Stock Exchange of Hong Kong Ltd

and

New World Development Co Ltd & Others

Bokhary, Chan and Ribeiro PJJ, Sir Noel Power and Lord Woolf NPJJ
Final Appeal No 22 of 2005 (Civil)
21–22 March and 6 April 2006

Banking and finance — Stock Exchange — Disciplinary Committee of Listing Committee — procedural directions for hearing — lawyers could draft written submissions, accompany and be consulted by client at hearing, but could not make oral submissions — whether could cross-examine witnesses left open at this stage — whether offended right to legal representation under art.35 — whether contrary to procedural fairness — whether judicial review justified at this stage — Basic Law art.35

Constitutional law — Basic Law — right to confidential legal advice, access to courts and choice of lawyers under art.35 — "access to the courts", "right to … choice of lawyers … for representation in the courts" — "courts" in art.35 meant judiciary and nothing else — Basic Law art.35

Administrative law — procedural fairness — tribunals — no absolute entitlement to full legal representation — mode and extent of representation which should be permitted depended on what was fair and proportionate

Administrative law — procedural fairness — assessment of what procedures were dictated by fairness could only be made where circumstances known

Administrative law — judicial review — rule that applicant should exhaust domestic remedies before seeking judicial review — exceptional circumstances required for court to allow departure from rule

Words and phrases — "courts" — Basic law art.35

[Basic Law art.35]

X, the Stock Exchange of Hong Kong, was a company authorised by the Securities and Futures Ordinance (Cap.571) to operate a stock exchange in Hong Kong. The first respondent (the Company) was a public company whose shares were traded on the Hong Kong Stock Exchange. In March 2001, the Company publicly announced its interim results for the six-month period ended on 31 December 2000. A report by X's Listing Division to the Listing Committee concluded that, in breach of the Company's Listing Agreement with X, prior to the public announcement, an employee of the Company had disclosed those interim figures, which were said to be price sensitive, to certain investment analysts. The report recommended that Rs, the Company and its four executive directors, should be publicly censured. Rs sought

A to challenge the report's findings and a Disciplinary Committee of X's Listing Committee was convened. Under the Listing Rules, if the Disciplinary Committee imposed a sanction, there was a right to a fresh hearing before the Review Committee and, if necessary, before the Listing Appeals Committee. The members of these respective B committees were market practitioners not judges or lawyers. The Disciplinary Committee's general Disciplinary Procedures (DP), which could be modified for a particular hearing, provided that proceedings should be informal, that hearings were primarily by way of written submissions with lengthy oral argument discouraged, and that all C submissions and answers should be made by the parties, not their legal advisers. Whilst these general Disciplinary Procedures envisaged lawyers having a restricted, purely advisory, role at hearings, lawyers could draft the written submissions (DP 2.5), accompany their clients to hearings, with clients allowed to confer with them at any stage D of a hearing (DP 5.1), the Disciplinary Committee might request a lawyer to clarify an answer given by a client (DP 6.3), and they could prepare the final submissions advanced by their clients (DP 6.3). In this instance, the Chairman of the Disciplinary Committee issued procedural directions for the hearing. These first required the parties E to define the factual issues dividing them and to disclose the substance of the evidence of their witnesses, with such disclosures to stand as evidence-in-chief. The directions also provided that whilst legal advisers could accompany Rs to the hearing, they would not be permitted to make oral submissions; and whether Rs' legal advisors F would be able to examine and cross-examine witnesses was left open for later decision. As per the directions, the Listing Committee served a "list of factual issues". But before Rs served such a list or either party served witness statements, Rs commenced judicial review proceedings, seeking orders that the directions breached art.35 of the G Basic Law, which provided for "the right to ... choice of lawyers ... for representation in the courts"; and, *inter alia*, common law principles of fairness. Rs' challenge failed at first instance (see [2004] 2 HKLRD 1027) but succeeded on appeal to the Court of Appeal (see [2005] 2 HKLRD 612). X appealed to the Court of Final Appeal. At issue was: H (a) the meaning of "court" under art.35 and whether the Disciplinary Committee was a "court"; (b) whether the common law principles of fairness required that Rs be given full legal representation at this stage of the proceedings; and (c) whether it was premature to bring judicial review proceedings at this stage.

I

Held, allowing the appeal, (*Per* Ribeiro PJ), that:

(1) (*Per* Bokhary and Ribeiro PJJ) When art.35 referred to "the courts" it meant the judiciary and nothing else. Article 35 applied to courts of law, that is the courts entrusted with the exercise of J independent judicial power in the HKSAR. The Disciplinary Committee was not a court of law and so art.35 did not apply to it (*Dr Ip Kay Lo, Vincent v Medical Council (No 2)* [2003] 3 HKC

579 (to the extent that it held that the Medical Council was a "court" under art.35), *Solicitor v Law Society of Hong Kong* (unrep., CACV No 302 of 2002, [2004] HKEC 219) (to the extent that it held that the Solicitors Disciplinary Tribunal was a "court" under art.35) overruled; *Royal Aquarium & Summer & Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, *Shell Co of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275, *A-G v British Broadcasting Corp* [1981] AC 303, *General Medical Council v British Broadcasting Corp* [1998] 1 WLR 1573, *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, *Yau Kwong Man & Another v Secretary for Security* (unrep., HCAL Nos 1595 & 1596 of 2001, [2002] HKEC 1142), *Yau Kwong Man & Another v Secretary for Security* (unrep., CACV No 377 of 2002, [2003] HKEC 853), *Solicitor v Law Society of Hong Kong* [2006] 2 HKLRD 116 considered). (See paras.1, 37–69, 88–89, 134.)

(2) Under the common law rules on procedural fairness, there was no absolute right to have counsel address a tribunal or question witnesses. Tribunals had a discretion whether to permit legal representation. The mode and extent of legal representation which should be permitted at a hearing depended on the needs of fairness in the circumstances and what was proportionate. There was no comprehensive list of factors that a tribunal should have regard to in deciding this, but such factors included the seriousness of the charge and potential penalty; whether any points of law were likely to arise; the capacity of the individual to present his own case; procedural difficulties; the need for reasonable speed in making the adjudication; and the need for fairness among the individuals concerned. It might well be that a blanket exclusion of legal representation was likely in most cases to offend the principles of fairness (*Pett v Greyhound Racing Association Ltd (No 1)* [1969] 1 QB 125 explained; *R v Secretary of State for the Home Department & Others, ex p Tarrant & Others* [1985] QB 251, *R v Board of Visitors of HM Prison, the Maze, ex p Hone & Another* [1988] AC 379, *R v Hong Kong Polytechnic, ex p Jenny Chua Yee Yen* (1992) 2 HKPLR 34 followed). (See paras.90–101.)

(3) Since in relation to the operation of the principles of fairness, everything must depend on the circumstances of the particular case, an assessment of what procedures were dictated by fairness could only be made where those circumstances were known. Here, unfairness did not inexorably follow if full legal representation was not given at this stage. First, whilst the seriousness of the sanctions must be taken into account, that should guide the Disciplinary Committee when the issues were better defined. Second, assuming difficult points of law existed, the Disciplinary Committee had a discretion to allow oral argument by legal representatives when the legal issues were better defined and the written submissions had been examined. Third, at this stage the court was not in a

A position to assess whether Rs as laymen would not be able to properly present their case. Fourth, if a risk of unfairness arose at the hearing because there was no equality of arms, eg the Listing Division was represented by lawyers, although not court lawyers and Rs were laymen, it might well be proper to permit legal
B representation. Finally, it was within the Chairman's discretion to take a "wait and see" approach and leave open the question of counsel examining witnesses; when it became clear what evidence the witnesses called were expected to give, fairness might or might not require some or all of them to be cross-examined by
C counsel for Rs. If, in the future, the Disciplinary Committee gave directions that were incompatible with the principles of fairness there would be grounds for judicial review (*R (Roberts) v Parole Board & Another* [2005] 3 WLR 152, *Stock Exchange of Hong Kong Ltd v Onshine Securities Ltd* [1994] 1 HKC 319 followed; *Dr Ip Kay*
D *Lo v Medical Council of Hong Kong (No 2)* [2003] 3 HKLRD 851, *Solicitor v Law Society of Hong Kong* (unrep., CACV No 302 of 2002, [2004] HKEC 219) distinguished). (See paras.111, 121, 128–129.)

(4) Moreover, it was only in exceptional circumstances that the court would allow a departure from the rule that in judicial review
E proceedings the applicant should exhaust the domestic remedies provided before seeking the court's intervention by judicial review. Here, there were no exceptional circumstances. No reason had been given for justifying the immediate intervention of the court. On the contrary, given the lack of definition in the
F issues and the lack of disclosure regarding the likely evidence, a judicial review requiring the court to assess the likely procedural fairness of the disciplinary proceedings could not sensibly be undertaken at present (*Stock Exchange of Hong Kong Ltd v Onshine Securities Ltd* [1994] 1 HKC 319 applied). (See paras.128–130.)

G (5) The applicability of common law principles of fairness made it unnecessary to embark on a parallel inquiry into the applicability of art.10 of the Hong Kong Bill of Rights. Certain questions arose as to art.10's scope and applicability to disciplinary proceedings and, in any event, here it did not add anything to the common
H law rules on procedural fairness. (See para.94.)

銀行與金融──聯交所──上市委員會轄下的紀律委員會──為聆訊而發出的程序指示──律師可草擬書面陳詞、陪同當事人出席聆訊及在聆訊期間向當事人提供法律意見，但不能作口頭陳詞──至於律師能否盤問證人，
I *在現階段不作決定──是否侵犯第35條下得享法律代表的權利──是否有違"程序必需公平"原則──現階段尋求司法覆核是否合理──《基本法》第35條*

憲法──《基本法》──第35條所賦予的得到秘密法律諮詢、向法院提起訴訟及選擇律師的權利──"向法院提起訴訟"、"有權…選擇律師…在法庭上
J *為[…]代理"──在第35條下，"法院"及"法庭"純粹指司法機構，別無其他解釋──《基本法》第35條*

行政法──"程序必需公平"原則──審裁處──訴訟人無絕對權利享有全面法律代表──可予容許的法律代表模式及範圍，須視乎何謂公平和相稱而定

行政法──"程序必需公平"原則──只能在已知情況下評估何等程序屬於公平

行政法──司法覆核──"申請人應先盡量尋求訴訟上的補救，然後才尋求司法覆核"的規則──法庭只會在特殊情況下偏離該規則行事

詞彙──"法院"及"法庭"──《基本法》第35條

[《基本法》第35條]

香港聯交所(下稱"聯交所")是一家獲《證券及期貨條例》(第571章)授權在香港經營聯合交易所的公司。本案第一答辯人(下稱"涉案公司")是一家上市公司，其股票在香港聯交所進行買賣。2001年3月，涉案公司公布直至2000年12月31日為止的六個月內的中期業績。聯交所上市委員會轄下的上市部發表報告，認為涉案公司的其中一名僱員曾於業績公布前向某些投資分析員披露該些中期數據，而該等資料屬於可影響股價的敏感資料，因此，上述報告斷定涉案公司曾違反與聯交所訂立的上市協議。該報告亦建議公開譴責涉案公司及其四名執行董事(以下統稱"答辯人")。答辯人對該報告的結論提出質疑，聯交所上市委員會亦成立紀律委員會以處理事件。根據《上市規則》，答辯人如不服紀律委員會所施加的處分，有權要求覆核委員會重新進行聆訊，如有必要，更可要求上市上訴委員會重新進行聆訊。這些委員會的成員俱為證券業界人士，而並非法官或律師。紀律委員會訂有一般紀律程序指示(下稱"指示")，其內容可因應個別聆訊的需要而予以變通。根據指示，紀律程序應不拘形式、聆訊主要以書面陳詞方式進行、各方應盡量避免作出長篇的口頭陳詞，以及所有陳詞和答覆均應由各方(而非其法律顧問)作出。指示預期律師在聆訊過程中只會擔當純諮詢性的有限角色，但：律師可草擬書面陳詞(指示第2.5項)以及陪同當事人出席聆訊並在聆訊的任何階段向當事人提供法律意見(指示第5.1項)；紀律委員會可要求律師澄清當事人所給予的答覆(指示第6.3項)；而律師亦可代當事人草擬最後陳詞(指示第6.3項)。在本案中，紀律委員會的主席曾經為有關聆訊發出下列程序指示(下稱"涉案指示")：(一)雙方須界定事實爭議點，並披露其證人的實質證據，而此等證據將成為主要證據；(二)答辯人可由其法律顧問陪同出席聆訊，但法律顧問不能作口頭陳詞；及(三)至於答辯人的法律顧問能否主問和盤問證人，須留待隨後決定。上市委員會按照涉案指示送交"事實爭議點列表"；但於答辯人送交同樣列表及雙方送交證人陳述書之前，答辯人入稟法庭，申請司法覆核，要求法庭下令涉案指示違反《基本法》第35條及其他法則，包括普通法下的公平原則。《基本法》第35條規定"有權…選擇律師…在法庭上為[…]代理"。原訟法庭駁回答辯人的申請(詳見[2004] 2 HKLRD 1027)，答辯人遂提出上訴，而上訴法庭裁定上訴得直(詳見[2005] 2 HKLRD 612)。聯交所現上訴至終審法院，所涉爭議點包括：(一)第35條下"法院"及"法庭"的意思，以及紀律委員會是否屬於"法庭"；(二)根據普通法下的公平原則，答辯人在紀律程序的現階段應否享有全面法律代表；及(三)在現階段提出司法覆核申請是否過早。

A **裁決**——上訴得直(判詞由常任法官李義作出):

(1) (判詞由常任法官包致金及李義作出(在《基本法》第35條下,"法院"及"法庭"純粹指司法機構,別無其他解釋。第35條適用於法院,意即香港特別行政區內受託行使獨立司法權的法院及法庭。紀律委員會並非法院或法庭,因此第35條不適用於該委員會(推翻 *Dr Ip Kay Lo, Vincent v Medical Council (No 2)* [2003] 3 HKC 579(在該案裁定香港醫務委員會乃屬第35條所指的"法庭"的範圍內),*Solicitor v Law Society of Hong Kong*(unrep., CACV No 302 of 2002,[2004] HKEC 219)(在該案裁定律師紀律審裁組乃屬第35條所指的"法庭"的範圍內);*Royal Aquarium & Summer & Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431,*Shell Co of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275,*A-G v British Broadcasting Corp* [1981] AC 303,*General Medical Council v British Broadcasting Corp* [1998] 1 WLR 1573,*Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211,*Yau Kwong Man & Another v Secretary for Security*(unrep., HCAL Nos 1595 & 1596 of 2001,[2002] HKEC 1142),*Yau Kwong Man & Another v Secretary for Security*(unrep., CACV No 377 of 2002,[2003] HKEC 853),*Solicitor v Law Society of Hong Kong* [2006] 2 HKLRD 116予以考慮)。(見第1,37至69,88至89,134段)

(2) 普通法下的"程序必需公平"原則並不賦予訴訟人絕對權利由訟辯律師代為向審裁庭陳詞或審問證人。審裁庭享有酌情權決定是否容許訴訟人使用代表。在聆訊期間容許的法律代表的模式和範圍,須取決於在有關情況下何謂公平和相稱。審裁庭在決定是否容許訴訟人使用代表前所要考慮的因素,固然無法盡列,但此等因素將包括:有關指控及其可能帶來的懲罰的嚴重程度;是否相當可能引發任何法律問題;個別訴訟人自行提述其案的能力;程序上的難度;以合理速度作出裁決的需要;以及公平對待所有相關人士的需要。在大部份個案中,全盤不容許訴訟人使用代表的做法都大有可能有違公平原則(*Pett v Greyhound Racing Association Ltd (No 1)* [1969] 1 QB 125予以解釋;依循 *R v Secretary of State for the Home Department & Others, ex p Tarrant & Others* [1985] QB 251,*R v Board of Visitors of HM Prison, the Maze, ex p Hone & Another* [1988] AC 379,*R v Hong Kong Polytechnic, ex p Jenny Chua Yee Yen* (1992) 2 HKPLR 34)。(見第90至101段)

(3) 鑒於公平原則的運作全繫於個別案件本身的情況,故此只能在知悉該等情況下評估何等程序屬於公平。就本案而言,即使在現階段不容許答辯人使用全面法律代表,也不一定代表對答辯人不公平。首先,儘管必須考慮有關懲罰的嚴重程度,但紀律委員會理應於涉案爭議點得到較清楚界定後才考慮該因素。第二,假設案中存在着複雜的法律問題,當涉案爭議點得到較清楚界定而紀律委員會審閱書面陳詞後,該委員會可酌情容許法律代表作口頭陳詞。第三,在現階段,法庭實無從評估作為外行人的答辯人是否無能力妥為提述其案。第四,假如在聆訊期間因雙方的"裝備"不相等——例如上市部由律師(縱使不是專門處理法庭訴訟的律師)代表,但作為外行人的答辯人親自應訊——而產生對答辯人不公平的風險,則紀律委員會大可恰當地容許答辯人使用法律代表。最後,紀律委員會主席具有酌情

權暫時將訟辯律師能否審問證人的問題按下不表；當清楚知道被傳召的證人預期將提出哪些證據時，公平原則自會決定是否有需要由答辯人的代表律師盤問部份或所有證人。假如紀律委員會將來作出有違公平原則的指示，這將構成申請司法覆核的理據(依循*Stock Exchange of Hong Kong Ltd v Onshine Securities Ltd* [1994] 1 HKC 319，*R (Roberts) v Parole Board & Another* [2005] 3 WLR 152；*Dr Ip Kay Lo v Medical Council of Hong Kong (No 2)* [2003] 3 HKLRD 851，*Solicitor v Law Society of Hong Kong* (unrep., CACV No 302 of 2002，[2004] HKEC 219)予以區別)。(見第111，121，128至129段)

(4) 此外，法庭只會在特殊情況下容許偏離"申請人應先盡量尋求既有的訴訟補救，然後才要求法庭以司法覆核方式作出干預"的規則。本案並不存有特殊情況。答辯人未有提出理由以支持法庭即時作出干預。反之，鑒於現階段仍未清楚界定涉案爭議點，加上雙方均未曾披露可能提出的證據，故此要求法庭即時進行司法覆核、評估紀律程序是否可能有欠公平，實非明智之舉(引用*Stock Exchange of Hong Kong Ltd v Onshine Securities Ltd* [1994] 1 HKC 319)。(見第128至130段)

(5) 既然普通法下的公平原則適用，本席無必要同時探討《香港人權法案》第10條是否適用。本案曾經帶出一些關乎第10條的適用範圍及是否適用於紀律程序的問題；但不論如何，就本案而言，既然普通法下的公平原則適用，任何關於第10條的討論都不會構成有用的補充。(見第94段)

Mr David Pannick QC and Mr John Scott SC, instructed by Richards Butler, for the appellant.

Mr John Griffiths SC, Mr Richard Zimmern and Ms Amanda Li, instructed by Woo, Kwan, Lee & Lo, for the respondents.

Legislation mentioned in the judgment

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Companies Ordinance (Cap.32)
Contempt of Court Act 1981 [England] s.19
Criminal Procedure Ordinance (Cap.221) s.67C
Hong Kong Bill of Rights Ordinance (Cap.383) s.8 art.10
International Covenant on Civil and Political Rights art.14
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Local Government Act 1948 [England]
Securities and Futures Ordinance (Cap.571) ss.5(1)(b), 19, 21, 23

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R v Secretary of State for the Home Department & Others, ex p Tarrant & Others [1985] QB 251, [1984] 2 WLR 613, [1984] 1
F All ER 799

Royal Aquarium & Summer & Winter Garden Society Ltd v Parkinson [1892] 1 QB 431

Shell Co of Australia Ltd v Federal Commissioner of Taxation [1931] AC 275

G Solicitor v Law Society of Hong Kong (unrep., CACV No 302 of 2002, [2004] HKEC 219)

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Stock Exchange of Hong Kong Ltd v Onshine Securities Ltd [1994] 1 HKC 319

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Yau Kwong Man & Another v Secretary for Security (unrep., CACV
I No 377 of 2002, [2003] HKEC 853)

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Bryan v United Kingdom (1996) 21 EHRR 342

J Chow Shun Yung v Wei Pih & Another (2003) 6 HKCFAR 299, [2004] 1 HKLRD 1

Dale v New South Wales Trotting Club Ltd [1978] 1 NSWLR 551
Edwards v United Kingdom (1993) 15 EHRR 417
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A Stock Exchange of Hong Kong, The, Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Ltd, rr.2.04, 2A.01–02, 2A.09–11, 2A.15–18, 2A.27, 2A.29
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B **Bokhary PJ**

1. I agree with the judgment of Mr Justice Ribeiro PJ allowing the appeal with costs here and below. In adding something in words of my own, I do so out of respect for the Court of Appeal, having regard to how vigorously they stated the views which we feel unable
C to support. Article 35 of the Basic Law is to be found in the chapter containing the constitutional rights and freedoms enjoyed in Hong Kong. These rights and freedoms are safeguarded by a judiciary whose independence is maintained by the structural provisions of the Basic Law. So when art.35 refers to "the courts" it obviously means the
D judiciary and nothing else. This does not run in any way counter to the importance which the Court of Appeal rightly attached to procedural fairness. The rules of procedural fairness extend to the disciplinary committee before which the respondents find themselves. But the committee has not yet had an opportunity to consider, in a
E position of knowledge rather than speculation, how the rules of procedural fairness are properly to be applied in the respondents' situation. So, even leaving aside any question of having first to exhaust the avenues of review and appeal available under the regulatory regime concerned, the respondents' resort to judicial review is plainly
F premature.

Chan PJ

2. I agree with the judgments of Mr Justice Bokhary PJ and Mr Justice Ribeiro PJ.

G

Ribeiro PJ

3. This appeal arises out of the respondents' challenge mounted by way of judicial review against certain procedural directions issued by the chairman of a Disciplinary Committee of the Stock Exchange. The
H directions were given before the start of the disciplinary hearing which, as a result, has been held in abeyance. The respondents claim to be entitled to full legal representation by lawyers at the hearing for the purposes of examining and cross-examining witnesses and making oral submissions. Whether art.35 of the Basic Law (art.35) confers
I such an entitlement upon them falls to be determined. The Court must also decide whether (as the respondents contend) the directions in question infringe the respondents' right to a fair hearing under s.8 art.10 of the Hong Kong Bill of Rights Ordinance (Cap.383) (art.10) and/or the common law principles of procedural fairness; or whether
J (as the appellant submits) no such infringement is, or can presently be, made out, the challenge having been brought prematurely and without first exhausting alternative remedies.

A. The parties

4. The first respondent (New World) is a company listed on the stock exchange operated by the appellant (SEHK). The other four respondents are executive directors of New World (collectively the directors).

5. SEHK, which is a company incorporated under the Companies Ordinance (Cap.32), operates the exchange pursuant to authority conferred by s.19 of the Securities and Futures Ordinance (Cap.571) (the SFO). It is supervised, monitored and regulated by the Securities and Futures Commission (SFC): SFO s.5(1)(b). By SFO s.21, SEHK is under a duty "to ensure … so far as reasonably practicable, an orderly, informed and fair market" acting "in the interest of the public, having particular regard to the interest of the investing public." It is required to prefer the interest of the public over its own interests.

6. SEHK is empowered (subject to SFC approval) to make rules including rules for the regulation and efficient operation of the market and for the regulation of exchange participants and holders of trading rights. Express power is given to make rules for (among other things) laying down standards of conduct, imposing sanctions for breach of the rules and establishing procedures (SFO s.23). Pursuant to these provisions, rules known as the "Listing Rules" (here cited as LR) have been made.

7. SEHK's Board has arranged for its functions and powers, including operation and enforcement of the Listing Rules, to be discharged by a committee known as the "Listing Committee" (LR 2A.01 and LR 2A.27). The Listing Committee is composed of 25 members, comprising individual participants in the exchange, directors of listed companies, market practitioners and experts, as well as the chief executive of SEHK's holding company (Hong Kong Exchanges and Clearing Ltd, "HKEC") who is a member *ex officio*. Only the latter is an employee of the Stock Exchange. The others participate on a voluntary basis, appointed by virtue of their experience, their standing in their profession or occupation and their availability to carry out the duties of a member (LR 2A.17 and 18).

8. The Listing Committee has in turn arranged for certain functions to be discharged by the Listing Division which consists of employees of SEHK (LR 2A.02). Thus, the Listing Division administers and enforces the Listing Rules, its duties including the investigation and pursuit of disciplinary matters. Where the Listing Division believes that an infringement has occurred, it reports to the Listing Committee which, when sitting in a disciplinary capacity, comprises a sub-committee with a quorum of five members, all drawn from the Listing Committee. It is convenient to refer to it here as a "Disciplinary Committee" although in various rules, it is referred to simply as "the Listing Committee".

9. As a condition of being allowed to trade their shares on the Stock Exchange, issuing companies must enter into an agreement with SEHK, known as a Listing Agreement which sets out certain

A covenants, including an undertaking to comply with the Listing Rules (para.2(3)). New World duly entered into such an agreement.

10. Another condition for being listed is that the issuing company's directors must give an undertaking to SEHK which is materially in the following terms:

B

> … in the exercise of my powers and duties as a director of the issuer, I shall: (i) comply to the best of my ability with the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Ltd from time to time in force (the Listing Rules); (ii) use my best
> C endeavours to procure that the issuer shall so comply; …

Such an undertaking was given by each of the directors.

B. The factual background

D

11. New World's interim results for the six-month period ended 31 December 2000 were expected to be published in mid-March 2001. As is usual, financial analysts in investment houses provided their own forecasts of the expected figures. On 9 March 2001, one such
E investment house, Goldman Sachs, forecast interim profits of $730 million. Another, Vickers Ballas, put the figure at $628 million on 12 March. However, on 14 March 2001, it appears that those analysts and certain others circulated sharply reduced forecasts, placing the expected interim profits at around $300 million. According to the
F Listing Division, 33.5 million New World shares (representing 1.6% of its issued capital) were traded on that day, more than 4.4 times the average trading volume over the 10 preceding days. New World's share price fell to $10.10 on 14 March, having traded at $13.40, $12.60 and $11.60 on the 9, 12 and 13 March respectively. New World
G announced that it was unaware of the reasons for the fall in price and increase in trading volume.

12. Interim profits of $311.4 million were officially announced on 15 March. That morning, and again on 16 March, articles appeared in the press suggesting that those results had selectively been leaked
H to certain analysts.

C. The Listing Division's case against the respondents

13. On 17 May 2002, drawing on statements and materials obtained
I in the course of an investigation by the SFC into possible insider dealing, the Listing Division wrote to New World's board of directors expressing the view that New World and the directors had breached certain obligations to the Stock Exchange and stating that it was minded to commence disciplinary proceedings against them. The
J respondents sought unsuccessfully to refute those suggestions by letter dated 24 June 2002, and, on 4 October 2002, the Listing Division

delivered a detailed report to the Listing Committee (the Report), confirming its view that the respondents had infringed certain rules and recommending sanctions against them by way of public censure. Subsequently, the Listing Division invited the Disciplinary Committee additionally to impose remedial measures on New World with a view to preventing future leakage of price sensitive information.

14. In the Report, the Listing Division asserts that, on 13 March 2001, in advance of New World's publication of the results, Mr Terence Kwok, an employee in its Corporate Communications Department, telephoned a number of analysts and disclosed to them the interim profit figures leading to publication of their revised forecasts. Mr Kwok denies having made such disclosures.

15. By para.2 of the Listing Agreement, New World was obliged to provide to its members and to the general investing public any price sensitive information relating to the group as soon as reasonably practical. It provided in particular that:

> … Information should not be divulged outside the Issuer [ie, New World] and its advisers in such a way as to place in a privileged dealing position any person or class or category of persons. Information should not be released in such a way that Exchange transactions may be entered into at prices which do not reflect the latest available information … (§2.1)

16. Since (so the Listing Division contends) Mr Kwok made the alleged disclosures in the course of his employment, New World must be held responsible for the leakage and accordingly, held to be in breach of para.2. This is denied by New World.

17. The Listing Division asserts that the directors were in breach of their abovementioned undertaking by failing to cause New World to put appropriate controls in place to prevent improper disclosure of price sensitive information. The directors deny that allegation.

D. The contested procedural directions

18. In May 2003, the chairman of the Disciplinary Committee sent to the parties draft procedural directions for the hearing, inviting comments. The draft proposed limiting the role of legal advisers at the hearing "in accordance with the usual practice provided for in the disciplinary procedures", such advisers not being permitted "to address the Committee (whether in respect of oral submission, the examination of witnesses of fact or otherwise)."

19. In their earlier written submissions (of 3 December 2002), the Listing Division had indicated that if witnesses were to be called, it would be appropriate for them all to be examined and cross-examined by counsel, adding "although … this is a matter for the Listing Committee". The respondents wrote seeking to persuade the chairman to make

various changes to the draft directions, including permitting unrestricted use of lawyers at the hearing, but without success.

20. On 25 June 2003, the chairman gave the procedural directions which triggered the respondents' application for judicial review (the Directions). After requiring the parties to define the factual issues dividing them and to disclose the substance of the evidence of witnesses to be called with such disclosures to stand as evidence-in-chief, the Directions continue in the following terms:

> 3. Cross-examination of any witnesses of fact by the Listing Division, [New World] and the [directors] will be allowed at the substantive hearing only on those factual issues identified by the parties as being in issue … and [identified in the disclosures relating to the evidence mentioned above].
> 4. Attendance of all witnesses at the substantive hearing is the sole responsibility of those parties proposing to call them.
> 5. Submissions by the Listing Division, [New World] and the [directors] will otherwise be presented in accordance with the usual practice provided for in the Disciplinary Procedures (a brief opportunity to consult with legal advisers, upon the conclusion of any oral evidence and prior to presentation of closing submissions will be allowed).
> 6. Legal advisers will not be permitted to address the [Disciplinary] Committee (whether in respect of oral submissions, the examination of witnesses of fact or otherwise).
> 7. Leave is granted to the Listing Division, [New World] and the [directors] to be accompanied by legal advisers (with no limitation as to number at the substantive hearing).

21. Hartmann J read the Directions as not prohibiting examination (which I will generally use to include "cross-examination" in this judgment) of witnesses by legal representatives but leaving that question open. By letter dated 4 May 2005 written on his behalf in response to a query by Cheung JA, confirmation was received from the chairman that it had been "deliberately left open for any application for examination or cross-examination, whether by Counsel or otherwise, to be made to the Committee at the substantive hearing." However, Mr John Griffiths SC (appearing with Mr Richard Zimmern and Ms Amanda WM Li for the respondents) submitted that the Court should approach this appeal solely on the basis of the Directions, ignoring the letter dated 4 May 2005. The Court, he argued, should judge the lawfulness of the procedural arrangements on the basis that the Directions have definitively excluded all examination and oral submissions by the respondents' legal advisers. Whether this is the correct approach is considered later in this judgment.

22. The respondents contend in any event that the limitations on legal representation are unlawful and ask the court to hold that

in principle the Disciplinary Committee must permit legal advisers to examine witnesses and to address it orally at the hearing without restriction.

E. The disciplinary powers of the Listing Committee

23. The contested procedural directions must be understood in the context of the Listing Rules and the Disciplinary Procedures referred to below.

24. The Listing Rules provide for a range of sanctions to be imposed for a breach (LR 2A.09). They range from a private reprimand, escalating through a public censure (which is sought by the Listing Division in this case) to orders aimed at removing individuals from further participation in stock exchange activities. The ultimate sanctions involve suspension or cancellation of a company's listing.

25. The Listing Rules provide for such sanctions to be imposed not only on listed companies and their directors (who have a contractual nexus with SEHK) but also on others, including substantial shareholders and professional advisers (LR 2A.10).

26. Where such a sanction has been imposed, the person concerned is given "the right to have the decision against him referred to the Listing Committee again for review" and, in relation to most of the sanctions, there is additionally a right to "a further and final review of the decision against the appellant by the Listing Appeals Committee" (LR 2A.11). The intermediate review is conducted by a committee (referred to here as a "Review Committee") consisting of members of the Listing Committee who had not sat on the Disciplinary Committee at first instance. The Listing Appeals Committee comprises the chairman and two other members of the board of HKEC (LR 2A.29).

F. The Disciplinary Procedures

27. The Listing Rules touch only briefly on the conduct of disciplinary proceedings. But they do so indicating that only a limited role is to be played by lawyers at the hearing. LR2A.16 provides:

> … In any disciplinary proceedings of the Listing Committee and on any further review of the decision resulting from those proceedings by the Listing Committee or the Listing Appeals Committee, the party the subject of such proceedings shall have the right to attend the meeting, to make submissions and to be accompanied by its professional advisers. In all disciplinary proceedings the Listing Division will provide the parties with copies of any papers to be presented by it at the meeting, in advance of the meeting…

28. Detailed procedures are prescribed by the "Disciplinary Procedures" (here cited as "DP") which are rules made by the Listing

Committee pursuant to LR 2A.15 (DP 2.3) and are referred to in para.5 of the Directions.

29. The function of the Disciplinary Committee (defined by DP 2.7) is "to decide whether there is a breach of the Listing Rules in light of the facts before it and to determine the appropriate sanction to be imposed in case of a finding that breaches of the Listing Rules have occurred." It must "have regard to all relevant circumstances, including the facts as contained in the written submissions, the documentary evidence appended to the submissions, and any oral evidence and submissions made" at the hearing.

30. DP 2.5 stipulates that the hearing "is primarily by way of written submissions". It elaborates as follows:

> … Whilst the procedures allow for limited oral submissions to be made at the hearing, all submissions should, so far as possible, be contained in the written submissions which are delivered to the [Disciplinary Committee] in advance of the hearing … This gives the other parties to the hearing fair notice of the case and ensures that the hearing is kept as brief as possible. Given the nature of the tribunal, the [Disciplinary Committee] discourages lengthy oral submissions and in so far as they are deemed necessary at all, oral submissions should be limited to matters not contained in the written submissions …

31. The chairman's approach to legal representation in the Directions reflects DP 5.1 and DP 6.3 which are materially in the following terms:

> … A Party may be accompanied by his/her legal adviser. The Representatives [ie, of the Listing Division] will not normally be accompanied by an independent legal adviser, but may be, in which case the Party(ies) will be notified in accordance with para.4.5 above. Whilst a Party may confer with his/her legal adviser at any stage during the first instance hearing, all submissions should be made by the Party(ies) and all questions addressed to a Party by the Chairman and/or any members of the [Disciplinary Committee] present at the first instance hearing must be answered directly by that Party and not through his/her legal adviser… (DP 5.1)

The procedural steps of a first instance hearing are as follows:

> … members of the [Disciplinary Committee] present may ask the Representatives, the Party(ies) and any persons attending the first instance hearing any question relevant to the disciplinary enquiry. Any person to whom a question is directed shall answer such question directly, and not through his/her legal adviser, although any party accompanied by a legal adviser may confer with his/her legal adviser prior to answering such questions. However, any member of the

> [Disciplinary Committee] present may request any legal adviser present to clarify or elaborate upon any answers given by their clients;
>
> … the Representatives, to be followed by the Party(ies) may make a final oral submission relating to matters arising at the first instance hearing if they so wish. Any Parties accompanied by a legal adviser may confer with his/her legal adviser prior to making that final submission. (DP 6.3)

32. The Disciplinary Procedures emphasise the informality of the disciplinary proceedings as follows:

> The Listing Committee is a lay and informal tribunal, and it is the intention of the Listing Committee to keep the first instance hearing informal. (DP 6.1)
>
> Rules of Evidence do not apply. The Listing Committee may receive any material, written or otherwise, and attach such weight as it thinks appropriate to these materials, notwithstanding that such material may not be admissible in civil or criminal proceedings. (DP 6.2)

G. The characteristics of the Disciplinary Committee summarised

33. The characteristics of the Disciplinary Committee which emerge from the foregoing survey may be summarised as follows.

(a) While the Disciplinary Committee is not itself a statutory creation, its purpose and existence derive from the duty imposed by the SFO on SEHK to regulate the securities market, acting in the interests of the investing public. It is part of the machinery for protecting those interests.

(b) To the same end, SEHK has made the Listing Rules which, while not themselves statutory, were expressly authorised by the SFO. The Listing Division brings alleged infringers before the Disciplinary Committee which has the task of deciding whether the rules have been breached and if so, what sanctions are appropriate.

(c) In carrying out that task, the Disciplinary Committee must (as everyone accepts) act fairly and in a judicial manner, taking proper account of all relevant circumstances. It has developed Disciplinary Procedures which establish general procedural rules applicable to its proceedings.

(d) The Disciplinary Committee has powers to impose sanctions which range from minor reprimands to orders having serious repercussions for the reputation and professional status of the person in question. The Listing Rules assert power to impose such sanctions not merely against those who (like the respondents) have a contractual nexus with SEHK, but others involved in the market.

A **(e) Where a sanction is imposed, there is a right to a fresh hearing before the Review Committee and, if necessary, before the Listing Appeals Committee.**

(f) Members of the Disciplinary, Review and Listing Appeals Committees are not judges or lawyers but market practitioners B **and experts. They are chosen for their knowledge, experience and standing in relation to market activities.**

H. The relief sought

C **34. Referring to the making of the Directions as "the Decision" challenged, the respondents sought the following relief in the judicial review proceedings:**

> 1. A declaration that insofar as the Decision purports to deny legal D representation, or proper and effective legal representation, to the [respondents] at the hearing of the Disciplinary Proceedings against the [respondents], the Decision is null, void or otherwise of no legal effect on the ground that it is calculated to deprive (or in the circumstances is bound to deprive) the [respondents] E of a fair hearing and the right to fair legal representation, in breach of the Basic Law and the Hong Kong Bill of Rights Ordinance, as well as the fundamental rules of natural justice.
> 2. An order of *certiorari* to quash the Decision.
> 3. An order of *mandamus* to compel the Disciplinary Committee F to allow the [respondents] full and unencumbered legal representation, by legal representatives of the [respondents'] own choice, at the Disciplinary Proceedings against the [respondents], including in particular the recognition of the entitlement of the [respondents'] legal advisers, as of right, to address the G Disciplinary Committee (including the making of both oral and written submissions) and to examine witnesses of fact at all hearings conducted by the Disciplinary Committee against the [respondents] in the Disciplinary Proceedings.

H

I. The decisions in the courts below

35. Hartmann J (whose decision is reported at [2004] 2 HKLRD 1027) held that the Disciplinary Committee was not "a court" for the I **purposes of art.35. He also held that the procedural arrangements catered for by the Directions and the Disciplinary Procedures do not deny the respondents a fair hearing and involve no breach of either art.10 or the common law principles of fairness. Accordingly, although his Lordship held that the circumstances justified the bringing of an** J **application for judicial review even at this early stage, he refused the relief sought and dismissed the application.**

36. The Court of Appeal (reported at [2005] 2 HKLRD 612), while agreeing that the case merited judicial review at the present stage, unanimously reversed Hartmann J. The Disciplinary Committee was held to be a "court" within art.35, giving the respondents a right to legal representation which had unlawfully been abridged by the Directions. The Directions were also held to have infringed the right to a fair hearing conferred by art.10 and the common law principles. By its Order dated 27 May 2005, the Court of Appeal substantially granted all the relief sought by the respondents.

J. Is the Disciplinary Committee a "court" within the meaning of art.35?

(i) A question of constitutional interpretation

37. As is apparent from the foregoing, whether art.35 avails the respondents depends on whether the Disciplinary Committee is "a court" within the meaning of its provisions. Article 35 states as follows:

> Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.
>
> Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.

38. The question whether the Disciplinary Committee is "a court" within art.35's reference to "the right to ... choice of lawyers ... for representation in the courts" is first and foremost a question of constitutional interpretation.

39. The Court's approach to that task is explained in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211. As Li CJ stated:

> The courts' role under the common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain the legislative intent as expressed in the language. (at p.223)

In doing so, the courts "do not look at the language of the article in question in isolation" but consider the language "in the light of its context and purpose"; and:

> To assist in the task of interpretation of the provision in question, the courts consider what is within the Basic Law, including provisions in the Basic Law other than the provision in question and the Preamble. These are internal aids to interpretation. (at p.224)

40. This is particularly apposite in the present case. The Basic Law contains numerous other provisions making reference to "the courts" which form the context in which art.35 is found and which may provide important guidance as to what the provisions of art.35 intend. One asks: What are the institutions referred to as "courts" in those other provisions? Construing the language of art.35 in the light of those provisions, is it referring to the same or to some different institutions when it speaks of "representation in the courts"?

(ii) The bodies referred to as "the courts" in the other provisions of the Basic Law

41. There can be no doubt as to the identity of the bodies referred to as "the courts" in the other provisions of the Basic Law. Moreover, the principal purposes of the Basic Law underpinning those articles are clear.

42. The first evident objective of the Basic Law is the establishment of the HKSAR as a Region having a legal system which is separate from the legal system of the Mainland in accordance with the principle of "one country two systems". Thus:

(a) By art.2, the National People's Congress authorises the Region "to exercise a high degree of autonomy and to enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law".

(b) Article 19 elaborates, making it plain that such independent judicial power is to be exercised by our courts:

> [The HKSAR] shall be vested with independent judicial power, including that of final adjudication. The courts of the [HKSAR] shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained. [Subject to certain exceptions not presently material]

(c) Article 80 then makes it clear that the courts in question are the courts of judicature, constituting the judicial system of the Region:

> The courts of the [HKSAR] at all levels shall be the judiciary of the Region, exercising the judicial power of the Region.

(d) Article 81 specifically identifies the courts in question:

> The Court of Final Appeal, the High Court, district courts, magistrates' courts and other special courts shall be established

> in the [HKSAR]. The High Court shall comprise the Court of Appeal and the Court of First Instance …

43. Secondly, the Basic Law aims to provide for continuity between the pre-existing and the present courts and judicial systems. Thus, for example:

(e) Article 81 states that "… The judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal of the [HKSAR]."

(f) Article 87 provides that "In criminal or civil proceedings in the [HKSAR], the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained" with the courts adjudicating cases in accordance with the laws previously in force in Hong Kong (arts.8 and 18), referring to precedents of "other common law jurisdictions" (art.84) and with judges and other members of the judiciary remaining in employment and retaining their seniority, pay and so forth (art.93).

44. A third evident purpose of the Basic Law in relation to the courts is to entrench the independence of the judiciary who operate those courts.

(g) This is made express by art.85 which provides:

> The courts of the [HKSAR] shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.

(h) It is also reflected in provisions such as art.88 which lays down the machinery for appointing judges; art.92 which stresses that judges must be chosen on the basis of their judicial and professional qualities; and art.89 which establishes that judges can only be removed on limited grounds.

45. It is therefore entirely clear that when, in such articles, the Basic Law refers to "the courts" it is referring to the courts of judicature: the institutions which constitute the judicial system, entrusted with the exercise of the judicial power in the HKSAR. I will refer to them simply as "courts of law". The purpose of the Basic Law provisions referred to is to establish the constitutional architecture of that system revolving around the courts of law, catering for the system's separation from that of the Mainland, its continuity with what went before and safeguarding the independence of the judiciary.

A 46. The characteristics of the Disciplinary Committee have been summarised in s.G above. It plainly does not exercise the independent judicial power conferred on the Region by the Basic Law. It is therefore perfectly plain that the provisions discussed above do not apply to that tribunal notwithstanding any judicial functions it may perform.

B

(iii) Interpretation of art 35

47. How does art.35 fit in with those provisions? Should its reference to "the courts" be given a different and wider meaning so that, unlike C the other Basic Law provisions discussed, art.35 encompasses a tribunal like the Disciplinary Committee? Mr Griffiths suggests that the answer to the latter question is "Yes", pointing to the fact that it is found in Chapter III which is concerned with Fundamental Rights and Duties of Residents, separated from the other provisions.

D 48. There are two dimensions to art.35 that should be noted for present purposes. In the first place, it lays down constitutional rights which need have nothing to do with court proceedings. Thus, for instance, the right to confidential legal advice is a right which is protected even where such advice does not bear on any existing or E contemplated court proceedings. This was recognised in the decision recently handed down in *Solicitor v Law Society of Hong Kong* [2006] 2 HKLRD 116, which concerned the constitutionality of provisions empowering an inspector, appointed by the Law Society to investigate disciplinary complaints against a solicitor, to inspect documents which F may contain privileged information derived from a client who is not involved in the disciplinary complaint. That client's privilege qualifies for independent protection notwithstanding the absence of his involvement in any related proceedings whether in a court of law or in any tribunal. These aspects of art.35 do not bear on the issues G in this appeal and nothing said in this judgment is intended in any way to affect the free-standing vigour of those rights.

49. What is of prime relevance to this appeal is the second dimension of art.35. As appears from its language, art.35 is also concerned with entrenching the individual's rights in relation to "the H courts": individuals are to have the right of "access to the courts", the right of "choice of lawyers ... for representation in the courts", the right "to judicial remedies" and "the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel".

I 50. This is a crucial additional feature of the constitutional architecture of the Basic Law in relation to the judicial system of the Region. Article 35 ensures that the fundamental rights conferred by the Basic Law as well as the legal rights and obligations previously in force and carried through to apply in the HKSAR are enforceable by J individuals and justiciable in the courts. It gives life and practical effect to the provisions which establish the courts as the institutions charged

with exercising the independent judicial power in the Region. This dimension of art.35 is therefore concerned with ensuring access to the courts for such purposes, buttressed by provisions aimed at making such access effective. The "courts" in this context are plainly the courts of law. They are the same bodies as those referred to in the other provisions of the Basic Law discussed above. I therefore reject Mr Griffiths' argument to the contrary.

51. Reliance was placed on the principle that "the courts should give a generous interpretation to the provisions in Chapter III that contain constitutional guarantees of freedoms that lie at the heart of Hong Kong's separate system" (*Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 at p.224). That principle is of course well-established and beyond question. However, one must establish what the essential right or freedom in question consists of. As a matter of constitutional interpretation, the Basic Law is plainly not concerned in art.35 with entrenching rights to legal representation in respect of tribunals which are not courts of law. No measure of generosity in the interpretation process can extend its width to the point required by the respondents.

52. It follows that the Disciplinary Committee, not being a court of law, is *not* a "court" within the meaning of art.35. This is decisive of the issue under discussion. However, in deference to the Court of Appeal which reached a different conclusion below relying on two previous Court of Appeal decisions, it is appropriate to examine those decisions and to some of the case-law on which they are founded.

K. The earlier Court of Appeal decisions

(i) Dr Ip's case

53. In *Dr Ip Kay Lo v Medical Council of Hong Kong (No 2)* [2003] 3 HKLRD 851, the appellant was found guilty of professional misconduct by the Medical Council and was disqualified from practice for three years. At the disciplinary hearing, he had been refused an adjournment which he had sought on the ground that he wanted to arrange for legal representation. The question of whether the Medical Council was "a court" for the purposes of art.35 was raised by the Court of Appeal one day before hearing the appeal and leading counsel appearing for the Medical Council was unable to provide any assistance on that important issue. The appellant was appearing in person.

54. Cheung JA nevertheless felt able to decide that the Medical Council *is* a "court" within art.35 and that refusal of the adjournment had infringed Dr Ip's constitutional rights. Yuen JA did not consider it necessary to base her decision on art.35. Burrell J stated that he agreed with both of the other judgments. I should make it plain that the comments in this judgment relate solely to the Court of Appeal's ruling that the Medical Council is "a court" within art.35. Nothing

A said here is intended to suggest that the result arrived at by the Court of Appeal on principles of fairness was incorrect.

55. In reaching his decision, Cheung JA makes two observations as to the general approach to be adopted.

B (i) First, he appears to adopt as a starting point a presumption in favour of treating tribunals as "courts" within art.35, stating:

> The use of tribunals are so prevalent in Hong Kong that it will need a strong case to justify the exclusion of tribunals from
C coming under the general word "courts". (§6)

I would say at once that I cannot see any basis for such an approach. The fact that numerous tribunals exist suggests instead a need for distinguishing among their various functions and characteristics
D rather than lumping them together as presumptive "courts".

(j) Secondly, he states that since art.35 is concerned "with the legal rights of a Hong Kong resident ... the word 'courts' should not be confined solely to [the courts of law]" (§7). However, with respect, this begs the question what are the rights — representation
E in respect of what tribunals — conferred by the article.

56. Cheung JA concludes that the Medical Council is "a court" for art.35 purposes because it is "performing judicial functions", that is, making decisions "according to rules and not policies" (citing Wade
F and Forsyth on *Administrative Law* (8th ed., 2000) (p.40); it is a "statutory tribunal" with procedures governed by statutory provisions (§9); and its decisions affect the doctor's rights and may involve severe penalties. (§10)

57. I return to discuss the significance of such factors later.
G However, it may be noted for present purposes that the decision on art.35 was reached without seeking to interpret that article in the context of the Basic Law and without citation of any relevant authority.

H

(ii) The Law Society case

58. Section 10(2)(e) of the Legal Practitioners Ordinance (Cap.159), gives the Solicitors Disciplinary Tribunal (SDT) power to order a party to pay the costs of a disciplinary hearing on a full indemnity
I basis. In *Solicitor v Law Society of Hong Kong* (unrep., CACV No 302 of 2002, [2004] HKEC 219; Woo V-P, Cheung JA and Burrell J) it was contended that exercise of that power in the case at hand was unconstitutional. It was argued that exposure to a risk of having to pay costs of a large magnitude inhibited a solicitor's defence against
J misconduct charges and so impaired his rights of access to, and of a fair hearing in, the SDT, infringing art.35 (among other constitutional

provisions): §60–63. I should likewise state that the comments in this judgment address solely the question of whether the SDT is "a court" for the purposes of art.35. It is not intended to say anything as to the correctness or otherwise of the other aspects of the decision.

59. Although Woo V-P was inclined to the view that the SDT is not "a court" within the meaning of art.35, he considered himself bound by *Dr Ip Kay Lo v Medical Council of Hong Kong (No 2)* [2003] 3 HKLRD 851 and therefore concluded that art.35 applies to that tribunal: §74–76. Woo V-P did not advance any independent grounds for that conclusion.

60. Cheung JA stated that he maintained the views he had expressed in *Dr Ip Kay Lo v Medical Council of Hong Kong (No 2)* [2003] 3 HKLRD 851 (§172). It appears that the *amicus* accepted that "the word 'courts' in art.35 includes tribunals" (§173). Cheung JA continued in the following terms (in §§174–175):

> It is not necessary to elaborate further on this issue. It is sufficient to recognise that art.35 is one of the provisions of the Basic Law under the heading of "Fundamental Rights and Duties of the Residents". In construing these rights it is in my view permissible and relevant to take into account the provisions dealing with fundamental rights in international covenants which are binding on Hong Kong such as the International Covenant on Civil and Political Rights. The principles on human values are universal in nature and the protection of human rights is based on the rule of law. This Court (Nazareth V-P, Liu and Mayo JJA) in *Cheung Ng Sheong Steven v Eastweek Publisher Ltd & Another* (1995) 5 HKPLR 428 recognised that our law should be developed by taking into consideration the international treaty obligations imposed on Hong Kong.
>
> Article 14 of International Covenant on Civil and Political Rights guarantees a right of fair hearing before courts and tribunals. It is not confined to "courts" only. This right obviously includes the right of access to courts and tribunals. Hence it would be artificial to the extreme to confine the "courts" in art.35 to those in the traditional sense.

61. Cheung JA therefore accepted in this case that the question whether the SDT was a "court" within the meaning of art.35 required interpretation of a provision of the Basic Law. However, his Lordship did not refer to other provisions of the Basic Law dealing with "courts", but embarked on an interpretation which relies solely on art.14 of the International Covenant on Civil and Political Rights (which is enacted in Hong Kong as art.10). His reasoning was as follows: Because art.14 of the International Covenant on Civil and Political Rights applies to both courts and tribunals, art.35 should also be interpreted to extend to courts and tribunals, since its interpretation should be consistent with the Region's international obligations.

A **62. I cannot accept such reasoning. Article 14 of the International Covenant on Civil and Political Rights, enacted as art.10, is expressly incorporated by art.39 of the Basic Law. It is therefore through art.39 that the Basic Law addresses the relevant international obligations and gives constitutional status to art.14 of the International Covenant on**
B **Civil and Political Rights implemented in Hong Kong as art.10. Article 35 is plainly concerned with other issues. As previously stated, it is concerned with the constitutional architecture of the courts entrusted by the Basic Law with the exercise of the judicial power in the HKSAR. Tribunals like the Medical Council and the SDT are not part of that**
C **architecture and art.14 of the International Covenant on Civil and Political Rights is not relevant in this context.**

63. Other than stating the abovementioned approach to interpretation, Cheung JA returned to his approach of identifying factors tending to justify the conclusion that a given tribunal is "a
D **court":**

> In my view a tribunal will fall within art.35 if it exercises a judicial function and its jurisdiction is not private or consensual. The exercise of judicial function clearly means that it will make determinations
E affecting the rights of the parties before it and such determination will be made on the basis of the rules of law and following proceedings conducted in a prescribed manner. This definition will exclude those organisations such as private members clubs whose decisions may also affect the "rights" of its members in matters such as the removal
F of membership. (§177)

I return to consider this approach later in this judgment.

64. Burrell J agreed with the conclusion on art.35 although he differed on other matters not presently material.

G

L. The decision of the Court of Appeal below

65. In the Court of Appeal below, Cheung JA summarises his approach to what constitutes a "court" for art.35 purposes as follows:

H

> Article 35 recognises the importance of legal assistance and specifically the right of legal representation in legal proceedings. While this provision clearly applies to court proceedings, in deciding whether it also applies to proceedings other than those held in courts such as
I in tribunals, the matter has to be approached on a case by case basis. The framework of a particular tribunal has to be examined. However, within the confines of this approach, the following principles are relevant:
>
J 1. The Basic Law being a constitutional document must be given a purposive approach in its interpretation. Where the provisions

are concerned with the fundamental rights of the residents, a generous approach in interpretation should be adopted.

2. The use of tribunals alongside courts is so prevalent in Hong Kong that it will need a strong case to justify the exclusion of tribunals from coming under the general word of "courts" in art.35.

3. A tribunal may be known by different names, the name given to a tribunal is irrelevant in this context.

4. Many of the tribunals are set up expressly by statute but a statute-created tribunal is not the only criterion for coming within art.35. What is equally important is that such a tribunal is an integral part of a legislative framework which is concerned with and takes into account matters of public interest.

5. The tribunal to be subject to art.35 does not need to be a part of the judicial organ of the government. A tribunal will fall within its ambit if it exercises a judicial function and its jurisdiction is not private and consensual.

6. A judicial decision is made according to rules and not administrative policies. The exercise of judicial function means the tribunal will make determinations affecting the rights of parties before it and on the basis of rules of law and following proceedings conducted in a prescribed manner. ([2005] 2 HKLRD 612 at §39)

66. Reyes J provided a reasoned judgment in which he concurred with Cheung JA's conclusion on art.35's applicability. His Lordship approaches that question on the basis of three "insights" for deciding whether a tribunal is a "court" for art.35 purposes derived from *Dr Ip Kay Lo v Medical Council of Hong Kong (No 2)* [2003] 3 HKLRD 851 and the *Solicitor v Law Society of Hong Kong* (unrep., CACV No 302 of 2002, [2004] HKEC 219) (§§103–115). The first is that the function of a forum rather than its label is what matters. The second is that helpful tests for characterising the tribunal include asking (i) whether it is exercising a judicial as opposed to an administrative function in making decisions (applying rules rather than merely administrative policies); (ii) whether its basis of power is consensual or statutory; and (iii) whether the consequences of its decision may have a serious impact on a person's reputation or career. The third insight is that even if a tribunal is an art.35 "court", the right to legal representation is not absolute but subject to legitimate proportional limitations.

67. It is clear from Point 1 in his summary that Cheung JA again recognises that a question of constitutional interpretation arises. He stresses the need for a purposive interpretation and for a generous approach to construing fundamental rights. However, it appears that he may have in mind the same approach as that adopted by him in the *Solicitor v Law Society of Hong Kong* (unrep., CACV No 302 of 2002, [2004] HKEC 219), namely, construing "courts" in art.35 to extend to "tribunals" to achieve congruence with art.14 of the International

A Covenant on Civil and Political Rights (equivalent to art.10). That is an approach which I have rejected on the grounds set out above.

68. I have also rejected the approach of treating tribunals presumptively as courts (Point 2). Crucially, in my view, when purposively interpreted in the context of other relevant Basic Law B provisions, art.35 leads to a conclusion diametrically opposed to the proposition in Point 5: For a tribunal to be subject to art.35 it *does* need to be an organ forming part of the judicial system, exercising the judicial power of the Region.

69. In my opinion, the same fundamental flaw regarding art.35 C affects the judgments in the Court of Appeal below as well as the relevant judgments in *Dr Ip Kay Lo v Medical Council of Hong Kong (No 2)* [2003] 3 HKLRD 851 and the *Solicitor v Law Society of Hong Kong* (unrep., CACV No 302 of 2002, [2004] HKEC 219). They do not adopt the correct approach to interpreting art.35 and consequently D fail to interpret it in the context of the Basic Law's evident purposes which involve laying the constitutional foundations for the exercise of the judicial power in the HKSAR.

E *M. Case-law on the concept of a "court"*

70. The focus of the Court of Appeal's judgments has instead been on identifying factors (drawn from the English case-law) capable of serving as indicators that a given tribunal is "a court". The factors favoured by Cheung JA and Reyes J are summarised in s.L above.

F 71. For the purposes of the present case, that approach was inapposite. When considering reported cases dealing with whether a particular tribunal may be regarded as "a court", the context in which that issue arises is all-important. Different questions, requiring quite different approaches to their solution may be involved. Different G answers may be given to what may superficially appear to be the same question. For example, one issue that often arises is whether certain recognised attributes of a court of law are applicable to a tribunal whose status as "a court" is in question. This is of course very different from the question of constitutional interpretation required H to be addressed in this case. As it happens, in certain other contexts, the concept of a body exercising the judicial power of the state is the criterion adopted by the common law or by statute for deciding whether a tribunal is a "court" for the purposes there relevant. But in other cases, a different, and perhaps wider, notion of what qualifies I as "a court" may be employed. The importance of context and the different approaches generated may be illustrated in the examples which follow.

J *(i) A "court" for the purposes of the law of contempt*

72. In *A-G v British Broadcasting Corp* [1981] AC 303, the question

was whether a body, created by the Local Government Act 1948 as a "local valuation court", could claim the protection of the law of contempt so that the British Broadcasting Corp might be restrained from making a broadcast which might prejudice a pending valuation appeal.

73. The House of Lords held that in the interests of freedom of expression, the law of contempt should not be extended beyond the protection of courts of law, meaning only those courts which form part of the judicial system and exercise the judicial power of the state. Applying that test, local valuation courts did not qualify:

> … in my opinion, the class of inferior courts protected by the law against contempt should be limited to those which are truly courts of law, exercising the judicial power of the state. (*per* Lord Fraser of Tullybelton at p.353)
>
> I would identify a court in (or "of") law, ie a court of judicature, as a body established by law to exercise, either generally or subject to defined limits, the judicial power of the state. In this context judicial power is to be contrasted with legislative and executive (ie administrative) power. If the body under review is established for a purely legislative or administrative purpose, it is part of the legislative or administrative system of the state, even though it has to perform duties which are judicial in character. Though the ubiquitous presence of the state makes itself felt in all sorts of situations never envisaged when our law was in its formative stage, the judicial power of the state exercised through judges appointed by the state remains an independent, and recognisably separate, function of government. Unless a body exercising judicial functions can be demonstrated to be part of this judicial system, it is not, in my judgment, a court in law. (*per* Lord Scarman at pp.359–360)

74. The same criterion was adopted by s.19 of the Contempt of Court Act 1981 which states:

> In this Act — "court" includes any tribunal or body exercising the judicial power of the state and "legal proceedings" shall be construed accordingly …

75. As Robert Walker LJ pointed out in *General Medical Council v British Broadcasting Corp* [1998] 1 WLR 1573:

> Although that definition applies, at first sight, only for statutory purposes, it was recognised by Lord Donaldson of Lymington MR in *P v Liverpool Daily Post & Echo Newspapers Plc* [1991] 2 AC 370, at p.380 as having a wider significance and being "intended to reflect the common law concept of what is a 'court' for the purposes of the common law jurisdiction of the courts in relation to contempt of

court." The expression "the judicial power of the state" is in fact a clear reflection of language used in the House of Lords in *A-G v British Broadcasting Corp* [1981] AC 303, in which their Lordships held that a local valuation court established for rating purposes was not a court in law (or a court of law) and so was not an inferior court for the purposes of RSC Ordinance 52, r.1. (at p.1578)

76. Accordingly, the common law has adopted the concept of a "court" as a body "exercising the judicial power of the state" in the context of contempt, which, as it happens, is the same concept adopted by the Basic Law.

(ii) Where only "a court" can exercise the judicial power

77. Another context in which the concept of "a court" may be in issue concerns cases where a challenge is made to a tribunal's jurisdiction on the ground that it is performing a function which involves exercise of the judicial power whereas it is not a properly constituted "court" and therefore cannot lawfully exercise such power.

78. Thus, in *Shell Co of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275, the question was whether the Board of Review set up under Australian tax legislation to review decisions of the Commissioner of Taxation was exercising the judicial power of the Commonwealth within the meaning of s.71 of the Australian Constitution. If so, the taxpayer contended that it was not a properly constituted "court" since the terms of appointment of its members lacked the entrenched security of tenure enjoyed by judges. The challenge was unsuccessful since the Board of Review was held not to be exercising the judicial power but merely acting administratively.

79. In our own jurisdiction, a challenge based on similar grounds succeeded in *Yau Kwong Man & Another v Secretary for Security* (unrep., HCAL Nos 1595 & 1596 of 2001, [2002] HKEC 1142; Hartmann J); see also *Yau Kwong Man & Another v Secretary for Security* (unrep., CACV No 377 of 2002, [2003] HKEC 853). Young persons who had been convicted of murder had been made subject to an indefinite sentence of imprisonment. Legislation (s.67C of the Criminal Procedure Ordinance (Cap.221) was passed to modify that sentence so that there would be a fixed minimum term. It was provided that this task would be performed by the Chief Executive on the recommendation of the Chief Justice. The constitutionality of that legislation was successfully challenged on the basis that the fixing of the term of imprisonment involved an exercise of the judicial power which had to be exercised by a court of law as provided for by art.80 of the Basic Law and not by the Chief Executive. Section 67C was consequently further amended to vest the function in the court instead.

80. Issues arising in this context are again obviously different from those arising in relation to whether a Disciplinary Committee

is a "court" within the meaning of art.35. In this category of cases, there is no doubt that if the function in question involves exercising the judicial power, only a court of law is qualified to exercise it. The argument is about the nature of the function and whether the body performing it is in fact a court of law.

81. These cases also highlight a difficulty with holding that tribunals like the Disciplinary Committee constitute "courts" for the purposes of the Basic Law. If that were so, it might be thought logically to follow that their composition might be subject to challenge on the ground that they are not manned by judges or other members of the judiciary, which would of course be absurd.

(iii) "A court" for the purposes of absolute privilege

82. *Royal Aquarium & Summer & Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, may be taken as a final example. In that case, a wider basis for qualifying as a "court" was adopted. The question was whether a meeting of the London County Council for granting music and dancing licences under a certain statute was "a court" for the purposes of conferring absolute privilege on members in respect of defamatory statements made in the course of its proceedings. Lord Esher MR held that the immunity extended not only to courts of justice, but to tribunals with "similar attributes":

> It is true that, in respect of statements made in the course of proceedings before a Court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of Courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorised inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes. (at p.442)

83. It is unclear what the criteria for qualifying in this wider category are. However, even on this wider test, the LCC, which was obviously not "a court", did not qualify for the immunity. This suggests that bodies which count as "courts" for the purposes of the absolute privilege against suit for defamation may not count as "courts" for other purposes, such as for the purposes of the law of contempt.

N. The indicators identified by the Court of Appeal

84. Both Cheung JA and Reyes J lay considerable emphasis on "acting judicially" as an indicator of "a court". But, as previously discussed, the real question is one of constitutional interpretation. However, even in contexts where a search for qualifying attributes

is relevant, it would appear that the guidance which the concept of "acting judicially" provides is very limited.

(k) Thus, in *Royal Aquarium & Summer & Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, the argument that absolute privilege applied to licensing proceedings in the LCC because it had to act judicially and therefore was "a court" was rejected. As Lopes LJ explained, the fact that a body acts judicially does not make it "a court":

> The word "judicial" has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind — that is, a mind to determine what is fair and just in respect of the matters under consideration. ([1892] 1 QB 431 at p.452)

(l) Fry LJ pointed out that using an "acting judicially" criterion for defining a "court" for the purposes of the immunity would catch far too many tribunals, referring in passing to the General Medical Council:

> It would apply to assessment committees, boards of guardians, to the Inns of Court when considering the conduct of one of their members, to the General Medical Council when considering questions affecting the position of a medical man, and to all arbitrators. Is it necessary, on grounds of public policy, that the doctrine of immunity should be carried as far as this? I say not. (at p.447)

(m) This was reiterated by their Lordships in *A-G v British Broadcasting Corp* [1981] AC 303. As Viscount Dilhorne (referring to a local valuation court) put it:

> It has to act judicially but that does not make it a court of law. The fact that it has to act judicially means as Fry LJ said in *Royal Aquarium & Summer & Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 that its proceedings must be "conducted with the fairness and impartiality which characterise proceedings in courts of justice, and are proper to the functions of a judge" and not, though established by law, that it is a court of law and part of the judicial system of the country. ([1981] AC 303 at p.340) (See also Lord Edmund-Davies at p.351; Lord Scarman at p.360)

85. The Court of Appeal also stressed the seriousness of the sanctions available to the Medical Council, the SDT and the Disciplinary

Committee as an indicator in the three cases. It is unfortunate, particularly in *Dr Ip Kay Lo v Medical Council of Hong Kong (No 2)* [2003] 3 HKLRD 851, that the Court of Appeal did not have the benefit of having *General Medical Council v British Broadcasting Corp* (above) cited to it. That case concerns the question whether contempt applies to the Professional Conduct Committee of the UK's General Medical Council which closely resembles the Medical Council in Hong Kong in relation, among other things, to the severity of potential sanctions administered. That feature did not, however, bring the PCC into the category of a court of law protected by contempt. Robert Walker LJ, giving the judgment of the court, stated:

> [Counsel] submitted correctly, that the PCC of the GMC has to adjudicate in a formal and judicial manner on very serious issues which are of public importance and may also have the gravest effect on the reputation and career of an accused medical practitioner. Mr Henderson was correct in submitting that the PCC is exercising a sort of judicial power but in our judgment it is not the judicial power of the state which is being exercised. … the PCC is a statutory committee of a professional body specially incorporated by statute. It exercises a function which is recognisably a judicial function, and does so in the public interest. It acts in accordance with detailed procedural rules which have close similarities to those followed in courts of law. Nevertheless it is not part of the judicial system of the state. Instead it is exercising (albeit with statutory sanction) the self-regulatory power and duty of the medical profession to monitor and maintain standards of professional conduct. ([1998] 1 WLR 1573 at p.1580)

86. Some reliance was also placed by the Court of Appeal on the statutory basis of a tribunal as a qualifying criterion. However, while it is true that a purely domestic tribunal derived wholly from private contractual relations is most unlikely to be considered "a court", the fact that a tribunal has been created by statute or is integral to a statutory scheme is plainly not sufficient to qualify it as "a court" for any requisite purpose.

87. Mr Griffiths submitted on the respondents' behalf that the Court should essentially adopt the approach of the Court of Appeal decisions mentioned above. Indeed, he sought to cast a wider net, suggesting that any tribunals which carry out judicial functions as opposed to administrative functions should be held to fall within art.35. For the foregoing reasons, I reject that submission.

O. Conclusion on art.35 and the Disciplinary Committee

88. Interpreted in the light of the Basic Law as a whole, art.35 only applies to courts of law, that is, the courts exercising the independent

judicial power conferred on the Region by the Basic Law. The Disciplinary Committee is not a court of law. Article 35 therefore does not apply to it.

89. Neither are the SDT and the Medical Council courts of law. Therefore, to the extent that the judgments in *Dr Ip Kay Lo v Medical Council of Hong Kong (No 2)* [2003] 3 HKLRD 851, *Solicitor v Law Society of Hong Kong* (unrep., CACV No 302 of 2002, [2004] HKEC 219; Woo V-P, Cheung JA and Burrell J), hold otherwise, they are wrong and should not be followed.

P. The applicability of the common law principles of procedural fairness

90. I have dealt at some length with the art.35 argument because of the need to address the case-law developed by the Court of Appeal on this important constitutional subject.

91. However, as all the parties correctly accept, the common law principles of procedural fairness provide an appropriate framework for dealing with the issues dividing them. As Reyes J points out: "An inquiry into whether art.35 rights have been transgressed by a court's procedure does not end with mere identification of a tribunal as a "court". As Cheung JA stresses, there remain questions of proportionality." (§113) It follows that even assuming the respondents succeeded in maintaining that the Disciplinary Committee is a court for art.35 purposes, they would still have to address the question whether it may be proportionate to restrict legal representation in given circumstances — an inquiry which mirrors the inquiry that is undertaken at common law. Legal representation is not invariably an attribute of a court of law. Thus in tribunals dealing with small claims or employment matters, lawyers are often dispensed with for wholly legitimate policy reasons (usually while providing for the possible transfer of proceedings and appeal to more formal courts where justice requires).

92. Moreover, this is not a case where the respondents face a prohibition against legal representation. On the contrary, as the provisions of the Disciplinary Procedures set out in s.F above indicate, persons appearing can avail themselves of legal assistance and advice before and during the hearing. The proceedings being primarily by way of written submissions (DP 2.5), their lawyers can and may be expected to draft the same. Their lawyers can accompany them and can confer with them at any stage of the hearing (DP 5.1). The lawyers may also, at the Disciplinary Committee's request, clarify or elaborate upon any answer given by their client (DP 6.3). And, prior to final submissions, the client can confer with the lawyer who will no doubt prepare submissions to be advanced (DP 6.3). One should bear in mind in this context that in many states which are signatories to relevant

human rights conventions, the rule is that parties have no right to examine witnesses.

93. The issue in the present case therefore concerns the precise mode and extent of legal representation which should be permitted at the hearing. The answer must depend on what is fair and proportionate, applying the common law approach. This case is therefore distinguishable from *Dr Ip Kay Lo v Medical Council of Hong Kong (No 2)* [2003] 3 HKLRD 851 where upon refusal of an adjournment, Dr Ip was left without any legal representation at the hearing. It is also quite different from the *Solicitor v Law Society of Hong Kong* (unrep., CACV No 302 of 2002, [2004] HKEC 219), where the court was concerned with the purported impact of indemnity costs on the right of access to a tribunal and where the solicitor in question actually had counsel appearing on his behalf (§3).

94. It is also convenient at this stage to deal with art.10. In my view, the applicability of the common law principles of fairness makes it unnecessary to embark on a parallel inquiry into the applicability of art.10. Certain questions arise as to art.10's scope and applicability to disciplinary proceedings (which, for instance, may or may not be "a suit at law"). But even assuming that it does apply, the parties are agreed that it does not add anything to the common law rules on procedural fairness. I therefore propose to say nothing more about art.10.

Q. Legal representation and the common law principles of fairness

95. Mr Griffiths based his submissions on a *dictum* of Lord Denning MR in *Pett v Greyhound Racing Association Ltd* [1969] 1 QB 125. After emphasising the value and importance of legal representation to a layman, his Lordship stated:

> … when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak by counsel or solicitor. (at p.132)

96. On that basis, Mr Griffiths suggested that in the circumstances of the present case, the respondents were entitled to legal representation as of right.

97. I am unable to accept that submission. The authorities have not developed along the lines suggested by Lord Denning MR. Indeed, as was pointed out by Webster J in *R v Secretary of State for the Home Department & Others, ex p Tarrant & Others* [1985] QB 251 at pp.273–274, in *Pett v Greyhound Racing Association Ltd (No 1)* [1969] 1 QB 125, the Court of Appeal was dealing with an interlocutory appeal against an interim injunction and was dealing "only with the question whether it was arguable that the trainer was entitled, as of right, to legal representation …" Webster J points out that at the substantive hearing, Lyell J found (see *Pett v Greyhound Racing Association Ltd (No 2)* [1970]

A 1 QB 46 at pp.63–66) that the defendant association had not acted contrary to the rules of natural justice in refusing the plaintiff legal representation at the inquiry, preferring the decision of the Privy Council in *University of Ceylon v Fernando* [1960] 1 WLR 223, to the *dicta* in *Pett v Greyhound Racing Association Ltd (No 1)*.

B 98. More recent authority clearly establishes that there is no absolute right to have counsel address the tribunal or to question witnesses, any such entitlement depending on whether such procedures are required as a matter of fairness.

99. Thus, in *R v Board of Visitors of HM Prison, the Maze, ex p Hone*
C *& Another* [1988] AC 379, the House of Lords was concerned with a case involving prisoners charged with offences against prison discipline (which would also constitute criminal offences). The cases were referred to the prison's board of visitors and the prisoners were refused legal representation before them. Their argument that they
D were entitled as of right to legal representation at the hearing was rejected. Lord Goff of Chieveley (with whom the other Law Lords agreed) stated:

> … though the rules of natural justice may require legal representation
E before a board of visitors, I can see no basis for Mr Hill's submission that they should do so in every case as of right. Everything must depend on the circumstances of the particular case, as is amply demonstrated by the circumstances so carefully listed by Webster J in *R v Secretary of State for the Home Department & Others, ex p Tarrant*
F *& Others* [1985] QB 251 as matters which boards of visitors should take into account. But it is easy to envisage circumstances in which the rules of natural justice do not call for representation, even though the disciplinary charge relates to a matter which constitutes in law a crime, as may well happen in the case of a simple assault where no
G question of law arises, and where the prisoner charged is capable of presenting his own case. To hold otherwise would result in wholly unnecessary delays in many cases, to the detriment of all concerned including the prisoner charged, and to wholly unnecessary waste of time and money, contrary to the public interest. (at p.392)

H

100. As his Lordship stated, the common law position is that such tribunals have a discretion whether to permit legal representation, depending on the needs of fairness:

> I In English law, we are fortunate in having available to us a discretionary power, so often employed when it is necessary to weigh the effect of different factors; and it is established that disciplinary tribunals have, in the exercise of their discretion, and having regard to a broad range of factors including those mentioned by the European Court, to decide
J whether natural justice requires that a person appearing before the tribunal should be legally represented. (at p.394)

101. The matters listed in *R v Secretary of State for the Home Department & Others, ex p Tarrant & Others* [1985] QB 251 (at pp.285–286) referred to by Lord Goff include (with modifications to make the point more general): the seriousness of the charge and potential penalty; whether any points of law are likely to arise; the capacity of the individual to present his own case; procedural difficulties; the need for reasonable speed in making the adjudication; and the need for fairness among the individuals concerned. This approach was adopted in Hong Kong by Mayo J in *R v Hong Kong Polytechnic, ex p Jenny Chua Yee Yen* (1992) 2 HKPLR 34. Plainly, as these judgments emphasise, no list of such factors can be comprehensive. The common law principles of fairness operate flexibly, requiring the tribunal to respond reasonably to the requirements of fairness arising in each case, balancing any competing interests and considering what, if any, limits may proportionately be imposed on legal representation in consequence.

102. Mr David Pannick QC (appearing with Mr John Scott SC for SEHK), made it plain that he fully accepts the Disciplinary Committee's obligation to act fairly and that considerations of fairness may well require it to permit the witnesses, or some of them, to be cross-examined by counsel or to permit submissions to be made by counsel. His fundamental objection is that these judicial review proceedings are premature in two essential respects. I return later to deal with that argument which is central to this appeal. I deal first with the approach of the Court of Appeal and the respondents.

R. The approach of the Court of Appeal and the respondents to the common law principles of fairness

103. The respondents invite the Court to find that they have, here and now, made good the case that unless their lawyers are given the unrestricted right to address the Disciplinary Committee and to examine and cross-examine witnesses, the common law principles of fairness will necessarily be infringed. The Court of Appeal adopted this approach and found that such case had been made out.

104. Cheung JA's view was that the Disciplinary Committee's procedure of allowing lawyers to advise but not to act as advocates for the respondents at the hearing would result in cumbersome and unsatisfactory to-ing and fro-ing between lawyer and client and that this "simply does not work" (§43). He listed the factors identified by Mayo J in *R v Hong Kong Polytechnic, ex p Jenny Chua Yee Yen* (1992) 2 HKPLR 34 and appears to have held that they militated in favour of a finding of unfairness. He did not, however, engage in any specific analysis of such unfairness.

105. Reyes J considered the restrictions contained in the Disciplinary Procedures to be unjustified, founding himself in the first place on the *dictum* of Lord Denning MR in *Pett v Greyhound Racing Association Ltd (No 1)* [1969] 1 QB 125. He points out that that *dictum*

was applied in *Joplin v Chief Constable of Vancouver Police Department* (1982) 2 CCC (3d) 396 (and upheld in the British Columbia Court of Appeal at *Joplin v Chief Constable of Vancouver Police Department* (1985) 19 CCC (3d) 331) where a provision in police disciplinary regulations which excluded legal representation was held to be *ultra vires*. As I have stated above, the development of English and Hong Kong authority has not proceeded along the lines of giving an absolute entitlement to full legal representation whenever someone may be faced with serious disciplinary consequences. It may in any event be noted that in *Joplin v Chief Constable of Vancouver Police Department*, one is concerned with regulations seeking to impose a blanket exclusion of legal representation. It may well be that such an exclusion is likely in most cases to offend against the principles of fairness. But that is not this case where, as stated above, the debate is as to the specific mode of legal representation to be permitted at a hearing.

106. Reyes J evidently gave weight to the potentially serious consequences of a public censure in the present case and to the likelihood that the directors, being laymen, would feel at a disadvantage presenting their cases.

107. In his submissions, Mr Griffiths pointed to a list of features in the present case which, he argued, meant that there would inevitably be unfairness at the hearing in the absence of full legal representation. I shall return to consider those features more fully later.

S. The SEHK's approach to the common law principles of fairness

108. As I have previously indicated, Mr Pannick accepts that the Disciplinary Committee is obliged to observe the common law principles of fairness. He accepts that, depending on circumstances which may arise, unfairness may result if counsel is not permitted to examine witnesses or to make submissions at the hearing. Equally, limiting representation by counsel may, depending on the circumstances, involve no breach of the principles.

109. It is therefore common ground, and obviously correctly so, that what fairness requires depends on the circumstances. SEHK's policy, reflected in the Listing Rules and the Disciplinary Procedures, of limiting (at least in the first instance) the role of lawyers at the hearing is based upon the belief that limited representation suffices in most cases; that an informal, expert, lay tribunal, steeped in the ways of the stock exchange, is best placed to deal effectively and swiftly with disciplinary issues; that the public interest in maintaining confidence in the market requires swift investigation and treatment of suspected infringements; and that "over-lawyering" the procedures would undermine many of these objectives, substantially lengthening and complicating proceedings, and making it difficult to persuade qualified individuals to accept unremunerated appointment to a Disciplinary Committee. These are plainly legitimate concerns. But they can only

be pursued with proper regard for the needs of procedural fairness and for proportionality in any procedural restrictions imposed.

110. Mr Pannick's objection to the respondents' position is two-fold. First, he argues that the state of the evidence and other materials placed before the Disciplinary Committee is such that it is presently not possible to form a view as to whether fairness does or does not require the examination of witnesses by counsel. He submits that the chairman is fully justified in deciding to leave open that question. Secondly, he contends that the respondents ought to be required, in accordance with the general rule in judicial review proceedings, to exhaust the domestic remedies provided by the Listing Rules before seeking the court's intervention by judicial review. It is contrary to the policy of the law to permit these proceedings to be brought at such an early stage.

111. These objections are related but distinct. The first involves what is essentially a practical question. Since, in relation to the operation of the principles of fairness, everything must depend on the circumstances of the particular case, it must follow that an assessment of what procedures are dictated by fairness can only be made where those circumstances are known.

112. This approach was adopted by the House of Lords in *R (Roberts) v Parole Board & Another* [2005] 3 WLR 152, a case where a life sentence prisoner was to come before the Parole Board with a view to being released on licence. Information was to be placed before the Board suggesting that he was involved in drug dealing and infractions of prison discipline. The Board decided that revealing the sensitive information to the prisoner would put the informant at risk and decided that it would instead be shown to a special advocate appointed to look after his interests. Judicial review proceedings were brought on the ground that this decision infringed the prisoner's rights under art.5(4) of the European Convention of Human Rights. The House of Lords held that the challenge was premature and that it was not possible to say in advance that the proposed procedure would necessarily be incompatible with art.5(4).

(n) Lord Bingham put it thus, identifying various possible outcomes which would not lead to any incompatibility:

> … I would decline the appellant's invitation to rule, at this stage, that the adoption of the proposed procedure is necessarily incompatible with art.5(4). The practice of the European Court is to consider the proceedings in question as a whole, including the decisions of appellate courts: *Edwards v United Kingdom* (1993) 15 EHRR 417 at para.34. Thus its judgment is almost necessarily made in retrospect, when there is evidence of what actually happened. This reflects the acute sensitivity of the Court to the facts of a given case. Save where an issue of

A compatibility turns on a pure question of statutory construction, the House should in my opinion be similarly reluctant to rule without knowing what has actually happened. This seems to me important because there are some outcomes which would not in my opinion offend art.5(4) despite the employment of
B a specially appointed advocate. It might, for instance, be that the Board, having heard the sensitive material tested by the specially appointed advocate, wholly rejected it. Or having heard the material tested in that way the Board might decline to continue the review unless the sensitive material, or at least
C the substance of it, were disclosed at least to the appellant's legal representatives … Or the board might, with the assistance of the specially appointed advocate, devise a way of anonymising, redacting or summarising the sensitive material so as to enable it to be disclosed to the appellant or his legal representatives. Or
D the board might, in a manner that was procedurally fair, reach a decision without relying at all on the sensitive material. If any of these possibilities were to eventuate, I do not think there would be a violation of art.5(4). (§19)

E **(o) Lord Woolf CJ made the point as follows:**

So far as art.5(4) is concerned the need to examine the facts as a whole, including any appellate process, before coming to a decision is critical as Lord Bingham points out in his speech (at
F para.19). The same is true in domestic law. To make rulings in advance of the actual hearing would be to introduce a rigidity that would make the task of the Board extraordinarily difficult. The position has to be looked at in the round examining the proceedings as a whole with hindsight and taking into account
G the task of the Board. (§77)

If a case arises where it is impossible for the Board both to make use of information that has not been disclosed to the prisoner and, at the same time, protect the prisoner from a denial of his fundamental right to a fair hearing then the rights
H of the prisoner have to take precedence, but we have not in my view reached the stage in this case where we can say this has happened. Certainly we cannot say it has happened without considering at least the closed as well as the open judgment of Maurice Kay J. The appellant has chosen to make the issue that
I which I identified at the outset. He is saying in no circumstances can a SAA be engaged at a hearing and this is putting the case too high. (§78)

(p) And Lord Rodger stated:

J

So far as the argument based on the European Convention is concerned, substantially for the reasons given by Lord Bingham,

> I consider that the House cannot decide in advance whether the full hearing, involving the specially appointed advocate, meets the requirements of art.5(4). The same competing interests fall to be considered for the purposes of art.5(4), but the weight to be attached to the various factors may well depend, in part at least, on what happens at the hearing. (§112)

113. The first argument is therefore well-supported in law. Whether it applies on the present facts is examined later.

114. The doctrine referred to in Mr Pannick's second argument is also well known and is not disputed in principle by the respondents. In the Court of Appeal and before the Court, the parties were content to argue the point on the basis of the principles set out in *Stock Exchange of Hong Kong Ltd v Onshine Securities Ltd* [1994] 1 HKC 319. In that case, a firm of stock brokers had been found guilty by the Disciplinary Committee of certain breaches of the rules. Instead of bringing an appeal to the Disciplinary Appeals Committee (DAC) as provided for in the rules, it brought judicial review proceedings complaining that those findings were unfair. The Court of Appeal proceeded on the assumption that the complaints could be made good so as to warrant quashing the Disciplinary Committee's decision. Nevertheless, since there was a domestic right of appeal to the DAC, it refused to intervene "unless and until Onshine Securities Ltd has exhausted that remedy and it can be seen that it has still not received fair treatment." *(ibid)*

115. Power V-P (as Sir Noel Power NPJ then was), giving the judgment of the court, noted that the appellant could only say, "not that it is *impossible* for the DAC to redress its grievances; only that there is a danger that it *might* not." He concluded: "In our judgment, this will not do." (at p.329) In a valuable summary accepted by both sides in this Appeal, his Lordship pointed out that it is only in extraordinary or highly exceptional circumstances that the court allows departure from this rule, providing some illustrative instances:

> It is neither advisable nor possible to define "extraordinary circumstances", but if the appeal available is adequate to deal with all the alleged flaws in the original proceedings, this will weigh heavily against the granting of leave. However, this cannot be decisive. For example, the applicant may show that immediate intervention is required because the appeal procedure is flawed by delay or some other extraneous matter. Similarly, if the court's immediate intervention will result in abating the litigation, this will also be an important — perhaps decisive — consideration. We have in mind cases where the tribunal had no jurisdiction to entertain the proceedings or where the proceedings were based on an obvious and fundamental error of law. In such circumstances it would not be possible to start the same proceedings again and justice and convenience may require that the decision is struck down immediately. (at p.329)

A **116. Basing himself on *Calvin v Carr & Others* [1980] AC 574 and *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] QB 424, Power V-P stated the principle in the following terms:**

> Where in the case of a domestic body like the Stock Exchange the
B appellate procedure may, or may not, ensure justice for the party aggrieved by the lower tribunal's decision, then, generally speaking, the court should not be asked to second-guess the appellate tribunal's decision. In the absence of exceptional circumstances requiring immediate intervention by the court, the aggrieved party should be
C told to wait and see what happens before the appellate tribunal. If that tribunal can, and does, quash the decision of the lower tribunal, that will be an end of the matter. If the appellate tribunal affirms the decision of the lower tribunal, the aggrieved party can then apply for a judicial review; but he will succeed only if, taking the procedure
D (original and appellate) as a whole, it can be seen that the aggrieved party has still not been fairly treated. (at p.330)

117. It is to be noted that while the rule requiring exhaustion of domestic remedies is generally to be applied, a degree of flexibility
E **exists to cater for cases (likely to be highly unusual) where it can starkly be shown that an exception must be made if substantial injustice is to be avoided. Mr Griffiths contends (as has been accepted by Hartmann J as well as the Court of Appeal) that the respondents have shown exceptional circumstances justifying their early launching of this judicial**
F **review. He also contends, as noted above, that the proceedings are not premature and that the court is now in a perfectly good position to rule on the inevitability of unfairness. Mr Pannick contends to the contrary. The facts must therefore be examined to decide who is correct.**

G

T. Procedural fairness and the exhaustion of alternative remedies on the facts

(i) What did the chairman in fact direct?

H

118. It is first necessary to resolve the point of controversy raised by Mr Griffiths at the hearing mentioned in s.D above. The contested procedural directions have been described in that Section. The chairman issued the Directions which provided, among other things, that:

I

> 6. Legal advisers will not be permitted to address the [Disciplinary] Committee (whether in respect of oral submissions, the examination of witnesses of fact or otherwise).

J **119. It will be recalled that Hartmann J took this to mean that the chairman had left open the question whether lawyers would be**

allowed to cross-examine witnesses and that, after clarification sought by the Court of Appeal, this was confirmed to be the chairman's position in a letter written on his behalf. The Court of Appeal (at §34 and §176) accepted this and dealt with the appeal on the basis that the question had been kept open. Notwithstanding this background, Mr Griffiths submitted that the Court should proceed on the footing that the only relevant direction being contested is §6 of the Directions set out above which should be read as definitively excluding any examination of witnesses and any submissions by lawyers on the respondents' behalf.

120. With respect, that proposition is untenable and Mr Griffiths did not advance any legal basis for it. While it is true that on their face a few of the Disciplinary Procedures (such as DP 5.1 and DP 6.3) lay down general procedures which envisage lawyers playing a restricted and purely advisory role at the hearing, it is clear that the Listing Committee (whether sitting as a Disciplinary Committee or otherwise) can modify those rules. Thus, LR 2.04 relevantly states:

> It is emphasised that the Exchange Listing Rules are not exhaustive and that the Exchange may impose additional requirements or make listing subject to special conditions whenever it considers it appropriate. Conversely, the Exchange may waive, modify or not require compliance with the Exchange Listing Rules in individual cases (to suit the circumstances of a particular case), as a variety of circumstances may exist which require it to make *ad hoc* decisions …

Such flexibility is obviously intended not only for the Listing Rules but also for the Disciplinary Procedures made thereunder.

121. Moreover, the Disciplinary Procedures themselves (in DP 6.1 and DP 6.2) emphasise the informality of the tribunal's proceedings which are conducted without the constraints of the rules of evidence. The Disciplinary Committee whether acting through the chairman or as a committee in session, must be master of its own informal procedures, subject always to the underlying obligation to act fairly. Its very informality and the need for it to meet the requirements of fairness give it an implicit discretion to modify directions previously made and to issue fresh directions as required by the circumstances.

122. In *R (D) v Secretary of State for the Home Department* [2006] EWCA Civ 143, a similar approach was adopted. Although the matter arose in quite a different context (involving the procedures for conducting an inquiry set up by the Home Secretary into events in a prison), the comments of Sir Anthony Clarke MR on the role of the chairman are helpful. Giving the judgment of the court, his Lordship noted that the applicable Act did not give a right to parties represented at the inquiry to cross-examine witnesses so that this was a matter to be decided by the chairman in accordance with the principles of fairness. In consequence, he held:

> It is a matter for the chairman of the particular inquiry to decide whether and to what extent to permit interested parties or their representatives to ask questions of witnesses.
>
> We see no reason why an inquiry conducted in such a way should not be compatible with art.2 of the Convention. The underlying obligation of the chairman is to act fairly. In discharging that obligation, the chairman may or may not allow others to question witnesses, depending upon the circumstances of the particular case. In some cases it may be appropriate to do so and in others it may not. (§§40–41)

In my view, a similar procedural latitude is open to the Disciplinary Committee acting through its chairman or as a whole.

123. Mr Griffiths' submission is surprising since the respondents plainly accepted Hartmann J's reading of the Directions in the letter dated 27 May 2005 from their solicitors to the chairman. It referred to the relevant paragraphs in Hartmann J's judgment and "by reason of the said paragraphs" sought further directions permitting examination of witnesses by legal representatives which obviously assumed power to modify earlier directions. As it happens, they did not follow up that letter since they took the decision shortly afterwards to launch the judicial review application and obtained a stay of the disciplinary proceedings.

(ii) Is an assessment of the fairness of the hearing possible at this stage?

124. The steps taken by the Listing Division in bringing its case against the respondents have been described in s.C above. This was followed by the making of the Directions as described in s.D above. The respondents' initial written submissions indicated a legal challenge to the admissibility of the statements obtained from the SFC and a general challenge to the reliability of the deponents particularly in the light of alleged deficiencies in the way those statements were taken. The Listing Division intimated that it was (in December 2002) intending to call four named witnesses, being two analysts from Goldman Sachs and one each from JP Morgan and DBS Vickers (Hong Kong) Ltd. It was in that submission that the Listing Division indicated its view that if these witnesses should be called, it would be appropriate for them to be examined and cross-examined by counsel, although that was a matter for the Disciplinary Committee.

125. On 2 July 2003 the Listing Division delivered its List of Factual Issues. This proved to be the first and last procedural step taken in the disciplinary proceedings after issue of the Directions. The proceedings were thereafter stayed, giving way to the judicial review proceedings culminating in this Appeal.

126. The Listing Division stated in its List that it was only able to identify a single factual dispute at that stage, namely, "whether

[New World] disclosed its interim profit figure to Goldman Sachs and/or JP Morgan and/or Vickers Ballas in advance of its formal publication on 15 March 2001." It added in a Note:

> To date submissions by the Parties concerned have not challenged any of the factual assertions made in para.7 of the Listing Division's Report … in respect of the complaint against the [directors] regarding their failure to put in place adequate control procedures to prevent selective disclosure of price sensitive information …

127. It is obviously true that the judicial review application was launched at a very early stage in the disciplinary proceedings. There was no List of Factual Issues from the respondents. Neither the Listing Division nor the respondents had served witness statements or summaries disclosing the substance of the evidence to be given by each witness intended to be called. There was only a voluminous collection of statements and other documents in the Listing Division's Report and argumentative replies from the respondents. It is in this context that the letter of 4 May 2005 written on the chairman's behalf stated: "Upon compliance with Mr Cheng's other directions, the Committee would have been in a better position to consider the exercise of their discretion …"

128. In my view, it was perfectly within the chairman's discretion to take this wait-and-see position without any necessary infringement of the principles of fairness resulting. In leaving open the question of counsel examining witnesses, he did not exclude that course. He was merely deferring his decision until the issues and scope of the proceedings were better defined. If and when notice is given of the witnesses to be called, with disclosure of the substance of their evidence, the respondents could apply (possibly with support from the Listing Division, in the light of what they have previously said) for them to be dealt with by counsel, stating the grounds relied on. Of course if in future, the chairman or the Disciplinary Committee should give directions that are incompatible with the principles of fairness there would be grounds for judicial review to be initiated at an appropriate stage. That stage may or may not (depending on the nature of the infringement and the then prevailing circumstances) be after the review and appeal procedures provided for by the Listing Rules have been exhausted, the position being governed by the *Stock Exchange of Hong Kong Ltd v Onshine Securities Ltd* [1994] 1 HKC 319 principles discussed above.

129. I am unable to accept that the features of this case identified by Mr Griffiths compel the Court to conclude that unfairness inexorably follows if directions authorising full legal representation are not given at this point. To take these features in series:

(q) Seriousness of the sanctions: I agree that in considering what fairness requires, the seriousness of the sanctions must be taken

A into account. That remains a factor that should guide the chairman and the Disciplinary Committee not only regarding the handling of witnesses, but on its procedure generally when the issues are better defined.

(r) Difficult points of law exist: Assuming this to be so, written B arguments have already been exchanged, obviously prepared by lawyers on both sides. Such submissions may or may not be enough to enable the Disciplinary Committee to decide the point. If not and if fairness so requires, it has a discretion to allow oral argument by legal representatives when the legal issues are better C defined and the written submissions have been examined.

(s) The respondents are laymen who will not be able properly to present their own cases: Until the issues are well-defined and the substance of the evidence of any live witnesses is known, the court is in no position to assess whether this is the case. If such D difficulties in fact arise, then it may well be proper to permit legal representation to the extent necessary.

(t) There is no equality of arms since the Listing Division would be represented by individuals who, while not court lawyers, are trained as lawyers and have experience of disciplinary cases E while the respondents are laymen: If this is so at the hearing and if a risk of unfairness arises, it may well be proper to permit legal representation to the extent necessary.

(u) There is a material dispute of facts so that cross-examination is required: Mr Griffiths pointed to the fact that the Report runs F to some 750 pages, involving 11 deponents and 16 records of interview, with the defence possibly calling additional witnesses. If anything, this supports the chairman's wait-and-see approach. The Listing Division has indicated that it is only going to call four witnesses, and not the 11 whose 16 statements have been made G available. When it becomes clear what evidence the witnesses actually to be called are expected to give, fairness may or may not require some or all of them to be cross-examined by counsel for the respondents. The chairman and the Disciplinary Committee will have to give careful consideration to that question, which has H been left open.

130. I also respectfully disagree with the view taken in the courts below that this is a case where exceptional circumstances justify judicial review proceedings at this early stage. No reason has been provided I for saying that immediate intervention by the court is required. Correctly interpreted, art.35 places no constitutional impediment in the way of the disciplinary proceedings. It cannot be said that proceeding on the basis that examination of witnesses by counsel has been left open involves any obvious and fundamental error of law. J In short, there is nothing exceptional to justify judicial review now. On the contrary, given the lack of definition in the issues and lack of disclosure regarding the likely evidence, a judicial review requiring

the court to assess the likely procedural fairness of the disciplinary proceedings cannot sensibly be undertaken at present.

Conclusion

131. It is accordingly my view that the attack on the Directions is premature in both of the senses contended for by Mr Pannick. I would therefore allow the appeal, set aside the Orders of the Court of Appeal dated 27 May 2005 and dismiss the application for judicial review. As the parties are agreed that the costs should follow the event of this Appeal, I would order the respondents to pay the appellant's costs here and in the courts below.

Sir Noel Power NPJ

132. I agree with the judgments of Mr Justice Bokhary PJ and Mr Justice Ribeiro PJ.

Lord Woolf NPJ

133. I agree with the judgments of Mr Justice Bokhary PJ and Mr Justice Ribeiro PJ.

Bokhary PJ

134. The Court is unanimous. We allow the appeal, set aside the Court of Appeal's orders, dismiss the respondents' application for judicial review and award the appellant costs here and in the courts below. In the course of holding that the Listing Committee is not a court within the meaning of art.35 of the Basic Law, we have held that neither are the Medical Council or the Solicitors Disciplinary Tribunal. To the extent that the Court of Appeal held otherwise in *Dr Ip Kay Lo v Medical Council of Hong Kong (No 2)* [2003] 3 HKLRD 851 and *Solicitor v Law Society of Hong Kong* (unrep., CACV No 302 of 2002, [2004] HKEC 219), those two Court of Appeal cases are overruled.