

## **Examiners' Comments on the 2015 Examination**

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

#### The Overall Performance of Candidates

1. The number of candidates this year was 36. Of those 36, 26 passed Head II, resulting in a pass rate of 72% (very similar to last year's pass rate of 75%).

#### 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.

### Performance on individual Questions

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

#### **Question 1**

7. Question 1 had two parts on which marks were awarded. Both parts were well answered by most candidates. For the first part, some students misunderstood the implications of making an admission under section 65C of the Criminal Procedure Ordinance. Most of those candidates who performed badly on the second part had their marks reduced for erroneously suggesting the defendant appeal to the Court of First Instance (mistaking the usual tariff for burglary as within the magistrate's sentencing range).

#### **Question 2**

8. Question 2 had three parts. The first part required candidates to identify and explain the rules under section 79F of the Criminal Procedure Ordinance. Many students were not aware of the section or had misread it. The second part required candidates to identify the defendant's right to apply for a discharge before his arraignment, under section 79G of the Criminal Procedure Ordinance. Again many students were unaware of the right and the implications of a successful application. The third part of the question required students to apply the age limits for using the special procedures for giving evidence, as described in sections 79A, B and C of the Criminal Procedure Ordinance.
9. 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**

10. Question 3 was split into 3 parts: part 1 – on legal aid in a personal injury context – worth 9 marks; part 2 – on choice of court as between District and High Court – worth 7 marks; and part 3 – on sanctioned offers – worth 9 marks. This question was well answered, as reflected in the high pass rate.

### **Question 4**

11. Question 4 was split into 4 parts: part 1 – requiring the drafting of a general endorsement for a sum due under a loan agreement – worth 3 marks; part 2 – on service and default judgment – worth 6 marks; part 3 – on setting aside a default judgment – worth 8 marks; and part 4 – on enforcement of judgment – worth 8 marks.

### **Question 5**

12. Question 5 was split into 3 parts: part 1 – on summary judgment and interim payment – worth 14 marks; part 2 – on summary judgment procedure – worth 2 marks; and part 3 – requiring preparation of an affidavit or affirmation in support of a summary judgment application – worth 9 marks.
13. This examination is a test of the ability to apply legal knowledge in order to give practical advice to a client. In an open book examination mere recitation of the legal principles is insufficient to get high marks – these are reserved for the candidate who demonstrates an ability to apply that knowledge to formulate advice. The significant fall in the pass rate on the civil questions conceals the fact that many answers were of a high quality, but the standard of answer was more variable than in previous years. In recent years the examiners have deliberately moved away from questions which can be passed merely by reciting passages from the White Book, in favour of questions which test the candidate's ability to apply procedural knowledge and give practical answers. This year that move appears to have accentuated the gap between the able candidates and the others. On the whole, we consider that to be in line with the purposes of an examination of this kind.

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