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# 2010 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

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## HEAD II: CIVIL AND CRIMINAL PROCEDURE

Tuesday, 2 November 2010



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

### **TEST PAPER**

**2 November 2010**

#### **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.**

# **2010 Overseas Lawyers Qualification Examination**

## **Head II: Civil and Criminal Procedure**

### **Question 1 (25 marks)**

You are a solicitor in local practice. You have a new client who is seeking advice on charges against him which are to be heard in the District Court. He wishes you to act for him at his trial. He had previously instructed a different firm of solicitors, but has now moved to the firm for which you work.

Your client is a director of a jewellery company. He is charged with conspiracy to offer unauthorized advantages to a firm of travel agents to bring customers to his showrooms. The conspiracy was alleged to have taken place over a total period of ten years. At trial the prosecution will allege that your client paid commissions to the tour company to encourage them to bring their groups of tourists to make purchases.

The case was investigated by the ICAC (Hong Kong's Independent Commission Against Corruption, which is required to comply, in the same way as the police, with the Secretary for Security's 'Rules and Directions for the Questioning of Suspects and the Taking of Statements'). The ICAC has provided the prosecution with a tape recording of a meeting which occurred between your client, one of his employees (a Ms. Wong), and a partner of your client's former solicitors. This meeting took place after the ICAC had conducted a raid on your client's company offices last year, but prior to his being charged. On the tape your client made damaging admissions and the prosecution will seek to produce the tape as evidence at trial.

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

The ICAC were able to tape covertly the meeting, and your client's admissions, by wiring Ms. Wong with a hidden listening device. Ms. Wong was interviewed by the ICAC, following the office raid, but was not charged with any offence. She wore the wire to assist the ICAC with their investigation of your client and she was wearing it when your client and she met with your client's former solicitor to discuss the outcome of the ICAC raid.

**Question:**

- (1) Can you challenge the admissibility of the tape-recorded evidence at the trial and if so, on what grounds? What procedures would you utilise to make such a challenge?**

**(9 marks)**

The trial proceeded in the District Court and Ms. Wong was not the only employee of your client's company who gave evidence for the prosecution. She, and a Mr. Cheung, were in fact the prosecution's main witnesses against your client. Mr. Cheung, financial controller of the company, gave evidence of being involved with the scheme to make payments to the tour guide company. He described the setting up of the scheme by your client, and how the company had required him to make the payments to the tour guide company to facilitate their business. He stated that he had been interviewed by the ICAC following the raid and that on their request, he had made six statements, totaling over 200 pages, and dealing with more than 300 exhibits. On cross-examination he revealed that initially he was detained by the ICAC for 47 hours and had received immunity from prosecution, in exchange for his statements. These statements took several hours to make and he visited the ICAC offices on ten separate occasions in order to finalise his statements.

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

On cross-examination, he also revealed that after completing his six statements he made a further six visits to the ICAC offices, at their request, for the purposes of re-reading his statements, and refreshing his memory, before the trial. On some occasions the officers left him to read the statements by himself, but more often, they read them to him, one paragraph at a time. During these sessions, after the officer had read out each paragraph, he would give a summary of it to Mr. Cheung, and ask if he agreed. The last of these sessions took place five days before your client's trial commenced in the District Court.

**Question:**

- (2) **On the basis of this evidence, what if any, application will you make to the District Court judge in relation to the prosecution case?**

**(8 marks)**

Unfortunately, your application failed and your client has been convicted of conspiracy, as charged. The judge relied heavily on both Ms. Wong and Mr. Cheung's evidence to support his finding of guilt.

**Question:**

- (3) **Can you properly appeal against your client's conviction? If so, please state:**
- (i) **any ground upon which you would rely,**
  - (ii) **the court to which you would make your appeal, and**
  - (iii) **identify the power of that court to hear your appeal.**

**(8 marks)**

**(25 marks in total)**

## **Question 2 (25 marks)**

Your client, who is named Dilshan, is a Sri Lankan national. Yesterday he was convicted of robbery by a judge sitting in the District Court. He will be sentenced next week.

The prosecution case at trial was that the victim (PW1), a taxi driver, had on the night of the offence parked his vehicle in the early hours of the morning, nearby a minibus parking station and had then walked to a close by convenience store to buy some refreshments. On his way back to his taxi he was intercepted by a dark-skinned man with waist-length hair who demanded money. When PW1 refused, the dark-skinned man commenced to assault him. His waist-bag containing his wallet, mobile phone and takings was snatched from him.

A very short time later, a patrolling constable (PW2), walking past the minibus parking area, heard noises and went towards the minibuses to investigate. When he got there he saw a dark-skinned man running out from the minibuses and intercepted him. It was agreed by the defence, before trial, pursuant to section 65C Criminal Procedure Ordinance, Cap 221, that the man PW2 intercepted was your client, Dilshan.

PW2 then heard groans coming from amongst the minibuses and, with your client, Dilshan, in custody, went to investigate and found PW1. When PW1 saw your client he immediately said that your client was the person who had robbed and hit him.

Your client was arrested and cautioned in English and as he was not proficient in that language, your client remained silent. PW2 searched your client and found the items taken from PW1 at the time of the robbery. Your client remained silent. Later, under legal advice, your client gave a 'no comment' record of interview at the police station.

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

No formal identification parade was held. At trial, PW1 made a dock identification of your client.

Your client is unhappy with his conviction and wishes to appeal against it.

**Questions:**

- (1) **Advise your client whether he can appeal against the use of a dock identification of him at trial. In giving your answer, identify any case law or statutory authority upon which you rely.**

**(12 marks)**

- (2) **Your client wants to know if, on appeal, he can withdraw his pre-trial admission that he was the man intercepted by PW2 at the scene of the robbery. Advise him and in giving your answer, identify any case law or statutory authority upon which you rely.**

**(5 marks)**

- (3) **Assuming your client has arguable grounds of appeal against his conviction, identify the court to which an appeal would be made, any time limit within which your initial grounds of appeal must be filed and the test which will be applied by the court in determining whether to allow your client's appeal.**

**(8 marks)**

**(25 marks in total)**

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

Profitable Leasing Limited is the landlord and Sunshine Cafe, a partnership operated by Sunny Chan and Star Chan, is the tenant under a written lease (the "Lease"). The 2-year Lease, which commenced on 1 July 2009, will be expiring on 30 June 2011. The monthly rental is HK\$50,000. The premises have been used by Sunshine Cafe to operate a cafe since 1 July 2009.

Under the Lease, rent is payable by Sunshine Cafe on the first day of each calendar month in advance. The Lease also provides that if rent or management charges or any other sums due shall be in arrears for 15 days after the same become due and payable (whether demanded or not), the landlord shall be entitled to re-enter the premises, forfeit the deposit of HK\$100,000 furnished by the tenant to secure its obligations under the Lease and the Lease shall thereby be absolutely determined.

Due to the financial difficulties of Sunny Chan and Star Chan, Sunshine Cafe has experienced a shortage in working capital since 1 May 2010. Sunshine Cafe failed to pay the monthly rent due to Profitable Leasing Limited after May 2010, (i.e. rent for May 2010 was paid, but the rent was not paid thereafter). On 31 July 2010, Profitable Leasing Limited instructed its solicitors, Messrs. Logans, to send a letter to Sunshine Cafe demanding payment of the rent in arrears and interest thereon, terminating the Lease and requiring Sunshine Cafe to surrender the leased premises. The amount of rent in arrears as of 31 July 2010 was HK\$100,000. This demand so sent by Messrs. Logans was ignored by Sunshine Cafe. Sunshine Cafe has continued to use the premises despite its continuous failure to pay rent which is due and payable.

It is now late August 2010. Profitable Leasing Limited intends to commence proceedings against Sunshine Cafe to enforce its rights under the Lease, including the recovery of vacant possession of the leased premises.

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



The annual rent and rateable value of the subject premises as determined under the Rating Ordinance (Cap.116) are HK\$600,000 and HK\$248,000 respectively.

**Question:**

- (1) **Apart from recovering the arrears of rent, the interest thereon and vacant possession of the premises, what other claims should be included in the Statement of Claim which Profitable Leasing Limited is entitled to make?**

**(4 marks)**

Messrs. Logans issued a Writ of Summons endorsed with a Statement of Claim with the parties properly described on 1 September 2010. On the same day at around 11 a.m., the process server of Messrs. Logans visited the residence of Sunny Chan but was told by the domestic helper that Sunny Chan was on a business trip in the PRC. The process server then inserted the Writ of Summons, enclosed in an envelope duly sealed and addressed to Sunny Chan, in the letterbox of Sunny Chan's residence before leaving. At around 12 p.m., the process server arrived at the leased premises, being Sunshine Cafe's principal place of business, and asked for Star Chan. A person who represented himself to be the manager-in-charge of Sunshine Cafe informed the process server that Star Chan was travelling in Korea. The process server then served a copy of the Writ of Summons on the manager. On 8 September 2010, when Sunny Chan returned from the PRC, among the mail items found in his letterbox, he discovered the sealed copy of the Writ of Summons.

**Questions:**

- (2) **Advise whether the Writ of Summons was properly served on Sunshine Cafe and if so, by which mode of service and when?**

**(6 marks)**

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

- (3) What is the earliest date Profitable Leasing Limited can apply for default judgment if Sunshine Cafe fails to acknowledge service of the Writ of Summons within the time stipulated in the court rules?**

**(3 marks)**

Messrs. Moon & Co., solicitors for Sunshine Cafe, filed an acknowledgement of service indicating Sunshine Cafe's intention to defend the proceedings. Sunshine Cafe is required under Order 18 rule 2(1) of the Court Rules to file its Defence within the prescribed time limit. As Sunny Chan and Star Chan are on busy travel schedules, Messrs. Moon & Co. cannot complete taking the necessary instructions required to compile the Defence. It is now anticipated that Sunshine Cafe cannot file its Defence within time. Meanwhile, no time extension request or application has been made by Messrs. Moon & Co. on behalf of Sunshine Cafe.

**Question:**

- (4) Advise what necessary steps Profitable Leasing Limited should take before entering judgment in default of Defence?**

**(2 marks)**

Sunshine Cafe filed and served its Defence on 19 October 2010 after securing a time extension from Profitable Leasing Limited to do the same. After considering the Defence, Messrs. Logans is of the view that Sunshine Cafe's Defence is only moonshine and does not have any merit.

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

**Question:**

- (5) Profitable Leasing Limited wishes to obtain money judgment and a possession order against Sunshine Cafe expeditiously and in a cost-efficient manner. You are the handling solicitor at Messrs. Logans. Write a letter of advice to the board of directors of Profitable Leasing Limited advising on the type of court application required to be made to achieve such objective by referring to the relevant Court Rules. Your advice should also cover the timing of making such application and the documents required to be prepared for such application (Note: you are not required to draft these documents). Your letter should also advise on the different possible outcome(s) of such application and the usual costs order(s) related to each outcome.

(10 marks)

(25 marks in total)

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

You have been instructed to act for Popsicle Limited (“Popsicle”), which has just been served with a Writ of Summons attached with a Statement of Claim. The proceedings were issued by Lollipop Limited (“Lollipop”) in the High Court on 1 September 2010 and were served on Popsicle today. Lollipop’s claim is for damages for breach of contract and an extract of the Statement of Claim is as follows:

#### **Statement of Claim**

1. The Plaintiff, Lollipop Limited, is a company incorporated in Hong Kong, carrying on business as the authorised dealer and supplier of “Choco” brand hi-definition television sets.
2. The Defendant, Popsicle Limited, is a company incorporated in Hong Kong, carrying on business as a retailer of electrical goods at various retail outlets in Hong Kong.
3. By a written agreement (the “Agreement”) entered into between the Plaintiff and the Defendant on 15 May 2010, the Plaintiff agreed to sell and the Defendant agreed to purchase 700 “Choco” brand CX543-42-inch hi-definition LCD television sets (the “Goods”) at a price of \$5,000 each (i.e. total price of  $700 \times \$5,000 = \$3,500,000$ ).
4. The Agreement contained the following express terms:
  - (1) The Defendant would pay a deposit of \$500,000 (the “Deposit”) to the Plaintiff by 30 May 2010;
  - (2) The Defendant would pay the Plaintiff the remaining \$3,000,000 within 14 days of the delivery of the Goods.
  - (3) Interest of 24% per annum would be chargeable by the Plaintiff for any outstanding sums owed to the Plaintiff by the Defendant under the Agreement.

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

5. Pursuant to the Agreement, the Defendant duly paid the Deposit to the Plaintiff on 30 May 2010.
6. Pursuant to the Agreement, the Plaintiff duly delivered the Goods to the Defendant on 10 June 2010. Despite repeated reminders by the Plaintiff, in breach of the Agreement, the Defendant failed to pay the remaining \$3,000,000 to the Plaintiff.

You have just met Candy Chan, the managing director of Popsicle, to take instructions from her. She tells you the following:

- Popsicle owns several electrical retail shops located in Causeway Bay, Mongkok, Shatin, Tsuen Wan and North Point. They are planning on opening a new shop in Tsimshatsui and therefore from May onwards, Candy had to contact their usual suppliers to order more stock. One of such suppliers she contacted was Lollipop.
- Lollipop is Popsicle's usual supplier of the "Choco" brand hi-definition television sets.
- On 14 May, Candy telephoned Bonnie Leung ("Bonnie"), Lollipop's Sales Manager. On the telephone, Candy ordered 400 sets of "Choco" brand CX543-42-inch hi-definition LCD television sets from Bonnie, on behalf of Lollipop, at \$5,000 per set (total price being  $400 \times \$5,000 = \$2,000,000$ ), with delivery on or before 15 June 2010. Candy also agreed to pay a deposit of \$500,000 by the end of the month, with the remaining \$1,500,000 payable within 14 days after delivery.
- Candy said that she had not signed any written contract with Lollipop on behalf of Popsicle.

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

- Candy said that on the day of delivery, 700 television sets were delivered instead of 400. She had contacted Bonnie immediately after delivery to ask Bonnie to arrange for collection of the extra 300 television sets delivered but to date, Lollipop had not arranged for collection of the extra 300 television sets mistakenly delivered to Popsicle.
- Popsicle did not pay the remaining price of \$1,500,000 for the 400 television sets because upon inspection, the television sets were defective. Again, Candy had informed Bonnie of such defects but Lollipop did not revert to Popsicle regarding the defects. Candy said she wants to return all 700 television sets to Lollipop and is awaiting Lollipop's collection of the same.
- Candy had heard from other staff at Lollipop that Bonnie was sacked by Lollipop 2 weeks ago.

### **Questions:**

- (1) Based on the above instructions, draft a Defence (and Counterclaim, if appropriate) to the above extracted Statement of Claim on behalf of Popsicle. If further information is required, indicate the same in square brackets at the appropriate place of your draft.**

**(15 marks)**

- (2) Towards the end of your meeting with Candy, she asks you:**
- (i) what are the next steps in the proceedings;**
  - (ii) what Popsicle would need to do to prepare the case for trial; and**
  - (iii) whether Popsicle can avoid trial of the case as Candy is concerned about the level of costs that would have to be expended to bring the case to trial.**

**Draft a brief advice in the form of a letter to Popsicle dealing with the above queries raised by Candy.**

**(10 marks)**

**(25 marks in total)**

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

You act for Davos Designs Limited (Davos), an interior design company affiliated to the Hong Kong Institute of Interior Designers (HKIID). In November 2009 Davos entered into a contract (the "Contract") with Floral Delights Company (Floral), operator of a chain of 8 florist shops located in the lobbies of prominent hotels in Hong Kong. The Contract provided that Davos would develop and implement a new concept for the florist shops. Before the Contract was concluded, a series of site meetings took place to discuss the new concept. The site meetings were attended by Ronald Wong (Wong), Davos' architect, and Ip Hing Wing (Ip), Floral's managing director.

The new concept that Davos developed for the shops was 'the Italian countryside', featuring painted walls in soft shades of ochre and terracotta and wrought-iron display shelves. Floral approved the concept in January 2010 and Davos started work on its implementation. Davos completed the work in May 2010. Although Floral had paid a deposit and made monthly stage payments to Davos, Floral refused to pay the final balance of the contract price. Floral alleged that the concept had not been implemented correctly as the walls were painted bright yellow and orange, evoking not so much the Italian countryside as a fast food chain. They also alleged negligent workmanship because the wrought-iron display shelves collapsed when stacked with plant pots.

An attempt at mediation on 30 August 2010 was unsuccessful and on 1 September 2010, Floral commenced proceedings against Davos for damages. Davos has defended the action and counterclaimed for the balance of the contract price. The proceedings have reached the discovery stage.

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

- (a) Davos has provided you with a file of correspondence they have had with their indemnity insurers. The file contains an e-mail message dated 23 August 2010, explaining some problems that Davos encountered when carrying out the work. It states that "our architect Wong did have some concerns about the weight of the wrought-iron shelves but he thought they should be adequate, as flowers don't weigh very much".

**Question:**

- (1) **Discuss whether you should disclose this e-mail message in the Defendant's List of Documents and if so, in which part.**

**(6 marks)**

- (b) Davos has also provided you with Wong's 2009 diary, in which Wong made contemporaneous notes of his site meetings with Ip. Wong is concerned about disclosing his diary because it contains confidential information about other, unrelated, projects.

**Question:**

- (2) **Explain what Davos' obligations are concerning the diary, and how you may address Wong's concern.**

**(5 marks)**

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



- (c) Assume now that the parties have exchanged their Lists of Documents. Before they did so, on Davos' instructions you made a "without prejudice" settlement offer to Floral's solicitors, which was then refused. You had listed this correspondence in Schedule 1, Part 2 of Davos' List, but you are surprised to see that it appears in Schedule 1, Part 1 of Floral's List. You are also concerned to see that inadvertently, you omitted to include the words "without prejudice" on the letter that contained the settlement offer.

**Question:**

- (3) **Explain the implications, if any, of (i) this correspondence appearing both in Parts 1 and 2; and (ii) the failure to mark your letter "without prejudice".**

**(5 marks)**

- (d) Assume now that you have inspected Floral's listed documents which included a fax sent by Ip to the HKIID, complaining about the standard of Davos' workmanship and stating that "Davos are an incompetent bunch of cowboys and you should tell the world not to use them". You show the fax to Davos who ask you whether they can sue Floral for defamation on the basis of this fax.

**Question:**

- (4) **Advise Davos as to whether there is any fetter on the use of the fax and if so, what procedure should be followed to obtain a release from any such restriction.**

**(4 marks)**

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

- (e) Davos' architect, Wong, makes an appointment to see you on an unrelated matter. He tells you that 3 months ago, he had laser eye surgery at the Harbour Optical Clinic (HOC). Since the operation he has suffered from severe pain in his right eye and a consultant at a hospital has told him that he may lose sight in it as a direct result of the laser surgery. Wong wishes to commence proceedings against the doctor who carried out the operation at the HOC but cannot recall that doctor's identity. He has asked the HOC for a copy of his medical file but so far, they have refused to give it to him.

**Question:**

- (5) **Advise Wong of any procedural steps that are available to assist him in identifying the doctor and obtaining a copy of his medical file.**

**(5 marks)**

**(25 marks in total)**

**END OF TEST PAPER**