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# 2008 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

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## HEAD II: CIVIL AND CRIMINAL PROCEDURE

Friday, 31 October 2008



## **HEAD II: CIVIL AND CRIMINAL PROCEDURE**

### **TEST PAPER**

**31 October 2008**

#### **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.

# 2008 Overseas Lawyers Qualification Examination

## Head II: Civil and Criminal Procedure

### Question 1 (25 marks)

Around 6:00 a.m. on 1<sup>st</sup> July 2008, a group of police officers intercepted D1 (Adam), D2 (Billy) and D3 (Charlie) for acting suspiciously outside No. 9 Queen's Road, Central and searched them.

Upon being searched, a note containing the name and address of one "Mr. Peter WONG" was found inside D1's left front trouser pocket. A photograph with "Peter WONG" written on the back was found in the right front pocket of D2's trousers. Surgical masks were found on each of the three defendants. The police then arrested D1 – 3 and escorted them to Central Police Station.

Under caution, D1, aged 19 years, admitted that "Mr. X" who is a triad member had told him to locate, identify and assault Peter WONG. The surgical mask that was found on him was given to him by "Mr. X". He further admitted asking D2 and D3 to help him "look out" for Peter WONG.

D2, aged 15, was interviewed under caution in the presence of his father. He admitted that he was told by D1 to help him identify Peter WONG. He was told by D1 that Peter WONG owed D1 money and asked to assist in recovering the money owed. D2 did not say who gave him the mask that was found on him.

D3, aged 17, was also interviewed and cautioned. He admitted that he was asked by D2 to help find Peter WONG. He was given a surgical mask by D2 and told to wear it when Peter WONG was identified. D3 states he does not know D1.

D1, 2 and 3 were subsequently charged with an offence of "Conspiracy to commit Assault Occasioning Actual Bodily Harm" contrary to section 159A and 159C of the Crimes Ordinance, Cap. 200 and punishable under section 39 of the Offences against the Person Ordinance, Cap. 212.

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

D1, 2 and 3 now come to see you to seek your advice on the following matters:

1. Whether they can all be represented by you?
2. Where the matter is likely to be tried?
3. What the likely sentence will be upon conviction?

In response to your preliminary enquiries, all three defendants tell you that they made admissions without the benefit of legal representation or advice. All three say they were threatened by the police into making their admissions and told there was “no point” in asking for legal representation. D1 also tells you he was assaulted by police.

### **Questions:**

- 1) **Assuming their instructions are the same as the version they gave to the Police, advise whether any conflict of interest arises between the defendants and if so, what you would advise the defendants to do? Give reasons for your answer.**

**(7 marks)**

- 2) **Advise what is the likely venue of trial? Give reasons for your answer.**

**(5 marks)**

- 3) **Given the relative age of the defendants, advise what the likely sentence would be upon conviction. Give reasons for your answer.**

**(5 marks)**

- 4) **Given your instructions concerning the recording of the defendant's statements, what advice would you give to the defendants? It is not necessary to describe the procedure by which these matters may later be determined by the Court.**

**(8 marks)**

**[25 marks in total]**

## Question 2 (25 marks)

Your client, Bobby Hui, a businessman who runs a large company in Hong Kong, has just been acquitted by a jury in the Court of First Instance of possession of arms without a licence, contrary to s.13(1) and (2) of the Firearms and Ammunition Ordinance (Cap. 238, Laws of Hong Kong). The prosecution case was that a parcel from Vancouver, Canada, arrived on a plane at Hong Kong International Airport on 15 January 2008. An X-ray revealed that it contained two pistols placed inside a vase. The recipient indicated on the parcel was “Bo Y Hui” and the address was Bobby’s residential address. Police checks revealed Bobby had been in Vancouver at the date the parcel was despatched from Vancouver to his home address. Two police officers disguised as FedEx couriers took the parcel to the address. The police gave evidence at the trial that originally a maid had answered the door and offered to take the parcel but the officers refused and returned to the address later. On the second attempted delivery Bobby answered the door at the address and explained that the parcel was for him and that “Bo” stood for “Bobby”, his English name, and “Y” stood for “Yui”. He produced his ID card to prove his identity and the police gave him the parcel and left to keep watch on the flat. The police also provided evidence that flick knives and cross bows were found in Bobby’s flat and that he kept unlicensed ammunition in his safe deposit box.

During police interview and again at trial Bobby described being asked by the couriers to produce his identity card and to sign for the parcel, giving them a \$100 tip; and after the couriers had left, checking the parcel and finding it was not for him. He said he had left home intending to ask his secretary to call FedEx to take back the parcel. As he left his address, he was arrested. The parcel had not been opened.

The jury acquitted Bobby of the charge. After the acquittal you applied for costs on behalf of Bobby, under s.5 of the Costs in Criminal Cases Ordinance (Cap. 492) but the Trial Judge refused to make the award. In giving his reasons for refusing costs the Trial Judge held Bobby had brought suspicion on himself because he had signed for the parcel, which was of a considerable size, without checking it. The Trial Judge also relied on arguments from the prosecutor that he should take into consideration the knives found in Bobby’s possession and the ammunition kept in his safe deposit box and the fact that Bobby was not under any pressure of time and clearly had ample opportunity to check the parcel as he gave the couriers a tip.

*(See over the page for a continuation of Question 2)*

## **Questions:**

**Advise Bobby whether he should appeal the decision to refuse him costs. In your answer ensure that you:**

- 1) Identify the Court which would hear the appeal;**  
**(1 mark)**
  
- 2) Identify any authorities supporting the initiation of an appeal;**  
**(8 marks)**
  
- 3) Describe generally any procedures which must be complied with in pursuing this appeal;**  
**(4 marks)**
  
- 4) Describe generally the grounds upon which an appeal could be made in this case.**  
**(12 marks)**

**[25 marks in total]**

### **Question 3 (25 marks)**

Wreckless Motors Limited (“WML”) is a Hong Kong company which manufactures and distributes motor vehicles. Jason, WML’s managing director, comes to you for advice this morning. He tells you the following:

- (i) Earlier this year, WML introduced for sale into the market a new model “Dream” multi-purpose vehicle (“MPV”). One of its first customers was Peter, who purchased an MPV at the price of \$650,000 in the name of Calamity BVI Ltd (“Calamity”), a company incorporated in the British Virgin Islands and wholly owned by Peter. Peter is a director of Calamity and resident in Hong Kong.
  
- (ii) On 31 October 2008, WML was served at its registered office with a Writ of Summons endorsed with a Statement of Claim issued by Calamity against WML seeking damages in the sum of \$800,000, together with interest and costs as a result of an accident that occurred on 15 March 2008. The Statement of Claim alleges that on 15 March 2008, while Peter was driving the new MPV along Tai Po Road, the vehicle failed to brake despite Peter applying both the hand brake and the foot brake. The vehicle collided with a tree and was severely damaged. Peter was fortunately not injured. Calamity claimed that the MPV which it had purchased from WML was not of merchantable quality and claimed: \$650,000 being the price paid for the MPV; \$150,000 being the costs incurred to rent a new vehicle for Peter’s use before Calamity could obtain a replacement, and other consequential losses.
  
- (iii) On 20 March 2008, Calamity sent an email message to WML demanding compensation for the damaged vehicle as a result of the accident. Upon receipt of that email message, WML conducted some internal investigations and found that there was a defect in a spare part in the MPV. That spare part was supplied by Tarnish Inc. (“Tarnish”), a company incorporated in the United States with no branch office in Hong Kong.

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

- (iv) On 30 March 2008, WML responded by email message to Calamity, apologising for the accident and offering to repair fully the damaged MPV in full and final settlement of Calamity's claims provided that Calamity and Peter agreed to keep the matter confidential. Calamity did not respond to WML's email message.

**Question:**

- 1) Jason wants to know what WML should now do in defending the claim and what legal steps it should take in the next 2 months.**

**(10 marks)**

Later in the proceedings, when you tell Jason that he should preserve all documents relevant to the claim, Jason expresses his worries that disclosure of the following documents in the proceedings may harm WML's reputation and business:

- (a) An internal report of WML's chief engineer dated 20 February 2007 setting out in detail the early design faults of the MPV and its incompatibility with the spare part provided by Tarnish ("the Tarnish spare part"). In that report, WML's chief engineer discovered some design faults as the Tarnish spare part was not really compatible with the other parts of the MPV. However, as the Tarnish spare part was the cheapest, WML continued to use the Tarnish spare part but took steps to modify the design of the MPV. After several modifications and extensive testing, the design faults were satisfactorily resolved before WML placed the MPV into the market for sale. Jason is very concerned that this previous design problem should not become public knowledge, as the market would react quite adversely to WML's decision to continue using the Tarnish spare part for the reason that it was the cheapest.
- (b) A report dated 28 March 2008 which was marked "Strictly Confidential" from an independent engineer, Tom, who was commissioned by WML to investigate into the accident. According to Tom's report, he found that the accident was caused by a defect in the Tarnish spare part in the MPV purchased by Calamity. He further found that the Tarnish spare parts

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



in the other MPVs manufactured in the same batch as Calamity's MPV were also defective and advised that WML should not further sell any MPVs manufactured in that batch. He found that the Tarnish spare parts used in other batches of the MPVs were not defective and were unlikely to cause similar problems.

- (c) WML's email message to Calamity of 30 March 2008 (referred to in (iv) above).

**Question:**

- 2) **Please advise WML whether the above-mentioned documents need to be disclosed by WML in the course of the proceedings and if so, whether Jason needs to be concerned that disclosure of the same would harm WML's reputation and business.**

**(10 marks)**

Assume that discovery has recently taken place and you now act for Calamity. You have just received a letter from WML's solicitors marked "Without Prejudice Save as to Costs", stating that WML is willing to offer to Calamity \$650,000 plus costs to be taxed in full and final settlement of Calamity's claims in the action. The offer is open for acceptance for 14 days.

**Question:**

- 3) **Please advise Calamity/Peter of the effect of the letter and whether WML's offer should be accepted.**

**(5 marks)**

**[25 marks in total]**

#### **Question 4 (25 marks)**

DP, a limited company incorporated in Hong Kong, was and is the registered owner of various shops on the ground floor and first floor of SK Centre (“the Premises”).

By an agreement dated 10 November 2004, DP agreed to let the Premises to MD, a limited company incorporated in Hong Kong, for 3 years from that date at a monthly rent of HK\$300,000. MD initially ran a restaurant at the Premises called The Number One. Under the tenancy, MD had an option to renew the tenancy for 6 years at a new monthly rent of HK\$380,000 provided that written notice was given at least 3 months prior to the Lease expiring by effluxion of time.

On 31 March 2008, DP commenced proceedings against MD for, inter alia, recovery of vacant possession of the Premises and mesne profits thereof from 10 November 2007. DP found its claims upon 2 grounds, namely (a) the tenancy ended by effluxion of time, and/or (b) there had been unlawful subletting and change of business name.

The Statement of Claim contained the following:

“10. By effluxion of time, the term of the Lease expired on 9 November 2007, upon which date the Lease terminated.

...

13. Further or alternatively, in or about early February 2008, it came to the Plaintiff's attention that the name of the Restaurant has been changed to The Best Restaurant, which was and is legally owned by one PR Limited. PR Limited is a limited company incorporated under the laws of Hong Kong on 4 January 2008, which company used the address of the Premises as its registered office.

...

15. At all material times, the Defendant had never informed the Plaintiff or obtained the Plaintiff's prior written consent in relation to any change of business name in accordance with Clause 2(a)(iii) of the Lease. The Defendant is thereby wrongfully in breach of Clause 2(a) of the Lease.

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

16. Further or alternatively, the Defendant is wrongfully in breach of Clause 2(a) by having assigned, transferred, underlet, parted with possession of the Premises or any part thereof by subletting the Premises to the said PR Limited for it to operate The Best Restaurant.”

The terms of the tenancy included the following:

“2. THE TENANT COVENANTS AND AGREES ...

- (a) Not to assign transfer underlet or part with the possession of the said premises or any part thereof either by way of subletting sharing or other means whereby any organization company firm or person not a party to this Lease obtains the use or possession of the said premises or any part thereof irrespective of whether any rental or other consideration is given for such use or possession. The tenancy hereby created shall be personal to the Tenant and without in any way limiting the generality of the foregoing, the following acts and events shall, unless approved in writing by the Landlord be deemed to be breaches of this Clause: -

...

- (iii) The change of the Tenant's business name without the previous written consent of the Landlord which shall not be unreasonably withheld or delayed.

...

5. PROVIDED ALWAYS AND IT IS MUTUALLY AGREED

...

- (c) This Lease sets out the full agreement between the parties hereto. No other warranties or representations have been made or given relating to the Landlord, the Tenant, the Building, or the said premises or if any warranty or representation has been made the same is hereby waived.

...

- (f) Any acceptance of rent by the Landlord shall not in any way constitute any waiver or acquiescence in any breach of any terms and conditions herein.

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

- (g) Any acceptance of rent by the Landlord on or after expiration of this term shall not create any new tenancy or renewal or extension of the existing tenancy unless a written agreement signed by the parties hereto shows otherwise.”

In relation to the argument on subletting, however, it is to be noted that the Lease also contains the following provision:

“19. In the event the Tenant shall use the said premises as a restaurant, the Tenant hereby expressly agrees with the Landlord that at the expiration or sooner determination of this Lease the Tenant shall transfer or procure the Licensee named in the Restaurant Licence and the Liquor Licence covering the said premises to transfer to the Landlord or its nominee unconditionally and free of charge the Restaurant Licence and the Liquor Licence covering the said premises.”

MD's case was expressed in correspondence between solicitors in terms that MD will contest the Action, as MD considers that:

- (a) The option to renew for a further term of 6 years was exercised by the sending of a written request to DP on 3 August 2007 in the form of a letter that was posted to DP's registered office in Hong Kong. Alternatively, DP waived such requirement.
- (b) The subletting and change of business name was in accordance with the usual practice of restaurants in Hong Kong. Although the Lease contains terms to prohibit the same, reliance on such terms were waived by DP through oral assurances.

DP considers MD's case to be moonshine as it has never received any letter at its registered office and it has no knowledge of any such “usual practice” of restaurants in Hong Kong.

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

## **Questions:**

- 1) **DP wishes to pursue the Action expeditiously and to bring it to a swift and favourable conclusion as immediately as possible, as DP believes The Best Restaurant is currently profitable and MD is presently cash rich, but other restaurants have opened up in competition in the vicinity of SK Centre and so The Best Restaurant's profitability may not last and MD's cash reserves may be used up in time.**

**You act for DP and are asked to write a letter of advice to DP's board of directors briefly describing the options open to DP in relation to the Action and setting out the strategy that you would advise DP to pursue mindful of the risks associated with each of the options, which risks should be identified.**

**(10 marks)**

- 2) **If the strategy set out in your letter in answer to Question 1 above involves DP making an immediate application to court:**

**(a) prepare the body of that application and any documents that may be required in support of such an application. (Only the substantive body of the documents are required; the title of the Action and names of the parties and court are not required.);and**

**(b) if an affidavit in support is required, set out with reference to the Rules of High Court:**

**(i) the options as to who would be the appropriate persons that could make the affidavit and why; and**

**(ii) who you would recommend makes the affidavit, and why.**

**(10 marks)**

- 3) **You now act for MD and are asked by it to inform it of the outcome or outcomes that could result from the application made by DP against it and what steps it could take to oppose the application.**

**(a) Set out the possible outcome or outcomes; and**

**(b) Set out the steps that could be taken.**

**You should identify the outcome or outcomes and steps and briefly explain the same.**

**(5 marks)**

**[25 marks in total]**

## **Question 5 (25 marks)**

Michael is an ex-employee of Loyal Employment Consultants Limited (“Loyal”).

On 1 February 2007, Michael entered into an employment contract with Loyal (the “Contract”). Pursuant to the Contract, Loyal agreed to employ Michael as an employment and recruitment manager. One of the terms of the Contract was that upon termination of Michael’s employment with Loyal, Michael agreed not to use and divulge any confidential information obtained from Loyal. Such confidential information was defined to include Loyal’s client lists and client contact details (the “Confidential Information”).

On 30 September 2007, Michael tendered his resignation with Loyal with immediate effect and made payment to Loyal in lieu of notice of termination. Michael then shortly thereafter commenced employment with Delta Recruitment (“Delta”), Loyal’s main competitor in the industry.

On 5 November 2007, Loyal commenced proceedings against Michael and Delta, alleging that Michael had divulged Loyal’s Confidential Information to Delta and that Loyal suffered damages as a result. Loyal’s claim was for an injunction, restraining Michael and Delta from using Loyal’s Confidential Information and for delivery up of the Confidential Information. Loyal also claimed damages in the sum of \$3 million. On 12 November 2007, Loyal obtained an interlocutory injunction against Michael and Delta, with costs of the application in the cause.

The trial of the matter was set down to be heard from 15 to 17 October 2008.

On 4 July 2008, Delta made a payment into Court in the sum of \$1.2 million. This payment in was not accepted by Loyal.

On 16 September 2008, Delta’s solicitors wrote to Loyal’s solicitors. In Delta’s solicitors’ letter marked “Without Prejudice Save as to Costs”, Delta offered to pay \$2 million to Loyal in full and final settlement of Loyal’s claims. Delta also agreed to abide by the terms of the injunction sought by Loyal. Delta’s offer was open for acceptance for 14 days. Loyal’s solicitors did not respond to the letter and the offer lapsed.

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

After the trial of the action, the trial judge reserved his judgment. On 30 October 2008, the trial judge handed down his written judgment. The trial judge found that Loyal had proved its case and granted the injunction sought by Loyal, restraining Delta and Michael from using the Confidential Information for a period of 12 months from the date of the Writ of Summons and requiring Delta and Michael to deliver up all forms of the Confidential Information in their possession. The trial judge also awarded Loyal damages in the sum of \$2 million. In relation to costs, the trial judge made a costs order nisi, and awarded to Loyal its costs of the action.

**Question:**

- 1) Assume you act for Delta. What is your advice to Delta in relation to the costs order made by the trial judge?**

**(10 marks)**

Having obtained judgment in its favour, Loyal would like to enforce the judgment against Delta. Loyal has the following information concerning Delta:

- (i) Delta is a partnership business owned by Andrew and his sister, Bonnie. When the Writ of Summons in the action was issued and served on 5 November 2007, Andrew was on a business trip in Taiwan and Bonnie acknowledged service of the Writ as a partner of Delta.
- (ii) Delta runs an office in Admiralty. This office premises was purchased by Delta in July 2007 at \$5.2 million with a mortgage from HSBC Bank.
- (iii) Andrew owns a flat in Happy Valley. The flat was purchased by Andrew and his wife as joint tenants on May 2005 at \$8.8 million without a mortgage. Andrew and his wife rent out this flat to a tenant at \$50,000 per month.
- (iv) Bonnie has 2 accounts with the Hang Seng Bank – a savings account with \$20,000 credit and a credit card account with \$30,000 owing to the Bank. Bonnie's monthly salary from Delta in the sum of \$80,000 is deposited into her savings account on the first day of each month.
- (v) Andrew and Bonnie come from a wealthy family and may own other assets and bank accounts.

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

**Question:**

- 2) Assume that you now act for Loyal. How would you advise Loyal to enforce the judgment? Please explain your answer and state, if you consider it necessary, what further information and/or investigations you would need.

(15 marks)

[25 marks in total]

**END OF TEST PAPER**