
2012 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD II: CIVIL AND CRIMINAL PROCEDURE

Monday, 5 November 2012



HEAD II: CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

5 November 2012

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.**

2012 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

You are a solicitor in criminal practice. Your client, Wai Oi Man (“Wai”), has been convicted of one charge of conspiracy to defraud the Immigration Department of the Hong Kong government contrary to the common law and punishable with a maximum sentence of 14 years’ imprisonment. The charge concerns an allegedly bogus marriage between Wai (a mainland citizen), and a Hong Kong man, for the purpose of gaining permission to reside in Hong Kong.

Wai pleaded not guilty to the charge and was tried before a magistrate.

The prosecution case relied wholly on admissions made by Wai in her record of interview with the Immigration Department. In that interview she admitted that her marriage was bogus and that she had paid a middle man to arrange it to enable herself and her two daughters to obtain one-way entry permits to enter and live in Hong Kong. The prosecution called the Immigration Officer (“PW2”) who conducted the cautioned interview with Wai and the interpreter (“PW1”) present at the interview to testify at the trial. They both testified that Wai had given the answers in her record of interview voluntarily and that the contents of the record of interview had been properly explained to her before she was asked to sign and confirm its accuracy.

At trial, Wai challenged the admissibility of the record of interview, claiming that when she entered the interview room PW2 shouted at her and threatened her and accused her of having entered into a bogus marriage. She was not allowed to make phone calls during the interview and she was told to turn off her mobile phone while the interview was taking place, although she was permitted to keep it in her pocket.

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

She testified that she told PW2 that her marriage was genuine and claimed that the incriminating answers included in her record of interview were not provided by her. She stated that she signed the record of interview without reading it over as she could not read traditional Chinese characters and PW1 did not properly explain the contents of the record of interview to her.

At trial the magistrate used the alternative procedure to determine Wai's challenge to the admissibility of the record of interview. After hearing the prosecution's case on both the special and general issue and finding there was a case to answer on the admissibility issue, the defence called Wai to give evidence on the special issue. After hearing her evidence and the submissions of Counsel the magistrate made the following ruling:

'I have carefully considered all the evidence. I am satisfied that full weight is to be attached to the evidence given by PW1 and PW2. During the examination-in-chief of both PW1 and PW2 they gave clear and straight forward answers. Their evidence was not shaken in cross-examination. I find them both to be honest and reliable. I am sure they acted in a proper and professional manner and that the content of the record of interview had been interpreted to the defendant and read over to her and all the answers in it were given by her in a voluntary manner. I have no hesitation in rejecting the evidence and explanation given by the defendant. She said she was not allowed to use her mobile phone and was asked to turn it off. However, she agreed it was not seized. I do not find credible the defendant's explanation that she failed to understand the contents of the record of interview in full. I am in no doubt as to the voluntary nature of the record of interview and do not exercise my discretion to exclude it from evidence. The admissions in the record of interview were clearly made.'

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

After this ruling the prosecution closed its case and a submission of no case to answer was made. The submission was rejected and the defendant then gave evidence on the general issue denying the truthfulness of the record of interview. After hearing closing submissions, the magistrate adjourned the case to consider his verdict.

You took the verdict today. The magistrate convicted the defendant of the charge and sentenced her to 18 months' imprisonment.

Questions:

(1) Should you file an appeal and if so, on what grounds? (10 marks)

(2) Identify the court in which any appeal would be heard, any procedures which must be complied with in order to have that court hear the appeal, and the power of that court in determining the appeal.

(7 marks)

(3) Can bail be sought pending appeal? What are the grounds the court would use to determine whether to grant bail?

(8 marks)

[25 marks in total]

Question 2 (25 marks)

You act for Lau Hing (“**Lau**”) who was convicted on 31 October 2012 of the indecent assault of his step-daughter, contrary to section 122(1) of the Crimes Ordinance, Cap 200. The offence carries a maximum penalty of 10 years’ imprisonment.

The victim of the indecent assault, Lau’s step-daughter Eliza is currently aged 18 years and was born on 12 April 1994. At the time of the offence she was sixteen years old. The offence occurred in the early hours of the morning on 5 September 2010. Eliza was lying in bed when her step-father entered her bedroom and pressed himself against her on the bed. He pressed himself against her in such a way that she felt pressure on her chest and claimed she was aware he had an erection.

Eliza did not mention the matter to anyone at the time of the incident as she was afraid of her step-father. A few months later, when her parents were in the course of getting a divorce, Eliza told her mother about the incident and her mother took her to the police.

Eliza was interviewed on 11 January 2011 by a police woman and the questions put to her and answers given were recorded on a DVD. At trial the prosecutor applied to the Court to play the DVD in lieu of Eliza giving evidence-in-chief. The Court allowed the application. The prosecution also applied for Eliza to undertake her cross-examination and re-examination without entering the court room. The magistrate allowed Eliza to give her evidence through live television link facilities in place at the court.

After convicting your client, the magistrate sentenced him to 12 months’ probation.

Your client wishes to appeal against his conviction.

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

Questions

(1) What advice would you give Lau as to possible grounds of appeal?
(15 marks)

(2) You are aware that the prosecutor was not happy about the sentence. Your client has asked you whether his sentence could be increased on appeal. Advise him whether this is possible.

(10 marks)

[25 marks in total]

Question 3 (25 marks)

Facts Part I

Your firm acts for Pacific International Bank Ltd. (“**Pacific**”). Pacific is incorporated in Singapore and all of its banking business is carried out there.

In December 2001 Pacific granted general banking facilities of Singapore \$2.5 million to Hong-Sing Enterprises Ltd. (“**Hong-Sing**”), a wholly-owned subsidiary of Law’s Glory Ltd., a Hong Kong company which was then establishing a branch office in Singapore with a view to expanding its business in Southeast Asia. Pacific required Mr. Law Ka Lok (“**Mr. Law**”), the managing director and major shareholder of Law’s Glory Ltd., to give a personal guarantee of Hong-Sing’s indebtedness.

Unfortunately, Hong-Sing’s business venture in Singapore was not successful. In 2003 it closed its operations in Singapore, and Mr. Law returned to live in Hong Kong. Pacific recovered most of the money borrowed by Hong-Sing from the liquidation of Hong-Sing’s assets, which was completed in December 2006. As at today the amount which remains owing, inclusive of accrued interest, is Singapore \$162,749, which at the current exchange rate is equivalent to HK\$1,007,416.31. Interest continues to accrue at the contractual rate of 7% per annum.

Pacific has now asked for your advice on the possibility of taking action in Hong Kong to recover the balance of money owing.

Question:

- (1) Advise Pacific whether Hong Kong is an appropriate forum to commence legal proceedings in this case, and if so, which court(s) or tribunal(s) would have jurisdiction, and the name(s) of the appropriate defendant(s).**

(10 marks)

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

Facts Part II

After Pacific's writ has been issued and served, you receive a letter from the solicitors who have been instructed to defend, asking Pacific to agree to put up HK\$500,000 as security for costs to the date when the case is set down for trial, with liberty to apply for further security.

Question:

- (2) **Explain to Pacific's responsible officer what security for costs is, and advise how Pacific should respond to the letter.**

(7 marks)

Facts Part III

After a lengthy trial, in which the main defence was an allegation that the borrowing was never properly authorised by Hong-Sing's Board of Directors, judgment was handed down awarding Pacific the full amount claimed plus interest. In her written reasons the trial judge found that the defence was entirely fabricated, that the defence had wrongly concealed relevant documents from the Plaintiff, and that defence witnesses told flagrant lies at trial. The trial judge asked the parties to make written submissions on costs within 28 days.

Question:

- (3) **Advise Pacific what types of costs order it should seek.**

(8 marks)

[25 marks in total]

Question 4 (25 marks)

Facts Part I

You act for French International Limited (“**French**”). French is a company which manufactures electronic toys. In January 2012 French supplied 50,000 electronic toy cars (the “**Toys**”) to German Trading Limited (“**German**”) at \$50 each (total purchase price being \$2.5 million). Although German paid an initial deposit of \$500,000 to French, it defaulted in paying the remaining \$2 million.

French has approached you for advice about recovering the outstanding \$2 million from German. Edward, the managing director of French, tells you that when he called Ben (the manager of German) to chase payment, Ben said that German refused to pay the \$2 million because 50% of the Toys supplied by French to German were slightly defective and German had had to re-sell them at a lower price, thereby making a loss.

Due to cash flow problem, French wants to recover the \$2 million from German as soon as possible.

Question:

- (1) Prepare a full list in point form of the topics you will want to discuss at your first meeting with Edward, including issues relating to merits, possible methods of dispute resolution, timing and any other matters you consider important.**

(10 marks)

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

Facts Part II

Eventually, in March 2012, French commenced proceedings against German. French claimed against German for the outstanding \$2 million. In its defence German alleged that there were quality defects in 50% of the Toys. German also counterclaimed against French for its loss as a result of the defects in the Toys. Pleadings are now closed. Edward approaches you with copies of the following documents:

- (a) an internal report marked “confidential” prepared by French’s factory foreman, Mark, dated 15 February 2012. Having investigated the matter and inspected the remaining batch of the Toys produced by the factory, Mark has concluded that some of the Toys might have been defective when they were delivered to German.
- (b) a letter from Edward to John, an expert, dated 15 July 2012. In the letter, Edward requested John’s assistance to inspect the remaining batch of the Toys in the factory, to provide his expert opinion on whether the Toys were indeed defective when they were delivered to German.

Question:

- (2) Are the 2 documents described in (a) and (b) above required to be disclosed in the proceedings? Explain your reasoning.**

(6 marks)

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

Facts Part III

On 31 July 2012, German made a sanctioned payment into court in the sum of HK\$500,000. French did not accept this payment.

On 20 August 2012, German wrote a letter to French. The letter was marked “without prejudice save as to costs”. In the letter, German made an offer to settle the action in the sum of HK\$1 million, inclusive of interest, with costs to be agreed. This offer was open for 21 days but French did not accept the offer.

The action proceeded to trial and on 20 October 2012, the trial judge awarded French damages in the sum of HK\$750,000, inclusive of interest.

Question:

- (3) In light of the above facts, what is the most appropriate costs order to be made by the trial judge in respect of costs of the action? Explain your answer.**

(9 marks)

[25 marks in total]

Question 5 (25 marks)

Facts Part I

You act for China Allsorts Incorporated (“CAI”), a mainland state-owned company headquartered in Shanghai. CAI operates numerous businesses, including raw materials and manufacturing.

CAI recently bought a widget polishing machine from Daibutsu Industrial Machinery Kisen Kaisha (“DIM”) of Tokyo at a cost of HK\$50 million. CAI chose DIM to supply the machine because DIM is also a substantial customer of CAI’s raw materials business. The contract specified Hong Kong law as the governing law. The price included installation by DIM at CAI’s factory in Wuhan in mainland China.

CAI is unhappy with the machine and the way it has been installed. Parts of the machine keep seizing up, and HK\$15 million-worth of widgets have been found to be defective and have had to be scrapped. CAI has instructed you to commence proceedings in Hong Kong seeking damages for breach of contract, and you have now issued a writ claiming damages of HK\$15 million plus interest.

Since issuing the writ you have learned that DIM is complaining about a large consignment of titanium sold to it by CAI, which DIM claims was adulterated with copper.

Question:

(1) What steps will you take to serve the writ on DIM?

(8 marks)

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

Facts Part II

The writ has now been served, and you are advising CAI whether to seek summary judgment on its claim.

DIM has not yet acknowledged service (although it still has a week within which to do so) but it has sent your firm a letter in which it:

- denies responsibility for the defective widget polishing machine. DIM claims that CAI is responsible, because it did not provide a level floor for the machine to be installed upon. DIM claims that it was an implied term of the contract that CAI would provide a level floor; and
- repeats its complaint about the adulterated titanium sold to it by CAI. The letter attaches a copy of the contract between CAI and DIM for the sale and purchase of the titanium. As DIM points out, it contains a liquidated damages clause entitling DIM to claim HK\$750,000 from CAI if the titanium fails to meet the required standard of purity.

CAI has instructed independent experts to review its claim, and in their view the widget polishing machine was clearly defective and is responsible for the scrapped widgets. They also helpfully point out that the contract for sale and purchase of the machine expressly states that DIM is responsible for procuring that the floor under the machine is suitably level.

CAI's management is dubious about DIM's allegations concerning the titanium.

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

Questions:

(2) What factors would you consider in advising CAI whether this is a proper case to apply for summary judgment?

(10 marks)

(3) When could such an application be made?

(1 mark)

(4) Draft an appropriate summons seeking summary judgment.

(6 marks)

[25 marks in total]

END OF TEST PAPER