

**2006 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Thursday, 2 November 2006



HEAD II: CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

2 November 2006

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 write your answers to any of:**
 - the Criminal Questions (Questions 1 and 2) in Answer Book 1**
 - the Civil Questions (Questions 3, 4 and 5) in Answer Book 2**
- 5. 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 YOU WERE INSTRUCTED TO ANSWER TAKING INTO ACCOUNT THE ANSWERS WITH THE LOWEST SCORES.**
- 6. Start each question on a separate page of your answer book.**
- 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. An examiner will be present for the first 30 minutes of the examination. Any question relating to the paper must be raised in that period. Questions raised after the first 30 minutes will not be entertained.**
- 9. Do not take either this question paper or any answer books with you when you leave the examination room.**

2006 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

You are a solicitor employed by Power & Co. You go to a police station this morning to see a client, Chin, who was arrested on suspicion of robbery yesterday afternoon.*

The officer in charge of the case ("OC") tells you that four days ago Chin approached a jade dealer, Dong, from behind as Dong was leaving a MTR station. Dong intended to meet a jade supplier and had \$200,000 in his shoulder bag. As he left the station, Dong felt a hard object pressed against his back. He was told "It's a gun, don't look round. Walk to the toilet around the corner." He did so. Inside the toilet he was pushed into a cubicle, struck on the head by a hard object and his bag was taken. As he entered the cubicle he looked over his shoulder. He saw that his attacker was of average build and height, had a red scar on his forehead, a small beard and wore purple and red trainers. He spoke with a Shanghainese accent.

The OC tells you Chin was arrested at his home after an anonymous telephone call that he was the robber. The police have a witness, Fang. Fang was passing the toilet at the relevant time when a man of average build, with a red scar on his forehead, wearing a surgical mask and carrying a shoulder bag came out of the toilet and bumped into him. The man told him in a Shanghainese accent "Get out of my way."

The OC tells you that a pair of blue and red trainers and a used surgical mask were found at Chin's home. When arrested and cautioned Chin said "I've nothing to say." The arresting officer recorded this in his notebook and Chin signed that record.

When you see Chin he denies committing the robbery and says that, if he is charged with robbery, he will plead not guilty. Chin tells you the trainers found in his flat were his but he denies any knowledge of the mask. He declines to tell you where he was at the relevant time. He has been in the cell since arriving at the police station. He has not yet been interviewed.

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

Chin has a red scar on his forehead. He was convicted of robbery in 2000 and of assault occasioning actual bodily harm in 2005 for which he received 6 months imprisonment suspended for 2 years.

The OC has arranged an identification parade for Dong and Fang. Chin has asked you whether he should take part in the parade.

Please answer all the sub-questions below, giving reasons for your advice or views.

- 1) What advice would you give to Chin about agreeing or not agreeing to take part in the identification parade? If Chin agrees to take part in the parade, what procedural safeguards would you suggest before Dong and Fang view the parade?**

(8 marks)

Dong views the parade. After about 5 minutes he says "It seems to be number 3" Chin is at position 3. The OC tells Chin "you have been identified as the robber." Fang then views the parade but does not make any identification. You see Chin after the parade. He says to you "As I have been identified, I will tell the police where I was at that time, so they will know I was not at the scene at the time of the robbery."

- 2) What advice would you give to Chin?**

(8 marks)

- 3) If Chin is charged with robbery, what advice would you give to him if he expresses concern that he will be prejudiced at his trial because of his previous convictions?**

(6 marks)

- 4) What would you say to Chin if he asks you in which level of Court will the case will be tried?**

(3 marks)

[25 marks in total]

** [Note: section 10 of the Theft Ordinance, Cap. 210 is attached at Appendix 1 at the back of the Test Paper.]*

Question 2 (25 marks)

Paul, a 19 year old student, has asked you to represent him. He was arrested by the police yesterday on suspicion of burglary. The burglary occurred a week ago in a residential hall of the University where Paul is studying and where he resides. An iPod was taken from the room of another student, Amy. It was recovered by the police two days ago from a second hand shop whose owner gave the police Paul's name and Identity Card number and said he had bought the iPod from Paul for \$2,500.

Paul says the police showed him a CCTV tape of the residential hall. Though not of good quality, it showed a person of female stature entering Amy's room at the time when the iPod was taken, coming out shortly afterwards with something in her hand and going into the room of another student, Doris, on the same corridor. The tape also showed about 15 minutes later a person of male stature coming out of Doris's room and leaving the residential hall. Apart from admitting he sold the iPod in the second hand shop for \$2,500, Paul refused to answer any questions or to explain to the Police how he came into possession of the iPod. He was charged with Burglary contrary to section 11 of the Theft Ordinance* and granted police bail to Shatin Magistracy next Friday.

Paul tells you that Doris is his girlfriend. At the time of the burglary he was waiting for her in her room. She came in with an iPod, said it was a present from her uncle and asked him to sell it for her at the second hand shop near the University. He did so that evening and gave the proceeds to Doris. The following morning he heard that an iPod had been stolen from Amy's room. When he asked Doris about that she admitted she had taken the iPod and asked Paul not to say anything to anyone about that.

Paul tells you that he believes the person of female stature on the CCTV tape is Doris and that he is the person of male stature shown on that tape. He is adamant he did not steal the iPod and will plead not guilty. Paul is concerned about your fees as he says he has limited means.

Please answer all the sub-questions below, giving reasons for your advice or views.

- 1) What may likely happen at Shatin Magistrates' Court on Friday? What, if anything, might be done to save Paul costs for that attendance? (5 marks)**

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

Whilst you are interviewing Paul, Doris calls him on his mobile phone. She has been arrested in connection with the same offence and asks Paul to arrange for a solicitor to come to the police station to advise her. Paul asks you to go to the police station to visit and advise Doris.

2) How would you respond to Paul's request? (3 marks)

Doris is charged with Burglary jointly with Paul and bailed to attend the Shatin Magistrates' Court next Friday. The police tell you she has made a statement under caution denying she stole the iPod and saying Paul is the person who stole it. Paul is very concerned that this will prejudice him at his trial. Paul wants to know whether the prosecution may use this statement at the trial against him and whether and how he can challenge Doris' false allegations. He also wants to know whether he has to testify in court in order to challenge Doris and when he needs to make that decision. At this stage it is not known how Doris will plead.

3) What advice would you give to Paul? (8 marks)

At their eventual trial in the Shatin Magistrates' Court, Doris is the First Defendant (D1) and Paul is the Second Defendant (D2). Doris pleads guilty to Burglary and Paul pleads not guilty. Paul testifies in his own defence how he came to possess the iPod and how he later found out how Doris had got it. After a trial lasting most of the day, the magistrate finds Paul not guilty, saying "I give you the benefit of the doubt that you were taken advantage of by Doris".

As Paul's father is a good friend of your firm's senior partner, you have agreed to represent Paul at the trial for a fixed sum of \$15,000 (inclusive of all preparation works and attendances), which Paul has withdrawn from his bank account. The firm's usual charging rate is \$5,000 per hour and you have spent about 10 hours working on the case.

4) What, if any, application might you now make to the Magistrate and what issues might arise? Can Paul challenge the Magistrate's decision on your application if he is not satisfied with it?

(9 marks)

[25 marks in total]

* [Note: section 11 of the Theft Ordinance, Cap. 210 is attached at Appendix 2 at the back of the Test Paper.]

Question 3 (25 marks)

You are a solicitor of Messrs. Wan, Cheuk & So. Please read the attached Attendance Note and Tenancy Agreement and prepare a draft Statement of Claim for the client.

If there are insufficient facts available, you should set out in square brackets the description of facts (e.g. [office address]) or the additional information you require (e.g. [further details of the client's assets]). You do NOT need to write down the title of the action or the names of the parties. You should start with the heading "Statement of Claim". Wan Bun is a partner of the firm.

Attendance Note

Wan Bun ("WB") attended a conference with Mr. Peter Wong ("PW") of Misfortune Financial Services Limited (the "Company"). The Company wanted to sue the previous landlord (the "Landlord"). PW handed to WB the relevant Tenancy Agreement.

PW said on 1 September 2006, when he returned to his office in the morning, he found that the office had been flooded with sewage water. He immediately called Mr. Mo Yung, the sole proprietor of Mo Yung Plumbing Services, to inspect the damaged sewage pipe. According to Mo, the flooding occurred because the main sewage pipe burst within the boundaries of the rented premises after mid-night as a result of wear and tear. Mo sent PW a written quotation in the afternoon for repairing the pipe at a cost of \$200,000. PW immediately faxed Mo's quotation to the Landlord and requested the Landlord to agree to the engagement of Mo and pay for Mo's cost. As the majority of the Company's technical equipment and furnishings were damaged and the Company was not able to carry on business at all, PW further requested the Landlord to indemnify the Company for its loss. The following morning PW spoke to Mr. Ng Fu Chak, the Landlord's managing director, over the telephone. However, Ng said his company had no obligation to repair the damaged pipe and refused to compensate the Company.

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

Given the Landlord's attitude, PW decided not to carry out any repair but to immediately locate to alternative premises. Fortunately, he was able to locate a fully furnished office premises nearby at a rent of \$100,000 per month. The Company moved out of the previous premises on 15 September 2006 and the keys were returned to the Landlord. The Company replaced its damaged computers and printers at a total cost of \$750,000 (\$550,000 for the computers and \$200,000 for the printers).

PW further explained that in early May 2006 he intimated to Ng that the rental market in Central was declining and if Ng did not agree to a rent reduction, the Company would tender a notice to quit. After lengthy negotiations, Ng orally agreed with PW on 25 May 2006 to reduce the rent to \$120,000 starting from 1 July 2006. PW said however that the Company did not pay any rent as from 1 August 2006 because at that time it had some cash-flow problems. PW originally decided to pay off the rental arrears in early September, but given the flooding problem and the Landlord's irresponsible attitude, he eventually decided to move out and pay nothing to the Landlord.

In response to WB's question, PW said the last time when the Landlord carried out the routine inspection of the premises and the pipes was in early February this year. PW also confirmed that the Landlord had not refunded the deposit to the Company.

PW instructed WB to institute legal proceedings against the Landlord to recover all the Company's loss.

Wan Bun

Messrs. Wan, Cheuk & So

2 November 2006

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

Tenancy Agreement

This Tenancy Agreement is made this 12 October 2004, between IRRESPONSIBLE LIMITED (the "Landlord") and MISFORTUNE FINANCIAL SERVICES LIMITED (the "Tenant").

1. The Landlord agrees to let and the Tenant agrees to rent the premises situated at Room 2001, Irresponsible Building, 6 Pedder Street, Central, Hong Kong (the "Premises") from 1 November 2004 to 31 October 2006 at a monthly rent of \$170,000 (inclusive of rates and management charges), such rent to be due and payable on the 1st day of each month (the "Rent").
2. The Tenant may terminate this Tenancy Agreement in advance of the expiry date upon giving the Landlord one month's written notice.
3. The Landlord agrees:
 - (1) to maintain the structural parts of the Premises, the water pipes and sewage pipes in good repair and condition;
 - (2) to inspect the Premises every 3 months to ensure that the said structural parts and pipes are maintained in good repair and condition;
 - (3) to indemnify the Tenant of any loss suffered as a result of any breach of Clause 3(1) and/or 3(2) above.

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

4. The Tenant agrees:

- (1) to pay the Landlord a deposit of \$300,000 upon signing of this Tenancy Agreement, which deposit shall be refunded forthwith upon the termination of this Tenancy Agreement;
- (2) to pay the Rent promptly to the Landlord;
- (3) to tender vacant possession of the Premises upon expiry of this Tenancy Agreement.

NG FU CHAK

Peter Wong

For and on behalf of

Managing Director

for and on behalf of

IRRESPONSIBLE LIMITED

MISFORTUNE

FINANCIAL

SERVICES LIMITED

We acknowledge receipt of the deposit payment of \$300,000.

NG FU CHAK

For and on behalf of IRRESPONSIBLE LIMITED

12 October 2004

Question 4 (25 marks)

The Hong Kong Masters Tennis Tournament is held in August each year. This year Robert Fedex and Ralph Needle, the ranked 1 and 2 in the world respectively are the top seeds. They each comfortably reached the final. It has been widely reported in the press that Ralph Needle holds a massive grudge against Fedex for the insults hurled at Needle (about Needle's mother) at the end of the Wimbledon Men's Singles Final, which Fedex won in straight sets, so avenging his 3 sets to 1 defeat in the French Open in June. In the first game of the first set, during a rally in which both players were close to the net in the middle of the court, Needle power drove the ball and it hit Fedex in the head. Fedex suffered a stroke as a result. He recovers but his career is over.

Immediately after the incident, Needle wrote to his Hong Kong insurers setting out details of the accident and the extent of Fedex's injuries. The insurers required the letter so that they could make an appropriate provision for liability under the insurance policy and if necessary use the letter to obtain their own legal advice.

Needle was concerned about how he should best explain to the press about the incident when he returned to Spain. He therefore emailed his Spanish lawyers, El Legale Studio, immediately after the incident setting out details of what happened and asking for advice from them as to what he should say or not say when confronted by the press.

Your firm has been instructed by Fedex (who has recuperated in hospital and is now living in Switzerland) to act on his behalf.

After your letter before action, Needle sent Fedex a letter marked "without prejudice", saying that although Fedex deserved the punishment, Needle was generous enough to offer him a sum of HK\$100 to settle all his potential claims as a token of goodwill.

Fedex wants to sue Needle (who has returned to Spain) in Hong Kong. In particular he has been motivated to sue because of Needle's letter and because he was recently told by Greg Bluitt, an Australian player, living in Australia, that shortly after the incident, Needle said to Bluitt "I got him good, didn't I?"

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

Fedex wants a letter of advice from you advising him regarding the following:

1) whether he can sue Needle in Hong Kong and if so, the procedure which will need to be followed in order to serve Needle with a Writ of Summons, and analysing what factors the court would take into account in considering any application to the court that you consider necessary;

(7 marks)

2) as he is a foreigner, whether the Hong Kong court may impose on him any additional restriction or burden;

(3 marks)

3) what procedures he would need to adopt to make use of Bluit as a witness;

(5 marks)

4) whether he can obtain from Needle and make use of the following documents to assist him in pursuing his claim:

(a) Needle's correspondence with the Hong Kong insurers;

(3 marks)

(b) Needle's email seeking advice from El Legale Studio;

(4 marks)

and further

(c) Can he adduce as evidence at trial Needle's letter marked "without prejudice" to him.

(3 marks)

Please write the letter of advice to Fedex. If you consider it necessary, you may state the further information and/or investigations you would need.

[25 marks in total]

Question 5 (25 marks)

Ms. Annie Chan was an employee of A, B & C Ltd. (the "Company"). She worked at the Company's secretariat and her main duties were to assist in completing and filing the company registration, business registration and tax forms and records for the Company. Due to the poor work performance of Ms. Chan, the Company terminated Ms. Chan's employment by giving 3 months' notice to Ms. Chan and settled all outstanding salary and benefits with Ms. Chan on her last working day according to the terms of her employment contract with the Company.

About one month after the last working day of Ms. Chan, the Company received a Writ of Summons issued in the Court of First Instance from Ms. Chan. Ms. Chan is the Plaintiff whereas the Company is named as the Defendant in the Writ of Summons. The Writ of Summons indicates that Ms. Chan acts in person and gives her address in Shenzhen, the PRC.

The Statement of Claim enclosed with the Writ of Summons states the following:-

"The Plaintiff was working for the Defendant between 1 January 2005 and 30 June 2006. Since the termination of her employment, she is forced to live in Shenzhen in order to reduce her living expenses. On or about 15 July 2006, the Plaintiff received a pamphlet distributed by a person stationed at a booth in the passengers' zone in the Shenzhen railway station. The Plaintiff put the pamphlet into her handbag without looking at its contents.

When the Plaintiff returned home and sorted the contents of her handbag, she looked at the pamphlet again and was surprised to see that the name of "Annie Chan" was put next to the picture printed on the pamphlet. The face of the woman in the picture was covered by a black circle. The pamphlet said that the woman in the picture weighed 160 lbs. Whilst the picture did not show the body of the woman in the picture, the pamphlet quoted remarks from the woman in the picture that women who are of such weight encounter different kinds of difficulties in their daily lives. The pamphlet therefore invited women who are of a similar weight to that of the woman in the picture to join the slimming package of A, B & C Beauty Salon in Hong Kong.

The Plaintiff claims that the Defendant should not use her name without her consent and she claims HK\$10,000,000 from the Defendant, being compensation for injury to her feelings."

(See the next page for a continuation of Question 5)

The Writ of Summons and the Statement of Claim were served by hand on the Company on 26 July 2006 (Wednesday). The Company approached you and sought your advice.

At your meeting with the Company, you were informed that although the Company operates a chain of hairdressing salons, it has absolutely no connection with A, B & C Beauty Salon and is simply not aware of the pamphlet in question. The Company wishes to dispose of the legal action (the "Action") as soon as possible. It is concerned about incurring substantial legal costs for a full trial and the difficulties in recouping the costs from Ms. Chan even if it is successful in the end. The Company, however, indicates that it is not prepared to enter into any settlement with Ms. Chan.

Assume that today is 7 August 2006 (Monday). The Company has not yet done anything in the Action since it received service of the Writ of Summons. The Company Secretary thinks that August is the Court's vacation and so nothing needs to be done in August.

Please answer all the following sub-questions. Please explain your answers and make reference to the relevant statutory Rules and Practice Directions to support your answers, if and when appropriate. If you consider it necessary, please state what further information and/or investigations you would need.

- 1) Whether the Company may carry out any act in the Action without engaging a solicitor's firm to come on the record as representing it. (2 marks)**

- 2) What are the legal procedures available to the Company to protect its interest and which procedure would you recommend the Company to pursue in order to best achieve its objective? (10 marks)**

- 3) What are the procedural steps that have to be attended to from today onwards to allow the implementation of your advice and what are the deadlines which the Company would have to meet? (5 marks)**

- 4) What are the documents that have to be prepared in accordance with your advice to the Company? Briefly describe what should be covered or stated in the contents of those documents. (8 marks)**

[25 marks in total]

Appendix 1 (Question 1)

Chapter: 210 Title: THEFT ORDINANCE Gazette
Number:
Section: 10 Heading: Robbery Version Date: 30/06/1997

(1) A person commits robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

(2) Any person who commits robbery, or an assault with intent to rob, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for life.

[cf. 1968 c. 60 s. 8 U.K.]

Appendix 2 (Question 2)

Chapter: 210 Title: THEFT ORDINANCE Gazette
Number:
Section: 11 Heading: Burglary Version Date: 30/06/1997

(1) A person commits burglary if-

- (a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2); or
- (b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.

(2) The offences referred to in subsection (1)(a) are-

- (a) stealing anything in the building or part of a building in question;
- (b) inflicting on any person therein any grievous bodily harm or raping any woman therein; and
- (c) doing unlawful damage to the building or anything therein.

(3) References in subsections (1) and (2) to a building shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is.

(3A) The reference in subsection (2)(c) to doing unlawful damage to anything in a building includes-

- (a) unlawfully causing a computer in the building to function other than as it has been established by or on behalf of its owner to function, notwithstanding that the unlawful action may not impair the operation of the computer or a program held in the computer or the reliability of data held in the computer;
- (b) unlawfully altering or erasing any program, or data, held in a computer in the building or in a computer storage medium in the building; and
- (c) unlawfully adding any program or data to the contents of a computer in the building or a computer storage medium in the building. (Added 23 of 1993 s. 6)

(4) Any person who commits burglary shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 14 years.

[cf. 1968 c. 60 s. 9 U.K.]

END OF TEST PAPER

