

**2011 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Thursday, 10 November 2011



HEAD II: CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

10 November 2011

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.**

2011 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

You are a solicitor in local practice retained to consider the merits of an appeal against a criminal conviction. Specifically, you represent Mr. Leung Chung Cheung (“Leung”) who has been convicted, along with 5 other defendants, of acting as a member of a triad society and conspiring to cause grievous bodily harm with intent. Last year, the intended victim of the harm had won over \$100 million in six months of gambling at a casino partially owned by Leung. It was alleged at trial that as the alleged victim had cheated the casino, on Christmas day last year Leung ordered him to be abducted, taken to a secret site and have his legs broken. The other defendants conspired with Leung to perform the abduction but all six men were arrested after a tip off to police on Christmas Eve.

The tip-off was provided by a Mr. C. K. Chan (“Chan”) who is a member of the same triad group and also a police informer. Chan was granted immunity from prosecution in exchange for giving evidence at Leung’s and the co-defendants’ trial in the District Court in October this year.

Leung wishes to appeal against his conviction. You did not represent him at trial. At the trial Chan was cross-examined by your client’s former Counsel for 5 days. During the course of the cross-examination it became clear that Chan had been reading over his three witness statements during the court adjournments. Chan stated in evidence that he had done so. During the trial, none of the Defence Counsel instructed applied to the judge to direct Chan not to read his statements out of court. The judge also did not make such an order of her own volition.

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

Questions:

- (1) Would it be advisable for Leung to appeal against his conviction on the basis that Chan rendered Leung's conviction unsafe by reading over his statements during the trial adjournments in the course of giving his evidence? Evaluate the strength of any such appeal ground.**

(12 marks)

- (2) Assuming this ground of appeal has merit, would you be permitted to pursue it given that none of the Defence Counsel present at trial complained to the judge about Chan's actions at the time?**

(6 marks)

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

(7 marks)

[25 marks in total]

Question 2 (25 marks)

You are a solicitor retained by the Duty Lawyer Service to present a bail application for Olih Ikojiko (“Olih”) in the Kowloon Magistracy this morning. Your client’s husband Mr. Ikojiko (“Ikojiko”) is a Japanese businessman. His wife Olih is Indonesian. In 2008, she went to work in Japan, where the pair met and married. Olih no longer works as her husband’s business is successful. She has learnt enough Japanese for family matters, but is not fluent. They both speak a very small amount of English but no Cantonese.

Two days ago Ikojiko and Olih traveled to Hong Kong for a short holiday, bringing their 2-year-old daughter with them. Late yesterday afternoon they visited a large shopping mall where Olih went into a dress shop, leaving Ikojiko and their daughter outside. She found a hat she liked, tried it on, and then went out of the shop to show her husband and to ask him to come into the shop to pay for it.

The shop detective followed her out of the shop and accused her, in Cantonese, of shoplifting. Olih and Ikojiko could not fully understand him but tried to communicate with him, in their limited English, that they had no intention to steal the hat. The shop detective did not accept their explanation. The police were called to the shop and they questioned Olih in English. She did not fully understand what they were asking her and became very confused. After about half an hour of asking her questions the police arrested Olih for theft.

Olih was taken to the police station and Ikojiko was given the name of the station written in Chinese characters on a card to allow him to follow by taxi. On arriving at the station Olih and Ikojiko discovered that there was no one present who spoke either Japanese or Indonesian to explain the situation to them. The police tried to communicate with them in English but this was not very effective.

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

The police called for an Indonesian interpreter but as the time was already 7:00 p.m. it took an hour to locate one and another hour for him to arrive at the police station. Over four hours had passed since Olihah was first stopped by the shop detective. At this time both Olihah and Ikojiko were extremely concerned not only for themselves but for their daughter, who was in extreme distress as she was very tired and hungry. It was agreed with the police that Ikojiko would take her back to their hotel and he left Olihah in police custody.

The police insisted on interviewing Olihah under caution, despite the fact that by this time it was after 10:00 p.m. Before commencing the interview, Olihah was allowed to telephone her husband, to let him know what was happening, and to tell him she wanted him to confirm to the police that he had the money to pay for the hat and had intended to do so. During the course of this phone call Ikojiko became increasingly concerned for his wife. She sounded terrified. He asked to speak to the police officer in charge and the officer told him that it would be easier for them to process Olihah's case and release her if she co-operated with them. Ikojiko communicated the officer's comment to Olihah. He also told the police officer on the telephone that it had been his intention to pay for the hat. He is not sure however whether the police officer understood him as he made this communication in Japanese.

After the telephone call was finished the police proceeded to take a cautioned statement from Olihah. The interview took a very long time as the interpreter had to translate all of the police questions into Indonesian before Olihah could answer them and then translate her answers into Cantonese. As Olihah had elected for the interviewing police officer to write down her answers he wrote down all his questions and her answers in Chinese. During the course of the interview Olihah began to agree with the police assertion that she had stolen the hat as she was too tired to argue anymore. At 1:00 a.m. the interview was concluded and Olihah signed her statement.

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

The police decided to charge Olihah with theft of the hat. Despite her request for release, they detained her in custody overnight to appear in the Magistrate's court at 10:00 a.m. this morning. Olihah has no prior convictions. She and her husband have return tickets to Tokyo leaving Hong Kong this evening. They have no relatives or friends residing in Hong Kong. Olihah is desperate to return to Japan with her family and is willing to comply with any bail conditions made by the court.

Questions

Answer the following questions based on the above facts:

(1) Are there any criticisms that can be made of the manner in which the police conducted their investigation of this case?

(12 marks)

(2) What are the factors the police should have taken into account when deciding whether to grant Olihah bail after taking her statement?

(5 marks)

(3) What matters pertinent to this case would you highlight to the magistrate in your application for bail for Olihah? For these purposes assume the court prosecutor will object to bail on the basis that Olihah has no ties to Hong Kong and is likely to abscond.

(8 marks)

[25 marks in total]

Question 3 (25 marks)

Facts Part I

You have instructions from Mega Bank Corporation (“Mega Bank”) to recover 100,000 in Wonderland currency (W\$100,000) which it was required to pay to the Wonderland government to settle tax owing by its former customer, Enerpower Limited (“Enerpower”).

You have advice from counsel that Mega Bank has a good claim in restitution against Enerpower.

The background is as follows.

Mega Bank is incorporated in Wonderland, and has a Hong Kong office, duly licensed, with 14 local branches carrying on general retail banking business.

Enerpower was one of Mega Bank’s Hong Kong customers. Enerpower is a trader in energy-efficient equipment which it sources in Mainland China and sells to customers in 8 different countries, including Wonderland.

Enerpower is incorporated in the British Virgin Islands (BVI). It is registered in Hong Kong as an overseas company, and has a Hong Kong Business Registration Certificate.

In 2009 the government of Wonderland issued a back-dated tax assessment requiring Enerpower to pay sales tax on goods sold to customers in Wonderland. The amount (W\$100,000) was at the time worth HK\$925,000. Enerpower did not pay the tax, and the government of Wonderland issued an order to Mega Bank requiring it to freeze Enerpower’s bank accounts worldwide.

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

Mega Bank froze Enerpower's account at its Hong Kong branch, but in subsequent litigation the Court of First Instance ordered Mega Bank to lift the freeze on the ground that the Hong Kong Courts will not enforce foreign revenue laws. Enerpower then withdrew all its funds from Mega Bank Hong Kong branch, and closed its account.

The government of Wonderland compelled Mega Bank's head office in Wonderland to pay the outstanding tax on behalf of Enerpower, despite the fact that Mega Bank no longer holds any of Enerpower's funds.

Your enquiries reveal that Enerpower owns a residential flat on Largesse Mountain, Hong Kong, where Mr. Jupiter TSANG Mok Sing, its sole shareholder and director lives. You have not been able to trace any other assets owned by Enerpower in Hong Kong, BVI or elsewhere.

The value of Wonderland's currency has recently increased substantially, and the amount lost by Mega Bank in Wonderland currency is now, in Hong Kong dollar terms, HK\$1,075,000.

Question:

(1) (a) Name the parties to the proceedings as you would state them on the originating process; and

(2 marks)

(b) prepare a general indorsement of claim for the originating process.

(5 marks)

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

Facts Part II

You have now issued originating process and served it on Enerpower. After acknowledging service, Enerpower issues an *inter partes* summons under Order 12 rule 8(2A) RHC seeking a stay of the Hong Kong proceedings on the ground that the dispute would be more conveniently dealt with in BVI Courts. The summons is successfully opposed and the proceedings will continue in Hong Kong. The order dismissing the summons states that the “party and party costs of the application shall be in the cause”.

Question:

- (2) **The responsible officer at Mega Bank asks you to explain the costs order. In particular she wants to know whether Mega Bank will recover all or part of the legal costs it expended in opposing the application (including counsel’s fees) and if so, how much and when. Advise her in writing.**

(10 marks)

Facts Part III

After trial, your client, Mega Bank, is given judgment for the full amount claimed against Enerpower, with costs. Your letter demanding payment from Enerpower is ignored, and after 3 months Mega Bank asks you what it should do now.

Question:

- (3) **Explain to your client what steps you would advise it to take to enforce the judgment against Enerpower.**

(8 marks)

[25 marks in total]

Question 4 (25 marks)

Facts Part I

You act for the Solid Insurance Company ("Solid"). It is suing Mr. Horace Ho and Fly-by-Night Air Freight Limited ("FBN") in the High Court of Hong Kong for unpaid premiums on insurance which it sold to FBN. Mr. Ho is a Hong Kong resident. FBN is incorporated in the Cayman Islands.

A key issue in the dispute is the role of Mr. Ho. Solid believes that in reality he is the owner and controller of FBN, however in their Defences both Mr. Ho and FBN have denied this.

The case has now reached the stage of discovery and you have just received FBN's List of Documents. You notice the following item in Schedule 1 Part II of the List:

"Confidential and privileged constitutional documents of FBN, memorandum and articles of association, board minutes, register of shareholders etc."

Question:

(1) (a) **Can you challenge FBN's claim to privilege for these documents?**

(4 marks)

(b) **Assuming FBN continues to assert privilege, what procedure could you follow to gain access to the documents?**

(5 marks)

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

Facts Part II

Mr. Ho has sought an extension of time to serve his List of Documents, but in the meantime he has brought an application to have Solid's claims against him struck out as frivolous and vexatious. His supporting affirmation includes the following paragraphs:

'I sent a copy of Solid's claims to my Cayman Island lawyer for his opinion. In his letter in response he commented: "Let me tell you Horace; this allegation that you are the owner FBN is complete rubbish". He could hardly have been any clearer than that. For the avoidance of doubt, the rest of his advice is, of course, privileged.

So far as I am aware FBN is administered by the Gnomegesellschaft Trust Company of Liechtenstein, and I have no idea who its true owner is. It is true that the Gnomegesellschaft Trust Company has occasionally sent me instructions on behalf of FBN, but I was merely acting as an employee.'

Question:

- (2) You believe it would be useful to Solid's case to know what was in the rest of the Caymen Island lawyer's opinion and Mr. Ho's instructions from the Gnomegesellschaft Trust Company. What steps could you take to gain access to this information and what would the effects be?

(9 marks)

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

Facts Part III

The defendants have today made a sanctioned payment in respect of all of Solid's claims in the proceedings. The matter has not yet been set down for trial.

Question:

- (3) **Draft a letter of advice to your client explaining what its options are, the relevant time limits and procedures, and the consequences of each.**

(7 marks)

[25 marks in total]

Question 5 (25 marks)

Facts Part I

Fruits Computer Limited (“Fruits”), a company incorporated and having its registered office in Australia, made an oral contract with a Hong Kong resident, Mr. Steven Hobs (“Hobs”), for the supply of 100,000 micro-chips for Hobs’ smartphone production business (the “Contract”). Fruits’ business director, Mr. Bryan McDonald (“McDonald”), flew to Hong Kong to discuss and orally concluded the terms of the Contract with Hobs at Hotel Grand Hyatt, Hong Kong on 1 April 2011. Hobs and McDonald agreed that the Hong Kong courts would have exclusive jurisdiction in the event of any disputes.

Pursuant to the Contract, Fruits agreed to supply Hobs with 100,000 micro-chips required for Fruits’ smartphone application program called “Where’s my app” at a price of HK\$1,000,000. Delivery was to be made to Hobs’ warehouse in Hong Kong by 30 April 2011. At the time of making the Contract, Hobs told McDonald that: (a) he acquired the micro-chips specifically for manufacturing a batch of 100,000 smartphones to meet the orders of a Taiwanese company and delivery was agreed to take place under that contract on 15 June 2011 (the “Taiwan Contract”); (b) time for delivery under the Contract was of essence; and (c) the profit for Hobs under the Taiwan Contract was estimated to be around HK\$1,000,000. Hobs paid a sum of HK\$100,000 as deposit under the Contract and agreed to pay the balance into Fruits’ bank account in Hong Kong upon taking delivery of the goods. Fruits wrote on a napkin: “Received HK\$100,000 from S. Hobs. Understood his Taiwan contract obligations and promised to deliver chips by 30 April 2011. *B. McDonald (1/4/2011)*” and handed it over to Hobs.

Fruits never delivered the micro-chips to Hobs. As a result, Hobs breached the Taiwan Contract and the Taiwanese company terminated the same. Hobs would like to recover his losses from Fruits.

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

Questions:

- (1) Advise Hobs the different types of losses and claims (contractual and/or statutory) which he can make against Fruits by commencing court proceedings in Hong Kong.

(2 marks)

- (2) Advise which court in Hong Kong Hobs should commence proceedings if he wishes to claim for all of his losses and state your reason(s). Would your answer be different if Hobs wishes to recover the money paid only and if so, how?

(5 marks)

Facts Part II

Hobs instructed Messrs. Kahns (“Kahns”), a Hong Kong law firm, to commence proceedings against Fruits. A writ of summons with general endorsement was prepared by Kahns. When Kahns’ clerk took the writ to the Court Registry for issue, the Registry’s clerk stamped on the writ the following: “Not for service out of the jurisdiction”. You are the handling solicitor of Hobs’ case at Kahns explaining the matter to Hobs.

Questions:

- (3) Explain why the Registry’s clerk stamped the writ with a statement appearing in the facts above.

(3 marks)

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

- (4) Explain the type of application which Kahns will need to make in order to serve the proceedings on Fruits effectively and discuss the procedure for bringing this type of application by citing and referring to the relevant Court Rules.

(5 marks)

- (5) Discuss which ground(s) which Kahns can rely on for bringing the application under the relevant Court Rules and advise Hobs the likely chance of success of the application based on each of the ground(s) and the merits of the Hobs' claim.

(5 marks)

Facts Part III

Assume now that the writ has been served on Fruits. Fruits instructed a Hong Kong law firm, Messrs. Taylor ("Taylor"), to advise it on Hobs' claims. Fruits admitted all the claims which Hobs has made and would like to end this matter quickly as it does not want to be involved in full-blown litigation. Fruits is prepared to return the sum of HK\$100,000 to Hobs and pay a sum of HK\$500,000 for the remainder of the claim. You are now Fruits' handling solicitor at Taylor.

Question:

- (6) Advise what Fruits should do in order to achieve its objective by referring to and discussing the steps which Fruits has to comply with under the relevant Court Rules.

(5 marks)

[25 marks in total]

END OF TEST PAPER