

**2018 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Tuesday, 13 November 2018



2018 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

Mr. Zhang ("Z"), a retired General of the Chinese People's Liberation Army, arrived in the Hong Kong Chek Lap Kok International Airport, en route to Beijing from a holiday in Thailand.

When Z presented his passport at the counter of the Hong Kong Immigration Department, an immigration officer told Z that he suspected his People's Republic of China ("PRC") passport was forged. Z replied: "I am on my way to Beijing for an important meeting. Now here is HK\$5,000 for you. Let me through. Ha ha, false passport; I have several passports on me."

Z was taken to an interview room and questioned by two immigration officers. All three spoke fluent Mandarin and Z confessed to having in his possession three forged passports all bearing different names and that he should not have offered HK\$5,000 to the immigration officer.

Z was charged with possession of one forged travel document contrary to s 42(2)(c)(i) of the Immigration Ordinance, Cap. 115 and of offering an advantage to a public servant contrary to s 4(1)(a) of the Prevention of Bribery Ordinance, Cap. 201 ("PoBO").

Z was not granted bail.

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

Z appeared in West Kowloon Magistrates' Courts where he was represented by the Duty Lawyer Service ("DLS"). He pleaded guilty to both charges. The brief facts of the case were read to Z in Mandarin and Z said he understood and admitted those brief facts.

The brief facts revealed that Z who came to Hong Kong from Thailand on 11 September 2018 had presented a forged PRC passport to an immigration officer, offered that officer HK\$5,000 to let him go through the counter despite the forged passport, and in a written statement under caution had admitted the passport was forged and that he was wrong to have offered money to the officer.

In mitigation, the DLS simply submitted that Z pleaded guilty and was remorseful, and hoped that Z could return to China "sooner rather than later". On 14 September 2018, the Magistrate imposed a custodial sentence of 15 months on the passport offence and 21 months on the PoBO; the sentences to run consecutively.

You were instructed by Z on 17 September 2018. Z told you all three passports were genuine passports issued by the Public Security Bureau in the PRC.

Z explained:

- (a) Z was joking with the immigration officer when he mentioned the money and about the passports being fake.
- (b) Z was in a hurry to return to China for an important meeting.
- (c) Further, Z did not know how the Hong Kong legal system works and wanted to find out for himself.
- (d) Z gave a similar explanation for the offering of money.

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

Questions:

- (1) Assume what Z told you above is all true. What steps would you take and what advice would you give to Z? (7 marks)**
- (2) What is his chance of success? (3 marks)**
- (3) Would Z have a chance to take his case to the Court of Final Appeal? Explain with reasons. (3 marks)**

Assume that in addition Z told you that as Z had to rush back to China for a meeting, at the interview room, Z told the two immigration officers that all three passports in his possession were genuine. But one of the officers told Z to make an admission, the reason being it would take a long time to confirm the authenticity of the three passports. The officer added that if Z cooperated with the immigration officers, pleaded guilty and made an admission, he would be able to leave Hong Kong soon.

The officer wrote a cautioned statement out for Z and told him not to tell his lawyers and the Magistrate the truth as it would complicate matters.

Question:

- (4) How would your answers be different from those to (1) to (3) above? Explain with reasons. (6 marks)**

Again assume that all the three passports in Z's possession were genuine passports issued by the PRC authority and that Z was charged with possession of one forged passport only. No reference was made by the prosecution to the other two passports.

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

Question:

(5) How, if at all, may this fact be of assistance to Z and why?

(6 marks)

[25 marks in total]

Question 2 (25 marks)

Facts

On 8 August 2018, R (a male) and A (a female) obtained two packets of white powder from a man in the street for a total sum of HK\$10,000, and then delivered at home the two packets to J (a boy). At that time, R and A were engaged to be married while J at the age of 13 had been born to them out of wedlock.

On 28 August 2018, R and A got married by having their marriage celebrated by a Civil Celebrant of Marriages in Hong Kong.

On 18 September 2018, R, A and J were all arrested by the police acting upon information, and the two packets of white powder both in their original state and condition were seized. Subsequent investigations revealed that (i) one packet contained 8 grammes of heroin and (ii) the other packet contained 2 grammes of ketamine.

On 28 September 2018, R and A were jointly charged with 2 counts of trafficking in a dangerous drug contrary to Section 4(1) of the Dangerous Drugs Ordinance, Cap. 134, Laws of Hong Kong, and J was charged with 2 counts of possession of a dangerous drug contrary to Section 8(1) of the same Ordinance.

Pending the first court appearance at Court No.1 of Fanling Magistrates' Courts, R was detained in police custody for the reasons that (i) he had two previous convictions for the same kind of offence, and (ii) he was suspected to have become involved in another dangerous drugs case under investigation. Both A and J were released on police bail.

This is the day of their first court appearance.

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

Questions:

- (1) **Is it appropriate that all the 3 defendants are brought before the same Court for hearing of the respective charges? (6 marks)**
- (2) While the prosecution has no objections to bail being granted to both A and J on terms and conditions as the Magistrate may deem appropriate, objection is vigorously raised on granting bail to R because of his previous convictions of the same kind of offence and his suspected present involvement in another dangerous drugs case under investigation.
- (a) **If you were instructed to apply for bail on R's behalf, what information would you seek about R and what would you submit to the Court?**
- (b) **If the Magistrate turns down the bail application, what might R do? (2 marks)**
- (3) **What is/are the likely venue(s) for the trial of the charges against R, A and J? (2 marks)**
- (4) **Assuming that each of the 3 defendants pleads not guilty to the respective charges each faces, and J has attained 15 years at the time of the trial,**
- (a) **can the prosecution call A to give evidence against R and J? (3 marks)**
- (b) **would it render your answer to (a) above different if R and A divorced just a few days before the commencement of the trial? (3 marks)**

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

- (5) If the trial court, after hearing and considering all the evidence and submissions of the parties, finds beyond all reasonable doubt that J should be found guilty of 2 counts of "Trafficking in a Dangerous Drug" instead of 2 counts of "Possession of a Dangerous Drug", can the trial court convict J of the former 2 counts?**

(4 marks)

- (6) Assume that all the 3 defendants are convicted of the charges each faces after trial, and are thereafter sentenced as follows: -**

- (a)** R and A (A has a clear record) are each sentenced to (i) 2 years' imprisonment suspended for 3 years on the count of "Trafficking in a Dangerous Drug" relating to heroin, and (ii) 1 year's imprisonment suspended for 2 years on the count of "Trafficking in a Dangerous Drug" relating to ketamine, both sentences to run concurrently; and
- (b)** Without stating a reason for the desirability of sentencing him in the trial court and without calling for any suitability report for consideration of the appropriate sentence, J, who has a clear record, is sentenced to 1 year's imprisonment on each count for the offence of "Possession of a Dangerous Drug", both sentences to run concurrently.

Is there any problem with any of the above sentences, and if so, what step(s) could be taken to remedy the problem(s)?

(5 marks)

[25 marks in total]

Question 3 (25 marks)

Facts Part 1

You have been instructed by Miss Zhang Wenyi ("Zhang"), a renowned Chinese actress who has been popular both in the Mainland of the People's Republic of China ("PRC") and Hong Kong. A columnist, Tao Lit ("Tao"), has written and published an article in a magazine circulating in Hong Kong which suggests that Zhang once had an affair with a married Hong Kong tycoon (the "Defamatory Statement").

Tao is a resident in Shenzhen, PRC, but he also spends time in Hong Kong as his wife and children live in Hong Kong at a flat owned by him in Fanling ("Fanling Flat"). Zhang commenced proceedings against Tao in the High Court of Hong Kong claiming damages in the sum of HK\$5,000,000 for the Defamatory Statement published by Tao against her and for an injunction prohibiting Tao from further publishing the same or similar statement.

The writ endorsed with a statement of claim ("Writ") was sent by registered post on Tuesday, 4 September 2018, to Tao's Fanling Flat and was left at the Fanling Flat when your firm's service clerk managed to slip the Writ through the door of the flat at 9 a.m., the next day, 5 September 2018. So far, Tao has not filed any acknowledgement of service of the Writ in Court. You obtained confirmation from Hongkong Post's mail tracking system that the item sent by registered post sent to Tao's Fanling Flat was received on Thursday, 6 September 2018, at 11 a.m.

Questions:

- (1) Advise whether the service of Writ on Tao is valid and if so, when the Writ was validly served.**

(3 marks)

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

- (2) Advise Zhang as to the due date for Tao to acknowledge service of the Writ. (2 marks)
- (3) Advise Zhang whether she can immediately obtain a judgment if Tao fails to acknowledge service of the Writ by the due date. If yes, what type of judgment can she obtain and if no, what further steps would she need to take in order to obtain judgment against Tao, citing the relevant Rules of the High Court in support. (6 marks)
- (4) If Zhang instructs you that she wants to obtain a judgment as soon as she can in order to save costs after it is confirmed that Tao has not filed an acknowledgement of service by the due date, how would you advise Zhang to proceed? (4 marks)
- (5) Would your answer to sub-question (3) above be different if it turns out that:
- (a) Tao had left for Shenzhen and crossed the border at 10 a.m. on 6 September 2018 and did not return to Hong Kong until 1 November 2018? (3 marks)
- (b) Tao's wife received the registered post on 6 September 2018 at 11 a.m. by which time, Tao was already in Shenzhen but she subsequently passed the registered post to Tao on 11 September 2018 when he was transiting Hong Kong for a flight to Singapore? (3 marks)

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

Facts Part 2

You subsequently obtained judgment against Tao for Zhang in late October 2018. After the sealed copy judgment was served on Tao, you, as Zhang's solicitors, were served with a summons and an affirmation of Tao by Tao's solicitors seeking to set aside the judgment on the basis that the Writ did not receive Tao's attention until early November 2018 when he returned to Hong Kong from outside the jurisdiction.

Question:

- (6) Advise Zhang what legal requirements Tao needs to satisfy the Court about before the judgment would be set aside in his favour. Would your answer be different if the scenarios mentioned in sub-questions 5(a) and (b) above apply? Give reasons for your answers.**

(4 marks)

[25 marks in total]

Question 4 (25 marks)

Facts Part 1

Your firm represents Brilliant Events (HK) Ltd. ("Brilliant"), a Hong Kong company which carries on business organising and promoting social, cultural and sporting events.

Brilliant was appointed by the Hong Kong Healthy Eating Association ("Healthy") to organise and promote a 3-day sports fest for 10,000 secondary school students. The event, which will be held in March 2019, is intended to foster team spirit amongst students from across Hong Kong and neighbouring places, while at the same time promoting healthy eating. The agreed price is a flat fee of HK\$5,500,000. Under the agreement Brilliant is required to provide 10,000 matching sets of 3-piece track suits, one for each participant.

Brilliant ordered the 10,000 sets of track suits from Kwikkee Stichee Garment Manufactory Ltd. ("Kwikkee"), a Hong Kong company with garment factories in Guangdong province, People's Republic of China and elsewhere, at an agreed price of HK\$90 for each 3-piece set. The price was paid in full in advance.

When the track suits were delivered, Brilliant staff immediately noticed that the printing on each of the 3 pieces of all 10,000 sets was incorrect. The event logo was printed upside down, and the slogan "Hong Kong China Teen Sports Fest 2019" was mis-printed as "Hong Kong China Teen Sports Pest 2019". Brilliant, having lost confidence in Kwikkee, made a replacement order with another company at a price which turned out to be marginally cheaper, at HK\$85 per set. Apart from a few sets kept as evidence, Brilliant destroyed the track suits supplied by Kwikkee.

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

Brilliant has now instructed your firm to commence legal proceedings against Kwikkee, claiming repayment of the whole HK\$900,000 it had paid in advance.

Question:

- (1) **Draft a complete statement of claim, including the heading showing the court and the names of the parties.** In doing so, you may assume any facts not inconsistent with those set out above. You may add notes explaining any part of your draft.

(15 marks)

Facts Part 2

In its Defence, the defendant alleges that the plaintiff could have mitigated its loss by selling the defective track suits on the "seconds" market for HK\$40 per set, or to a fibre recycler for HK\$30 per set; alternatively that the goods should have been returned to the defendant. The defendant makes a sanctioned payment of HK\$400,000 said to be in full and final satisfaction of the plaintiff's claims.

Question:

- (2) **Draft a letter advising the plaintiff of the effect and consequences of the sanctioned payment.**

(10 marks)

[25 marks in total]

Question 5 (25 marks)

You are approached by your client Mr. Lionel Louvre ("Louvre"), a wealthy Singaporean art collector. He is in some distress. For months now he has been negotiating with an art dealer, Ms. Penelope Prado ("Prado"), to buy an important 19th Century painting – "Still Life with Banana" by Titus Tate ("Tate") - which is on sale in her gallery in Hong Kong. "Still Life with Banana" is one of a series of three works painted by Tate during his highly regarded "fruit period". Louvre already owns two of them - "Still Life with Mango" and "Still Life with Durian" – so this third purchase was intended to complete his collection. After much negotiation, Prado eventually agreed in September to sell the painting to him for HK\$ 2.5 million, half payable immediately and half payable a week later. Delivery was to take place on payment of the second instalment. Louvre shows you his receipt, which reads as follows:

*Penelope Prado trading as Exclusive Art Collectables
26B Hollywood Road, Central, Hong Kong*

RECEIPT

Date: 10 September 2018

SOLD: "*Still Life with Banana*" by Titus Tate (oils on canvas); circa 1875

Payment by 2 instalments:

HK\$ 1,250,000 – PAID

Balance HK\$ 1,250,000 payable on 17 September 2018

Delivery against full payment.

P. Prado

P. Prado (proprietor)

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

Louvre was unable to pay the second instalment on 17 September 2018 because of a typhoon, but he went to Prado's shop first thing the next day with the money. To his surprise, Prado refused to accept the money. She told him that a wealthy Sicilian private collector, Mr. Carmine Uffizi ("Uffizi"), had offered a higher price for "Still Life with Banana". Uffizi would be making a short stopover in Hong Kong on 15 November 2018, and she was minded to meet him and accept his offer. She offered Louvre back his cheque for the first instalment, but he refused to accept it, and stormed out of the shop.

Questions:

(1) Louvre instructs you urgently to stop Prado from selling "Still Life with Banana" to Uffizi. **What application will you make, and what papers will you need to make it?**

(4 marks)

(2) **How, if at all, will you involve Prado in the application? State your reasoning.**

(4 marks)

(3) You are to be the advocate on your application. **Draft a note in bullet point form of the submissions you will need to make to the judge, including any legal and factual issues on which the judge will expect to hear from you when considering your application.**

(17 marks)

[25 marks in total]

END OF TEST PAPER