

## **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.

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