

Examiners' Comments on the 2008 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. There was a general improvement in the quality of answers and results obtained in the 2008 Examination, when compared to the 2006 Examination and the 2007 Examination. However, the tendency for candidates not to address the issues contained in the questions with the practicality expected from the Day One Lawyer was repeated. This year, however, an improvement in the quality and formatting of letters of advice was seen, which probably resulted from the comments set out in the Examiner's Report on the 2007 Examination.
2. There was again a marked tendency amongst the candidates to avoid the question on pleadings and it may be that there will need to be a greater focus on such questions in the future, particularly mindful of the forthcoming Civil Justice Reforms.

The Standard and Format of the Examination

3. The 2008 Examination, as in previous years, was open book.
4. The 2008 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 required in advising and representing clients in litigious matters.
5. 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

6. There were five questions in the paper, 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.
7. The majority of candidates brought into the examination room a significant amount of materials, but it was again noted that such practice proved to be somewhat counter-productive. There is insufficient time in the examination to search such materials for the required answers. Preparation is required in order to be fully conversant with the content of such materials in order to be able to refer to the same in an efficient manner that results in a precise answer to the actual question. In several answers, the candidates went down the road of including materials which were wholly irrelevant to the questions asked or were peripheral to the issues and accordingly, marks were not granted.
8. Candidates would be recommended to spend part of their preparation in focusing upon examination technique. Answers should be carefully prepared such that the issues raised in the questions are identified and precise, direct answers relevant to those issues are produced.

Performance on individual Questions

9. Questions 1 and 2 addressed issues of criminal procedures and the performance were generally good on these questions.
10. Question 1 was split into 4 parts with 7 marks available for parts 1:1, 5 marks available for each of parts 1:2 and 1:3 and 8 marks for part 1:4. Most candidates scored well on the question. Part 1 was generally well answered with students identifying the potential conflict of interest between clients. Part 2 was well answered with most candidates identifying the correct venue for trial. Part 3 was well answered with nearly all candidates identifying the relevant sentencing principle in s109A of the Criminal Procedure Ordinance for young offenders and many indicating the correct sentencing options for the age range

given. Part 4 was quite well answered with most candidates identifying the relevant parts of the Secretary for Justice's Rules and Directions.

11. Question 2 was split into 4 parts with 1 mark available for part 2:1, 8 marks available for part 2:2, 4 marks available for parts 2:3 and 12 marks for part 2:4. Many candidates performed poorly on this question and a number chose not to attempt the question at all. Of those who attempted the question Parts 1 and 2 were better answered with candidates correctly identifying the venue as the Court of Final Appeal and the correct basis for initiating the appeal. Part 3 was less well answered with fewer candidates noting the need for leave to be sought from the CFA unless the case had already been certified. Answers to Part 4 lacked application of legal principles to facts. Those candidates who were able to identify the principles to be applied by the court when refusing costs were, for the most part, unable to apply them to the facts given. Many candidates appeared to have managed their time poorly as they did not appear have adequate time to answer Part 4.
12. Questions 3, 4, and 5 addressed issues of civil procedure and should not have unduly tested the abilities of an averagely competent Day One Lawyer. The relevant procedure was tested in a manner that sought reference to the rules or other materials in support of the answers and a sensible, practical approach to the issues.
13. Question 3 was split into three parts with 10 marks for each of parts 1 and 2 and 5 marks for part 3. Most candidates addressed the issues fairly well in respect of this question, identifying the correct procedural requirements and the related time limits, as well as issues regarding service out of the jurisdiction and relevance in respect of the obligation to disclose. The issues raised regarding privilege were not addressed so well and a number of candidates appeared to have a less than good understanding of Calderbank offers.
14. Question 4 was split into three parts with 10 marks for each of parts 1 and 2 and 5 marks for part 3. This question concerned drafting in that candidates were required to prepare a summons and supporting affidavit, as well as write a letter of advice identifying an appropriate strategy to be followed in terms of opposing the application that they recommended be pursued in the earlier part of their answer. The majority of candidates did not attempt this question and a number of those who did, did not seem to grasp what was required. The question was lengthy and therefore, careful analysis and planning was required, albeit that if proper preparation had been undertaken enough marks to score well and pass the question would have been easily obtained by reference to source materials contained in the precedent books and the White Book.

15. Question 5 was split into 2 parts with 10 marks for the first part and 15 marks for the second part. In the first part, candidates were asked to address the position in relation to a costs order nisi and to bring in various factors that may argue against the costs order nisi made being made absolute. The procedural points were not complex and many of the candidates identified the same. However, the second part of the question tested knowledge of enforcement of judgments and generally, candidates performed less well in answering this part of the question, particularly in addressing the different options available for enforcement, particularly with respect to the position of a partnership.

Conclusion

16. There was a general consistency in that the candidates who addressed the criminal questions well also addressed the civil questions well, which evidenced such candidates' proper and careful preparation for the 2008 Examination. Mindful that generally those who performed badly on the criminal questions also performed badly on the civil questions, this would seem to confirm the findings of previous years that a lack of preparation for the examination will be identified. Candidates would therefore, be well advised to prepare thoroughly for the examination and to focus upon careful planning and prioritising the content of their answers, which answers should address the precise questions set in a logical and practical manner demonstrating the candidates' knowledge.

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