

Candidate No. _____

**1998 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Thursday, 29 October 1998



HEAD II : CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

29 October 1998

Instructions to Candidates

1. The duration of the examination is 3 hours and 30 minutes.
2. This is an open-book examination.
3. There are FIVE questions in this paper. You must answer any FOUR questions.
4. Apart from Question 5, start each answer on a separate page of your answer book.
5. If you answer Question 5, your answer must be written in the spaces provided for that question on your question paper.
6. You must attach your question paper to your answer book at the end of the examination.
7. 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.
8. Do not take either this question paper or any answer books with you when you leave the examination room.

1998 Overseas Lawyers Qualification Examination

Head II : Civil and Criminal Procedure

Question 1 (25 marks)

Write your answer to this question in your answer book and answer all parts of the question.

You have been instructed by David who has just passed his eighteenth birthday. He is a secondary school student and lives with his parents.

About two months ago while on his way to a Bible reading class in Wanchai, he was stopped and searched by a group of plain clothes police officers on special drug duty patrol. A small amount of dangerous drugs, namely cannabis, was found in David's left front trousers pocket.

He was arrested and taken to Wanchai police station where he was subsequently charged with possession of dangerous drugs as follows :

Statement of Offence

Possession of Dangerous Drugs contrary to Section 8 of the Dangerous Drugs Ordinance Cap. 134 Laws of Hong Kong

Particulars of Offences

David Wong of [insert address] on [date of offence] you did unlawfully have in your possession a dangerous drug namely one rolled cigarette containing 0.5 grams of cannabis contrary to Section [8] of the Dangerous Drugs Ordinance Cap.134, Laws of Hong Kong

After he was charged he was released on police bail to attend Western Magistracy in 7 days time.

No plea was taken when he appeared at Western Magistracy in answer to his bail and the case was adjourned for 14 days for a Government Chemist Certificate ("GCC") on the substance found in his pocket. The magistrate granted unconditional bail. David was not then legally represented having declined the services of the Duty Lawyer.

David will attend Western Magistracy again tomorrow when a plea will be taken. The GCC confirms the substance as 0.5 gm. of pure cannabis.

His instructions are that :

1. The dangerous drug was planted on him by one of the arresting police officers after he was searched and nothing was found.
2. At the police station he was taken to the Detective's room for questioning. When he refused to co-operate and to give a confession statement to the police, he was beaten up by a number of plainclothes police officers who had arrested him. He was then forced to

sign a confession statement/cautioned statement prepared by one of the officers. He was told he would be released on bail after he signed the cautioned statement.

3. He suffered bruises all over his upper body. He did not receive medical treatment and was not aware he could have complained about that to the Magistrate at the first court appearance.
4. Sometime ago, he cannot recall the exact date, he pleaded guilty to a similar offence and was put on probation. He claims not to know whether the probation period has expired.

Advise David as to the likely consequences if :

1. **He pleads not guilty.**
2. **He pleads guilty.**
3. **What sentence he might receive if he pleads guilty ?**
4. **If he was convicted after trial what sentence might be expected ?**

Give reasons for your advice and support your answer with authorities where appropriate.

Question 2 (25 marks)

Write your answer to this question in your answer book and answer all parts of the question.

Ivan, born on 20 May 1978, has been charged with burglary contrary to s.11(1)(a) of the Theft Ordinance Cap. 210.

The police allege he entered a flat on the 10th floor of a high rise building at about 11 pm by climbing a drainpipe and forcing open a bedroom window. The flat was occupied by two females Ann and Brenda. When Brenda heard a noise and went into the bedroom she found a man there. The man threatened her with a knife before escaping through the window. Nothing was taken from the flat.

Ivan was arrested on the following day after an anonymous telephone call was made to the police. At an identification parade conducted on the afternoon of the day Ivan was arrested Brenda identified him as the man she saw in her flat. Ivan was then charged with burglary.

Ivan was refused police bail and was produced to Court No. 1 of South Kowloon Magistracy on the day after he was charged. The prosecutor asked that no plea be taken and that he be remanded in police custody for further investigation and identification parades because of suspicion of involvement in other burglaries. The magistrate was told Ivan was convicted in 1995 of criminal intimidation and being a member of a triad society when he was sent to a detention centre.

Ivan was legally represented on that court appearance. His solicitor advised him not to apply for bail until it was known whether there would be further charges. He said it was pointless making an application which would be refused. He also told Ivan that the more he co-operated with the police the better his chances of bail next time. Ivan accepted that advice and the magistrate remanded him in police custody for three clear days. Ivan refused to take part in identification parades arranged during the remand.

You now represent Ivan. You have seen him in the police cells. He denies the burglary with which he has been charged and will plead not guilty. He says he was in a video games centre with friends. He denies involvement in any other burglary.

Ivan wants bail. He feels that not applying for bail on his first appearance before the magistrate and his refusal to take part in identification parades have prejudiced his chance of bail as when he next comes to court he will appear before the same magistrate. He agrees he was sent to a detention centre in 1995.

Ivan is taking a full time business degree at a local university. He works part time as a hotel porter earning \$5,000 per month. His parents live in Canada and he visits them during vacations. He is due to fly to Canada in 14 days time. In Hong Kong he lives with an uncle who owns and operates an electrical repair business.

When you telephone the police officer in the case he said the prosecution will not be asking for a plea to be taken on Ivan's next court appearance and will seek an adjournment for 14 days and "the case will probably go to the District Court". The police are sure Ivan is involved in other burglaries and more charges are likely. The officer told you bail will be opposed on Ivan's next court appearance because of :

- the seriousness of the offence and the likely punishment upon conviction;
- the strength of the prosecution case;
- the likelihood of other charges of a similar nature;
- Ivan's unco-operative nature in refusing to attend identification parades during the remand in police custody;
- the nature and implications of Ivan's previous convictions; and
- the likelihood Ivan will abscond if bail is granted.

Now answer the following :

1. **What, if any, further information would you want before you can apply for bail?**
2. **What submissions issues would you advance on the bail application?**
3. **How should the magistrate approach the bail application?**
4. **What, if any, advice would you give Ivan if bail is granted?**
5. **What, if anything, might the prosecution do if Ivan is granted bail by the magistrate?**

You must support your answer with reasons and with authorities.

You are not concerned with substantive law issues. You can take it that burglary is the correct charge for which the maximum punishment is 14 years imprisonment. Restrict your answer to issues relating to bail.

Question 3 (25 marks)

Write your answer to this question in your answer book.

You act for Henry Chan, managing director of the company, Sports and Dots Ltd in an action against Sylvia Ng, trading as Tennis and Socks Co, for the nonpayment of 600 Marilyn Wingis Deluxe tennis racquets and 80 super graphite Leopard golf clubs sold and delivered by Sports and Dots Ltd to Tennis & Socks Co for the sum of HK\$1.5m.

Judgment has been obtained against Tennis & Socks Co in the High Court, Court of First Instance for the sum of HK\$1.5m plus interest and costs.

On oral examination of Sylvia Ng you obtained the following information.

Sylvia Ng conducts a current account No. 7676768 at the Heng Seng Bank, Chai Wan, in the name of Tennis & Socks Co. The balance in the account was HK\$152,000 per the last bank statement 2 days ago. The account has an available overdraft facility of HK\$200,000. The account is usually overdrawn by the end of the month by up to HK\$180,000 because Tennis & Socks Co has to pay its trade creditors.

Sylvia owns the trading stock and shop fittings and furniture in her shop at Chai Wan (which are leased premises). The estimated value of the stock and fittings is HK\$480,000.

At present, in the current economic climate, the shop is only just breaking even after payment of wages and outgoings.

Trade creditors are owed HK\$164,000 and legal action has been commenced by at least one of them. Two years ago Sylvia took out a loan from the Sunshinel Bank for HK\$500,000 on the security of a personal guarantee. She has missed the last two repayments. The amount currently outstanding to the bank is HK\$350,000.

Sylvia drives a 1997 Porsche registered in the name of her husband, Ivan Ng. She has HK\$90,000 in a savings account No. 1234456 with the Metro Bank of Hong Kong, Central Office and has a Visa card debt of HK\$60,000. Sylvia and Ivan have recently sold their house at Stanley Beach, registered in Ivan's name, for HK\$8.5m.

Henry has also obtained some further information from a private investigator. Apparently, Sylvia and Ivan have recently bought a villa in Italy near where their daughter lives. Their daughter, Livia, runs a sports goods business in Sorrento, Italy, which is owned by a company, registered in Italy, whose directors are Sylvia and Ivan Ng. They are also the sole shareholders of the company. Sylvia travels frequently to Sorrento.

To date, Sylvia has not paid any money pursuant to the judgment. Henry Chan is concerned that unless action is taken soon he will get nothing. Sports and Dots Ltd is also facing financial difficulties with the current economic downturn and has to pay its lawyers the costs of the litigation. It needs the money from the judgment as soon as possible.

Draft a letter to Henry Chan advising him of the actions he should take which would best protect the interests of his company, and enable the company to recoup the amount of its judgments.

Question 4 (25 marks)

Write your answer to this question in your answer book and answer all parts of the question.

The Lucky Diamond is a limited liability corporation incorporated according to the laws of the State of Nevada in the United States of America. It carries on business in Las Vegas as a licensed casino under a gaming licence issued by the Nevada Gaming Commission. Under the laws of the State of Nevada a licensed casino may provide credit facilities to its patrons for the purpose of gaming and any such agreement entered into between a licensed casino and one of its patrons is valid and enforceable thereunder.

On 20 December 1996 Mr Chan, a resident of Hong Kong who was on holiday in Las Vegas, entered into an agreement with The Lucky Diamond whereby The Lucky Diamond granted Mr Chan a credit facility for US\$200,000 for the purpose of gaming. On 21 December, Mr Chan drew upon the credit facility for the full amount of US\$200,000 and executed a 'marker' evidencing the amount of money advanced in the form of gaming tokens. The marker stated :

"I have received cash. I acknowledge that the said debt is incurred in Nevada and agree to submit to the jurisdiction of any Nevada Court."

Mr Chan gambled at the Lucky Diamond and lost his tokens. He then returned to Hong Kong. The Lucky Diamond has issued a Writ endorsed with a Statement of Claim in the High Court, Court of First Instance of Hong Kong seeking payment of the sum of US\$200,000. Mr. Chan seeks your advice : -

- A. (i) He tells you that the Writ was inserted through the letterbox of his flat. He asks what steps must be taken and when to ensure that a default judgment cannot be entered against him. (3 marks)**
- (ii) Mr Chan wants to know whether he can challenge the jurisdiction of the Hong Kong Court and, if so, what steps he must take to do so and at what stage of the proceedings and what would be the chances of succeeding if such an application were made. (10 marks)**
- (iii) Mr Chan submits to jurisdiction in Hong Kong. What application could Mr Chan make to protect himself on costs and what are the applicable principles? (5 marks)**
- B. The Lucky Diamond has sued Mr Chan in Nevada and obtained a judgment against him. Mr Chan wants to know whether the judgment can be registered in Hong Kong or otherwise enforced against his Hong Kong assets. Please advise. (7 marks)**

Question 5 (25 marks)

This question has 10 parts to be answered.

Write your answers to this question in the spaces provided on the question paper and then attach your question paper securely to your answer book.

Note the spaces provided for you to write your answers are intentionally small. You must approach each part of the question on that basis. Each part of the question must be answered.

Mo Chin-bei and Yau Chin-wan are partners trading in the name of Ho Ho Wan Trading. The business is mainly for exporting toys to overseas customers. Mo, on behalf of the partnership, placed an order with its local supplier, B & C Ltd, at the end of last year for the supply of 10,000 dozens toys according to a sample given by his overseas buyer, at the price of HK\$100 per dozen. The partnership paid HK\$150,000 to B & C Ltd upon placing of the order.

The toys were delivered on 12 January this year. Ho Ho Wan Trading gave a post-dated cheque dated 30 January for HK\$850,000 drawn in favour of B & C Ltd in payment for the balance of purchase price.

Upon inspection of the toys 2 days later by the representative of the partnership's overseas buyer, the representative was of the opinion that a substantial portion of the toys were poorly manufactured and were not up to the standard of the sample. The overseas buyer therefore refused to accept the toys. Mo accordingly countermanded the cheque and notified the manager of B & C Ltd about the problem of the toys and the rejection thereof. B & C Ltd's manager was however adamant that the toys were OK and refused to take back the toys, saying that Mo was simply making up some excuse because of the economic downturn.

B & C Ltd issued a Writ of Summons in the High Court, Court of First Instance, on 12 February this year against Ho Ho Wan Trading for HK\$850,000 on the dishonoured cheque.

Please go the next page for questions

Part (1) (3 marks)

On Monday 15 February the litigation clerk of B & C Ltd's solicitors attended the office of Ho Ho Wan Trading at 6:00 p.m. and served the Writ by handing it personally to the secretary at the reception counter.

Has service of proceedings been validly effected? If so, when? If not, why not? Please explain your answer briefly.

Service **was/was not effective* [please delete the inappropriate*] and occurred on _____
_____ [date].**

Reason(s): _____

Part (2) (2 marks)

If Ho Ho Wan Trading wishes to recover the payment of HK\$150,000, it should, in addition to defending B & C Ltd's claim, do so by way of :-

(Please tick the best answer)

- (a) a set-off in the same action
- (b) a counterclaim in the same action
- (c) both a set-off and counterclaim in the same action
- (d) a fresh action
- (e) none of the above

Part (3) (4 marks)

B & C Ltd applied for summary judgment against Ho Ho Wan Trading. The application was heard before Master Wu, who, after hearing submissions from Counsel for each party, dismissed B & C Ltd's application. If you were the solicitor for Ho Ho Wan Trading, what application(s) relating to costs would you suggest your Counsel to make upon hearing Master Wu's decision? Explain your answer briefly.

Part (4) (2 marks)

If Master Wu's decision was made orally on Wednesday 22 April this year and the Order was sealed and served on the following Monday 27 April, what would be the last date for issuing a notice of appeal against Master Wu's Order? To whom should the appeal be made? Is leave to appeal required?

The last date for issuing a notice of appeal would be _____

The appeal should be made to _____

Leave to appeal *is/is not required. [*please delete the inappropriate*]

Part (5) (4 marks)

Before the appeal, the manager of B & C Ltd, upon legal advice, swore a further affidavit explaining how the responsible staff of Ho Ho Wan Trading had inspected the toys in detail before acceptance on 12 January. Could that further affidavit be admitted as evidence in the appeal ? Explain your answer briefly.

Please go to next page for Part 6

Part (6) (2 marks)

Before the appeal, Ho Ho Wan Trading showed to B & C Ltd on a without prejudice basis a copy of its expert report demonstrating that a substantial portion of the toys were poorly manufactured and were not up to the standard of the sample. B & C Ltd and Ho Ho Wan Trading eventually came to a settlement on terms that the latter would return all the toys to the former and recover the payment of HK\$150,000; each party was to discontinue its respective claims and/or counterclaim and/or proceedings against the other and to bear its own legal costs (notwithstanding any previous costs order to the contrary).

The toys were actually manufactured by B & C Ltd's overseas manufacturer A & B Inc. (a company incorporated in Thailand and carrying on manufacturing business there) at a cost of HK\$600,000. B & C Ltd has therefore issued a Writ against A & B Inc. in the High Court, Court of First Instance, to recover its loss. It obtained leave to serve outside the jurisdiction on A & B Inc. and sent the Writ by ordinary airmail to the business address of A & B Inc. in Thailand. A & B Inc. subsequently filed an Acknowledgment of Service in Court stating an intention to defend the proceedings.

(Please tick the best answer) :

- (a) **Service of the Writ on A & B Inc. is valid because A & B Inc. has acknowledged service.**
- (b) **Service of the Writ on A & B Inc. is valid because leave to serve outside the jurisdiction was obtained.**
- (c) **Service of the Writ on A & B Inc. is invalid because service by ordinary airmail to the business address of A & B Inc. in Thailand cannot be an acceptable means of service.**
- (d) **Whether service of the Writ on A & B Inc. is valid depends on whether the Plaintiff can produce expert evidence that service by ordinary airmail to the business address of A & B Inc. in Thailand is valid service under Thai law.**
- (e) **None of the above.**

Please go to next page for Part 7

Part (7) (2 marks)

A & B Inc. has filed a Defence contesting liability. B & C Ltd is worried that A & B Inc., being outside the Hong Kong jurisdiction, may choose not to comply with any judgment that may eventually be obtained against it so that the proceedings may result in a wastage of legal costs. The managing director of A & B Inc. is now in Hong Kong on a business trip.

B & C Ltd should:

(Please tick the best answer) :

- (a) apply for an order for security for costs against A & B Inc
- (b) apply for a Prohibition Order against the managing director of A & B Inc
- (c) apply for an Anton Pillar Order against A & B Inc
- (d) apply to strike out A & B Inc.'s Defence
- (e) none of the above

Please go to next page for Part 8

Part (8) (2 marks)

Assume that you act as the solicitor for B & C Ltd. In preparing the List of Documents for mutual discovery, your client has given you, among other documents, the Affidavit referred to in Part (5) (which Affidavit had not been filed or produced to the Court in the earlier proceedings because of the settlement). Your client does not wish to disclose it to the other side for fear that this Affidavit may weaken its case.

The advice you should give to your client is :

(Please tick the best answer) :

- (a) **there is no need to disclose this Affidavit as the document is confidential in nature**
- (b) **there is no need to disclose this Affidavit as in any event the other side cannot rely on it as admissible evidence**
- (c) **your client should disclose the existence of this Affidavit but it can probably assert privilege on the ground that the document was sent to you, in your capacity as its solicitor, at a time when the current proceedings were both contemplated and had commenced**
- (d) **your client should disclose the existence of this Affidavit but it can probably assert privilege on the ground that the document was created for the purpose of the earlier proceedings and there had been no waiver of the privilege**
- (e) **your client has to disclose this Affidavit and allow the other side to inspect the same as there is no arguable ground to resist discovery.**

Please go to next page for Part 9

Part (9) (2 marks)

Now it is 5 weeks before the trial. You receive a letter from the solicitor acting for the Defendant marked "Without Prejudice save as to Costs" offering to pay a total sum of HK\$400,000 in full and final settlement of the Plaintiff's claim and costs and reserving expressly the "right to produce the letter to the court in case the issue of costs arises". Your client, B & C Ltd, considers that HK\$400,000 is too low but it would like to know what would be its position on costs if at the trial the Plaintiff is awarded judgment in a total sum less than HK\$400,000 in view of the said letter.

You should advise your client that in that event :

(Please tick the best answer) :

- (a) **the Court will likely award costs of the whole proceedings in favour of the Defendant**
- (b) **the Court will likely award costs of the whole proceedings in favour of the Plaintiff**
- (c) **the Court will likely award costs of the proceedings up to the date of receipt of the offer letter in favour of the Plaintiff and thereafter in favour of the Defendant**
- (d) **it is not possible to advise on the likelihood of the Court's decision on costs as different judges have completely different ways of exercising discretion on costs in that event**
- (e) **none of the above.**

Please go to next page for Part 10

Part (10) (2 marks)

Assume that the Defendant had made no such offer as referred to in Part (9) but made a payment into Court in the sum of HK\$500,000 four weeks before trial.

(Please tick the best answer) :

- (a) **The Plaintiff is entitled to accept the payment into Court within 21 days after receipt of the notice of payment without any need to obtain the Court's leave.**
- (b) **If the payment is not accepted and at the trial the Plaintiff is awarded judgment in a total sum of HK\$450,000, the Court will still likely award costs of the whole proceedings in favour of the Plaintiff because the payment in was made too close to the trial.**
- (c) **If the payment is not accepted and at the trial the Plaintiff is awarded judgment in a total sum of HK\$450,000, it is not possible to advise on the likelihood of the Court's decision on costs as different judges have completely different ways of exercising discretion on costs in that event.**
- (d) **If the payment is not accepted and at the trial the Plaintiff is awarded judgment in a total sum of HK\$510,000, the Court will likely award costs of the whole proceedings in favour of the Plaintiff.**
- (e) **None of the above.**

END OF PAPER