

**2014 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Tuesday, 4 November 2014



**HEAD II: CIVIL AND CRIMINAL PROCEDURE
TEST PAPER**

4 November 2014

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.**

2014 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

You are in criminal practice. You have recently received instruction to represent a client who is currently serving a 6 months' prison sentence for importing goods into Hong Kong to which a forged trade mark had been applied, contrary to sections 12 (1) and (2), as read with section 18(1) of the Trade Descriptions Ordinance, Cap 362, Law of Hong Kong.

The client's name is Lam and you have been instructed to see him in custody. His conviction was last week. He has told you the history of his case. At his arraignment 12 months ago, Lam was represented by another solicitor, Ho, and pleaded not guilty to the charge. His case was then fixed for trial in the magistrates' court.

On the morning of his trial, Lam was advised by his solicitor, Ho, that he should plead guilty as the evidence against him was overwhelming but his sentence would be reduced if he pleaded guilty early. Lam then entered a plea of guilty before the magistrate and admitted by way of section 65C of the Criminal Procedure Ordinance, Cap 221 that, when searched by police, his truck was found to be carrying 140 handbags, 2,000 headphones, 400 mobile phones, 487 pairs of sport shoes, 112 suits, 60 ties, 57 T-shirts and 6,788 watches to which a forged trade mark had been applied. Lam was then convicted and his case was adjourned for three weeks to allow for background and community service reports to be prepared before sentencing. Lam was given bail pending sentence.

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

While on bail, awaiting sentence, Lam had a conversation with the director of the company which owned the counterfeit goods. The director told Lam that he was very happy Lam had taken the blame and that he had made a deal with Ho to pay the entire cost of Lam's legal fees. Lam then suspected that Ho had been conflicted when he gave him advice encouraging him to plead guilty. At the resumption of the hearing, Lam sacked Ho and asked the magistrate to adjourn the case for 7 days to allow him to seek new legal advisers. He also requested to change his plea to one of not guilty.

The magistrate had the following exchange of words with Lam before discharging the solicitor, Ho:

Magistrate: Your solicitor has told me that you do not require his assistance any more, is that correct?

Lam: I, he, this way, no way out...I plead not guilty.

Magistrate: Hold on, please answer my question directly. You have given instruction to your solicitor that you do not need him anymore. Is that correct?

Lam: I'll engage another one.

Magistrate: You should know that if you are no longer represented by Mr. Ho, then today you need to handle the case yourself. You clearly know that, right?

Lam: Yes, I know.

Magistrate: Then what do you want to apply for?

Lam: I apply for a further extension, to get another lawyer.

Magistrate: Hold on, you are not answering my question. Can you handle your case without Mr. Ho?

Lam: Because he has told me to plead guilty but I don't. He said he would defend me then he said I had to get probation.

Magistrate: It is not necessary for you to tell me about the conversation with your solicitor. I am only asking you if you believe you can handle this case on your own.

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

Lam: I beg for an adjournment.

Magistrate: I am going to finish this case now. What have you got to say in mitigation?

Lam: Please, listen to me. My Hakka is not good...my Punti is not very clear.

Magistrate: Have the reports been explained to you?

Lam: My solicitor said I have to have probation.

The magistrate then sentenced Lam to 6 months' imprisonment. Lam is unhappy and wants to appeal against his conviction (but not sentence).

Questions:

(1) Can Lam appeal against his conviction? If so, on what grounds?

(10 marks)

(2) Assuming you can identify arguable grounds of appeal, identify the court to which Lam's appeal should be made, the time limits within which the appeal papers would need to be filed and the powers of the court on hearing the appeal.

(7 marks)

(3) Assuming Lam pursued an appeal but was unsuccessful, can Lam make a further appeal? If so, identify the court to which the further appeal would be made, any tests which must be met to have the appeal heard, and the powers of the court in determining the appeal.

(8 marks)

[25 marks in total]

Question 2 (25 marks)

Your client is a 60-year-old male. He has been charged with the offence of theft, contrary to s 9 of the Theft Ordinance, Cap 210.

The police allege that at 2 p.m. on 12 January this year a plain clothes officer observed your client walking through the Sheung Wan Fruit Market. He appeared to be paying close attention to the bags carried by the people around him. The officer observed your client followed a man carrying a backpack. Your client opened the zipper of one of the backpack pockets and removed something. The officer immediately intercepted your client and in his hand was found a cardholder containing two credit cards belonging to the owner of the backpack. Your client was arrested and cautioned. He admitted the offence and claimed he had been forced to do it as he had no money.

Question:

- (1) Identify all the possible venues in which the case could be heard and give your opinion as to the most likely court in which the case will be tried.**

(7 marks)

Your client has plead guilty to one count of theft and has been sentenced to 18 months' imprisonment. At the time of conviction he had 58 prior convictions spanning 40 years. Half of those convictions related to pick-pocketing offences. The court adopted a starting point of 15 months' imprisonment and enhanced it by adding 9 months to reflect your client's appalling criminal record. It then added a further 3 months in view of the fact that the offence took place in a crowded market place at a busy time of day. Upon reaching a total of 27 months' imprisonment, the court then reduced the sentence by one-third to reflect your client's guilty plea; imposing an 18 months' sentence of imprisonment.

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

Questions:

- (2) Your client is unhappy with his sentence and wants to appeal against it. Advise him of any arguable grounds of appeal he may pursue.**

(12 marks)

- (3) Assuming your client instructs you to pursue an appeal against his conviction, identify where the appeal would be heard and what statutory time limits must be complied with.**

(6 marks)

[25 marks in total]

Question 3 (25 marks)

Facts Part I

You have been instructed by professional indemnity insurers to represent a solicitor (“S”), who has been sued by a former client in relation to a dispute arising from a conveyancing transaction.

S is the sole proprietor of the firm known as S & Co., Solicitors (“S & Co.”). In December 2008, S & Co. was instructed by Madam Chung (“C”) on the purchase of a flat in Cheung Sha Wan. On C’s instructions, the flat was assigned into the joint names of her son, Dennis (“D”), and D’s wife, Eleanor (“E”). C executed the assignment as confirmor. S & Co. represented C, D, E and the mortgagee bank in the transaction.

The purchase price was HK\$15 million. C paid HK\$5 million in cash, and the balance was financed by a loan from Dollar Bank Ltd. secured by a mortgage on the flat. It appears that the mortgage instalments were paid by D and E.

In 2012 C issued a writ against D and E claiming a declaration that D and E hold the flat as trustees for C, and an order requiring D and E to transfer the flat into C’s name. C alleges in the statement of claim that there was an agreement (the “**alleged agreement**”) between herself and D and E, that C would be permitted to live in the flat for the rest of her life, and that only after her death would D and E become the beneficial owners. C claims that she lived in the flat together with D and E for one year, but after disputes arose between them she felt compelled to move out to live with her sister.

In September 2014 the writ and statement of claim were amended by adding S as a defendant, and adding a claim against him for damages in negligence for assigning the flat into the names of D and E only, without mention of the alleged agreement.

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

S has more than 20 years' experience in practice as a solicitor. His firm specialises in conveyancing and its clients include property developers and financial institutions with retail mortgage departments. He is not up-to-date with civil litigation procedure at all. All the major newspapers have reported the claims now made against him. He has received enquiries from the Law Society of Hong Kong and from banks asking for his explanation.

Records kept by S & Co. contain no mention of C giving any instructions about the alleged agreement. On the signature page of the assignment, it is recorded that the document was read over and explained to C, D and E in Cantonese by a senior legal executive ("L") employed by S & Co. at that time.

S was served with the amended writ and amended statement of claim 7 days ago. No prior demand letter was issued to him, and he had no prior notice of the claim.

S considers that the claims against him are totally without foundation. He is very concerned that his firm's business will be adversely affected and wants to have the matter resolved in his favour as quickly as possible.

Question:

- (1) S seeks your advice as to whether there is any way to dispose of the claims against him quickly, without having to wait for full trial. He asks you specifically about summary judgment and striking out. Advise S in writing.**

(10 marks)

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

Facts Part II

The action proceeds. One of the issues which arises on the pleadings is whether S was negligent in delegating to L, the legal executive, the task of reading over and explaining the assignment in Cantonese to C, D and E, rather than handling it himself or assigning the task to an assistant solicitor. Counsel has advised that expert evidence should be obtained on the usual and accepted practice of Hong Kong solicitors in such transactions.

Question:

- (2) **You need to obtain the approval of the professional indemnity insurers to incur the cost of instructing an expert witness. Prepare a letter to the insurers explaining what steps would be involved in obtaining and using such evidence.**

(8 marks)

Facts Part III

At the case management conference, the court gives directions for the exchange of witness statements. You propose to call L as one of the defence witnesses at trial. You interviewed L early on and prepared a full attendance note recording L's confirmation that he did attend on C, D and E together, and did explain to them in Cantonese the assignment before they executed it. On the basis of your attendance note, you have prepared a draft witness statement for L to consider. L has now left S & Co. and is employed as senior legal executive in another firm. He informs you that he does not wish to be a witness at trial and he refuses to meet with you again or to sign a witness statement. He does not want his new boss to know that he is involved in any way with a professional negligence suit.

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

Question:

- (3) Consider the best way to proceed in light of L's refusal. Is L's evidence necessary? Can L be compelled to attend trial as a witness? Is there any other way L's evidence can be placed before court? Do you need to disclose L's evidence even if he does not sign a witness statement?**

(7 marks)

[25 marks in total]

Question 4 (25 marks)

Facts Part I

Your firm acts for ABC Properties Limited (“ABC”). Last December, an incident occurred at XYZ Plaza, a shopping arcade owned and managed by ABC. The incident involved the world-renowned violinist Ji Jundi (“Ji”). In January this year, ABC was served with a High Court writ of summons and statement of claim. In the statement of claim Ji, the plaintiff, alleged that:

- On 15 December 2013 Ji was walking on the first floor of XYZ Plaza with his assistant Karl Ko (“Ko”). Ji had just finished performing at a private function held at XYZ Plaza, and Ko was carrying his violin. As they were walking, Ko tripped, fell and dropped Ji’s violin. The impact was so great that the violin was damaged beyond repair.
- Ko’s fall was caused because he tripped over a bucket which had been placed in the area in which he and Ji were walking. In addition, the floor area was wet with soapy water. A cleaner was cleaning the floor but the area being cleaned was not cordoned off.
- ABC was negligent in the way it cleaned the floor, and thereby breached its occupier’s liability. That negligence caused Ko’s fall and the damage to Ji’s violin.

Ji claims HK\$6 million in damages for his ruined violin, which was an 18th Century antique instrument by Antonio Stradivari.

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

Leo Lee (“Lee”), director of ABC, has instructed your firm that:

- it is true that at the relevant time a cleaner was cleaning the floor;
- the area being cleaned was cordoned off and there were “slippery floor” signs placed beside it;
- Ko negligently walked into the cordoned-off area, tripped, and fell over the bucket of soapy water;
- ABC denies that it is liable for the incident or the damage caused to Ji’s violin.

Your firm has already filed a defence on behalf of ABC in these terms.

It is now March 2014. Ji has not filed a reply, and pleadings will soon close.

Question:

- (1) Prepare a letter to ABC to advise it of its discovery obligations. In particular, advise ABC of the types of documents which it should be providing in order to comply with those obligations.**

(8 marks)

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

Facts Part II

The action proceeds. The parties have already exchanged Lists of Documents and witness statements.

Three days ago Lee called you and said that one of his staff has unexpectedly managed to obtain a copy of a CCTV recording of the incident. The recording was obtained from the owner of a shop situated next to the scene of the incident. The shop owner was going through a routine check of his CCTV recordings before deleting them. During this check, the shop owner noticed that his CCTV had picked up a good recording of the incident.

Having reviewed the CCTV footage, you note the following:

- The floor at the scene of the incident was being cleaned at the time.
- An area for cleaning had been cordoned off.
- However, a cleaner, using his bucket and mop, was mopping with soapy water a part of the floor outside the cordoned-off area.
- Ko tripped over the bucket and dropped the violin which he was holding. The violin flew out of his hand and smashed on the floor.

Yesterday, Lee sent you a confidential report which he personally prepared after interviewing the cleaner, who has now been identified from the CCTV recording. The cleaner admitted that he did not follow ABC's procedures, and that he should not have been cleaning the floor with soapy water outside the area which was being cordoned-off. He apologised for his mistake. The cleaner's admissions and apology were recorded in Lee's report.

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

Questions:

- (2) Advise ABC whether Lee's confidential report and the CCTV recording need to be disclosed. If any of these materials needs to be disclosed, when and how should it/they be disclosed?

(10 marks)

- (3) Advise ABC what it should do now to best protect its position in the proceedings.

(7 marks)

[25 marks in total]

Question 5 (25 marks)

Facts

Highest Peak House Partners ("**HPHP**") is a private equity partnership carrying on business in Hong Kong. The three partners, with equal shares, are Mr. Au, Mr. Beng and Mr. Choy. They all left the same investment bank together to set up HPHP at the beginning of 2014. HPHP employs a small team of analysts, including Ms. Lilian Zhang, who specializes in the PRC hi-tech industry.

In June 2014 Ms. Zhang told Mr. Au that she had identified an opportunity, through a new Hong Kong hi-tech industry consultancy firm, e-Dealmakers & Partners, for HPHP to invest in EZ-Com Shenzhen Limited ("**EZ-Com**"), a privately owned, but quite substantial and rapidly growing, hi-tech business operating in the PRC.

In early July 2014 Ms. Zhang arranged a visit to EZ-Com's offices in Shenzhen for Mr. Au to meet Mr. Xiao, the senior partner of e-Dealmakers & Partners, and the senior management of EZ-Com. In late July 2014 she presented to Mr. Au, Mr. Beng and Mr. Choy at a meeting of HPHP's investment committee a formal proposal whereby HPHP would invest US\$25 million in EZ-Com in return for acquiring a 20% shareholding in it and 2 board seats out of 8. The proposal was supported by a detailed valuation report from e-Dealmakers & Partners, and included a US\$5 million consultancy fee payable to e-Dealmakers & Partners, of which 50% (US\$2.5 million) was payable upfront and the remaining 50% (another US\$2.5 million) was payable on execution of a sale & purchase agreement between HPHP and EZ-Com Holdings (BVI) Limited, a BVI company which is the offshore 100% holding company of EZ-Com. The BVI company was owned by EZ-Com's founder, Mr. Young.

The proposal was approved. Four weeks ago the investment was made and completed. HPHP has paid US\$5 million to e-Dealmakers & Partners into their bank account in Hong Kong. US\$25 million was paid to the Hong Kong bank account of EZ-Com Holdings (BVI) Limited.

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

Two weeks later, however, the Shenzhen Public Security Bureau contacted Mr. Au and told him that, whilst their investigation is still at an early stage, EZ-Com appears to be a complete fraud. Mr. Young has been detained in Shenzhen.

When Mr. Au tries to contact Ms. Zhang, he finds that she has disappeared. He then contacts e-Dealmakers & Partners. Mr. Xiao's other partners, Mr. Lo and Mr. Ma, both of whom live in Hong Kong, confirm that Mr. Xiao has disappeared having transferred US\$5 million from the firm's bank account to his personal Hong Kong bank account. They tell him that they were aware that Mr. Xiao had arranged the EZ-Com deal for HPHP, but they had not been involved in it.

Questions:

- (1) Prepare a memorandum of advice outlining for HPHP what, if any, interim measures could be taken to try to safeguard the funds that have been taken, and the main procedural steps involved.**

(12 marks)
- (2) Who will be the plaintiff(s) and how would they be named?**

(3 marks)
- (3) Summarise any requirements for service of the proceedings on Mr. Young.**

(6 marks)
- (4) How would e-Dealmakers & Partners be named as a defendant and service effected on them.**

(4 marks)

[25 marks in total]

END OF TEST PAPER