

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2022 SUPPLEMENTARY INFORMATION PACKAGE

HEAD II: CIVIL AND CRIMINAL PROCEDURE

Contents

- 1. Standards, Syllabus and Materials**
- 2. Examiners' Comments on the 2019, 2020 and 2021 Examinations**
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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 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**
- types 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
 - 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
- Calderbank offers
- sanctioned offers and sanctioned payments
- 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.

- Hong Kong Court of Final Appeal Ordinance (Cap 484)
- High Court Ordinance (Cap 4)
- Rules of the High Court
- District Court Ordinance (Cap 336)
- Rules of the District Court
- Practice Directions
- 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: <http://legalref.judiciary.hk/lrs/common/ju/judgment.jsp>.

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

Main Texts

- 'Hong Kong Civil Procedure 2022 - The Hong Kong White Book', Sweet & Maxwell, (ISBN 978 988 859 013 1)
- 'A Guide to Civil Procedure in Hong Kong', 6th Edition, LexisNexis, *Wilkinson, Cheung & Meggitt* (ISBN 978 988 838 996 4)
- 'Hong Kong Civil Court Practice', Desk Edition 2022, LexisNexis, *W S Clarke* (ISBN 978 988 876 546 1)

The following materials are useful for reference:

- 'Hong Kong District Court Practice', 5th Edition, LexisNexis, *Lo, P.Y.* (ISBN 978 988 876 486 0)
- 'Civil Procedure in Hong Kong: A Guide to the Main Principles', 4th Edition (2017), Sweet & Maxwell, *Dave Lau* (ISBN 978 962 661 971 1)
- 'Civil Litigation in Hong Kong', 6th Edition (2021), Sweet & Maxwell, *Douglas Clark* (ISBN 978 988 859 085 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

- *Simon S.Y. So; Christopher Knight; Anthony Upham* 'Knight and Upham - Criminal Litigation in Hong Kong', 4th Edition, Sweet & Maxwell Hong Kong (ISBN 978 988 859 077 3)
- *Amanda Whitfort*, 'Criminal Procedure in Hong Kong: A Guide for Students and Practitioners', 3rd Edition, LexisNexis (ISBN 978 988 868 236 2)

For Reference

- 'Archbold Hong Kong 2022', Sweet & Maxwell Hong Kong (ISBN 978 988 859 036 0)
- *Cross, I.G. and Chung, P.W.S.* 'Sentencing in Hong Kong', 9th Edition, LexisNexis, (ISBN 978 988 860 177 6)

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 2019, 2020 and 2021 Examinations

Examiners' Comments on the 2019 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. The number of candidates this year was 59. Of those 59, 18 passed Head II, resulting in a pass rate of 31%. This continues a steep downward trend from 43% last year and 65% in 2017. This reflects a deterioration in the overall quality of answers, which this year was readily observable.

The Standard and Format of the Examination

2. The Examination, as in previous years, was open book.
3. The Examination is 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. They should not be a danger to the client.
4. 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. The examination deliberately mimics the situation of a solicitor asked

to advise a client about a problem, and calls for directional practical answers, sometimes against an unfamiliar factual background.

General Comments

5. There were five questions in the paper, and 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.

Performance on individual Questions

Criminal Procedure

6. Questions 1 and 2 addressed issues of criminal procedure. The overall pass rate for Criminal Procedure was 22%, compared to 37% and 66.7% in the past 2 years. The pass rate was extremely disappointing and reflected what appeared to be a failure to adequately prepare, with scant/point form, incorrect or equivocal answers provided by many candidates. The questions were not any more difficult than those posed in recent years and covered advice before plea, bail applications, challenging the choice of charges and appropriate sentencing/appeal options.

Question 1 (pass rate 29%)

7. This question related to an offence of ‘up-skirting’. A few candidates spotted the effect of the cases of *HKSAR v Ngo Van Nam* and *HKSAR v Abdou Maikido Abdoukarim* on the granting of credit for guilty pleas at different stages and advised the client to seek an adjournment of the case before taking any plea. However, in order to correctly advise the client on his plea it was necessary to take note of the recent Court of Final Appeal decision: *SJ v Cheng*

Ka Yee and Ors, a case which most candidates were not aware of. Failing to understand that the charges under section 161(1)(c) of the Crimes Ordinance could not be sustained, candidates advised the client to plead guilty early to gain the maximum discount and overlooked the primary challenge to be made against his conviction. Whilst it is conceivable that candidates may not be keeping up with the latest CFA decisions, a second appeal point relating to the admissibility of the confession, was also widely overlooked. The questions concerning sentencing options and bail conditions were answered more adequately.

Question 2 (pass rate 28%)

8. This question related to a drug trafficking charge. Most candidates failed to explore, in any depth, the possibilities available to the client in negotiating with the prosecution on the charges and in seeking a Newton Inquiry. A large number of candidates did not recognize that section 81A of the Criminal Procedure Ordinance is used by the prosecution to review a sentence and a disturbing number suggested the client might use section 83G to appeal against his own (lenient) sentence.

Civil Procedure

9. Questions 3, 4, and 5 addressed issues of civil procedure. The questions raised issues which could well land on the desk of a newly-admitted solicitor. The answers being sought were pitched at the level of sophistication to be expected of a lawyer at that stage, which in some cases was simply to spot the issue being raised. In many cases common sense application of the law, rather than just a recitation of black letter rules, was sought. The overall pass rate for Civil Procedure was 42%, somewhat up from last year at 37%. However, this average figure masks big differences in the marks for the three individual questions – 84, 30 and 34% respectively.

Question 3 (pass rate 84%)

10. This question consisted of two parts, arising from a potential personal injury claim.
11. The first part was about limitation periods. The overall performance was good. Most candidates identified correctly the 3-year limitation period and the fact that it had expired. Not so many referred to the relevant provisions of the Limitation Ordinance whereby the 3-year period for personal injury claims may be disapplied by the court. Few candidates appeared to be aware of the fact that an expired limitation period is not a bar to commencement of proceedings, but a defence which must be pleaded.
12. The second part asked candidates to choose the appropriate court, name the parties and draft a general indorsement of claim. Performance on this part of the question was adequate, but unfortunately, there were many errors, for example:
 - Only one candidate followed the relevant practice direction and included the required information at the head of the writ stating that the claim was monetary only, and based on tort (or contract). Without this information, the court registry will not accept a writ for filing.
 - Almost every candidate specified that the claim was for HK\$750,000, which was the quantum given in counsel's advice. This showed candidates were probably not aware of the difference between general and special damages. It was inappropriate to quantify the former at this stage (the amount being up to the court to assess, and in PI cases a matter for a separate document, the statement of damages). By doing so candidates could have been limiting the amount which might eventually be awarded to the client.

- Most candidates appended a Statement of Truth. This is not necessary with a general indorsement (which is technically not a pleading), but since it does no harm, candidates were not marked down for this error.
- Some candidates showed a lack of understanding of remedies. In a simple claim for monetary compensation several asked for a declaration!

Question 4 (pass rate 30%)

13. Question 4 concerned pre-action discovery, and consisted of two parts. In Part 1 candidates were asked when pre-action discovery is available and what the procedure is for getting it. Part 2 required candidates to prepare a bullet-point skeleton argument making the application. Although pre-action discovery is less used than some other litigation procedures, the subject-matter of the question was well-signposted, and the overall poor quality of the answers was therefore disappointing.

Question 5 (pass rate 34%)

14. Question 5 concerned summary judgment, and consisted of two parts. Part I asked candidates to consider the applicability of summary judgment to an overdue debt, a dishonoured cheque, and a non-overdue debt. Part 2 required candidates to prepare an affirmation or affidavit in support of an application for judgment on a dishonoured cheque. The standard of answer was again poor. On the overdue debt part, the primary issue was how the court deals with potential defences/cross-claims on a summary judgment application. Very few candidates made a serious attempt to answer that question. Similarly, of the 41 candidates who answered this question, not a single candidate identified that set-offs and cross-claims are not permitted to rebut summary judgment applications on a cheque.

March 2020

Examiners' Comments on the 2020 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. The number of candidates who sat the Head II paper in 2020 was 64, up from 59 in the previous year. 48 candidates were given overall pass marks, resulting in a pass rate of 75%. This is a remarkable increase from the 31% pass rate the previous year. It is pleasing to see that the deterioration in performance of candidates which had been noted in recent years has now reversed. The improvement was on both the criminal and civil parts of the paper. However, overall performance remained relatively weak on the criminal questions. This could reflect the background of candidates, many of whom, anecdotal evidence suggests, have gained their experience on the civil and commercial side of legal practice.

The Standard and Format of the Examination

2. The Examination, as in previous years, was open book.
3. The Examination is 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. They should not be a danger to the client.
4. 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. The examination deliberately mimics the situation of a solicitor asked to advise a client about a problem, and calls for directional practical answers, sometimes against an unfamiliar factual background.

General Comments

5. There were five questions in the paper, and 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.

Performance on individual Questions

Criminal Procedure

6. Questions 1 and 2 focused on the kinds of issues any newly qualified solicitor should be able to guide their client through in a competent manner. Some answers provided were good but many candidates are still taking the exam with little understanding of criminal practice and either failing to answer the question asked or answering in the briefest point form, missing many of the key issues raised by the examiners. That said, the overall pass rate for criminal procedure was 45%, a significant rise from the pass rate of 22% last year.

Question 1 (pass rate 42%)

7. Question 1 had three parts. The first part required an understanding of police powers to conduct a search of mobile phones seized on arrest, as articulated in the Court of Appeal decision, *Sham Wing Kan v Commissioner of Police* CACV 270/2017. The second part related to the conduct of a Newton Inquiry and required candidates to refer to the Court of Appeal decision, *HKSAR v Khalid Mansoor* [2020] 2 HKLRD 374, which is authority that a trial judge cannot combine the trial of two defendants who contest their guilt with a co-defendant's Newton Inquiry. The third part of the question required recognition that while section 19 of the Costs in Criminal Cases Ordinance, Cap 492, does not provide a mechanism to appeal a refusal to award costs, a refusal by a magistrate to award costs is a 'decision of a magistrate' for the purposes of an appeal under section 113(1) of the Magistrates' Ordinance (*HKSAR v Coghlan* [1999] 4 HKC 608) and can therefore be appealed. The candidates who failed this question all displayed limited knowledge of these significant Hong Kong cases.

Question 2 (pass rate 50%)

8. Question 2 related to a simple drug trafficking case. It had four parts which focused on bail, the potential conflict of interest in representing two defendants and the appropriate action to be taken when new information revealing that the prosecution cannot prove their case comes to light before/after conviction. Candidates also needed to be able to identify where any appeal against conviction would be heard and have an understanding of the defendants' rights to seek costs. This question was answered adequately by only half the candidates who attempted it despite the areas examined all being relatively simple to identify and address with a moderate amount of preparation.

Civil Procedure

9. Questions 3, 4 and 5 addressed issues of civil procedure which could well land on the desk of a newly admitted solicitor. The answers were expected to be at the level of sophistication and experience of a solicitor at that stage. In some cases, common sense application of established procedures and procedural law was all that was sought, rather than a recitation of black letter rules. The overall pass rate was 71% on the civil procedure side, a welcome increase on the previous year's 42%. The preponderance of candidates were able to pass all the civil procedure questions they attempted, whereas in the previous year, the pass rate for 2 of the questions was below 50%.

Question 3 (pass rate 95%)

10. Question 3 asked candidates to advise a client (plaintiff) on a notice of sanctioned payment which had been served by the defendant. Such payments, under RHC Order 22, are intended to encourage parties to settle their disputes amicably.
11. Order 22 is very technical and can be difficult to understand without careful reading. But it is an essential tool in the armoury of a civil litigator these days. It provides for costs and interest sanctions to be imposed on a party who unreasonably refuses to accept a qualifying offer of settlement (sanctioned offer or, as in this question, sanctioned payment).
12. Fortunately, the vast majority of candidates clearly understood Order 22 and the consequences provided therein. There were few failures.
13. The only negative point which could be made is that many candidates regurgitated an almost identical answer, presumably provided in advance by one of the course providers. As those answers were mostly correct, they were awarded pass marks. Better candidates, who answered from their own knowledge, and addressed the actual question directly, were awarded higher marks.

Question 4 (pass rate 72%)

14. Question 4 was relatively straightforward. Overall candidates performed reasonably well.
15. The question had 2 parts, in each of which candidates were asked to answer 2 specific questions. The facts concerned litigation over a commercial agreement for the sale of goods in which the buyer (client) paid 50% of the purchase price in advance, but the goods were never delivered.
16. In the first part of the question, candidates were asked what step their client could take in the absence of action on the part of the defendant. Candidates were asked what could be done if the defendant failed to acknowledge service, alternatively, if the defendant failed to serve a defence. The answers are of course, that client could seek judgment for failure to give notice of intention to defend (O 13) in the first scenario, and judgment in default of defence (O 19) in the second. Not all candidates were able to identify the difference between final and interlocutory judgment (which was relevant because the claim was for both a fixed amount and for damages for breach of agreement).
17. The second part of the question concerned enforcement of a money judgment against the seller (opposing party). The facts were that the seller had paid only \$4 million on account of the judgment debt of \$10 million, though it had plenty of cash in the bank. Candidates were asked what application the buyer (client) could make, and to draft an affidavit or affirmation for the purpose of such application. The answer is, of course (a) that client should apply for a garnishee order to attach the funds in the opposing party's bank account and (b) that the affidavit or affirmation in support of the application should set out the information required by RHC O 49 r 2 so far as relevant in this case. The majority of candidates were able to identify garnishee proceedings as the most appropriate enforcement option and to draft the requisite affirmation.

However, most candidates who prepared the draft affirmation included the underlying judgment as a documentary exhibit, which should not have been done, and as a result a mark was deducted for these candidates.

Question 5 (pass rate 62%)

18. Question 5 concerned a claim in defamation by a plastic surgeon (client) against a dissatisfied patient who had, together with his publicity agents, published negative comments in a press release and in social media about the doctor. Candidates were asked:

(1) to draft a concise endorsement of claim

(2) what the quickest way would be to serve the publicity agents, an unincorporated body owned by one person living and working in Hong Kong, and another in Singapore.

(3) how to serve the proceedings on the dissatisfied patient, who had returned to Taiwan.

(4) to draft a short affirmation or affidavit in support of that application.

19. Whereas questions 3 and 4 were 1st marked by the panel members who set them, a substitute 1st examiner had to be found for this question as the panel member who set it had left before the paper was sat.

20. Overall the candidates performed quite well on question 5.

21. Generally, part (1) was answered well.

For part (2), instead of just setting out one or more possible methods of service, since the question was asking about the ‘quickest way to serve proceedings’, candidates were expected to come up with some sort of comparison as to what was the quickest method. Not all candidates managed to do that and those who did were credited accordingly.

For part (3), again generally this was done quite well. It was surprising, though, that since this question was in relation to service out of the jurisdiction, that some candidates did not mention the applicable gateways under Order 11 rule 1(1).

There was the same issue when students embarked on the draft affidavit for part (4). Many of them just covered the fact that there was a serious issue to be tried. Some covered where the defendant was located and the forum conveniens requirements. Many did not cover the requirement that there was a good arguable case that one of the gateways under Order 11 rule 1(1) applied. This is not surprising as many candidates and students confuse this with the serious issue to be tried requirement.

But overall, the majority of candidates who took this question were awarded passing marks.

Examiners' Comments on the 2021 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. The number of candidates who sat the Head II paper in 2021 was 44, down from 64 in the previous year. 14 candidates were given overall pass marks, resulting in a pass rate of 32%. This is a significant decrease from the 77% pass rate in the previous year where 49 out of 64 candidates were given overall pass marks. Unfortunately the pass rate is now back to where it was in 2019 (31%). Whether 2020 was simply an outlier year of improvement as opposed to the start of a significant trend remains to be seen.

The Standard and Format of the Examination

2. The Examination, as in previous years, was open book.
3. The Examination is 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. They should not be a danger to the client.
4. 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. The examination deliberately mimics the situation of a solicitor asked to advise a client about a problem, and calls for directional practical answers, sometimes against an unfamiliar factual background.

General Comments

5. There were five questions in the paper, and 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.

Performance on individual Questions

Criminal Procedure

6. Questions 1 and 2 focused on the kinds of issues any newly qualified solicitor should be able to guide their client through in a competent manner. This year the answers provided by the candidates were notably poor. For question two, which was based on basic and long-standing tests for criminal culpability, not one of the 14 candidates who attempted the question was able to explain the applicable law satisfactorily. For question one, the pass rate was much better, but still low at 43%. The questions were no more difficult than those posed in previous years and it is very clear that many candidates take this exam with little understanding of criminal practice and either fail to answer the question asked or answer in the briefest point form, ensuring they miss many of the key issues raised by the examiners. The overall pass rate for criminal procedure was a disappointing 30%, a significant drop from the pass rate of 45% last year.

Question 1 (pass rate 43%)

7. This question had two parts, the first requiring candidates to identify the court in which common criminal offences of assault and criminal damage would be tried. This requires candidates to have mastered basic statutory interpretation skills and an understanding of sentencing practices in Hong Kong which should not have presented the difficulties they did to many candidates. Part two of the question required candidates to explain, in basic terms, the threshold requirements for bail in cases related to national security offences. Many were unable to do so.

Question 2 (pass rate 0%)

8. This question had two parts and related to a case of drug trafficking with an international element. The first part of the question required candidates to be aware of and explain in simple terms the application of the evidentiary burden arising from the presumption of knowledge under section 47 of the Dangerous Drugs Ordinance Cap 134. The applicable section was provided in the paper. The law in this area was settled in *HKSAR v Hung Chan Wa and Another* [2005] 3 HKLRD 291.
9. The second part of this question required candidates to evaluate the evidence against the hypothetical client and identify whether to make a no case to answer submission. The capability to recognise when the prosecution has insufficient evidence to claim a reasonable jury properly directed could convict is a fundamental requirement for practice in any jurisdiction. It is astonishing it presented such a burden to candidates for practice in Hong Kong.

Civil Procedure

10. Questions 3, 4 and 5 addressed issues of civil procedure which could well land on the desk of a newly admitted solicitor. The answers were expected to be at the level of sophistication and experience of a solicitor at that stage. In some cases, common sense application of established procedures and procedural law was all that was sought, rather than a recitation of black letter rules. The overall pass rate was 48% on the civil

procedure side, which is down from 71% in the previous year and closer to the 2019 figure of 42%. 57% of candidates were able to pass all the civil procedure questions they attempted. Questions 3 and 4 proved easier in that an over 60% pass rate was achieved but this dropped to 23% for question 5 which might reflect the fact question 5 required a rather wider range of knowledge of civil procedure than questions 3 and 4 which were more discrete in their areas of knowledge dealing with the commencement of proceedings and the drafting of a statement of claim (question 3) and a summary judgment application (question 4).

Question 3 (pass rate 65%)

11. Question 3 asked candidates to advise a client resident in Taiwan (potential plaintiff) on his rights against a borrower under a simple loan agreement where the borrower was in default.
12. Candidates were asked to advise the client on what proceedings could be brought and in which forum and also to advise on any matters he should be aware of if legal proceedings were brought in Hong Kong.
13. Candidates were then asked to draft a statement of claim, which task constituted three-fifths of the marks available and lastly to consider and advise on a specific bare allegation in a defence.
14. The majority of candidates were able to identify and draft the statement of claim to a reasonably acceptable standard.
15. Not many candidates were able to properly identify and explain the potential issue of security for costs given the client's residence outside the jurisdiction
16. Very few candidates seemed to understand the purpose of a request for further and better particulars of an allegation in a pleading which resulted in no or very low marks being given to the majority of candidates for this part of the question.

Question 4 (pass rate 61%)

17. Question 4 concerned a client (defendant) who was being sued on a dishonoured cheque which he said he had mistakenly issued on his personal account rather than his company account. An Order 14 (summary judgment) application had been taken out by the plaintiff. The question consisted of two parts.
18. First, for 10 marks candidates were asked to explain a few short points about the Order 14 application such as what client could do to oppose it, and whether client's personal assets were at risk. This part of the question was generally well answered. However, many answers were uncannily similar, suggesting that candidates were answering with the benefit of pre-prepared notes from a common source. These answers were mostly rather general but correct and were generally awarded passing marks. Better candidates focused on the facts given in the question, resulting in better answers which were rewarded with higher marks.
19. Secondly, for 15 marks candidates were asked to draft an affirmation in opposition to the Order 14 application. To avoid going into substantive law candidates were told they

could assume that client had a good defence of total failure of consideration on the basis that liability for the payment lay with client's limited company and not himself. The overall performance was reasonably good, and the pass rate was high. Some candidates produced excellent draft affirmations and were awarded with high marks. Common mistakes among candidates who unfortunately did poorly included:

- (1) mixing up plaintiff and defendant;
 - (2) naming client's company rather than client himself as defendant when it was clear from the facts set out in the question that client had been sued personally;
 - (3) failing to put forward a defence in the affirmation, clearly or at all, meaning that the document being drafted could not possibly serve its purpose of opposing the Order 14 application.
20. There were also some candidates who assumed that client was being sued in the Court of First Instance, when the District Court would clearly have been more appropriate. However, as the choice of forum was not up to client, but the plaintiff, and given that the two courts technically have concurrent jurisdiction for this level of simple claim, this was not treated as a grave error.

Question 5 (pass rate 23%)

21. Question 5 concerned matters arising before and after the trial of an action. It embraced diverse areas relating to the giving of evidence at trial in the light of the Covid pandemic and the perennial issue of a recalcitrant witness.
22. Separately questions were put as to certain post-trial matters relating to issues of quantum after a trial with a finding of liability and appeals by both parties.
23. Disappointingly, few candidates had any real knowledge of how evidence could be given at a trial other than by viva voce testimony. This is disappointing given this has been an issue which has been the subject of several cases since the inception of Covid.
24. There was a greater understanding of the possible need to serve a subpoena on a reluctant witness although little consideration of the possible impact of compelling a reluctant witness to give evidence.
25. There seemed to be very little knowledge or understanding of a split trial between liability and quantum and the type of directions that might be sought for such a quantum hearing. On reflection this may have been a little too arcane a subject to expect widespread knowledge on the part of candidates.
26. Conversely, an understanding of the basic principles of an appeal from a trial on liability in the High Court is something of which one would expect any candidate to have a reasonable knowledge. Sadly this was not the case with a number of candidates although this part of the question was better answered than the others.

3. Past Examination Papers from 2019 to 2021

**2019 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Wednesday, 6 November 2019



2019 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

At about 20:06 hours on 8 August 2019, a police officer on duty in uniform ("P") was patrolling at Wong Tai Sin MTR Station, Kowloon, Hong Kong and saw a male young person ("X") playing with a mobile phone alone at a location near Exit B. When X noticed that P was approaching, X immediately and nervously put the mobile phone into the left pocket of his trousers and attempted to flee. P stopped X and asked to see the mobile phone. P found that there were two 'upskirt' photographic images of women captured by the phone.

P immediately arrested X and cautioned him for suspected offences of 'upskirt' photography without the consent of the subject women.

Under caution, X initially remained silent. However, after P told him in a strict and threatening tone that there was no chance for him to avoid prison and that for his own benefit, he had better tell the truth, X admitted that that mobile phone belonged to him. He stated that he put his mobile phone under an unknown woman's skirt and took a photo of her secretly at about 19:00 hours on 7 August 2019 (i.e. one day earlier) at Mongkok MTR Station.

Under further caution, X further stated that due to great study pressure and stress, he had repeated the action and again put his mobile phone (i.e. the same phone) under another woman's skirt and secretly taken a photo of her at about 20:00 hours on 8 August 2019 at Wong Tai Sin MTR Station.

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

P seized X's mobile phone and took X to Wong Tai Sin Police Station for conducting further enquiries and investigation.

Inside Wong Tai Sin Police Station, a cautioned video-recorded interview was conducted with X by another police officer, Q. At the commencement of the interview, Q reminded X of what he had said, under caution, to P, at the MTR station and told him that he (X) had no choice but to repeat the same admissions for the video-recorded interview. X then repeated, on video, the same admissions he had made to P at the MTR station. Shortly after the video-recorded interview concluded, at around 23:30 hours on 8 August 2019, a house search of X's home situated in Homantin was conducted and a number of obscene photographs, found stored in his personal computer, were seized by the police.

X was detained overnight at Wong Tai Sin Police Station. He was later charged with two counts of "Obtaining access to computer with a view to dishonest gain for oneself or another, contrary to section 161(1)(c) of the Crimes Ordinance, Cap. 200, Laws of Hong Kong" in relation to the 'upskirt' photos found on his phone at the MTR station.

X is aged 24 and today is the day of his first court appearance at Court No.1 of Kowloon City Magistracy for plea. You are a Duty Lawyer who is instructed to represent X. X is the sole child of a decent middle-class family. He is pursuing a Bachelor of Laws degree (and is in his final year) at The University of Hong Kong. His father is a highly respected doctor and his mother the principal of a well-known secondary school. X's family are supportive of him.

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

Questions:

- (1) **What would you advise X to do before plea is taken?** (6 marks)
- (2) X intends to plead not guilty to both charges. The prosecution have told you they would object to bail on the basis that there are potential further charge(s) to be laid for the obscene photographs stored in X's computer. You have instructions to apply for bail for X.
- (i) **What submissions would you make to secure bail?** (4 marks)
- (ii) **If the Magistrate refuses your bail application, what can X do?** (2 marks)
- (3) The trial has now concluded. X has been convicted of the two charges relating to the 'upskirt' photos in contravention of section 161(1)(c) of the Crimes Ordinance, Cap. 200. In convicting X, the magistrate relied on his admissions to the police, despite X challenging the admissibility of the admissions in a voir dire. **Advise X whether there are any grounds upon which he might appeal against these convictions.** (8 marks)
- (4) X was sentenced to 12 months' imprisonment for each charge, the sentences to run consecutively, resulting in a total of 24 months' imprisonment. No reports were called for prior to the sentence being passed. **Irrespective of any appeal against conviction, advise X whether there are any grounds upon which he should appeal against his sentence.** (5 marks)

[25 marks in total]

Question 2 (25 marks)

In the early morning of 16 August 2019, Denis Fong, aged 35, a Hong Kong estate agent, was arrested by Hong Kong police while attempting to drive through the Lok Ma Chau control point at the border between Hong Kong and the Mainland in his car. He was intending to take a break from work, by visiting the Mainland and meeting up with friends for a couple of weeks.

The police involved had received a tipoff and searched both Denis and his car. The officer who conducted the search of Denis' person found, in his right trouser pocket, a packet containing 13 grammes of a white substance. The substance was later confirmed by the Government Chemist to be metamphetaime hydrochloride, commonly known as "ICE". The "ICE" had been placed into several small individual plastic packets.

Under caution, Denis told police that the drugs were all for his own consumption. He claimed that he had bought the total amount at a discounted price and the 13 grammes were intended to last him for his 2-week trip. The police did not believe the drugs were for his own use and later the same day Denis was charged with trafficking in dangerous drugs, contrary to s. 4(1)(a) and (3) of the Dangerous Drugs Ordinance (Cap. 134).

Questions:

- (1) Concerned that trafficking in dangerous drugs is a much more serious charge than possession of dangerous drugs, Denis wants to challenge the charge laid. **Can he challenge the police's choice of charge? Advise him of any action he can take, before the trial commences, to have the charge against him reduced to one of possession of dangerous drugs.** (6 marks)

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

- (2) If Denis is unsuccessful in having the charge reduced and he decides to plead guilty to the charge of trafficking in dangerous drugs, can he still claim the drugs were for his own consumption? How could he bring evidence of this fact to the court's notice?**

(6 marks)

Assume that the charge is not reduced and Denis pleads guilty to trafficking in 13 grammes of "ICE". The court accepts, however, that Denis purchased all the "ICE" for his own use. Using a starting point of 18 months' imprisonment (the tariff for possession), the judge increased the sentence to 27 months to take into account the fact that Denis was caught taking the drugs over the border, then reduced the total of 27 months by one-third for the early guilty plea and arrived at a sentence of 18 months' imprisonment. The Judge justified his sentence by stating: "To do otherwise would ignore the reality of the situation, which is that there was no intention by the Defendant to supply others."

Question:

- (3) The Prosecution are not happy with the sentence passed on Denis. Can they challenge it? Identify the grounds for and procedures which should be used to challenge the sentence and the possible results of such a challenge.**

(13marks)

[25 marks in total]

Question 3 (25 marks)

Your firm represents Ms. Mavis Mo Pak Shuet ("Ms. Mo") in her personal injury claim resulting from a road accident which occurred in June 2016.

Ms. Mo was a passenger in a taxi which she flagged down in Central, asking the driver to take her home to Robinson Road. She is a 52-year-old housewife who had been shopping for a new dress to wear at the forthcoming celebration of her daughter's graduation from university.

During the journey Ms. Mo noticed that the taxi-driver had a bank of mobile telephones and other electronic devices in front of him. The driver was watching the devices, sending and receiving messages and talking animatedly. When the driver narrowly missed hitting a pedestrian, Ms. Mo scolded him.

A short time later, the taxi crashed into the back of a public light bus which had stopped to pick up a passenger. It was raining heavily at the time.

Ms. Mo had recently had an operation to remove a malignant mole on her shoulder. She found it painful to use a seatbelt. As a result she had pulled it in front of her during the journey but had not fastened it.

Ms. Mo was thrown forward in the accident. Her face hit a screen which was affixed into back of the headrest in front of her. She suffered cuts and bruises to the forehead. At the same time her false teeth were dislodged and she was so embarrassed that she left the taxi and hurried home on foot, without paying the taxi fare.

Several passengers in the back of the public light bus also suffered minor injuries.

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

Ms. Mo did not seek medical treatment. However, she was unable to attend her daughter's graduation party. She was simply too embarrassed to show her injured face in public.

The next day Ms. Mo saw a video of the accident in the online edition of the Pineapple Daily newspaper. It had apparently been taken from a camera mounted at the front of another public light bus which had been travelling immediately behind the taxi. From the video, she could see that the taxi's registration number was MX 234. The video also showed a brief interview with the taxi-driver who identified himself as Mr. Mak and complained about how difficult it is for taxi-drivers to make a living.

Later enquiries undertaken by your firm established that the registered owner of the taxi is ABC Taxi Limited, and that the driver was Mak Chung Shing, who had hired the taxi for that shift.

Mr. Mak is 46 years old and has worked as a taxi-driver for 25 years. He is married with 2 children and has lived in a public housing estate in Hung Hom, Kowloon since 1999. After the accident, he was convicted of careless driving, his 17th such conviction.

Your firm has been instructed by Ms. Mo to commence proceedings to claim compensation for the accident. You have obtained a medical report which confirms that there is a small permanent scar above Ms. Mo's left eyebrow. You have also obtained counsel's advice to the effect that Ms. Mo's damages should be around HK\$750,000 gross.

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

Ms. Mo claims that she tried to conceal her facial injury from her husband, for fear he would lose interest in her. However, she says, her husband later found a girlfriend in Dongguan, PRC. When Ms. Mo found out last month, she decided to take legal action.

Questions:

- (1) **Having regard to the provisions of the Limitation Ordinance (Cap. 347), are there any time issues which may arise in Ms. Mo's proposed action? Discuss.**

(10 marks)

- (2) **Draft a writ of summons to commence court proceedings on behalf of Ms. Mo, showing the complete heading (including the court, and the names of the parties) and a general indorsement of claim. You do not need to set out the purely formal parts of the prescribed form of writ. You may assume any facts not inconsistent with those set out above. You may add notes explaining any part of your draft.**

(15 marks)

[25 marks in total]

Question 4 (25 marks)

Facts

You act for 78-year-old Madam Wang ("Wang"), who has received a demand dated 30 June 2019 from her bank (the "Bank"). The Bank threatens High Court proceedings to obtain possession of her flat in Conduit Road, which she owns jointly with her son Kwan. The Bank says that on 11 November 2013 Kwan and Wang mortgaged the flat to the Bank to secure sums owed by Dominant Limited ("Dominant") to the Bank. Dominant is a Hong Kong-incorporated company of which Kwan is the sole director and shareholder, and he has guaranteed Dominant's borrowings to the Bank. The total amount now owed by Dominant and secured by the mortgage is HK\$8 million.

Wang remembers signing a document which she now understands was the mortgage, but says at the time she did not understand its effect. She has been totally reliant on Kwan to look after her affairs since her husband died in 2000, and simply did what he told her. She executed the mortgage at the Bank manager's office in the presence of the Bank manager, the Bank's solicitor and Kwan. The process only took about 5 minutes. No one present explained to her the risk of entering into the mortgage - that she might lose her home. She was not asked if she wanted independent legal advice. The Bank manager just said it was a standard form document and that she should sign it because her son had already done so and it was similar to other bank documents which she had signed for her son before. The document was in English, which Wang cannot speak. She was not given a copy.

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

To investigate this account, last week you asked the Bank to provide copies of:

- Any telephone or written communications between staff of the Bank discussing the mortgage;
- All attendance notes of meetings between Wang and the Bank between 2013 and 2018; and
- All practice manuals, internal guidance, procedures and written policies to be followed by the Bank's staff when attending the execution of mortgages.

The Bank has declined, saying that any such documents are not readily available because some will be stored in their back office and others have been converted into electronic form.

Questions:

- (1) Draft a letter to Wang advising her how pre-action discovery of these materials may be obtainable at this stage, and outlining the procedure, including the consequences of the application failing.**

(15 marks)

- (2) Assuming you are the advocate on such an application, prepare in bullet point form a note of the submissions you will make to the court in support of your application.**

(10 marks)

[25 marks in total]

Question 5 (25 marks)

You act for Fred's Fresh Fish Limited ("Fredco"), a Hong Kong company which supplies seafood to the catering industry, on terms which include 60 days' credit. One of the company's longstanding customers is Wallace Nip ("Wallace"), who runs a sole proprietorship business as the "Celestial Dynasty Fishball Company" ("Celestial"). However, Celestial has recently been extensively criticised in the press and on social media for allegedly adulterating its fishballs with sawdust, and the business is now in financial difficulties. Fredco has outstanding invoices totalling HK\$8,500,000 for sales of fish to Celestial, which have not been paid. All but HK\$1,000,000 of those invoices are past their 60-day credit period and are therefore now overdue. The remaining HK\$1,000,000 will be overdue in 45 days.

Last month Fred Lam ("Fred"), the Managing Director of Fredco, encountered Wallace by chance at the Happy Valley Racetrack ("Racetrack"), and he complained about the overdue account. Wallace, to pacify Fred, wrote out a cheque to Fredco for HK\$5,000,000, and promised that he would pay the rest soon. However, Wallace's bank dishonoured the cheque on presentation, and no further payment has been forthcoming. Instead, Wallace has recently sent Fred a letter making vague allegations that for several years now Fredco's fish supply has been unfit for human consumption and could not be used for making fishballs. No such allegation has ever been made before.

Such a large unpaid account has put a strain on Fredco's cashflow too. Fred has now instructed you to take action to recover the unpaid bills. He is convinced by Wallace's demeanour at the Racetrack that he has enough money to pay. Your instructions are to take whatever action will result in a money payment as quickly as possible.

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

Questions:

(1) What litigation steps will you take to attempt to get a quick payment of the sums owed to Fredco? Discuss whether a different approach is appropriate (and if so, why) for:

- (i) the HK\$5,000,000 covered by the dishonoured cheque;**
- (ii) the HK\$1,000,000 which is still within the 60-day credit period; and**
- (iii) the remaining HK\$2,500,000;**

and what the possible outcomes from those approaches are.

(15 marks)

(2) Focusing on just the HK\$5,000,000, draft an appropriate supporting affidavit or affirmation for your proposed approach, including the headings showing the court and the names of the parties.

(10 marks)

[25 marks in total]

END OF TEST PAPER

**2020 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Tuesday, 17 November 2020



2020 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

Three men, Ho, Hung and Lam have been arrested for public order offences in relation to a march organized by the Civil Human Rights Front. The charges against them are: breaches of the requirements and conditions applying to public processions under section 15(4) of the Public Order Ordinance, Cap 245, and obstructing a police officer in the due execution of his duty, contravening section 36 of the Offences Against the Person Ordinance, Cap 212.

The charges related to their failures, as organisers of the event, to hasten the movement of the procession, putting it outside of the time limits set by the police for the march and their failures to adequately move forward the procession on the instruction of a police officer.

On arrest the police seized the mobile phones (“phones”) of all three men and took possession of them on the basis that the information in the phones was suspected to be related to the offences for which the 3 men had been charged. Specifically the police took the view that the phones were likely to contain messages showing a joint enterprise between the suspects and other people showing that they intended to slow down the procession and obstruct the police.

The police had no warrant to seize the phones and have not yet inspected them. On seizure they placed them in sealed plastic tamper proof bags.

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

Question:

- (1) **Under what circumstances can the police search the seized phones? Provide authority for your answer. (8 marks)**

The trial of the three men has now commenced in the magistrates' court. Lam's defence counsel has informed the magistrate that his client will plead guilty to both charges but contends some aspects of the Summary of Facts prepared by the Prosecution relating to the public order charge are inaccurate. The magistrate intends to hold a Newton Inquiry into the facts contested by Lam. For the sake of expediency, he intends to hear the evidence on the Newton Inquiry within the same hearing as the trial of Ho and Hung.

Question:

- (2) **Can the calling and examining of witnesses on the Newton Inquiry for Lam take place in the course of the same hearing as the contested trial against Ho and Hung? Provide authority for your answer. (9 marks)**

The trial has concluded and Ho, Hung and Lam have all been convicted of the public order offence (Lam on his own plea). Ho and Hung were acquitted on the charge of obstructing the police while Lam pleaded guilty to that offence. Ho and Hung have been sentenced to 6 months' imprisonment and Lam to 8 months' imprisonment by the magistrate.

Question:

- (3) **Ho and Hung want to challenge the magistrate's decision to refuse to award them costs on their acquittal of the obstruction of police charge. On what basis can they have this decision reviewed? Provide authority for your answer. (8 marks)**

[25 marks in total]

Question 2 (25 marks)

Harry is a successful business man in Hong Kong who emigrated 5 years ago from Nigeria. You have acted as his lawyer since he arrived in Hong Kong.

Harry operates a chain of clothing distribution stores in Hong Kong but is not yet a Hong Kong permanent resident. He was recently married to a Hong Kong permanent resident. He and his wife own no properties in Hong Kong and live in a rented apartment in Happy Valley. Harry very recently bought a car and hired a local man, by the name of Mohan, to drive it as Harry does not drive.

Two days ago, after entertaining clients at a restaurant dinner, Harry was collected by Mohan, in Harry's car, to be driven home.

On the way home, Harry's car was stopped by police, just outside the Happy Valley race course. The police had received an anonymous tip that a car carrying a large amount of cannabis would be driven through that area that evening and had several road blocks in place.

On searching the boot of Harry's car, the police discovered one hundred small individual packets of suspected dangerous drugs (believed to be herbal cannabis). The total weight of the suspected dangerous drugs was nine kilograms.

Both Harry and Mohan were arrested for suspected trafficking in a dangerous drug.

The police seized a set of car keys from Mohan which opened all the car doors and the boot compartment of the car where the packets of cannabis were found.

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

On a search of Harry's person the police found another set of car keys, which opened the car doors, but was not able to open the car boot.

Later that night at the police station, Harry gave a signed statement in which he stated he regularly smoked a herbal medicine for his allergies. He bought it online from a herbal doctor who had advised him that it would assist in fixing his coughing caused by air pollution. He was not certain if the packets found in his car were the medicines he had purchased as he had not paid attention to the way they were packed in the last shipment he ordered.

Mohan remained silent under caution.

Both men were later charged with trafficking in nine kilograms of herbal cannabis contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134.

Questions:

- (1) Mohan and Harry were denied police bail on the basis that the charges against them were too serious. They wish to secure bail from a magistrate. **What arguments should be made in support of applications for bail for both Harry and Mohan? Identify any further information you would require from Harry and Mohan in order to assist in preparation for their bail hearings.**

(7 marks)

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

- (2) Harry has asked you to represent both him and Mohan. He will pay for the defence of both as Mohan does not have sufficient assets to employ his own lawyers. **Is it appropriate for you to act for both men? What advice would you give them about this?**

(6 marks)

- (3) Before the trial is due to commence you learn that a Government Chemist Certificate which had identified the matter in the packets as cannabis was wrong and in fact the matter is a herbal medicine, as Harry had suggested to the police. **What action should you take?**

(6 marks)

- (4) **Would your answer to (3) above differ if you learned of the mistaken identification of the drugs after the men had been convicted? If so, why?**

(6 marks)

[25 marks in total]

Question 3 (25 marks)

Facts

Your firm acts for a property developer (“Prop Dev”). Prop Dev is re-developing a prime site in Central (28 Golden Path). The plans are for a 55-storey top grade commercial building on the site. The project has been delayed. Your firm has issued a writ on behalf of Prop Dev against the main contractor, China Dream, claiming damages for the delay.

Your firm has just received a Notice of Sanctioned Payment (“NSP”) served by China Dream’s solicitors. Prop Dev seeks your advice as to the significance of the NSP and how to respond.

The background to the dispute is as follows:

Prop Dev entered into a contract in June 2017 with China Dream for construction of the new building. The agreed price was HK\$10 billion (HK\$10,000,000,000), all inclusive. The contract expressly stipulated that the new building was to be completed within 3 years from the date of the contract, that is by the end of June 2020.

The most recent estimate is that the new building will not be ready for occupancy until the end of 2021. Prop Dev is losing rental income which it estimates at HK\$50 million per month.

As a result of the delay, Prop Dev, on 15 August 2020, instructed your firm to take action to recover damages.

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

Your firm issued the writ on behalf of Prop Dev on 17 August 2020 claiming damages of HK\$50 million per month over a period of 1.5 months (i.e. HK\$75 million) for the period from end June to mid-August 2020, and continuing until actual completion.

On 15 September 2020, China Dream served a defence alleging that it was unable to complete on time because of the Covid-19 pandemic, which had caused delays in importing necessary materials and workers. This, according to China Dream's defence, excused it from liability by reason of a force majeure clause in the contract. In the alternative, it is pleaded that the Covid-19 pandemic has caused a downward correction in the rental market, meaning that Prop Dev would not have been able to rent out the units at 28 Golden Path for anything more than HK\$35 million per month.

The NSP (served on 2 November 2020) shows that HK\$630 million (representing HK\$35 million per month for the whole of the estimated delay) was paid into court in settlement of the whole of Prop Dev's claim.

Question:

Draft a letter of advice to Prop Dev on the legal significance of the NSP and how Prop Dev should respond, including the pros and cons of accepting the offer.

(25 marks)

[25 marks in total]

Question 4 (25 marks)

Facts Part 1

Your firm acts for Honest Buyer Limited (“HBL”), who has entered into an agreement with Bad Seller Limited (“BSL”) whereby BSL acting as seller has agreed to sell certain goods to HBL as buyer for a total contract price of HK\$20 million. Both HBL and BSL are limited companies incorporated in Hong Kong. The sale and purchase agreement (“Agreement”) contained, inter alia, the following term:

“3. Payment of Contract Price

- (a) *HBL agrees to pay BSL the contract price of HK\$20 million in the following manner:*
- (i) *The sum of HK\$10 million representing 50% of the contract price shall be paid by HBL to BSL within 7 days after the execution of this agreement; and*
- (ii) *The further sum of HK\$10 million representing the remaining 50% of the contract price shall be paid by HBL to BSL upon acceptance of the goods by HBL under this agreement.*
- (b) *Payment of the contract price by HBL under clause 3(a) above shall be made by way of wire/telegraphic transfer to the following bank account of BSL:*

Bank Name: Super Bank Limited, Hong Kong

Bank Address (Head Office): 2 Central Road, Hong Kong

Bank Account No: 011-88882222-05

Name of Account Holder: Bad Seller Limited’

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

In accordance with the Agreement, HBL duly paid 50% of the contract price (HK\$10 million) to BSL. However, BSL subsequently defaulted and was unable to deliver the goods to HBL.

HBL approached you and your firm seeking legal advice concerning possible legal action against BSL. You advised HBL to commence court proceedings in Hong Kong, and subsequently you issued a Writ of Summons together with a Statement of Claim in which HBL as Plaintiff claims against BSL as Defendant for:

- (i) payment of the HK\$10 million which HBL previously paid to BSL; and
- (ii) damages for the breach of the agreement by BSL.

The Agreement gives the address of BSL as No. 31 Fortunate Road, Hong Kong, which, according to a search you conducted, is also the registered office of BSL. You have carried out service of the Writ of Summons and the Statement of Claim on BSL. BSL has however failed to file an acknowledgement of service.

For purpose of the questions, you may ignore any issues concerning interest and costs.

Questions:

- (1) Explain what immediate procedural step HBL can take in light of BSL's failure to acknowledge service, what HBL would be entitled to obtain by taking such step, and any necessary procedural requirements which need to be satisfied.**

(5 marks)

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

- (2) Would there be any difference to your answer to question (1) if BSL had appointed solicitors and filed an acknowledgement of service, but subsequently failed to file a Defence? If so, what difference?**

(2 marks)

Facts Part 2

Time has passed, and HBL has now obtained judgment against BSL for HK\$10 million. BSL has paid HK\$ 4 million to HBL in partial satisfaction of the judgment, but despite further demand, HBL has received no further payment from BSL. HBL's information is that BSL's business is performing well, and it has plenty of cash in the bank.

Questions:

- (3) What application can HBL make now to pursue the remainder of its judgment against BSL?**

(3 marks)

- (4) Draft the necessary supporting affidavit or affirmation (including headings and name of parties) required for purpose of the application you have identified in (3) above. The affidavit or affirmation should include reference to all relevant documents/exhibits which you consider are necessary to be included as supporting evidence to the affirmation and the application. You may assume and state in the affidavit/affirmation any necessary facts not inconsistent with the facts given above.**

(15 marks)

[25 marks in total]

Question 5 (25 marks)

You act for Mr. Sylvester Wu (“Wu”), one of Hong Kong's most eminent (and expensive) plastic surgeons. He has had a career spanning 4 decades, and hitherto an unblemished reputation. Six months ago, Wu was consulted by Monsta-Z (real name Joe Wang (“Wang”)). Wang is the lead singer in the successful Taiwanese boy band FormosaBoyz. He sought Wu's advice on having nose implant surgery to give him a pointier nose. After the consultation, Wang decided to have the surgery, and Wu performed the procedure on him a week later.

Wang was very unhappy with the outcome. He claims the implant was too large and was attached at a crooked angle, making it look as if he has a broken nose, detracting from his characteristic good looks and undermining his career as a performer.

After the surgery, FormosaBoyz decided to cancel their planned 14 venue tour of South-East Asia. On 15 July 2020, the band's publicity agents in Hong Kong, Mere Puff, issued a press release apologising to the band's fans, using the excuse that Monsta-Z had been "disfigured by clumsy surgery" and naming Wu as the culprit. This was picked up and quoted by various Hong Kong media publications.

Wang has now returned to Taiwan. On his popular social media platform, Monsta-Z.com, he has continued to make disparaging and emotional remarks about Wu's skill as a surgeon, including one post on 2 August 2020 describing him as "The Demon Butcher of Wanchai".

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

Wu has noticed a marked decline in his plastic surgery bookings which he believes is the result of this bad publicity. He has decided that he must act to vindicate his reputation, so he has instructed you to issue proceedings for defamation against Monsta-Z (Wang) and Mere Puff. Mere Puff is an unincorporated firm run and owned by Steve Mere and Elijah Puff. Elijah Puff lives and works in Hong Kong, while Steve Mere runs the firm's Singapore office.

Questions:

- (1) Prepare a suitable concise endorsement of claim for inclusion on the writ. Your answer should include only the substantive drafting – you are not required to include the title of the action or other formal matters. (3 marks)**
- (2) What is the quickest way to serve the proceedings on Mere Puff? (4 marks)**
- (3) (i) What application will you need to make before you can serve the proceedings on Monsta-Z (Wang)?**
(ii) On what basis (or bases) will you make the application?
(iii) What will you need to show?
(iv) What procedure will you follow? (8 marks)
- (4) Draft the contents (but not the formal parts) of a short affirmation or affidavit in support of your application. (10 marks)**

[25 marks in total]

END OF TEST PAPER

**2021 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Friday, 5 November 2021



2021 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

Part A

Abel, Cain and Zach are all fresh graduates of the University of Hong Kong having just passed the Postgraduate Certificate in Laws course. They decided to have a night out to celebrate their success in Central, Hong Kong. Having visited several bars in Lan Kwai Fong, they became intoxicated with alcohol. At one point, Cain and Zach decided to go home and sleep their drunkenness off. Abel was left alone in a bar.

At 2:00 am, Abel prepared to leave the bar, having got the impression that the final bar tab had been settled by either Cain or Zach. He was stopped by Jim, the manager, at the door, as the bill was not paid. Jim told Abel the bill was for HK\$3,000. Abel had spent all his cash at the previous establishments and did not have any credit cards. Abel explained to Jim that it was common practice for the bar tabs to be divided between him and his friends, Cain and Zach. He was prepared to settle his share of the bar bill for HK\$1,000, only Abel had no cash and needed to visit an automatic teller machine to get more. Jim would not let Abel leave. Abel tried several times to telephone Cain and Zach but neither answered his calls.

In desperation, Abel tried to push past Jim, kicking into chairs and a table as he went. A waiter, Bill, saw what was happening and tried to assist Jim. Feeling threatened by the men, Abel picked up an empty beer bottle and struck Bill with it to the head, causing him to bleed.

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

Police were called and Abel was arrested and taken back to the police station where he was allowed to sober up before interview. The next morning, when Abel had sobered up, he cried and told the police, under caution, that he did not recall any of the previous night's events.

Abel was subsequently charged with:

- Criminal damage to the table and chairs, contrary to section 60, in Part VIII of the Crimes Ordinance, Cap. 200.
- Making off without payment for the drinks contrary to section 18C of the Theft Ordinance, Cap 210.
- Assault occasioning actual bodily harm against Bill, contrary to section 39 of the Offences Against the Person Ordinance, Cap 212.

All three offence sections are attached below.

Question:

(1) You represent Abel. **Advise him where his case is likely to be tried.**

(13 marks)

Part B

You have recently learned that all three students, Abel, Cain and Zach are members of the Student's Union of the University of Hong Kong and took part in actions which are alleged to have contravened the National Security Law ("NSL"). As such, all three students were subsequently arrested and charged with an offence against the NSL.

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

Question:

(2) What is the prospect of the students obtaining bail pre-trial?

(12 marks)

[25 marks in total]

Attachment

Crimes Ordinance, Cap 200, Part VIII Criminal Damage to Property

Section 60. Destroying or damaging property

- (1) *A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.*
- (2) *A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—*
- (a) *intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and*
- (b) *intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered,*
- shall be guilty of an offence.*
- (3) *An offence committed under this section by destroying or damaging property by fire shall be charged as arson.*

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

Section 63. Punishment of offences

- (1) *A person guilty of arson under section 60 or of an offence under section 60(2) (whether arson or not) shall be liable on conviction upon indictment to imprisonment for life.*
- (2) *A person guilty of any other offence under this Part shall be liable on conviction upon indictment to imprisonment for 10 years.*

Theft Ordinance, Cap 210

Section 18C. Making off without payment

- (1) *Subject to subsection (3), a person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent to avoid payment of the amount due shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 3 years.*
- (2) *For the purposes of this section **payment on the spot** includes payment at the time of collecting goods on which work has been done or in respect of which service has been provided.*
- (3) *Subsection (1) shall not apply where the supply of the goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable.*

Offences Against the Person Ordinance, Cap 212.

Section 39. Assault occasioning actual bodily harm

Any person who is convicted of an assault occasioning actual bodily harm shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for 3 years.

Question 2 (25 marks)

Your client, an 18-year old Chinese national, has been charged with one count of trafficking in a dangerous drug, namely 1 kilogramme of a crystalline solid containing 0.9 kg of methamphetamine hydrochloride (known as ice). He was intercepted at the Hong Kong airport after attempting to board a plane destined for Auckland, New Zealand with the drugs in his bag.

The drugs were found inside a gaming console. They were wrapped inside plastic bags and inserted into the console's main cavity. None of the bags were marked with fingerprints, however one of the bags showed DNA material which may have come from the defendant.

On arrest, the defendant denied knowledge of the drugs. He agreed, however, that he knew that there was a powder inside the console. In a video-recorded interview with the police, he claimed he had been asked by a friend to carry the powder inside the console to his friend's grandmother who lives in New Zealand. The powder, he believed, was a kind of legal traditional Chinese medicine. His friend said it was better to carry it in a concealed way to avoid unnecessary questions and delay by ignorant border patrol officers in New Zealand. After his interview, he produced to you a series of email messages on his laptop showing that he had been told by his friend repeatedly that the console contained nothing illegal.

The prosecution's case relies on the presumption of knowledge in section 47 of the Dangerous Drugs Ordinance Cap 134, which states:

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

“47. Presumption of possession and knowledge of dangerous drug

- (1) *Any person who is proved to have had in his physical possession—*
- (a) *anything containing or supporting a dangerous drug;*
 - (b) *the keys of any baggage, briefcase, box, case, cupboard, drawer, safe-deposit box, safe or other similar container containing a dangerous drug,*
- shall, until the contrary is proved, be presumed to have had such drug in his possession.*
- (2) *Any person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug.*
- (3) *The presumptions provided for in this section shall not be rebutted by proof that the defendant never had physical possession of the dangerous drug.”*

The defendant wishes to rely on the email messages to defend himself at trial.

Question:

- (1) **Assuming your client is permitted to rely on the messages as part of his defence, what direction would the trial judge need to give the jury on the use of the evidence in determining the guilt or innocence of your client?**

(12 marks)

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

The trial has now begun. At the close of the prosecution's case, the case against your client relied on his possession of the drugs (inside the console), and the possible DNA match on one of the plastic bags containing the drugs. No other evidence against him was offered.

Question:

- (2) Prior to commencing the defence case before the jury, what application would you make to the trial judge?

(13 marks)

[25 marks in total]

Question 3 (25 marks)

Raymond Chen (“Mr. Chen”) is a wealthy businessman. Mr. Chen lives in Taiwan but travels to Hong Kong from time to time for business matters.

During a visit to Hong Kong in early January 2020, Mr. Chen met up with one of his long-term business partners, Mr. Henry Lau (“Mr. Lau”), who conducts his business through “Lau Trading Company Limited”, a company incorporated in Hong Kong of which Mr. Lau is the sole shareholder and one of the directors.

At the meeting, Mr. Lau told Mr. Chen that his business was not going well lately and that he was having some cash flow problems because a number of his customers have delayed in settling payments due to Mr. Lau, and in turn, Mr. Lau was unable to settle payments owed to his suppliers.

Mr. Lau mentioned that he needed around HK\$4 million to pay off outstanding business expenses in particular the payments due to his suppliers who had already threatened to sue him if they did not get paid soon.

Mr. Chen wanted to help his long-term business partner and offered to lend the money to Mr. Lau. Mr. Chen informed Mr. Lau that he would need a few days to make some financial arrangements, after which he will then have the cash available to lend to Mr. Lau.

Mr. Chen has a bank account in Hong Kong which he uses to settle business costs and expenses in HKD currency, such as payments due to his clients/customers in Hong Kong, when necessary. Mr. Chen does not maintain a large amount of money in the Hong Kong bank account and only puts in funds when needed.

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

After the meeting, Mr. Chen and Mr. Lau had a number of follow up discussions over the phone regarding the details of the intended loan to Mr. Lau. Mr. Chen also arranged to transfer money into the bank account in Hong Kong for the purpose of the intended loan to Mr. Lau.

Mr. Chen and Mr. Lau met again on 25th January 2020. At the meeting, Mr. Chen and Mr. Lau signed an agreement containing, inter alia, the following terms:

“This Agreement is made on 25th of January 2020 between

Raymond Chen of 1 Tao Yuen Road, Taipei, Taiwan (“Lender”); and

Mr. Henry Lau of 23rd Floor, Lucky Building, Kowloon Bay, Hong Kong (“Borrower”)

...

- 1. The Lender agrees to lend the sum of HK\$4 million (“the Loan”) by way of a personal loan to the Borrower on or before 31st January 2020.*
- 2. The Borrower shall pay interest on the outstanding principal amount of the Loan at the rate of 4% per annum which shall accrue from 31st January 2020 until full repayment of the Loan by the Borrower to the Lender.*
- 3. Subject to any further agreement between the Lender and the Borrower, the Borrower shall repay the Loan in full to the Lender by 31st January 2021 (“Repayment Date”) together with all unpaid accrued interest due under this Agreement. The Borrower may repay all or part of the Loan at any time prior to the Repayment Date.*

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

....

16. This Agreement is subject to Hong Kong Law and any disputes shall be determined by the Hong Kong Courts.”

Mr. Chen issued a cheque for HK\$2 million in favour of Mr. Lau, which he passed to Mr. Lau during the meeting, as part of the HK\$4 million loan. Mr. Chen told Mr. Lau that he would transfer the remaining HK\$2 million loan to him within the next few days. Mr. Lau subsequently deposited the cheque, which was duly cleared by the bank, and Mr. Chen also transferred the remaining HK\$2 million loan to Mr. Lau’s bank account in Hong Kong on 31st January 2020.

Mr. Chen returned to Taiwan in February 2020. Towards the end of 2020, Mr. Lau contacted Mr. Chen via instant messaging and the following exchanges took place:

“28th December 2020

Henry Lau:

Hi Raymond, trust everything is going well and you are staying safe and healthy. Regarding the 4 mil loan, I would need some further time to arrange repayment to you.

Raymond Chen:

Thanks Henry and yes I am doing well. I am generally okay to give you further time to repay, but can you give me an idea how long you need?

Henry Lau:

A few more months, but perhaps to stay safe, I would say by 31st August 2021, and I am pretty confident that I will be able to repay the loan to you by then and I will honour the payment of interest due as per the loan agreement we signed back in January.

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

Raymond Chen:

Ok Henry, I can agree to extend the repayment deadline to 31st August 2021.

Henry Lau:

Many thanks Henry for agreeing to this.”

On 18th April 2021, Mr. Chen received an instant message from Mr. Lau, stating “*Hi Raymond, I have today transferred HK\$500,000 to you as partial repayment of the HK\$ 4mil loan. Please check for receipt*”. On the same day, Mr. Chen responded to Mr. Lau, stating, “*Thanks, Henry. I confirm receipt of the HK\$500,000 you mentioned*”.

Mr. Chen has received no further payment from Mr. Lau in respect of the HK\$ 4 million loan by the repayment date, and despite having sent a number of messages to Mr. Lau to enquire about the status, Mr. Lau did not provide any response to Mr. Chen.

Mr. Chen has recently returned to Hong Kong for business, and using the occasion, he has approached you and your firm seeking advice on recovery of the outstanding loan from Mr. Lau.

Questions:

- (1) Explain what formal legal proceedings can be taken against Mr. Lau, how they can be commenced, and whether there are any issues which Mr. Chen needs to be aware of if he is to commence legal proceedings in Hong Kong against Mr. Lau.**

(4 marks)

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

- (2) Your firm, acting on behalf of Mr. Chen as the Plaintiff, has commenced legal proceedings against Mr. Lau. **Draft the necessary pleading (including headings and name of parties) required for the purpose of pursuing the formal legal proceedings against Mr. Lau. The pleading must include the necessary components to comply with any necessary procedural requirements of the Rules of Court. You may assume and state in the pleading any facts (including dates) not inconsistent with the facts/information as provided in this question which you consider are necessary for the purpose of drafting the pleading.**

(15 marks)

- (3) Mr. Lau appointed a firm of solicitors to represent him as the Defendant in the legal proceedings. Mr. Lau's solicitors subsequently served a pleading containing, inter alia, the following allegation:

“ ...

6. *It was agreed that Lau Trading Company Limited would be liable to repay the loan to the Plaintiff*

... ”

Mr. Chen has instructed you he has no recollection or any information relating to the above alleged agreement.

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

Explain:

- (i) What would be the most appropriate procedural step that Mr. Chen/Plaintiff can take if he wants to seek additional information from Mr. Lau/Defendant in respect of the above allegation;**

- (ii) Based on your answer to (3)(i) above, draft the appropriate wording setting out the additional information which you (on behalf of Mr. Chen/Plaintiff) intend to seek from Mr. Lau/Defendant in respect of the above allegation.**

(6 marks)

[25 marks in total]

Question 4 (25 marks)

Your firm acts for Mr. Wong Ming San (Mr. Wong) who carries on business through his company, WMS Contractors Limited (WMS Ltd), renovating residential properties in Hong Kong.

Mr. Wong has instructed your firm with regard to legal proceedings which have been brought against him. His initial instructions are as follows:

Mr. Wong was approached by Top Peak Landlord Limited (Top Peak) to renovate a house owned by it at Papaya Garden, The Peak. The agreed price was HK\$6 million. A standard form WMS Ltd contract was signed by both parties, with an addendum, added by Top Peak, providing that if for any reason the renovation works could not be completed by 30 June 2021, Top Peak had the right to terminate the contract and would not be liable for any sum thereunder. Mr. Wong did not seek legal advice when entering into this contract.

Because of material and manpower shortages during the Covid 19 pandemic, the renovations could not be completed by 30 June 2021. Top Peak terminated the contract and demanded repayment of HK\$2,500,000, being the amount of work-in-progress payments it had made. Top Peak also threatened to sue for damages resulting from the loss of rental income. After some discussions between Mr. Wong and Top Peak, it was agreed that the HK\$2,500,000 would be refunded on condition that Top Peak would waive its threatened claim for damages. This settlement agreement was purely oral.

Mr. Wong then issued a cheque for HK\$2,500,000 in favour of Top Peak and handed it over.

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

Later the same day Mr. Wong realised that he had used the wrong cheque book, that he should have drawn the settlement cheque on the account of WMS Ltd rather than on his personal account. First thing the next morning Mr. Wong instructed his bank to countermand the personal cheque. As a result the personal cheque was dishonoured by the bank on presentation.

Before Mr. Wong had an opportunity to discuss the matter with Top Peak, or consult solicitors, he was served with a writ, naming him as sole defendant. The writ was indorsed with a statement of claim seeking judgment for HK\$2,500,000, being the amount of the dishonoured cheque, plus interest and costs.

Your firm was then instructed, and you filed and served notice of intention to defend.

Before you had the time to file a Defence, your firm, as solicitors for Mr. Wong, was served with a summons and affirmation seeking summary judgment under Order 14.

The statement of claim is very short. It deals only with the cheque issued by Mr. Wong, and its dishonour, without mention of any of the background facts. The affidavit in support of the O 14 application verifies the statement of claim and produces a copy of the cheque, with the bank's "refer to drawer" notice as an exhibit.

Mr. Wong's instructions are that he is a simple man, born in the Mainland, able to understand only limited English; that he did not understand the addendum Top Peak inserted into the contract, and that he made a genuine mistake in issuing the cheque on his personal account. He wishes to protect his own personal assets, which consist largely of the flat where he and his family live, as well as his life savings in his personal bank account.

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

In the meantime WMS Ltd has become insolvent, as a result of the downturn in business and disputes with other clients. A winding-up petition has been issued against it, meaning that it is not in a position to pay any part of the HK\$2,500,000 owing to Top Peak.

A senior member of your firm has suggested that Mr. Wong may have a defence on the basis of total failure of consideration, since the written renovation contract was expressly stated to be between Top Peak and WMS Ltd. For the purpose of this question, you may assume that this suggestion is correct, or at least arguable.

Questions:

- (1) Prepare brief notes for your supervising partner to use in a forthcoming meeting with Mr. Wong to seek his further instructions. Your notes should set out (briefly):**
- (a) the nature of an O 14 application;**
 - (b) the consequences if the O 14 application is not opposed, or not opposed successfully;**
 - (c) what Mr. Wong could do to oppose the application, should he wish to do so;**
 - (d) whether Mr. Wong's personal assets could be at risk.**

Your brief notes may be in point form.

(10 marks)

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

(2) Prepare a draft affirmation in opposition to the O 14 application. You should include the full heading and the full names of the parties. You should also include the necessary formal parts. If you choose to exhibit documentary evidence, you may do so simply by referring to it in the body of the affirmation without actually writing down the contents of the exhibit itself. For extra credit, you may add footnotes explaining any part of your draft.

(15 marks)

[25 marks in total]

Question 5 (25 marks)

You act for Mr. Xyllius Yung. Mr. Yung's was head of research in Hong Kong for Advanced Bio-Tech Corp, a Mainland Chinese bio-tech company, until his employment was terminated in 2017 with payment in lieu of notice following an internal investigation and disciplinary process, including an appeal, which ultimately found that, whilst he was not guilty of either dishonesty or recklessness, he had committed a serious error of judgement in his managerial responsibilities, including lack of control over subordinates. The date of termination was one month before the vesting date of various stock options granted to him under Advanced Bio-Tech Corp's employee incentive plan. Mr. Yung claims in his Hong Kong High Court action that the termination of his employment was in bad faith: other managers had an equal or larger responsibility for supervising the subordinates in question, but no disciplinary action was taken against them; and the primary motivation for terminating his employment was to deprive him of the benefit of the stock options. He claims damages of HKD 50 million, together with interest. In a second claim in the same action, Mr. Yung seeks an injunction restraining Advanced Bio-Tech Corp from continuing one line of research which he has claimed is dependent on the use of certain bio-tech patents, the licence for which was only granted in favour of Advanced Bio-Tech Corp for the duration of his employment and six months thereafter. Advanced Bio-Tech Corp is defending the patent infringement counterclaim on various grounds, including in particular that the line of research it is conducting does not involve any infringement of the patents. In addition to permanent injunctive relief, Mr. Yung also seeks damages for infringement based on a fair market value of the patent. There is no interim injunction in place.

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

Part A

The trial is scheduled for 15 days commencing on Monday, 28 February 2022. The trial will deal only with liability in relation to Mr. Yung's patent infringement claim, and not quantum. Both sides have submitted reports on behalf of an independent expert in relation to the patent infringement claim, addressing the question of whether there has been any infringement. Mr. Yung was able to find a suitable expert witness in Hong Kong. Advanced Bio-Tech Corp has served and filed 6 witness statements: the two internal audit officers who conducted the internal investigation; two out of the three members of the disciplinary review committee that first heard his case; and two out of three of the members of the disciplinary appeal committee that heard Mr. Yung's unsuccessful appeal from the decision of the disciplinary review committee.

The Pre-Trial Review is scheduled for hearing for 1 hour on Friday, 3 December 2021 before the trial Judge.

Questions:

- (1) You have just received a letter from Advanced Bio-Tech Corp's solicitors requesting that the plaintiff consents to leave for all six of its factual witnesses to give evidence by way of video-conferencing facilities in 5 different locations – two from Singapore; one from Dubai; one from Paris; one from London and one from New York on the basis that, in the light of the Covid-19 situation, there is a real likelihood of it not being feasible for them to travel to Hong Kong to give evidence, and none of them is willing to risk doing so in the present circumstances. You know that Mr. Yung was very hopeful the witnesses would be cross-examined in person, given the allegations of bad faith made by him.

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

Draft a suitable letter of advice to Mr. Yung explaining to him: (i) how the High Court would normally (in the absence of Covid-19) consider such an application for leave for evidence to be given by witnesses by video-conference, (ii) how the High Court may consider the Defendant's application for leave given Covid-19, and (iii) what procedural steps would be involved in the Defendant making an application for leave.

(7 marks)

- (2) Mr. Yung's expert witness has indicated some reluctance to Mr. Yung to give evidence at the trial – the expert appears to be getting “cold feet”. What steps would you take to protect your client's position?**

(5 marks)

Part B

Following the trial, a written judgment is handed down dismissing Mr. Yung's first claim, but allowing his second patent infringement, subject to calculation of damages. The judgment does not deal with any aspect of the costs of the proceedings. The judgment contains a direction for a hearing to be scheduled to take place within 4 weeks of the date of the judgment for the purpose of (i) hearing the parties on questions of costs, and (ii) giving directions for the trial on quantum of the patent infringement claim.

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

Questions:

- (3) Describe in outline the procedure if either Advanced Bio-Tech Corp or Mr. Yung wishes to appeal against the part of the judgment that they respectively lost.

(6 marks)

- (4) On behalf of Mr. Yung, what directions should be sought in respect of the outstanding trial on quantum and what arguments should be made in respect of the costs of the action to date?

(7 marks)

[25 marks in total]

END OF TEST PAPER