

**2019 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD V: PRINCIPLES OF
COMMON LAW**

Friday, 17 January 2020



2019 Overseas Lawyers Qualification Examination

Head V: Principles of Common Law

Part A (Constitutional Law & Introduction to Legal System)

Question 1 (25 marks)

Part A

"He who comes to equity must come with clean hands" is an often quoted maxim of equity.

- (a) Explain (i) what that maxim means, and (ii) the major distinction between common law and the rules of equity.

(5 marks)

Part B

A number of principles of defence in criminal cases, which are in accordance with Article 14 of the International Covenant on Civil and Political Rights (applied to Hong Kong by the Hong Kong Bill of Rights Ordinance, Cap. 383), have been incorporated in the Criminal Procedure Ordinance (Cap. 221), Legal Aid in Criminal Cases Rules (Cap. 221D), or absorbed into the common law. The Hong Kong Basic Law guarantees the preservation of these rights.

- (b) Name 5 of those rights.

(5 marks)

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

Part C

- (c) Give reasons why you agree (or disagree) with the statement that "Hong Kong Basic Law offers a high degree of separation that the Hong Kong courts enjoy from institutions on the mainland of the People's Republic of China".

(15 marks)

(See the next page for a continuation of Part A)

Question 2 (25 marks)

Part A

- (a) Is third-party litigation funding permitted in Hong Kong? If the answer is no, explain why and are there exceptions?**

(5 marks)

Part B

Your friend has been selected for jury service in Hong Kong. He has asked you for a succinct explanation of a jury trial. He has also asked if he can during the trial call you for advice on matters arising out of the trial.

- (b) What would you tell your friend?**

(5 marks)

Part C

- (c) Explain the doctrine of judicial precedent and how it works within the Hong Kong court system.**

(15 marks)

End of Part A

Part B (Law of Contract)

Question 3 (25 marks)

Cherry owns an antique shop on Cat Street.

Walking past the shop one day, Kitty saw a vase on display in the shop window described as being of early Ming Dynasty and priced at HK\$28,000. Kitty bought the vase from Cherry. Both Cherry and Kitty believed that the vase had been accurately described as early Ming Dynasty. However, the vase turned out to be an excellent fake.

There was another vase on display in the shop window offered for sale at HK\$9,000. Lucy, believing that it was of early Ching Dynasty, agreed to buy it. In fact, the vase was made in the late Ching Dynasty and accordingly was worth much less than HK\$9,000. Cherry knew of Lucy's mistake but said nothing.

Advise the parties of their respective contractual rights and liabilities as well as the remedies available to each of them in the two sales described above.

(25 marks)

(See the next page for a continuation of Part B)

Question 4 (25 marks)

'Super Jupiter' is the 2019 hip-hop group of the year and is very popular. With their Asian tour coming up in November 2019, they decided to make some personnel changes and on 1 July 2019 they entered into the following contracts:

- They hired a new singer, Ebony, who will receive a salary of HK\$2,000,000 a year.
- They engaged Neil to be their new manager at HK\$1,500,000 a year.
- They also signed up Craig as a Stage Manager at HK\$400,000 a year.

The following subsequently occurred (after the above contracts had been signed):

- Ebony was not popular with the fans, so Super Jupiter advised her that they would reduce her salary to HK\$1,500,000 a year. Ebony accepted this because she needed the money to help pay for her brother's university fees.
- Super Jupiter heard that their rival, 'Marvellous Mars', was trying to poach Neil. To prevent Neil from leaving, they offered him an extra HK\$500,000 a year.
- Craig told the group in September 2019 that another group, 'Viva Venus', was offering him more money as Senior Stage Manager and he intended to leave. Since the tour was approaching, Super Jupiter had no choice but to agree to raise his salary to HK\$500,000 a year and make him Head of Stage Management.

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

The Asian tour was very successful, but now:

- Super Jupiter does not want to pay the higher fees to Neil and Craig.
- Ebony also wants to be paid the original salary under her 1 July 2019 contract.

Advise Super Jupiter. You may ignore all issues relating to employment law.

(25 marks)

(See the next page for a continuation of Part B)

Question 5 (25 marks)

Part A

Cherry Chan was a promising young singer. In December 2018, when she was 16, she entered into a 3-year agreement with Yvonne Yeung, a noted singing coach. Yvonne undertook to organize Cherry's training and decide which competitions she should sing in. In return, Cherry agreed to follow Yvonne's advice and to pay her 20 per cent of her winnings from singing competitions.

In December 2019, Cherry disobeyed Yvonne's instruction to sing in the National Pop Song Singing Competition in Beijing, where the total prize money was equivalent to HK\$1.8 million. Instead, Cherry stayed in Hong Kong to defend her title at the New Territories Regional Singing Competition, where the total prize money was only HK\$10,000.

- (a) **What is the position as to the enforceability of Cherry Chan's contract with Yvonne Yeung?**

(10 marks)

Part B

Happy Bakers Ltd. ("Happy Bakers") produces and sells pastries. It signed a contract with Fawltly Tools Ltd. ("Fawltly Tools") to repair one of its baking ovens, at a cost of HK\$1,000. Fawltly Tools' employee reassembled the oven negligently, so that the first

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

time it was used the interior of the oven cracked and the oven was rendered beyond repair. The cost of replacing the oven is HK\$8,000. Happy Bakers was unable to obtain a replacement oven for 3 weeks. During this period it is estimated that the lack of the oven reduced Happy Bakers' profits by HK\$1,400 per week. Moreover, Happy Bakers missed out on the chance to bid for a very lucrative contract, which would have produced a profit of HK\$2,000.

Advise Happy Bakers as to the damages it can claim for Fawltly Tools' breach of contract.

(15 marks)

End of Part B

Part C (Introduction to Law of Torts)

Question 6 (25 marks)

Joe's Juice Ltd. ("JJ") has developed a popular drink called Durian Delight. This drink is made by extracting the pulp from fresh durians and mixing it with coconut water. JJ has been manufacturing Durian Delight in its factory at an industrial estate in Tai Po, New Territories. The factory has been operating for 2 years. As the government has a policy of encouraging the start up of small manufacturing enterprises producing export goods, it readily granted JJ planning permission for its factory which produces a very strong unpleasant odour released by the many durians it uses.

The occupiers of a nearby residential building, Happy Homes, have complained about the strong durian smell which has emanated from JJ's premises since it started its operations.

Mrs. Chan, an owner of a flat in Happy Homes, says that the fumes and smell from JJ's manufacturing operations have killed her valuable collection of sensitive rose plants growing on her balcony.

Mr. Ding lives rent-free at a flat owned by his father in Happy Homes. Mr. Ding has complained that because of the fumes and odour from JJ's premises, he has lost his sense of smell and is unable to sleep at night. As a result, he is suffering from severe exhaustion which is affecting his job performance.

JJ does not care about the complaints made by the various residents of Happy Homes. JJ feels that they have chosen to live in a residential building next to an industrial area and have nothing to complain about.

(See over the page for a continuation of Question 6)

As its business is doing so well, JJ is thinking of expanding its business which will involve increasing the size of its factory. As part of its expansion plans, JJ employed a contractor to check its waste pipes to see if they were adequate for expanded production of Durian Delight. Whilst the pipes were being checked, one of the pipes burst, and the waste substances in the waste pipes spread into nearby pipes supplying water to Happy Homes. The result was that the water supply to Happy Homes was contaminated and unusable for a significant period of time.

- (a) Mrs. Chan and Mr. Ding seek your advice as to whether they have any legal remedies in respect of the loss and damage they have suffered.**

(20 marks)

- (b) The residents of Happy Homes seek your advice as to whether they have any legal remedies in respect of the contamination of their water supply.**

(5 marks)

(See the next page for a continuation of Part C)

Question 7 (25 marks)

The Happy Healing Hospital ("Hospital") is a privately owned and operated hospital located in the New Territories. The Hospital specializes in treating patients who suffer from long-term illnesses and require specialist care.

Friday, 9 August 2019 was a busy and eventful day at the Hospital.

At 11:00 a.m., Angel, a long-term patient in the Hospital, gave an hour-long lecture on stock market investments to a group of fellow patients who voluntarily attended her lecture. At the end of the lecture, Angel said, "My stock market tip for today is ABC Co. Ltd. This is a well-run listed Hong Kong company with great growth potential".

Betty, a patient in the Hospital, on hearing Angel's investment tip, immediately called her stock broker, Charlie and asked him to invest all her savings of HK\$10 million in ABC Co. Ltd. Charlie immediately complied with Betty's request and bought HK\$10 million dollars worth of shares in ABC Co. Ltd.

At 3:00 p.m., Betty saw an announcement by the Hong Kong Stock Exchange that trading in ABC Co. Ltd. shares had been suspended as the company had been petitioned for winding-up. The winding-up meant that shareholders in the company would likely lose all the money which they had invested in ABC Co. Ltd.

The following facts have been established by independent witness statements, police reports and an investigation by the Hospital:

- a) The Hospital, to promote the recovery of its patients, has for a number of years organized a series of free lectures for its patients.

(See over the page for a continuation of Question 7)

- b) Angel was a stockbroker who had worked at a leading investment firm. The Hospital asked Angel to deliver weekly lectures on finance and investment topics, but told her that she was not to give investment advice.
- c) Angel had given lectures weekly for six months prior to 9 August 2019. Unbeknown to the Hospital, Angel gave an investment tip or investment advice at the end of each of her lectures.
- d) Betty had attended Angel's weekly lectures for the four months prior to 9 August 2019. Betty had from time to time relied on Angel's investment tips or investment advice and had made money in reliance on such tips and advice.
- e) Angel was not paid for her weekly lectures, but the Hospital gave her a 5% discount on the fees and charges she had to pay the Hospital as a patient.
- f) Angel had done no research into the financial position of ABC Co. Ltd. She had heard from a friend that it was a good company to invest in.
- g) Charlie was aware, when Betty called him, that ABC Co. Ltd. was in financial difficulties. He did not mention this to Betty as he did not want to lose his commission on Betty's purchase of shares in the company.

Advise Betty as to her possible tort claims for recovering damages for her potential HK\$10 million loss. Discuss all relevant causes of action, legal principles and cases.

(25 marks)

(See the next page for a continuation of Part C)

Question 8 (25 marks)

Section 21 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) states in part:

- (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage ...

- (10) "fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this section, give rise to the defence of contributory negligence.

Discuss the purpose and significance of the above legislation and its interpretation by the courts in respect of negligence claims.

(25 marks)

End of Part C

Part D (Criminal Law)

Question 9 (25 marks)

Albert, a six-foot tall athlete, was approached by Bebe, an attractive lady but a stranger to Albert, at a bar. After drinking and chatting, Bebe agreed to go to Albert's apartment to have sex.

Later, at Albert's home, whilst Albert was kissing Bebe, she demanded he pay her \$20,000 in exchange for sexual advances. Albert thought that Bebe was trying to take advantage of him financially. A fierce argument ensued. During the course of the argument, Albert slapped Bebe a number of times. Bebe cried out loudly for help. She also fought back by repeatedly punching Albert's face and squeezing his genitals. Albert did not want her to shout, so he placed his hands over her mouth in order to silence her. Bebe became unconscious shortly afterwards. In a panic and having waited for a few hours, Albert decided to take Bebe to a nearby pier and dump her body in the sea, which he did.

After a lengthy investigation, the police arrested Albert for murder. In a subsequent video interview, Albert explained to the police the events that occurred on that day. He said that Bebe seduced him when he was having a drink at the bar. Later, in his apartment and in the middle of caressing, he became very angry when Bebe suddenly asked him for money. There was an exchange of blows between himself and Bebe. He covered her mouth with both hands as he had lost control. Albert thought, when Bebe became unconscious, that she was then already dead. He said if he had known that Bebe was still alive, he would not have thrown her into the sea.

A post-mortem examination determined that the cause of death was drowning.

(See the next page for a continuation of Question 9)

The defence contended that when Albert threw Bebe's body into the sea, she in fact was still alive. At that very moment, Albert would not have had any intention to kill or cause grievous bodily harm as he thought he was dealing with a corpse. It was argued that one could not murder a dead body.

(a) Should Albert be found guilty of murder or any other offences? Explain.

(12½ marks)

(b) Explain what possible defence or defences Albert can rely on to the murder charge against him.

(12½ marks)

(See over the page for a continuation of Part D)

Question 10 (25 marks)

John went out with Simon and Lucy one night to a bar in Lan Kwai Fong ("LKF") and drank a large quantity of alcohol.

At approximately 11.30 p.m., John left the bar and proceeded down a road in LKF. There he noticed a man sprawled on the pavement asleep and a mobile phone lying on the ground close by. John picked up the phone, put it in his back pocket and continued down the road to a junction. At the junction stood various police officers and other persons. Unbeknown to John, he was being watched and followed by a plain clothes police officer after leaving the bar. John was stopped, questioned and searched. In John's back pocket, the mobile phone was found. When asked whether that was his own phone, John declared that he had found the phone and he was intending to hand it in to the nearest police station.

John was promptly arrested, taken to the police station and placed on police bail. When he returned 4 weeks later, John was charged with theft. At the Court, John, represented by the Duty Lawyer, pleaded not guilty. He has now visited your office. He explained to you that he found the mobile phone on the pavement. He picked it up and when he saw the police officers at the junction, it was his intention to give them the mobile phone but he was arrested and searched before he could do so. He mentioned to you that he had a considerable amount of drink but was aware of what he was doing.

He indicated that his friends may have been following him and might be able to assist. He also told you that he has never been in trouble with the Police, nor has he had any criminal conviction either in Hong Kong or elsewhere. His trial has been fixed for 20 February 2020 at Court 3 at Eastern Magistrates' Court for 1 day.

(See the next page for a continuation of Question 10)

(a) Set out all steps you should take in order to prepare for John's defence and, in particular, identify the various issues that need to be addressed in order to ensure that you are in a proper position to defend him.

(15 marks)

(b) What defences are available to John based on the instructions he has provided to you?

(5 marks)

(c) Are there any other aspects of this matter that would give you concern?

(5 marks)

End of Test Paper