

**2017 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND
CRIMINAL PROCEDURE**

Friday, 10 November 2017



2017 Overseas Lawyers Qualification Examination

Head II: Civil and Criminal Procedure

Question 1 (25 marks)

Your client, a 69-year-old man has been charged with one count of indecent assault, contrary to section 122(1) of the Crimes Ordinance, Cap. 200.

The victim is a 24-year-old Indonesian domestic helper employed by your client's daughter to work at the flat where she lives ("the flat"). Your client frequently visits the flat for meals.

The prosecution alleges that on Tuesday last week, when only your client and the victim were at the flat, your client approached the victim from behind and squeezed her breasts twice with his hands. He then whispered in her ear that she was very pretty. The victim did not say anything but later telephoned a friend and told her about the incident.

The victim's friend encouraged the victim to report the matter to the police and your client was arrested and charged yesterday. He was given police bail and has now come to your office for legal advice.

Question:

- (1) Your client has asked you where his case is likely to be tried and whether he would get a discount on his sentence for an early plea of guilty. **Advise him.**

(10 marks)

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

It is now one month before the trial is due to commence in the court you have identified. You have received a communication from the Department of Justice informing you that the victim has requested a screen to be used in court to shield her from sight of the accused and the public during her testimony. Your client is upset at this request and has asked you to object to the screen.

Question:

(2) When and how could any such objection be made?

(5 marks)

Assume it is now the first day of the trial hearing at the court you have identified. Your client has instructed you, this morning, that he has decided to plead guilty to the charge. He enters a guilty plea and you make a plea in mitigation highlighting his wish to apologize to the victim. Your client is a person of clear record. The court sentences your client to 3 months' imprisonment, suspended for 12 months. The prosecutor is angry with the sentence and has indicated they will challenge it.

Question:

(3) Can the prosecution challenge the sentence? Identify the manner in which any such challenge could be made, the grounds for the challenge and the likelihood of success.

(10 marks)

[25 marks in total]

Question 2 (25 marks)

You are a duty lawyer and have been assigned a case defending a man on dangerous drugs charges. Your client, Mo Wan Hang ("Mo") will make his first appearance today in the magistrate's court. He is aged 18 years and is of clear record. He lives at home with his severely disabled mother. He has been charged with two offences, together with a second man Koo Wat Chai ("Koo"), aged 21.

The details of the two charges against Mo and Koo are:

Charge One

Statement of Offence

Conspiracy to traffic in a dangerous drug; contrary to sections 4 (1)(a), (3) and 39 of the Dangerous Drugs Ordinance, Cap. 134 and sections 159A and 159C of the Crimes Ordinance, Cap. 200.

Particulars of Offence

Mo and Koo between 1 April 2017 and 1 May 2017, both dates inclusive, in Hong Kong, conspired together with a person known as "Lo Sun" and other persons to unlawfully traffic in a dangerous drugs, namely methamphetamine hydrochloride.

Charge Two

Statement of Offence

Trafficking in a dangerous drug, contrary to section 4 (1)(a) and (3) of the Dangerous Drugs Ordinance, Cap. 134

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

Particulars of Offence

Mo and Koo on 23 April 2016, at Room 1, First floor, 14 Tung Chau Street, Mongkok in Hong Kong unlawfully trafficked in dangerous drugs, namely 28 grams of a crystalline solid containing 27 grams of methamphetamine hydrochloride.

Your client has instructed you to seek bail from the magistrate. He intends to plead not guilty to both charges.

Questions:

- (1) **What factors will the magistrate consider in determining whether to grant him bail? (5 marks)**
- (2) Your client wants to know whether his case could be tried in the magistrates' court or would have to be tried in a higher court. **Advise him of the factors which will determine venue. (7 marks)**
- (3) Your client has asked you if there would be any benefit to him in telling the police more information about the master mind in the conspiracy "Lo Sun". **Advise him. (7 marks)**
- (4) You secured bail for your client and he is so impressed he wants you to also represent the second defendant Koo, who is his good friend. **What factors should you consider before agreeing to represent both accused in this case? (6 marks)**

[Section 4 of Dangerous Drugs Ordinance, Cap. 134 is attached in the Appendix at the back of the Test Paper.]

[25 marks in total]

Question 3 (25 marks)

You are a newly admitted solicitor in the firm of PQR Solicitors LLP. Your firm recently acted for Mrs. Muriel LAM Suet Oi ("Mrs. Lam") in the purchase of Flat Z, Block 99, Ping Gardens, Skytown, New Territories (the "flat"). Mrs. Lam purchased the flat with vacant possession for herself, her husband, two children and helper to live in. Mrs. Lam has now come to see you about a dispute with MDL Ltd. ("MDL"), the contractor she appointed to redecorate the flat before moving in. She instructs you that she signed a written contract with MDL to completely redecorate the flat for an agreed price of HK\$1 million all-inclusive (the "contract"). One of the items of work specifically set out in the contract was removal of the 30-year-old floor tiles throughout the flat and replacement with new "Santa Fe" tiles imported from Spain.

After the renovation works were completed, Mrs. Lam discovered that the old tiles had not been removed, and instead the new ones had simply been cemented on top. As a result, the space between floor and ceiling was reduced by 5 cm throughout the flat. Mrs. Lam instructs you that Mr. Poon of MDL later told her that this mistake was the fault of one of MDL's subcontractors; further that MDL would not rectify the mistake as in Mr. Poon's view the reduced space between floor and ceiling was nothing to worry about.

Mrs. Lam engaged another contractor, at her own expense, to dig up both the old and new tiles, and re-lay "Santa Fe" tiles. This cost HK\$300,000 and took 3 weeks. Mrs. Lam had to delay moving into the flat while this rectification work was being done, and had to pay HK\$25,000 for rent of a serviced apartment to live in during that time.

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

Mrs. Lam refused to pay the full HK\$1 million contract price to MDL. However, she did tender a cheque to MDL for HK\$675,000, being the contract price less (1) the cost of re-doing the tiling, and (2) the amount she paid to rent the serviced apartment. MDL refused to accept the tender of HK\$675,000 and has now issued a writ against Mrs. Lam claiming the whole contract price of HK\$1,000,000. The writ is indorsed with a Statement of Claim which reads as follows:

1. The plaintiff is a company incorporated in the British Virgin Islands.
2. The defendant is the registered owner of Flat Z, Block 99, Ping Gardens, Skytown, New Territories.
3. By contract in writing dated 31 August 2017 the defendant agreed to pay HK\$1 million to the plaintiff to renovate the said flat.
4. The plaintiff duly completed the renovation works under the contract and issued Invoice No. R72722 dated 14 October 2017 to the defendant for the agreed price of HK\$1 million.
5. The defendant has wrongfully failed or refused to pay the agreed price of HK\$1 million under the said invoice.

AND THE PLAINTIFF CLAIMS:

- (a) judgment against the defendant in the amount of HK\$1 million
- (b) interest
- (c) costs.

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

The Statement of Claim is signed by MDL's solicitors, and is duly verified by a statement of truth signed by Mr. Poon on behalf of MDL.

Your firm has advised Mrs. Lam that she should not be liable for more than HK\$675,000; that she has a partial defence as to HK\$325,000 which could be pleaded as a set-off or counterclaim; alternatively that she could rely on the defence of tender before action based on the cheque for HK\$675,000 which MDL refused to accept.

Question:

Draft Mrs. Lam's Defence, or Defence and Counterclaim, whichever you consider appropriate, based on Mrs. Lam's instructions as set out in the question. You may, if you consider it helpful, include notes to explain your drafting approach. There is no need to set out the heading to the action.

(25 marks)

[25 marks in total]

Question 4 (25 marks)

You act for Monsieur Luigi (Hong Kong) Limited ("Monsieur Luigi"), the Hong Kong subsidiary of the luxury French perfume house. Monsieur Luigi has recently discovered that a counterfeit version of its exclusive perfume "Kiss d'Amour" is being sold by Joe's House of Scent, a discount cosmetics shop in Kowloon. Genuine "Kiss d'Amour" retails for HK\$2,500 a bottle, but Joe's House of Scent is selling the counterfeit version for HK\$39.99. Monsieur Luigi has brought an action in the High Court against the sole proprietor of the shop, Joe Ho ("Joe"), alleging trademark infringement and passing-off. Joe is defending the claims through his solicitors, Nip & Tuck. Joe's defence is that he was sold the perfume by his supplier in Mainland China, and had no reason to believe it was counterfeit. He does not name the supplier. Pleadings have closed and the parties have just exchanged Lists of Documents under the Rules of the High Court Order 24 rule 2.

Questions:

- (1) Joe's List of Documents contains the following items which Nip & Tuck are not proposing to disclose on discovery:
 - (a) In Schedule 2: "2016 perfume sales ledger, passed to Nip & Tuck for litigation purposes";
 - (b) In Schedule 1 Part II: "Note to liability insurers on outstanding claims, for purposes of policy renewal"; and
 - (c) Also in Schedule 1 Part II: "Report obtained by Nip & Tuck from the Chemistry Department of Hong Kong University on the chemical analysis of "Kiss d'Amour"". The same report was mentioned by Joe in his recently-served Defence.

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

You believe these documents may contain materials which would be useful to Monsieur Luigi's case. **Can you require Joe or Nip & Tuck to disclose them, and if so, on what basis? What application(s) would you have to make, and what would you need in order to make it/them?**

(6 marks)

- (2)** Monsieur Luigi is very keen to discover well before the trial who is supplying Joe with the counterfeit perfume. **What action could you take to force Joe to disclose that information now? Prepare a note in bullet-point form of the submissions you would make to the Court in support of your application. (You are not required to address the purely procedural aspects of making the application.)**

(12 marks)

- (3)** You have now discovered that the source from whom Joe's House of Scent is buying the counterfeit perfume is Wuhan Industrial Fragrances Limited ("WHIF"), a company incorporated and operating in Mainland China. Monsieur Luigi has instructed you to join WHIF into the proceedings as a defendant. **What application(s) will you need to make, and what will you need to show?**

(7 marks)

[25 marks in total]

Question 5 (25 marks)

- (1) You are preparing for the Pre-Trial Review of a High Court action where you act for the Plaintiff, and you are concerned that all your client's evidence should be in good order. You have a number of problem items to resolve:

Questions:

- (a) Mrs. Maisie Leung's factual evidence is important for the Plaintiff's case. She has given you a witness statement, which has been disclosed to the Defendant, but she is now reluctant to come to court to give evidence. **What necessary steps would you take to protect your client's position?**

(4 marks)

- (b) Professor Mark Lam's factual evidence is also important. He too has given you a full witness statement, which has been disclosed to the Defendant, but now he has been posted by his employer to Los Angeles, and has indicated that his employer will not agree to release him to attend trial or to take part in a video link. **What necessary steps would you take to protect your client's position?**

(4 marks)

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

(c) Mr. Stephen Liu is one of the Plaintiff's witnesses. He has in his possession a number of documents which will be important for the Plaintiff's case, but he has declined to disclose them to the Plaintiff on the grounds that he owes the Defendant a duty of confidentiality in respect of the documents. You have served him with a subpoena duces tecum. However, you would very much like to be able to show the documents to the Plaintiff's counsel and expert witness before the trial starts. **How might you achieve that?**

(4 marks)

(2) You have just discovered that 30 minutes ago your trainee solicitor by accident sent a bundle containing your confidential instructions to the Plaintiff's barrister and the barrister's opinions on liability to the solicitors for the Defendants. **Draft a suitable letter to the Defendant's solicitors for the purposes of protecting your client's interests.**

(13 marks)

[25 marks in total]

END OF TEST PAPER

4. Trafficking in dangerous drug

- (1) Save under and in accordance with this Ordinance or a licence granted by the Director hereunder, no person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Hong Kong—
 - (a) traffic in a dangerous drug;
 - (b) offer to traffic in a dangerous drug or in a substance he believes to be a dangerous drug; or
 - (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug or in a substance he believes to be a dangerous drug. (*Amended 37 of 1980 s. 2*)
- (2) Subsection (1) shall apply whether or not the dangerous drug is in Hong Kong or is to be imported into Hong Kong or is ascertained, appropriated or in existence.
- (3) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence and shall be liable—
 - (a) on conviction on indictment, to a fine of \$5,000,000 and to imprisonment for life; and
 - (b) on summary conviction, to a fine of \$500,000 and to imprisonment for 3 years. (*Amended 43 of 1974 s. 2*)
- (4) This section does not apply to—
 - (a) a preparation specified in Part II of the First Schedule; or
 - (b) a dangerous drug which is in transit and—
 - (i) is in course of transit from a country from which it may lawfully be exported to another country into which it may lawfully be imported; and
 - (ii) was exported from a country which is a party to the Conventions and is accompanied by a valid export authorization or diversion certificate, as the case may be. (*Replaced 7 of 1984 s. 2*)