

Examiners' Comments on the 2013 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. There was a sharp drop in the number of candidates this year – from 63 to 42. 30 of the 42 candidates passed: an overall pass rate of 71%. We commented after last year's examination that there were fewer candidates whose answers were plainly well below the standard required for a pass, suggesting that there were less speculative applications to sit the examination by candidates who were not ready. Happily that situation has continued.

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.

6. At 71% the pass rate for Head II was down from 2012 (78%), but higher than 2011 (66%).

Performance on individual Questions

7. Questions 1 and 2 addressed issues of criminal procedures.

Question 1

8. Question 1 had three parts on which marks were awarded. The first part required an appreciation of the risk of cut throat defences if both clients were represented by the same practitioner. Most candidates realised the tariff placed the case in the High Court for trial, however the weaker ones missed the many aggravating feature of the case, including using a minor to assist in the trafficking and the international element of the syndicate. Some erroneously argued that having a clear record would reduce the sentence.

Question 2

9. Question 2 required candidates to identify the power under s104 of the Magistrates Ordinance for the magistrate to review his own decision and the opportunity to appeal the case to the High Court. Candidates were required to assess the value of the identification evidence and how to deal with the situation where reference to the client's medical condition had not been made at trial.

Responses on the sentencing aspect of the question varied. Some failed to comprehend the factors to be considered before passing a Community Service Order.

10. 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.

Question 3

11. Question 3 was split into 3 parts: part 1 – on settlement techniques and mediation – worth 10 marks; part 2 – on solicitors' conflicts of interest – worth 7 marks; and part 3 – on security for costs – worth 8 marks. This question was very well answered, as reflected in the high pass rate.

Question 4

12. Question 4 was split into 5 parts: part 1 – on timing for acknowledgment of service – worth 2 marks; part 2 – on default judgment – worth 3 marks; part 3 – on setting aside default judgment – worth 8 marks; part 4 – on enforcement options and procedures – worth 8 marks; and part 5 – on the effect of insolvency on enforcement – worth 4 marks. The overall standard of answer was acceptable.

Question 5

13. Question 5 was split into 5 parts: part 1(a) – drafting a concise statement for endorsement on a writ – worth 4 marks; part 1(b) – drafting a statement of claim – worth 13 marks; part 2(a) – about joinder and amendment of a writ before issue – worth 2 marks; part 2(b) – about joinder and amendment after issue but before service – worth 3 marks; and part 2(c) – about joinder and amendment after service – worth 3 marks. Part 1, which was entirely a drafting question, was mostly well done. Part 2 was a simple test on the rules concerning amendment of a writ, and was surprisingly poorly done, considering that this is an everyday issue for civil litigators.

Conclusion

14. Although there was a fall in pass rate this year, we consider a 71% pass rate is within acceptable bounds, and fairly reflects the standard of papers submitted.

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