

Examiners' Comments on the 2007 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. The results for the 2007 Examination appear similar to those for the 2006 Examination in that the results overall seemed an improvement on previous years, but again, there remained a tendency among a significant number of candidates not to address the issues contained in the questions with the practicality expected from the Day One Lawyer. A number of candidates also appeared to face difficulty in providing answers in the form of letters of advice and mindful of what one expects from the Day One Lawyer, future candidates may be well advised to concentrate more during their preparation on producing letters of advice.

The Standard and Format of the Examination

2. The 2007 Examination, as in previous years, was Open Book.

3. The 2007 Examination was premised on the standard to be expected from the Day One Lawyer. The Day One Lawyer is one who has completed both the academic and vocational stages necessary for professional qualification. In Hong Kong that means the LL.B (or a non-law degree and the CPE), the PCLL and the two year training contract. Day One Lawyers should have a sound base of substantive knowledge and have acquired the ability to apply that knowledge to straightforward situations. In reality those taking the examination will be more than Day One Lawyers because of experience obtained in their home jurisdictions. Even so the Panel was careful to focus on the 'Day One' standard and to keep away from what might be classed as 'advanced procedure' or 'superior ability'. A Day One Lawyer intending to practise in Hong Kong should, however, have the ability to demonstrate an appreciation of the structure, powers and responsibilities of Hong Kong's Courts

and have a basic knowledge of what is 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. Regrettably, the general criticisms in relation to the 2007 Examination are identical to the comments made by the Examiners in respect of the 2006 Examination. Those general criticisms are repeated verbatim herein.

6. 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 an 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.

7. 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.

8. 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 the 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.

9. 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 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

10. Questions No. 1 and 2 addressed very basic issue of criminal procedure and should not have unduly tested the abilities of an averagely competent Day One Lawyer. However, the performance was mixed on the Criminal Procedure Questions. Most candidates who chose Question 1 performed well. Most candidates who chose Question 2 performed poorly.

11. With respect to Question No. 1, it was split into 4 parts with 7 marks available for each of parts 1:1, 1:2 and 1:3, and 4 marks for part 1:4. Most candidates scored well on the question. Parts 1 and 2 were generally well answered with students identifying the correct parts of the Rules and Directions for questioning suspects and taking statements and the applicable common law. Part 3 was well answered with most candidates providing practical advice as to the procedure at identification parades along with tactical awareness of the process. Part 4 was not well answered as many candidates failed to consider alibi and/or the practical considerations with regard to formal CAPO complaints.

12. Question No. 2 was split into 4 parts with 5 marks available for part 2:1, 6 marks available for part 2:2, and 7 marks available for each of parts 2:3 and 2:4. Many candidates scored poorly on this question. Parts 1 and 2 were generally answered poorly as candidates had misapplied ss79A and 79C of the Criminal Procedure Ordinance and did not know the appropriate age limits. These candidates demonstrated a basic inability to interpret statute law. Part 3 was reasonably well answered with most candidates noting that the District Court could not grant bail pending appeal. Part 4 was well answered with candidates who finished the question demonstrating awareness of the principles supporting costs awards. Some candidates however appeared to have managed their time poorly and did not have time to answer Parts 3 or 4 adequately.

13. Question No. 3 was a relatively straight forward question concerning enforcement and seeking a detailed letter of advice setting out the available options. The question was short and to the point and contained relevant, but limited, information, which should have directed the candidates to the areas concerning enforcement that needed to be covered in the answer. The answers were marked as follows: 5 marks for presentation, 15 marks for content and 5 marks on the overall effectiveness of the letter of advice, in particular, whether the letter accurately, coherently, logically and effectively set out the available options and recommended steps to be pursued. Whilst most candidates approached the question in a logical manner and identified the majority of the available options, there was often lacking quality with respect to presentation and a logical sequence to the advice. The answers would have benefited greatly had they led the client through the available options and then set out a recommendation as to which of the options should be pursued and why in the opinion of the candidate. A number of candidates fared very poorly with respect to their presentation and, as noted above, future candidates would do well to spend time ensuring they are able to prepare and lay out a letter of advice in a logical and well presented manner.

14. Question No. 4 involved the preparation of a Statement of Claim and short letter of advice in relation to the provision of security for costs. Whilst the

contractual claim that needed to be pleaded was not unduly difficult, the question also sought the pleading of a claim for breach of fiduciary duty, which was more difficult. Whilst 20 marks were awarded in relation to the Statement of Claim, there were 5 marks available in respect of the letter of advice as to which 1.75 were allocated to the content of the letter of advice and 3.25 in relation to the overall effectiveness of the letter of advice. There tended to be a consistency of answers in that where the pleading part the question was well answered, there was also produced an effective letter of advice in relation to the second part of the question. However, a number of the Statement of Claims were not well organized nor succinct nor precise. Often irrelevant material was included and not many candidates identified and pleaded both causes of action. There was a tendency to plead evidence and immaterial facts, which evidenced a lack of understanding as to the rules of procedure with respect to pleadings. Again, it would seem that future candidates would do well to concentrate on the preparation of pleadings in their preparation for future exams.

15. Question No. 5 provided candidates with a series of events that needed analysis and ordering. The questions was generally aimed at testing procedural knowledge and allowing the candidates to demonstrate strategic thinking. Candidates were expected to demonstrate practical considerations when first accepting instructions to defend a claim and thereafter, to set out practical steps that were available and could sensibly be pursued to the strategic benefit of the client. Whilst generally the answers addressed the relevant points, there was a tendency not to identify the procedural rules and processes, and not to describe with particularity the benefit of pursuing a particular available option.

Conclusion

16. It was noticeable that the candidates who addressed the criminal questions well also seem to address the civil questions well and this evidenced that such candidates had taken the 2007 Examination seriously and undertaken adequate preparation. It seems that those who performed badly with respect to the criminal questions similarly did not perform well on the civil questions and hence, as in previous years, it appears

that those that fell short of the required standard did so as a consequence of a lack of planning of their answers, improper utilization of the available time and failing to apply in a logical and practical manner their knowledge to the actual questions asked.

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