
**1996 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Monday, 4 November 1996



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TEST PAPER

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Instructions to Candidates

1. The examination duration is three (3) hours, plus 30 minutes reading time.
2. There are FOUR questions in 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.

Overseas Lawyers Qualification Examination 1996

Head II : Civil and Criminal Procedure

Question 1 (25 marks)

Brian Chu and David Fu were walking in Queens Road Hong Kong at 11 pm. Brian is a Canadian citizen and is lawfully visiting Hong Kong. He has been staying with David Fu, a Hong Kong resident whom he met when they were both studying in Canada. David was carrying a sports bag. Both Brian and David had consumed some alcohol and were talking loudly.

They were approached by two males, both wearing civilian clothes. One of those males told Brian and David to "make less noise and behave yourselves". Brian replied they should mind their own business. One of the males then said "I am Police Constable Fang and this is Police Constable Ho, we don't need to do what you say, show us your identity cards". [Both males are police constables]

Brian and David kept walking. PC Fang ran up to Brian, placed his hand on his shoulder and said "Fat boy, show me your identity card." Brian pushed his hand away and said "I don't have one, I'm a visitor here." PC Fang then said "I believe you are an illegal immigrant, you are under arrest for unlawfully entering Hong Kong" and again grabbed Brian. Brian again pushed him away, said "I don't believe you are police, leave us alone" and tried to run off. He was caught by PC Fang, who threw him to the ground, handcuffed him and said "That's it, you are also arrested for obstructing me, resisting me and assaulting me."

David by this time had walked some distance away followed by PC Ho. PC Ho told David he wanted to search his bag and also ordered him to turn out his pockets, adding he suspected David of helping an illegal immigrant to remain in Hong Kong. When David told PC Ho not to be so stupid, he was told he was under arrest. PC Ho then seized the bag David was carrying. David tried to pull the bag away from PC Ho but PC Ho took it from him, opened it and found a packet containing white powder inside. When David was asked what that was he replied "I don't know, it's Brian's bag, I was carrying it for him". Brian was then told "You are under arrest for suspected trafficking in drugs". [Analysis later revealed the packet contained 200 grammes of a mixture containing 120 grammes of heroin.]

PC Ho then took David back to where Brian and PC Fang were standing and said "Look what I've found" showing them the packet containing the powder." Brian then shouted "They are not police, quick run." David pushed PC Fang away. PC Fang fell into the road where he was struck by a passing bus. As a result of injuries he sustained his left arm was subsequently surgically amputated. David kept running but was subsequently caught by other police officers whom PC Fang alerted through his beat radio.

Brian and David were taken to Central Police Station where they were placed in separate cells. Neither of them was allowed to see a solicitor despite their requests to do so. Twenty four hours after their arrest Brian and David were questioned

separately by Det-Sergeant Mau about the drugs found in the bag that David was carrying. Under caution Brian denied the bag was his and denied any knowledge of the drugs. When he was questioning David Det-Sgt Mau told him that Brian admitted he had brought the drugs into Hong Kong and intended to sell them in Hong Kong. Det-Sgt Mau told David if he co-operated by making a statement admitting his part in the intended sale of the drugs this would substantially reduce his sentence, especially as the police appreciated that Brian was the main culprit. David then made a statement under caution admitting that he knew Brian had brought the drugs found in the bag into Hong Kong intending to sell them, that he was helping him sell them and would have received 10% of the profits.

Brian has been charged with:

Failing to produce proof of identity on demand contrary to s. 17C of the Immigration Ordinance, Cap. 115.

Obstructing PC Fang in the due execution of his duty contrary to s. 36(b) of the Offences Against the Person Ordinance, Cap. 212.

Resisting PC Fang in the due execution of his duty contrary to s. 63 of the Police Force Ordinance, Cap. 232.

Assaulting PC Fang in the execution of his duty contrary to s. 36(b) of the Offences Against the Person ordinance, Cap. 212.

David has been charged with:

Failing to produce proof of identity on demand contrary to s. 17C of the Immigration Ordinance, Cap. 115.

Resisting PC Ho in the execution of his duty contrary to s. 63 of the Police Force Ordinance, Cap. 232.

Brian and David have been jointly charged with:

Trafficking in dangerous drugs contrary to s.4 of the Dangerous Drugs Ordinance, Cap. 136.

Unlawfully and maliciously causing grievous bodily harm to PC Ho with intent to do him grievous bodily harm contrary to s. 17 of the Offences Against the Person Ordinance, Cap. 212.

Brian, a Canadian citizen, is 26 years old and has no connection with Hong Kong. David is a Hong Kong resident. He is 27 years old, married with one child aged 6 months. His wife is a Clerk in the Immigration Dept. He has one previous conviction for fighting in a public place when he was 19 for which he was fined \$100 and one conviction for giving false information to a pawnbroker when he was 25 for which he was fined \$500.

Both have been refused police bail and both are to be produced before a magistrate.

- 1) Advise Brian and David as to the legality or otherwise of the actions of the two police officers and, if their actions or the actions of either of them were improper, what remedies they might have.
- 2) Consider any conflicts of interest which might arise between Brian and David and whether the offences charged can be tried together.
- 3) Advise Brian and David in which court or courts the charges are likely to be heard and why and explain the procedure involved in getting the charges to trial. Are there any special matters to which consideration should be given arising from these pre-trial procedures? If so, what are they and how should they be addressed?
- 4) Brian and David require advice about bail, advise them.

Note: Copies of sections 17C and 17D of the Immigration Ordinance, Cap. 115 are attached at the back of this paper.

Question 2 (25 marks)

- (a) You have received instructions from Wigwam & Co., a firm of solicitors in London, to represent their client, Augustus Johns, who was injured in a traffic accident on 15 May, 1992, while working on secondment in Hong Kong. Mr Johns was a passenger in a taxi being driven by George Kwok. It was late at night, and the road was wet from rain. When approaching a set of traffic lights at a road junction (the light facing Mr Johns was green) Mr Johns noticed a motorcar travelling towards the taxi indicating that it intended to turn right, across the path of the taxi. Mr Johns knew that the traffic light control at this junction operated in such a way that the motorcar was not permitted to turn right while the green light gave priority to the taxi. However, the motorcar did not stop. It turned right and collided with the taxi. Mr Johns was treated for his injuries in Queen Mary Hospital, but then returned immediately to England for further treatment. He is now resident in England.
 - (i) On the instructions of Wigwam & Co you issued a generally endorsed writ citing the driver of the motorcar as Defendant on 6 May, 1995, but which you have not yet served. On 1 May, 1995 you received a fax from them informing you that the medical report requested by you will be available in 7 days time. Assuming that to-day's date is 7 May, 1995, advise what action, if any, should you take? Give reasons for your answer.
 - (ii) The solicitor for the Defendant has requested that the Plaintiff provide security for costs on the ground that he is resident out of the jurisdiction.

Advise Wigwam & Co. in the event that the Plaintiff refuses to provide such security, as to what action the Defendant may take to force the Plaintiff to pay, and the likelihood of his success.

- (iii) Shortly before trial the Defendant applies for leave to amend his Defence in a material way and the Court grants leave, with costs to the Plaintiff.

Explain the purpose and significance of this order as to costs.

- (b) You act for the Sun Rise Bank Limited, a bank incorporated in Hong Kong and carrying on business here. The bank wishes you to bring proceedings to recover an overdue loan of \$5m together with default interest of \$1.25m which it made to Macau Insinational Limitada (the 'borrower'). The borrower is a limited company registered in Macau. It does not carry on business in Hong Kong, but operates in Hong Kong through an agent, a Hong Kong company known as Macau Insinational Agency Limited. The loan in respect of which the bank wishes you to bring proceedings was arranged by the Hong Kong agent on behalf of the Macau principal.

- (i) Explain what needs to be done to serve the writ on the borrower once you have commenced proceedings.

Assume that the action has proceeded. Prior to the trial the Defendant borrower made an offer of settlement of \$5.25m contained in a letter written 'without prejudice' but expressly reserving the right to bring the letter to the notice of the judge on the issue of costs after judgment. The offer is refused. The action proceeds to trial and judgment is given for the Plaintiff for the sum of \$5.1m.

- (ii) The Defendant seeks to tender the letter to the court on the issue of costs. Advise the Defendant of what advantage this procedure could bring and the likelihood of success.

Note : You should refer in your answers to questions (a) and (b) to the relevant legislation, rules and case law applicable to Hong Kong.

Question 3 (25 marks)

Bush Securities Limited ("BSL") is a company registered in Hong Kong under the Companies Ordinance. BSL carries on the business of a dealer in bonds and securities on various stock markets throughout the world including the U.S.A. It is a wholly owned subsidiary of Bush Trust Inc. ("BTI"), its parent company which is registered in the U.S.A. In 1991 Mr. Wong opened a securities trading account with BSL and entered into a margin trading agreement with BSL to be operated on his behalf on a discretionary basis. The U.S.A. stock market collapsed in 1994. BSL issued margin call letters to Mr. Wong, who failed to respond. As a consequence, BSL liquidated Mr. Wong's account and sold all the collateral securities leaving a negative balance of US\$2 million on his margin trading account. On 1st January, 1995, BSL issued proceedings against Mr. Wong to recover the sum outstanding, interest and costs. Mr. Wong has filed a Defence and Counterclaim alleging fraud, negligence and breach of trust. Pleadings are closed and an Order for Directions has been made which provides

for mutual discovery and the exchange of witnesses statements.

- (a) The President of BSL asks what is meant by "mutual discovery". Advise the President on the meaning of this procedural step and the scope of the obligation imposed on BSL and its solicitors to disclose documents in the proceedings.
- (b) The President is particularly concerned whether BSL will be required to disclose the following documents and seeks your advice in relation to each one :
 - (i) a series of memoranda circulated among the Board of BSL in 1994 regarding the high risk nature of the transactions being conducted on behalf of Mr. Wong.
 - (ii) letters between BSL and its solicitors, some of which were written in 1994 and others in 1995.
 - (iii) a report written by the Vice-President of BTI to his President concerning the status of Mr. Wong's account, pursuant to his investigations in the Hong Kong office.
- (c) During your meeting with the President of BSL to discuss the above matters, your secretary enters the room to give you a document which she has just found on the fax machine and she tells you that it looks as though the Defendant wants to settle the action on a very favourable basis to your client. As soon as you read the document, you realise that it is a communication between the Defendant's solicitors and their Counsel which has been sent to your office in error. The President of BSL demands to see a copy of the letter and to be advised on its implications for the proceedings. What advice do you give?
- (d) Briefly, what is the purpose of a witness statement and what should it contain?

Question 4 (25 marks)

Last year, **Angelwings Sight and Sound Ltd.**, a software engineering company, entered into an agreement for the design and sale of a large number of super intelligent computer programmes to **Last Chance Games Co.** The proprietors of the business, Alfonso Lau and Sonia Wong, refused to pay for the programmes, claiming that the programmes were faulty. **Angelwings** issued a writ against **Last Chance** and the action went to trial resulting in a judgment in favour of **Angelwings** for the sum of \$1.5m.

You are the solicitor for **Angelwings**. Mr Simon Chan, Angelwing's managing director, has sought your advice on the following issues concerning enforcement of the judgment.

- (a) Mr Chan tells you that the defendants should have sufficient money to pay the debt. Although he does not know precisely what all their assets are, he has seen Alfonso's wife driving a recent model mercedes sports car and wearing the latest designer clothes. He has seen Sonia at the Hong Kong Jockey Club betting large sums of

money. However, he has heard from business friends that Alfonso Lau has recently been collecting his debts; is trying to sell his debenture in the Hong Kong Golf Club and has recently transferred a large number of shares to his son, Tiberous Lau. There are also rumours that he has recently purchased a luxury house in Canada in his wife's name.

Advise him as to what steps you can take to protect the company's interests and facilitate enforcement of the judgment debt.

- (b) You are still acting for **Angelwings** and have now obtained details of the assets of Sonia Wong and of the business. The business premises and equipment are leased from **Ping Pong Enterprises Ltd.**

Ms Wong owns:

- (1) a porsche sports car valued at \$450,000.
- (2) 10,000 shares in **Honeypot Uranium Mining Ltd** worth \$350,000,
- (3) a HKD savings account in the Hongkong & Shanghai Bank with \$150,000 deposited and a \$1m overdraft facility.
- (4) an apartment in Parkview worth \$7.3m which is subject to a mortgage in favour of Delphina Wong, Sonia's sister. Sonia is in the process of selling the apartment to **Sonia Holdings Ltd.**, a company in which Sonia, her husband and sister are shareholders.
- (5) a debt owed to her by a former friend, Bobby Tong, for \$100,000.

Advise Mr Chan of the best mode of enforcement available to the judgment creditor in respect of each asset and the appropriate procedure to be used. Give reasons for your answer.

- (c) Assume that the judgment debt has not been paid and the judgement creditor has issued a writ of fieri facias to the bailiff. On 10 August 19XX the bailiff attended Alfonso Lau's flat, obtained peaceable entry and made a formal seizure of various goods. On 10 September 19XX the bailiff came again to Alfonso's, but this time the flat was unoccupied and locked. The bailiff called a locksmith and broke in. He removed more goods, installed new locks and left.

Alfonso Lau now seeks to restrain the bailiff from selling the goods seized on 10 September on the ground that the bailiff's actions were unlawful.

Advise Alfonso Lau of his chances of success, giving reasons for your answer.

FOR REFERENCE IN ANSWERING QUESTION 1

CAP. 115 IMMIGRATION ORDINANCE

17C. Carrying and production of proof of identity

- (1) Every person who--
- (a) has attained the age of 15 years; and
 - (b) (i) is the holder of an identity card or is required to apply to be registered under the Registration of Persons Ordinance (Cap.177); or
 - (ii) is the holder of a Vietnamese refugee card,

shall have with him at all times proof of his identity.

- (2) A person who is required by subsection (1) to have with him proof of his identity shall on demand produce it for inspection by--
- (a) any police officer;
 - (b) any immigration officer or immigration assistant; or
 - (c) any person or member of a class of persons authorized for the purpose by the Governor by order published in the Gazette,

who is in uniform or who produces, if required to do so, documentary identification officially issued to him as proof of his appointment as a police officer, immigration officer, immigration assistant or, as the case may be, person authorized under paragraph (c).

- (3) Any person who fails to produce proof of his identity for inspection as required by subsection (2) commits an offence and is liable on conviction to a fine of \$1,000:

Provided that it shall be a defence in proceedings for an offence under this subsection for the person charged to prove that he had reasonable excuse for failing to produce proof of identity.

- (4) In respect of any failure to produce proof of identity for inspection as required by subsection (2), it shall be reasonable excuse for the purposes of subsection (3) if at the date of the alleged offence the defendant had no proof of identity with him because all proof of identity of which he was the holder, including any document specified in section 17B(b)(ii), had been lost or destroyed and--
- (a) he had reported the loss or destruction to a police officer at a police station or, in the case of an identity card, to a registration officer; or (*Amended 31 of 1987 s.15*)

(i)

- (b) he had had no opportunity so to report the loss or destruction.
- (5) Where the Governor authorizes any person or class of persons for the purposes of subsection (2)(c) he may limit the authority of such persons to such area, place or occasion or in such other manner as is specified in the order by which the authority is given.
- (6) Nothing in this section shall affect the operation of any order made under regulation 11(1) of the Registration of Persons Regulations (Cap. 177 sub.leg.)(relating to the compulsory carrying of identity cards).

17D. Arrest

- (1) A person referred to in section 17C(2)(a), (b) or (c) may arrest without warrant any person who fails to produce for inspection on demand proof of his identity, and in the case of such an arrest by a person referred to in section 17C(2)(a) or (c), the person arrested shall if not released be delivered as soon as reasonably practicable into the custody of the officer in charge of a police station.
- (2) An arrest carried out under subsection (1) shall not be unlawful by reason only of the fact that the arrested person is a person not required by section 17C(1) to have proof of his identity with him.
- (3) Where a person is arrested under subsection (1) otherwise than by an immigration officer or immigration assistant and it appears to the officer in charge of a police station that he may have landed in Hong Kong unlawfully, or have intended or attempted so to do, or is contravening or has contravened a condition of stay in respect of him, he shall be taken as soon as is reasonably practicable to an immigration officer or immigration assistant for examination under section 17E. *(Amended 75 of 1981 s.4)*
- (4) Where a person who is arrested under subsection (1) otherwise than by an immigration officer or immigration assistant and is not--
- (a) taken before an immigration officer or immigration assistant under subsection(3); or
- (b) proceeded against for an offence under section 17C(3),
- he shall be released forthwith unless he may be held in lawful custody for some other reason.

(ii)