

**2009 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Tuesday, 3 November 2009



HEAD II: CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

3 November 2009

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 questions 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.**

2009 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

Your client has been found guilty, after trial in the Magistrates' Court, of one charge of common assault. The charge arose out of an incident which took place in a cell at the Stanley Correctional Institution where your client was serving a sentence of 18 years' imprisonment for drug trafficking.

At the common assault trial in the Magistrate's Court, it was the prosecution's case that your client had assaulted a member of the Correctional Services Department, PW1. Your client was alleged to have punched PW1 in the chest three times. In evidence PW1 stated that an argument had broken out with your client over a newspaper which had been provided for him to read and then give back, after a certain time. When your client was asked to return the newspaper he punched PW1 on the chest three times. PW2 (also a Correctional Services Department officer) gave evidence supporting PW1's version of events.

The defence case was that it was the other way round. According to your client the incident consisted of an assault on him by officers of the Correctional Services Department, PW1 and PW2. He suggested that this was in retaliation for complaints made by him against them.

The magistrate rejected your client's testimony and accepted the evidence of PW1 and PW2. Your client was convicted of common assault as charged and sentenced to six months' imprisonment, consecutive to the sentence of 18 years' imprisonment which he was serving for drug trafficking.

The account given by the officers in the witness-box was also the account given by them in their statements to the Correctional Services Department, which were disclosed by the prosecution to the defence, prior to the Magistrates' Court trial.

Your client has now discovered that the officers PW1 and PW2 also made further statements to the Correctional Services Department, giving a different account of events. The undisclosed statements alleged that your client had not only refused to return the newspaper when asked by PW1 but also splashed some liquid on PW1, and threw a stool at him, when he tried to take the newspaper back. Your client discovered these further statements, by chance, during an interview at the prison hospital in relation to another matter.

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

Questions:

- (1) **Your client has obtained copies of these undisclosed statements made by PW1 and PW2. He wants to know if he would be entitled to and can use them to appeal against his conviction for common assault in the Magistrates' Court. Advise him.**

(15 marks)

- (2) **If your client appeals against his conviction to which court would he make his appeal, how soon must he appeal and under what power could that court hear his appeal?**

(5 marks)

- (3) **If your client wins an appeal against conviction can he get the costs of his appeal paid by the prosecution and if so, under what power could the appeal court order that his costs are paid to him?**

(5 marks)

[25 marks in total]

Question 2 (25 marks)

Mr. DD has been charged with one count of trafficking in a dangerous drug as per the attached Statement of Offence with the Particulars of Offence (the "Charge Sheet"). The Summary of Facts of the case is also attached.

In brief, Mr. DD was caught red handed, buying drugs from another person (XYZ), in a male toilet. He had just completed the transaction with XYZ (who was not charged but was arrested).

At the time of his arrest, Mr. DD said to the arresting officer that: he just bought the 4 chai (No. 4) from the other person XYZ and paid him HK\$13,000; those 4 chai (i.e. the dangerous drug more particularly described in the Particulars of Offences on the attached Charge Sheet) were for Mr. DD's own consumption; and Mr. DD bought it to consume slowly.

The case has now been transferred to the District Court for the first time. You are instructed to represent Mr. DD at the District Court hearing.

Questions:

- (1) Mr. DD requested that you make an application to have the case remitted back to the Magistrates Court for the purpose of plea and sentence. What advice would you give to Mr. DD on his request?**

(8 marks)
- (2) Mr. DD wants to plead guilty but is not satisfied the Summary of Facts (attached) accurately reflects his criminality. In particular Mr. DD tells you that he had the drugs for personal possession but does not agree that he trafficked in the drugs. What advice would you give to Mr. DD in respect of his instructions?**

(8 marks)
- (3) What is the likely sentence that Mr. DD will receive if he is convicted of the offence as currently stated in the Charge Sheet at the District Court?**

(4 marks)
- (4) If Mr. DD is unhappy with the sentence imposed, can it be appealed? If so, to what court would the application to appeal against sentence be made and under what power could the court hear the appeal?**

(5 marks)

[25 marks in total]

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

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NO.1 OF 2009

HKSAR

v

DD (aged 30) (on bail)

The Court is informed that the following charge(s) is preferred against DD by the Secretary for Justice.

Statement of Offence

Trafficking in a dangerous drug, contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap.134.

Particulars of Offence

DD, on the 1st day of January 2009, at public male toilet, Central Street, Central, in Hong Kong unlawfully trafficked in a dangerous drug, namely 17.51 grams of a mixture containing 15.77 grams of heroin hydrochloride.

Dated this 1st of March 2009.

(SPP)

Senior Public Prosecutor

For and on behalf of the Secretary for Justice

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

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CRIMINAL CASE NO.1 OF 2009

HKSAR

v

DD (aged 30) (on bail)

SUMMARY OF FACTS

1. At about 9:50 p.m. on 1.1.2009 PC1111 (PW1) and PC 2222 (PW2) were on duty patrolling in the vicinity of Central Police Station. At 9:57 p.m. on 1.1.2009, at Central Street, Central, PW1 and PW2 saw two men (later known as the Defendant and male XYZ) going into the public male toilet in a furtive manner. PW1 and PW2 followed the Defendant and XYZ into the male toilet. From the gap at the lower part of a cubicle door, PW1 and PW2 saw 4 feet inside one of the three cubicles. 2 males were chatting inside but PW1 could not hear clearly what was said. PW1 climbed up the partition wall at the adjacent cubicle and saw the Defendant and XYZ standing inside the cubicle while the Defendant was putting his left hand into his left trousers pocket nervously. PW1 demanded the Defendant and XYZ to open the door of the cubicle.
2. PW1 searched the Defendant while PW2 searched XYZ separately in the male toilet. Upon search, PW1 found a resealable transparent plastic bag containing 60 plastic packets containing suspected heroin (E1) in the Defendant's left trousers pocket. PW1 arrested and cautioned the Defendant, who pointed at XYZ and said, "I just bought 4 chai from that other person Mr. M and paid him \$13,000. Those 4 chai were bought for my self-consumption. I bought from him for the first time. I really bought it to consume slowly." At the time of arrest, the Defendant had cash of \$2,890 on him.

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

3. PW2 searched XYZ and found XYZ in possession of cash \$15,600.
4. The Defendant and XYZ were taken to the Police Station.
5. In the police station, in a video recorded interview, the Defendant remained silent under caution.
6. E1 was examined by the Government Chemist, EEE (PW3) who confirmed that E1 contained 60 packets containing a total of 17.51 grams of a mixture containing 15.77 grams of heroin hydrochloride.
7. No fingerprint of the Defendant and XYZ was found on the money HK\$15,600 seized from XYZ. No DNA of XYZ was found on the surface of the 60 packets containing heroin (E1).

Dated this 1st day of March 2009.

(SPP)

Senior Public Prosecutor

For and on behalf of the Secretary for Justice

Question 3 (25 marks)

You act for MegaSupplies Limited, a company that manufactures and supplies electrical catering equipment to restaurants throughout Hong Kong and Guangdong Province. You receive your instructions from Wong Hing-Wai (“Wong”), a director.

MegaSupplies Limited and Viva Pescara Limited

On 7 July 2008 MegaSupplies delivered an order for cookers, dishwashers and extractor fans to Viva Pescara Limited, a company that was expanding its chain of popular Italian fish restaurants. The total purchase price of the order was HK\$1.6 million. The payment terms were for a 15% deposit to be paid by 20 June 2008 and the balance to be paid within 30 days of delivery. Viva Pescara paid the 15% deposit but failed to pay the balance by the due date of 6 August 2008, despite many reminders being sent. Eventually, on the instructions of your client, you commenced proceedings in the High Court on 28 July this year. Pleadings closed two weeks ago. Viva Pescara, which has legal representation, served a defence alleging serious defects in the controls of the cookers and extractor fans. No mention of these defects was made prior to the Defence and it is your client's belief that Viva Pescara is simply seeking to avoid payment, owing to poor restaurant trade as a result of the economic downturn. However, MegaSupplies did tell you that they have had one complaint from another customer about a small problem with the controls of the same model of cooker that they supplied to Viva Pescara.

You have discussed with Wong making an Order 14 application, but Wong has told you that MegaSupplies does not wish to do so, because of the expense and uncertainty of the outcome. The strategy you have agreed is to proceed with discovery to see what evidence if any the Defendant can produce of the alleged defects.

This morning you receive a call from Wong, expressing concern about mounting costs. He asks if there is any way in which the claim can now be settled. He tells you that MegaSupplies would like to get some money out of Viva Pescara as soon as possible. He wants to know if you can do anything to encourage them to settle.

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

Question:

- (1) What step is available that might encourage Viva Pescara to settle? Explain the procedure and the costs consequences of taking such a step. (15 marks)

Elena Chan and MegaSupplies Limited

Elena Chan ("Chan") was Operations Manager of MegaSupplies but left the company in 2008 after significant disagreements with the directors. She has sued MegaSupplies for constructive dismissal and during discovery, applied to the Court for a wide range of documents. The hearing took place yesterday. MegaSupplies succeeded in resisting her application on grounds of irrelevance and oppression. At the end of the hearing, the Judge made a provisional summary assessment of MegaSupplies' costs.

Question:

- (2) Explain to Wong the meaning and purpose of the judge's order on costs. (6 marks)

It is now 2 months later and you have just had a without prejudice meeting with Chan's lawyers. The meeting was successful and the parties agreed the terms of a settlement. Both parties require the settlement to be formalised by the Court and for the terms to remain confidential.

Question:

- (3) Explain how the settlement should be formalised by the Court. (4 marks)

[25 marks in total]

Question 4 (25 marks)

Part A

You act on behalf of Aquarius Watch Co. (“Aquarius”), a partnership business set up by May Chan and June Mok. On 3 July 2009, Aquarius entered into a contract with Pisces Co. Ltd. (“Pisces”), a company registered in Hong Kong. Pursuant to the said contract, Aquarius agreed to supply to Pisces 100 diamond watches (the “Watches”) at a discounted price of \$10,000 each (i.e. total price of \$1,000,000). Pisces agreed to pay a deposit of \$300,000 on 5 July 2009 and the remaining \$700,000 14 days after the Watches were delivered. Pisces duly paid the deposit of \$300,000 on 5 July 2009 and Aquarius duly delivered the Watches to Pisces on 15 July 2009. To date, despite repeated reminders sent by Aquarius, Pisces did not make payment of the remaining \$700,000 due under the contract.

You have been instructed by Aquarius to commence proceedings to recover the \$700,000 from Pisces.

Question:

- (1) **On behalf of Aquarius, with reference to the attached Writ of Summons form (*Note: your answers are NOT to be set out on the attached form, but are to be written in the answer book*) set out:**
- (a) **The Plaintiff’s name;**
 - (b) **The Defendant’s name; and**
 - (c) **The General Endorsement of Claim.**

If any further information is required from Aquarius, please set out the same in square brackets in your answer.

(10 marks)

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

IN THE DISTRICT COURT OF
THE HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO. OF 2009

Between

Plaintiff

AND

Defendant

TO THE DEFENDANT (name) of
(address)

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff in respect of the claim set out on the back.

Within (14 days) after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the Registry of the District Court the accompanying ACKNOWLEDGMENT OF SERVICE stating therein whether you intend to contest these proceedings or to make an admission.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest these proceedings or to make an admission, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

If you intend to make an admission, you may complete an appropriate form enclosed in accordance with the accompanying Directions for Acknowledgment of Service.

Issued from the Registry of the District Court this day of 2009.

Registrar

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

Note:- This Writ may not be served later than 12 calendar months beginning with that date unless renewed by order of the Court.

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

GENERAL ENDORSEMENT OF CLAIM

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

Part B

Assume that Aquarius has commenced a claim against Pisces in the District Court and that you now act for Pisces. Pisces was served with the Writ of Summons yesterday. Pisces does not dispute the claim but it is presently suffering from financial difficulties and would like to make payment of the remaining \$700,000 due to Aquarius by instalments and to avoid the costs of litigation proceedings.

Question:

(2) Advise Pisces in light of the abovementioned information.

(5 marks)

Part C

Ignore the facts from Part B above.

Assume that you act for Pisces and that it is now 4 January 2010. In September 2009, you were instructed by April Lee ("April"), the director of Pisces to dispute Aquarius' claim. According to April, the Watches supplied by Aquarius were actually made with fake diamonds. Pisces therefore withheld payment of the \$700,000 due to Aquarius under the contract. A Defence was filed by Pisces pleading the delivery of the fake diamond watches by Aquarius. At the same time, Pisces also counterclaimed against Aquarius for a refund of the \$300,000 deposit paid to Aquarius on 5 July 2009. Last week, you attended a case management conference on behalf of Pisces where the following directions were made:

- i. The parties were to exchange their witness statements by 20 January 2010;
- ii. The parties were to exchange their experts reports by 20 February 2010; and
- iii. A pre-trial review was to be held on 5 March 2010.

On behalf of Pisces, you originally approached an expert, Mr. Leo Wong ("Leo"), who had examined the Watches and confirmed that the diamonds were fake. Yesterday, Leo called you and told you that he had to travel to Canada urgently as his mother there was seriously ill, that it was unlikely he would be able to return to Hong Kong until mid-March 2010 and that given the circumstances, he doubted whether he would be able to complete his expert report on time.

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

When you telephoned April this morning to take instructions from her regarding Leo's absence from Hong Kong, April told you that she would be very busy and was going on a business trip tomorrow. She said that she would be returning to Hong Kong on 25 January and asked you whether it was possible to file her witness statement around end of January 2010 instead of 20 January 2010. As for Leo's situation, April said that her cousin is a jewellery designer and qualified gemologist and that she could ask her cousin to prepare an expert report instead of Leo in support of Pisces' case. She wants to know whether this would be feasible.

Question:

(3) Advise April in light of her queries above.

(10 marks)

[25 marks in total]

Question 5 (25 marks)

Your firm is acting for ABC Bank, Hong Kong branch, which is the defendant to a Hong Kong High Court action by Mrs. Deidre Eu. Mrs. Eu's solicitors, Fong & Fong, commenced the action by issuing a Writ of Summons with a Statement of Claim endorsed on the Writ of Summons. The Statement of Claim was verified by the Plaintiff. Mrs. Eu's claim is that on 31 July 1997, Mr. Gregory Ho, a member of the sales team of ABC Bank, mis-sold to her two sophisticated financial products known as accumulator contracts.

Mrs. Eu alleges in the Statement of Claim that:

- She was an inexperienced investor, a housewife, married to a mainland Chinese businessman;
- Mr. Ho failed, in breach of the duty owed to her, to explain to her at all, or at least adequately, the risks involved in the accumulator contracts;
- In addition and alternatively, Mr Ho provided her only with product documentation for the accumulator contracts written in English, when he knew that she could not read English;
- Mr. Ho failed to explain to her that she could incur very significant losses under the accumulator contracts if the price of the underlying stocks went down, which they did, causing her mark-to-market losses of US\$ 1.5 million;
- had Mrs Eu received proper advice from Mr. Ho, she would not have invested in the accumulator contracts, but instead she would have invested in some real estate in mainland China, from which (by now) she would have made a profit of at least US\$ 1.5 million; and
- she is entitled to damages of US\$ 3 million, plus interest.

Your firm has filed and served a Defence for ABC Bank admitting that Mrs. Eu invested in the two accumulator contracts and that this led to losses of US\$ 1.5 million, but otherwise denying all of Mrs. Eu's allegations and pleading that Mr. Ho did explain properly the nature, complexity and risks of accumulator contracts to Mrs. Eu in Chinese before she invested in them. Mr. Ho verified the Defence.

Mrs. Eu's has not filed any Reply.

In searching ABC Bank's records, e-mail messages have been found relating to a separate account for Mrs. Eu's cousin, which contain as attachments about a dozen e-mail messages passing between Mrs. Eu and her cousin, all written in English.

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

Mr. Ho has resigned and left ABC Bank to join a competitor. He has indicated he is reluctant to provide a witness statement.

A former banker of ABC Bank has agreed to provide a report expressing the opinion that the explanation that Mr. Ho says he gave to Mrs. Eu in respect of the risks of the accumulator contracts was adequate, but he is willing to provide a report only on condition that his identity is disclosed at the latest possible moment in the litigation.

ABC Bank could obtain an expert report as to values of real estate in mainland China.

Questions:

ABC Bank's in-house lawyer wants your advice in respect of the following questions:

(1) The records relating to Mrs. Eu's cousin's account are confidential. What is the position regarding disclosure of these records in the litigation brought by Mrs. Eu?

(5 marks)

(2) It appears Mrs. Eu is not telling the truth about her ability to read English. What are the possible consequences?

(8 marks)

(3) How should ABC Bank deal with the fact that Mr. Ho may not be a willing witness?

(2 marks)

(4) ABC Bank would rather delay as long as possible disclosing to Mrs. Eu (a) the identity of its expert witness on the adequacy of Mr. Ho's explanation and (b) the fact that Mr. Ho may not be a willing witness. When will it likely have to disclose these matters and how?

(5 marks)

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

- (5) **ABC Bank believes it can win the action by showing that Mrs. Eu was an experienced investor and received an adequate explanation before investing in the accumulator contracts. Can it do that and thereby avoid the cost of having to engage an expert as to values of real estate in mainland China? What procedural steps would need to be followed to achieve this?**

(3 marks)

- (6) **There could potentially be four expert witnesses (two for each party). Will the court have any particular views on the numbers of witnesses?**

(2 marks)

[25 marks in total]

END OF TEST PAPER