

Examiners' Comments on the 2011 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. Whilst the quality of answers to the recent years' Examination was improved in 2011, there remains a tendency for many candidates not to address the specific issues contained in the questions with the practicality expected from the Day One Lawyer.
2. There was yet again a tendency amongst the candidates to avoid questions involving drafting and therefore to favour the criminal questions, whether prepared or not, and hence, the need for there to be a greater focus on such questions in the future continues, particularly mindful of the Civil Justice Reforms.

The Standard and Format of the Examination

3. The 2011 Examination, as in previous years, was open book.
4. The 2011 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. They should not be a danger to the client, as some candidates would have been, if permitted to pass.
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. It is clear that many did so without planning their answers first. This is not a sensible approach to take.

7. Some candidates appeared to look for a clue as to what a particular question was about, and then disgorge all their knowledge on that subject without regard to the specifics of the question being asked. For example, a question on discovery would elicit a page-long *tour d'horizon* on discovery, starting with the **Peruvian Guano** test. In almost all cases this is a waste of valuable time, which would have been better spent in carefully reading the question, thinking and planning an answer. No marks are awarded for unsolicited background material. A one-sentence answer pertinent to the real question would have been more worthwhile. This error fails to appreciate the nature of this examination, which mimics the situation of a solicitor asked to advise a client about a problem, and calls for directional practical answers.
8. As in previous years, the majority of candidates brought into the examination room a significant amount of materials, but it was yet 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.
9. As has been raised in respect of previous years, 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. Answers were often messily presented, with large areas of text crossed out or later text contradicting earlier advice given. Planning the answers before writing them would have avoided these problems.
10. This year the pass rate for Head II was 66%. The criminal questions were generally done well; the civil questions less so.

Performance on individual Questions

11. Questions 1 and 2 addressed issues of criminal procedures. Question 1 was split into 3 parts with 12 marks available for part 1(1), 6 marks available for part 1(2) and 7 for part 1(3). Question 1 was answered well. Most candidates identified the fact that it is well settled a witness may read his statement to refresh his memory before giving evidence at court. It is not desirable, but not prohibited, for him to do so once he starts giving evidence. As such this matter will not necessarily undermine the convictions. The students who did poorly on this question confused refreshing of the memory with coaching of the witness and seemed to rely on a model answer learned on last year's paper to answer this year's question. Better students realised the important issue is the weight that should have been attached to the evidence given Chan's actions. In this case it would have been appropriate for the judge to show in her Reasons for Verdict that she was mindful

that Chan had refreshed his memory during the course of giving evidence and factored that into her consideration as to whether she accepted his evidence as reliable. Most students realised that the fault of the earlier counsel should not be placed on the client and identified the correct court of appeal.

12. Question 2 was split into 3 parts with 12 marks available for part 2(1), 5 marks available for part 2(2), and 8 marks available for part 2(3). This question was done very well with high marks awarded.
13. Questions 3, 4, and 5 addressed issues of civil procedure. The questions raised issues which could well land on the desk of a newly-admitted solicitor. The answers being sought were pitched at the level of sophistication to be expected of a lawyer at that stage, which in some cases was simply to spot the issue being raised. In many cases we were looking for common sense application of the law, rather than just a recitation of black letter rules.
14. Question 3 was split into 3 parts: part 1 - drafting a list of parties and a general endorsement – worth 7 marks; part 2 – on costs – worth 10 marks; and part 3 – on enforcement of judgment – worth 8 marks. Most candidates addressed well the issues raised by this question.
15. Question 4 was split into 3 parts: part 1 – on privilege and discovery – worth 9 marks; part 2 – on waiver of privilege – worth 9 marks; and part 3 – drafting a letter to a client on the effect of sanctioned payment – worth 7 marks. This was the most popular of the civil questions, but answers were patchy. A significant proportion of candidates were clearly unaware of a litigant's right to request early discovery of documents mentioned in affidavits under RHC Order 24 rule 10, and of waiver of privilege in a document by selective disclosure. The former is an important and frequently-used technique in practice, and the latter is a well-known pitfall for the unwary.
16. Question 5 was split into 5 parts: part 1 – on heads of loss – worth 2 marks; part 2 – on choice of court – worth 5 marks; parts 3, 4 and 5 – on leave to serve out of the jurisdiction – worth 3, 5 and 5 marks respectively, and part 6 – on early settlement and disposal – worth 5 marks. The issues were not overly complex and many of the candidates identified and addressed the pertinent points.

Conclusion

17. This paper had a much better pass rate than in previous years. This was largely due to a better performance on the criminal side. Taking the civil side on its own the pass rate was a more-disappointing 49%.