

**2020 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Tuesday, 17 November 2020



2020 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

Three men, Ho, Hung and Lam have been arrested for public order offences in relation to a march organized by the Civil Human Rights Front. The charges against them are: breaches of the requirements and conditions applying to public processions under section 15(4) of the Public Order Ordinance, Cap 245, and obstructing a police officer in the due execution of his duty, contravening section 36 of the Offences Against the Person Ordinance, Cap 212.

The charges related to their failures, as organisers of the event, to hasten the movement of the procession, putting it outside of the time limits set by the police for the march and their failures to adequately move forward the procession on the instruction of a police officer.

On arrest the police seized the mobile phones (“phones”) of all three men and took possession of them on the basis that the information in the phones was suspected to be related to the offences for which the 3 men had been charged. Specifically the police took the view that the phones were likely to contain messages showing a joint enterprise between the suspects and other people showing that they intended to slow down the procession and obstruct the police.

The police had no warrant to seize the phones and have not yet inspected them. On seizure they placed them in sealed plastic tamper proof bags.

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

Question:

- (1) **Under what circumstances can the police search the seized phones? Provide authority for your answer. (8 marks)**

The trial of the three men has now commenced in the magistrates' court. Lam's defence counsel has informed the magistrate that his client will plead guilty to both charges but contends some aspects of the Summary of Facts prepared by the Prosecution relating to the public order charge are inaccurate. The magistrate intends to hold a Newton Inquiry into the facts contested by Lam. For the sake of expediency, he intends to hear the evidence on the Newton Inquiry within the same hearing as the trial of Ho and Hung.

Question:

- (2) **Can the calling and examining of witnesses on the Newton Inquiry for Lam take place in the course of the same hearing as the contested trial against Ho and Hung? Provide authority for your answer. (9 marks)**

The trial has concluded and Ho, Hung and Lam have all been convicted of the public order offence (Lam on his own plea). Ho and Hung were acquitted on the charge of obstructing the police while Lam pleaded guilty to that offence. Ho and Hung have been sentenced to 6 months' imprisonment and Lam to 8 months' imprisonment by the magistrate.

Question:

- (3) **Ho and Hung want to challenge the magistrate's decision to refuse to award them costs on their acquittal of the obstruction of police charge. On what basis can they have this decision reviewed? Provide authority for your answer. (8 marks)**

[25 marks in total]

Question 2 (25 marks)

Harry is a successful business man in Hong Kong who emigrated 5 years ago from Nigeria. You have acted as his lawyer since he arrived in Hong Kong.

Harry operates a chain of clothing distribution stores in Hong Kong but is not yet a Hong Kong permanent resident. He was recently married to a Hong Kong permanent resident. He and his wife own no properties in Hong Kong and live in a rented apartment in Happy Valley. Harry very recently bought a car and hired a local man, by the name of Mohan, to drive it as Harry does not drive.

Two days ago, after entertaining clients at a restaurant dinner, Harry was collected by Mohan, in Harry's car, to be driven home.

On the way home, Harry's car was stopped by police, just outside the Happy Valley race course. The police had received an anonymous tip that a car carrying a large amount of cannabis would be driven through that area that evening and had several road blocks in place.

On searching the boot of Harry's car, the police discovered one hundred small individual packets of suspected dangerous drugs (believed to be herbal cannabis). The total weight of the suspected dangerous drugs was nine kilograms.

Both Harry and Mohan were arrested for suspected trafficking in a dangerous drug.

The police seized a set of car keys from Mohan which opened all the car doors and the boot compartment of the car where the packets of cannabis were found.

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

On a search of Harry's person the police found another set of car keys, which opened the car doors, but was not able to open the car boot.

Later that night at the police station, Harry gave a signed statement in which he stated he regularly smoked a herbal medicine for his allergies. He bought it online from a herbal doctor who had advised him that it would assist in fixing his coughing caused by air pollution. He was not certain if the packets found in his car were the medicines he had purchased as he had not paid attention to the way they were packed in the last shipment he ordered.

Mohan remained silent under caution.

Both men were later charged with trafficking in nine kilograms of herbal cannabis contrary to section 4(1)(a) and (3) of the Dangerous Drugs Ordinance, Cap 134.

Questions:

- (1) Mohan and Harry were denied police bail on the basis that the charges against them were too serious. They wish to secure bail from a magistrate. **What arguments should be made in support of applications for bail for both Harry and Mohan? Identify any further information you would require from Harry and Mohan in order to assist in preparation for their bail hearings.**

(7 marks)

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

- (2) Harry has asked you to represent both him and Mohan. He will pay for the defence of both as Mohan does not have sufficient assets to employ his own lawyers. **Is it appropriate for you to act for both men? What advice would you give them about this?**

(6 marks)

- (3) Before the trial is due to commence you learn that a Government Chemist Certificate which had identified the matter in the packets as cannabis was wrong and in fact the matter is a herbal medicine, as Harry had suggested to the police. **What action should you take?**

(6 marks)

- (4) **Would your answer to (3) above differ if you learned of the mistaken identification of the drugs after the men had been convicted? If so, why?**

(6 marks)

[25 marks in total]

Question 3 (25 marks)

Facts

Your firm acts for a property developer (“Prop Dev”). Prop Dev is re-developing a prime site in Central (28 Golden Path). The plans are for a 55-storey top grade commercial building on the site. The project has been delayed. Your firm has issued a writ on behalf of Prop Dev against the main contractor, China Dream, claiming damages for the delay.

Your firm has just received a Notice of Sanctioned Payment (“NSP”) served by China Dream’s solicitors. Prop Dev seeks your advice as to the significance of the NSP and how to respond.

The background to the dispute is as follows:

Prop Dev entered into a contract in June 2017 with China Dream for construction of the new building. The agreed price was HK\$10 billion (HK\$10,000,000,000), all inclusive. The contract expressly stipulated that the new building was to be completed within 3 years from the date of the contract, that is by the end of June 2020.

The most recent estimate is that the new building will not be ready for occupancy until the end of 2021. Prop Dev is losing rental income which it estimates at HK\$50 million per month.

As a result of the delay, Prop Dev, on 15 August 2020, instructed your firm to take action to recover damages.

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

Your firm issued the writ on behalf of Prop Dev on 17 August 2020 claiming damages of HK\$50 million per month over a period of 1.5 months (i.e. HK\$75 million) for the period from end June to mid-August 2020, and continuing until actual completion.

On 15 September 2020, China Dream served a defence alleging that it was unable to complete on time because of the Covid-19 pandemic, which had caused delays in importing necessary materials and workers. This, according to China Dream's defence, excused it from liability by reason of a force majeure clause in the contract. In the alternative, it is pleaded that the Covid-19 pandemic has caused a downward correction in the rental market, meaning that Prop Dev would not have been able to rent out the units at 28 Golden Path for anything more than HK\$35 million per month.

The NSP (served on 2 November 2020) shows that HK\$630 million (representing HK\$35 million per month for the whole of the estimated delay) was paid into court in settlement of the whole of Prop Dev's claim.

Question:

Draft a letter of advice to Prop Dev on the legal significance of the NSP and how Prop Dev should respond, including the pros and cons of accepting the offer.

(25 marks)

[25 marks in total]

Question 4 (25 marks)

Facts Part 1

Your firm acts for Honest Buyer Limited (“HBL”), who has entered into an agreement with Bad Seller Limited (“BSL”) whereby BSL acting as seller has agreed to sell certain goods to HBL as buyer for a total contract price of HK\$20 million. Both HBL and BSL are limited companies incorporated in Hong Kong. The sale and purchase agreement (“Agreement”) contained, inter alia, the following term:

“3. Payment of Contract Price

- (a) *HBL agrees to pay BSL the contract price of HK\$20 million in the following manner:*
- (i) *The sum of HK\$10 million representing 50% of the contract price shall be paid by HBL to BSL within 7 days after the execution of this agreement; and*
- (ii) *The further sum of HK\$10 million representing the remaining 50% of the contract price shall be paid by HBL to BSL upon acceptance of the goods by HBL under this agreement.*
- (b) *Payment of the contract price by HBL under clause 3(a) above shall be made by way of wire/telegraphic transfer to the following bank account of BSL:*

Bank Name: Super Bank Limited, Hong Kong

Bank Address (Head Office): 2 Central Road, Hong Kong

Bank Account No: 011-88882222-05

Name of Account Holder: Bad Seller Limited’

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

In accordance with the Agreement, HBL duly paid 50% of the contract price (HK\$10 million) to BSL. However, BSL subsequently defaulted and was unable to deliver the goods to HBL.

HBL approached you and your firm seeking legal advice concerning possible legal action against BSL. You advised HBL to commence court proceedings in Hong Kong, and subsequently you issued a Writ of Summons together with a Statement of Claim in which HBL as Plaintiff claims against BSL as Defendant for:

- (i) payment of the HK\$10 million which HBL previously paid to BSL; and
- (ii) damages for the breach of the agreement by BSL.

The Agreement gives the address of BSL as No. 31 Fortunate Road, Hong Kong, which, according to a search you conducted, is also the registered office of BSL. You have carried out service of the Writ of Summons and the Statement of Claim on BSL. BSL has however failed to file an acknowledgement of service.

For purpose of the questions, you may ignore any issues concerning interest and costs.

Questions:

- (1) Explain what immediate procedural step HBL can take in light of BSL's failure to acknowledge service, what HBL would be entitled to obtain by taking such step, and any necessary procedural requirements which need to be satisfied.**

(5 marks)

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

- (2) Would there be any difference to your answer to question (1) if BSL had appointed solicitors and filed an acknowledgement of service, but subsequently failed to file a Defence? If so, what difference?**

(2 marks)

Facts Part 2

Time has passed, and HBL has now obtained judgment against BSL for HK\$10 million. BSL has paid HK\$ 4 million to HBL in partial satisfaction of the judgment, but despite further demand, HBL has received no further payment from BSL. HBL's information is that BSL's business is performing well, and it has plenty of cash in the bank.

Questions:

- (3) What application can HBL make now to pursue the remainder of its judgment against BSL?**

(3 marks)

- (4) Draft the necessary supporting affidavit or affirmation (including headings and name of parties) required for purpose of the application you have identified in (3) above. The affidavit or affirmation should include reference to all relevant documents/exhibits which you consider are necessary to be included as supporting evidence to the affirmation and the application. You may assume and state in the affidavit/affirmation any necessary facts not inconsistent with the facts given above.**

(15 marks)

[25 marks in total]

Question 5 (25 marks)

You act for Mr. Sylvester Wu (“Wu”), one of Hong Kong's most eminent (and expensive) plastic surgeons. He has had a career spanning 4 decades, and hitherto an unblemished reputation. Six months ago, Wu was consulted by Monsta-Z (real name Joe Wang (“Wang”)). Wang is the lead singer in the successful Taiwanese boy band FormosaBoyz. He sought Wu's advice on having nose implant surgery to give him a pointier nose. After the consultation, Wang decided to have the surgery, and Wu performed the procedure on him a week later.

Wang was very unhappy with the outcome. He claims the implant was too large and was attached at a crooked angle, making it look as if he has a broken nose, detracting from his characteristic good looks and undermining his career as a performer.

After the surgery, FormosaBoyz decided to cancel their planned 14 venue tour of South-East Asia. On 15 July 2020, the band's publicity agents in Hong Kong, Mere Puff, issued a press release apologising to the band's fans, using the excuse that Monsta-Z had been "disfigured by clumsy surgery" and naming Wu as the culprit. This was picked up and quoted by various Hong Kong media publications.

Wang has now returned to Taiwan. On his popular social media platform, Monsta-Z.com, he has continued to make disparaging and emotional remarks about Wu's skill as a surgeon, including one post on 2 August 2020 describing him as "The Demon Butcher of Wanchai".

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

Wu has noticed a marked decline in his plastic surgery bookings which he believes is the result of this bad publicity. He has decided that he must act to vindicate his reputation, so he has instructed you to issue proceedings for defamation against Monsta-Z (Wang) and Mere Puff. Mere Puff is an unincorporated firm run and owned by Steve Mere and Elijah Puff. Elijah Puff lives and works in Hong Kong, while Steve Mere runs the firm's Singapore office.

Questions:

- (1) Prepare a suitable concise endorsement of claim for inclusion on the writ. Your answer should include only the substantive drafting – you are not required to include the title of the action or other formal matters. (3 marks)**
- (2) What is the quickest way to serve the proceedings on Mere Puff? (4 marks)**
- (3) (i) What application will you need to make before you can serve the proceedings on Monsta-Z (Wang)?**
(ii) On what basis (or bases) will you make the application?
(iii) What will you need to show?
(iv) What procedure will you follow? (8 marks)
- (4) Draft the contents (but not the formal parts) of a short affirmation or affidavit in support of your application. (10 marks)**

[25 marks in total]

END OF TEST PAPER