

**2020 OVERSEAS LAWYERS  
QUALIFICATION EXAMINATION**

**HEAD V: PRINCIPLES OF  
COMMON LAW**

**Thursday, 14 January 2021**





# **2020 Overseas Lawyers Qualification Examination**

## **Head V: Principles of Common Law**

### **Part A (Constitutional Law & Introduction to Legal System)**

#### **Question 1 (25 marks)**

You are watching a television programme with your friend. Two political commentators are debating if Hong Kong is an “executive-led government” or if its government can be defined as possessing a “separation of powers”. Your friend turns to you and asks: “What does separation of powers mean?”

**(a) Explain the doctrine of the separation of powers.**

**(10 marks)**

One of the commentators on the programme remarks that: “The term ‘separation of powers’ is not stated in the Basic Law.”

**(b) To what extent is the doctrine of the separation of powers reflected in the Basic Law?**

**(15 marks)**

*(See over the page for a continuation of Part A)*

## **Question 2 (25 marks)**

### Part A

A relative of yours is seeking damages for HK\$50,000 in a contract dispute.

- (a) **Explain what the Small Claims Tribunal can do in respect of your relative's claim.**

**(5 marks)**

### Part B

- (b) **Explain what the mischief rule is with respect to statutory interpretation. Discuss with respect to the purposive approach.**

**(10 marks)**

### Part C

- (c) **Explain what "Persuasive Authorities" are.**

**(10 marks)**

**End of Part A**

## **Part B (Law of Contract)**

### **Question 3 (25 marks)**

Television International Limited (“TVI”) planned to organize “Hong Kong’s Got Talent” (“HGT”), a talent competition in Hong Kong. TVI approached Britney Pears (“Britney”), a famous local singer, to perform on the HGT opening night and on the closing night when the competition finals would be held.

TVI found the performance fee proposed by Britney to be too expensive. TVI’s General Manager, Simon Kao (“Simon”), told Britney that TVI could not afford to pay more than HK\$300,000, but that perhaps some other benefit could be arranged. Simon said that TVI had invited world famous judges for the competition. The judges were looking for singers to perform at prestigious musical festivals around the world. Singing in front of them might bring Britney further global performing opportunities.

Britney decided to use the opportunity to help her friend Nick and his group “The Low Moons”, an up-and-coming band. She asked Simon if The Low Moons could also perform on 8 June 2020, the closing night. Simon replied: “That should be okay. If you sign with us, we will invite The Low Moons to perform on the closing night for HK\$40,000. We will pay them after their performance.”

Eventually, TVI and Britney signed a contract - Britney would be paid HK\$300,000 in total to perform on both evenings. She would receive HK\$180,000 on signing the contract (which she could keep regardless of whether she performed on the opening night), and HK\$120,000 after performing on the closing night. The contract also mentioned the agreement regarding The Low Moons.

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

Excited about the TVI opportunity, The Low Moons turned down an offer they had received to perform on 8 June 2020 at a small concert in Kowloon for HK\$15,000. However, a few days before the start of HGT, TVI informed The Low Moons that they were no longer needed. Britney was upset and refused to perform at either the HGT opening or closing nights. She later found out that the singer who replaced her was asked by the judges to perform at a few well known music festivals in Europe.

Britney has received HK\$180,000 from TVI, but The Low Moons have not been paid anything.

**(a) Advise Britney of her rights and/or liabilities against TVI.**

**(20 marks)**

**(b) Advise The Low Moons of their rights against TVI.**

**(5 marks)**

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

#### **Question 4 (25 marks)**

Will, a musician, recently decided to go into the events venue business. He rented a floor of an industrial building and engaged Tubby Tunes Limited (“Tubby Tunes”), a specialist sound/lighting systems engineering firm, to put in a state-of-the-art sound system, special lighting and installations for special effects suitable for band performances and disco events. Will paid a deposit of HK\$50,000 to Tubby Tunes. Tubby Tunes’ manager, Charlie, phoned Will to say: “Don’t worry. We will make sure that we have a licensed electrician in charge of this. We have been in the business for a long time and only use licensed electricians.” In fact, the licensed electrician who worked with Tubby Tunes had been on sick leave for over two weeks and was unlikely to return to work for another month.

Tubby Tunes signed a contract with Will for the work for a total fee of HK\$200,000. The contract did not mention the engagement of a licensed electrician. Tubby Tunes engaged Harry to install the wiring system for the whole floor. Harry completed the installations in three weeks. Will then got the whole floor painted and purchased furniture which was delivered.

The day before his venue was due to be hired out for the first event, Will decided to try out the sound effects himself. However, as soon as he plugged in his electric guitar, keyboard, the speakers and other equipment, the wiring short-circuited. The sparks hit the curtain fabric and the venue caught fire. Because final renovations were still ongoing in the venue, there was some flammable liquid lying around. Large parts of the venue were burnt, although the fire was eventually put out.

The venue suffered a lot of fire damage. Much of the furniture and equipment was burnt. Will had to cancel all the venue bookings for three months and had to pay damages to customers whose bookings were cancelled.

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

Will himself suffered burns and required extensive burn treatment for four months, which cost him HK\$100,000 in medical fees.

It was discovered that Harry had incorrectly installed the wiring in the venue, leading to the short circuiting. Harry was not a licensed electrician, but only an assistant working at Tubby Tunes who was studying a course of electrical engineering at the Hong Kong Institute of Vocational Education.

- (a) **Advise Will of his rights against Tubby Tunes regarding the loss caused by the damage to the venue and his injuries.**

**(16 marks)**

- (b) **Would your answer be different if the contract contained wording which said: “Any liability incurred by Tubby Tunes Limited for any negligence, loss or damage to any property or person howsoever caused by the acts of its contractors, subcontractors or employees shall be limited to HK\$10,000.”?**

**(9 marks)**

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



## Question 5 (25 marks)

Answer both parts (a) and (b).

(a) Davy decided to sell a few pieces from his Ming dynasty furniture collection. He approached a few collectors and dealers, all of whom expressed an interest. The following takes place:

- Davy emailed Ivan on Monday morning and offered to sell two Imperial chairs to Ivan for HK\$1,000,000. Davy said that he would keep the offer open until 6:00 p.m. on Tuesday.
- On Monday afternoon, James, another dealer, offered to buy the chairs for HK\$1,200,000. Davy was happy with the higher offer and sold the chairs to James. James was so happy with the purchase that he posted a picture of himself with the chairs on his social media account.
- Ivan saw this picture. He emailed Davy immediately late on Monday night to accept the offer to purchase the chairs at HK\$1,000,000.
- On Tuesday morning, Davy telephoned Cliff offering to sell him a set of cupboards from his collection. Cliff agreed to buy them. However, on Tuesday afternoon, Davy received a higher offer from another collector. He telephoned Cliff to tell Cliff that he could not sell the cupboards to him.

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

- On Wednesday, Davy met Frank in the street and told him that he would sell him a set of tables from the collection for HK\$300,000. Frank agreed to buy them and to pay Davy and take delivery in two weeks. However, Davy lost a lot of money on the stock market during the following two weeks. Frank found out about this and called Davy to say that he was no longer willing to pay HK\$300,000 but only HK\$200,000 for the tables. Davy accepted this because he needed the money to pay off some of his losses.

**(1) Advise Ivan and Cliff whether they have a binding contract with Davy and their rights against him.**

**(8 marks)**

**(2) Advise Davy of his rights against Frank.**

**(7 marks)**

**(b)** Passion Foods Ltd. (“Passion”) sources specialty foods for hotels in Hong Kong. In August 2020 it entered into the following contracts:

- it agreed to supply to The Pacific Hotel 500 dozens of French oysters for consumption at the Oyster Festival to be held at the hotel in September 2020; and
- it agreed to supply to The Atlantic Hotel 1,000 legs of Iberian dry-cured ham from Spain. This is a very popular item and the hotel expected a large number of 2020 Christmas orders.

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

Passion placed orders for these foods with the respective food item suppliers.

A flood occurred at the Pacific Hotel during a storm in late August and the hotel had to be closed for three months for repairs. All events scheduled at the hotel during the three-month period were cancelled. A disease broke out at many Spanish pig farms in September, severely reducing the supply of dry-cured ham. The ham would now cost three times as much to source, and Passion would lose money on the contract.

**Advise whether Passion's contracts with The Pacific Hotel and The Atlantic Hotel can be treated as frustrated and the consequences, if the contracts are found to be frustrated.**

**(10 marks)**

**End of Part B**

## **Part C (Introduction to Law of Torts)**

### **Question 6 (25 marks)**

At 10:00 a.m. on Thursday, 16 January 2020, Angel, a financial consultant, who was feeling very sick, registered to see a doctor at a private medical clinic in Central. Whilst Angel was waiting to see a doctor, she received a telephone call from a client, Ben. Ben told Angel that he had heard a rumour of an unknown virus that was making people ill and a rumour that some ill people had died. Ben was worried about the effect of this unknown virus on the Hong Kong stock market and asked if he should sell his Hong Kong shares.

Angel, who was feeling very sick and had not heard of the rumours about the virus, told Ben that she was in no position to advise him on what to do with his Hong Kong shares. Angel stressed that she did not give investment advice based on rumours but only on research and analysis. She also told Ben that she was sick and sitting in a medical clinic waiting to see a doctor.

Ben was very persistent and kept asking Angel if he should sell his Hong Kong shares. Under the persistent demands for advice from Ben, Angel suggested that he should not sell his Hong Kong shares, as she felt that the unknown virus would be contained and would not affect the Hong Kong stock market.

Following this conversation Ben did not sell his Hong Kong shares. The Hong Kong shares dropped significantly in value the day after his conversation with Angel, when the existence of the deadly virus was confirmed by the government.

Ben claims to have lost HK\$15 million as a result of not selling his Hong Kong shares on 16 January 2020.

*(See the next page for a continuation of Question 6)*

**Discuss any tort actions that Ben might have against Angel in respect of his alleged HK\$15 million loss. Support your discussion with reference to relevant principles and authorities.**

**(25 marks)**

*(See over the page for a continuation of Part C)*

### **Question 7 (25 marks)**

Mavis Chan (“Mavis”) was a 22-year-old student, living in a hostel, at the University of Shatin (“US”) in the New Territories, Hong Kong. For some time, she had been suffering from stress due to study and examination pressures. She had told her mother, Eva Chan (“Eva”), about her stress problems and had also spoken to the US counselling service about her stress problems.

Recently Eva had noticed that Mavis had become more stressed as she was worried about poor job prospects for graduates due to the Covid-19 pandemic.

On 1 July 2020 at 8:00 a.m., Eva made a 999 call to the police expressing concern about her daughter, Mavis, who was a US student. Eva explained to the police call handler that her daughter, Mavis, was severely depressed when she last spoke to her 40 minutes ago and that Mavis was thinking of committing suicide. Since that conversation with Mavis, Eva had been unable to contact her. Eva explained that she was unwell and unable to travel to the US to see Mavis. Eva also said that she had unsuccessfully tried to contact the US helpline and so she had contacted the police for help.

The police call handler told Eva that the police would be immediately sent to Mavis’ accommodation at US to check on her and if Mavis needed to be transferred to hospital, the police would arrange it.

The police arrived at Mavis’ US accommodation three hours after Eva’s call and found Mavis dead from an overdose of sleeping pills.

*(See the next page for a continuation of Question 7)*

Following these events, the following facts have been established by independent witness statements, police, US and hospital reports:

1. The police call handler, who answered Eva's 999 call, after assuring her that the police would immediately go to Mavis' US accommodation, graded the call as Grade 2 (priority attendance within 4 hours);
2. For immediate attendance, the call should have been graded as Grade 1 (immediate response);
3. If the police had responded to the call immediately, they would have arrived in time to prevent Mavis from committing suicide.
4. Eva, as a result of being assured by the police call handler that the police would immediately attend to Mavis, did not try again to call Mavis or the US helpline.

**Discuss any tort actions that might be brought against the police in respect of the death of Mavis. Support your discussion with reference to relevant principles and authorities.**

**(25 marks)**

*(See over the page for a continuation of Part C)*

### **Question 8 (25 marks)**

In Gloccheski, Tort Law in Hong Kong (Revised Fourth Edition, 2018) page 299, the author states:

“It has already been observed that volenti (non fit injuria) may also arise out of an express agreement between plaintiff and defendant that purports to exclude the liability of the defendant. Such a term, when found in an agreement is known as a disclaimer, or exemption clause....

The Control of Exemption Clauses Ordinance, based on English legislation (the Unfair Contract Terms Act 1977) came into force on 1 December 1990...A primary objective of the ordinance is to restrict or at least control the use by business entities of contract terms or notices intended to limit or exclude liability for personal injury.”

- (a) **Discuss the elements required to establish the defence of volenti (non fit injuria).**

**(15 marks)**

- (b) **Discuss the effect of the Control of Exemption Clauses Ordinance (Cap. 71) on contract terms or notices intended to limit or exclude liability for personal injury.**

**(10 marks)**

**End of Part C**



## Part D (Criminal Law)

### Question 9 (25 marks)

1. After several hours of visiting numerous bars in Wanchai, Bill goes into a 7-11 convenience store (“7-11”). He walks around. He then sees some sandwiches and picks them up from the shelves. He continues walking. He sees some beers. He takes two cans and puts them in the side pockets of his jacket and holds two other cans and the sandwiches in his hands. He proceeds to the check-out. He puts down the two cans of beer and the sandwiches. He pays for them, takes a receipt in the sum of HK\$50 and starts walking out of the store. Just after he passes the entrance, he is stopped by the store detective and asked if he has anything in his pockets. Bill laughs and asks the store detective whether he would like to join him for a beer! He then takes out the two cans from his pockets.
2. The Police are called. He is arrested for theft of the two cans of beer. On the way to the police station, he tells the police officers that he could not recollect taking the two cans of beer and asks them whether they would like to join him for a drink. Bill spends the night in the police cells. He is cautioned. He does not give a statement and is charged with theft, and released on police bail in the sum of HK\$500 to appear in the Eastern Magistrates’ Court in three weeks’ time.
3. Bill comes to your office and tells you the following:-
  - (i) He works as an investment banker.
  - (ii) He has never been in trouble before either here or anywhere else in the world.

*(See over the page for a continuation of Question 9)*

- (iii) He has been under severe stress that evening since his girlfriend had left him.
  - (iv) He has looked at his credit card receipts and had spent HK\$15,000 in several bars.
  - (v) He can recollect going into 7-11 and buying some sandwiches. He has no idea why he bought two cans of beer and a further two cans of beer which were found in the pockets of his jacket.
  - (vi) He feels that one of his drinks that evening may have been spiked.
- (a) **Set out all steps and advice you should give Bill in order to prepare his defence.**
- (13 marks)**
- (b) **What defences, if any, are available to him?**
- (12 marks)**

*(See the next page for a continuation of Part D)*

### **Question 10 (25 marks)**

On the evening of 15 July 2018, Alan, 22 years of age, went up the stairs from the ground floor to the first floor of Lucliff Court (the “Building”). He did so intending to look for his friend. In doing so, he accidentally triggered a burglar alarm. Mr. Boo, a 70-year-old watchman of the Building, confronted Alan by grabbing Alan’s neck in order to prevent him from leaving. Mr. Boo accused Alan of burgling one of the flats in the Building. Feeling insulted, Alan scolded Mr. Boo with foul language, saying: “You accuse me of stealing, fxxx you!” Alan pushed Mr. Boo causing him to fall on the ground. Alan then kicked Mr. Boo’s head four to five times. The altercation alerted Charlie, a resident of the Building. Charlie managed to restrain Alan. The police soon arrived at the scene and arrested Alan for assaulting Mr. Boo.

Mr. Boo fell into a coma after the assault and died in the hospital a couple of days later. The government pathologist who performed an autopsy on Mr. Boo stated in the autopsy report that although the direct cause of death was bronchopneumonia, which is a condition that causes an inflammation of the lungs, the intervening antecedent cause was intracranial bleeding (i.e. blood vessels within the skull are ruptured) and that the underlying antecedent cause was complications of a head injury. Alan was subsequently charged with the offence of murder.

Under caution, Alan claimed that (1) he was furious when being accused of stealing from one of the flats in the Building, (2) he had only used necessary and reasonable force to free himself when he had been grabbed and held by Mr. Boo, and (3) he denied having any intention to cause grievous bodily harm to Mr. Boo.

*(See over the page for a continuation of Question 10)*

**(a) Explain what possible defence or defences Alan can rely on regarding the murder charge against him.**

**(15 marks)**

**(b) Discuss the concept of causation of death in the present case.**

**(10 marks)**

**End of Test Paper**