

Questions 1 to 4

**2003 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Monday, 3 November 2003



HEAD II: CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

3 November 2003

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. ANSWER ANY FOUR QUESTIONS ONLY.
4. You must answer:
 - Questions 1 and 2 (Criminal Questions) in Answer Book 1
 - Questions 3 and 4 (Civil Questions) in Answer Book 2
 - Question 5 in the separate question paper
5. Please note that Question 5 is printed in a separate question paper. If you answer Question 5, your answer must be written in the spaces provided for that question in the separate question paper.
6. IF YOU ATTEMPT MORE QUESTIONS THAN YOU HAVE BEEN INSTRUCTED TO ANSWER:
 - (a) THE EXAMINERS WILL MARK ALL QUESTIONS THAT HAVE BEEN ATTEMPTED AND NOT DELETED; AND
 - (b) IN COMPUTING YOUR FINAL MARK, THE EXAMINERS WILL COUNT THE MARKS FOR THE NUMBER OF QUESTIONS THAT YOU WERE INSTRUCTED TO ANSWER TAKING INTO ACCOUNT THE ANSWERS WITH THE LOWEST SCORES.
7. Apart from Question 5, start each answer on a separate page of your answer book.
8. 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.
9. Do not take either the question papers or any answer books with you when you leave the examination room.

2003 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

ANSWER BOTH PARTS 1 AND 2 OF THIS QUESTION.

You act for **Dave** who is charged with wounding contrary to s. 19 of the Offences Against the Person Ordinance Cap. 212, and criminal intimidation contrary to s. 24 of the Crimes Ordinance, Cap. 200.

PART 1

Dave was employed by XYZ Ltd until he was dismissed six months ago. Since then he has been to the company's office in Wanchai several times demanding wages which he claims are due to him. On some of those occasions, he has sworn at **V**, the manager of XYZ Ltd. On Monday of last week, he went to the company's offices again. An argument developed with **V**. During that argument **Dave** allegedly head butted **V** in the face. On medical examination **V** was found to have a fractured nose and a cut lip. **Dave** was arrested and charged with wounding **V**. He was given police bail to appear in the Eastern Magistrates' Court tomorrow.

V's secretary, **S**, claims she witnessed the attack upon **V**. She made a statement to the police in which she said that she intervened when **Dave** and **V** started to argue and told **Dave** to leave **V** alone. She alleges that **Dave** told her 'You keep out of it', and then head butted **V**.

Dave consulted you the day after he was given police bail and asked you to represent him at Eastern Magistrates' Court tomorrow. **Dave** then told you that he had not made any admissions to the police and had remained silent during questioning. His instructions were that he had gone to XYZ Ltd on the day in question and he had again asked **V** to pay him the outstanding wages. He said **V** then swore at him, grabbed him and tried to force him out of the office. He told you that, as **V** did this, there was an accidental clash of heads. **Dave** claimed that **S** was not present at the time **V** was injured. He has instructed you that he intended to 'plead not guilty' to the charge of wounding.

Yesterday, **Dave** was arrested again and subsequently charged with criminal intimidation. The police allege that **Dave** approached **S** whilst she was shopping in Causeway Bay, shouted at her and told her 'Don't come to court and tell lies about me. If you dare to give evidence against me, I will chop you to death.' He was arrested by a patrolling police officer to whom **S** complained about his conduct. **S** also told the police that she was very frightened of **Dave** as he knew where she lived. After being charged with criminal intimidation, **Dave** was refused police bail. He will be brought up at Eastern Magistrates' Court tomorrow.

(See over the page for a continuation of Question 1)

You have seen **Dave** in the police station. He says he met S unexpectedly whilst he was walking in Causeway Bay. He says that S laughed at him. **Dave** denies shouting at her. He said to S, 'Please don't tell lies about me in court. If you do you will only regret it later'. **Dave** wants you to represent him on both the criminal intimidation and the wounding charge.

You have spoken to the Prosecutor. She told you the prosecution will want both charges dealt with together and will ask that no pleas be taken when **Dave** appears before the magistrate tomorrow as no decision has yet been made whether Dave will be tried before a magistrate or in the District Court. She said that bail will be opposed, but 'You will have to wait until you get to court tomorrow to find out the reasons'. The prosecution witnesses are V, S and the two arresting police officers.

Dave was born in Hong Kong on 1 August 1983. Whilst he was working for XYZ Ltd he rented a flat for \$8,000 per month. When he lost his job he could not pay that rent and he gave up the flat to live with friends. Three months ago, he started to work for Nathan Wong who operates an electrical supply and repair business. Nathan is the father of **Dave's** girlfriend Lulu. For the last two months **Dave** and Lulu have lived together in a flat in Mongkok. Lulu is a sales assistant in her father's business and she persuaded him to employ **Dave**. Lulu and Nathan will be in court tomorrow. All of **Dave's** family live in Mainland China.

Dave has previous convictions. In September 1999, he was fined \$750 for theft from a shop contrary to s. 9 of the Theft Ordinance, Cap. 210. In December 1999, he was convicted of criminal damage contrary to s. 60 of the Crimes Ordinance Cap. 200 and sent to a Detention Centre. **Dave** pleaded 'guilty' to the charge of theft, but 'not guilty' to the charge of criminal damage. He still denies committing the criminal damage offence and has a sense of grievance at that conviction, claiming he was poorly represented. **Dave** was released from the Detention Centre in April 2000. He then obtained employment as a trainee electrician, keeping that job until October 2001 when the business closed. He then started to work for XYZ Ltd.

Questions:

- (a) **What objections to bail might the prosecutor advance and how would you respond to them? (10 marks)**
- (b) **What, if any, action(s) might the prosecutor take if, despite the objections to bail, bail is granted, and what would that involve? (5 marks)**

(See the next page for a continuation of Question 1)

PART 2

Assume that **Dave** is granted bail, that the charges against him will be dealt with in the Magistrate's Court, that he has pleaded 'not guilty' to both charges and that a trial date has been set.

Between **Dave** pleading not guilty and the trial date you take his detailed instructions. He admits to you that when V grabbed him and tried to force him out of the offices of XYZ Ltd, he took the opportunity to head butt him. He regrets this and says that his frustration got the better of him when V called him 'a worthless criminal'. With **Dave's** consent, you successfully negotiate with the prosecution that they will offer no evidence on the criminal intimidation charge in return for a guilty plea to the wounding charge. You appear for **Dave** on the trial date. **Dave** pleads 'guilty' to wounding and 'not guilty' to criminal intimidation. Those pleas are accepted by the prosecution and by the Magistrate. **Dave's** previous convictions are put to him and are agreed. The magistrate invites you to address her in mitigation.

Question:

- (c) **How would you mitigate on behalf of Dave? What sentence would you invite the magistrate to impose? Why would you do that and what would this involve? (10 marks)**

[NOTE: Section 19 of the Offences Against the Person Ordinance, Cap. 212, and sections 24 and 27 of the Crimes Ordinance, Cap. 200 are attached at Appendices 1, 2 and 3 respectively at the back of the Test Paper.]

Question 2 (25 marks)

You are a solicitor with Messrs AB Chan & Co. You have been consulted by Mr John Yip, aged 32. He has been charged with one offence of burglary contrary to s. 11 of the Theft Ordinance, Cap. 210.

The charge has been transferred to the District Court under s. 88 of the Magistrates Ordinance. When making the transfer to the District Court, the magistrate granted Yip bail. Yip was unrepresented before the magistrate. He was similarly unrepresented on the plea day in the District Court. Yip pleaded not guilty on the plea day in the District Court.

The burglary is alleged to have been committed at 11 p.m. on 1 July 2003 at a residential flat at 2A, 13th Floor, Goodview Court, Stanley, Hong Kong. A gold watch and \$80,000 in cash were stolen from the premises. The burglar was disturbed by one of the occupants of the flat who later gave a description of the burglar to the police. That description was circulated to all police stations in Hong Kong.

Yip was arrested in Nathan Road, Tsim Sha Tsui, Hong Kong at 2 p.m. on 14 July 2003 by two police officers. They noticed that Yip matched the description of the person alleged to have committed the burglary in Stanley. The officers stopped Yip and questioned him about his whereabouts on the evening of 1 July 2003. When Yip did not reply, the officers asked him about the burglary at Stanley. Yip denied committing that burglary. Nonetheless, Yip was arrested on suspicion of burglary, taken to Tsim Sha Tsui police station and later transferred to Stanley police station.

At Stanley police station he was interviewed under caution about the burglary. Yip again denied involvement. He was detained overnight and the following morning took part in an identification parade. The occupant of the flat, who had disturbed the burglar, viewed the parade but failed to make any identification. Yip was again questioned under caution on the afternoon of 15 July 2003. By then he had been in police custody for over 24 hours. This time Yip admitted committing the burglary.

Yip has told you he is heroin dependant and consumes the drug daily. He instructs you that, before his arrest, he had last consumed heroin on the morning of 13 July 2003. He was on his way to meet his supplier to buy more drugs when he was arrested on 14 July 2003. He says that by the time he was interviewed at Stanley police station on the afternoon of 15 July 2003 he was desperate for heroin and was suffering from drug withdrawal symptoms.

He says that the officer who interviewed him on that afternoon told him, before the interview started, that if he admitted the burglary he would be charged and bailed. He would then be free to buy heroin or to go to a methadone clinic. Yip then made a statement admitting the burglary. He says that one of the officers told him what to say. One hour after the interview ended Yip was charged with burglary and then released on police bail to appear in the Eastern Magistrate's Court the next day.

(See the next page for a continuation of Question 2)

Yip now denies any involvement in the burglary. He intends to maintain his 'not guilty' plea. He says that from 9.30 p.m. to midnight on 1 July 2003 he was having dinner with two friends at the Palace Restaurant in Shatin in the New Territories. He says that he could not have been in Stanley at the time of the burglary because of the distance between the two locations. He has not previously told the police about this.

Yip has three previous convictions for possession of dangerous drugs. Apart from that, he was convicted of assault occasioning actual bodily harm contrary to s. 39 of the Offences Against the Person Ordinance, Cap. 212 on 10 February 2002 and sentenced to 6 months imprisonment suspended for 18 months.

Questions:

How would you advise **Yip** on the following matters :

- (a) **The record of interview taken at the police station?** (7 marks)

- (b) **Yip's concerns that the trial judge may be prejudiced against him because of his previous convictions?** (7 marks)

- (c) **The action(s), if any, that you would take concerning Yip's instructions about where he was on the night of the burglary?** (4 marks)

- (d) **The likely sentence Yip will receive if he is convicted of the burglary after trial?** (7 marks)

[NOTE: Section 11 of Theft Ordinance, Cap. 210 is attached at Appendix 4 at the back of the Test Paper.]

Question 3 (25 marks)

Last year, **Good Ideas Limited**, a Hong Kong company manufacturing novelty mobile telephone handsets, entered into an agreement to sell 500,000 handsets to **Creative Mobiles Co** at a price of HK\$10 per unit. The handsets were delivered in accordance with the terms of the agreement but **Creative Mobiles Co** has failed to pay for them.

Mr Chan, a qualified accountant and the Managing Director of **Good Ideas Limited**, tells you that the company's former solicitors issued a writ against **Creative Mobiles Co** for the full amount of the claim and obtained a Judgment in Default of Acknowledgement of Service several months ago. However, **Good Ideas Limited** has not taken any steps to enforce the Judgment. Mr Chan now wishes to instruct you in respect of the claim and all other legal work for **Good Ideas Limited**.

Mr Chan tells you that he is not sure whether **Creative Mobiles Co** is still in business, but he has information that the proprietors, Mr Lee Lai Man and Ms Wong Wai Min, enjoy a good lifestyle. Mr Chan says he knows that:-

- (1) Mr Lee owns a red Porsche motor car which must be worth around HK\$750,000;
- (2) Mr Lee is also a director and shareholder of **Mobiles R' US**, a company listed on the Hong Kong Growth Enterprise Market, owning around 1 million shares which are currently trading at HK\$0.75 each, and also a shareholder of **Creative Investments Limited**, a Hong Kong registered company about which Mr Chan knows nothing;
- (3) Ms Wong owns a large amount of jewellery and a collection of antique watches which must have a substantial value;
- (4) Ms Wong is currently employed as a consultant by an international jewellery retailer at a salary of HK\$250,000 per month;
- (5) Ms Wong banks with HSBC and recently held a deposit of HK\$500,000 as well as having a HK\$2 million overdraft facility;
- (6) Ms Wong only has a 20% interest in **Creative Mobiles Co**.

Mr Chan tells you that his company is experiencing financial difficulties due to the current economic environment. He needs to enforce the Judgment but is concerned about costs. Also, when he met Mr Lee in the street the other day by chance, Mr Lee laughed and said he would never get a cent because his solicitors had failed to serve the Writ properly.

Mr Chan hands to you a copy of the Judgment, the Affirmation of Service and a copy of the memorandum received from the former solicitors, Messrs Wong Wai & Co (set out below).

(See the next page for a continuation of Question 3)

Question:

Mr Chan asks you to advise him by letter, for discussion with his board of directors, on the following points:-

- (1) Against whom can the Judgment be enforced?**
- (2) What other steps, if any, need to be taken before enforcement action can be taken?**
- (3) Can the Judgment be enforced against any of the assets to which he has referred at the meeting and, if so, what is the best mode of enforcement available and the appropriate procedure to be used?**

Mr Chan specifically asks you to set out the reasons for the advice given and to draw to the directors' attention any additional matters on which you consider advice should be given to enable the directors to make a decision. Please draft the letter of advice.

(25 marks)

(See over the page for a continuation of Question 3)

Memorandum

To: Good Ideas Limited
(Mr Chan)
From: Messrs Wong Wai & Co
Date: 7 April 2003
Re: Creative Mobiles Co

The Business Registry search result confirms that Creative Mobiles Co is a partnership carrying on business at Room 401, 4th Floor, Hop Hing Factory Building, 27 Tsingtao Road, Tsuen Wan, New Territories, Hong Kong.

The partners are:-

- (1) Mr Lee Lai Man
- (2) Ms Wong Wai Min

Signed: Wong Wai & Co.

(See the next page for a continuation of Question 3)

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 8888 of 2003

BETWEEN

GOOD IDEAS LIMITED

Plaintiff

and

CREATIVE MOBILES CO (A FIRM)

Defendant

Affirmation of Service

I, Man Tai Tai of 22nd Floor, Printing House, 6 Duddell Street, Hong Kong, clerk to Messrs Wong Wai & Co, solicitors for the Plaintiff herein, solemnly and sincerely affirm as follows:-

1. I did on Monday, 7 April 2003 serve the above mentioned Defendant, Creative Mobiles Co (a firm) with a true copy Writ of Summons in this action by serving the same personally on Ms Wong Wai Min, a partner of the Defendant, at Room 401, 4th Floor, Hop Hing Factory Building, 27 Tsingtao Road, Tsuen Wan, New Territories, Hong Kong, the principal place of business of the Defendant.

2. The said copy Writ was duly sealed with the seal of the Registry of the High Court where it was issued and was accompanied by a prescribed form of Acknowledgement of Service.

Affirmed at Ground Floor, Printing House)
6 Duddell Street, Central, Hong Kong)

MAN Tai Tai

)
)
)
)
)
)

this 14th day of April 2003)

Before me:

P.C. CHAN

P.C. Chan
Solicitor, HKSAR

This affirmation is filed on behalf of the Plaintiff.

(See over the page for a continuation of Question 3)

IN THE HIGH COURT OF THE
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ACTION NO. 8888 of 2003

BETWEEN

GOOD IDEAS LIMITED

Plaintiff

and

CREATIVE MOBILES CO (A FIRM)

Defendant

JUDGMENT

The 28th day of April 2003

No notice of intention to defend having been given by the Defendant herein, IT IS THIS DAY ADJUDGED that the Defendant to pay the Plaintiff the sum of HK\$5,000,000 together with interest thereon at the rate of 8% per annum from 7 April 2003 to the date hereof, and HK\$1,550 fixed costs.

REGISTRAR

Question 4 (25 marks)

You are a solicitor with A.B. Chan & Co.

You are consulted by Mr Wong. Mr Wong and his wife are the only shareholders and directors of **XYZ Ltd**, a private limited company incorporated in Hong Kong. Mr Wong brings with him a writ and other court documents which had been served upon **XYZ Ltd** earlier that afternoon.

XYZ Ltd is the registered owner of Flat 14A, a small flat on the 14th floor of the DEF Building in Mongkok. Mr and Mrs Wong have been operating a business from the flat. The flat is the registered office of **XYZ Ltd**. Mr and Mrs Wong propose to sell the flat as it is too small for their needs.

To make the flat attractive to potential purchasers, **XYZ Ltd** hired a number of casual labourers to carry out alteration and decoration work at Flat 14A. This work included the demolition of an internal wall, converting two small rooms into one larger room and installing a new kitchen. Whilst the labourers were demolishing the wall, Mr Tse, the registered owner of Flat 13A which is directly below Flat 14A, came to Flat 14A. He complained to Mr Wong that the demolition work had caused part of the ceiling of his flat to collapse and also that water was leaking into his flat from a ruptured pipe in Flat 14A. Flat 13A is the same size as Flat 14A.

Mr Wong immediately arranged for a former class mate S, who is a loss adjuster with an insurance company, to inspect Flat 13A. When S went to Mr Tse's flat the following day Mr Tse was absent but Mrs Tse allowed him in to inspect the damage. S did not discuss the cost of putting right the damage to Flat 13A with Mrs Tse. Later that same day S told Mr Wong that the cost of replacing the fallen ceiling, making good damage caused by the water leak and re-painting where necessary would be no more than \$90,000 and would take three days to complete. S made that estimate based upon his long experience in the insurance industry.

The day after receiving S's estimation of the costs of the repair to Flat 13A, Mr Wong delivered a letter on **XYZ Ltd** notepaper to Mr Tse's flat apologising for the inconvenience and damage. The letter stated that all the demolition work had now been completed and the remaining work involved only fitting out the new kitchen, re-painting and general tidying up. In its letter, **XYZ Ltd** offered to pay Mr Tse his reasonable expenses in repairing the damage to his flat and asked him to obtain a detailed written estimate of the cost. The letter also stated that the work to Flat 14A had been carried out on an urgent basis because the flat would shortly be viewed by a prospective purchaser whom it was anticipated would make a substantial offer to purchase the flat.

(See over the page for a continuation of Question 4)

The following afternoon (i.e. today) a writ with a Statement of Claim was served at XYZ Ltd's registered office together with, *inter alia*, an order for an injunction prohibiting XYZ Ltd from carrying on any work of demolition and/or refurbishment at Flat 14A. The injunction had been obtained at an *ex parte* hearing that morning. The parties to the action are Mr Tse as plaintiff and XYZ Ltd as defendant. The action had been begun and the injunction had been granted in the District Court.

Mr Tse's Statement of Claim alleged that the demolition of the wall had been carried out negligently, and as a result of that and the leakage of water, damage amounting to \$500,000 had been caused to his flat. Mr Tse is claiming repair costs of \$500,000, and general damages for inconvenience and loss of enjoyment of his flat, an injunction, costs and interest.

The writ had been taken out by Messrs Burgers, Solicitors. The Statement of Claim had been settled by Frank Bristle of Counsel. The injunction had been obtained *ex parte* and Mr Bristle had appeared for Mr Tse.

Mr Wong says that XYZ Ltd cannot afford the cost of retaining solicitors to represent the company in this action but it can pay for the initial legal advice as to what it should do in response to Mr Tse's action. Mr Wong does not accept that Flat 13A has suffered damage in the amount claimed and considers that any inconvenience to Mr Tse and his family while the necessary repair work is done will be minimal. He asks for your advice on what XYZ Ltd should do and the procedural steps that would involve.

What advice would you give to Mr Wong?

(25 marks)

(See Question 5 in the separate Test Paper)

Question 5

Candidate No. _____

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Question 5 (25 marks in total with 6 sub-questions)

This question contains 6 sub-questions carrying 25 marks in total.

NOTE: Candidates are required to answer all sub-questions in the space reserved on this question paper, not in the answer book.

The sub-questions in this question are based upon an initial fact pattern progressively modified by the addition of facts, or the alteration of facts, in subsequent sub-questions.

INITIAL FACTS

Lo Mong Tung is a retired accountant and lives in Sydney, Australia. He visited Hong Kong in April 2002. On 22 April 2002, he went to an antique shop in Hollywood Road, Hong Kong and purchased four pieces of Chinese antiques at a total price of HK\$800,000 from **Wan Bun**. He said **Wan** represented to him at that time that these were genuine antiques of the Tang dynasty. However, when he had the antiques inspected by an expert upon his return to Sydney, he was told that they were, in fact, modern reproductions and worth only HK\$150,000. He telephoned **Wan** and asked **Wan** to take back the antiques, but **Wan** refused.

Lo therefore wants to take legal action against **Wan** in Hong Kong in order to cancel the deal and recover the purchase price, or as a fallback, to obtain compensation for his loss of HK\$650,000. He thinks that once legal proceedings are issued, **Wan** will likely agree to settle.

Sub-Question 1

Please draft a general indorsement of claim for the Writ to be issued against Wan in the Court of First Instance of the High Court.

(N.B. You only need to draft the contents of the general indorsement. There is no need to insert the formal title or heading showing the name of the parties and Action number etc).

(4 marks)

Sub-Question 2

In case Wan does not file any acknowledgment of service within 14 days after he has been duly served with the generally indorsed Writ of Summons, what procedure would you advise Lo to take? Briefly explain your answer.

(4 marks)

Sub-Question 3

ASSUME FOR THIS SUB-QUESTION ONLY THAT YOU ACT FOR WAN.

You have filed on **Wan's** behalf an acknowledgment of service stating an intention to defend and have just received the Statement of Claim. **Wan** tells you that he bought the antiques in question for HK\$300,000 in January 2002 in Macau from **Mr Mo Leung**, who operates a large antique shop there. **Mo** told him before the purchase that they were genuine antiques of the Tang dynasty. **Wan** says, however, that he did not make any such representation to **Lo**. As far as **Wan** can recall, he might have mentioned to **Lo** that the supplier had said the antiques were of the Tang dynasty. **Wan** says he would not have given any warranty or promise to **Lo**.

Wan wants to know what he should do next. **What procedural step(s) should you advise Wan to take or consider in the circumstances? Briefly explain your answer.**

(5 marks)

Sub-Question 4

The proceedings continue. **Wan** discloses in his List of Documents a copy invoice dated 22 April 2002 for the sale of the antiques to **Lo** for a total price of HK\$400,000. This is different from the original invoice issued by **Wan** to **Lo** at that time, where the price was stated to be HK\$800,000. Being a retired accountant, **Lo** believes that **Wan** inserted a much lower price in the copy invoice for the purpose of evading his profit tax liability.

Lo wants to know whether he can take advantage of this discovery to further his case. In particular, **Lo** thinks if he reports the matter to the Inland Revenue and supply it with a copy of the forged invoice, **Wan** will likely agree to settle **Lo**'s claim.

How should you advise Lo? Briefly explain your answer.

(4 marks)

Sub-Question 5

Assume that the proceedings have been set down for a 3-day trial on the fixture list, to be commenced in about two month’s time. Lo tells you that he has recently suffered a back injury and so does not wish to travel to Hong Kong to testify. He asks if he can just prepare an affidavit setting out his evidence and rely on the affidavit as his evidence at trial. If permission is required from the court, he wishes you to seek the requisite permission.

How should you advise Lo? Briefly explain your answer.

(4 marks)

Sub-Question 6

Assume that it is now 12 days before the trial is to commence in the Court of First Instance of the High Court. **Lo** receives a notice of payment into court from **Wan**, stating that **Wan** made a payment of HK\$500,000 into court and that the payment “is in satisfaction of all the causes of action in respect of which the Plaintiff claims.”

If **Lo** is to accept the payment into court, is he entitled to costs of the whole proceedings without leave from the court? Will the costs be in the High Court scale or in the District Court scale? Briefly explain your answer.

(4 marks)
