

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2011 SUPPLEMENTARY INFORMATION PACKAGE

HEAD II: CIVIL AND CRIMINAL PROCEDURE

Contents

- 1. Standards, Syllabus and Materials**
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Important: The test paper for Head II Civil and Criminal Procedure:

- 1. is open book. Candidates may bring in and refer to any book, document or other written material**
- 2. has a duration of 3½ hours**
- 3. has no specific reading time allocated**
- 4. contains FIVE questions. Candidates should answer any FOUR questions only.**

1. Standards, Syllabus and Materials

Overseas Lawyers Qualification Examination

HEAD II: CIVIL AND CRIMINAL PROCEDURE

Standards, Syllabus and Materials

A. CIVIL PROCEDURE

STANDARDS

Candidates will be expected:-

- (i) to be familiar with causes of action arising out of the contract and tort sections of Head V: Principles of Common Law;
- (ii) to demonstrate an ability to draft simple pleadings, affidavits and letters of advice; and
- (iii) to demonstrate a knowledge of and an ability to apply the rules of practice and procedure as set out in the syllabus.

The test paper for this Head of the Examination is set at the standard expected of a newly qualified (day one) solicitor in Hong Kong who has completed a law degree (or its equivalent), the professional training course (PCLL) and a two year traineeship prior to admission.

SYLLABUS

1. Structure of Hong Kong's Civil Courts System

- Court of Final Appeal
- Court of Appeal
- Court of First Instance of the High Court
- District Court
- jurisdiction of the courts, including supervisory jurisdiction
- sources of civil procedure: Ordinances, Rules of the High Court, Practice Directions

2. Pre-action Considerations

- the cause of action
- the parties to the action
- time limits
- the merits
- costs only proceedings
- financial considerations including legal aid

3. **Underlying objectives of the High Court and District Court Rules**
 - the underlying objectives
 - case management powers
 - use of alternative dispute resolution procedures such as mediation

4. **Commencement and Service of Proceedings**
 - modes of originating process
 - preparing and issuing originating process
 - validity and renewal of writs
 - modes of service
 - acknowledgement of service and intention to defend
 - applications to serve out of the jurisdiction

5. **Pleadings and Particulars**
 - the function of pleadings
 - Statement of Claim
 - Defence
 - Counterclaim and/or Set Off
 - Reply to Defence and Defence to Counterclaim
 - amendments to writ and pleadings
 - Further and Better Particulars
 - Third party proceedings

6. **Interlocutory Matters**
 - striking out and staying
 - security for costs
 - interim payment
 - judgment in default and summary judgment
 - summons for directions
 - discovery and inspection of documents
 - interrogatories
 - exchange of witnesses' statements
 - orders for exchanged statements to stand as evidence in chief at trial
 - experts' reports
 - joinder of parties
 - contribution notices
 - case management summons, case management conference and pre-trial review
 - case management timetable

7. **Pre-emptive remedies including:**
 - simple interlocutory injunctions
 - prohibition orders

8. **Preparations for Trial and Trial**
 - checklist for hearing
 - setting down
 - preparing and lodging documents for trial
 - subpoenas
 - conduct of the trial

9. **Termination and Compromise**
 - without prejudice negotiations
 - payments into and out of Court
 - withdrawal and discontinuance
 - simple settlement agreements
 - consent orders and judgments

10. **Enforcement of Judgments**
 - oral examination
 - execution against goods
 - charging orders
 - injunctions and prohibition orders in aid of enforcement
 - garnishee proceedings
 - winding up and bankruptcy (N.B. in so far as this is relevant to the enforcement of judgments)

11. **Costs**
 - bases and scales
 - costs between litigants and between solicitor and client
 - wasted costs
 - security for costs
 - taxed costs and fixed costs
 - discretion of the Court
 - costs on interlocutory applications
 - summary assessment of costs

12. **Rights of Appeal**
 - setting aside a judgment in default
 - interlocutory appeals
 - appealing a judgment
 - appeals to the Court of Appeal
 - appeals to the Court of Final Appeal (s.22 CFA Ordinance)

MATERIALS

A sound knowledge of the following Ordinances and other materials cited is essential to any understanding of civil procedure.

- Court of Final Appeal Ordinance (Cap 484)
- High Court Ordinance (Cap 4), as amended by the Civil Justice (Miscellaneous Amendments) Ordinance 2008

- Rules of the High Court (Amendment) Rules 2008
- District Court Ordinance (Cap 336), as amended by the Civil Justice (Miscellaneous Amendments) Ordinance 2008
- Rules of the District Court (Amendment) Rules 2008
- Practice Directions, High Court
- authorities

Hong Kong Texts on Civil Procedure

Candidates should note that although Hong Kong's civil procedure was modelled upon the civil procedure of England and Wales, procedural reforms in England and Wales have not been adopted in Hong Kong, but rather Hong Kong has implemented its own civil justice reforms. Reference must therefore be made to Hong Kong texts and materials.

Candidates should also note that Hong Kong Cases can be accessed through the Hong Kong Judiciary web site: www.info.gov.hk/jud/eindex.htm

Similarly, much useful Hong Kong material can be found on the Hong Kong Legal Information Institute web site: www.hklii.org.

Main Texts

- *Wilkinson, Booth & Cheung*, 'A Guide to Civil Procedure in Hong Kong', Third Edition, LexisNexis, 2009 (ISBN 978 988 801 651 8)
- *Camille Cameron & Elsa Kelly*, 'Principles and Practice of Civil Procedure in Hong Kong', Second Edition, Sweet & Maxwell Asia, 2008 (ISBN 978 962 661 332 0)
- *W S Clarke*, 'Hong Kong Civil Court Practice', Desk Edition 2008, LexisNexis (ISBN 978 962 897 274 6)

The following materials are useful for reference:

- 'District Court Handbook 2002: Civil Practice', Sweet & Maxwell Asia (ISBN 962 661 157X)
- *Lo, P.Y.*, 'Hong Kong District Court Practice' LexisNexis (ISBN 9628105418)
- *Rogers M. (Ed)*, 'Hong Kong Civil Procedure 2009', The Hong Kong White Book, Sweet & Maxwell Asia (ISBN 978 962 661 336 8)

Candidates must ensure they are using the latest editions of texts and up to date versions of Ordinances.

B. CRIMINAL PROCEDURE

STANDARDS

Candidates will be expected to demonstrate a knowledge of and an ability to apply the rules of practice and procedure as set out in the syllabus.

The test paper for this Head of the Examination is set at the standard expected of a newly qualified (day one) solicitor in Hong Kong who has completed a law degree (or its equivalent), the professional training course (PCLL) and a two year traineeship prior to admission.

SYLLABUS

- 1. Hong Kong's Criminal Courts**
 - Court of Final Appeal (in outline only)
 - Court of Appeal of the High Court
 - Court of First Instance of the High Court
 - District Court
 - The Magistrate's Court
 - The Juvenile Court

- 2. Criminal Procedure in Hong Kong**
 - The Role of the Judge
 - The Role of the Jury
 - Police Powers in Hong Kong
 - The Classification of Offences

- 3. Commencement of Proceedings**
 - Prosecuting authorities and the role of the Secretary for Justice
 - Arrest, Detention and Seizure of Property, Arrest and False Imprisonment
 - Questioning of suspects and obtaining statements
 - Receiving instructions to represent a client
 - Identification parades and attending the client in custody
 - Charging
 - Bailing
 - Proceeding by way of Summons
 - Service of Process and compelling attendance at court

- 4. From Charging to Trial**
 - Summonses, Charges and Indictments
 - Duplicity
 - Joinder of Offences and Offenders
 - Severance and Separate Trials
 - The Prosecution's Duty to Disclose Unused Materials
 - Alibi Notices and Expert Evidence

5. **Procedure in the Magistrates' Court**
 - Applications for Bail
 - The Plea before the Magistrate
 - The Trial before the Magistrate
 - Amending Charges and Summonses, s 27 of the Magistrates Ordinance
 - Sentencing Powers
 - Transferring to and from the District Court
 - Committals to the Court of First Instance of the High Court

6. **Procedure in the District Court**
 - From Transfer to Trial
 - Trial in the District Court
 - Sentencing Powers

7. **Particular Problems During Trials**
 - Admissibility of Caution Statements: the Voir Dire and the Alternative Procedure
 - Objecting to the Information, Charge or Indictment
 - The Duty and Responsibility to the Court and to the Client
 - Vulnerable Witnesses and Video Linking and Pre-Trial Statements

8. **Verdict and Sentencing**
 - Alternative verdicts
 - Aims and objectives of sentencing
 - Available sentences
 - Sentencing guidelines

9. **Challenging and Appealing the Decision**
 - Appealing from Magistrates
 - The Review powers of Magistrates
 - Appealing from the District Court
 - Reviewing Sentence
 - Appeals generally

10. **Costs and Finance**
 - Powers of Courts to Award Costs and Against Whom
 - Compensation Orders and Restitution Orders
 - Forfeiture Proceedings
 - Duty Lawyer Scheme
 - Legal Aid

MATERIALS

Candidates should note that although criminal procedure in Hong Kong is modelled upon the procedure in England and Wales, there are differences between the two procedures. Reference must be made to Hong Kong texts and materials.

The remarks about the Judiciary web site and the Hong Kong Legal Information Institute web site made in the civil procedure section of this syllabus are equally apposite to criminal procedure.

A sound knowledge of the following Ordinances and other materials cited is essential to any understanding of criminal procedure.

Ordinances and sub-legislations

- Criminal Procedure Ordinance, Cap. 221
 - Sub-legislation:
 - Criminal Appeal Rules, Cap. 221A
 - Indictment Rules, Cap. 221C
 - Legal Aid in Criminal Cases Rules, Cap. 221D
 - Criminal Procedure (Reference of Questions of Law) Rules, Cap. 221E
 - Criminal Procedure (Appeal Against Discharge) Rules, Cap. 221F
 - Criminal Procedure (Applications under Section 16) Rules, Cap. 221G
 - Criminal Procedure (Representation) Rules, Cap. 221H
 - Criminal Procedure (Record of Bail Proceedings), Cap. 221I
 - Live Television Link and Video Recorded Evidence, Cap. 221J
 - Application for Dismissal of Charges Contained in a Notice of Transfer, Cap. 221K
- Juvenile Offenders Ordinance, Cap. 226
- Magistrates Ordinance, Cap. 227
- District Court Ordinance, Cap. 336
- Costs in Criminal Cases Ordinance, Cap. 492
- Police Force Ordinance, Cap. 232
- Detention Centre Ordinance, Cap. 239
- Drug Addiction Treatment Centres Ordinance, Cap. 244
- Training Centres Ordinance, Cap. 280
- Probation of Offenders Ordinance, Cap. 298
- Community Service Orders Ordinance, Cap. 378
- Rehabilitation of Offenders Ordinance, Cap. 297

Other Materials

- The (Hong Kong) Rules and Directions for the Questioning of Suspects and the Taking of Statements (Hong Kong Government)
- Notice to Suspect for Attendance at Identification Parade (Pol. 60) Hong Kong Police Force
- The Bar Council, Code of Conduct of the Bar of Hong Kong Special Administrative Region (Hong Kong Bar Association)
- The Hong Kong Solicitors Guide to Professional Conduct, The Law Society of Hong Kong (Paragraphs relating to the Conduct of Litigation)
- Practice Directions
- Solicitor's Practice Rules relating to criminal litigation, esp. Rule 5D

Texts

- *Knight, C. and Upham, A. R.*, 'Hong Kong Legal Practice Manuals, Criminal Litigation' (2nd Edition), Sweet & Maxwell Asia (ISBN 962 661 039 5)
- *Amanda Whitfort*, 'Criminal Procedure in Hong Kong: A Guide for Students and Practitioners', LexisNexis (ISBN 978 962 8937 15 8)

For Reference

- 'Archbold Hong Kong 2011', Thomson Sweet & Maxwell Asia (ISBN 978 962 661 388 7)
- *Lo, P.Y.*, 'Hong Kong District Court Practice' LexisNexis (ISBN 9628105418)
- *Cross, I.G. and Chung, P.W.S.* 'Sentencing in Hong Kong', 5th Edition, LexisNexis, (ISBN 978 962 8937 65 3)

Candidates must ensure they are using the latest editions of texts and up to date versions of Ordinances.

RECOMMENDATION

Candidates may find it useful to spend half a day in the High Court, half a day in the District Court and half a day in the Magistrates' Court.

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**2. Examiners' Comments on
the 2008, 2009 and 2010
Examinations**

Examiners' Comments on the 2008 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. There was a general improvement in the quality of answers and results obtained in the 2008 Examination, when compared to the 2006 Examination and the 2007 Examination. However, the tendency for candidates not to address the issues contained in the questions with the practicality expected from the Day One Lawyer was repeated. This year, however, an improvement in the quality and formatting of letters of advice was seen, which probably resulted from the comments set out in the Examiner's Report on the 2007 Examination.
2. There was again a marked tendency amongst the candidates to avoid the question on pleadings and it may be that there will need to be a greater focus on such questions in the future, particularly mindful of the forthcoming Civil Justice Reforms.

The Standard and Format of the Examination

3. The 2008 Examination, as in previous years, was open book.
4. The 2008 Examination was premised on the standard to be expected from the Day One Lawyer. The Day One Lawyer is one who has completed both the academic and vocational stages necessary for professional qualification. In Hong Kong that means the LL.B (or a non-law degree and the CPE), the PCLL and the two year training contract. Day One Lawyers should have a sound base of substantive knowledge and have acquired the ability to apply that knowledge to straightforward situations. In reality those taking the examination will be more than Day One Lawyers because of experience obtained in their home jurisdictions. Even so the Panel was careful to focus on the "Day One" standard and to keep away from what might be classed as "advanced procedure" or "superior ability". A Day One Lawyer intending to practise in Hong Kong should, however, have the ability to demonstrate an appreciation of the structure, powers and responsibilities of Hong Kong's Courts and have a basic knowledge of what is required in advising and representing clients in litigious matters.
5. If it is to have any value in ensuring that those seeking to practise in Hong Kong are of a suitable standard, the examination must test both substantive

knowledge and the ability to apply that knowledge. As with any professional qualifying examination, the Panel was concerned to set questions which would test substantive knowledge and the ability to apply that knowledge in a constructive, practical and common sense manner.

General Criticisms

6. There were five questions in the paper, candidates were required to answer any four of those questions. The time allowed was 3 hours and 30 minutes. The first 30 minutes is intended to allow candidates an opportunity to read and digest the questions in the paper and to plan their answers before starting to write. However, candidates can start to write their answers as soon as they wish.
7. The majority of candidates brought into the examination room a significant amount of materials, but it was again noted that such practice proved to be somewhat counter-productive. There is insufficient time in the examination to search such materials for the required answers. Preparation is required in order to be fully conversant with the content of such materials in order to be able to refer to the same in an efficient manner that results in a precise answer to the actual question. In several answers, the candidates went down the road of including materials which were wholly irrelevant to the questions asked or were peripheral to the issues and accordingly, marks were not granted.
8. Candidates would be recommended to spend part of their preparation in focusing upon examination technique. Answers should be carefully prepared such that the issues raised in the questions are identified and precise, direct answers relevant to those issues are produced.

Performance on individual Questions

9. Questions 1 and 2 addressed issues of criminal procedures and the performance were generally good on these questions.
10. Question 1 was split into 4 parts with 7 marks available for parts 1:1, 5 marks available for each of parts 1:2 and 1:3 and 8 marks for part 1:4. Most candidates scored well on the question. Part 1 was generally well answered with students identifying the potential conflict of interest between clients. Part 2 was well answered with most candidates identifying the correct venue for trial. Part 3 was well answered with nearly all candidates identifying the relevant sentencing principle in s109A of the Criminal Procedure Ordinance for young

offenders and many indicating the correct sentencing options for the age range given. Part 4 was quite well answered with most candidates identifying the relevant parts of the Secretary for Justice's Rules and Directions.

11. Question 2 was split into 4 parts with 1 mark available for part 2:1, 8 marks available for part 2:2, 4 marks available for parts 2:3 and 12 marks for part 2:4. Many candidates performed poorly on this question and a number chose not to attempt the question at all. Of those who attempted the question Parts 1 and 2 were better answered with candidates correctly identifying the venue as the Court of Final Appeal and the correct basis for initiating the appeal. Part 3 was less well answered with fewer candidates noting the need for leave to be sought from the CFA unless the case had already been certified. Answers to Part 4 lacked application of legal principles to facts. Those candidates who were able to identify the principles to be applied by the court when refusing costs were, for the most part, unable to apply them to the facts given. Many candidates appeared to have managed their time poorly as they did not appear have adequate time to answer Part 4.
12. Questions 3, 4, and 5 addressed issues of civil procedure and should not have unduly tested the abilities of an averagely competent Day One Lawyer. The relevant procedure was tested in a manner that sought reference to the rules or other materials in support of the answers and a sensible, practical approach to the issues.
13. Question 3 was split into three parts with 10 marks for each of parts 1 and 2 and 5 marks for part 3. Most candidates addressed the issues fairly well in respect of this question, identifying the correct procedural requirements and the related time limits, as well as issues regarding service out of the jurisdiction and relevance in respect of the obligation to disclose. The issues raised regarding privilege were not addressed so well and a number of candidates appeared to have a less than good understanding of Calderbank offers.
14. Question 4 was split into three parts with 10 marks for each of parts 1 and 2 and 5 marks for part 3. This question concerned drafting in that candidates were required to prepare a summons and supporting affidavit, as well as write a letter of advice identifying an appropriate strategy to be followed in terms of opposing the application that they recommended be pursued in the earlier part of their answer. The majority of candidates did not attempt this question and a number of those who did, did not seem to grasp what was required. The question was lengthy and therefore, careful analysis and planning was required, albeit that if proper preparation had been undertaken enough marks to score well and pass the question would have been easily obtained by reference to source materials contained in the precedent books and the White Book.

15. Question 5 was split into 2 parts with 10 marks for the first part and 15 marks for the second part. In the first part, candidates were asked to address the position in relation to a costs order nisi and to bring in various factors that may argue against the costs order nisi made being made absolute. The procedural points were not complex and many of the candidates identified the same. However, the second part of the question tested knowledge of enforcement of judgments and generally, candidates performed less well in answering this part of the question, particularly in addressing the different options available for enforcement, particularly with respect to the position of a partnership.

Conclusion

16. There was a general consistency in that the candidates who addressed the criminal questions well also addressed the civil questions well, which evidenced such candidates' proper and careful preparation for the 2008 Examination. Mindful that generally those who performed badly on the criminal questions also performed badly on the civil questions, this would seem to confirm the findings of previous years that a lack of preparation for the examination will be identified. Candidates would therefore, be well advised to prepare thoroughly for the examination and to focus upon careful planning and prioritising the content of their answers, which answers should address the precise questions set in a logical and practical manner demonstrating the candidates' knowledge.

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Examiners' Comments on the 2009 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. Although there was a maintenance of the quality of answers to the 2009 Examination, when compared with the 2008 Examination, again the tendency for candidates not to address the specific issues contained in the questions with the practicality expected from the Day One Lawyer was repeated.
2. There was yet again a marked tendency amongst the candidates to avoid the question related to pleadings and hence, the need for there to be greater focus on such questions in the future continues, particularly mindful of the recently implemented Civil Justice Reforms.

The Standard and Format of the Examination

3. The 2009 Examination, as in previous years, was open book.
4. The 2009 Examination was premised on the standard to be expected from the Day One Lawyer. The Day One Lawyer is one who has completed both the academic and vocational stages necessary for professional qualification. In Hong Kong that means the LL.B (or a non-law degree and the CPE), the PCLL and the two year training contract. Day One Lawyers should have a sound base of substantive knowledge and have acquired the ability to apply that knowledge to straightforward situations. In reality those taking the examination will be more than Day One Lawyers because of experience obtained in their home jurisdictions. Even so the Panel was careful to focus on the "Day One" standard and to keep away from what might be classed as "advanced procedure" or "superior ability". A Day One Lawyer intending to practise in Hong Kong should, however, have the ability to demonstrate an appreciation of the structure, powers and responsibilities of Hong Kong's Courts and have a basic knowledge of what is required in advising and representing clients in litigious matters.
5. If it is to have any value in ensuring that those seeking to practise in Hong Kong are of a suitable standard, the examination must test both substantive knowledge and the ability to apply that knowledge. As with any professional qualifying examination, the Panel was concerned to set questions which would

test substantive knowledge and the ability to apply that knowledge in a constructive, practical and common sense manner.

General Criticisms

6. There were five questions in the paper, candidates were required to answer any four of those questions. The time allowed was 3 hours and 30 minutes. The first 30 minutes is intended to allow candidates an opportunity to read and digest the questions in the paper and to plan their answers before starting to write. However, candidates can start to write their answers as soon as they wish.
7. As in previous years, the majority of candidates brought into the examination room a significant amount of materials, but it was again noted that such practice proved to be somewhat counter-productive. There is insufficient time in the examination to search such materials for the required answers. Preparation is required in order to be fully conversant with the content of such materials in order to be able to refer to the same in an efficient manner that results in a precise answer to the actual question. In several answers, the candidates went down the road of including materials which were wholly irrelevant to the questions asked or were peripheral to the issues and accordingly, marks were not granted.
8. As has been raised in respect of previous years, candidates would be recommended to spend part of their preparation in focusing upon examination technique. Answers should be carefully prepared such that the issues raised in the questions are identified and precise, direct answers relevant to those issues are produced.

Performance on individual Questions

9. Questions 1 and 2 addressed issues of criminal procedures.
10. Question 1 was split into 3 parts with 15 marks available for parts 1(1), 5 marks available for each of parts 1(2) and 1(3). Question 1 was very poorly answered with a large number of candidates having no notion of the prosecutor's ongoing duty of full and frank disclosure, both at common law and in accordance with the Basic Law. Where mention was made of the Prosecution Policy, old paragraph numbers were used, on the basis of the 2002 document, which has since been updated. Many candidates were also unaware of the large body of

case law on this point and few referred to the test for the materiality of evidence (the Keane test).

11. Of even greater concern was the very large number of candidates who, whilst aware of the duty of disclosure, counselled the client not to appeal on the basis that the information in the undisclosed statements of the officers would make matters worse. Their failure to recognize the credibility issue which had arisen was astounding.
12. A good number of candidates were able to identify the correct court of appeal and the right of appeal under statute but too many failed to identify the power under which the appellate court could award the appellant his costs.
13. Question 2 was split into 4 parts with 8 marks available for part 2(1), 8 marks available for part 2(2), 4 marks available for part 2(3) and 5 marks for part 2(4). Question 2 was answered well by the majority of students. A small number, however, tried to suggest the defendant could influence the choice of venue for his trial, or even dictate it.
14. Most candidates recognized the defendant's ability to challenge the prosecution's case in relation to the use of the drugs and correctly identified the means for doing so, however many did not know the likely tariff for the crime alleged. Unfortunately those students who misidentified the wrong court of appeal.
15. Questions 3, 4, and 5 addressed issues of civil procedure and should not have unduly tested the abilities of an averagely competent Day One Lawyer. The relevant procedure was tested in a manner that sought reference to the rules or other materials in support of the answers and a sensible, practical approach to the issues.
16. Question 3 was split into three parts with 15 marks for part 1, 6 marks for part 2 and 4 marks for part 3. The question was designed to ensure candidates had knowledge of certain aspects of the provisions introduced by the Civil Justice Reforms. Most candidates addressed the issues fairly well in respect of this question, identifying the correct procedural issues and related time limits. However, a number of candidates elected to write at length without focussing the answer on the relevant issues as identified by the question, which indicated a lack of awareness as to what was being sought by the question.
17. Question 4 was split into two parts with 10 marks for part A, which had one question, and 15 marks for part split as to 5 marks for the first question under part B and 10 marks for the second question under part B. Part A of this question concerned drafting in that candidates were required to complete parts

of a writ and prepare a general endorsement of claim and part B tested procedural steps and related issues following service of a Writ. Again, knowledge of certain aspects of the provisions introduced by the Civil Justice Reforms was tested. The majority of candidates did not attempt this question and a number of those who did prepared detailed statements of claim and not a general endorsement of claim. The question needed careful analysis, but if proper preparation had been undertaken enough marks to score well and pass the question should have been easily obtainable.

18. Question 5 was split into 6 parts with the 25 marks being allocated in the following manner: 5 marks for the first part, 8 marks for the second part, 2 marks for the third part, 5 marks for the fourth part, 3 marks for the fifth part, and 2 marks for the sixth part. The question tested knowledge of confidentiality, disclosure, witness credibility, subpoenas, requirement for expert evidence and the procedural timetable. The issues were not overly complex and many of the candidates identified and addressed the pertinent points. However, again there was a tendency to set out knowledge without focussing on the specific question being asked, which resulted in candidates wasting time and not obtaining as many marks as they might have.

Conclusion

19. There was a general consistency in that the candidates who addressed the criminal questions well also addressed the civil questions well, which evidenced such candidates' proper and careful preparation for the 2009 Examination. Mindful that generally those who performed badly on the criminal questions also performed badly on the civil questions, this would seem to confirm the findings of previous years that a lack of preparation for the examination will be identified. Candidates would therefore, be well advised to prepare thoroughly for the examination and to focus upon careful planning and prioritising the content of their answers, which answers should address the precise questions set in a logical and practical manner demonstrating the candidates' knowledge.

Examiners' Comments on the 2010 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. The quality of answers to the recent years' Examination was maintained in 2010, there remains a tendency for candidates not to address the specific issues contained in the questions with the practicality expected from the Day One Lawyer.
2. There was yet again a tendency amongst the candidates to avoid the question related to pleadings and hence, the need for there to be a greater focus on such questions in the future continues, particularly mindful of the Civil Justice Reforms.

The Standard and Format of the Examination

3. The 2010 Examination, as in previous years, was open book.
4. The 2010 Examination was premised on the standard to be expected from the Day One Lawyer. The Day One Lawyer is one who has completed both the academic and vocational stages necessary for professional qualification. In Hong Kong that means the LL.B (or a non-law degree and the CPE), the PCLL and the two year training contract. Day One Lawyers should have a sound base of substantive knowledge and have acquired the ability to apply that knowledge to straightforward situations. In reality those taking the examination will be more than Day One Lawyers because of experience obtained in their home jurisdictions. Even so the Panel was careful to focus on the "Day One" standard and to keep away from what might be classed as "advanced procedure" or "superior ability". A Day One Lawyer intending to practise in Hong Kong should, however, have the ability to demonstrate an appreciation of the structure, powers and responsibilities of Hong Kong's Courts and have a basic knowledge of what is required in advising and representing clients in litigious matters.
5. If it is to have any value in ensuring that those seeking to practise in Hong Kong are of a suitable standard, the examination must test both substantive knowledge and the ability to apply that knowledge. As with any professional qualifying examination, the Panel was concerned to set questions which would test substantive knowledge and the ability to apply that knowledge in a constructive, practical and common sense manner.

General Criticisms

6. There were five questions in the paper, candidates were required to answer any four of those questions. The time allowed was 3 hours and 30 minutes. The first

30 minutes is intended to allow candidates an opportunity to read and digest the questions in the paper and to plan their answers before starting to write. However, candidates can start to write their answers as soon as they wish.

7. As in previous years, the majority of candidates brought into the examination room a significant amount of materials, but it was yet again noted that such practice proved to be somewhat counter-productive. There is insufficient time in the examination to search such materials for the required answers. Preparation is required in order to be fully conversant with the content of such materials in order to be able to refer to the same in an efficient manner that results in a precise answer to the actual question. In several answers, the candidates went down the road of including materials which were wholly irrelevant to the questions asked or were peripheral to the issues and accordingly, marks were not granted.
8. As has been raised in respect of previous years, Candidates would be recommended to spend part of their preparation in focusing upon examination technique. Answers should be carefully prepared such that the issues raised in the questions are identified and precise, direct answers relevant to those issues are produced.
9. Candidates scored disappointingly in the Head II paper, with a pass rate of 53%. The criminal questions were generally done poorly. The answers to the civil questions were generally slightly better.

Performance on individual Questions

10. Questions 1 and 2 addressed issues of criminal procedures.
11. Question 1 was split into 3 parts with 9 marks available for parts 1(1), and 8 marks available for each of parts 1(2) and 1(3). Question 1 was very poorly answered. While many candidates identified the breach of legal professional privilege, few noticed there was any problem with coaching the witness. Further, very few suggested applying for a stay of proceedings.
12. Question 2 was split into 3 parts with 12 marks available for part 2(1), 5 marks available for part 2(2), and 8 marks available for part 2(3). In Question 2, few candidates realised that the defendant has been identified by the victim at the scene. In the next part of the question, many mistakenly argued that section 65C admissions could easily be retracted on appeal. Finally, candidates should be reminded to read the question given carefully. Too many failed to identify the test for allowing an appeal in the Court of Appeal, which should have offered easy marks under the third part of the question.
13. Questions 3, 4, and 5 addressed issues of civil procedure and should not have unduly tested the abilities of an averagely competent Day One Lawyer. The relevant procedure was tested in a manner that sought reference to the rules or

other materials in support of the answers and a sensible, practical approach to the issues.

14. Question 3 was split into 5 parts with 4 marks for part 3(1), 6 marks for part 3(2), 3 marks for part 3(3), 2 marks for part 3(4) and 10 marks for part 3(5). The question was designed to ensure candidates had knowledge of certain aspects of the court rules. Most candidates addressed the issues fairly well in respect of this question, identifying the correct procedural issues and related time limits. However, yet again some candidates elected to write at length without focussing the answer on the relevant issues as identified by the question, which indicated a lack of awareness as to what was being sought by the question.
15. Question 4 was split into 2 parts with 15 marks for part 4(1) and 10 marks for part 4(2). The first part of this question concerned drafting in that candidates were required to draft a Defence and Counterclaim if appropriate. The second part required candidates to draft advice in the form of a letter addressing specified queries named in the question. A majority of candidates did not attempt this question. The question needed careful analysis, but if proper preparation had been undertaken enough marks to score well and pass the question should have been easily obtainable.
16. Question 5 was split into 5 parts with the 25 marks being allocated in the following manner: 6 marks for the first part, 5 marks for the second part, 5 marks for the third part, 4 marks for the fourth part and 5 marks for the fifth part. The question tested knowledge of confidentiality, privilege and discovery / disclosure. The issues were not overly complex and many of the candidates identified and addressed the pertinent points.

Conclusion

17. As has been found in previous years, there was a general consistency in that the candidates who addressed the criminal questions well also addressed the civil questions well, which evidenced such candidates' proper and careful preparation for the 2010 Examination. Mindful that generally those who performed badly on the criminal questions also performed badly on the civil questions, this would seem to confirm the findings of previous years that a lack of preparation for the examination will be identified. Candidates would therefore, be well advised to prepare thoroughly for the examination and to focus upon careful planning and prioritising the content of their answers, which answers should address the precise questions set in a logical and practical manner demonstrating the candidates' knowledge.

February 2011

3. Past Examination Papers from 2008 to 2010

2008 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD II: CIVIL AND CRIMINAL PROCEDURE

Friday, 31 October 2008



HEAD II: CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

31 October 2008

Instructions to Candidates:

- 1. The duration of the examination is 3 hours and 30 minutes.**
- 2. This is an open book examination.**
- 3. There are five questions in this paper.
ANSWER ANY FOUR QUESTIONS ONLY.**
- 4. You must write your answers to any of:**
 - the Criminal Questions (Questions 1 and 2) in Answer Book 1**
 - the Civil Questions (Questions 3, 4 and 5) in Answer Book 2**
- 5. IF YOU ATTEMPT MORE QUESTIONS THAN YOU HAVE BEEN INSTRUCTED TO ANSWER:**
 - (a) THE EXAMINERS WILL MARK ALL QUESTIONS THAT HAVE BEEN ATTEMPTED AND NOT DELETED; AND**
 - (b) IN COMPUTING YOUR FINAL MARK, THE EXAMINERS WILL COUNT THE MARKS FOR THE NUMBER OF QUESTIONS YOU WERE INSTRUCTED TO ANSWER TAKING INTO ACCOUNT THE ANSWERS WITH THE LOWEST SCORES.**
- 6. Start each question on a separate page of your answer book.**
- 7. Each question has the value noted on the question paper. You are urged to apportion your time in accordance with the relative value of each question. No marks can be awarded to a question for which there is no attempted answer.**
- 8. An examiner will be present for the first 30 minutes of the examination. Any question relating to the paper must be raised in that period. Questions raised after the first 30 minutes will not be entertained.**
- 9. Do not take either this question paper or any answer books with you when you leave the examination room.**

2008 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

Around 6:00 a.m. on 1st July 2008, a group of police officers intercepted D1 (Adam), D2 (Billy) and D3 (Charlie) for acting suspiciously outside No. 9 Queen's Road, Central and searched them.

Upon being searched, a note containing the name and address of one "Mr. Peter WONG" was found inside D1's left front trouser pocket. A photograph with "Peter WONG" written on the back was found in the right front pocket of D2's trousers. Surgical masks were found on each of the three defendants. The police then arrested D1 – 3 and escorted them to Central Police Station.

Under caution, D1, aged 19 years, admitted that "Mr. X" who is a triad member had told him to locate, identify and assault Peter WONG. The surgical mask that was found on him was given to him by "Mr. X". He further admitted asking D2 and D3 to help him "look out" for Peter WONG.

D2, aged 15, was interviewed under caution in the presence of his father. He admitted that he was told by D1 to help him identify Peter WONG. He was told by D1 that Peter WONG owed D1 money and asked to assist in recovering the money owed. D2 did not say who gave him the mask that was found on him.

D3, aged 17, was also interviewed and cautioned. He admitted that he was asked by D2 to help find Peter WONG. He was given a surgical mask by D2 and told to wear it when Peter WONG was identified. D3 states he does not know D1.

D1, 2 and 3 were subsequently charged with an offence of "Conspiracy to commit Assault Occasioning Actual Bodily Harm" contrary to section 159A and 159C of the Crimes Ordinance, Cap. 200 and punishable under section 39 of the Offences against the Person Ordinance, Cap. 212.

(See over the page for a continuation of Question 1)

D1, 2 and 3 now come to see you to seek your advice on the following matters:

1. Whether they can all be represented by you?
2. Where the matter is likely to be tried?
3. What the likely sentence will be upon conviction?

In response to your preliminary enquiries, all three defendants tell you that they made admissions without the benefit of legal representation or advice. All three say they were threatened by the police into making their admissions and told there was “no point” in asking for legal representation. D1 also tells you he was assaulted by police.

Questions:

- 1) **Assuming their instructions are the same as the version they gave to the Police, advise whether any conflict of interest arises between the defendants and if so, what you would advise the defendants to do? Give reasons for your answer.**

(7 marks)

- 2) **Advise what is the likely venue of trial? Give reasons for your answer.**

(5 marks)

- 3) **Given the relative age of the defendants, advise what the likely sentence would be upon conviction. Give reasons for your answer.**

(5 marks)

- 4) **Given your instructions concerning the recording of the defendant’s statements, what advice would you give to the defendants? It is not necessary to describe the procedure by which these matters may later be determined by the Court.**

(8 marks)

[25 marks in total]

Question 2 (25 marks)

Your client, Bobby Hui, a businessman who runs a large company in Hong Kong, has just been acquitted by a jury in the Court of First Instance of possession of arms without a licence, contrary to s.13(1) and (2) of the Firearms and Ammunition Ordinance (Cap. 238, Laws of Hong Kong). The prosecution case was that a parcel from Vancouver, Canada, arrived on a plane at Hong Kong International Airport on 15 January 2008. An X-ray revealed that it contained two pistols placed inside a vase. The recipient indicated on the parcel was “Bo Y Hui” and the address was Bobby’s residential address. Police checks revealed Bobby had been in Vancouver at the date the parcel was despatched from Vancouver to his home address. Two police officers disguised as FedEx couriers took the parcel to the address. The police gave evidence at the trial that originally a maid had answered the door and offered to take the parcel but the officers refused and returned to the address later. On the second attempted delivery Bobby answered the door at the address and explained that the parcel was for him and that “Bo” stood for “Bobby”, his English name, and “Y” stood for “Yui”. He produced his ID card to prove his identity and the police gave him the parcel and left to keep watch on the flat. The police also provided evidence that flick knives and cross bows were found in Bobby’s flat and that he kept unlicensed ammunition in his safe deposit box.

During police interview and again at trial Bobby described being asked by the couriers to produce his identity card and to sign for the parcel, giving them a \$100 tip; and after the couriers had left, checking the parcel and finding it was not for him. He said he had left home intending to ask his secretary to call FedEx to take back the parcel. As he left his address, he was arrested. The parcel had not been opened.

The jury acquitted Bobby of the charge. After the acquittal you applied for costs on behalf of Bobby, under s.5 of the Costs in Criminal Cases Ordinance (Cap. 492) but the Trial Judge refused to make the award. In giving his reasons for refusing costs the Trial Judge held Bobby had brought suspicion on himself because he had signed for the parcel, which was of a considerable size, without checking it. The Trial Judge also relied on arguments from the prosecutor that he should take into consideration the knives found in Bobby’s possession and the ammunition kept in his safe deposit box and the fact that Bobby was not under any pressure of time and clearly had ample opportunity to check the parcel as he gave the couriers a tip.

(See over the page for a continuation of Question 2)

Questions:

Advise Bobby whether he should appeal the decision to refuse him costs. In your answer ensure that you:

- 1) **Identify the Court which would hear the appeal;**
(1 mark)

- 2) **Identify any authorities supporting the initiation of an appeal;**
(8 marks)

- 3) **Describe generally any procedures which must be complied with in pursuing this appeal;**
(4 marks)

- 4) **Describe generally the grounds upon which an appeal could be made in this case.**
(12 marks)

[25 marks in total]

Question 3 (25 marks)

Wreckless Motors Limited (“WML”) is a Hong Kong company which manufactures and distributes motor vehicles. Jason, WML’s managing director, comes to you for advice this morning. He tells you the following:

- (i) Earlier this year, WML introduced for sale into the market a new model “Dream” multi-purpose vehicle (“MPV”). One of its first customers was Peter, who purchased an MPV at the price of \$650,000 in the name of Calamity BVI Ltd (“Calamity”), a company incorporated in the British Virgin Islands and wholly owned by Peter. Peter is a director of Calamity and resident in Hong Kong.
- (ii) On 31 October 2008, WML was served at its registered office with a Writ of Summons endorsed with a Statement of Claim issued by Calamity against WML seeking damages in the sum of \$800,000, together with interest and costs as a result of an accident that occurred on 15 March 2008. The Statement of Claim alleges that on 15 March 2008, while Peter was driving the new MPV along Tai Po Road, the vehicle failed to brake despite Peter applying both the hand brake and the foot brake. The vehicle collided with a tree and was severely damaged. Peter was fortunately not injured. Calamity claimed that the MPV which it had purchased from WML was not of merchantable quality and claimed: \$650,000 being the price paid for the MPV; \$150,000 being the costs incurred to rent a new vehicle for Peter’s use before Calamity could obtain a replacement, and other consequential losses.
- (iii) On 20 March 2008, Calamity sent an email message to WML demanding compensation for the damaged vehicle as a result of the accident. Upon receipt of that email message, WML conducted some internal investigations and found that there was a defect in a spare part in the MPV. That spare part was supplied by Tarnish Inc. (“Tarnish”), a company incorporated in the United States with no branch office in Hong Kong.

(See over the page for a continuation of Question 3)

- (iv) On 30 March 2008, WML responded by email message to Calamity, apologising for the accident and offering to repair fully the damaged MPV in full and final settlement of Calamity's claims provided that Calamity and Peter agreed to keep the matter confidential. Calamity did not respond to WML's email message.

Question:

- 1) **Jason wants to know what WML should now do in defending the claim and what legal steps it should take in the next 2 months.**

(10 marks)

Later in the proceedings, when you tell Jason that he should preserve all documents relevant to the claim, Jason expresses his worries that disclosure of the following documents in the proceedings may harm WML's reputation and business:

- (a) An internal report of WML's chief engineer dated 20 February 2007 setting out in detail the early design faults of the MPV and its incompatibility with the spare part provided by Tarnish ("the Tarnish spare part"). In that report, WML's chief engineer discovered some design faults as the Tarnish spare part was not really compatible with the other parts of the MPV. However, as the Tarnish spare part was the cheapest, WML continued to use the Tarnish spare part but took steps to modify the design of the MPV. After several modifications and extensive testing, the design faults were satisfactorily resolved before WML placed the MPV into the market for sale. Jason is very concerned that this previous design problem should not become public knowledge, as the market would react quite adversely to WML's decision to continue using the Tarnish spare part for the reason that it was the cheapest.
- (b) A report dated 28 March 2008 which was marked "Strictly Confidential" from an independent engineer, Tom, who was commissioned by WML to investigate into the accident. According to Tom's report, he found that the accident was caused by a defect in the Tarnish spare part in the MPV purchased by Calamity. He further found that the Tarnish spare parts

(See the next page for a continuation of Question 3)

in the other MPVs manufactured in the same batch as Calamity's MPV were also defective and advised that WML should not further sell any MPVs manufactured in that batch. He found that the Tarnish spare parts used in other batches of the MPVs were not defective and were unlikely to cause similar problems.

- (c) WML's email message to Calamity of 30 March 2008 (referred to in (iv) above).

Question:

- 2) Please advise WML whether the above-mentioned documents need to be disclosed by WML in the course of the proceedings and if so, whether Jason needs to be concerned that disclosure of the same would harm WML's reputation and business.

(10 marks)

Assume that discovery has recently taken place and you now act for Calamity. You have just received a letter from WML's solicitors marked "Without Prejudice Save as to Costs", stating that WML is willing to offer to Calamity \$650,000 plus costs to be taxed in full and final settlement of Calamity's claims in the action. The offer is open for acceptance for 14 days.

Question:

- 3) Please advise Calamity/Peter of the effect of the letter and whether WML's offer should be accepted.

(5 marks)

[25 marks in total]

Question 4 (25 marks)

DP, a limited company incorporated in Hong Kong, was and is the registered owner of various shops on the ground floor and first floor of SK Centre (“the Premises”).

By an agreement dated 10 November 2004, DP agreed to let the Premises to MD, a limited company incorporated in Hong Kong, for 3 years from that date at a monthly rent of HK\$300,000. MD initially ran a restaurant at the Premises called The Number One. Under the tenancy, MD had an option to renew the tenancy for 6 years at a new monthly rent of HK\$380,000 provided that written notice was given at least 3 months prior to the Lease expiring by effluxion of time.

On 31 March 2008, DP commenced proceedings against MD for, inter alia, recovery of vacant possession of the Premises and mesne profits thereof from 10 November 2007. DP found its claims upon 2 grounds, namely (a) the tenancy ended by effluxion of time, and/or (b) there had been unlawful subletting and change of business name.

The Statement of Claim contained the following:

“10. By effluxion of time, the term of the Lease expired on 9 November 2007, upon which date the Lease terminated.

...

13. Further or alternatively, in or about early February 2008, it came to the Plaintiff's attention that the name of the Restaurant has been changed to The Best Restaurant, which was and is legally owned by one PR Limited. PR Limited is a limited company incorporated under the laws of Hong Kong on 4 January 2008, which company used the address of the Premises as its registered office.

...

15. At all material times, the Defendant had never informed the Plaintiff or obtained the Plaintiff's prior written consent in relation to any change of business name in accordance with Clause 2(a)(iii) of the Lease. The Defendant is thereby wrongfully in breach of Clause 2(a) of the Lease.

(See the next page for a continuation of Question 4)

16. Further or alternatively, the Defendant is wrongfully in breach of Clause 2(a) by having assigned, transferred, underlet, parted with possession of the Premises or any part thereof by subletting the Premises to the said PR Limited for it to operate The Best Restaurant.”

The terms of the tenancy included the following:

“2. THE TENANT COVENANTS AND AGREES ...

- (a) Not to assign transfer underlet or part with the possession of the said premises or any part thereof either by way of subletting sharing or other means whereby any organization company firm or person not a party to this Lease obtains the use or possession of the said premises or any part thereof irrespective of whether any rental or other consideration is given for such use or possession. The tenancy hereby created shall be personal to the Tenant and without in any way limiting the generality of the foregoing, the following acts and events shall, unless approved in writing by the Landlord be deemed to be breaches of this Clause: -

...

- (iii) The change of the Tenant's business name without the previous written consent of the Landlord which shall not be unreasonably withheld or delayed.

...

5. PROVIDED ALWAYS AND IT IS MUTUALLY AGREED

...

- (c) This Lease sets out the full agreement between the parties hereto. No other warranties or representations have been made or given relating to the Landlord, the Tenant, the Building, or the said premises or if any warranty or representation has been made the same is hereby waived.

...

- (f) Any acceptance of rent by the Landlord shall not in any way constitute any waiver or acquiescence in any breach of any terms and conditions herein.

(See over the page for a continuation of Question 4)

- (g) Any acceptance of rent by the Landlord on or after expiration of this term shall not create any new tenancy or renewal or extension of the existing tenancy unless a written agreement signed by the parties hereto shows otherwise.”

In relation to the argument on subletting, however, it is to be noted that the Lease also contains the following provision:

- “19. In the event the Tenant shall use the said premises as a restaurant, the Tenant hereby expressly agrees with the Landlord that at the expiration or sooner determination of this Lease the Tenant shall transfer or procure the Licensee named in the Restaurant Licence and the Liquor Licence covering the said premises to transfer to the Landlord or its nominee unconditionally and free of charge the Restaurant Licence and the Liquor Licence covering the said premises.”

MD's case was expressed in correspondence between solicitors in terms that MD will contest the Action, as MD considers that:

- (a) The option to renew for a further term of 6 years was exercised by the sending of a written request to DP on 3 August 2007 in the form of a letter that was posted to DP's registered office in Hong Kong. Alternatively, DP waived such requirement.
- (b) The subletting and change of business name was in accordance with the usual practice of restaurants in Hong Kong. Although the Lease contains terms to prohibit the same, reliance on such terms were waived by DP through oral assurances.

DP considers MD's case to be moonshine as it has never received any letter at its registered office and it has no knowledge of any such “usual practice” of restaurants in Hong Kong.

(See the next page for a continuation of Question 4)

Questions:

- 1) **DP wishes to pursue the Action expeditiously and to bring it to a swift and favourable conclusion as immediately as possible, as DP believes The Best Restaurant is currently profitable and MD is presently cash rich, but other restaurants have opened up in competition in the vicinity of SK Centre and so The Best Restaurant's profitability may not last and MD's cash reserves may be used up in time.**

You act for DP and are asked to write a letter of advice to DP's board of directors briefly describing the options open to DP in relation to the Action and setting out the strategy that you would advise DP to pursue mindful of the risks associated with each of the options, which risks should be identified.

(10 marks)

- 2) **If the strategy set out in your letter in answer to Question 1 above involves DP making an immediate application to court:**

(a) prepare the body of that application and any documents that may be required in support of such an application. (Only the substantive body of the documents are required; the title of the Action and names of the parties and court are not required.);and

(b) if an affidavit in support is required, set out with reference to the Rules of High Court:

(i) the options as to who would be the appropriate persons that could make the affidavit and why; and

(ii) who you would recommend makes the affidavit, and why.

(10 marks)

- 3) **You now act for MD and are asked by it to inform it of the outcome or outcomes that could result from the application made by DP against it and what steps it could take to oppose the application.**

(a) Set out the possible outcome or outcomes; and

(b) Set out the steps that could be taken.

You should identify the outcome or outcomes and steps and briefly explain the same.

(5 marks)

[25 marks in total]

Question 5 (25 marks)

Michael is an ex-employee of Loyal Employment Consultants Limited (“Loyal”).

On 1 February 2007, Michael entered into an employment contract with Loyal (the “Contract”). Pursuant to the Contract, Loyal agreed to employ Michael as an employment and recruitment manager. One of the terms of the Contract was that upon termination of Michael’s employment with Loyal, Michael agreed not to use and divulge any confidential information obtained from Loyal. Such confidential information was defined to include Loyal’s client lists and client contact details (the “Confidential Information”).

On 30 September 2007, Michael tendered his resignation with Loyal with immediate effect and made payment to Loyal in lieu of notice of termination. Michael then shortly thereafter commenced employment with Delta Recruitment (“Delta”), Loyal’s main competitor in the industry.

On 5 November 2007, Loyal commenced proceedings against Michael and Delta, alleging that Michael had divulged Loyal’s Confidential Information to Delta and that Loyal suffered damages as a result. Loyal’s claim was for an injunction, restraining Michael and Delta from using Loyal’s Confidential Information and for delivery up of the Confidential Information. Loyal also claimed damages in the sum of \$3 million. On 12 November 2007, Loyal obtained an interlocutory injunction against Michael and Delta, with costs of the application in the cause.

The trial of the matter was set down to be heard from 15 to 17 October 2008.

On 4 July 2008, Delta made a payment into Court in the sum of \$1.2 million. This payment in was not accepted by Loyal.

On 16 September 2008, Delta’s solicitors wrote to Loyal’s solicitors. In Delta’s solicitors’ letter marked “Without Prejudice Save as to Costs”, Delta offered to pay \$2 million to Loyal in full and final settlement of Loyal’s claims. Delta also agreed to abide by the terms of the injunction sought by Loyal. Delta’s offer was open for acceptance for 14 days. Loyal’s solicitors did not respond to the letter and the offer lapsed.

(See the next page for a continuation of Question 5)

After the trial of the action, the trial judge reserved his judgment. On 30 October 2008, the trial judge handed down his written judgment. The trial judge found that Loyal had proved its case and granted the injunction sought by Loyal, restraining Delta and Michael from using the Confidential Information for a period of 12 months from the date of the Writ of Summons and requiring Delta and Michael to deliver up all forms of the Confidential Information in their possession. The trial judge also awarded Loyal damages in the sum of \$2 million. In relation to costs, the trial judge made a costs order nisi, and awarded to Loyal its costs of the action.

Question:

- 1) **Assume you act for Delta. What is your advice to Delta in relation to the costs order made by the trial judge?**

(10 marks)

Having obtained judgment in its favour, Loyal would like to enforce the judgment against Delta. Loyal has the following information concerning Delta:

- (i) Delta is a partnership business owned by Andrew and his sister, Bonnie. When the Writ of Summons in the action was issued and served on 5 November 2007, Andrew was on a business trip in Taiwan and Bonnie acknowledged service of the Writ as a partner of Delta.
- (ii) Delta runs an office in Admiralty. This office premises was purchased by Delta in July 2007 at \$5.2 million with a mortgage from HSBC Bank.
- (iii) Andrew owns a flat in Happy Valley. The flat was purchased by Andrew and his wife as joint tenants on May 2005 at \$8.8 million without a mortgage. Andrew and his wife rent out this flat to a tenant at \$50,000 per month.
- (iv) Bonnie has 2 accounts with the Hang Seng Bank – a savings account with \$20,000 credit and a credit card account with \$30,000 owing to the Bank. Bonnie's monthly salary from Delta in the sum of \$80,000 is deposited into her savings account on the first day of each month.
- (v) Andrew and Bonnie come from a wealthy family and may own other assets and bank accounts.

(See over the page for a continuation of Question 5)

Question:

- 2) **Assume that you now act for Loyal. How would you advise Loyal to enforce the judgment? Please explain your answer and state, if you consider it necessary, what further information and/or investigations you would need.**

(15 marks)

[25 marks in total]

END OF TEST PAPER

**2009 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Tuesday, 3 November 2009



HEAD II: CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

3 November 2009

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ANSWER ANY FOUR QUESTIONS ONLY.**
- 4. You must write your answers to any of:**
 - the Criminal Questions (Questions 1 and 2) in Answer Book 1**
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 - (b) IN COMPUTING YOUR FINAL MARK, THE EXAMINERS WILL COUNT THE MARKS FOR THE NUMBER OF QUESTIONS YOU WERE INSTRUCTED TO ANSWER TAKING INTO ACCOUNT THE ANSWERS WITH THE LOWEST SCORES.**
- 6. Start each question on a separate page of your answer book.**
- 7. Each question has the value noted on the question paper. You are urged to apportion your time in accordance with the relative value of each question. No marks can be awarded to a question for which there is no attempted answer.**
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- 9. Do not take either this question paper or any answer books with you when you leave the examination room.**

2009 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

Your client has been found guilty, after trial in the Magistrates' Court, of one charge of common assault. The charge arose out of an incident which took place in a cell at the Stanley Correctional Institution where your client was serving a sentence of 18 years' imprisonment for drug trafficking.

At the common assault trial in the Magistrate's Court, it was the prosecution's case that your client had assaulted a member of the Correctional Services Department, PW1. Your client was alleged to have punched PW1 in the chest three times. In evidence PW1 stated that an argument had broken out with your client over a newspaper which had been provided for him to read and then give back, after a certain time. When your client was asked to return the newspaper he punched PW1 on the chest three times. PW2 (also a Correctional Services Department officer) gave evidence supporting PW1's version of events.

The defence case was that it was the other way round. According to your client the incident consisted of an assault on him by officers of the Correctional Services Department, PW1 and PW2. He suggested that this was in retaliation for complaints made by him against them.

The magistrate rejected your client's testimony and accepted the evidence of PW1 and PW2. Your client was convicted of common assault as charged and sentenced to six months' imprisonment, consecutive to the sentence of 18 years' imprisonment which he was serving for drug trafficking.

The account given by the officers in the witness-box was also the account given by them in their statements to the Correctional Services Department, which were disclosed by the prosecution to the defence, prior to the Magistrates' Court trial.

Your client has now discovered that the officers PW1 and PW2 also made further statements to the Correctional Services Department, giving a different account of events. The undisclosed statements alleged that your client had not only refused to return the newspaper when asked by PW1 but also splashed some liquid on PW1, and threw a stool at him, when he tried to take the newspaper back. Your client discovered these further statements, by chance, during an interview at the prison hospital in relation to another matter.

(See the next page for a continuation of Question 1)

Questions:

- (1) Your client has obtained copies of these undisclosed statements made by PW1 and PW2. He wants to know if he would be entitled to and can use them to appeal against his conviction for common assault in the Magistrates' Court. Advise him.**

(15 marks)

- (2) If your client appeals against his conviction to which court would he make his appeal, how soon must he appeal and under what power could that court hear his appeal?**

(5 marks)

- (3) If your client wins an appeal against conviction can he get the costs of his appeal paid by the prosecution and if so, under what power could the appeal court order that his costs are paid to him?**

(5 marks)

[25 marks in total]

Question 2 (25 marks)

Mr. DD has been charged with one count of trafficking in a dangerous drug as per the attached Statement of Offence with the Particulars of Offence (the "Charge Sheet"). The Summary of Facts of the case is also attached.

In brief, Mr. DD was caught red handed, buying drugs from another person (XYZ), in a male toilet. He had just completed the transaction with XYZ (who was not charged but was arrested).

At the time of his arrest, Mr. DD said to the arresting officer that: he just bought the 4 chai (No. 4) from the other person XYZ and paid him HK\$13,000; those 4 chai (i.e. the dangerous drug more particularly described in the Particulars of Offences on the attached Charge Sheet) were for Mr. DD's own consumption; and Mr. DD bought it to consume slowly.

The case has now been transferred to the District Court for the first time. You are instructed to represent Mr. DD at the District Court hearing.

Questions:

- (1) Mr. DD requested that you make an application to have the case remitted back to the Magistrates Court for the purpose of plea and sentence. What advice would you give to Mr. DD on his request?**

(8 marks)
- (2) Mr. DD wants to plead guilty but is not satisfied the Summary of Facts (attached) accurately reflects his criminality. In particular Mr. DD tells you that he had the drugs for personal possession but does not agree that he trafficked in the drugs. What advice would you give to Mr. DD in respect of his instructions?**

(8 marks)
- (3) What is the likely sentence that Mr. DD will receive if he is convicted of the offence as currently stated in the Charge Sheet at the District Court?**

(4 marks)
- (4) If Mr. DD is unhappy with the sentence imposed, can it be appealed? If so, to what court would the application to appeal against sentence be made and under what power could the court hear the appeal?**

(5 marks)

[25 marks in total]

(See the next page for a continuation of Question 2)

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NO.1 OF 2009

HKSAR

v

DD (aged 30) (on bail)

The Court is informed that the following charge(s) is preferred against DD by the Secretary for Justice.

Statement of Offence

Trafficking in a dangerous drug, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap.134.

Particulars of Offence

DD, on the 1st day of January 2009, at public male toilet, Central Street, Central, in Hong Kong unlawfully trafficked in a dangerous drug, namely 17.51 grams of a mixture containing 15.77 grams of heroin hydrochloride.

Dated this 1st of March 2009.

(SPP)

Senior Public Prosecutor

For and on behalf of the Secretary for Justice

(See over the page for a continuation of Question 2)

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NO.1 OF 2009

HKSAR

v

DD (aged 30) (on bail)

SUMMARY OF FACTS

1. At about 9:50 p.m. on 1.1.2009 PC1111 (PW1) and PC 2222 (PW2) were on duty patrolling in the vicinity of Central Police Station. At 9:57 p.m. on 1.1.2009, at Central Street, Central, PW1 and PW2 saw two men (later known as the Defendant and male XYZ) going into the public male toilet in a furtive manner. PW1 and PW2 followed the Defendant and XYZ into the male toilet. From the gap at the lower part of a cubicle door, PW1 and PW2 saw 4 feet inside one of the three cubicles. 2 males were chatting inside but PW1 could not hear clearly what was said. PW1 climbed up the partition wall at the adjacent cubicle and saw the Defendant and XYZ standing inside the cubicle while the Defendant was putting his left hand into his left trousers pocket nervously. PW1 demanded the Defendant and XYZ to open the door of the cubicle.
2. PW1 searched the Defendant while PW2 searched XYZ separately in the male toilet. Upon search, PW1 found a resealable transparent plastic bag containing 60 plastic packets containing suspected heroin (E1) in the Defendant's left trousers pocket. PW1 arrested and cautioned the Defendant, who pointed at XYZ and said, "I just bought 4 chai from that other person Mr. M and paid him \$13,000. Those 4 chai were bought for my self-consumption. I bought from him for the first time. I really bought it to consume slowly." At the time of arrest, the Defendant had cash of \$2,890 on him.

(See the next page for a continuation of Question 2)

3. PW2 searched XYZ and found XYZ in possession of cash \$15,600.
4. The Defendant and XYZ were taken to the Police Station.
5. In the police station, in a video recorded interview, the Defendant remained silent under caution.
6. E1 was examined by the Government Chemist, EEE (PW3) who confirmed that E1 contained 60 packets containing a total of 17.51 grams of a mixture containing 15.77 grams of heroin hydrochloride.
7. No fingerprint of the Defendant and XYZ was found on the money HK\$15,600 seized from XYZ. No DNA of XYZ was found on the surface of the 60 packets containing heroin (E1).

Dated this 1st day of March 2009.

(SPP)

Senior Public Prosecutor

For and on behalf of the Secretary for Justice

Question 3 (25 marks)

You act for MegaSupplies Limited, a company that manufactures and supplies electrical catering equipment to restaurants throughout Hong Kong and Guangdong Province. You receive your instructions from Wong Hing-Wai (“Wong”), a director.

MegaSupplies Limited and Viva Pescara Limited

On 7 July 2008 MegaSupplies delivered an order for cookers, dishwashers and extractor fans to Viva Pescara Limited, a company that was expanding its chain of popular Italian fish restaurants. The total purchase price of the order was HK\$1.6 million. The payment terms were for a 15% deposit to be paid by 20 June 2008 and the balance to be paid within 30 days of delivery. Viva Pescara paid the 15% deposit but failed to pay the balance by the due date of 6 August 2008, despite many reminders being sent. Eventually, on the instructions of your client, you commenced proceedings in the High Court on 28 July this year. Pleadings closed two weeks ago. Viva Pescara, which has legal representation, served a defence alleging serious defects in the controls of the cookers and extractor fans. No mention of these defects was made prior to the Defence and it is your client's belief that Viva Pescara is simply seeking to avoid payment, owing to poor restaurant trade as a result of the economic downturn. However, MegaSupplies did tell you that they have had one complaint from another customer about a small problem with the controls of the same model of cooker that they supplied to Viva Pescara.

You have discussed with Wong making an Order 14 application, but Wong has told you that MegaSupplies does not wish to do so, because of the expense and uncertainty of the outcome. The strategy you have agreed is to proceed with discovery to see what evidence if any the Defendant can produce of the alleged defects.

This morning you receive a call from Wong, expressing concern about mounting costs. He asks if there is any way in which the claim can now be settled. He tells you that MegaSupplies would like to get some money out of Viva Pescara as soon as possible. He wants to know if you can do anything to encourage them to settle.

(See the next page for a continuation of Question 3)

Question:

- (1) **What step is available that might encourage Viva Pescara to settle? Explain the procedure and the costs consequences of taking such a step.** (15 marks)

Elena Chan and MegaSupplies Limited

Elena Chan (“Chan”) was Operations Manager of MegaSupplies but left the company in 2008 after significant disagreements with the directors. She has sued MegaSupplies for constructive dismissal and during discovery, applied to the Court for a wide range of documents. The hearing took place yesterday. MegaSupplies succeeded in resisting her application on grounds of irrelevance and oppression. At the end of the hearing, the Judge made a provisional summary assessment of MegaSupplies' costs.

Question:

- (2) **Explain to Wong the meaning and purpose of the judge's order on costs.** (6 marks)

It is now 2 months later and you have just had a without prejudice meeting with Chan's lawyers. The meeting was successful and the parties agreed the terms of a settlement. Both parties require the settlement to be formalised by the Court and for the terms to remain confidential.

Question:

- (3) **Explain how the settlement should be formalised by the Court.** (4 marks)

[25 marks in total]

Question 4 (25 marks)

Part A

You act on behalf of Aquarius Watch Co. ("Aquarius"), a partnership business set up by May Chan and June Mok. On 3 July 2009, Aquarius entered into a contract with Pisces Co. Ltd. ("Pisces"), a company registered in Hong Kong. Pursuant to the said contract, Aquarius agreed to supply to Pisces 100 diamond watches (the "Watches") at a discounted price of \$10,000 each (i.e. total price of \$1,000,000). Pisces agreed to pay a deposit of \$300,000 on 5 July 2009 and the remaining \$700,000 14 days after the Watches were delivered. Pisces duly paid the deposit of \$300,000 on 5 July 2009 and Aquarius duly delivered the Watches to Pisces on 15 July 2009. To date, despite repeated reminders sent by Aquarius, Pisces did not make payment of the remaining \$700,000 due under the contract.

You have been instructed by Aquarius to commence proceedings to recover the \$700,000 from Pisces.

Question:

- (1) **On behalf of Aquarius, with reference to the attached Writ of Summons form (*Note: your answers are NOT to be set out on the attached form, but are to be written in the answer book*) set out:**
- (a) **The Plaintiff's name;**
 - (b) **The Defendant's name; and**
 - (c) **The General Endorsement of Claim.**

If any further information is required from Aquarius, please set out the same in square brackets in your answer.

(10 marks)

(See the next page for a continuation of Question 4)

IN THE DISTRICT COURT OF
THE HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO. OF 2009

Between

Plaintiff

AND

Defendant

TO THE DEFENDANT (name) of
(address)

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff in respect of the claim set out on the back.

Within (14 days) after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Registry of the District Court the accompanying ACKNOWLEDGMENT OF SERVICE stating therein whether you intend to contest these proceedings or to make an admission.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest these proceedings or to make an admission, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

If you intend to make an admission, you may complete an appropriate form enclosed in accordance with the accompanying Directions for Acknowledgment of Service.

Issued from the Registry of the District Court this day of 2009.

Registrar

(See over the page for a continuation of Question 4)

Note:- This Writ may not be served later than 12 calendar months beginning with that date unless renewed by order of the Court.

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

GENERAL ENDORSEMENT OF CLAIM

(See the next page for a continuation of Question 4)

Part B

Assume that Aquarius has commenced a claim against Pisces in the District Court and that you now act for Pisces. Pisces was served with the Writ of Summons yesterday. Pisces does not dispute the claim but it is presently suffering from financial difficulties and would like to make payment of the remaining \$700,000 due to Aquarius by instalments and to avoid the costs of litigation proceedings.

Question:

(2) Advise Pisces in light of the abovementioned information.

(5 marks)

Part C

Ignore the facts from Part B above.

Assume that you act for Pisces and that it is now 4 January 2010. In September 2009, you were instructed by April Lee ("April"), the director of Pisces to dispute Aquarius' claim. According to April, the Watches supplied by Aquarius were actually made with fake diamonds. Pisces therefore withheld payment of the \$700,000 due to Aquarius under the contract. A Defence was filed by Pisces pleading the delivery of the fake diamond watches by Aquarius. At the same time, Pisces also counterclaimed against Aquarius for a refund of the \$300,000 deposit paid to Aquarius on 5 July 2009. Last week, you attended a case management conference on behalf of Pisces where the following directions were made:

- i. The parties were to exchange their witness statements by 20 January 2010;
- ii. The parties were to exchange their experts reports by 20 February 2010;
and
- iii. A pre-trial review was to be held on 5 March 2010.

On behalf of Pisces, you originally approached an expert, Mr. Leo Wong ("Leo"), who had examined the Watches and confirmed that the diamonds were fake. Yesterday, Leo called you and told you that he had to travel to Canada urgently as his mother there was seriously ill, that it was unlikely he would be able to return to Hong Kong until mid-March 2010 and that given the circumstances, he doubted whether he would be able to complete his expert report on time.

(See over the page for a continuation of Question 4)

When you telephoned April this morning to take instructions from her regarding Leo's absence from Hong Kong, April told you that she would be very busy and was going on a business trip tomorrow. She said that she would be returning to Hong Kong on 25 January and asked you whether it was possible to file her witness statement around end of January 2010 instead of 20 January 2010. As for Leo's situation, April said that her cousin is a jewellery designer and qualified gemologist and that she could ask her cousin to prepare an expert report instead of Leo in support of Pisces' case. She wants to know whether this would be feasible.

Question:

(3) Advise April in light of her queries above.

(10 marks)

[25 marks in total]

Question 5 (25 marks)

Your firm is acting for ABC Bank, Hong Kong branch, which is the defendant to a Hong Kong High Court action by Mrs. Deidre Eu. Mrs. Eu's solicitors, Fong & Fong, commenced the action by issuing a Writ of Summons with a Statement of Claim endorsed on the Writ of Summons. The Statement of Claim was verified by the Plaintiff. Mrs. Eu's claim is that on 31 July 1997, Mr. Gregory Ho, a member of the sales team of ABC Bank, mis-sold to her two sophisticated financial products known as accumulator contracts.

Mrs. Eu alleges in the Statement of Claim that:

- She was an inexperienced investor, a housewife, married to a mainland Chinese businessman;
- Mr. Ho failed, in breach of the duty owed to her, to explain to her at all, or at least adequately, the risks involved in the accumulator contracts;
- In addition and alternatively, Mr Ho provided her only with product documentation for the accumulator contracts written in English, when he knew that she could not read English;
- Mr. Ho failed to explain to her that she could incur very significant losses under the accumulator contracts if the price of the underlying stocks went down, which they did, causing her mark-to-market losses of US\$ 1.5 million;
- had Mrs Eu received proper advice from Mr. Ho, she would not have invested in the accumulator contracts, but instead she would have invested in some real estate in mainland China, from which (by now) she would have made a profit of at least US\$ 1.5 million; and
- she is entitled to damages of US\$ 3 million, plus interest.

Your firm has filed and served a Defence for ABC Bank admitting that Mrs. Eu invested in the two accumulator contracts and that this led to losses of US\$ 1.5 million, but otherwise denying all of Mrs. Eu's allegations and pleading that Mr. Ho did explain properly the nature, complexity and risks of accumulator contracts to Mrs. Eu in Chinese before she invested in them. Mr. Ho verified the Defence.

Mrs. Eu's has not filed any Reply.

In searching ABC Bank's records, e-mail messages have been found relating to a separate account for Mrs. Eu's cousin, which contain as attachments about a dozen e-mail messages passing between Mrs. Eu and her cousin, all written in English.

(See over the page for a continuation of Question 5)

Mr. Ho has resigned and left ABC Bank to join a competitor. He has indicated he is reluctant to provide a witness statement.

A former banker of ABC Bank has agreed to provide a report expressing the opinion that the explanation that Mr. Ho says he gave to Mrs. Eu in respect of the risks of the accumulator contracts was adequate, but he is willing to provide a report only on condition that his identity is disclosed at the latest possible moment in the litigation.

ABC Bank could obtain an expert report as to values of real estate in mainland China.

Questions:

ABC Bank's in-house lawyer wants your advice in respect of the following questions:

- (1) The records relating to Mrs. Eu's cousin's account are confidential. What is the position regarding disclosure of these records in the litigation brought by Mrs. Eu?**

(5 marks)
- (2) It appears Mrs. Eu is not telling the truth about her ability to read English. What are the possible consequences?**

(8 marks)
- (3) How should ABC Bank deal with the fact that Mr. Ho may not be a willing witness?**

(2 marks)
- (4) ABC Bank would rather delay as long as possible disclosing to Mrs. Eu (a) the identity of its expert witness on the adequacy of Mr. Ho's explanation and (b) the fact that Mr. Ho may not be a willing witness. When will it likely have to disclose these matters and how?**

(5 marks)

(See the next page for a continuation of Question 5)

- (5) **ABC Bank believes it can win the action by showing that Mrs. Eu was an experienced investor and received an adequate explanation before investing in the accumulator contracts. Can it do that and thereby avoid the cost of having to engage an expert as to values of real estate in mainland China? What procedural steps would need to be followed to achieve this?**

(3 marks)

- (6) **There could potentially be four expert witnesses (two for each party). Will the court have any particular views on the numbers of witnesses?**

(2 marks)

[25 marks in total]

END OF TEST PAPER

2010 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD II: CIVIL AND CRIMINAL PROCEDURE

Tuesday, 2 November 2010



HEAD II: CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

2 November 2010

Instructions to Candidates:

- 1. The duration of the examination is 3 hours and 30 minutes.**
- 2. This is an open book examination.**
- 3. There are five questions in this paper.
ANSWER ANY FOUR QUESTIONS ONLY.**
- 4. You must write your answers to any of:**
 - the Criminal Questions (Questions 1 and 2) in Answer Book 1**
 - the Civil Questions (Questions 3, 4 and 5) in Answer Book 2**
- 5. IF YOU ATTEMPT MORE QUESTIONS THAN YOU HAVE BEEN INSTRUCTED TO ANSWER:**
 - (a) THE EXAMINERS WILL MARK ALL QUESTIONS THAT HAVE BEEN ATTEMPTED AND NOT DELETED; AND**
 - (b) IN COMPUTING YOUR FINAL MARK, THE EXAMINERS WILL COUNT THE MARKS FOR THE NUMBER OF QUESTIONS YOU WERE INSTRUCTED TO ANSWER TAKING INTO ACCOUNT THE ANSWERS WITH THE LOWEST SCORES.**
- 6. Start each question on a separate page of your answer book.**
- 7. Each question has the value noted on the question paper. You are urged to apportion your time in accordance with the relative value of each question. No marks can be awarded to a question for which there is no attempted answer.**
- 8. An examiner will be present for the first 30 minutes of the examination. Any questions relating to the paper must be raised in that period. Questions raised after the first 30 minutes will not be entertained.**
- 9. Do not take either this question paper or any answer books with you when you leave the examination room.**

2010 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

You are a solicitor in local practice. You have a new client who is seeking advice on charges against him which are to be heard in the District Court. He wishes you to act for him at his trial. He had previously instructed a different firm of solicitors, but has now moved to the firm for which you work.

Your client is a director of a jewellery company. He is charged with conspiracy to offer unauthorized advantages to a firm of travel agents to bring customers to his showrooms. The conspiracy was alleged to have taken place over a total period of ten years. At trial the prosecution will allege that your client paid commissions to the tour company to encourage them to bring their groups of tourists to make purchases.

The case was investigated by the ICAC (Hong Kong's Independent Commission Against Corruption, which is required to comply, in the same way as the police, with the Secretary for Security's 'Rules and Directions for the Questioning of Suspects and the Taking of Statements'). The ICAC has provided the prosecution with a tape recording of a meeting which occurred between your client, one of his employees (a Ms. Wong), and a partner of your client's former solicitors. This meeting took place after the ICAC had conducted a raid on your client's company offices last year, but prior to his being charged. On the tape your client made damaging admissions and the prosecution will seek to produce the tape as evidence at trial.

(See the next page for a continuation of Question 1)

The ICAC were able to tape covertly the meeting, and your client's admissions, by wiring Ms. Wong with a hidden listening device. Ms. Wong was interviewed by the ICAC, following the office raid, but was not charged with any offence. She wore the wire to assist the ICAC with their investigation of your client and she was wearing it when your client and she met with your client's former solicitor to discuss the outcome of the ICAC raid.

Question:

- (1) Can you challenge the admissibility of the tape-recorded evidence at the trial and if so, on what grounds? What procedures would you utilise to make such a challenge?**

(9 marks)

The trial proceeded in the District Court and Ms. Wong was not the only employee of your client's company who gave evidence for the prosecution. She, and a Mr. Cheung, were in fact the prosecution's main witnesses against your client. Mr. Cheung, financial controller of the company, gave evidence of being involved with the scheme to make payments to the tour guide company. He described the setting up of the scheme by your client, and how the company had required him to make the payments to the tour guide company to facilitate their business. He stated that he had been interviewed by the ICAC following the raid and that on their request, he had made six statements, totaling over 200 pages, and dealing with more than 300 exhibits. On cross-examination he revealed that initially he was detained by the ICAC for 47 hours and had received immunity from prosecution, in exchange for his statements. These statements took several hours to make and he visited the ICAC offices on ten separate occasions in order to finalise his statements.

(See over the page for a continuation of Question 1)

On cross-examination, he also revealed that after completing his six statements he made a further six visits to the ICAC offices, at their request, for the purposes of re-reading his statements, and refreshing his memory, before the trial. On some occasions the officers left him to read the statements by himself, but more often, they read them to him, one paragraph at a time. During these sessions, after the officer had read out each paragraph, he would give a summary of it to Mr. Cheung, and ask if he agreed. The last of these sessions took place five days before your client's trial commenced in the District Court.

Question:

- (2) On the basis of this evidence, what if any, application will you make to the District Court judge in relation to the prosecution case?

(8 marks)

Unfortunately, your application failed and your client has been convicted of conspiracy, as charged. The judge relied heavily on both Ms. Wong and Mr. Cheung's evidence to support his finding of guilt.

Question:

- (3) Can you properly appeal against your client's conviction? If so, please state:
- (i) any ground upon which you would rely,
 - (ii) the court to which you would make your appeal, and
 - (iii) identify the power of that court to hear your appeal.

(8 marks)

(25 marks in total)

Question 2 (25 marks)

Your client, who is named Dilshan, is a Sri Lankan national. Yesterday he was convicted of robbery by a judge sitting in the District Court. He will be sentenced next week.

The prosecution case at trial was that the victim (PW1), a taxi driver, had on the night of the offence parked his vehicle in the early hours of the morning, nearby a minibus parking station and had then walked to a close by convenience store to buy some refreshments. On his way back to his taxi he was intercepted by a dark-skinned man with waist-length hair who demanded money. When PW1 refused, the dark-skinned man commenced to assault him. His waist-bag containing his wallet, mobile phone and takings was snatched from him.

A very short time later, a patrolling constable (PW2), walking past the minibus parking area, heard noises and went towards the minibuses to investigate. When he got there he saw a dark-skinned man running out from the minibuses and intercepted him. It was agreed by the defence, before trial, pursuant to section 65C Criminal Procedure Ordinance, Cap 221, that the man PW2 intercepted was your client, Dilshan.

PW2 then heard groans coming from amongst the minibuses and, with your client, Dilshan, in custody, went to investigate and found PW1. When PW1 saw your client he immediately said that your client was the person who had robbed and hit him.

Your client was arrested and cautioned in English and as he was not proficient in that language, your client remained silent. PW2 searched your client and found the items taken from PW1 at the time of the robbery. Your client remained silent. Later, under legal advice, your client gave a 'no comment' record of interview at the police station.

(See over the page for a continuation of Question 2)

No formal identification parade was held. At trial, PW1 made a dock identification of your client.

Your client is unhappy with his conviction and wishes to appeal against it.

Questions:

- (1) **Advise your client whether he can appeal against the use of a dock identification of him at trial. In giving your answer, identify any case law or statutory authority upon which you rely.**

(12 marks)

- (2) **Your client wants to know if, on appeal, he can withdraw his pre-trial admission that he was the man intercepted by PW2 at the scene of the robbery. Advise him and in giving your answer, identify any case law or statutory authority upon which you rely.**

(5 marks)

- (3) **Assuming your client has arguable grounds of appeal against his conviction, identify the court to which an appeal would be made, any time limit within which your initial grounds of appeal must be filed and the test which will be applied by the court in determining whether to allow your client's appeal.**

(8 marks)

(25 marks in total)

Question 3 (25 marks)

Profitable Leasing Limited is the landlord and Sunshine Cafe, a partnership operated by Sunny Chan and Star Chan, is the tenant under a written lease (the "Lease"). The 2-year Lease, which commenced on 1 July 2009, will be expiring on 30 June 2011. The monthly rental is HK\$50,000. The premises have been used by Sunshine Cafe to operate a cafe since 1 July 2009.

Under the Lease, rent is payable by Sunshine Cafe on the first day of each calendar month in advance. The Lease also provides that if rent or management charges or any other sums due shall be in arrears for 15 days after the same become due and payable (whether demanded or not), the landlord shall be entitled to re-enter the premises, forfeit the deposit of HK\$100,000 furnished by the tenant to secure its obligations under the Lease and the Lease shall thereby be absolutely determined.

Due to the financial difficulties of Sunny Chan and Star Chan, Sunshine Cafe has experienced a shortage in working capital since 1 May 2010. Sunshine Cafe failed to pay the monthly rent due to Profitable Leasing Limited after May 2010, (i.e. rent for May 2010 was paid, but the rent was not paid thereafter). On 31 July 2010, Profitable Leasing Limited instructed its solicitors, Messrs. Logans, to send a letter to Sunshine Cafe demanding payment of the rent in arrears and interest thereon, terminating the Lease and requiring Sunshine Cafe to surrender the leased premises. The amount of rent in arrears as of 31 July 2010 was HK\$100,000. This demand so sent by Messrs. Logans was ignored by Sunshine Cafe. Sunshine Cafe has continued to use the premises despite its continuous failure to pay rent which is due and payable.

It is now late August 2010. Profitable Leasing Limited intends to commence proceedings against Sunshine Cafe to enforce its rights under the Lease, including the recovery of vacant possession of the leased premises.

(See over the page for a continuation of Question 3)

The annual rent and rateable value of the subject premises as determined under the Rating Ordinance (Cap.116) are HK\$600,000 and HK\$248,000 respectively.

Question:

- (1) Apart from recovering the arrears of rent, the interest thereon and vacant possession of the premises, what other claims should be included in the Statement of Claim which Profitable Leasing Limited is entitled to make?**

(4 marks)

Messrs. Logans issued a Writ of Summons endorsed with a Statement of Claim with the parties properly described on 1 September 2010. On the same day at around 11 a.m., the process server of Messrs. Logans visited the residence of Sunny Chan but was told by the domestic helper that Sunny Chan was on a business trip in the PRC. The process server then inserted the Writ of Summons, enclosed in an envelope duly sealed and addressed to Sunny Chan, in the letterbox of Sunny Chan's residence before leaving. At around 12 p.m., the process server arrived at the leased premises, being Sunshine Cafe's principal place of business, and asked for Star Chan. A person who represented himself to be the manager-in-charge of Sunshine Cafe informed the process server that Star Chan was travelling in Korea. The process server then served a copy of the Writ of Summons on the manager. On 8 September 2010, when Sunny Chan returned from the PRC, among the mail items found in his letterbox, he discovered the sealed copy of the Writ of Summons.

Questions:

- (2) Advise whether the Writ of Summons was properly served on Sunshine Cafe and if so, by which mode of service and when?**

(6 marks)

(See the next page for a continuation of Question 3)

- (3) What is the earliest date Profitable Leasing Limited can apply for default judgment if Sunshine Cafe fails to acknowledge service of the Writ of Summons within the time stipulated in the court rules?**

(3 marks)

Messrs. Moon & Co., solicitors for Sunshine Cafe, filed an acknowledgement of service indicating Sunshine Cafe's intention to defend the proceedings. Sunshine Cafe is required under Order 18 rule 2(1) of the Court Rules to file its Defence within the prescribed time limit. As Sunny Chan and Star Chan are on busy travel schedules, Messrs. Moon & Co. cannot complete taking the necessary instructions required to compile the Defence. It is now anticipated that Sunshine Cafe cannot file its Defence within time. Meanwhile, no time extension request or application has been made by Messrs. Moon & Co. on behalf of Sunshine Cafe.

Question:

- (4) Advise what necessary steps Profitable Leasing Limited should take before entering judgment in default of Defence?**

(2 marks)

Sunshine Cafe filed and served its Defence on 19 October 2010 after securing a time extension from Profitable Leasing Limited to do the same. After considering the Defence, Messrs. Logans is of the view that Sunshine Cafe's Defence is only moonshine and does not have any merit.

(See over the page for a continuation of Question 3)

Question:

- (5) Profitable Leasing Limited wishes to obtain money judgment and a possession order against Sunshine Cafe expeditiously and in a cost-efficient manner. You are the handling solicitor at Messrs. Logans. Write a letter of advice to the board of directors of Profitable Leasing Limited advising on the type of court application required to be made to achieve such objective by referring to the relevant Court Rules. Your advice should also cover the timing of making such application and the documents required to be prepared for such application (Note: you are not required to draft these documents). Your letter should also advise on the different possible outcome(s) of such application and the usual costs order(s) related to each outcome.

(10 marks)

(25 marks in total)

Question 4 (25 marks)

You have been instructed to act for Popsicle Limited (“Popsicle”), which has just been served with a Writ of Summons attached with a Statement of Claim. The proceedings were issued by Lollipop Limited (“Lollipop”) in the High Court on 1 September 2010 and were served on Popsicle today. Lollipop’s claim is for damages for breach of contract and an extract of the Statement of Claim is as follows:

Statement of Claim

1. The Plaintiff, Lollipop Limited, is a company incorporated in Hong Kong, carrying on business as the authorised dealer and supplier of “Choco” brand hi-definition television sets.
2. The Defendant, Popsicle Limited, is a company incorporated in Hong Kong, carrying on business as a retailer of electrical goods at various retail outlets in Hong Kong.
3. By a written agreement (the “Agreement”) entered into between the Plaintiff and the Defendant on 15 May 2010, the Plaintiff agreed to sell and the Defendant agreed to purchase 700 “Choco” brand CX543-42-inch hi-definition LCD television sets (the “Goods”) at a price of \$5,000 each (i.e. total price of $700 \times \$5,000 = \$3,500,000$).
4. The Agreement contained the following express terms:
 - (1) The Defendant would pay a deposit of \$500,000 (the “Deposit”) to the Plaintiff by 30 May 2010;
 - (2) The Defendant would pay the Plaintiff the remaining \$3,000,000 within 14 days of the delivery of the Goods.
 - (3) Interest of 24% per annum would be chargeable by the Plaintiff for any outstanding sums owed to the Plaintiff by the Defendant under the Agreement.

(See over the page for a continuation of Question 4)

5. Pursuant to the Agreement, the Defendant duly paid the Deposit to the Plaintiff on 30 May 2010.
6. Pursuant to the Agreement, the Plaintiff duly delivered the Goods to the Defendant on 10 June 2010. Despite repeated reminders by the Plaintiff, in breach of the Agreement, the Defendant failed to pay the remaining \$3,000,000 to the Plaintiff.

You have just met Candy Chan, the managing director of Popsicle, to take instructions from her. She tells you the following:

- Popsicle owns several electrical retail shops located in Causeway Bay, Mongkok, Shatin, Tsuen Wan and North Point. They are planning on opening a new shop in Tsimshatsui and therefore from May onwards, Candy had to contact their usual suppliers to order more stock. One of such suppliers she contacted was Lollipop.
- Lollipop is Popsicle's usual supplier of the "Choco" brand hi-definition television sets.
- On 14 May, Candy telephoned Bonnie Leung ("Bonnie"), Lollipop's Sales Manager. On the telephone, Candy ordered 400 sets of "Choco" brand CX543-42-inch hi-definition LCD television sets from Bonnie, on behalf of Lollipop, at \$5,000 per set (total price being $400 \times \$5,000 = \$2,000,000$), with delivery on or before 15 June 2010. Candy also agreed to pay a deposit of \$500,000 by the end of the month, with the remaining \$1,500,000 payable within 14 days after delivery.
- Candy said that she had not signed any written contract with Lollipop on behalf of Popsicle.

(See the next page for a continuation of Question 4)

- Candy said that on the day of delivery, 700 television sets were delivered instead of 400. She had contacted Bonnie immediately after delivery to ask Bonnie to arrange for collection of the extra 300 television sets delivered but to date, Lollipop had not arranged for collection of the extra 300 television sets mistakenly delivered to Popsicle.
- Popsicle did not pay the remaining price of \$1,500,000 for the 400 television sets because upon inspection, the television sets were defective. Again, Candy had informed Bonnie of such defects but Lollipop did not revert to Popsicle regarding the defects. Candy said she wants to return all 700 television sets to Lollipop and is awaiting Lollipop's collection of the same.
- Candy had heard from other staff at Lollipop that Bonnie was sacked by Lollipop 2 weeks ago.

Questions:

- (1) Based on the above instructions, draft a Defence (and Counterclaim, if appropriate) to the above extracted Statement of Claim on behalf of Popsicle. If further information is required, indicate the same in square brackets at the appropriate place of your draft.**

(15 marks)

- (2) Towards the end of your meeting with Candy, she asks you:**
- (i) what are the next steps in the proceedings;**
 - (ii) what Popsicle would need to do to prepare the case for trial; and**
 - (iii) whether Popsicle can avoid trial of the case as Candy is concerned about the level of costs that would have to be expended to bring the case to trial.**

Draft a brief advice in the form of a letter to Popsicle dealing with the above queries raised by Candy.

(10 marks)

(25 marks in total)

Question 5 (25 marks)

You act for Davos Designs Limited (Davos), an interior design company affiliated to the Hong Kong Institute of Interior Designers (HKIID). In November 2009 Davos entered into a contract (the "Contract") with Floral Delights Company (Floral), operator of a chain of 8 florist shops located in the lobbies of prominent hotels in Hong Kong. The Contract provided that Davos would develop and implement a new concept for the florist shops. Before the Contract was concluded, a series of site meetings took place to discuss the new concept. The site meetings were attended by Ronald Wong (Wong), Davos' architect, and Ip Hing Wing (Ip), Floral's managing director.

The new concept that Davos developed for the shops was 'the Italian countryside', featuring painted walls in soft shades of ochre and terracotta and wrought-iron display shelves. Floral approved the concept in January 2010 and Davos started work on its implementation. Davos completed the work in May 2010. Although Floral had paid a deposit and made monthly stage payments to Davos, Floral refused to pay the final balance of the contract price. Floral alleged that the concept had not been implemented correctly as the walls were painted bright yellow and orange, evoking not so much the Italian countryside as a fast food chain. They also alleged negligent workmanship because the wrought-iron display shelves collapsed when stacked with plant pots.

An attempt at mediation on 30 August 2010 was unsuccessful and on 1 September 2010, Floral commenced proceedings against Davos for damages. Davos has defended the action and counterclaimed for the balance of the contract price. The proceedings have reached the discovery stage.

(See the next page for a continuation of Question 5)

- (a) Davos has provided you with a file of correspondence they have had with their indemnity insurers. The file contains an e-mail message dated 23 August 2010, explaining some problems that Davos encountered when carrying out the work. It states that "our architect Wong did have some concerns about the weight of the wrought-iron shelves but he thought they should be adequate, as flowers don't weigh very much".

Question:

- (1) **Discuss whether you should disclose this e-mail message in the Defendant's List of Documents and if so, in which part.**

(6 marks)

- (b) Davos has also provided you with Wong's 2009 diary, in which Wong made contemporaneous notes of his site meetings with Ip. Wong is concerned about disclosing his diary because it contains confidential information about other, unrelated, projects.

Question:

- (2) **Explain what Davos' obligations are concerning the diary, and how you may address Wong's concern.**

(5 marks)

(See over the page for a continuation of Question 5)

- (c) Assume now that the parties have exchanged their Lists of Documents. Before they did so, on Davos' instructions you made a "without prejudice" settlement offer to Floral's solicitors, which was then refused. You had listed this correspondence in Schedule 1, Part 2 of Davos' List, but you are surprised to see that it appears in Schedule 1, Part 1 of Floral's List. You are also concerned to see that inadvertently, you omitted to include the words "without prejudice" on the letter that contained the settlement offer.

Question:

- (3) Explain the implications, if any, of (i) this correspondence appearing both in Parts 1 and 2; and (ii) the failure to mark your letter "without prejudice".**

(5 marks)

- (d) Assume now that you have inspected Floral's listed documents which included a fax sent by Ip to the HKIID, complaining about the standard of Davos' workmanship and stating that "Davos are an incompetent bunch of cowboys and you should tell the world not to use them". You show the fax to Davos who ask you whether they can sue Floral for defamation on the basis of this fax.

Question:

- (4) Advise Davos as to whether there is any fetter on the use of the fax and if so, what procedure should be followed to obtain a release from any such restriction.**

(4 marks)

(See the next page for a continuation of Question 5)

- (e) Davos' architect, Wong, makes an appointment to see you on an unrelated matter. He tells you that 3 months ago, he had laser eye surgery at the Harbour Optical Clinic (HOC). Since the operation he has suffered from severe pain in his right eye and a consultant at a hospital has told him that he may lose sight in it as a direct result of the laser surgery. Wong wishes to commence proceedings against the doctor who carried out the operation at the HOC but cannot recall that doctor's identity. He has asked the HOC for a copy of his medical file but so far, they have refused to give it to him.

Question:

- (5) Advise Wong of any procedural steps that are available to assist him in identifying the doctor and obtaining a copy of his medical file.

(5 marks)

(25 marks in total)

END OF TEST PAPER