

PCLL Conversion Examination August 2007

Civil Procedure

Extracts from the Examiner's Report

The Standard and Format of the Examination

1. The examination was set to assess candidates who are seeking to apply for admission into the PCLL course from September 2008 onwards. As such the standard to be expected of the candidates was that they should have the basic knowledge of the rules of Civil Procedure in Hong Kong and the ability to apply those rules in simple problem solving exercises. As candidates have not yet completed their vocational training, they are not expected to be aware of the more extensive and advanced application of the Civil Procedure rules. Candidates were tested as if they have just completed or about to complete the Civil Procedure course in the 4-year LLB program in the Universities in Hong Kong. This is the standard that would be expected from students entering the PCLL course from September 2008 onwards.
2. When setting the examination, the examiners took into account the fact that most of the candidates would be undergoing their LLB / JD studies overseas and that the majority of the candidates would either not have completed their LLB /JD studies or have just completed the same. The examiners have also taken note of the fact that from September 2008 onwards, for admission into PCLL, students would have to demonstrate competence not only in Civil Procedure, but also in the other 10 Core Subjects. However, when marking the examination, examiners have taken into account the fact that at the time of the Civil Procedure examination, candidates might not have been sufficiently competent in all the other 10 Core Subjects.
3. The examination was open book.
4. The examination was divided into 2 parts, part A consisted of 5 short questions and part B consisted of 2 long questions. There was no element of choice and candidates were required to answer all questions. This would give candidates about 14 minutes to answer each short question and 50 minutes to answer each long question. In the examiners' opinion, candidates should have sufficient time to answer all questions as long as they are able to grasp the key issues in the questions.
5. The questions were designed to test the candidates' basic knowledge of the Civil Procedure rules in Hong Kong and the application of those rules in light of the given facts. The main difference is that the short questions focus on one distinct area of Civil Procedure whereas for the long questions, different areas of Civil Procedure should be covered in the answer
6. When marking the examination, the examiners were looking for
 - (i) The ability to identify the relevant legal and factual issues;

- (ii) The ability to apply the relevant legal principles to the given facts; and
 - (iii) The ability to explain the answers in a clear and coherent manner.
7. Candidates would be able to obtain a pass if they were able to identify the basic issues and apply the general principles in a sensible manner.

General Comments

8. The overall performance of the candidates was not satisfactory. It was apparent that a lot of the candidates have done very little preparation for the examination and many lacked the basic understanding of the rules. Many candidates were also weak in the application of the rules in a practical context.

Comments on the candidates' performance on each of the questions in the examination

Question 1

9. This question required candidates to calculate the deadline for filing an acknowledgment of service and the deadline for filing and service of a Defence. This would involve the interpretation and application of Order 12 rule 5(1) of the Rules of the High Court ("RHC"), Order 18 rule 2 RHC and Order 10 rule 1 RHC.
10. In answering part (a) of this question, the majority of the candidates failed to recognise that the date of service of the Writ was 20 July as they failed to appreciate that Order 10 rule 1(3)(a) did not apply because Bill had actual knowledge of the Writ.
11. In relation to part (b) of this question, many candidates failed to correctly interpret Order 18 rule 2. They simply stated that the Defence would be due 14 days after service of the Statement of Claim and did not consider the wording of the whole rule which stipulates that the Defence should be served before the expiration of 14 days after the time limited for acknowledging service of the writ or after the Statement of Claim is served, whichever is later.
12. In relation to part (c), most students who were able to identify that the defendant should be in the jurisdiction when the writ was served.

Question 2

13. Some candidates did not understand the question. What was required was for the candidates to analyse the Master's findings and suggest the orders that would be made in relation to the summary judgment and interim payment applications and to identify any consequential orders that would be made.
14. Most candidates who understood the question were able to realise that the Master would give the defendant unconditional leave to defend since the defendant was able to show an arguable and credible defence.

15. However, some of the candidates failed to appreciate the relationship between a summary judgment application and an interim payment application and despite indicating that unconditional leave should be granted in relation to the summary judgment application, then went on to say that the interim payment application should also be granted without realising that this conclusion in relation to the interim payment application was actually contradictory to their conclusion in relation to the summary judgment application.
16. Some candidates suggested that security for costs should be given by the defendant without realising that such application was not actually made and therefore, under normal circumstances, would not be considered by the Court and that the security for costs is an order which is made against parties in the position of a plaintiff in favour of parties in the position of a defendant.
17. Candidates' answers were weak in relation to the consequential orders that should be made, e.g. orders as to the future conduct of the case if the defendant was granted leave to defend, the relevant costs orders and whether Certificate for Counsel should be granted.

Question 3

18. Most candidates who answered this question were able to appreciate that since the amount of the payment into court did not beat the final award, it need not be taken into account when the Court considers the costs of the action.
19. Only a small number of the candidates were able identify that in fact, since this was a monetary claim, there was no real need to consider the Calderbank offer because it was not effective (proviso to Order 22 rule 14(2) RHC – the defendant could have protected his costs position by means of payment into court).
20. Many candidates, instead of dealing with the question of the liability for costs, i.e. which party should pay the costs of the action, answered the question by discussing the different scale of costs that would apply. The facts of this question did not indicate that the issue of scale of costs was relevant.

Question 4

21. In relation to part (a), most of the candidates misunderstood this question and thought that this related to joining a party as a defendant to proceedings. Only a small number of candidates realised that “an implied joinder of issues” was that under Order 18 rule 14 of the Rules of the District Court (“RDC”) or RHC.
22. In relation to part (b), many candidates confused the procedures in Order 15 with the procedures in Order 16. This is a case whether the defendant wishes to join another party to the proceedings and the proper procedure would be to issue a Third Party Notice under Order 16 rule 1 RDC. Many candidates confused this with Order 15

rule 4 which deals with joinder by the defendant of persons jointly or severally liable under a contract (when this is a tort case).

Question 5

23. This is a straightforward question involving application of Order 58.
24. Most candidates were able to tackle part (a) satisfactorily, i.e. application of Order 58 rule 1 RHC.
25. In relation to part (b), some candidates confused this with an appeal of an order made by a Taxing Master following taxation. The relevant procedure should be that under Order 58 rule 2 RDC.

Question 6

26. Part (a) of this question required candidates to consider whether the default judgment was regularly or irregularly obtained and what was required if Phoenix wished to set aside the default judgment. The question also tested the candidates' ability to identify the other procedures that would be relevant if Phoenix were to contest the proceedings.
27. Whilst most candidates were able identify that setting aside a default judgment was one of the main issues involved in this question, there was little application of the legal principles to the facts.
28. As the writ was served on the wrong address, the default judgment was irregular and therefore authorities suggest that Phoenix could have the judgment set aside as of right. However, before embarking on the application, since the plaintiff would have to effect service of the writ again and since the wrong party was being sued, it would be practical for Phoenix to approach the Plaintiff to advise them of this and invite the Plaintiff to withdraw the default judgment and discontinue the proceedings. Less than a handful of candidates were able to suggest this practical solution.
29. If the proceedings were to continue, Phoenix could apply to strike out the claim under Order 18 rule 19 and apply for security for costs under Order 23. Only a small number of candidates were able to recognise the possibility of these applications.
30. Part (b) covers enforcement. It was apparent that many candidates did not appreciate the difference between an individual, a partnership and a limited company. As Phoenix is a partnership, Order 81 had to be considered. None of the candidates considered this. When marking this question, the examiners appreciated that whilst Business Associations is one of the 11 Core Subjects which are PCLL pre-requisites starting from September 2008, there was no requirement that candidates be sufficiently competent in the law of Business Associations before attempting the Civil Procedure Examination. Therefore candidates were not marked down if they failed to consider Order 81 in answering this question.

31. Other than the issue concerning Order 81, most candidates who understood the question were able to answer this question satisfactorily.

Question 7

32. Part (a) covers the topic of discovery. Many candidates answered this question poorly. The answers showed a lack of understanding of the discovery obligations and the principles governing whether a document is discoverable in civil proceedings.
33. Some candidates applied the criminal procedure instead of Order 24 RDC.
34. Candidates were able to identify that most of the documents were relevant. However, there was a lack of understanding of the principles concerning privileged documents. Only a small number of students discussed whether Zach's correspondence with the law firm and Zach's correspondence with Victor were privileged.
35. More alarming was the fact that some candidates were not aware of the discovery obligations and suggested that since the correspondence with Victor was damaging to the client, there was no need to disclose such correspondence. This is a grave misunderstanding of an important obligation in civil procedure.
36. Part (b) is straightforward and required candidates to set out the procedures involved after the close of pleadings in order to take the matter to trial. This required candidates to discuss the relevant procedure in the District Court and in particular, Order 23A. Some candidates misread the question and dealt with pre-action considerations in their answers.

Conclusion

37. As already indicated above, the overall performance of the candidates was not satisfactory. Many candidates left their answers to some questions blank. Others misread or misinterpreted the questions in a way which suggested a total lack of understanding of the issues. It is believed that performance was poor due to a lack of preparation.
38. It is hoped that as this examination paper is now available for access on the website and with the publication of this report, potential candidates could be aware of the standard expected of them in order to undertake the necessary preparation for the Civil Procedure examination in the future.