CFA), 176; *Chau Chin Hung v Market Misconduct Tribunal* [2008] HKCU 1463 (HCAL 123/2007, 124/2007, 22/2008, 22 September 2008, unreported) [99]-[100].

270 *Chau Chin Hung v Market Misconduct Tribunal* [2008] HKCU 1463 (HCAL 123/2007, 124/2007, 22/2008, 22 September 2008, unreported).

271 *Ibid.*, [102]. The Chairman of the tribunal in that case had said "The financial services industry in Hong Kong is of very considerable importance to the community. Accordingly, there is a directly proportionate interest in the community to ensure that the market in securities is not only well regulated but also that the public at large are protected from the misconduct of those that seek to obtain impermissible personal advantage to the disadvantage of the market generally. The widespread recognition in other jurisdictions, as well as the Hong Kong, of the difficulty of achieving this objective, given the complexity of the operations of the market, is a factor to be borne in mind in weighing the proportionality of the measures adopted in Hong Kong."

272 *Li Kwok Keung Asser v Securities and Futures Commission* [2010] HKCU 2572 (CACV 85/2010, 26 November 2010, unreported) (CA (Eng)).

(6) ADJOURNMENT**(a) Meaning of 'adjourn'**

6.219 The question has arisen as to when a person can apply for an adjournment, and whether an inquiry has to be opened before the power to adjourn can be exercised. It was held that the proposition was too restricted. The definition of 'adjourn' in the Oxford English Dictionary (2nd Edition) includes "to defer or put off (a time, action or state) ... to another day; also indefinitely; to postpone, defer, put off". Hence, no light is shed by the use of the word 'postpone' in relation to a judgment or sentence as to whether the inquiry has to be opened before the power to adjourn can be exercised.²⁷³

6.220 It has been submitted in the context of a Medical Council inquiry that an 'adjournment' is to suspend a hearing already commenced and direct it to be re-commenced at a future date. There is a difference between 'adjournment' and 'postponement' by reference to the power of postponement of judgment²⁷⁴ and postponement of sentence.²⁷⁵ However, if a defendant is unable for whatever reason to do justice to his case at a hearing on a particular date, it may be necessary for the proceedings to be adjourned, no matter how inconvenient that may be to the prosecution or to the members of the tribunal. This is largely because a failure to give an adjournment when it is justified is a breach of the rules of natural justice.

6.221 A number of situations for adjournment may arise:

- (a) prior to hearing,
- (b) ill health,
- (c) dubious grounds.

(b) Adjournment prior to hearing

6.222 In *R v Dairy Produce Quota Tribunal for England and Wales, ex parte Lively*²⁷⁶ the court granted judicial review of a refusal of a request to adjourn disciplinary proceedings when the only reason was the personal convenience of the members of the tribunal.

(c) Ill health

6.223 In respect of ill health, it has been held that²⁷⁷ there was a breach of Article 6(1) of the European Convention of Human Rights and of natural justice principles when the respondent's Professional Conduct Committee failed to adjourn proceedings to

273 *Dr Darren Vivian Mann v Medical Council of Hong Kong* [2007] HKCU 1650 (HCAL 21/2007, 2 October 2007, unreported).

274 Under section 27(1) of the Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

275 Under section 28(1) of the Medical Practitioners (Registration and Disciplinary Procedure) Regulation (Cap 161E).

276 [1988] 27 EG 79.

277 *Brabazon-Drenning v UK Central Council for Nursing, Midwifery and Health Visiting* [2000] All ER (D) 1620 (Rose LJ & Elias J)

6.315 This approach may be contrasted with criminal cases. The Courts have always applied a general rule that evidence that an accused has committed criminal offences other than those with which he is charged is inadmissible.

(b) *Hong Kong cases*

6.316 In *Amy So v Au Leslie*⁴²¹ the Court of Appeal explained the principles on whether to receive similar facts evidence:

- (a) In civil cases the courts will admit evidence of similar facts if it is logically probative, ie if it is logically relevant in determining the matter which is in issue.
- (b) But facts which prove nothing more than likelihood of repetition, although logically relevant, should be rejected on grounds of fairness, since they tend to waste time, embarrass the inquiry with collateral issues, prejudice the parties with the fact finding tribunal, and encourage attack without notice.⁴²²
- (c) There is a distinction between evidence having a direct relation to the principal question in dispute and evidence relating to collateral facts, which will, if established, tend to elucidate that question. To make the latter admissible that party tendering the evidence must satisfy the court that the collateral fact which he proposes to prove will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute and also to satisfy the court that the evidence which is prepared to adduce will be reasonably conclusive.

(c) *Development after Amy So*

6.317 After *Amy So*, there was further development in the law in the UK. In *O'Brien v Chief Constable of South Wales Police*,⁴²³ the claimant's conviction of murder was quashed after he had served 11 years of a life sentence. He began proceedings against the Chief Constable claiming damages for misfeasance in public office and malicious prosecution. He alleged in particular that, in conducting the investigations which led to his criminal trial, named police officers used specific operational methods which were oppressive, dishonest and unprofessional. At a case management conference he sought to support his allegations by adducing evidence to show that the same officers had used the same or similar methods in two earlier cases. The Chief Constable resisted admission of the evidence on the grounds that it did not meet the test of admissibility that it should be reasonably conclusive of an issue in the case or have enhanced relevance or substantial probative value, and that in any event, if admitted, it would add unjustifiably to the length and complexity of the trial. The judge reviewed the evidence and ruled that the greater part should be admitted. The Court of Appeal dismissed the Chief Constable's appeal and, allowing the claimant's cross-appeal, concluded that the remainder of the material should be admitted.

421 [1995] 2 HKC 113 (CA), 122B-E.

422 *A-G v Nottingham Corporation* [1904] 1 Ch 673.

423 [2005] UKHL 26, [2005] 2 AC 534 (HL) [51-7] (Lord Phillips).

6.318 Lord Phillips in the House of Lords held that the test of relevance is the test of admissibility of similar fact evidence in a civil suit after considering a number of different tests, that the enhanced relevance test in *DPP v P*⁴²⁴ is not applicable in disciplinary proceedings:

- (a) The test⁴²⁵ that it must be logically probative of an issue in the case, and the first part of the House of Lords' test in *DPP v P* must be applied to exclude evidence which is not sufficiently similar to the evidence before the court, is a test which is too restrictive.
- (b) The test of admissibility of similar facts against a defendant in criminal proceedings, as stated in *DPP v P*⁴²⁶ and the Criminal Justice Act 2003 (UK) requires an enhanced relevance or substantial probative value. If the evidence is not cogent, the prejudice that it will cause to the defendant may render the proceedings unfair.
- (c) In addition, so far as evidence of bad character that the defendant wishes to adduce against a police witness, the test of admissibility in both *R v Edwards*⁴²⁷ and Section 100 of the 2003 Act requires an enhanced relevance in order to ensure that the ambit of the trial remains manageable.
- (d) There is no warrant for the automatic application of either of these tests as a rule of law in a civil suit. This is because these tests will build into the civil procedure an inflexibility which is inappropriate and undesirable.
- (e) The Court should simply apply the test of relevance as the test of admissibility of similar fact evidence in a civil suit. Such evidence is admissible if it is potentially probative of an issue in the action.
- (f) This is not to say that the policy considerations that have given rise to the complex rules of criminal evidence⁴²⁸ have no part to play in the conduct of civil litigation. They are policy considerations which the judge who has the management of the litigation will wish to keep well in mind. The CPR gives power to the court to exclude evidence that would otherwise be admissible and to limit cross-examination.
- (g) Similar fact evidence will not necessarily risk causing any unfair prejudice to the party against whom it is directed. It would not have done so in *Metropolitan Asylum District Managers v Hill*.⁴²⁹ It may, however, carry such a risk.

424 (1990) 93 Cr App R 267 (CA (Eng)).

425 Court of Appeal in *O'Brien* (Brooke LJ).

426 (1990) 93 Cr App R 267 (Lord Mackay).

427 [1991] 1 WLR 207 (CA (Eng)).

428 Not infrequently a defendant in a criminal trial makes allegations of misconduct on the part of police witnesses in relation to the circumstances in which alleged admissions have been obtained, or the accuracy of those admissions. The defendant may wish to adduce "similar fact" evidence designed to show that the police witness has been guilty of similar misconduct in the past. Once again the courts have restricted the circumstances in which such evidence can be adduced by a defendant. Those restrictions are now codified in section 100 of the 2003 Act.

429 (1882) 47 LT 29. This case involved an action for nuisance brought by the owners of land adjacent to a smallpox hospital in Hampstead against the managers of the hospital. Their case appears to have included an averment that a smallpox hospital was a nuisance per se

7.22 Whilst the Privy Council in *Ghosh* asserted a wide jurisdiction on hearing the doctor's appeal from her penalty to decide whether it was appropriate or was excessive or disproportionate, it affirmed the reasons for caution explained in *Evans v General Medical Council*,³⁴ quoted in *Ghosh*, and held that it would accord an "appropriate measure of respect to the judgment of the committee". In *Evans*, the Court held that:

- (a) The principles upon which the Court acts in reviewing sentences are well settled. A disciplinary committee are the best possible people for weighing the seriousness of professional misconduct and that the Board will be very slow to interfere with the exercise of the discretion of such a committee.
- (b) The disciplinary committee are familiar with the whole gradation of seriousness of various types of cases, and are peculiarly well qualified to say at what point on that gradation erasure becomes the appropriate sentence. The Court does not have that advantage nor can it have the same capacity for judging what measures are from time to time required for the purpose of maintaining professional standards.

7.23 In *Lau Koon Leung v Medical Council of Hong Kong*,³⁵ the Court applied the new approach of the Privy Council:

- (a) The decision of Ghosh on how Article 6(1) of the European Convention can be satisfied by either the decision-making tribunal itself or by an appellate body which controls it is the same as the Hong Kong approach in Article 10 of the Bill of Rights Ordinance.³⁶
- (b) *Libman* was a case when the Medical Council did not in general give reasons, but in subsequent cases³⁷ the Courts urged disciplinary tribunals to provide reasons for their decision and the emphasis on protection of human rights, so the *Libman* approach has been regarded as too restrictive by the Privy Council (Yuen JA and Lam J).
- (c) The courts remain cautious when it comes to appeals from orders of penalties.³⁸ In *Ghosh*, the Privy Council recognised that its powers of intervention may be circumscribed by the circumstances in which they are invoked, particularly in the appeals against sentence.

7.24 The modern trend in light of the human rights regimes is that any attempt to read down the right of appeal in disciplinary cases may be resisted.

(c) *Academic appeals*

7.25 In *Luck Continent Ltd v Cheng Chee Tock Theodore & Ors*³⁹ the Court of Final Appeal re-affirmed that it requires rare and exceptional cases for an appeal which

34 [1984] UKPC 48.

35 [2006] HKCU 452 (CACV 250/2004, 14 March 2006, unreported) [29] (Cheung JA).

36 *Otis Elevator Company (HK) Limited v Director of Electrical and Mechanical Services* (1995) 5 HKPLR 78 (CA) (Cheung JA).

37 See eg *Dr Ip Kay Lo Vincent v Medical Council of Hong Kong* [1999] 1 HKLRD 491, 504; *Dr Wu Hin Ting v Medical Council of Hong Kong* [2004] 2 HKC 367, [34].

38 *Lau Koon Leung v Medical Council of Hong Kong* [2006] HKCU 452 (CACV 250/2004, 14 March 2006, unreported).

39 [2014] HKCU 2839 (FACV 4/2014, 10 December 2014, unreported) (CFA).

is academic to be heard. The Court also referred to *Peter Po Fun Chan v Winnie Cheung*⁴⁰ on the approach to academic appeals:

"Rarely and exceptionally, the public interest in having a particular point of law decided can be so great as to warrant leave to pursue an application or appeal even though the case has become academic as between the immediate parties save perhaps as to costs. Normally, however, such a case should proceed no further. And any issue as to costs should be dealt with on such an appreciation as can be formed on a broad view of the matter. This broad approach avoids further costs. It represents practical justice."

(d) *Concurrent finding of facts*

7.26 In conformity with *Sky Heart Ltd v Lee Hysan Estate Co Ltd*,⁴¹ the Court of Final Appeal will not review concurrent findings of fact save for special circumstances in insider dealing proceedings.⁴²

(e) *New evidence in the Court of Appeal*

7.27 In order to admit new evidence in the Court of Appeal, special grounds are required.⁴³ Under RHC Order 59 rule 10(2), it is stated that where there has been a trial of hearing on the merits, fresh evidence cannot be admitted before the court unless there are special grounds.

7.28 For special grounds to be made out, certain conditions must be satisfied:

- (a) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- (b) the further evidence is such that, if given, it would probably have an important influence on the result of the case; and
- (c) the evidence is such as is presumably to be believed.

7.29 *Ladd v Marshall* has been applied in appeals from disciplinary proceedings.⁴⁴

(f) *Adjournment of hearing in the Court of Appeal*

7.30 It may be stated that adjournment of hearing in the Court of Appeal is not common. For an example see *Dr Lo Roderick & Anor v The Medical Council of Hong Kong*,⁴⁵ where the Court of Appeal balanced the undesirability of having a complicated case part heard, adjourned the hearing (set down for one day) to a two day hearing.

40 (2007) 10 HKCFAR 676 (CFA) [18].

41 [1999] 1 HKC 18 (CFA).

42 *Chong Wai Lee Charles & Anor v Insider Dealing Tribunal* (2011) 14 HKCFAR 875.

43 *Ladd v Marshall* [1954] 1 WLR 1489 (CA (Eng)).

44 See *Mui Kwok Keung Louie v Bar Council* [2011] HKCU 621 (CACV 102/2010, 21 March 2011, unreported) [29] (Fok JA).

45 [2013] HKCU 326 (CACV 274/2011, 5 February 2013, unreported).

(7) CANVASSING*(a) A form of advertising*

9.130 Canvassing is normally understood to include the making of personal representation to individual persons to solicit their custom. It is a form of advertising.¹¹⁶

9.131 The gravamen of misconduct in relation to canvassing arises on the giving of information in the wrong way or to the wrong people. For example, by giving information to non-patients in circumstances giving rise to the expectation that as a result they may become patients.

9.132 Thus in a warning notice, in the first paragraph under canvassing there is a prohibition against passing on calling cards to individuals, who are not patients, save on express request. In the second paragraph, these words appear:

"Medical practitioners are warned that association with any such institution, company etc. which advertises clinical or diagnostic services to the general public, and directs patients to particular medical practitioners, may be regarded as canvassing."

9.133 There is an issue as to whether certain restrictions against practice promotion imposed on doctors by the Medical Council contravene the right to freedom of expression guaranteed by Article 27 of the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap 383). This issue appears to be unsettled.

(8) IMPROPER ASSOCIATION OR SEXUAL RELATIONSHIP WITH PATIENT*(a) Sexual relationships with patients generally prohibited*

9.134 In *McCoan v General Medical Council*,¹¹⁷ a registered medical practitioner approaching his retirement had sexual relations with a patient who was a divorcee in her fifties. She complained to the General Medical Council when the relationship went sour. The General Medical Council Disciplinary Committee found him guilty of "infamous conduct in a professional respect".

(b) Misconduct even though no injury to the public

9.135 In *McCoan*,¹¹⁸ four grounds were proposed to justify the sexual relationship:

- (a) There had been no injury to the public as the association was successfully clandestine.
- (b) There was no element of seduction nor was the association adulterous or intended ever to lead to matrimony.

116 *Lee Chiu Tong v Medical Council of Hong Kong* [1996] HKCU 318 (CACV 220/1995, 28 May 1996, unreported).

117 [1964] 1 WLR 1107 (PC), 1108.

118 *Ibid.*

- (c) The misconduct ceased long before the charge was made and there was no danger of any repetition.
- (d) He had not abused his position for the visit to the surgery when sexual intercourse took place for the first time was not on a professional occasion.

9.136 The Privy Council rejected those grounds. It was held that sexual intercourse with a patient has always been regarded as a most serious breach of the proper relationship between doctor and patient, and their Lordships did not see how the finding of the committee, and on the facts of this case, that the appellant was guilty of infamous conduct in a professional respect can be successfully challenged before their Lordships.

(c) Adultery after ceasing to be patient

9.137 Even if adultery took place after ceasing to be patient, a doctor may still be guilty of misconduct. In *James Albert De Gregory v General Medical Council*,¹¹⁹ when the wife realised she was becoming fond of the family doctor, she took her name off his list. Later they began to commit adultery. She left her husband and children to live with him.

9.138 In the doctor's appeal against a finding of infamous conduct in a professional respect by the Disciplinary Committee, the Court (Lord Denning)¹²⁰ said the doctor's association with the wife becomes improper when by look, touch or gesture he shows undue affection for her, when he seeks opportunities of meeting her alone, or does anything else he thinks more of her than he should. The Court went on to hold that even if: "she sets her cap at him, he must in no way respond or encourage her. If she seeks opportunities of meeting him, which are not necessary for professional reasons. He must be on guard. He must shun any association with her altogether rather than let it become improper. He must be above suspicion."

(d) Gradual falling in love with a married woman who was a previous patient

9.139 In *Richard Wordsworth Barker v General Medical Council*,¹²¹ a doctor to a family developed a relationship with the wife after she began giving him lessons in German. Without telling her husband, the wife took her name off the doctor's list. The relationship of pupil and teacher changed into a relationship of a different character and they began to commit adultery.

9.140 The Privy Council rejected the doctor's appeal. Their Lordships added that a time must come when the doctor will be guilty of serious professional misconduct if he allows the association to continue.

119 [1961] AC 957 (PC).

120 *Ibid.*, at 965-966.

121 [1971] UKPC 21 (PCA 6/71, unreported).

- (k) failed to properly carry out implant treatment in area of tooth which caused damage to salivary gland in the mandible.³²

(a) *Not limited to activities criminalised by the Dentists Registration Ordinance*

11.27 The Dental Council can properly regard as unprofessional conduct acts or omissions by a dentist which significantly undermine the effectiveness of the registration regime. For the purpose of the disciplinary process it is for the Council to determine what professional responsibilities will be required of dentists and what standards will be set for them in the performance of those responsibilities. The criminalisation of particular conduct will guide the Council in its deliberations on what professional duties it should impose on dentists and whether particular acts or omissions, in breach of those responsibilities, constitute unprofessional conduct. In determining whether such conduct is unprofessional conduct, the Council is not confined to those activities criminalised by the Dentists Registration Ordinance.

11.28 In *Sin Chung Yin Ronald v Dental Council of Hong Kong*,³³ certain dentists were charged with professional misconduct by employing unregistered dentists to perform dental work. The Court of Appeal said that the dentists' contention was that dentists have no statutory or professional duty to ensure that an employed dentist maintains his registration by renewing his annual practising certificate. Therefore, a dentist, or a dentist director of a dental company, can only be guilty of unprofessional conduct if they knowingly employ an unregistered person or knowingly share premises with an unregistered person or are negligent about a dentist's unregistered status. The Ordinance, it is said, does not make directors of a dental company guarantors of registration. The Court of Appeal rejected those contentions and held that irrespective of how the criminal offences might be drafted, the Council is not to be limited to the *mens rea* requirements of those offences when determining what professional responsibilities it should impose on dentists for the purpose of setting the ethical standards of the profession.

In the application for leave to appeal to the Court of Final Appeal, the Court of Appeal in *Sin Chung Yin Ronald* held that whether a particular professional who is the subject of disciplinary proceedings has been treated fairly in respect of those areas on which the following questions focus is always going to be case sensitive.

32 Ibid.

33 [2014] 4 HKLRD 337, [46]. This case distinguished *Faridian v General Medical Council* [1971] 1 All ER 144 (PC), a case which concerned the liability of a medical practitioner for infamous conduct solely on the basis of his shareholding in a company which managed a clinic in respect of which acts of infamous conduct were alleged to have taken place – [52]-[55]. Application for leave to appeal to the Court of Final Appeal was dismissed by the Court of Appeal *Sin Chung Yin Ronald v Dental Council of Hong Kong* [2014] HKCU 2848 (CACV 149/2013, 10 December 2014, unreported).

(b) *Improper association or adultery*

(i) **Adultery**

11.29 Section 5 of the Warning Notice provides that improper association or adultery is unprofessional conduct.³⁴

(c) *Improper manner in negotiation of sale of assets*

(i) **Relationship with colleagues: Improper manner in negotiation of sale of assets**

11.30 Disagreements between former partners or associates may feature in this type of disputes. In *Dr Roger Gordon Bishop v Dental Council of Hong Kong*,³⁵ Dr Bishop entered into a five-year agreement with Cathay Pacific Airways (CPA) to run a dental clinic at the Kai Tak Airport. The clinic opened in June 1979 and Dr Bishop's main obligation was to treat members of the staff of Cathay Pacific and of other companies in the Swire Group, and their dependents.

11.31 Dr Bishop employed Dr Allan as his associate in September 1979. Disagreements between them arose. Dr Allan terminated employment from the end of April 1982. Dr Bishop had given her notice on the 7th February. On 23 February 1982, Cathay Pacific gave Dr Bishop notice that his services would no longer be required from 1st September.

11.32 During negotiation in selling his assets to Dr Allan, Dr Bishop wrote to the Medical Protection Society in London seeking their advice on three specific aspects of the position he found himself in. He lodged a formal complaint with the Dental Council. He alleged that Dr Allan had used her position and knowledge gained through working in his clinic, to influence the CPA management to appoint her in his stead. But he admitted that he had no concrete evidence of collusion, or that Dr Allan has canvassed CPA management for his position, the circumstances and manner of her behaviour during her period of notice, left him in little doubt that she knew that she would be working in the Cathay clinic after September 1982.

11.33 On 10 August 1982 Dr Bishop wrote the letter to Dr Allan which eventually led to the disciplinary proceedings. The relevant part of the letter states that:

"... The Medical Protection Society is handling my professional interests and that following advice a formal complaint has been lodged against you with the Hong Kong Dental Council. In the event of your accepting my price for the assets of my practice it is unlikely that I shall pursue the matter further.

I look forward to hearing from you."

11.34 Dr Allan replied that in view of the contents of his letter, she could negotiate no further with him for the purchase of any assets of his practice. She could see no connection between the value of assets he wished to sell and the complaint he had

34 "Abuse of Professional Position in order to further an improper association or commit adultery. A dental practitioner who abuses his professional position in order to further an improper, immoral, or indecent association or to commit adultery with a person with whom he stands in a professional relationship may be subject to disciplinary proceedings."

35 CACV 52/1983, 12 July 1983, unreported.

- (e) regulatory control of the selling, purchasing, compounding and dispensing of pharmaceutical products; and
- (f) registration and classification of pharmaceutical products.

(2) PHARMACISTS

(a) *Many pharmacists are both professional and civil servants*

12.03 Misconduct can take many forms. Given that many pharmacist-related practitioners are employed in the public sector, their conduct is often looked at from both the professional and also employment (as a civil or public servant) dimension.

12.04 In accordance with section 15 of the Pharmacy and Poisons Ordinance (Cap 138), a Disciplinary Committee is appointed by the Board for the purpose of disciplinary inquiry of:

- (a) a complaint received by the Board regarding the conduct of a registered pharmacist or his employee, or an authorized seller of poisons (ASP) or its partner or employee;
- (b) any person or body, mentioned in (a) above, convicted of an offence under the Pharmacy and Poisons Ordinance, the Dangerous Drugs Ordinance (Cap 134) or the Antibiotics Ordinance (Cap 137); or
- (c) the conduct of any such person or body, which appears necessary or desirable to the Board, that should be inquired into.

12.05 In respect of a registered pharmacist, the Disciplinary Committee may, at the conclusion of an inquiry:

- (a) censure the registered pharmacist; or
- (b) remove his name from the register of pharmacists for such period as the Disciplinary Committee directs.

(i) Opening of inquiry¹

12.06 At the opening of an inquiry the Secretary shall read the notice of inquiry. If the defendant is neither present nor represented by a solicitor or counsel at the opening of the inquiry, the Secretary shall furnish to the Disciplinary Committee such evidence as the Disciplinary Committee may require that the notice of inquiry was served on the defendant and the Disciplinary Committee, if satisfied as to such service, may proceed with the inquiry in the absence of the defendant. If the defendant is present at the inquiry, the chairman, immediately after the charge has been read, shall inform him of his right to cross-examine witnesses, to give evidence and to call witnesses on his behalf. A disciplinary Committee may adopt a procedure from the Pharmacy and Poisons Ordinance or the Pharmacists (Disciplinary Procedure) Regulations (Cap 136E).

¹ Pharmacists (Disciplinary) Procedure Regulations, Reg 5.

(ii) Legal representation

12.07 A party to an inquiry may be represented by a solicitor or by a solicitor and counsel.²

(iii) Order of procedure³

12.08 The complainant, or his solicitor or counsel, or, in their absence or if there is no complainant, the Secretary, may open the case against the defendant and call evidence in support. When the case against the defendant is closed, the defendant, or his solicitor or counsel, may submit that insufficient evidence has been adduced upon which the Disciplinary Committee can find that the charge has been proved. If the Disciplinary Committee rejects the submission, the chairman shall call upon the defendant to make his defence. The defendant, or his solicitor or counsel, may open his case, call evidence and address the Disciplinary Committee, provided that only one address may be made by the defendant, or his counsel or solicitor, which may be made either before or after evidence has been called by him. At the conclusion of the defendant's case, the complainant, or his solicitor or counsel, or in their absence the Secretary, may address the Disciplinary Committee in reply, if evidence has been called by the defendant other than his own evidence. At the conclusion of proceedings, the Disciplinary Committee may reach and announce its decision, or postpone its decision to such future date as it may think fit.

(iv) Rules of evidence do not apply⁴

12.09 The rules of evidence shall not apply to an inquiry. A Disciplinary Committee may decline to admit a written statement unless the maker thereof is available and willing to give evidence. The chairman and any member of the Disciplinary Committee may put such questions to a party or witness as he may think desirable.

(3) DISPENSERS

(a) *Not pharmacists but responsible for dispensing medication*

12.10 In *Lam Yuk Ming & Ors v Attorney General*,⁵ the plaintiffs were persons employed in the Department of Medical and Health of the Hong Kong Government, who held the offices of Senior Dispenser, Dispenser, Probationary Dispenser or Student Dispenser.

12.11 By 1980, some of them had given many years of the service to what was then the Crown. The grade of Dispenser within the Government did not call for any professional qualifications, although a student must receive three years' training within the Department before he may qualify for appointment as Dispenser. Those

² Pharmacists (Disciplinary) Procedure Regulations, Reg 3.
³ Pharmacists (Disciplinary) Procedure Regulations, Reg 6, 7.
⁴ Pharmacists (Disciplinary) Procedure Regulations, Reg 11.
⁵ [1980] HKC 546.

(3) CODE OF CONDUCT

(a) ARB Code of Professional Conduct

18.14 The ARB Code of Professional Conduct was first established in 1990. It aims to offer general principles to guide professional conduct for registered architects.

18.15 There are seven general principles under the Code:

- a. A Registered Architect shall endeavour to promote architectural excellence through his work and by the encouragement of others.
- b. A Registered Architect shall carry out the duties he undertakes under the Client/Architect Agreement to the best of his ability and shall have a proper regard for the interests of all those who may be expected to use or enjoy the result of his efforts.
- c. A Registered Architect shall at all times, whether in the course of business or not, conduct himself with the honesty, integrity and propriety to be expected of a member of an honourable profession. He shall not act in any manner which is liable to bring the profession of architecture in Hong Kong into disrepute.
- d. A Registered Architect shall act impartially and professionally at all times. He shall administer building contracts under his control with fairness and integrity.
- e. A Registered Architect shall not have any interest, financial, or personal, in connection with any business which may be inconsistent or in conflict with his professional obligations, unless such interest or connection is fully declared to all parties likely to be affected by such interest.
- f. A Registered Architect shall rely only on ability, performance and experience as the basis for his business advancement, and shall not maliciously criticize the work of another architect.
- g. A Registered Architect shall be automatically disqualified to serve or act as a partner or director of any architecture practice proffering services to the public when he becomes a bankrupt or has his application for renewal of registration rejected by the Architects Registration Board.

(4) DISCIPLINARY OFFENCES

(a) Section 9 of the Architects Registration Ordinance

18.16 Under section 9 of the Architects Registration Ordinance (Cap 408), the Board may make rules for the conduct and discipline of registered architects.

18.17 A registered architect commits a disciplinary offence if he:¹³

- (a) commits misconduct or neglect in any professional respect;
- (b) has been convicted of an offence under this Ordinance;
- (c) has obtained registration under this Ordinance by fraud or misrepresentation;

¹³ Section 21, Architects Registration Ordinance (Cap 408).

- (d) was not at the time of his registration under the Architects Registration Ordinance entitled to be registered;
- (e) without reasonable excuse, fails to attend before an inquiry committee when summoned either as a witness or as a person in respect of whom the inquiry committee is meeting; or
- (f) has been convicted in Hong Kong or elsewhere of any offence which may bring the profession into disrepute and sentenced to imprisonment, whether the sentence is suspended or not.

(5) DISCIPLINARY PROCEEDINGS

(a) Not a court of law

18.18 Disciplinary proceedings against a registered architect under Part IV of the Ordinance take place in a self-regulatory context. The inquiry committee is composed of members of the Hong Kong Institute of Architects. It is not a court of law. The Disciplinary Rules were made to regulate disciplinary proceedings. They are not considered to be statutes but should be considered with the objective to ensure efficiency and fairness in the proceedings. Rule 28(i) of the Rules allows considerable scope for the exercise of discretion by the inquiry committee in conducting its own proceedings.

18.19 Rule 28(i) and (ii) state that:

- "28 (i) Subject to the Ordinance and to these Rules, the inquiry committee shall conduct the hearings in such manner as it considers most suitable for the clarification of the issues before it and generally for the just handling of the proceedings."
- (ii) The inquiry committee shall act fairly when conducting its investigations and receiving evidence but shall not otherwise be bound by any common law or statutory rule of evidence or procedure."

18.20 Where the Registrar receives a complaint concerning a disciplinary offence, the Registrar shall submit the facts to two members, in consultation with the Registrar, and shall determine whether the complaint should be referred to the Board.

18.21 The Board may refer any complaint concerning a disciplinary offence to an inquiry committee for decision.¹⁴ For that purpose the Board may establish an inquiry committee of not less than three members of the Institute to determine whether or not the registered architect has committed a disciplinary offence.

¹⁴ Section 22(1), Architects Registration Ordinance (Cap 408). In the UK, under the Architects Act 1997, section 14(2) provides that the Architect Registration Board would decide whether there was a case to answer. It would then report its finding to the Professional Conduct Committee (section 14(3)), which is a committee set up by statute. The Committee has the power to make disciplinary orders. A disciplinary order is defined in section 15(2) of the Architects Act 1997 as a reprimand, a penalty order, a suspension order or an erasure order. See also sections 16, 18 and 18 of the 1997 Act.

(1) ACCOUNTANT

(a) Critical role in commerce

21.01 It has been said¹ that the accountancy profession plays a critical role in ensuring the orderly and lawful conduct of commercial activities. Dishonesty, dereliction or culpability on the part of its members can and does have a far-reaching effect, not only in the sphere of business activities but in matters concerning the financial well-being of individuals.

(2) REGULATORY FRAMEWORK

(a) Professional Accountants Ordinance

21.02 The profession of accountants in Hong Kong is regulated by the Professional Accountants Ordinance (Cap 50). The Ordinance came into effect on 1 January 1973, but significant amendments were made in 1994.

21.03 The Hong Kong Society of Accountants was the statutory body established² to regulate the practice of the accountancy profession in Hong Kong, to represent the views of that profession, to conduct examinations, and to safeguard professional interests of its members.

(b) HKICPA

21.04 The Hong Kong Society of Accountants was renamed as the Hong Kong Institute of Certified Public Accountants (HKICPA) in 2004.³ It is the only body authorized by law to register and grant practicing certificates to certified public accountants in Hong Kong.

21.05 The HKICPA is a statutory body corporate with perpetual succession.

(c) Objects of HKICPA

21.06 The objects demanded of the HKICPA, by section 7 of the Professional Accountants Ordinance include these:

- “...
 (b) to regulate the practice of the accountancy profession;
 (g) to represent the views of the profession and to preserve and maintain its reputation, integrity and status;
 (h) to discourage dishonourable conduct and practices by certified public accountants,

1 *Chao Pak Ki, Raymond & Arthur Andersen & Co v The Hong Kong Society of Accountants* [2004] HKCU 1388 (HCAL 134/2003, 30 November 2004, unreported) [16] Hartmann J, *AB & An accountant firm v Hong Kong Institute of Certified Public Accountants* [2005] HKCU 883 (HCAL 65/2005, 30 June 2005, unreported) [25].

2 It was set up in 1974 with the assistance of the Association of Chartered Certified Accountants (ACCA) as the local statutory accountancy body in Hong Kong.

3 Amended 23 of 2004.

4 Section 3, Professional Accountants Ordinance (Cap 50).

and for this purpose to hold inquiries into the conduct of certified public accountants, firms and corporate practices ...;

- (j) to take such action as the Institute considers necessary in any matter affecting the professional interests of the accountancy profession;
 (k) to do all such other things as are incidental or conducive to the attainment of the above objects.”

(3) COUNCIL

21.07 Under the Professional Accountants Ordinance, there is established a Council of the HKICPA.⁵ It was empowered⁶ to regulate its own procedure. The Council is the body responsible for the management of the HKICPA and with the implementation of the objects of the Ordinance.

21.08 Accountancy matters may be of great complexity. The Council receives informed, professional advice to enable it to exercise its discretion and in this regard the Council has two ‘advisory’ bodies; namely a Monitoring Committee or an Investigation Committee.

(a) Composition of Council of HKICPA

21.09 The Council of the HKICPA consists⁷ of the Financial Secretary or his representative, the Director of Accounting Services or his representative, 14 certified public accounts with not less than 6 being in full time practice, not less than 6 not being in full time practice, the immediate past president, and 4 lay persons appointed by the Chief Executive.

(b) Powers of Council

21.10 The Council has the power to issue or specify any:

- (a) statement of professional ethics; or
 (b) standards of accounting, auditing and assurance practices, required to be observed, maintained or otherwise applied by any certified public accountant.

(c) Registrar

21.11 The Council appoints a Registrar to assist in the Council’s work. At present, the Registrar also serves as the Institute’s Chief Executive Officer. The HKICPA has a Compliance Department which is responsible for inquiring into complaints about the conduct of certified public accountants and their firms.

5 Section 10.

6 By Section 17.

7 Section 10, Professional Accountants Ordinance (Cap 50).

discipline, future developments of the profession and law reforms. So far there are over 30 Special Committees.

23.18 The disciplinary process by which the barristers' profession is governed by statute, ie the Legal Practitioners Ordinance (Cap 159).

23.19 In *Re Siu See Chun*,⁷ it was decided that the Bar Council cannot be sued as a defendant because it does not have legal existence. However it may be noted that for the purpose of an appeal from the finding of a barrister disciplinary tribunal, the Bar Council shall be the Respondent.⁸ There is no right of appeal by the Bar Council against the acquittal of a barrister in disciplinary proceedings. The only conceivable way against the finding of a barrister disciplinary tribunal on an acquittal would be by way of judicial review.

(3) CODE OF CONDUCT

(a) Bar Code

23.20 As a preliminary point, respect for the law and for the freedom of the individual citizen depends to a large extent on the maintenance of high standards by all who practise in the Courts. Consequently, it is the duty of every barrister, whether practising or otherwise, to comply with the provisions of the Code of Conduct for the Bar of Hong Kong. The Code is aimed at promoting and maintaining the high standards of the profession.

23.21 Paragraph 4 of the Code specifically provides that "Every barrister whenever called to the Bar, whether in practice or not, should uphold at all times the standards set out in this Code, the dignity and high standing of the profession of barrister and his own standing as a member of it." Paragraph 6(b) further provides that it is the duty of a barrister not to engage in conduct (whether in pursuit of his profession or otherwise) which is dishonest or which may otherwise bring the profession of the barrister into disrepute, or which is prejudicial to the administration of justice.

23.22 In a serious breach of conduct, a barrister may be struck off the roll or be suspended generally or for a specified period.

(b) Different from English Bar Code of Conduct

23.23 As early as 1989, the Court of Appeal already recognised⁹ that while historically its origins are similar to that which resulted in the present code of conduct of the Bar of England and Wales, its present form and substance differs widely.

23.24 The central theme is stated in Paragraph 6 of the Code of Conduct:

- "6. It is the duty of every barrister—
- (a) to comply with the provisions of this Code and with the undertakings (if any) which he made on his call to the Bar;

⁷ B827 of 1997, 17 March 1998, unreported.

⁸ Section 37B(2) of the Legal Practitioners Ordinance.

⁹ *Re a Committee of Inquiry ex parte a Barrister* [1990] 1 HKLR 216 per Silke VP.

- (b) not to engage in conduct (whether in pursuit of his profession or otherwise) which is dishonest or which may otherwise bring the profession of barrister into disrepute, or which is prejudicial to the administration of justice;
- (c) to observe the ethics and etiquette of his profession;
- (d) if a practising barrister, or an employed barrister acting under paragraph 1 83 of this Code, to be competent in all his professional activities."

23.25 Serious failure¹⁰ to comply with the duties set out in paragraph 6 shall be professional misconduct and, if so found by a Barristers Disciplinary Tribunal, shall render the barrister liable to be punished in accordance with the provisions of the Legal Practitioners Ordinance.

23.26 Any failure to comply with the duties set out in Paragraph 6 of the Code of Conduct which does not, in the opinion of the Bar Council, amount to professional misconduct shall be a breach of proper professional standards and, if established to the satisfaction of the Bar Council, shall render the barrister liable either:

- (a) to be ordered to attend upon the Chairman or some other person nominated by the Bar Council in order that he should be (1) admonished or (2) given appropriate advice as to his future conduct; or
- (b) to be admonished by letter from the Chairman.

(4) NO RIGHT TO REMAIN SILENT

(a) Failure to respond is a disciplinary offence

23.27 It is a peculiar feature of the Code that it is the duty of a barrister to respond to any requirement from the Bar Council for comments or information or to attend the Special Committee on Discipline or any other nominated or appointed person when required to do so by the Bar Council.¹¹

(b) Duty to report criminal conviction involving dishonesty

23.28 A barrister must report to the Bar Council if he is convicted of a criminal offence which involves dishonesty or which may bring the profession into disrepute. In case of doubt, the offence should be reported.¹²

(5) EXAMPLES OF MISCONDUCT

23.29 The following cases had been considered by the Court:

- (a) alleged assaults perpetrated by the barrister upon his pupil¹³ contrary to Paragraph 6(b) of the Code of Conduct;

¹⁰ §7 Code of Conduct.

¹¹ §10(a) Code of Conduct, Bar Circular No. 06/94.

¹² Paragraph 11 of the Code of Conduct.

¹³ *Pirie v Bar Council* [2001] 4 HKC 190 (CA).

26.13 As stated above, the securities and futures markets in Hong Kong are currently governed by the Securities and Futures Ordinance (Cap 571) (SFO). The SFO consolidates some 10 previous ordinances regulating the securities and futures markets. The primary legislation and the subsidiary legislation commenced operation on 1 April 2003.

26.14 There are tiers of regulation. Firstly, by law, any person carrying on a business of dealing in securities, or carrying on a business of dealing in futures contracts in Hong Kong, has to be licensed by the SFC or else they must fall within one of the licensing exemptions. SFC therefore has both regulatory and disciplinary functions.

26.15 In addition, the Stock Exchange and Futures Exchange have rules to require any person who wishes to trade on or through their respective facilities to hold a "Trading Right". The Trading Right confers on its holder the eligibility to trade on or through the relevant exchange. However, the holding of a Trading Right does not, of itself, permit the holder to actually trade on or through the relevant exchange. In order to do this, it is also necessary for the person to be registered as a participant of the relevant exchange in accordance with its rules, including those requiring compliance with all relevant legal and regulatory requirements.

(3) SECURITIES AND FUTURES COMMISSION

26.16 The Securities and Futures Commission (SFC) is now the statutory regulator for the securities and futures market in Hong Kong. It administers the Securities and Futures Ordinance (SFO) and parts of the Companies Ordinance (Cap 622). Its functions and responsibilities are also set out in these Ordinances.

(i) Regulatory objectives

26.17 The SFC is an independent statutory body. It has the following statutory regulatory objectives:

- (a) to maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry;
- (b) to promote understanding by the public of the operation and functioning of the securities and futures industry;
- (c) to provide protection for members of the public investing in or holding financial products;
- (d) to minimise crime and misconduct in the securities and futures industry;
- (e) to reduce systemic risks in the securities and futures industry; and
- (f) to assist the Financial Secretary in maintaining the financial stability of Hong Kong by taking appropriate steps in relation to the securities and futures industry.

26.18 The SFO is complicated. This is notwithstanding the different forms of registration under the former Securities Ordinance has now been replaced by one single licensing scheme covering a variety of business activities: "regulated activities".²

² Part I, Schedule 5 of the Securities and Futures Ordinance (Cap 571).

26.19 One single license will be issued to cover any combination of different types of regulated activities.

(a) Structure of SFO

26.20 Structurally, the SFO comprises 17 parts and 10 Schedules. It consolidates and replaces some 10 prior ordinances governing the Hong Kong securities, investments, futures and leveraged foreign exchange markets.

26.21 It also introduces a number of new regulatory initiatives such as the single licensing regime intended to streamline registration requirements (Part V); increased power of the SFC to inquire into market misconduct cases (Parts XIII and XIV); the establishment of the Market Misconduct Tribunal to adjudicate market misconduct (Part XIII) and a disclosure regime to provide a regulatory regime for the development of a fair, orderly and transparent market (Part XV).

26.22 On the question of who may be licensed, a licensee must be a "licensed corporation".

(i) Dual civil and criminal regime

26.23 The SFO introduces a dual civil and criminal regime, following the practice in the United States, the United Kingdom and Australia.

26.24 The SFC's role bears some similarities to a prosecutor who undertakes criminal proceedings. That does not mean that what the SFC does is fully analogous to that of a prosecutor in the conduct of criminal proceedings.³

26.25 The SFC has disciplinary powers originating from the former Securities Ordinance. Those powers include the revocation or suspension of the registration of the registered person, reprimanding said person, or any officer of a registered corporation.

26.26 The SFC is not a formal Court or tribunal and in policing the activities of licensed persons cannot realistically be expected to follow the full rigours of court criminal procedure.

26.27 On the other hand, the SFC has to act promptly and efficiently in order to protect the investing public from the harmful effects of unethical conduct by suspected licensed persons. The SFC needs to supervise and investigate the activities of numerous licensed persons on a day-to-day basis. To expect the SFC to adhere to the full technicalities of Court criminal procedure would unduly hamper the SFC from carrying out its role effectively.⁴

³ *A v Securities and Futures Commission* [2010] HKCU 1780 (HCAL 64/2010, 18 August 2010, unreported) [11].

⁴ *A v Securities and Futures Commission* [2010] HKCU 1780 (HCAL 64/2010, 18 August 2010, unreported) [12-13] per Reyes J.

(v) No infringement of Article 10 of Bill of Rights

26.297 In *Chau Chin Hung v Market Misconduct Tribunal*,¹⁷¹ it was argued that having regard to the special nature of proceedings before the Tribunal, especially regarding the potential severity of the sanctions that may be imposed, a person accused of market misconduct would be denied a fair hearing (pursuant to his rights under Article 10 of the Bill of Rights) if:

- (a) he was compelled to give evidence when that evidence may incriminate him; or
- (b) a statement which he had been forced to give under statutory compulsion was admissible into evidence against him.

26.298 The Court of Appeal rejected this submission and stated:

- (a) Although evidence is compellable, such evidence is, with very limited exceptions, only admissible in those proceedings before the Tribunal.
- (b) Such evidence is not admissible against the person who has given it in any other proceedings, civil or criminal, in any court of law.
- (c) Section 255(1) of the SFO directs that evidence given by any person at or for the purposes of any proceedings instituted under section 252¹⁷² shall be admissible in evidence for all the purposes of this Part but shall not be admissible in evidence against that person for any other purposes in any proceedings (civil or criminal) in a court of law brought by or against him.

26.299 The Court of Appeal further said that subject to certain important protections, a specified person may be compelled to give evidence before the Tribunal even though such evidence may tend to incriminate him, because:

- (a) Under section 183(1) of the Ordinance, when a person is under investigation for possible market misconduct, he may be compelled.
- (b) Section 187(2) provides that if a person under investigation claims that an answer to any question might tend to incriminate him, then his answer shall not be admissible in evidence against him in any criminal proceedings.

(i) Registration of order

26.300 An order of the Market Misconduct Tribunal may be registered in the Court of First Instance. When registered, it shall take effect as if it were an order of that court.¹⁷³ However, registration of an order of Market Misconduct Tribunal is not automatic.¹⁷⁴ The court retains the discretion of whether to register an order

171 [2008] HKCU 1463 (HCAL 123/2007, 124/2007 and 22/2008, 22 September 2008, unreported).

172 This includes any material, record or document received by the Tribunal from the person or produced to the Tribunal by the person under section 253, and any record or document or information given, provided, produced or disclosed to the Tribunal by the person under section 254.

173 Section 264(1). Under the former Ordinance, registration of the orders of the Insider Dealing Tribunal was automatic: section 29 of the Securities (Insider Dealing) Ordinance.

174 Unlike in *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10, (1995) 183 CLR 245 (Aust HC). See *Luk Ka Cheung v Market Misconduct Tribunal* [2009]

under section 264(1). The Court of Appeal had held that such registration is not unconstitutional by reason of inconsistency with articles 80, 19(2), 83, 88 and 92 of the Basic Law.¹⁷⁵

(j) Penalty**(i) Statutory**

26.301 The sanctions that the Market Misconduct Tribunal can impose, namely, orders of disqualification, cold shoulder orders,¹⁷⁶ cease and desist orders, disgorgement orders and extensive costs orders, are, by and large, sanctions not known to the common law. They are creatures of statute.

26.302 An example of a penalty has been passed is payment to the government, under section 23(1)(b) of the repealed Securities (Insider Dealing) Ordinance, for example, in *Lau Luen Hung v Insider Dealing Tribunal*¹⁷⁷ (\$15,301,676, decision on 8 September 2006).

(k) Appeal

26.303 Under section 266 of the Securities and Futures Ordinance (Cap 571), a person identified as having engaged in market misconduct who is dissatisfied with a finding or determination of the Market Misconduct Tribunal may appeal to the Court of Appeal against the finding or determination on a point of law or, with the leave of the Court of Appeal, on a question of fact.

26.304 In order for leave to be granted the proposed appeal must be one which has "a reasonable prospect of success"¹⁷⁸ ie prospects of success that are reasonable and therefore more than fanciful, without having to be probable.¹⁷⁹ The weight to be attached to any particular matter of evidence was clearly a matter for the Market Misconduct Tribunal and does not give rise to an appeal with a reasonable prospect of success, so leave may not be granted.¹⁸⁰

1 HKC 1 [57] per A Cheung J (as he then was).

175 *Koon Wing Yee v Secretary for Justice* [2013] 1 HKLRD 76.

176 A cold shoulder order prohibits other licensed persons to act for the person sanctioned. It serves to maintain the integrity of the market. It is not meant to be a deterrent. The effect of a disqualification order is tantamount to a disqualification order. Both are protective in nature, and not punitive. See *Koon Wing Yee v Insider Dealing Tribunal* [2008] 3 HKLRD 372; *A v Financial Secretary* [2013] 1 HKLRD 76.

177 [2009] HKCU 526 (HCMP 1017/2008, 9 April 2009, unreported).

178 *Leung Chi Keung v Market Misconduct Tribunal & Anor* [2010] HKCU 2471 (HCMP 2539/2009, 16 November 2010, unreported) [8], appeal was dismissed ([2012] HKCU 809 (CACV 256/2010, 18 April 2012, unreported)); *Chui Tak Keung Duncan v Market Misconduct Tribunal* [2013] 6 HKC 462 (CA), [4]; *George William Stairs v Market Misconduct Tribunal & The Financial Secretary* [2012] HKCU 1907 (HCMP 1187/2012, 19 September 2012, unreported) [3] (real, or a sensible, as opposed to fanciful prospect of success).

179 *SMSE v KL* [2009] 4 HKLRD 125 per Le Pichon JA [17]; *Chui Tak Keung Duncan v Market Misconduct Tribunal* [2013] 6 HKC 462, [4].

180 *Chui Tak Keung Duncan v Market Misconduct Tribunal* [2013] 6 HKC 462, [18].