
**2015 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Friday, 6 November 2015



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

6 November 2015

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.**

2015 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

Your client, Fred Pong ("Pong"), was convicted yesterday of attempted burglary of commercial premises (a retail shop), under section 11 of the Theft Ordinance, Cap 210 and section 159G of the Crimes Ordinance, Cap 200. The prosecution case is that on 8 March this year he attempted to enter as a trespasser part of a building, namely the ground floor of No. 1B Bayview Road, North Point, with intent to steal.

At the material time, Pong resided at No. 1B Bayview Road, on the second floor, North Point. On the ground floor, Mrs. Li ran a shop secured with wooden boards and a padlock at night. It was secured on the night of 8 March this year.

The prosecution called as a witness, a police constable who said he saw Pong acting suspiciously in the Bayview Road area at 1:50 a.m. on 8 March this year. He said he saw Pong use a screwdriver to try to prise open the padlock of Mrs. Li's shop and arrested Pong. On arrest, the officer seized the screwdriver from Pong. Pong was taken to the North Point police station and interviewed. He exercised his right to silence in relation to all questions put to him, including when the officer showed him the screwdriver and asked him about it.

At his trial, Pong gave evidence denying that the police officer saw him trying to prise open the padlock of the shop on 8 March. He denied that the screwdriver seized by the police officer was his and that he had attempted to burgle the shop. He said he had been out and was returning home when he was arrested.

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

The Admitted Facts signed by the Prosecution and Defence at trial included the fact that, on the day following the attempted burglary, police forensic experts dusted the padlock for fingerprints. Before they did so they asked Mrs. Li to check the padlock for damage. In the Admitted Facts it was stated that on her examination of the padlock, Mrs. Li found it was in the same state as when she had put it on the door of the shop, at closing, the night before. No fingerprints were found on it. Photographs of the padlock were tendered as part of the prosecution evidence.

The Judge's Reasons for Verdict stated that despite Mrs. Li's finding no evidence of damage to the padlock, scratches to the padlock could be seen in the Prosecution's photographs. He stated he was entitled to use the photographs of the padlock to assist him in determining his verdict.

The Judge also stated that the defendant's silence, when he was shown the screwdriver in his interview at the police station, brought suspicion on him as, on the defendant's own case, this was the first time he had ever seen the screwdriver.

After the case was concluded you learned that during the investigation of the case by police, they sent the screwdriver to a forensic expert for fingerprinting. The expert who dusted the screwdriver for fingerprints found the fingerprint of a third party (an unknown person) on the handle of the tool. No other fingerprints were found on the screwdriver. The expert made a statement to the police, reporting his findings, three weeks before the trial commenced. The expert's statement was never disclosed to the defence.

Questions:

- (1) Advise Pong whether he has any reasonable grounds of appeal. (15 marks)**

- (2) Identify the court of appeal, any time limits and tests that will be applied to the application. (10 marks)**

[25 marks in total]

Question 2 (25 marks)

Your client, a banker, has been charged with the rape of the sixteen-year-old school friend of his daughter, under section 118 of the Crimes Ordinance, Cap 200. The complainant claims your client forced himself on her. Your client claims she has made the assault up. There is no physical evidence to support the complainant's allegation.

Your client went before a magistrate yesterday who set the case down for a return day in one month's time. Your client has instructed you that the complainant is lying about the incident in question and told you he wants her evidence tested at every opportunity. The prosecution has alerted you that they will shortly apply to have the case committed to the Court of First Instance for trial, without a preliminary inquiry, in order to protect the complainant from being cross-examined in two courts.

Question:

- (1) Identify the application the Prosecution would need to make to avoid the complainant having to undergo cross-examination in two courts. Can you resist the application?**

(8 marks)

Your client has been denied a preliminary inquiry and the case has now been committed for trial to the Court of First Instance. You have read the prosecution witness statements and take the view their case is very weak. The jury are to be empaneled in three weeks' time.

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

Questions:

- (2) **What application can you make before your client is arraigned to protect your client's interests? What procedures must you comply with, in order to have your application heard? If your application is successful, can the prosecution appeal it? If so, under what provision?**

(10 marks)

- (3) **Assuming the case goes to trial, describe any special procedures for giving evidence the prosecution may apply to use in order to minimize the distress caused to the complainant when giving her testimony at court.**

(7 marks)

[25 marks in total]

Question 3 (25 marks)

Facts Part I

You are assisting the litigation partner in your firm in a personal injury case. The client, Molly Chan, is a clerk who was involved in a traffic accident when she was a passenger in a minibus on her way to work in Central. Ms. Chan suffered multiple lacerations and a bone fracture, resulting in hospitalisation for 3 weeks followed by out-patient treatment for 3 months. She was off-work for 4 months altogether but, fortunately, has now recovered fully and has resumed her employment.

According to Ms. Chan's instructions, she was playing an online game on her smartphone at the time of the accident, and she did not see what actually happened. She says that she was aware that the minibus was travelling at high speed (as usual) along Connaught Road Central when the accident suddenly occurred. After the accident, she noticed that the minibus had collided with a van painted with the "KourierExpress.com" logo.

Ms. Chan was granted legal aid to bring a personal injury claim.

You have obtained the police file of witness statements and other documents. Some of these have been redacted and it appears the file may be incomplete.

Counsel has advised on quantum and liability. In his opinion, Ms. Chan should be able to claim damages in the range of HK\$800,000 to HK\$1,200,000, to be apportioned between the following potential defendants:

Mak Bing Oung – owner of the minibus, who had failed to change the vehicle's worn tyres.

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

Vuong Dyong – the driver of the van.

Mo Bok Dick – driver of the minibus, who was speeding at the time.

KourierExpress Limited – registered owner of the van, which may be vicariously liable.

Unknown – the unknown driver of a private car with registration number ABC 123 who is alleged to have made a dangerous manoeuvre in heavy, fast-moving traffic, forcing the van driver to take immediate action to avoid what could have been a much worse accident.

Counsel has advised that an application be made under (a) sections 41 and 42 of the High Court Ordinance, Cap. 4 and Order 24 r 7A of the Rules of the High Court, Cap. 4A, and/or (b) the *Norwich Pharmacal* line of cases, to compel disclosure of the identity of the unknown driver of ABC 123 at the time of the accident. The police have refused to disclose this information on the grounds of personal data privacy, and the owner of ABC 123 has ignored your requests for information. Your firm requires the authority of the Legal Aid Department to make the application.

Question:

- (1) Draft a letter to the Director of Legal Aid explaining the nature of the application, against whom it would be brought, and why it would be appropriate in this case.**

(9 marks)

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

Facts Part II

You are now ready to begin action on behalf of Ms. Chan. Counsel has advised that proceedings could be commenced in either the District Court or the Court of First Instance, and that Ms. Chan should make an informed choice, in full knowledge of the consequences either way. The litigation partner asks you to obtain Ms. Chan's instructions on this question.

Question:

- (2) Draft a letter to Ms. Chan, explaining the relevant factors to be considered in making this choice, and the consequences, and asking for her instructions.**

(7 marks)

Facts Part III

You have now commenced proceedings on behalf of Ms. Chan. All defendants have denied liability, each alleging that some or other of the defendants were responsible for the accident. Further, each defendant alleges that Ms. Chan was wholly or partly contributorily negligent because she had not fastened the seat belt which was available. Counsel advises that the cost of proceeding to full trial may be out of proportion to the amount at issue, and that Ms. Chan should take the initiative to seek an early settlement by way of sanctioned offer.

Question:

- (3) Prepare a draft letter to Ms. Chan explaining what a sanctioned offer is, and the consequences of such an offer, and seek her instructions whether she would agree to such an offer being made, and if so, for what amount.**

(9 marks)

[25 marks in total]

Question 4 (25 marks)

Facts Part I

Alan Baldwin (“**Alan**”) advanced a loan of HK\$5 million (“**Loan**”) to Brandon Butler (“**Brandon**”) with contractual interest rate of 10% per annum pursuant to a loan agreement dated 1 January 2015 (“**Loan Agreement**”). Under the terms of the Loan Agreement, the repayment date of the Loan was 31 March 2015.

Brandon failed to repay the Loan and interest to Alan on 31 March 2015. Alan instructed Messrs. Hagen Lowalls (“**HL**”) to issue a pre-action letter to Brandon demanding repayment of the Loan and the related interest by 14 April 2015. No response was received from Brandon.

Question:

- (1) You are the handling solicitor of Alan’s file at HL. Alan has instructed you to issue a generally indorsed Writ of Summons (“**Writ**”) for recovery of the Loan and the related interest. Your trainee solicitor has drafted the formal parts of the Writ for you. **Draft the general indorsement of claim.**

(3 marks)

Facts Part II

The Writ was issued out of the High Court and served on Brandon by insertion into the letter box of Brandon’s residential flat in the morning of 1 May 2015. Brandon was on a business trip from 20 April 2015 to 12 June 2015, his first stop being Singapore where he stayed between 20 April 2015 and 30 April 2015. In the late afternoon of 1 May 2015 Brandon was in transit through Hong Kong to London.

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

Brandon's domestic helper picked up the Writ from the letterbox on 1 May 2015 at lunch time and e-mailed a copy of it to Brandon. While at Hong Kong airport waiting for his flight to London, Brandon checked his e-mail and found out about the Writ.

After arriving in London, Brandon sent a fax to Alan on 3 May 2015 (Hong Kong time) asking him not to proceed further with the action until his return on 12 June 2015. Alan did not reply to Brandon's fax.

On 12 June 2015, upon Brandon's return to Hong Kong, he found out that judgment had been entered by Alan against him on 8 June 2015 in the sum of HK\$5 million, together with (1) interest thereon at the contractual rate of 10% per annum from the date of the Writ until judgment and thereafter at the judgment rate until payment and (2) fixed costs for the action.

On 15 June 2015 Brandon instructed Messrs. Manor Bold ("MB") to act for him in his dispute with Alan.

Questions:

- (2) You are the handling solicitor of Brandon's file at MB. **Brandon has asked you for advice as to whether the judgment was validly entered in light of the fact that he had already notified Alan by fax on 3 May 2015 that he would not be in Hong Kong until 12 June 2015 and asked Alan not to proceed further with the action. Advise Brandon. The relevant Order in the Rules of the High Court and the relevant case authorities should be cited in support of your advice.**

(6 marks)

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

- (3) Brandon has admitted that he borrowed the sum of HK\$5 million from Alan pursuant to the Loan Agreement, but tells you that on 31 March 2015 Alan orally agreed to waive a sum of HK\$2 million in light of a previous business transaction on which Brandon had helped him. Brandon says he has kept a note signed by Alan documenting that waiver. In addition, Brandon says Alan previously borrowed a sum of HK\$3 million from him which Alan has not yet repaid and he intends to call for repayment. **Given your advice to Brandon in answer to paragraph (2) above, and in light of this new information, advise Brandon what application he should make. Set out the legal requirements of the application and discuss whether these requirements are satisfied in Brandon's case.**

(8 marks)

Facts Part III

The default judgment is allowed to stand to the extent of HK\$3 million after Court hearings. Alan now wishes to enforce his judgment against Brandon based on the following information provided by the investigation agent instructed by HL on Alan's behalf:

- (a) Brandon has a residential flat in Hong Kong which is the address at which the Writ was served. The flat was purchased in 2008 for HK\$2 million and has a mortgage on it securing a loan which now stands at HK\$1 million. Brandon also has a second mortgage on the flat which he took out in 2010, securing borrowings of HK\$2.6 million. The flat is now worth HK\$3.5 million.
- (b) Brandon has a bank account with HSBC Australia with a credit of AUD380,000 (around HK\$2.5 million).

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

- (c) Brandon and his uncle are equal shareholders in a Hong Kong incorporated private company which runs a profitable trading business. Brandon's shares are worth around HK\$500,000.
- (d) Brandon has a collection of commemorative coins presented by the Royal Mint which he has been keeping in his flat. These coins would be worth HK\$2 million if sold in the open market.

Question:

- (4) **Advise Alan of the different options of enforcement (excluding bankruptcy) based on the information above and of any obstacles which Alan may face in employing each option.**

(8 marks)

[25 marks in total]

Question 5 (25 marks)

Facts

Your client, Lockhart Building Materials ("LBM"), has been selling stone to its customer Kwun Tong Kitchens ("KTK") for years. A well-drafted master contract has been negotiated between them which specifies that LBM must supply "best quality fine grain interior quality grey granite" in one-metre-square slabs, priced at HK\$500 per slab. KTK has traditionally given LBM monthly orders. The contract provides that:

- delivery will be within 7 days of KTK placing an order;
- upon delivery KTK must immediately inspect the merchandise;
- KTK must raise any problems immediately with the delivery man, but if delivery is to specification KTK must countersign a declaration printed on the delivery note which says "delivery received; quality and quantity in accordance with order";
- payment is due in full 21 days after delivery.

However, there has recently been a change of owner at KTK, and a problem has developed. LBM has still not been paid for its August and September 2015 orders, each of which was for 300 slabs of granite.

The August order was placed by KTK on 4 August 2015 and LBM made delivery on 17 August. KTK (then still under its former management) countersigned the delivery note as usual. LBM invoiced the sale (HK\$150,000) on 21 August, and payment was due on 7 September. Payment was not made and is still outstanding.

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

The September order was placed by KTK on 4 September 2015 and LBM made delivery on 17 September. This time KTK declined to countersign the delivery note in the usual way. The LBM delivery man, Joe Nip ("**Nip**"), explains that the KTK warehouse manager, Stanley Pan ("**Pan**"), indicated to him orally that the consignment "looked OK as usual" except for one slab, the corner of which had been broken off. Nip says he tried to persuade Pan to countersign the delivery note in respect of the 299 good slabs, but Pan claimed that following the management change he no longer had the authority to do so. The LBM invoiced KTK for 299 slabs (HK\$149,500) on 21 September, with payment due on 7 October. Again, payment was not made and is still outstanding.

On 14 October LBM sent a letter reminding KTK of the overdue invoices. KTK wrote back refusing to pay anything, and claiming that both the August and September deliveries were substandard coarse-grained granite, which it will have to use for exterior use. It claims that external-quality granite is worth only HK\$150 per slab.

LBM's finance director, Ms. Heidi Ho, now seeks your advice. You have issued a writ on LBM's behalf which KTK has indicated an intention to defend. For the sake of LBM's cash flow Heidi Ho is keen to get as much of these debts as possible paid as soon as possible.

Questions:

- (1) Which amounts of the two invoices, if any, are suitable for a summary judgment or interim payment application? Give reasons.**

(14 marks)

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

(2) Outline the procedure for making a summary judgment application.
(2 marks)

(3) If you conclude there are amounts suitable for a summary judgment application, prepare an appropriate affidavit or affirmation in support of that application (you need draft only the substantive text, ignoring the formal headings etc.).
(9 marks)

[25 marks in total]

END OF TEST PAPER