

## **PCLL Conversion Examination**

**June 2010**

### **Examiner's Comments**

#### **Civil Procedure**

#### **The Standard and Format of the Examination**

- The examination format was not new and the paper was not a difficult one. It was disappointing to see a large number of failures.
- Since the new Civil Procedure rules following the Civil Justice Reforms are already effective, the paper covered some of the main changes in the Civil Procedure rules following the Civil Justice Reforms. It was again disappointing to see that some candidates did not appear to be aware of the changes to the Civil Procedure rules following the Civil Justice Reforms. Candidates should be aware that the PCLL is a practical course, involving the practice and application of current law and procedure. Candidates should therefore familiarize themselves with the new Civil Procedure rules, effective as a result of the Civil Justice Reforms.
- 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. 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.
- It is apparent that the candidates who failed the exam were not familiar with the relevant Civil Procedure rules and/or failed to apply the relevant rules to the facts in the questions. It should be emphasized that mainly regurgitating the rules or copying information about the rules from a textbook would not assist candidates. The skills that are being tested are the ones identified in the paragraph above.

#### **Comments on each of the questions in the examination and a brief summary of the major areas of weaknesses**

##### Question 1(a)

- Most candidates correctly identified Order 12 rule 5(1) Rules of the High Court (“RHC”). However, most failed to apply it correctly. Order 12 rule 5(1) states that the time limited for acknowledging service of the writ is 14 days after service of the writ (including the day of service). Many candidates failed to apply the latter part of the rule, i.e. that in counting the 14 days, the date of service should be included.
- Also, many candidates failed to realize that in this case, the deemed date of service under Order 10 rule 1(3)(a) RHC does not apply since we were told that Bilbo had actual notice of the writ on 10 June when he collected it from his letterbox on 10 June.
- Since the date of service of the writ was 10 June, 14 days (including the day of service) brings us to 23 June 2010.

#### Question 1(b)

- Again, many candidates correctly identified Order 18 rule 2 RHC as being the relevant rule. However, many candidates stated 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 the later, instead of 28 days.
- In relation to the application of the said rule, since the time limited for acknowledging service of the writ expired on 23 June 2010 and the Statement of Claim was served on 20 June 2010, as 23 June was the later date, the date of 23 June should be used in calculation of the 28-day deadline. If we calculate from 23 June, then the 28-day deadline expired on 21 July 2010.
- Many candidates failed to correctly interpret and apply the phrase “the time limited for acknowledging service of the writ” in Order 18 rule 2.

#### Question 2(a)

- Most candidates answered this question correctly. The function of an expert is to give expert assistance to the Court on the subject of his own expertise. Full marks would only be awarded to candidates who were able to apply this principle to the facts of the case. In this case, one of the issues in dispute which the Court would have to determine is the genuineness of the ring. The Court would therefore require an expert to assist it to determine this matter.

### Question 2(b)

- This did not appear to be a difficult question but it was not answered satisfactorily.
- After the Civil Justice Reforms, experts in the High Court must comply with a code of conduct and any party instructing an expert is required to provide the expert with a copy of the code of conduct (Appendix D to the RHC).
- It is clear from the code of conduct that the expert owes an overriding duty to the Court to help the Court impartially and independently. In this case, since Pip is Merry's brother, it is not clear whether Pip would be able to act independently and impartially. It is also not clear whether Pip has the relevant expertise to comment on the genuineness of the ring.
- The question also suggests that Merry would simply ask Pip to prepare an expert report to confirm that the ring is indeed fake. The expert's duty is to assist the Court and not act as advocates for a party. More importantly, an expert report is inadmissible unless it contains a declaration that the expert (i) has read the code of conduct and agrees to be bound by it, (ii) understands his duty to the Court and (iii) will continue to comply with that duty. Therefore, Pip cannot just render a report confirming that the ring is fake unless he is qualified to provide such expert opinion, has examined the ring carefully and came to his own opinion that the ring is fake. Otherwise, he will be in breach of his duty to the Court. This aspect of the question was not really addressed by a majority of the candidates.

### Question 2(c)

- For this part of the question, candidates should give some suggestion as to what Merry could do. Many candidates did not answer this part of the question. This showed candidates' general failure to apply the relevant rules in a practical manner.
- In fact, there is one hint in the question itself. Merry could approach Sotheman's Auction House to see whether they are able to assist him to provide an independent expert report. Even if they are not able to do so, they may be able to recommend an expert to him.
- Further, if 3 weeks is not sufficient, Merry could consider whether he would need to apply for an extension of time to comply with the Court's direction.
- He could also consider asking the Court to appoint a single joint expert in relation to this issue.

### Question 3(a)

- This is a relatively straightforward question and many candidates dealt with it well. Examiners were expecting some application of the relevant rules to the facts of the case. Good candidates were able to point out that the Hospital should be applying for security for costs of its defence pursuant to Order 23 rule 1(1)(a). The Hospital is worried that as an overseas plaintiff, it would be difficult to enforce any costs order against Sam if Sam does not succeed in the proceedings and is ordered to pay the Hospital's costs in defending the action.
- Sam should be advised that as a matter of discretion, it is the usual general rule of practice of the Court to require the foreign plaintiff to give security for costs because it is ordinarily just to do so (The "Alpha" [1991] 2 LI LR 52).

### Question 3(b)

- For this part of the question, again examiners were looking for candidates' ability to apply the relevant rules to the facts of the case and to explain the merits of the application coherently, arriving at a logical conclusion.
- The focus of the answer should therefore be on the prospects of success of Sam's claim, whether the order for security would stifle a genuine claim and the timing of the application.
- Many candidates mentioned irrelevant factors such as whether Sam had assets in Hong Kong.

### Question 4(a)

- Again, this was a straightforward question and many candidates answered this question satisfactorily.

### Question 4(b)

- In relation to the letter from his solicitor, many candidates correctly identified that it should be covered by legal advice privilege and need only be generally disclosed in Gimli's list of documents.
- In relation to his letter to Legolas, it would depend on whether the letter was a genuine attempt to settle the proceedings. If so, the letter would be classified as without prejudice. Many candidates failed to realize that the "without

prejudice label” concerns primarily with the document’s admissibility at trial rather than disclosure under the mutual discovery process.

Question 5(a)

- Most candidates dealt with this part of the question satisfactorily.

Question 5(b)

- This question was not difficult but it appeared that some students struggled with this question and hence lost many marks.
- Since Rosie won the case, the usual rule is that costs follow the event and Rosie should be awarded her costs of the action. However, when making the costs order, the trial judge did not take into account the non-acceptance of the sanctioned payment into Court by Rosie. Since the amount of the sanctioned payment into Court beat the award, the Court shall make the orders as set out in Order 22 rule 23, unless it considers it unjust to do so. When considering whether it would be unjust to apply such orders, the Court would take into account the factors as set out in Order 22 rule 23(6).
- Candidates should then consider the facts of the case and discuss whether the terms of the sanctioned payment into Court appeared reasonable.

Question 5(c)

- There was some confusion in relation to the correct answer to this question. Many candidates confused this with the review by a Master of his/her own costs order. In fact the question is actually asking about the procedure for an appeal of the quantum of the award.
- Since this is a district Court judge’s decision at trial, appeal of the judgment or any part thereof would be to the Court of Appeal (Order 58 rule 2(1)), within 28 days from the judgment (Order 58 rule 2(4)(b)). Candidates should be discussing this procedure and whether leave to appeal is required.

Question 6(a)

- There are various matters which Frodo would need to consider and marks were awarded for any sensible **discussion** of the relevant issues, including but not limited to:

- Merits of the claim;
- Limitation period;
- Jurisdiction of the claim - Court of First Instance or abandon part of the claim (\$100,000) to bring the matter within the District Court's jurisdiction?
- Letter before action/negotiation/mediation?
- Is Saruman worth suing?

Question 6(b)

- This question required candidates to show a general understanding of the Civil Procedure rules which come into play from the commencement of the proceedings until trial of the action. Candidates should briefly outline the usual procedures that would generally apply from the issuance of a Writ of Summons to trial, e.g:  
Writ of Summons → Acknowledgment of Service → Pleadings → Discovery → Timetabling Questionnaire → Case Management Summons, if any → Case Management Timetable → Case Management Conference, if any → Pre-Trial Review, if any.
- Candidates should briefly explain the relevant procedures and with reference to the facts of the case, discuss whether each of the above procedures would be applicable and the likely directions that would be required in this case in order to prepare the case for trial.

Question 6(c)

- This question concerns the enforcement of the default judgment.
- The relevant procedures to be discussed include:
  - The application for a post judgment urgent Mareva injunction/interim attachment of property under Order 44A rule 7
  - Application for a Garnishee Order;
  - Application for a Charging Order;
  - Application for a Prohibition Order;
  - Application for an oral examination of Saruman under Order 49B;
  - Instruction of an enquiry agent?