
**OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Wednesday, 27 September 1995



HEAD II: CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

27 September 1995

Instructions to Candidates

- 1. The examination duration is Three (3) hours, plus 30 minutes reading time.**
- 2. There are FOUR questions on this paper. EACH must be answered.**
- 3. This is an Open-Book examination.**
- 4. Each question has the value noted on the question paper. You are urged to apportion your time in accordance with the relative value of each question. No marks can be awarded to a question for which there is no attempted answer.**
- 5. Do not take either this question paper or any answer booklets with you when you leave the examination room.**

QUESTION 1 (25 marks)

William Wu commenced employment as the head of the accounts department at Excel Equipment Ltd ("Excel") in January 1989.

Between May 1989 and October 1990 he allegedly joined with Hugo Lo (who was then employed in the Overseas Sales Division of Excel) to defraud Excel by dishonestly drawing 24 cheques on Excel's account made payable to themselves or to other nominees. Wu signed each cheque and also allegedly made, or caused to be made, false entries in Excel's accounts to show the payments as legitimate business expenses. The cheques amount to HK\$12.5 million.

Twelve cheques, amounting to HK\$5.5 million, were made payable to Fine Arts Design, an interior decoration business. Wu's wife Gloria and his sister Helen Wu are both partners of that business. Six cheques, amounting to HK\$2.5 million, were made payable to Hugo Lo and were negotiated by him through his account with the Double Up Bank Ltd. Four cheques amounting to HK\$3.5 million were made payable to The William Enterprise Company, the sole proprietor of which was William Wu, and two cheques, amounting to HK\$1 million, were made payable to Wu himself.

Excel discovered these payments in August 1991 during a routine audit. Wu had by then left Excel and had set up an estate agency, Wu Realty, of which he is the sole proprietor.

Excel reported the matter to the police, who interviewed Wu on 1st October 1991. He refused to answer any questions or to make any statement. He was arrested on 2nd December 1991 and charged with conspiracy to defraud, 24 offences of theft and 24 offences of false accounting. He was bailed to South Kowloon Magistrates Court on 6th January 1992.

On 6th January 1992, the prosecution asked that no pleas be taken and to adjourn for legal advice to 17th February 1992. Wu was bailed in the cash sum of \$20,000 with a condition to surrender his passport to the court and not to leave Hong Kong without the court's prior consent.

After several further adjournments, each requested by the prosecution, the magistrate was told on 8th July 1992 that the charges would be heard in the High Court. He was asked to allocate a return day for the continuation of committal proceedings and allocated 13th August 1992. Wu was committed for trial on 13th August 1992 and bailed in the same terms as before.

The trial was eventually fixed for 6th December 1993, ten days being allocated. The trial did not proceed, because the trial judge was ill, and was re-fixed for 12th September 1994.

In July 1994, Wu's then counsel (who has since withdrawn from the case) invited the Crown to transfer the trial to the District Court, considering that venue more appropriate as issues of law were involved and the trial would take at least 28 days. The Crown agreed and the case was transferred to the District Court. Trial was set for 14th November 1994, fourteen days being allocated.

Wu claims the delay has adversely affected his health. He has suffered a minor stroke which has left him partially paralysed and affected both his speech and his memory.

In August 1994 Excel commenced High Court proceedings against Wu, his wife Gloria, his sister Helen and Hugh Lo to recover the sum of HK\$12.5 million. The proceedings were served on each defendant, apart from Lo, whose whereabouts is not known and who is believed to have left Hong Kong.

There is an outstanding warrant for Lo's arrest. Lo would face the same charges as Wu. One reason for the Crown seeking adjournments was the attempts being made to trace Lo and the desirability of both being tried together.

Wu's defence, which has not been revealed to the Crown in the criminal proceedings, is that the cheques were lawfully drawn and were payments to Lo and himself for commission, bonuses and work done for Excel outside normal working hours and had been approved by a former Managing Director of Excel. The payments were kept secret to prevent other senior personnel requesting similar payments. Wu has not provided the name of the Managing Director concerned.

- 1) Assuming you act for Excel Ltd how would you proceed on the civil action?
- 2) Assuming you act for William Wu, Gloria Wu and Helen Wu in the civil action, what advice would you give them and what, if any, action would you take in response to the action, given the current criminal proceedings?
- 3) Assuming you act for William Wu in the criminal proceedings, what, if any, action might be taken in view of his complaints about the delay and the state of his health?

QUESTION 2 (25 marks)

Your client, Matthew Ng who is 18 years of age, has been arrested and charged with burglary contrary to s.11 of the Theft Ordinance, Cap. 210. He has been refused bail by a magistrate and has been remanded into the custody of the Commissioner of Correctional Services to await his trial before a magistrate in two weeks time.

The prosecution case is that Ng entered a private dwelling at night by climbing up a drain pipe and forcing open the bedroom window. There were two female occupants of the premises, neither of whom were physically harmed, even though one of them heard a noise from the bedroom and entered the room to investigate. Ng has one previous conviction for theft, for which he was placed on 12 months probation three months ago. He was arrested at his home the following day.

Ng tells you he was placed on an identification parade and one of the occupants of the flat identified him, but only after appearing to think about it for some time.

Ng denies he was the person who entered the flat and says he was playing snooker with friends at the time of the burglary. He says he intends to plead not guilty.

Now answer the following:-

- 1) Having taken a detailed statement from Ng, what further statements would you take in order to prepare Ng's defence.?
- 2) What, if any, information would you seek from the prosecution and what matters, if any, would you disclose to the prosecution? (You should not deal with any bail issues in relation to this question.)
- 3) If Ng is convicted what sentencing options would there be?
- 4) What duties, if any, does the prosecution have with regard to sentence?
- 5) If Ng is convicted, what methods of challenging the conviction are available to him?
- 6) If Ng is convicted and the prosecution consider the sentence is too lenient, could the prosecution challenge the sentence and, if so, by what method?

QUESTION 3 (25 marks)

Sam Say Limited manufactures roller skates at its factory in Kwai Chung. Sam Say bought 10 industrial size air conditioning units for its Kwai Chung factory from Harry Lam. He is the Hong Kong representative of Outback Enterprises Limited, the Australian company which manufactured the air conditioners. Harry Lam was described by Outback in a letter it wrote to Sam Say as "our Hong Kong representative".

Sam Say had purchased equipment on previous occasions from Outback, and on those occasions they had always dealt with Harry Lam. Sam Say has told you, but you have not been able to confirm, that Harry Lam works exclusively for Outback, and represents no other companies in Hong Kong.

Sam Say's employees installed the air conditioning units in the Kwai Chung factory. Soon after they were installed, they began to malfunction. This caused other equipment in the factory to break down.

Sam Say sued Outback and Lam for damages for breach of contract. Sam Say alleged in the Statement of Claim that Lam was acting as agent for Outback, and alleged in the alternative that Lam made the contract on his own behalf and not as an agent. Sam Say also alleged that the air conditioners were defective and that Sam Say suffered loss of profit as a result of the defective air conditioners.

Outback served a Defence in which it denied Lam was acting as its agent, denied the air conditioners were defective, alleged the air conditioners were not installed properly and denied that Sam Say suffered the damages as alleged in the Statement of Claim.

Sam Say has an expert opinion that the air conditioners were defective, and that Sam Say's employees installed the air conditioners properly. Outback has an opinion from an expert that the air conditioners were not defective, and that they malfunctioned because they were improperly installed.

- 1) **Assume that you are Sam Say's solicitor.** Advise Sam Say of the steps, if any, which it should take as a result of Outback's denial in its Defence that Harry Lam was acting as Outback's agent.
- 2) **Assume that you are Outback's solicitor.** Outback has decided to admit that Harry Lam was acting as Outback's agent when he sold the air conditioners to Sam Say. Outback has instructed you to take the necessary steps. What will you do?

(see over on page 5 for questions 3) and 4))

- 3) **Assume you still represent Outback.** It is your opinion that there probably were some minor defects in some of the air conditioning units and that these defects contributed to the machine breakdown at Sam Say's factory. You also think, however, that Sam Say's employees installed the air conditioners incorrectly, and that this improper installation contributed to the machine breakdown at the factory. You have had some informal settlement discussions with Sam Say's solicitor, but he does not agree with you that negligent installation might have contributed to the problem.

Advise Outback of the procedures, if any, which are available to Outback to put pressure on Sam Say to settle this claim. Include in your advice a brief explanation of any such procedures.

- 4) **Assume that you are Harry Lam's solicitor.** He tells you he has just received notice that judgment was entered against him because he did not respond to Sam Say's Statement of Claim.

Advise Mr Lam what you can do for him in these circumstances, and what the likelihood of success would be. State what additional information, if any, you require in order to advise him on the likelihood of success.

QUESTION 4 (25 marks)

You have been consulted by Walkabout Enterprises Limited, an Australian company which manufactures and sells the popular sports shoe called the "Kangaroo Hiker". Walkabout has learned that Sai Kung Limited, a Hong Kong company, is selling shoes which appear identical to the Kangaroo Hiker, and which Sai Kung has called the "Tankaroo Hiker". The Tankaroo shoes are in similar packaging, but they bear no manufacturer's name. Walkabout has received many complaints about the poor quality of the Tankaroo shoes from people who bought Tankaroos, thinking they had bought Kangaroo Hikers.

Walkabout is very concerned about the effect this could have on its sales. It has been having financial problems for the past few years, and it is worried that this situation might worsen those problems. Walkabout has heard that Sai Kung packages the Tankaroos at Sai Kung's premises in the New Territories. It has not heard anything about where the Tankaroos are made.

Walkabout's sales manager, John Chiu, went to Sai Kung's premises one day during business hours and, without revealing his identity, asked if Tankaroo shoes were made or packaged there. The persons to whom he spoke said they had never heard of Tankaroo shoes, and asked him to leave immediately.

Advise Walkabout what you can do in these circumstances to protect its interests. Include in your advice a brief description of the procedure you would have to follow, the obligations which you and Walkabout would have to discharge and your opinion whether any steps you take to protect Walkabout's interests are likely to succeed.