

**2007 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Friday, 2 November 2007



HEAD II: CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

2 November 2007

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.**

2007 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

You are a solicitor employed by Messrs. Allcock & Brown. About 8:30 a.m. this morning you receive urgent instructions from Ms. Cleo CHAN that her brother Derek, (“the client”), has been arrested for ‘Handling Stolen Goods’.

You arrive at the Police Station at 9:30 a.m. The officer-in-charge, (“OC”), tells you that 2 days ago Mr. Fred FONG, the wages clerk of the Guangdong Garment factory, was ambushed en-route to the factory from the Hang Hon Bank. Mr. FONG was struck on the head from behind and robbed of the cash bag containing HK\$70,000. In the ensuing struggle, Mr. FONG’s new ‘Intima’ wristwatch was also stolen. The OC tells you it was obviously an “inside job”.

During the robbery, Mr. FONG glimpsed his attacker to be a strongly-built Chinese male of medium height wearing a blue ‘T’ shirt and jeans. The robber wore a dark-coloured ‘Jets’ baseball cap pulled down low over his eyes and had a thin moustache.

The OC tells you your client was arrested at home early this morning after the Kwan Kee Pawnshop reported a man wearing a dark baseball cap had used your client’s Hong Kong Identity Card to pawn a gents ‘Intima’ wristwatch yesterday afternoon. Enquiries disclosed your client to be a former employee of the garment factory.

You request to see your client but the OC refuses on the grounds that the client has not asked to see a lawyer and that enquiries are underway to locate the stolen cash which has not yet been recovered.

You reiterate your request. The OC tells you he will find out from the client what he wants. After 45 minutes, you are allowed into an interview room and meet your client. As you go in, the OC tells you he is arranging an identification parade involving the client later that afternoon.

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

Your client tells you the following:

- He had nothing to do with the robbery or the pawning
- He was employed by the garment factory until about one week ago
- A day before his dismissal, he found his Hong Kong Identity Card missing from his wallet. He has not yet applied for a replacement
- On the date and at the time of the robbery he was looking for a job at a factory in Lung Tau Industrial Estate.
- Police raided his home at 1:30 a.m. this morning. His flat was searched and a blue 'T' shirt and jeans were seized. He was told to come along with the officers to the station
- When he asked why, he was told that he, "should know the reason"
- He was not cautioned
- He immediately asked the arresting officers to be able to call his sister, but his mobile phone was confiscated. He was only later permitted access to a telephone by the uniform-branch officer at the police station report room
- While waiting to make a call, 3 plainclothes officers told him the "victim from the factory knew who he was" and his silence merely served to aggravate his situation. He was told he had better "come clean and return the money". If not, "he knew what to expect"
- The client was frightened and confused. He told the officers, "I did not think it would lead to this. Please give me a chance!" The officer recorded these words in his notebook and ordered the client to sign thereafter
- The client is thinly-built. He used to have a moustache but shaved it off about a month ago

Questions:

- 1) **What advice would you give Derek CHAN concerning the principles governing arrest and the rights of persons in custody? What considerations arise in this case? (Note: It is not necessary to discuss the procedure with which these matters might later be addressed in court.)**
(7 marks)

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

2) What advice would you give Derek CHAN concerning his alleged confession?

(Note: It is not necessary to discuss the procedure with which these matters might later be addressed in court.)

(7 marks)

3) What advice would you give Derek CHAN concerning the proposed Identification Parade?

(7 marks)

4) Given your instructions, what other useful advice and/or assistance might you suggest?

(4 marks)

[25 marks in total]

Question 2 (25 marks)

You represent Father Lau, a former priest and teacher at a local Catholic Anglo Chinese school. Father Lau has been charged with 4 counts of indecently assaulting his former student Joseph Wong, contrary to section 122(1) of the Crimes Ordinance, Cap 200. The alleged offences occurred over a period of 10 months in 2000, commencing when Joseph was 11 years of age and ending when he was sent by his parents to school in the UK. Joseph did not complain to police until last year when he returned to Hong Kong to celebrate his 17th birthday, which fell on 15th September 2006. A few days before his birthday police arranged for him to make a video recorded statement describing the alleged offences to a social worker. The Prosecution has provided you with a copy of the video tape.

The trial has commenced in the District Court. It is now October 2007. The Prosecution wants to play the video tape in court as Joseph's evidence in chief, rather than call him to give viva voce evidence. The Prosecution will also apply to the District Judge to have you cross examine Joseph by way of live television link into the court. The link would ensure Joseph would not be present in the court room but you could see his face and cross -examine him via the television link.

Questions:

- 1) **Can the Prosecution play the video tape as Joseph's evidence in chief? Explain your answer with reference to authorities where applicable.**
(5 marks)

- 2) **Will the Prosecution's application to have Joseph cross examined by way of live television link be likely to succeed? Explain your answer with reference to authorities where applicable.**
(6 marks)

After hearing all the prosecution and defence evidence the District Judge convicted Lau on all four counts and sentenced him to 5 years imprisonment. Lau immediately asked you to apply for bail, pending appeal.

- 3) **What application, if any, should you make to the District Judge?**
(7 marks)

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

The Prosecution applied for costs and the District Judge ruled in their favour. On making the award for costs she stated: "Costs in Hong Kong should follow the event and there is no reason for me to deny the Prosecution their rights in this case".

- 4) **Comment on the District Judge's ruling in relation to costs and advise whether her ruling can be appealed.**

(7 marks)

[25 marks in total]

Question 3 (25 marks)

You act for Japanese No. 1 Bank Limited (the “Bank”), a bank incorporated in Japan with a branch in Hong Kong.

The Hong Kong branch of the Bank granted a loan (the “Loan”) to Runaway Company Limited (“RCL”), a private company incorporated in Hong Kong.

RCL engages in the trading of valuable watches and usually keeps its stock in its office premises. RCL is run by a couple, Mr. and Mrs. Xia, who are the only directors and shareholders of RCL. Mr. and Mrs. Xia acted as guarantors of the Loan. The Bank also required Mr. and Mrs. Xia to pledge their shares in RCL as security for the Loan and give the bank account details of RCL to the Bank. When the Loan was advanced by the Bank Mr. and Mrs. Xia lived in a luxurious flat they jointly owned, without a mortgage, in Mid-levels, Hong Kong (the “Mid-levels flat”).

RCL has failed to make any repayment to the Bank since early 2007.

As a result, the Bank obtained a default judgment, which is regular, against RCL and Mr. and Mrs. Xia. The Bank, however, has found it difficult to serve the default judgment on RCL as RCL’s office premises have been vacated and Mr. and Mrs. Xia no longer reside at the Mid-levels flat, which appears to be unoccupied. It has also come to the attention of the Bank that the Mid-levels flat has been recently mortgaged to another bank.

The Bank seeks your advice as to how to recover the Loan in these circumstances.

Questions:

Please prepare a detailed letter of advice setting out the options open to the Bank and the steps that you would advise the Bank to take.

If you consider, or would advise, that further enquiries are required or information needed, you should state this with details in your letter of advice.

(25 marks)

[25 marks in total]

Question 4 (25 marks)

James Chan passed away in Hong Kong on 1st March 2005. By his will, he left everything he owned to Tom, his son, who lives in Vietnam. The main asset in James' estate is a flat located in Kowloon ("the Property").

On 5th March 2005, Tom instructed John Later, a partner at a law firm named Later & Later, to apply for the grant of probate in his father's estate and to handle the sale of the Property. He also gave John all the documents necessary for the application for the grant of probate ("the Application"), including James' original will. John Later accepted the instructions on behalf of the firm and gave Tom an engagement letter on the same day. He placed Angie Wan, a probate clerk, in charge of the case.

A day later, Tom found a buyer who was willing to purchase the Property at a price of HK\$6.3 million.

When Tom visited the offices of Later & Later on 7th March 2005, Angie advised Tom to reject the HK\$6.3 million offer that he had received. Angie said that she knew a person who was interested in purchasing the Property for HK\$6 million. She told Tom that although this offer was lower than the one Tom had received, the sale would run smoother because Angie was good friends with this buyer. Tom accepted her advice and agreed to sell the Property to the buyer that Angie suggested. This buyer turned out to be a company named Wong Properties Limited.

Wong Properties Limited insisted that a term be inserted to provide that the Application shall be made to the Probate Registry within 3 months of the date of the Agreement, and that a breach of this term would entitle Wong Properties Limited to terminate the Agreement. Tom agreed, and the sale agreement was signed on 9th March 2005.

After Tom returned to Vietnam, he did not hear anything from Later & Later for a few months. He called Angie in May 2005 and found out that probate had not yet been granted. Further phone calls in 2005 and 2006 were met with increasingly evasive answers from Angie.

Finally, on 26th April 2007, Tom called Angie and requested that all original documents be returned to him. At this point Angie admitted that the file had

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

gone missing in June 2005. Fortunately, it had just been found, and the Application had been submitted on 13th April 2007. Subsequently, Tom received a letter from Mr Later admitting that that his firm had been negligent and offering to handle the probate application on a complimentary basis, (Tom had not paid any fees on account, and no bills had yet been sent to Tom).

Mr Later also informed Tom that Wong Properties Limited had given a notice on 13th August 2005 rescinding the Agreement.

Probate was finally granted on 3rd May 2007. Tom found a buyer on 17th May 2007 who agreed to purchase the Property at a price of HK\$5.7 million. This was the highest offer he received and reflected the current value of the Property, according to the real estate agents.

Tom has just discovered that John Later has been a majority shareholder in Wong Properties Limited at all times from 2002 until the present time.

You may assume that no estate duty is required to be paid in relation to the grant of probate in the estate of James Chan.

Tom has engaged your firm to act for him.

Questions:

- 1) Please draft a Statement of Claim on behalf of Tom in respect of any causes of action he may have against Later & Later.**

(Note: Where the Statement of Claim involves information such as addresses or legal description of properties, you may substitute square brackets.)

(20 marks)

- 2) Tom asks if he needs to be aware of any special issues by reason of the fact that he lives in Vietnam. Please draft a short letter of advice to Tom.**

(5 marks)

[25 marks in total]

Question 5 (25 marks)

Andy is the sole director and sole shareholder of Bonus Limited (“Bonus”), a company registered in Hong Kong. Bonus is a small trading company.

On 15th July 2007, Bonus moved its office premises from Admiralty to Wanchai. Yesterday, Andy received a telephone call from the management office of his old office building in Admiralty. The officer at the management office told Andy that some documents had been left at Bonus’ former office premises and asked Andy to collect the documents. When Andy collected the documents earlier today, he discovered that within the documents, there is a Writ of Summons issued at the Court of First Instance dated 20th July 2007 and a Statement of Claim dated 20th July 2007. There is also a Judgment entered against Bonus on 25th August 2007 for the sum of \$2.5 million. The Writ together with the Statement of Claim and the Judgment were placed in sealed envelopes and addressed to Bonus at Bonus’ former office address in Admiralty. Andy explained that this office address in Admiralty had been Bonus’ registered office. When he moved office to Wanchai on 15th July 2007, he had forgotten to file the requisite change of registered address form at the Companies Registry. Andy indicated that he would arrange for the form to be filed at the Companies Registry shortly.

The Writ was issued on behalf of the Plaintiff, Clifford International Company Limited, a company registered in the United Kingdom. Andy explains to you that Bonus had entered into an agreement with the Plaintiff in April this year when Bonus agreed to supply 400 LCD television sets to the Plaintiff on or before 30th May 2007 for onward sale of the same by the Plaintiff to one of its customers in Europe. Bonus managed to supply only 200 LCD television sets and on 15th June 2007. The Plaintiff’s claim, as set out in the Statement of Claim, is for \$2.5 million (\$1.5 million being the refund of the purchase price of the 200 LCD television sets which Bonus failed to deliver and \$1 million being the damages sustained by the Plaintiff as a result of Bonus’ breach of contract) together with interest and costs. The Judgment was a default judgment which the Plaintiff entered against Bonus in the sum of \$2.5 million plus interest and costs.

Andy said that he was expecting such a claim from the Plaintiff and since Bonus was trading at a substantial loss since December last year, he is considering what Bonus should do about the present proceedings.

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

Questions:

- 1) In light of the above information, advise Andy what Bonus should do in relation to the proceedings. Please explain your answer and state, if you consider it necessary, what further information or investigation you would require in order to furnish your advice.**

(9 marks)

Andy decided that Bonus should defend the claim as he had just entered into several big business deals with various customers in the PRC and South East Asia and to protect Bonus' reputation, he did not want a judgment entered against Bonus. Assume that Bonus was successful in setting aside the Judgment which the Plaintiff had entered against it on 25th August 2007. Although Andy doubts whether the Plaintiff's claim for damages for breach of contract in the sum of \$1 million is sustainable, he accepts that Bonus should return to the Plaintiff \$1.5 million, being the refund of the purchase price of the 200 LCD television sets which Bonus did not deliver. Andy wants to protect Bonus' position on costs. In addition, he wants to know whether there are any ways to apply pressure on the Plaintiff to settle the matter. He also wants to know the settlement methods available if the Plaintiff is agreeable to settle the matter given that he is reluctant to have judgment entered against Bonus and he would like to keep the settlement terms confidential.

- 2) What advice would you give Andy in light of the above-mentioned information and concerns raised by him? Please explain your answer and state, if you consider it necessary, what further information or investigation you would require in order to furnish your advice.**

(8 marks)

- 3) You now act for the Plaintiff. Assume that Bonus was successful in setting aside the Judgment entered against the Defendant on 25th August 2007. The Plaintiff wants to know the steps which it would need to take in order to bring the case to trial. Please draft a short advice to the Plaintiff accordingly. Please explain your answer and state, if you consider it necessary, what further information or investigation you would require in order to furnish your advice.**

(8 marks)

[25 marks in total]

END OF TEST PAPER