

Examiners' Comments on the 2020 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. The number of candidates who sat the Head II paper in 2020 was 64, up from 59 in the previous year. 48 candidates were given overall pass marks, resulting in a pass rate of 75%. This is a remarkable increase from the 31% pass rate the previous year. It is pleasing to see that the deterioration in performance of candidates which had been noted in recent years has now reversed. The improvement was on both the criminal and civil parts of the paper. However, overall performance remained relatively weak on the criminal questions. This could reflect the background of candidates, many of whom, anecdotal evidence suggests, have gained their experience on the civil and commercial side of legal practice.

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 focused on the kinds of issues any newly qualified solicitor should be able to guide their client through in a competent manner. Some answers provided were good but many candidates are still taking the exam with little understanding of criminal practice and either failing to answer the question asked or answering in the briefest point form, missing many of the key issues raised by the examiners. That said, the overall pass rate for criminal procedure was 45%, a significant rise from the pass rate of 22% last year.

Question 1 (pass rate 42%)

7. Question 1 had three parts. The first part required an understanding of police powers to conduct a search of mobile phones seized on arrest, as articulated in the Court of Appeal decision, *Sham Wing Kan v Commissioner of Police* CACV 270/2017. The second part related to the conduct of a Newton Inquiry and required candidates to refer to the Court of Appeal decision, *HKSAR v Khalid Mansoor* [2020] 2 HKLRD 374, which is authority that a trial judge cannot combine the trial of two defendants who contest their guilt with a co-defendant's Newton Inquiry. The third part of the question required recognition that while section 19 of the Costs in Criminal Cases Ordinance, Cap 492, does not provide a mechanism to appeal a refusal to award costs, a refusal by a magistrate to award costs is a 'decision of a magistrate' for the purposes of an appeal under section 113(1) of the Magistrates' Ordinance (*HKSAR v Coghlan* [1999] 4 HKC 608) and can therefore be appealed. The candidates who failed this question all displayed limited knowledge of these significant Hong Kong cases.

Question 2 (pass rate 50%)

8. Question 2 related to a simple drug trafficking case. It had four parts which focused on bail, the potential conflict of interest in representing two defendants and the appropriate action to be taken when new information revealing that the prosecution cannot prove their case comes to light before/after conviction. Candidates also needed to be able to identify where any appeal against conviction would be heard and have an understanding of the defendants' rights to seek costs. This question was answered adequately by only half the candidates who attempted it despite the areas examined all being relatively simple to identify and address with a moderate amount of preparation.

Civil Procedure

9. Questions 3, 4 and 5 addressed issues of civil procedure which could well land on the desk of a newly admitted solicitor. The answers were expected to be at the level of sophistication and experience of a solicitor at that stage. In some cases, common sense application of established procedures and procedural law was all that was sought, rather than a recitation of black letter rules. The overall pass rate was 71% on the civil procedure side, a welcome increase on the previous year's 42%. The preponderance of candidates were able to pass all the civil procedure questions they attempted, whereas in the previous year, the pass rate for 2 of the questions was below 50%.

Question 3 (pass rate 95%)

10. Question 3 asked candidates to advise a client (plaintiff) on a notice of sanctioned payment which had been served by the defendant. Such payments, under RHC Order 22, are intended to encourage parties to settle their disputes amicably.
11. Order 22 is very technical and can be difficult to understand without careful reading. But it is an essential tool in the armoury of a civil litigator these days. It provides for costs and interest sanctions to be imposed on a party who unreasonably refuses to accept a qualifying offer of settlement (sanctioned offer or, as in this question, sanctioned payment).
12. Fortunately, the vast majority of candidates clearly understood Order 22 and the consequences provided therein. There were few failures.
13. The only negative point which could be made is that many candidates regurgitated an almost identical answer, presumably provided in advance by one of the course providers. As those answers were mostly correct, they were awarded pass marks. Better candidates, who answered from their own knowledge, and addressed the actual question directly, were awarded higher marks.

Question 4 (pass rate 72%)

14. Question 4 was relatively straightforward. Overall candidates performed reasonably well.
15. The question had 2 parts, in each of which candidates were asked to answer 2 specific questions. The facts concerned litigation over a commercial agreement for the sale of goods in which the buyer (client) paid 50% of the purchase price in advance, but the goods were never delivered.
16. In the first part of the question, candidates were asked what step their client could take in the absence of action on the part of the defendant. Candidates were asked what could be done if the defendant failed to acknowledge service, alternatively, if the defendant failed to serve a defence. The answers are of course, that client could seek judgment for failure to give notice of intention to defend (O 13) in the first scenario, and judgment in default of defence (O 19) in the second. Not all candidates were able to identify the difference between final and interlocutory judgment (which was relevant because the claim was for both a fixed amount and for damages for breach of agreement).
17. The second part of the question concerned enforcement of a money judgment against the seller (opposing party). The facts were that the seller had paid only \$4 million on account of the judgment debt of \$10 million, though it had plenty of cash in the bank. Candidates were asked what application the buyer (client) could make, and to draft an affidavit or affirmation for the purpose of such application. The answer is, of course (a) that client should apply for a garnishee order to attach the funds in the opposing party's bank account and (b) that the affidavit or affirmation in support of the application should set out the information required by RHC O 49 r 2 so far as relevant in this case. The majority of candidates were able to identify garnishee proceedings as the most appropriate enforcement option and to draft the requisite affirmation.

However, most candidates who prepared the draft affirmation included the underlying judgment as a documentary exhibit, which should not have been done, and as a result a mark was deducted for these candidates.

Question 5 (pass rate 62%)

18. Question 5 concerned a claim in defamation by a plastic surgeon (client) against a dissatisfied patient who had, together with his publicity agents, published negative comments in a press release and in social media about the doctor. Candidates were asked:

(1) to draft a concise endorsement of claim

(2) what the quickest way would be to serve the publicity agents, an unincorporated body owned by one person living and working in Hong Kong, and another in Singapore.

(3) how to serve the proceedings on the dissatisfied patient, who had returned to Taiwan.

(4) to draft a short affirmation or affidavit in support of that application.

19. Whereas questions 3 and 4 were 1st marked by the panel members who set them, a substitute 1st examiner had to be found for this question as the panel member who set it had left before the paper was sat.

20. Overall the candidates performed quite well on question 5.

21. Generally, part (1) was answered well.

For part (2), instead of just setting out one or more possible methods of service, since the question was asking about the ‘quickest way to serve proceedings’, candidates were expected to come up with some sort of comparison as to what was the quickest method. Not all candidates managed to do that and those who did were credited accordingly.

For part (3), again generally this was done quite well. It was surprising, though, that since this question was in relation to service out of the jurisdiction, that some candidates did not mention the applicable gateways under Order 11 rule 1(1).

There was the same issue when students embarked on the draft affidavit for part (4). Many of them just covered the fact that there was a serious issue to be tried. Some covered where the defendant was located and the forum conveniens requirements. Many did not cover the requirement that there was a good arguable case that one of the gateways under Order 11 rule 1(1) applied. This is not surprising as many candidates and students confuse this with the serious issue to be tried requirement.

But overall, the majority of candidates who took this question were awarded passing marks.