

**THE LAW SOCIETY OF HONG KONG**  
**OVERSEAS LAWYERS QUALIFICATION EXAMINATION**  
**2020 SUPPLEMENTARY INFORMATION PACKAGE**

**HEAD II: CIVIL AND CRIMINAL PROCEDURE**

**Contents**

- 1. Standards, Syllabus and Materials**
- 2. Examiners' Comments on the 2017, 2018 and 2019 Examinations**
- 3. Past Examination Papers (2017 to 2019)**

**Important: The test paper for Head II Civil and Criminal Procedure:**

- 1. is open book. Candidates may bring in and refer to any book, document or other written material**
- 2. has a duration of 3½ hours**
- 3. has no specific reading time allocated**
- 4. contains FIVE questions. Candidates should answer any FOUR questions only.**



# **1. Standards, Syllabus and Materials**



# **Overseas Lawyers Qualification Examination**

## **HEAD II: CIVIL AND CRIMINAL PROCEDURE**

### **Standards, Syllabus and Materials**

#### **A. CIVIL PROCEDURE**

##### **STANDARDS**

Candidates will be expected:-

- (i) to be familiar with causes of action arising out of the contract and tort sections of Head V: Principles of Common Law;
- (ii) to demonstrate an ability to draft simple pleadings, affidavits and letters of advice; and
- (iii) to demonstrate a knowledge of and an ability to apply the rules of practice and procedure as set out in the syllabus.

The test paper for this Head of the Examination is set at the standard expected of a newly qualified (day one) solicitor in Hong Kong who has completed a law degree (or its equivalent), the professional training course (PCLL) and a two year traineeship prior to admission.

##### **SYLLABUS**

#### **1. Structure of Hong Kong's Civil Courts System**

- Court of Final Appeal
- Court of Appeal
- Court of First Instance of the High Court
- District Court
- jurisdiction of the courts, including supervisory jurisdiction
- sources of civil procedure: Ordinances, Rules of Court, Practice Directions

#### **2. Pre-action Considerations**

- the cause of action
- the parties to the action
- time limits
- the merits
- costs only proceedings
- financial considerations including legal aid

#### **3. Underlying objectives of the High Court and District Court Rules**

- the underlying objectives

- case management powers
- use of alternative dispute resolution procedures such as mediation

**4. Commencement and Service of Proceedings**

- types of originating process
- preparing and issuing originating process
- validity and renewal of writs
- modes of service
- acknowledgement of service and intention to defend
- applications to serve out of the jurisdiction

**5. Pleadings and Particulars**

- the function of pleadings
- Statement of Claim
- Defence
- Counterclaim and/or Set Off
- Reply to Defence and Defence to Counterclaim
- amendments to writ and pleadings
- Further and Better Particulars
- Third party proceedings

**6. Interlocutory Matters**

- striking out and staying
- security for costs
- interim payment
- judgment in default and summary judgment
- discovery and inspection of documents
- interrogatories
- exchange of witnesses' statements
- orders for exchanged statements to stand as evidence in chief at trial
- experts' reports
- joinder of parties
- contribution notices
- case management summons, case management conference and pre-trial review
- case management timetable

**7. Pre-emptive remedies including:**

- simple interlocutory injunctions
- prohibition orders

**8. Preparations for Trial and Trial**

- checklist for hearing
- setting down
- preparing and lodging documents for trial
- subpoenas
- conduct of the trial

**9. Termination and Compromise**

- without prejudice negotiations
- Calderbank offers
- sanctioned offers and sanctioned payments
- withdrawal and discontinuance
- simple settlement agreements
- consent orders and judgments

**10. Enforcement of Judgments**

- oral examination
- execution against goods
- charging orders
- injunctions and prohibition orders in aid of enforcement
- garnishee proceedings
- winding up and bankruptcy (N.B. in so far as this is relevant to the enforcement of judgments)

**11. Costs**

- bases and scales
- costs between litigants and between solicitor and client
- wasted costs
- security for costs
- taxed costs and fixed costs
- discretion of the Court
- costs on interlocutory applications
- summary assessment of costs

**12. Rights of Appeal**

- setting aside a judgment in default
- interlocutory appeals
- appealing a judgment
- appeals to the Court of Appeal
- appeals to the Court of Final Appeal (s.22 CFA Ordinance)

**MATERIALS**

**A sound knowledge of the following Ordinances and other materials cited is essential to any understanding of civil procedure.**

- Court of Final Appeal Ordinance (Cap 484)
- High Court Ordinance (Cap 4)
- Rules of the High Court
- District Court Ordinance (Cap 336)
- Rules of the District Court
- Practice Directions
- authorities

## Hong Kong Texts on Civil Procedure

Candidates should note that although Hong Kong's civil procedure was modelled upon the civil procedure of England and Wales, procedural reforms in England and Wales have not been adopted in Hong Kong, but rather Hong Kong has implemented its own civil justice reforms. Reference must therefore be made to Hong Kong texts and materials.

Candidates should also note that Hong Kong Cases can be accessed through the Hong Kong Judiciary web site: <http://legalref.judiciary.hk/lrs/common/ju/judgment.jsp>.

Similarly, much useful Hong Kong material can be found on the Hong Kong Legal Information Institute web site: [www.hklii.org](http://www.hklii.org).

### Main Texts

- 'Hong Kong Civil Procedure 2020 - The Hong Kong White Book', Sweet & Maxwell, (ISBN 978 962 661 498 3)
- 'A Guide to Civil Procedure in Hong Kong', 6<sup>th</sup> Edition, LexisNexis, *Wilkinson, Cheung & Meggitt* (ISBN 978 988 838 996 4)
- 'Hong Kong Civil Court Practice', Desk Edition 2019, LexisNexis, *W S Clarke* (978 988 847 789 0)

The following materials are useful for reference:

- 'Hong Kong District Court Practice', 4<sup>th</sup> Edition, LexisNexis, *Lo, P.Y.* (ISBN 978 988 847 763 0)
- 'Civil Procedure in Hong Kong: A Guide to the Main Principles', 4<sup>th</sup> Edition (2017), Sweet & Maxwell, *Dave Lau* (ISBN 978 962 661 971 1)
- 'Civil Litigation in Hong Kong', 5<sup>th</sup> Edition (2017), Sweet & Maxwell, *Allan Leung & Douglas Clark* (ISBN 978 962 661 885 1)

**Candidates must ensure they are using the latest editions of texts and up to date versions of Ordinances.**



## **B. CRIMINAL PROCEDURE**

### **STANDARDS**

Candidates will be expected to demonstrate a knowledge of and an ability to apply the rules of practice and procedure as set out in the syllabus.

The test paper for this Head of the Examination is set at the standard expected of a newly qualified (day one) solicitor in Hong Kong who has completed a law degree (or its equivalent), the professional training course (PCLL) and a two year traineeship prior to admission.

### **SYLLABUS**

- 1. Hong Kong's Criminal Courts**
  - Court of Final Appeal (in outline only)
  - Court of Appeal of the High Court
  - Court of First Instance of the High Court
  - District Court
  - The Magistrate's Court
  - The Juvenile Court
  
- 2. Criminal Procedure in Hong Kong**
  - The Role of the Judge
  - The Role of the Jury
  - Police Powers in Hong Kong
  - The Classification of Offences
  
- 3. Commencement of Proceedings**
  - Prosecuting authorities and the role of the Secretary for Justice
  - Arrest, Detention and Seizure of Property, Arrest and False Imprisonment
  - Questioning of suspects and obtaining statements
  - Receiving instructions to represent a client
  - Identification parades and attending the client in custody
  - Charging
  - Bailing
  - Proceeding by way of Summons
  - Service of Process and compelling attendance at court
  
- 4. From Charging to Trial**
  - Summonses, Charges and Indictments
  - Duplicity
  - Joinder of Offences and Offenders
  - Severance and Separate Trials
  - The Prosecution's Duty to Disclose Unused Materials
  - Alibi Notices and Expert Evidence

- 5. Procedure in the Magistrates' Court**
  - Applications for Bail
  - The Plea before the Magistrate
  - The Trial before the Magistrate
  - Amending Charges and Summonses, s 27 of the Magistrates Ordinance
  - Sentencing Powers
  - Transferring to and from the District Court
  - Committals to the Court of First Instance of the High Court
  
- 6. Procedure in the District Court**
  - From Transfer to Trial
  - Trial in the District Court
  - Sentencing Powers
  
- 7. Particular Problems During Trials**
  - Admissibility of Caution Statements: the Voir Dire and the Alternative Procedure
  - Objecting to the Information, Charge or Indictment
  - The Duty and Responsibility to the Court and to the Client
  - Vulnerable Witnesses and Video Linking and Pre-Trial Statements
  
- 8. Verdict and Sentencing**
  - Alternative verdicts
  - Aims and objectives of sentencing
  - Available sentences
  - Sentencing guidelines
  
- 9. Challenging and Appealing the Decision**
  - Appealing from Magistrates
  - The Review powers of Magistrates
  - Appealing from the District Court
  - Reviewing Sentence
  - Appeals generally
  
- 10. Costs and Finance**
  - Powers of Courts to Award Costs and Against Whom
  - Compensation Orders and Restitution Orders
  - Forfeiture Proceedings
  - Duty Lawyer Scheme
  - Legal Aid

## **MATERIALS**

**Candidates should note that although criminal procedure in Hong Kong is modelled upon the procedure in England and Wales, there are differences between the two procedures. Reference must be made to Hong Kong texts and materials.**

**The remarks about the Judiciary web site and the Hong Kong Legal Information Institute web site made in the civil procedure section of this syllabus are equally apposite to criminal procedure.**

**A sound knowledge of the following Ordinances and other materials cited is essential to any understanding of criminal procedure.**

### **Ordinances and sub-legislations**

- Criminal Procedure Ordinance, Cap. 221
  - Sub-legislation:
    - Criminal Appeal Rules, Cap. 221A
    - Indictment Rules, Cap. 221C
    - Legal Aid in Criminal Cases Rules, Cap. 221D
    - Criminal Procedure (Reference of Questions of Law) Rules, Cap. 221E
    - Criminal Procedure (Appeal Against Discharge) Rules, Cap. 221F
    - Criminal Procedure (Applications under Section 16) Rules, Cap. 221G
    - Criminal Procedure (Representation) Rules, Cap. 221H
    - Criminal Procedure (Record of Bail Proceedings), Cap. 221I
    - Live Television Link and Video Recorded Evidence, Cap. 221J
    - Application for Dismissal of Charges Contained in a Notice of Transfer, Cap. 221K
- Juvenile Offenders Ordinance, Cap. 226
- Magistrates Ordinance, Cap. 227
- District Court Ordinance, Cap. 336
- Costs in Criminal Cases Ordinance, Cap. 492
- Police Force Ordinance, Cap. 232
- Detention Centre Ordinance, Cap. 239
- Drug Addiction Treatment Centres Ordinance, Cap. 244
- Training Centres Ordinance, Cap. 280
- Probation of Offenders Ordinance, Cap. 298
- Community Service Orders Ordinance, Cap. 378
- Rehabilitation of Offenders Ordinance, Cap. 297

### **Other Materials**

- The (Hong Kong) Rules and Directions for the Questioning of Suspects and the Taking of Statements (Hong Kong Government)
- Notice to Suspect for Attendance at Identification Parade (Pol. 60) Hong Kong Police Force
- The Bar Council, Code of Conduct of the Bar of Hong Kong Special Administrative Region (Hong Kong Bar Association)
- The Hong Kong Solicitors' Guide to Professional Conduct, The Law Society of Hong Kong (Paragraphs relating to the Conduct of Litigation)
- Practice Directions
- Solicitor's Practice Rules relating to criminal litigation, esp. Rule 5D

## **Texts**

- *Knight, C. and Upham, A. R.*, 'Criminal Litigation in Hong Kong', 3<sup>rd</sup> Edition, Sweet & Maxwell Hong Kong (ISBN 978 962 661 421 1)
- *Amanda Whitfort*, 'Criminal Procedure in Hong Kong: A Guide for Students and Practitioners', 2<sup>nd</sup> Edition, LexisNexis (ISBN 978 988 8146 69 7)

## **For Reference**

- 'Archbold Hong Kong 2020', Sweet & Maxwell Hong Kong (ISBN 978 962 661 527 0)
- *Cross, I.G. and Chung, P.W.S.* 'Sentencing in Hong Kong', 8<sup>th</sup> Edition, LexisNexis, (ISBN 978 988 847 667 1)

**Candidates must ensure they are using the latest editions of texts and up to date versions of Ordinances.**

## **RECOMMENDATION**

Candidates may find it useful to spend half a day in the High Court, half a day in the District Court and half a day in the Magistrates' Court.

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## **2. Examiners' Comments on the 2017, 2018 and 2019 Examinations**



## **Examiners' Comments on the 2017 Examination**

### **Head II: Civil & Criminal Procedure**

#### The Overall Performance of Candidates

1. The number of candidates this year was 48. Of those 48, 31 passed Head II, resulting in a pass rate of 65% (slightly lower than last year's pass rate of 69%).

#### 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

6. Questions 1 and 2 addressed issues of criminal procedure.

### **Question 1**

7. Question 1 concerned indecent assault, choice of court, discount for a guilty plea, screened witness testimony, and prosecution appeals against sentence. It had three parts on which marks were awarded.
8. This question, considered by the examiners to be an easy one, was very poorly answered. A most serious omission was the widespread failure to mention/apply correctly the sentencing discount guidelines set down in *HKSAR v Ngo Van Nam* and *HKSAR v Abdou Maikido Abdoukarim* [2016] 5 HKLRD 1. Many candidates also failed to recognise that the tariff for indecent assault would likely place the case in the jurisdiction of the Magistrates' Court. Accordingly, they did not discuss the prosecution's right to seek review of the sentence under section 104 or appeal, by way of case stated, under section 105 of the Magistrates Ordinance, Cap 227. Where the possibility of an appeal to the Court of First Instance was discussed, many candidates confused the means of appeal by way of case stated under section 105, which is open to both the prosecution and defence, with the right of appeal under section 113, which is open to the defence only, under the Magistrates' Ordinance, Cap. 227. A large number of candidates also overlooked review of sentence in the Court of Appeal, under section 81A of the Criminal Procedure Ordinance, Cap 221.
9. A startling number of candidates did not recognise that the offence was an excepted one under Schedule 3 to the Criminal Procedure Ordinance, Cap 221. Many candidates also confused the means of giving evidence by a vulnerable witness, by way of live television link, under Part IIIA of the Criminal Procedure Ordinance, Cap. 221, with the use of screens in giving evidence in sexual offence cases in magistrates' courts under Practice Direction 9.10.

### **Question 2**

10. Question 2 concerned drug trafficking, bail, choice of court, the merits of a defendant assisting the Police, and the principles of representing multiple defendants. The question had four parts.
11. Part 1 concerned the factors that a magistrate would take into account when considering whether to grant or refuse bail where the offence was a serious drug trafficking offence. In general terms this part was adequately answered, and the relevant provisions of Cap 221 were mentioned. The fact that the defendant was looking after his disabled mother was sometimes missed.
12. In Part 2, some candidates did not read beyond the fact that the offence carried a possible sentence of life imprisonment. Tariff was often not mentioned as the prime basis for the prosecution determining venue. In some cases, candidates failed to identify that it was for the prosecution to choose venue.



13. In Part 3, the benefit, particularly in regard to mitigating sentence of giving assistance, was not always identified. Some candidates seemed to think it was for the police to decide whether to accept the defendant as a prosecution witness, although the initial approach might be to the police.
14. In Part 4, most candidates identified the possible conflict in representing both defendants.
15. Questions 3, 4, and 5 addressed issues of civil procedure. The questions raised issues which could well land on the desk of a newly-admitted solicitor. The answers being sought were pitched at the level of sophistication to be expected of a lawyer at that stage, which in some cases was simply to spot the issue being raised. In many cases we were looking for common sense application of the law, rather than just a recitation of black letter rules.

### **Question 3**

16. Question 3 was a single task worth 25 marks – the drafting of a Defence or Defence and Counterclaim. Issues raised included set-off, counterclaim, the defence of tender, and the formal aspects of drafting a pleading. This question was well answered, as reflected in the high pass rate.

### **Question 4**

17. Question 4 was split into 3 parts: part 1 – on the limits of discoverability – worth 6 marks; part 2 – on pre-action disclosure and the Norwich Pharmacal jurisdiction – worth 12 marks; and part 3 – on joinder and service out – worth 7 marks. Overall the standard of answer was reasonable, although a surprisingly small group identified the Norwich Pharmacal jurisdiction.

### **Question 5**

18. Question 5 was split into 4 parts: part 1(a) – on subpoenas *ad testificandum* – worth 4 marks; part 1(b) – on adducing hearsay evidence under Section 47A Evidence Ordinance – worth 4 marks; part 1(c) – about *Khanna* applications – worth 4 marks; and part 2 – on accidental disclosure of privileged materials – worth 13 marks. Overall the standard of answer was poor. Few candidates had a working familiarity with the practicalities of assembling evidence for trial. Very few were aware of the availability of a *Khanna* application, which may be forgivable, but almost no one was aware of the possibility of adducing hearsay evidence under Section 47A of the Evidence Ordinance, which is a serious lacuna.
19. The markers are aware from previous years that some candidates appear to be copying from pre-prepared answers, as evidenced by the fact that similar wording was seen in different candidates' scripts. This appears to indicate that the pre-prepared answers were not prepared by the candidates individually, but provided by external suppliers.

20. The use of commercially reproduced answers in this way, whilst not improper under the current rules, might be thought to subvert the purpose of the examination. In particular it undermines the examiners' attempt to reposition the Head II paper as a test of the ability to apply legal knowledge in order to give practical advice to a client, and away from mere recitation of the White Book (or any other text). Consideration is invited as to whether there is a case for limiting the permitted "open books" in this head to textbooks on the approved reading list. The alternative would seem to be an effort by the examiners to choose more *recherché* topics for which commercially reproduced answers are unlikely to have been prepared.

March 2018

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## **Examiners' Comments on the 2018 Examination**

### **Head II: Civil & Criminal Procedure**

#### The Overall Performance of Candidates

1. The number of candidates this year was 46. Of those 46, 20 passed Head II, resulting in a pass rate of 43% (lower than last year's pass rate of 65%).

#### 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 addressed issues of criminal procedure.

#### **Question 1**

7. Some candidates read the whole questions and answered Parts (1) to (3) based on the new facts for Part (4) only. For next year consideration should be given to making it clearer which facts apply to which questions. Some candidates totally missed answering Part (5).
8. Part (1) was generally well answered, but some candidates mixed up the facts from Part (4) and used the new facts to answer Parts (1) to (3). Marks were not deducted from these scripts for over-reading the facts. Parts (2) and (3) were short questions that carried a small number of marks. In Part (3) most candidates got 2/3 marks by simply reciting the provisions at the Court of Final Appeal Ordinance. Part (4) required analysis of new facts: some candidates answered well and some missed the question altogether. It was disappointing in that some candidates missed answering Part (5) altogether, and those that did answer it did so badly. They did not discuss the Prosecution's positive duty to disclose unused materials, and the burden of proof.

#### **Question 2**

9. This question concerned matters including juvenile offenders, choice of appropriate trial forum, bail application and review, competence and compellability of a defendant's spouse to testify for the prosecution, verdict of the trial court on conviction of an offence not charged, and sentence. As evidenced by the low pass rate, most candidates lacked the standard of knowledge of those areas expected of them.

### *Civil Procedure*

10. Questions 3, 4, and 5 addressed issues of civil procedure. The questions raised issues which could well land on the desk of a newly-admitted solicitor. The answers being sought were pitched at the level of sophistication to be expected of a lawyer at that stage, which in some cases was simply to spot the issue being raised. In many cases we were looking for common sense application of the law, rather than just a recitation of black letter rules.

### **Question 3**

11. Question 3 was split into 2 parts: part 1 – on service of process and default judgment – worth 21 marks; and part 2 – on setting aside default judgment – worth 4 marks. Overall the standard of answer was poor, as reflected in the low pass mark.

### **Question 4**

12. Question 4 consisted of two parts. The first part, worth 15 marks, required candidates to draft a complete Statement of Claim in a relatively simple commercial dispute over defective goods delivered after the full purchase price had been paid. The essential facts were set out in the question, and candidates were told they could assume any additional facts. Candidates had to choose the appropriate court. It was disappointing to see that a significant number of candidates did not appear to understand clearly the differences between "High Court", "Court of First Instance" and "District Court", sometimes issuing the proceedings in one, and claiming relief under the statute of another. Candidates were also required to name the parties, and most were able to do so correctly. Unfortunately some used short form names in the heading (unacceptable) and some went so far as to name an additional defendant which was peripherally involved, but against which no relief was (or could be) claimed.
13. The second part, worth 10 marks, asked candidates to advise their client (the plaintiff) on a sanctioned payment which had been made by the defendant. A disappointingly high number of candidates appeared to base their answers on pre-prepared texts. In result their answers sometimes were based on client itself having made a sanctioned offer (not the given facts), meaning the advice to client was essentially useless.
14. Subject to those comments, the overall standard was reasonably good and most candidates were awarded a passing mark.

### **Question 5**

15. Question 5 concerned an emergency injunction, and included an issue of whether to move the court ex parte or ex parte on notice. The preponderance of the marks (17) were for drafting bullet point submissions. Overall the standard of answer was poor. Not many candidates had a working familiarity with preparing an emergency injunction application, including the documents which the judge would expect to see. Commonplace issues such as the need for full and frank disclosure were absent from many answers.

March 2019

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## **Examiners' Comments on the 2019 Examination**

### **Head II: Civil & Criminal Procedure**

#### The Overall Performance of Candidates

1. The number of candidates this year was 59. Of those 59, 18 passed Head II, resulting in a pass rate of 31%. This continues a steep downward trend from 43% last year and 65% in 2017. This reflects a deterioration in the overall quality of answers, which this year was readily observable.

#### 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 addressed issues of criminal procedure. The overall pass rate for Criminal Procedure was 22%, compared to 37% and 66.7% in the past 2 years. The pass rate was extremely disappointing and reflected what appeared to be a failure to adequately prepare, with scant/point form, incorrect or equivocal answers provided by many candidates. The questions were not any more difficult than those posed in recent years and covered advice before plea, bail applications, challenging the choice of charges and appropriate sentencing/appeal options.

#### **Question 1 (pass rate 29%)**

7. This question related to an offence of ‘up-skirting’. A few candidates spotted the effect of the cases of *HKSAR v Ngo Van Nam* and *HKSAR v Abdou Maikido Abdoukarim* on the granting of credit for guilty pleas at different stages and advised the client to seek an adjournment of the case before taking any plea. However, in order to correctly advise the client on his plea it was necessary to take note of the recent Court of Final Appeal decision: *SJ v Cheng*



*Ka Yee and Ors*, a case which most candidates were not aware of. Failing to understand that the charges under section 161(1)(c) of the Crimes Ordinance could not be sustained, candidates advised the client to plead guilty early to gain the maximum discount and overlooked the primary challenge to be made against his conviction. Whilst it is conceivable that candidates may not be keeping up with the latest CFA decisions, a second appeal point relating to the admissibility of the confession, was also widely overlooked. The questions concerning sentencing options and bail conditions were answered more adequately.

### **Question 2 (pass rate 28%)**

8. This question related to a drug trafficking charge. Most candidates failed to explore, in any depth, the possibilities available to the client in negotiating with the prosecution on the charges and in seeking a Newton Inquiry. A large number of candidates did not recognize that section 81A of the Criminal Procedure Ordinance is used by the prosecution to review a sentence and a disturbing number suggested the client might use section 83G to appeal against his own (lenient) sentence.

### ***Civil Procedure***

9. Questions 3, 4, and 5 addressed issues of civil procedure. The questions raised issues which could well land on the desk of a newly-admitted solicitor. The answers being sought were pitched at the level of sophistication to be expected of a lawyer at that stage, which in some cases was simply to spot the issue being raised. In many cases common sense application of the law, rather than just a recitation of black letter rules, was sought. The overall pass rate for Civil Procedure was 42%, somewhat up from last year at 37%. However, this average figure masks big differences in the marks for the three individual questions – 84, 30 and 34% respectively.

### **Question 3 (pass rate 84%)**

10. This question consisted of two parts, arising from a potential personal injury claim.
11. The first part was about limitation periods. The overall performance was good. Most candidates identified correctly the 3-year limitation period and the fact that it had expired. Not so many referred to the relevant provisions of the Limitation Ordinance whereby the 3-year period for personal injury claims may be disapplied by the court. Few candidates appeared to be aware of the fact that an expired limitation period is not a bar to commencement of proceedings, but a defence which must be pleaded.
12. The second part asked candidates to choose the appropriate court, name the parties and draft a general indorsement of claim. Performance on this part of the question was adequate, but unfortunately, there were many errors, for example:
  - Only one candidate followed the relevant practice direction and included the required information at the head of the writ stating that the claim was monetary only, and based on tort (or contract). Without this information, the court registry will not accept a writ for filing.
  - Almost every candidate specified that the claim was for HK\$750,000, which was the quantum given in counsel's advice. This showed candidates were probably not aware of the difference between general and special damages. It was inappropriate to quantify the former at this stage (the amount being up to the court to assess, and in PI cases a matter for a separate document, the statement of damages). By doing so candidates could have been limiting the amount which might eventually be awarded to the client.

- Most candidates appended a Statement of Truth. This is not necessary with a general indorsement (which is technically not a pleading), but since it does no harm, candidates were not marked down for this error.
- Some candidates showed a lack of understanding of remedies. In a simple claim for monetary compensation several asked for a declaration!

#### **Question 4 (pass rate 30%)**

13. Question 4 concerned pre-action discovery, and consisted of two parts. In Part 1 candidates were asked when pre-action discovery is available and what the procedure is for getting it. Part 2 required candidates to prepare a bullet-point skeleton argument making the application. Although pre-action discovery is less used than some other litigation procedures, the subject-matter of the question was well-signposted, and the overall poor quality of the answers was therefore disappointing.

#### **Question 5 (pass rate 34%)**

14. Question 5 concerned summary judgment, and consisted of two parts. Part I asked candidates to consider the applicability of summary judgment to an overdue debt, a dishonoured cheque, and a non-overdue debt. Part 2 required candidates to prepare an affirmation or affidavit in support of an application for judgment on a dishonoured cheque. The standard of answer was again poor. On the overdue debt part, the primary issue was how the court deals with potential defences/cross-claims on a summary judgment application. Very few candidates made a serious attempt to answer that question. Similarly, of the 41 candidates who answered this question, not a single candidate identified that set-offs and cross-claims are not permitted to rebut summary judgment applications on a cheque.

March 2020



### **3. Past Examination Papers from 2017 to 2019**



**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*)

**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 19<sup>th</sup> 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)

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*(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**

**2019 OVERSEAS LAWYERS  
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND  
CRIMINAL PROCEDURE**

Wednesday, 6 November 2019





# **2019 Overseas Lawyers Qualification Examination**

## **Head II: Civil and Criminal Procedure**

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

At about 20:06 hours on 8 August 2019, a police officer on duty in uniform ("P") was patrolling at Wong Tai Sin MTR Station, Kowloon, Hong Kong and saw a male young person ("X") playing with a mobile phone alone at a location near Exit B. When X noticed that P was approaching, X immediately and nervously put the mobile phone into the left pocket of his trousers and attempted to flee. P stopped X and asked to see the mobile phone. P found that there were two 'upskirt' photographic images of women captured by the phone.

P immediately arrested X and cautioned him for suspected offences of 'upskirt' photography without the consent of the subject women.

Under caution, X initially remained silent. However, after P told him in a strict and threatening tone that there was no chance for him to avoid prison and that for his own benefit, he had better tell the truth, X admitted that that mobile phone belonged to him. He stated that he put his mobile phone under an unknown woman's skirt and took a photo of her secretly at about 19:00 hours on 7 August 2019 (i.e. one day earlier) at Mongkok MTR Station.

Under further caution, X further stated that due to great study pressure and stress, he had repeated the action and again put his mobile phone (i.e. the same phone) under another woman's skirt and secretly taken a photo of her at about 20:00 hours on 8 August 2019 at Wong Tai Sin MTR Station.

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

P seized X's mobile phone and took X to Wong Tai Sin Police Station for conducting further enquiries and investigation.

Inside Wong Tai Sin Police Station, a cautioned video-recorded interview was conducted with X by another police officer, Q. At the commencement of the interview, Q reminded X of what he had said, under caution, to P, at the MTR station and told him that he (X) had no choice but to repeat the same admissions for the video-recorded interview. X then repeated, on video, the same admissions he had made to P at the MTR station. Shortly after the video-recorded interview concluded, at around 23:30 hours on 8 August 2019, a house search of X's home situated in Homantin was conducted and a number of obscene photographs, found stored in his personal computer, were seized by the police.

X was detained overnight at Wong Tai Sin Police Station. He was later charged with two counts of "Obtaining access to computer with a view to dishonest gain for oneself or another, contrary to section 161(1)(c) of the Crimes Ordinance, Cap. 200, Laws of Hong Kong" in relation to the 'upskirt' photos found on his phone at the MTR station.

X is aged 24 and today is the day of his first court appearance at Court No.1 of Kowloon City Magistracy for plea. You are a Duty Lawyer who is instructed to represent X. X is the sole child of a decent middle-class family. He is pursuing a Bachelor of Laws degree (and is in his final year) at The University of Hong Kong. His father is a highly respected doctor and his mother the principal of a well-known secondary school. X's family are supportive of him.

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



## Questions:

- (1) **What would you advise X to do before plea is taken?** (6 marks)
- (2) X intends to plead not guilty to both charges. The prosecution have told you they would object to bail on the basis that there are potential further charge(s) to be laid for the obscene photographs stored in X's computer. You have instructions to apply for bail for X.
- (i) **What submissions would you make to secure bail?** (4 marks)
- (ii) **If the Magistrate refuses your bail application, what can X do?**  
(2 marks)
- (3) The trial has now concluded. X has been convicted of the two charges relating to the 'upskirt' photos in contravention of section 161(1)(c) of the Crimes Ordinance, Cap. 200. In convicting X, the magistrate relied on his admissions to the police, despite X challenging the admissibility of the admissions in a voir dire. **Advise X whether there are any grounds upon which he might appeal against these convictions.**  
(8 marks)
- (4) X was sentenced to 12 months' imprisonment for each charge, the sentences to run consecutively, resulting in a total of 24 months' imprisonment. No reports were called for prior to the sentence being passed. **Irrespective of any appeal against conviction, advise X whether there are any grounds upon which he should appeal against his sentence.**  
(5 marks)

**[25 marks in total]**

## Question 2 (25 marks)

In the early morning of 16 August 2019, Denis Fong, aged 35, a Hong Kong estate agent, was arrested by Hong Kong police while attempting to drive through the Lok Ma Chau control point at the border between Hong Kong and the Mainland in his car. He was intending to take a break from work, by visiting the Mainland and meeting up with friends for a couple of weeks.

The police involved had received a tipoff and searched both Denis and his car. The officer who conducted the search of Denis' person found, in his right trouser pocket, a packet containing 13 grammes of a white substance. The substance was later confirmed by the Government Chemist to be metamphetaime hydrochloride, commonly known as "ICE". The "ICE" had been placed into several small individual plastic packets.

Under caution, Denis told police that the drugs were all for his own consumption. He claimed that he had bought the total amount at a discounted price and the 13 grammes were intended to last him for his 2-week trip. The police did not believe the drugs were for his own use and later the same day Denis was charged with trafficking in dangerous drugs, contrary to s. 4(1)(a) and (3) of the Dangerous Drugs Ordinance (Cap. 134).

### Questions:

- (1) Concerned that trafficking in dangerous drugs is a much more serious charge than possession of dangerous drugs, Denis wants to challenge the charge laid. **Can he challenge the police's choice of charge? Advise him of any action he can take, before the trial commences, to have the charge against him reduced to one of possession of dangerous drugs.** (6 marks)

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

- (2) If Denis is unsuccessful in having the charge reduced and he decides to plead guilty to the charge of trafficking in dangerous drugs, can he still claim the drugs were for his own consumption? How could he bring evidence of this fact to the court's notice?**

**(6 marks)**

Assume that the charge is not reduced and Denis pleads guilty to trafficking in 13 grammes of "ICE". The court accepts, however, that Denis purchased all the "ICE" for his own use. Using a starting point of 18 months' imprisonment (the tariff for possession), the judge increased the sentence to 27 months to take into account the fact that Denis was caught taking the drugs over the border, then reduced the total of 27 months by one-third for the early guilty plea and arrived at a sentence of 18 months' imprisonment. The Judge justified his sentence by stating: "To do otherwise would ignore the reality of the situation, which is that there was no intention by the Defendant to supply others."

**Question:**

- (3) The Prosecution are not happy with the sentence passed on Denis. Can they challenge it? Identify the grounds for and procedures which should be used to challenge the sentence and the possible results of such a challenge.**

**(13marks)**

**[25 marks in total]**

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

Your firm represents Ms. Mavis Mo Pak Shuet ("Ms. Mo") in her personal injury claim resulting from a road accident which occurred in June 2016.

Ms. Mo was a passenger in a taxi which she flagged down in Central, asking the driver to take her home to Robinson Road. She is a 52-year-old housewife who had been shopping for a new dress to wear at the forthcoming celebration of her daughter's graduation from university.

During the journey Ms. Mo noticed that the taxi-driver had a bank of mobile telephones and other electronic devices in front of him. The driver was watching the devices, sending and receiving messages and talking animatedly. When the driver narrowly missed hitting a pedestrian, Ms. Mo scolded him.

A short time later, the taxi crashed into the back of a public light bus which had stopped to pick up a passenger. It was raining heavily at the time.

Ms. Mo had recently had an operation to remove a malignant mole on her shoulder. She found it painful to use a seatbelt. As a result she had pulled it in front of her during the journey but had not fastened it.

Ms. Mo was thrown forward in the accident. Her face hit a screen which was affixed into back of the headrest in front of her. She suffered cuts and bruises to the forehead. At the same time her false teeth were dislodged and she was so embarrassed that she left the taxi and hurried home on foot, without paying the taxi fare.

Several passengers in the back of the public light bus also suffered minor injuries.

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

Ms. Mo did not seek medical treatment. However, she was unable to attend her daughter's graduation party. She was simply too embarrassed to show her injured face in public.

The next day Ms. Mo saw a video of the accident in the online edition of the Pineapple Daily newspaper. It had apparently been taken from a camera mounted at the front of another public light bus which had been travelling immediately behind the taxi. From the video, she could see that the taxi's registration number was MX 234. The video also showed a brief interview with the taxi-driver who identified himself as Mr. Mak and complained about how difficult it is for taxi-drivers to make a living.

Later enquiries undertaken by your firm established that the registered owner of the taxi is ABC Taxi Limited, and that the driver was Mak Chung Shing, who had hired the taxi for that shift.

Mr. Mak is 46 years old and has worked as a taxi-driver for 25 years. He is married with 2 children and has lived in a public housing estate in Hung Hom, Kowloon since 1999. After the accident, he was convicted of careless driving, his 17<sup>th</sup> such conviction.

Your firm has been instructed by Ms. Mo to commence proceedings to claim compensation for the accident. You have obtained a medical report which confirms that there is a small permanent scar above Ms. Mo's left eyebrow. You have also obtained counsel's advice to the effect that Ms. Mo's damages should be around HK\$750,000 gross.

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

Ms. Mo claims that she tried to conceal her facial injury from her husband, for fear he would lose interest in her. However, she says, her husband later found a girlfriend in Dongguan, PRC. When Ms. Mo found out last month, she decided to take legal action.

**Questions:**

- (1) **Having regard to the provisions of the Limitation Ordinance (Cap. 347), are there any time issues which may arise in Ms. Mo's proposed action? Discuss.**

**(10 marks)**

- (2) **Draft a writ of summons to commence court proceedings on behalf of Ms. Mo, showing the complete heading (including the court, and the names of the parties) and a general indorsement of claim. You do not need to set out the purely formal parts of the prescribed form of writ. You may assume any facts not inconsistent with those set out above. You may add notes explaining any part of your draft.**

**(15 marks)**

**[25 marks in total]**

## Question 4 (25 marks)

### Facts

You act for 78-year-old Madam Wang ("Wang"), who has received a demand dated 30 June 2019 from her bank (the "Bank"). The Bank threatens High Court proceedings to obtain possession of her flat in Conduit Road, which she owns jointly with her son Kwan. The Bank says that on 11 November 2013 Kwan and Wang mortgaged the flat to the Bank to secure sums owed by Dominant Limited ("Dominant") to the Bank. Dominant is a Hong Kong-incorporated company of which Kwan is the sole director and shareholder, and he has guaranteed Dominant's borrowings to the Bank. The total amount now owed by Dominant and secured by the mortgage is HK\$8 million.

Wang remembers signing a document which she now understands was the mortgage, but says at the time she did not understand its effect. She has been totally reliant on Kwan to look after her affairs since her husband died in 2000, and simply did what he told her. She executed the mortgage at the Bank manager's office in the presence of the Bank manager, the Bank's solicitor and Kwan. The process only took about 5 minutes. No one present explained to her the risk of entering into the mortgage - that she might lose her home. She was not asked if she wanted independent legal advice. The Bank manager just said it was a standard form document and that she should sign it because her son had already done so and it was similar to other bank documents which she had signed for her son before. The document was in English, which Wang cannot speak. She was not given a copy.

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

To investigate this account, last week you asked the Bank to provide copies of:

- Any telephone or written communications between staff of the Bank discussing the mortgage;
- All attendance notes of meetings between Wang and the Bank between 2013 and 2018; and
- All practice manuals, internal guidance, procedures and written policies to be followed by the Bank's staff when attending the execution of mortgages.

The Bank has declined, saying that any such documents are not readily available because some will be stored in their back office and others have been converted into electronic form.

### **Questions:**

- (1) Draft a letter to Wang advising her how pre-action discovery of these materials may be obtainable at this stage, and outlining the procedure, including the consequences of the application failing.**

**(15 marks)**

- (2) Assuming you are the advocate on such an application, prepare in bullet point form a note of the submissions you will make to the court in support of your application.**

**(10 marks)**

**[25 marks in total]**



## **Question 5 (25 marks)**

You act for Fred's Fresh Fish Limited ("Fredco"), a Hong Kong company which supplies seafood to the catering industry, on terms which include 60 days' credit. One of the company's longstanding customers is Wallace Nip ("Wallace"), who runs a sole proprietorship business as the "Celestial Dynasty Fishball Company" ("Celestial"). However, Celestial has recently been extensively criticised in the press and on social media for allegedly adulterating its fishballs with sawdust, and the business is now in financial difficulties. Fredco has outstanding invoices totalling HK\$8,500,000 for sales of fish to Celestial, which have not been paid. All but HK\$1,000,000 of those invoices are past their 60-day credit period and are therefore now overdue. The remaining HK\$1,000,000 will be overdue in 45 days.

Last month Fred Lam ("Fred"), the Managing Director of Fredco, encountered Wallace by chance at the Happy Valley Racetrack ("Racetrack"), and he complained about the overdue account. Wallace, to pacify Fred, wrote out a cheque to Fredco for HK\$5,000,000, and promised that he would pay the rest soon. However, Wallace's bank dishonoured the cheque on presentation, and no further payment has been forthcoming. Instead, Wallace has recently sent Fred a letter making vague allegations that for several years now Fredco's fish supply has been unfit for human consumption and could not be used for making fishballs. No such allegation has ever been made before.

Such a large unpaid account has put a strain on Fredco's cashflow too. Fred has now instructed you to take action to recover the unpaid bills. He is convinced by Wallace's demeanour at the Racetrack that he has enough money to pay. Your instructions are to take whatever action will result in a money payment as quickly as possible.

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

**Questions:**

**(1) What litigation steps will you take to attempt to get a quick payment of the sums owed to Fredco? Discuss whether a different approach is appropriate (and if so, why) for:**

- (i) the HK\$5,000,000 covered by the dishonoured cheque;**
- (ii) the HK\$1,000,000 which is still within the 60-day credit period; and**
- (iii) the remaining HK\$2,500,000;**

**and what the possible outcomes from those approaches are.**

**(15 marks)**

**(2) Focusing on just the HK\$5,000,000, draft an appropriate supporting affidavit or affirmation for your proposed approach, including the headings showing the court and the names of the parties.**

**(10 marks)**

**[25 marks in total]**

**END OF TEST PAPER**