

**2013 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Wednesday, 13 November 2013



HEAD II: CIVIL AND CRIMINAL PROCEDURE

TEST PAPER

13 November 2013

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.**

2013 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

You are a solicitor who has received instructions to represent two Hong Kong men, Wong Siu Ming (“Wong”) and Chan Tai Man (“Chan”), who have been charged with three offences of conspiracy to traffic in dangerous drugs, contrary to sections 4(1)(a), 4(3) and 39 of the Dangerous Drugs Ordinance, Cap 134, and section 159A of the Crimes Ordinance, Cap 200.

The two men are alleged to have conspired together with a third person, one “Ah Kit” to traffic the dangerous drug commonly known as “Ice” from Shenzhen in Mainland China to Hong Kong (on two occasions) and from Hong Kong to Australia (on one occasion).

Ah Kit is a 16-year-old Hong Kong boy. At the time of the offences, he was 15 years old. He has made a statement to police in which he claims he was recruited by Chan and introduced to Wong in early October last year to smuggle “Ice” from Shenzhen to Hong Kong. The essence of his allegations is as follows.

On the first occasion, he taped “one Key” - that is, one kilogram of “Ice” - on his back, and wore a pair of fake Nike shoes with 650 grammes of “Ice” hidden in the soles. After Ah Kit brought in the “Ice”, he retrieved the “Ice” hidden inside the soles of the shoes by cutting open the seams, and he weighed all the “Ice” according to the instruction of Wong. After confirming the weight to be 1,650 grammes, he made delivery to someone he did not know at the lobby of a hotel in Tsim Sha Tsui. He was paid HK\$10,000 by Wong via Chan. That is the first charge.

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

On the second occasion, Ah Kit strapped another kilogram of "Ice" to his body and wore another pair of fake Nike shoes with "Ice" inside, and brought the "Ice" into Hong Kong from Shenzhen. He was instructed by Wong not to cut open the seams, and his shoes were taken away by Chan upon the instruction of Wong. That is the second charge.

After Ah Kit had completed these two deliveries of "Ice" from Shenzhen, he was asked by Wong whether he "had the guts" to deliver drugs to Australia. Wong promised to pay Ah Kit HK\$30,000 for the delivery. Ah Kit agreed.

Chan, upon the instructions of Wong, passed HK\$15,000 to Ah Kit to pay for an aeroplane ticket for Sydney and to change some Hong Kong dollars into \$1,000 Australian dollars for Ah Kit's expenses.

Ah Kit was originally scheduled to fly out on 10 December 2012. Chan visited Ah Kit in the early hours of 10 December and gave Ah Kit a pair of shoes with "Ice" hidden inside to wear. Chan also checked Ah Kit's ticket and travel documents to make sure everything was in order.

When Ah Kit set off for the airport wearing the shoes with "Ice" inside, the seam of one shoe suddenly burst open, exposing the packet inside, even before Ah Kit managed to walk to get a cab. The trip had to be aborted. Ah Kit was reprimanded by Wong who accused him of causing the whole line of trafficking to come to a halt. Chan came and retrieved the shoes and the Australian money from Ah Kit.

The trip was later rescheduled to 1 January 2013. On the day of departure, Chan again paid Ah Kit a visit at Ah Kit's home. Chan gave Ah Kit the same pair of shoes with "Ice" inside - this time with the seams firmly stitched together - and the Australian \$1,000. Chan again checked Ah Kit's ticket and travel documents to make sure everything was in order.

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

Ah Kit encountered another problem when he went to check in at the airport. As he was an unaccompanied minor, the airline required a waiver signed by Ah Kit's parent(s) or legal guardian before Ah Kit could board the plane. Chan forged the signature of Ah Kit's father, and faxed the waiver back to the airline.

Ah Kit thus was able to board the plane, and finally arrived in Sydney on 2 January 2013. Ah Kit's job did not end after he successfully brought the "Ice" to Sydney from Hong Kong. In Sydney, according to the instructions given by Wong, Ah Kit was engaged in delivering the "Ice" to someone codenamed "Ah Leung" and receiving a total of Australian \$90,000 from this "Ah Leung". Furthermore, Ah Kit was instructed to meet a man at the Four Seasons Hotel and receive a pair of shoes with "Ice" hidden in the soles. Ah Kit was instructed to travel to Brisbane from Sydney by train in order to deliver the Australian \$90,000 he received from Ah Leung to that same man Ah Kit had met at the Four Seasons Hotel.

Ah Kit found the Australian experience frightening and after he returned to Hong Kong he complained to the police.

Wong and Chan deny Ah Kit's allegations against them and Wong has instructed you they want to contest the case against them at trial. Wong is 36-years-old and married with two sons. He has told you he has six previous convictions. Five of them relate to employing a person not lawfully employable, and he was fined HK\$2,500 for each offence on 19 January 1993. As for his sixth and last offence, he was convicted of trafficking in dangerous drugs and was originally sentenced to 18 years' imprisonment. The sentence was reduced to 16 years upon appeal. He was released from prison in 2009.

Chan is 46 years of age, has been divorced but is re-married with one child and has a clear record.

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

Questions:

(1) Can and should you defend both Wong and Chan? Give reasons for your advice.

(6 marks)

(2) Assuming the case goes ahead in what court will it be prosecuted?

(7 marks)

(3) Advise the two men on their likely sentences if convicted. Include in your answer any factors which may aggravate the sentence.

(12 marks)

[25 marks in total]

Question 2 (25 marks)

You are a solicitor in criminal practice. You act for Mrs. Margaret Chan (“Mrs. Chan”) who has just been convicted by a magistrate of theft of a credit card, contrary to section 9 of the Theft Ordinance, Cap 210 and obtaining goods by deception, contrary to section 17 of the same Ordinance. Mrs. Chan is the daytime manageress of a restaurant. She works from 11:00 am to 8:30 pm, Mondays to Saturdays.

Mrs. Chan is in late middle age. She lives with her husband and two children. She has never been in trouble with the police before.

On 16 March, a Saturday evening, earlier this year, Mrs. Chan finished work as usual at 8:30 pm. She returned to work at 11:00 am on the morning of the following Monday (18 March).

On 16 April, four weeks later, Mrs. Chan finished her work as usual and then had a meal with her husband and some friends. At about 9:30 pm a party of police officers came and arrested her alleging that she had used the credit card of a customer. The customer had been to the restaurant on 16 March and had left his credit card behind by accident. It had then been used on 18 March to purchase two tins of baby formula worth HK\$480.

Mrs. Chan was taken to the police station and interviewed by police officers. She was detained for 24 hours and was then charged with stealing the credit card (by finding it) and using it to obtain the baby formula.

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

The owner of the credit card, Mr. Tam, had discovered that it was missing some days after his visit to the restaurant. He checked his account online and noted the purchase of the baby formula at 9.07 pm on the night of 18 March. The last item immediately before this one was payment of a bill by Mr. Tam at the restaurant at about 1:00 am of the morning of the preceding Sunday, 17 March.

With Mr. Tam's credit card, any purchase up to HK\$500 need not be signed for.

He reported the loss to the police and alerted them to the transaction for baby formula.

The police visited the supermarket where the purchase had been made and from the video camera recording of the customers at the till could see an image of the person involved in the transaction at 9.07 pm on 18 March for 2 tins of baby formula. The cashier claimed that he recognized Mrs. Chan from the image on the security film as she was a regular customer at the supermarket and lives close by, although the cashier could not remember the actual transaction.

The police did not hold an identity parade but relied at trial on the cashier's identification from the image on the security camera. The cashier confirmed the identification at court. The prosecution alleged Mrs. Chan must have found the credit card at the restaurant on 18 March and used it to make the purchase.

Before the trial in the magistrates court Mrs. Chan told you she had no recollection at all of anything concerning the credit card: neither that she had it, nor that she had ever used it. She also told you she had no recollection of the purchase of the baby formula at the supermarket. She denied committing the offence and pleaded not guilty.

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

Before the magistrates court trial, Mrs. Chan did not tell you anything of her medical condition, nor of the medication that she had been taking, although you asked her directly about her medical history. Her defence at trial was that the cashier was mistaken as to her identity.

Following Mrs. Chan's conviction by the magistrate you have started to prepare Mrs. Chan's plea in mitigation. She has just told you that a year ago she consulted her doctor because of the increasingly severe symptoms of menopause that she was suffering. The doctor prescribed a number of drugs for her but did not advise her of any side effects these drugs may have on her behaviour and mental state. She started taking the course of medicinal drugs one month before the alleged criminal offences occurred.

Questions:

(1) Although Mrs. Chan did not tell you of her medical condition and the treatment she was receiving before, or even during the hearing of her trial, can you now ask the magistrate to reconsider his decision based on the medical evidence? What are your chances of success? Identify any power which would permit such a review of the case by the magistrate and any orders which could be made by him on review.

(5 marks)

(2) If the magistrate refuses your request, can you appeal and have the medical evidence introduced? What are your chances of success? Identify any authority under which this evidence could be admitted and what powers the court would have on appeal.

(5 marks)

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

(3) If you pursue an appeal, should you also challenge the prosecution's use of the cashier's identification evidence at trial? If so, on what basis?

(7 marks)

(4) While Mrs. Chan has already been convicted, sentencing by the magistrate has not yet taken place. Mrs. Chan has heard about community service orders and is hopeful of receiving one. Advise her of the sentencing considerations in her case and whether she is likely to receive such a sentence from the magistrate.

(8 marks)

[25 marks in total]

Question 3 (25 marks)

Facts Part I

Your firm acts for Belle Bank Inc., which is incorporated in the United States and has a branch office in Hong Kong.

Belle Bank Hong Kong branch granted banking facilities to Liu Dong (“Mr. Liu”), to enable him to deal in derivative investment products on margin. Mr. Liu is a successful property developer from Mainland China, with a personal net worth exceeding US\$500 million. Previously Mr. Liu was a client of another bank in Hong Kong, but he switched to Belle Bank in 2009 when his relationship manager in the previous bank, Ms. Ping, moved to Belle Bank.

After initial success, Mr. Liu incurred heavy losses from his derivative investments at Belle Bank. He failed to meet a margin call and as a result Belle Bank liquidated the investments in the account in accordance with the terms of the account. Belle Bank has, for several months, been pressing Mr. Liu for payment of HK\$106 million, being the deficit in his account, plus interest of 5½ per cent per annum.

Belle Bank has just received a letter from solicitors representing Mr. Liu, threatening to commence proceedings seeking a declaration that Mr. Liu is not obliged to repay Belle Bank, and for damages. It is alleged in the letter that Mr. Liu never received Belle Bank’s margin call notice; that Belle Bank sold the investments in the account at too low a price; that the account would now have a substantial surplus if Belle Bank had held the investments (which have risen substantially in value); and that many of the relevant trades were executed without Mr. Liu’s authority by Ms. Ping, who did so in order to earn commission for herself.

Belle Bank’s concern at this early stage is to try to avoid negative publicity which could cause other customers to lose confidence.

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

Question:

- (1) **Advise Belle Bank on the procedures available to try to achieve a settlement before action, including mediation, explaining what those procedures are, how they work, and their advantages and disadvantages.**

(10 marks)

Facts Part II

Mr. Liu has now issued a writ naming Belle Bank as 1st defendant, and Ms. Ping as 2nd defendant. Your firm is instructed to give notice of intention to defend on behalf of Belle Bank, and to make a counterclaim for Belle Bank to recover the money owing by Mr. Liu and interest.

You are then approached by Ms. Ping who asks your firm to represent her as well as Belle Bank, on the basis that this would be more efficient and would save costs.

Question:

- (2) **The partner in charge of Belle Bank matters asks you to consider whether the firm can act for Ms. Ping as well as Belle Bank in the case. Prepare a memo for the partner setting out the pros and cons of representing both defendants, and making a recommendation one way or the other.**

(7 marks)

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

Facts Part III

The writ states that Mr. Liu's address is 8/F, Tongzhi Commercial Building, Central, Hong Kong. Your enquiries reveal that this is the business premises of a Hong Kong subsidiary of Mr. Liu's Mainland company. A company search of the Hong Kong subsidiary shows that Mr. Liu is a director, and that his address is in the Mainland. That Mainland address is the same as the one Mr. Liu gave Belle Bank when he opened his account.

Question:

- (3) **Advise Belle Bank whether it would be appropriate in this case to seek an order for security for costs against Mr. Liu, explaining what security for costs is, and the procedures which should be followed on making such an application.**

(8 marks)

[25 marks in total]

Question 4 (25 marks)

Facts Part I

Schwarzgelben Manufacturing Limited (“SML”) is an authorized manufacturer of souvenirs for the world-famous football club, Dye Roten, in Hong Kong, Taiwan and the PRC. On 1 April 2013 SML contracted to sell a batch of 80,000 T-shirts bearing the club crest of Dye Roten (the “Dye Roten T-shirts”) to a Hong Kong company, Bayern Trading Limited (“BTL”), the authorized wholesalers of Dye Roten’s souvenirs in Hong Kong, at a total price of HK\$1.5 million. The Dye Roten T-shirts were delivered to BTL on 30 April 2013 and full payment was made to SML on the same day.

On careful inspection after taking delivery, BTL discovered that the Dye Roten T-shirts were losing colour on a casual rubbing, and about 95% of the club crests fell off. As a result, BTL could not meet the orders placed by its Hong Kong retailers in time for the UEFA Champions Final scheduled on 25 May 2013. SML was well aware that BTL had contracts with Hong Kong retailers to supply the Dye Roten T-shirts 20 days before the date of the UEFA Champions Final. BTL received demands to compensate the Hong Kong retailers for their losses, estimated to be around HK\$3 million in total, as a result of BTL’s inability to supply the Dye Roten T-shirts in time.

On 2 July 2013 BTL instructed a law firm, Messrs. Heynckes, to issue a writ of summons (the “Writ”) for the recovery of its losses from SML for the defective Dye Roten T-shirts, and also for the recovery of a HK\$2 million trade loan owed by SML to BTL which has been overdue for 9 months. The Writ was issued and served on the same day at the registered office of SML. You are now the handling solicitor at Messrs. Heynckes assigned to look after this matter.

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

Questions:

- (1) Advise BTL as to the last day on which SML is required to acknowledge service of the Writ under the Rules of the High Court (the “RHC”).
(2 marks)
- (2) Assuming SML fails to acknowledge service of the Writ within the time stipulated under the RHC, advise what type(s) of judgment BTL can enter against SML, citing the relevant rules/provisions in support.
(3 marks)

Facts Part II

After being served with a default judgment, SML has immediately issued a summons applying to set the judgment aside on the ground that the Writ was not served properly, as it had moved away from the registered office shown in the company search by the time service was carried out, although a Notification of Change of Address of Registered Office had not yet been filed with the Companies Registry to reflect the move. The amount of the judgment entered is not disputed.

Question:

- (3) Advise BTL what the legal requirements are for setting aside the default judgment entered, citing relevant case law(s) where applicable. Based on the information provided, also advise whether SML’s application is likely to be successful.
(8 marks)

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

Facts Part III

SML has now withdrawn its setting aside application after considering BTL's affidavit in opposition. BTL now wishes to enforce its judgment against SML immediately, especially in relation to the trade loan which is long overdue. BTL is aware that SML holds an integrated account with DZ Bank in Hong Kong with a positive account balance, and that it owns an industrial property in Yuen Long which it uses as its office and warehouse.

Questions:

- (4) Advise BTL what its enforcement option(s) are in light of the information provided, and state in detail the application(s) and document(s) required to be prepared, and the procedural steps involved for each enforcement option, citing the relevant ordinance(s) and RHC in support.**

(8 marks)

- (5) It transpires that SML has liquidity problems and cannot repay its debts to its creditors. Advise BTL whether other enforcement option(s) ought to be considered in light of the information provided, and briefly state what such other option(s) is/are.**

(4 marks)

[25 marks in total]

Question 5 (25 marks)

Facts Part I

You have been instructed to act for Mrs. Cynthia Lee (“Mrs. Lee”). In May 2009, Mrs. Lee agreed orally with Jerry's Builders Limited that they would design and build underground rooms under the swimming pool of her house at 25 Peak Rise, Hong Kong, including a wine storage room and a room to store and display her extensive collection of designer shoes. The underground rooms were to have natural light through glass tiles in the floor of the swimming pool. Jerry Ho, the managing director of Jerry's Builders Limited, assured Mrs. Lee that he had used this technique before and that it would give a good result.

The works were carried out from June to September 2010. Unfortunately, immediately after the rooms were built and the swimming pool was refilled, the glass tiles began to leak. By the time Mrs. Lee discovered the problem, the underground rooms were flooded to a depth of 3 feet. Mrs. Lee's designer shoes have been ruined, and the labels have come off her vintage wine collection, rendering it far less valuable.

Mrs. Lee instructs you to sue Jerry's Builders Limited in the High Court of Hong Kong for breach of contract, to claim compensation for the ruined shoes, which she estimates were worth HK\$1 million, and the wine, which she estimates has lost HK\$750,000 of its value.

You have decided to issue a writ with only a concise statement of the nature of the claim, and to serve a separate Statement of Claim.

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

Question:

(1) Prepare:

- (a) a suitable concise statement; and (4 marks)
(b) a draft Statement of Claim (13 marks)

to send to Mrs. Lee. The claim should be pleaded in contract only. If you need further information or details from Mrs. Lee, please indicate in square brackets what you need. Your answers should include only the substantive drafting – you are not required to include the title of the action or other formal matters.

[17 marks in total]

Facts Part II

Having thought the matter over, Mrs. Lee has decided that, in addition to her contract claim against Jerry's Builders Limited, she would like to sue Jerry Ho in his personal capacity for negligence.

Question:

- (2) (a) Can you join Jerry Ho into the proceedings, and if so what steps would you take to do so? (2 marks)

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

(b) Would your answer differ if the writ (with Jerry's Builders Limited as the sole defendant) had already been issued?

(3 marks)

(c) Would your answer differ if the writ (with Jerry's Builders Limited as the sole defendant) had already been issued and served on Jerry's Builders Limited?

(3 marks)

[25 marks in total]

END OF TEST PAPER