

2024 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD II: CIVIL AND CRIMINAL PROCEDURE

Wednesday, 13 November 2024



2024 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

You received urgent instructions from an organization “Help for Domestic Helper HK” regarding an overseas foreign worker (“OFW”) named Denise Santana (“Denise”). The note read as follows:

“Dated 1 October 2024

Urgent help required for Miss Denise Santana, aged 45, an OFW from Manila.

Denise has a clear record in Hong Kong.

Denise was an OFW who has been working and looking after an elderly couple, Mr. and Mrs. Chan (no children or other persons) for over 10 years in Blue Pool Road, Happy Valley on Hong Kong Island.

Recently, Mrs. Chan discovered that cash in the sum of HK\$5,000 was unaccounted for from the market shopping money Mrs. Chan prepared for Denise.

Mrs. Chan also discovered that a pair of pearl earrings worth HK\$10,000 (a gift from Mr. Chan to Mrs. Chan on their 30th wedding anniversary) was missing from her main unlocked drawer on Mrs. Chan’s dressing table.

As a result, Mr. and Mrs. Chan questioned Denise at home from midnight till the early morning on 10 September 2024.

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

At first, Denise denied having stolen the cash and the earrings.

After some 5 hours of oral interrogations by the Chans, with threats that they would beat Denise with a cane, report the theft to the police and to the Philippines Consulate, and deprive Denise of water and food, Denise finally admitted in writing in Chinese to the Chans, that she did use the cash of HK\$5,000 to pay for the hospital bill of her husband who had a motorcycle accident in Manila.

But Denise maintained she has not seen the pair of pearl earrings.

The Chans also made a search of Denise's personal possession without Denise's consent, but the pair of pearl earrings was not discovered in Denise's personal items.

As a result of Denise's confession, the Chans reported the theft to the Happy Valley Police Station.

Denise was arrested by the Happy Valley Criminal Investigation Department ("CID") on 12 September 2024 and was charged with two counts of theft from Mr. and Mrs. Chan first of cash in the sum of HK\$5,000 and second of a pair of earrings worth HK\$10,000.

No further native language version of Denise's cautioned statement was obtained. But Mr. and Mrs. Chan both gave witness statements in Chinese."

Questions:

- (1) Explain in details if the confession from Denise is admissible in Court and why.

(6 marks)

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

- (2) You are asked to apply for bail for Denise, what grounds would you submit to the Magistrate for his/her consideration for bail, if applicable?**

(6 marks)

- (3)** After further investigation by the CID at several pawn shops in the Wanchai area, Hong Kong, the Chans' pair of pearl earrings was found to have been pawned at Glory Pawn Shop by one Jenny Vargas ("Jenny").

There is no further information if there is any personal direct or indirect connections between Denise and Jenny.

I have recently come to discover this information before the plea day.

What application will you be making to the Court on the plea day regarding the charge of theft of the pair of earrings?

(6 marks)

- (4) Advise Denise how she should plead and why.**

(7 marks)

[25 marks in total]

Question 2 (25 marks)

Mary, aged 35, is an Australian who was born and raised in Sydney, Australia. She is single with her parents in Sydney. Mary is the only child in her family. She is a Native-speaking English Teacher in a local primary school in the New Territories, Hong Kong. She has been working in the same school for 5 years. Mary has no criminal record.

Peter, aged 36, is a locally born Chinese. He is Mary's boyfriend. They cohabitated together for 2 years. Peter is an insurance agent. He has a criminal conviction for "possession of a dangerous drug" 15 years ago. He was put on probation for 12 months.

On 30 August 2023, Mary and Peter came back to Hong Kong from Bangkok after a holiday trip. A Custom & Excise officer found a pack of substance suspected to be cocaine ("the Seized Drug") in a concealed compartment in their luggage. Both of them were arrested by the Custom & Excise Department.

Questions:

Assuming you are acting for the Prosecution for question (1).

- (1) On 2 September 2023, Mary and Peter were jointly charged with "unlawfully trafficking in a dangerous drug". They were brought before West Kowloon Magistrates' Court for mention. The Prosecution asked for (a) no plea to be taken from Mary and Peter; and (a) an adjournment of the case for 8 weeks.

Explain on what grounds the application for adjournment was made.

(4 marks)

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

Assuming Mary and Peter were separately legally represented and you are acting for Peter for questions (2) to (4).

- (2) Peter pleaded not guilty to the charge of “unlawfully trafficking in a dangerous drug”. He was granted bail pending trial. His case was tried before a District Judge. He was convicted after trial and sentenced to imprisonment for 2 years. He would like to ask for bail pending appeal.

Advise Peter.

(4 marks)

- (3) **Would your advice in question (2) be different if his case was tried before a Magistrate?**

Advise Peter.

(2 marks)

- (4) Peter’s application to the Court of Appeal for leave to appeal against conviction was refused by a single judge of Court of Appeal. Peter is not satisfied with the refusal. He wishes to attempt further appeal.

Advise what Peter may do and what he should be warned.

(5 marks)

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

Assuming Mary and Peter were separately legally represented and you are acting for Mary for question (5).

- (5)** Mary admitted to you that (a) she knew that the Seized Drug was cocaine; (b) the Seized Drug was provided by an agent arranged by her friend, George who is a drug dealer; (c) she was paid HK\$10,000 by George for bringing the Seized Drug to Hong Kong; (d) Neither did Peter know the Seized Drug was cocaine nor participate in the trafficking of the Seized Drug; and (d) she would plead guilty to the charge.

Advise Mary what important factors the court would consider when sentencing Mary apart from her timely guilty plea. What further instructions do you need to take from Mary for her mitigation? What would be the procedure that you would adopt so that Mary's interest would be fully protected?

(10 marks)

[25 marks in total]

Question 3 (25 marks)

Mr. Ian Wong (“Ian”) came to seek your advice about a loan he has made to Mr. Nicholas Chan (“Nicholas”).

Background

Ian is a businessman and a long-time friend of Nicholas.

Nicholas is the sole director and shareholder of Digital Innovation Limited (“DIL”) which was set up in early 2021 providing blockchain technology.

In January 2023, Nicholas invited Ian to invest in DIL to which Ian agreed. He purchased 50% of the shares in cash but left the day-to-day running of the business to Nicholas.

On 1 May 2023, Nicholas told Ian he needed a loan in the sum of HK\$3M. Ian agreed to advance Nicholas a loan of HK\$3M by 3 instalments respectively in the sums of HK\$2M (on 5 May 2023), HK\$500,000 (on 5 June 2023), and HK\$500,000 (on 6 July 2023). The terms of the oral agreement were that each of the sums advanced must be repaid within 1 month of advancement with the last repayment to be made on 6 August 2023 together with aggregate interest in the sum of HK\$200,000. Ian transferred the money to an account held in the personal name of Nicholas.

Despite the agreement, Nicholas has not made any repayment despite Ian having reminded him on several occasions. Nicholas said he was waiting for a return from an overseas investment.

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

Around the end of August 2023, Ian again reminded Nicholas to make repayment and told him if he did not repay the full amount by 15 September 2023, he would consider taking legal action.

Nicholas assured Ian his overseas investment was soon to come in. In order to ease Ian's concerns, Nicholas issued a cheque post-dated to 15 September 2023, in the sum of HK\$3,200,000 in favour of Ian. Nicholas told Ian to hold onto the cheque and present it for payment on 15 September 2023.

Ian presented the cheque for payment on 16 September 2023. The cheque was later returned "Refer to drawer". Ian called Nicholas and asked him what happened with the cheque. Nicholas said his investment failed. He also said the loan was made to DIL so he had no personal responsibility.

Ian wants to know how he can get his money back and how quickly.

Questions:

- (1) **Write a letter of advice to Ian summarising what steps he can take in terms of issuing legal proceedings and applying for summary judgment. The letter should explain the procedure, the information needed to be put before the Court and the possible responses of Nicholas.**

(20 marks)

- (2) **Draft the affidavit in support of the summary judgment application including the heading, parties and all relevant averments needed.**

(5 marks)

[25 marks in total]

Question 4 (25 marks)

Your firm's client ("client") is the defendant in a commercial dispute in the Court of First Instance. The plaintiff claims damages of HK\$4 million on the ground that goods delivered by client under contract were of inferior quality. In its pleadings, client denies liability, and in the alternative asserts that the quantum of damages should be no more than HK\$2,000,000.

Client has all along been keen to reach a settlement. After pleadings closed, your firm proposed mediation. The proposal was ignored by the plaintiff's legal representatives and the action proceeded. Following discovery, client, still keen on settlement, made a sanctioned payment of HK\$2.5 million ("1st SP"). No response was received. Later, following exchange of witness statements, client made a top-up sanctioned payment of HK\$500,000, bringing the total to HK\$3 million ("2nd SP"). Again, no response was received.

The case proceeded to trial. Judgment was handed down awarding HK\$2.5 million to the plaintiff, with an order *nisi* that client pay the plaintiff's costs of the action.

Client feels aggrieved by the costs order given that a substantial amount of costs could have been saved if the plaintiff had been more receptive to the attempts to settle. Client had delayed delivering counsel's brief for trial in the hope that this expense could be avoided. Counsel's brief, marked with a flat fee of HK\$800,000, was delivered only after it had become clear that the 2nd SP would not be accepted.

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

Question:

Prepare a draft letter, for your supervising partner's approval, advising client what the costs order means, and what could now be done to address client's sense of grievance.

(25 marks)

[25 marks in total]

Question 5 (25 marks)

The managing partner sends you the following attendance note:

“Client: Mr. Colin Chan (“Mr. Chan”)

- Meeting in our offices today.
- Existing client. Owner and CEO of C. Chan & Co (Holdings) (Hong Kong) Limited. Successful bio-tech start up manufacturing and distributing skincare products.
- Mr. Chan’s long-time personal secretary, Phyllis Poon (“Phyllis”), retired last month – last day was 31 August 2024. As well as her contractual and statutory termination package, Mr. Chan had promised her a gift. He had talked about getting her a Patek Philippe Calatrava Ref. 6119R-001 (rose gold), worth about USD 33,000. But had not got around to organizing it by the time she left.
- He has just discovered that, on her last day, Phyllis faked his signature on a number of cheques on the company’s bank account to herself in the aggregate amount of USD 550,000 and paid them into an account at the Hong Kong branch of Suisse Credit Privee, a Swiss bank. He found this out when the Financial Controller noticed the entries in the monthly bank statements and brought them to his attention. After calling the bank, they sent him copies of the cheques which showed the cheques had been cleared by Suisse Credit Privee’s branch in Hong Kong in an account in the name “Gloria Poon”. He can tell the signatures are forged. He is not completely sure, but he thinks he recognizes Phyllis’ handiwork in the forged signatures. He is pretty sure that only Phyllis knew about the cheque book in his personal office from which the cheques came.

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

- He also produced an exchange of three WhatsApp messages between himself and Phyllis in July 2024:
 - o Dear Sweet P – how about a Calatrava (rose gold)?
 - o Oh, ChubbyChan-kins – how about a Nautilus Tiffany?
 - o Dear Sweet P – you adorable trouble-maker – ha ha, how about a Nautilus Factory Diamond? – ha ha.

Note: the price of a Calatrava (rose gold) is USD 33,000. The price of a Nautilus Tiffany is approximately USD 6 million. A Nautilus Factory Diamond is approximately USD 550,000.

- Mr. Chan (married) had engaged in an “affair of the heart” (his words) with Phyllis since 2000 and each year bought her a watch priced around USD 30,000 - 50,000. He has many photographs on his private cellphone of Phyllis and himself at dinner and visiting watch conventions.”

Questions:

- (1) Mr. Chan wants to get the company’s money back. He is prepared to sue. But who does he sue? He very strongly suspects Phyllis stole his money. But he does not know anyone called Gloria Poon. It might be a pseudonym for Phyllis, or may be a relative. Mr. Chan simply does not know.

- (a) **What information can he find out by issuing proceedings and on what legal basis?**

(6 marks)

- (b) **What procedural steps does he need to take?**

(6 marks)

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

(2) He is worried that Phyllis will defend herself by saying she was simply taking money representing the value of the Nautilus Factory Diamond. He does not want to disclose the WhatsApp messages.

(a) These are only WhatsApp messages. Mr. Chan thinks they are not proper documents. **Does that mean they will not have to be disclosed as part of the Plaintiff's discovery? Can they be deleted?**

(4 marks)

(b) Mr. Chan has heard it is not necessary to have to disclose documents covered by "legal professional privilege". **Briefly, what does that mean and can it be relied on in respect of the WhatsApp messages?**

(3 marks)

(c) What about the photographs? Mr. Chan's photographs will be terribly incriminating for him in the eyes of his wife. **On what grounds might it be possible to withhold them? He has heard that documents do not have to be produced if one can claim privilege against self-incrimination. What is that and is it likely to help? Are there other possible grounds?**

(4 marks)

(d) At what stage in any litigation will it be necessary to produce documents to Phyllis and any other defendants?

(2 marks)

[25 marks in total]

END OF TEST PAPER