

## **Examiners' Comments on the 2006 Examination**

### **Head II: Civil & Criminal Procedure**

#### The Overall Performance of Candidates

1. The results overall represented an improvement from previous years but there was still a worrying tendency among a significant number of candidates not to address issues with the practicality expected from the Day One Lawyer.

#### The Standard and Format of the Examination

2. The examinations, as in previous years, was Open Book.

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

4. If it is to have any value in ensuring that those seeking to practise in Hong Kong are of a suitable standard, the examination must test both substantive knowledge and the ability to apply that knowledge. As with any professional qualifying examination, the Panel was concerned to set questions which would test substantive knowledge and the ability to apply that knowledge in a constructive, practical and common sense manner.

#### General Criticisms

5. There were five questions in the paper. Candidates were required to answer any four of those. The time allowed was three hours and thirty minutes. The first

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

6. As in previous years, many candidates brought large amounts of material into the examination room. The seating arrangement of the examination room catered for this. It is, however, often counter-productive to bring large amounts of material into open book examinations. There is a tendency to under-prepare and to rely on being able to look up answers in material taken into the examination. This results in issues not being addressed and a 'write all that is known' approach.

7. As in previous years some candidates demonstrated very poor examination technique. The first half hour of the three and a half hour examination period is intended to provide opportunity to read and understand the questions, to enable candidates to prioritize their answers and to plan those answers. Some candidates started writing very soon after being told they could begin the examination. There was a marked absence of planning of answers. Answers were fragmented, lacked focus on the issues in the questions, contained inherent inconsistencies and contradictions and revealed basic weaknesses of understanding.

8. Some candidates showed little knowledge of civil and criminal procedure. There was also a marked absence of ability to apply substantive knowledge to the practical situations in the questions. Some answers were poorly structured and often inherently contradictory. Some candidates appeared to have done little preparation for the examination. Whilst the answers were marked as constructively as they sensibly could be, those who failed the examination simply did not deserve to pass: they had not shown that they had reached a sufficient degree of competence to meet the criteria of the Day One Lawyer.

#### Performance on Individual Questions

9.1. Question No. 1 addressed very basic issues of criminal procedure and should have been well within the abilities of an averagely competent Day One Lawyer. The question revolved around a client who had been recently arrested for robbery, and the solicitor visiting him in a police station to give him advice. This is a common scenario likely to be experienced by newly qualified lawyers. The question was divided into a number of sub-questions. The objective was to present candidates with a structured and progressive question to test both awareness of substantive issues and the practicality of application of principles to a realistic scenario. The marks for each

sub-question were shown on the examination paper to assist candidates with time management.

9.2. Sub-questions required candidates to demonstrate knowledge about, inter alia, the conduct of identification parades and the alternatives open to the police if the client refused to participate in a parade. They were generally well answered, but surprisingly a significant number of candidates had no practical suggestions concerning how to make the parade fair for a client who had a noticeable facial scar. The essential point was the failure of the witness to make a positive identification of the client on an identification parade and the practicality of subsequent “tactics.” Most candidates appreciated that their client had not been positively identified. However, weaknesses were revealed when it came to practical advice on whether the client should now advance an alibi defence to the police which he had not done earlier. Some candidates digressed on to the requirements to give alibi notices before trial rather than concentrating on the practical aspects of whether he should advance this alibi in a statement under caution following his arrest. This indicates a lack of appreciation of the practicality of criminal procedure.

10.1 Question No. 2 was similarly structured to present candidates with a developing situation and was again a scenario with which a day one admitted solicitor could well be confronted.

10.2 Sub-questions required candidates, inter alia, to show a basic appreciation of: routine procedure in the Magistrates’ Court on a first appearance by an accused; advising about the possibility of representation by the Duty Lawyer Service; a conflict of interest; admissibility of evidence; and costs applications. Generally this question was answered adequately. Most candidates identified the problems and gave satisfactory answers. However, few candidates appreciated that what another arrested person had told the police about the client was not admissible evidence against the client. This resulted in many candidates giving erroneous and dangerous advice to the client. The issue is a basic issue of fairness. This point had featured in recent past examinations. Weaknesses in addressing it in previous examinations justified its inclusion in this examination and it was therefore surprising that so many candidates failed to identify and deal with the issue. Again this indicates a lack of the hard work and preparation expected from candidates in a professionally qualifying examination.

10.3 Further sub-question (4) required a discussion of a possible application for costs following the acquittal of an accused after trial in the Magistrates’ Court, and an

awareness of the means of appeal against the decision of the magistrate. Most candidates were able to advance some arguments in favour of making a costs application. Few entered into any discussion of the arguments for and against the application. Advocates making an application must see both the strengths and weaknesses in their case, and anticipate arguments from an opponent as well as questions from the bench. Again, many candidates appeared ready to regurgitate what they knew about the subject, rather than seeking to apply that knowledge to a set of facts, again an indication of lack of hard work and preparation. That having been said most displayed a basic knowledge of the subject of costs.

11.1 Question No. 3 was a pleading question involving a relatively straight forward contractual claim. The claim by the Plaintiff was based upon various breaches by the Defendant of a tenancy agreement and candidates were expected to identify and analyze the sequence of breaches by the Defendant. The examiners were looking for candidates to identify which breach was repudiatory and what entitlements flowed to the Plaintiff as a consequence. Candidates were also expected to identify and set out the loss and damage suffered by the Plaintiff and that the Plaintiff was required to give credit for outstanding rent that it had not paid.

11.2 The answers were marked as regards presentation, (in particular whether the draft Statement of Claim was well-organized, succinct and precise); contents, (in particular whether the draft set out all material facts and necessary particulars and excluded immaterial facts and unnecessary particulars, evidence and legal arguments); and overall effectiveness, (in particular whether the draft accurately, coherently, logically and effectively set out the client's cause of action).

11.3 Surprisingly, few candidates attempted this question and with a couple of exceptions, the standard of pleadings was not high. Often the drafts were not set out in a logical sequence and lacked all the required elements to constitute a cohesive and effective Statement of Claim. The impression given was that there was a lack of hands-on experience of even a limited nature on pleading drafting amongst the candidates that attempted this question.

12. Question No. 4 involved relatively straight forward facts and required the candidates to write a letter of advice. In addition to content, the letter writing skills of the candidates were also taken into account during marking. There was a wide ranging degree of success as regards this question. Whilst most answers included the relevant points, a most disappointing aspect in relation to the answers was that in a significant number of cases the letter writing skills of the candidate were not of great

quality such that the advice in the letter would not have been easy to follow or be understood by a client. Some candidates simply wrote the answers in point or narrative form instead of answering the question in the form of an advice letter.

13 Question 5 provided the candidates with a chronological series of events that required the candidates to analyze and order the same. The question was generally aimed at testing candidates' procedural knowledge and allowing them to demonstrate strategic thinking. The candidates were expected to identify the relevant issues to be considered and set out the most appropriate course to achieve the company's objective, together with naming the correct procedural rules and processes. Whilst generally the answers addressed the right points, there was a tendency not to identify the procedural rules and processes, and not to describe with sufficient details what should be covered by or stated in the Summons and Affidavits/Affirmations.

### Conclusions

14. Generally there was an overall consistency in the results in the sense that candidates who did well on the criminal questions did well on the civil questions whilst those who did badly on the criminal questions similarly did badly on the civil questions.

15. It appeared that those that fell short of the required standard often did so as a consequence of a lack of planning of their answers and applying their knowledge in a practical manner to the questions asked.

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