

Examiners' Comments on the 2022 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. The number of candidates who sat the Head II paper in 2022 was 61, up from 44 in the previous year. 39 candidates were given overall pass marks, resulting in a pass rate of 64%. This is a very welcome increase from the lowly 32% pass rate in the previous year where 14 out of 44 candidates were given overall pass marks. It is difficult to draw long term conclusions as the pass rates over the last four years have been 31% (2019), 77% (2020), 32% (2021) and now 64% (2022).

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. The overall pass rate for criminal procedure was 48%.

Question 1 (pass rate 45%)

7. This question raised matters of bribery, bail, legal representation, conflict of interest, evidence, sentence and mitigation. It was divided into 6 sub-questions. It required a good, basic understanding of the legal principles involved.
8. The question was very straight forward.
9. Some of the answers to 1 (a) appear to be a standard stock answers as anticipated by the course providers. But the candidates did not analyse the facts and apply the law to the facts.
10. Some of the answers to all parts were sketchy and not enough depth. Hence, the marks are low in general.
11. Some candidates do not know the differences between Duty Lawyer Service (“DLS”) and Legal Aid Department (“LAD”). No candidates mentioned the first appearance for all accused is the Magistrate Court and DLS is available to the accused.

Question 2 (pass rate 52%)

12. This question related to the National Security Law. It has 2 main parts - the first on bail and the second on High Court procedure with regard to jury trial and the Secretary for Justice’s Certificate. This question required the candidates to be familiar with this important legislation.
13. The overall performance of the candidates who answered this question was not that satisfactory.
14. Generally speaking, most of the candidates who answered this question did a little well with some parts whilst doing so poorly with the remaining parts, resulting in achieving a bare pass or a fail in the total mark.
15. There was a part on the issues of “review of sentence and appeal against sentence.” A Day One Lawyer engaged in criminal procedure should possess and grasp these issues.

Civil Procedure

16. The overall pass rate was 62% on the civil procedure side, which is up from 48% in the previous year. 72% of candidates were able to pass all the civil procedure questions they attempted. Questions 4 and 5 proved easier as an over 80% pass rate was achieved but this dropped to 48% for question 3. This probably reflected the fact the primary focus in questions 4 and 5 was on the drafting of pleadings as opposed to question 3 which sought a memorandum of advice on security for costs. This means candidates may be better able to source drafting precedents in an open book examination than in considering advisory issues on a specific interlocutory application such as security for costs.

Question 3 (pass rate 48%)

17. Question 3(1) related to security for costs and sought a memorandum of advice on the merits of a security for costs application at the stage of a case management conference and where the law firm advising the defendant had recently changed.
18. Most candidates appeared to be copying from a template in rendering their memorandum of advice hence the answers were very similar.
19. Most candidates failed to address the various discretionary factors which were embedded in the facts of the question. As such, the application of the specific facts to the principles of security for costs was weak.
20. Many candidates also failed to address the timing of the security for costs application and the impact of the recent change of solicitors on the merits of any proposed application.
21. Question 3(2) addressed a different scenario where the court had awarded judgment to the plaintiff in a certain sum and made a costs order nisi. The defendant client had filed two separate Notices of Sanctioned Payment on different dates at amounts below and above the court's awards of damages. In addition, a "without prejudice save as to costs" letter had been sent between the dates of the Notices of Sanctioned Payment.
22. While most candidates recognised the first sanctioned payment could be ignored as it was below the amount of damages awarded, many candidates failed to address the "without prejudice save as to costs" offer in the appropriate manner i.e. as the claim was a monetary one, such an offer did not attract costs consequences as under Order 2 Rules of the High Court, a sanctioned payment should have been made instead.
23. Candidates who spotted this issue did well on this question but mere recognition that a sanctioned payment above the amount of damages (as the second sanctioned payment was) and the consequences that flowed did not suffice to get a good mark. A proper consideration of the factors which might make it unjust for the court to order the plaintiff to pay the defendant's costs on an indemnity basis with enhanced interest would have also been of benefit to many candidates.

Question 4 (pass rate 80%)

24. Question 4 concerned the drafting of a statement of claim in a relatively simple claim for breach of contract, the plaintiff being the firm of solicitors for whom the candidate is assumed to work.
25. Most candidates appeared to be copying from a precedent. Regrettably, quite a few of them failed to adapt the precedent to the facts of the particular case. For example, quite a number described the plaintiff (a firm of solicitors) as a company incorporated under the Companies Ordinance. This is a serious error whether it arises from lack of knowledge of the law relating to business associations or simple carelessness.
26. Again, possibly copying from a precedent, many candidates over-egged their pleading. A simple breach of contract claim had added to it allegations such as breach of fiduciary duty and claims for equitable damages. Such claims were inappropriate on the facts of the case which was a simple crisp and clear claim for common law damages for breach of contract.
27. Overall, however, the standard was good and the high pass rate was pleasing.

Question 5 (pass rate 88%)

28. Question 5 asked candidates to draft a writ of summons with a statement of claim endorsed on it in respect of a breach of contract for non-delivery of a specific product for a specific use where the price was an agreed fee.
29. Generally speaking, candidates were able to answer the question well. For the writ itself, as marks were given for following the correct format of a writ of summons, using a precedent, as most candidates obviously did, allowed marks to be easily earned.
30. For the statement of claim, the claim was a relatively simple breach of contract case and most candidates were able to produce a passworthy draft pleading.

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