

## **Examiners' Comments on the 2018 Examination**

### **Head II: Civil & Criminal Procedure**

#### The Overall Performance of Candidates

1. The number of candidates this year was 46. Of those 46, 20 passed Head II, resulting in a pass rate of 43% (lower than last year's pass rate of 65%).

#### The Standard and Format of the Examination

2. The Examination, as in previous years, was open book.
3. The Examination is premised on the standard to be expected from the Day One Lawyer. The Day One Lawyer is one who has completed both the academic and vocational stages necessary for professional qualification. In Hong Kong that means the LL.B (or a non-law degree and the CPE), the PCLL and the two year training contract. Day One Lawyers should have a sound base of substantive knowledge and have acquired the ability to apply that knowledge to straightforward situations. In reality those taking the examination will be more than Day One Lawyers because of experience obtained in their home jurisdictions. Even so the Panel was careful to focus on the "Day One" standard and to keep away from what might be classed as "advanced procedure" or "superior ability". A Day One Lawyer intending to practise in Hong Kong should, however, have the ability to demonstrate an appreciation of the structure, powers and responsibilities of Hong Kong's Courts and have a basic knowledge of what is required in advising and representing clients in litigious matters. They should not be a danger to the client.
4. The Panel was concerned to set questions which would test substantive knowledge and the ability to apply that knowledge in a constructive, practical and common sense manner. The examination deliberately mimics the situation of a solicitor asked to advise a client about a problem, and calls for directional practical answers, sometimes against an unfamiliar factual background.

#### General Comments

5. There were five questions in the paper, and candidates were required to answer any four of those questions. The time allowed was 3 hours and 30 minutes. The first 30 minutes is intended to allow candidates an opportunity to read and digest the questions in the paper and to plan their answers before starting to write. However, candidates can start to write their answers as soon as they wish.

## Performance on individual Questions

### *Criminal Procedure*

6. Questions 1 and 2 addressed issues of criminal procedure.

#### **Question 1**

7. Some candidates read the whole questions and answered Parts (1) to (3) based on the new facts for Part (4) only. For next year consideration should be given to making it clearer which facts apply to which questions. Some candidates totally missed answering Part (5).
8. Part (1) was generally well answered, but some candidates mixed up the facts from Part (4) and used the new facts to answer Parts (1) to (3). Marks were not deducted from these scripts for over-reading the facts. Parts (2) and (3) were short questions that carried a small number of marks. In Part (3) most candidates got 2/3 marks by simply reciting the provisions at the Court of Final Appeal Ordinance. Part (4) required analysis of new facts: some candidates answered well and some missed the question altogether. It was disappointing in that some candidates missed answering Part (5) altogether, and those that did answer it did so badly. They did not discuss the Prosecution's positive duty to disclose unused materials, and the burden of proof.

#### **Question 2**

9. This question concerned matters including juvenile offenders, choice of appropriate trial forum, bail application and review, competence and compellability of a defendant's spouse to testify for the prosecution, verdict of the trial court on conviction of an offence not charged, and sentence. As evidenced by the low pass rate, most candidates lacked the standard of knowledge of those areas expected of them.

### *Civil Procedure*

10. Questions 3, 4, and 5 addressed issues of civil procedure. The questions raised issues which could well land on the desk of a newly-admitted solicitor. The answers being sought were pitched at the level of sophistication to be expected of a lawyer at that stage, which in some cases was simply to spot the issue being raised. In many cases we were looking for common sense application of the law, rather than just a recitation of black letter rules.

### **Question 3**

11. Question 3 was split into 2 parts: part 1 – on service of process and default judgment – worth 21 marks; and part 2 – on setting aside default judgment – worth 4 marks. Overall the standard of answer was poor, as reflected in the low pass mark.

### **Question 4**

12. Question 4 consisted of two parts. The first part, worth 15 marks, required candidates to draft a complete Statement of Claim in a relatively simple commercial dispute over defective goods delivered after the full purchase price had been paid. The essential facts were set out in the question, and candidates were told they could assume any additional facts. Candidates had to choose the appropriate court. It was disappointing to see that a significant number of candidates did not appear to understand clearly the differences between "High Court", "Court of First Instance" and "District Court", sometimes issuing the proceedings in one, and claiming relief under the statute of another. Candidates were also required to name the parties, and most were able to do so correctly. Unfortunately some used short form names in the heading (unacceptable) and some went so far as to name an additional defendant which was peripherally involved, but against which no relief was (or could be) claimed.
13. The second part, worth 10 marks, asked candidates to advise their client (the plaintiff) on a sanctioned payment which had been made by the defendant. A disappointingly high number of candidates appeared to base their answers on pre-prepared texts. In result their answers sometimes were based on client itself having made a sanctioned offer (not the given facts), meaning the advice to client was essentially useless.
14. Subject to those comments, the overall standard was reasonably good and most candidates were awarded a passing mark.

### **Question 5**

15. Question 5 concerned an emergency injunction, and included an issue of whether to move the court ex parte or ex parte on notice. The preponderance of the marks (17) were for drafting bullet point submissions. Overall the standard of answer was poor. Not many candidates had a working familiarity with preparing an emergency injunction application, including the documents which the judge would expect to see. Commonplace issues such as the need for full and frank disclosure were absent from many answers.

March 2019

.4491346