

**PCLL Conversion Examination**  
**June 2011**  
**Examiner's Comments**  
**Civil Procedure**

General

1. The results of this examination were overall acceptable, showing an overall improvement from the previous examinations. However, many of the answers showed a lack of the ability to apply the relevant legal principles to the given facts. Candidates should always ensure that their answers not only demonstrate their knowledge in the particular procedure being discussed but also, their ability to apply the relevant principles to the specific facts of the case. For example, in relation to Question 2, it was quite apparent that many candidates were clear about the cost consequences under Order 22 rule 23 (costs consequences where plaintiff fails to do better than a sanctioned offer or sanctioned payment). However, the facts indicated that the plaintiff did in fact obtain an award that was better than the sanctioned payment into court, and what students then had to discuss was whether the subsequent Calderbank offer had any effect on the costs order. This rendered the discussion of Order 22 rule 23 unnecessary. Hence, students must read the question and analyse the factual scenarios carefully before putting down their answers to the questions.
2. Another example of the candidates' failure to apply the relevant principles to the specific facts in question is when answering question 3(b). Whilst most candidates were able to state that security for costs is discretionary and then proceeded to list out the circumstances that the court would consider in such application, some candidates did not focus on the facts of the case and went on to discuss issues such as whether the plaintiff had assets in the jurisdiction, when there is simply no information in the facts of this case which are relevant to such discussions. Candidates should instead have focussed on the merits of the plaintiff's case and whether an application for security would stifle the plaintiff's genuine claim.
3. It should be noted again that it is unlikely that a candidate would do well in the examination if he/she merely regurgitated the relevant legal principles without application of such principles to the facts of the case.

**PART A**

**Question 1(a)**

- This is a straightforward application of Order 12 rule 5(1) and Order 10 rule 1(3)(a) of the Rules of the High Court ("RHC").
- Most candidates answered this answer quite well. Some students who did badly on this question failed to recognise that the writ was served by registered post and did not refer at all to Order 10 rule 1(3)(a), RHC.

### **Question 1(b)**

- Most candidates realized that an affidavit of service, complying with Order 10 rule 1(2) RHC, was required.
- Many candidates were not able to conclude whether the claim was liquidated or unliquidated. Since this is a claim for damages for breach of contract, prima facie, it is an unliquidated claim and as such, an application for interlocutory default judgment can be made pursuant to Order 13 rule 2 RHC if Mary fails to give notice of intention to defend/acknowledge service of the writ before the stipulated deadline.

### **Question 2**

- Only very few candidates answered this question satisfactorily.
- It should be noted that since the sanctioned payment into court on 1 September 2010 for HK\$800,000, inclusive of interest, did not beat the final award, the sanctioned payment into court has no effect and the usual costs order (that costs follow the event) should be made, subject to any circumstances in the case which may lead the court to make a different order.
- Further although the subsequent Calderbank offer of HK\$1.2 million, inclusive of interest, did beat the final award, this is a simple debt claim and George could have made a sanctioned payment into court (in this case, he should have made a sanctioned payment into court of HK\$400,000 to top up his earlier sanctioned payment in). Since he did not do so, the trial judge should not take this Calderbank offer into account when determining costs of the action (Order 62 rule 5(1)(d) RHC).
- Therefore, in this case, the most appropriate costs order would be for George to pay Fitz's costs of the action, unless it appears that in the circumstances of the case, some other order should be made (Order 62 rule 3(2) RHC).
- Most students just treated the Calderbank offer as a sanctioned payment into court and concluded that since the plaintiff failed to do better than this offer, the costs consequences in Order 22 rule 23 should apply. This is not the correct approach to be taken.

### **Question 3(a)**

- Most students were able to answer this question satisfactorily.

### **Question 3(b)**

- Since, the power to award security for costs is discretionary, even if the negligent lorry driver were able to satisfy the Court that Kitty is indeed resident outside the jurisdiction, the Court will still look at all the circumstances of the case to determine whether security ought to be ordered (*Lauria v. Le Salon Orient (Hong Kong) Limited and Another* [1996] 2HKLR 27).
- The circumstances which the Court will look at in this case would include the prospects of success of Kitty's claim and whether the order for security would stifle a genuine claim.

#### **Question 4(a)**

- This question required students to discuss the relevancy of the documents to the issues in dispute. Many candidates answered this question well.
- Good candidates also discussed the implied undertaking that documents disclosed in the discovery process cannot be used for collateral or ulterior purposes and that Elizabeth could obtain a court order to impose restrictions on the use of such documents in open court.

#### **Question 4(b)**

- Since Elizabeth's new contract with Darcy appears to be directly relevant to the issues in dispute in the proceedings, it should be disclosed during discovery, even if the contract is damaging to Elizabeth's case. Most candidates recognised this and better candidates also advised Elizabeth of her discovery obligations and her obligations to preserve documents relevant to the dispute.

### **PART B**

#### **Question 5(a)**

- There are various matters which Mr. and Mrs. Wong would need to consider. However, when answering this question, many students just copied the standard pre-action considerations as set out in the standard textbook with little application of the relevant legal principles to the facts.
- From the facts as set out in the question, it is unclear whether the accident was caused by Charles' negligence or Anne's negligence or both. Mr. and Mrs. Wong should find out more information concerning the accident. Candidates should briefly discuss the ways of obtaining pre-action discovery pursuant to section 41 of the High Court Ordinance and Order 24 rule 7A RHC. Only very little candidates discussed this issue.
- A further problem which Mr. and Mrs. Wong may encounter is their inability to locate Charles and to serve any court documents on him. Again, only a small number of candidates realised this problem.
- When discussing the limitation period, many candidates failed to realise that since Anne is a minor, the limitation period of 3 years for personal injury actions will not start to run until Anne reaches 18, or in case she is rendered disabled by the accident, 3 years from the date in which her disability ceases (i.e. 3 years after she recovers from her disability)
- Regarding legal aid, again, since Anne is a minor and is likely that she will have no assets, she should easily satisfy the means test. Further information is required as to whether she would pass the merits test but application for legal aid would also mean that the legal aid department may assist Mr. and Mrs. Wong to find out more about the underlying facts of the accident (which they would have to do in order to assess the merits of the case). Again, many students failed to realise this.

### **Question 5(b)**

- The parties should be Anne as the plaintiff and Charles as the defendant. The Firm can also be named as defendant if Charles was driving the van in the course of employment at the time of the accident.
- Since Anne is a minor, proceedings must be commenced by her next friend – this could be Mr. or Mrs. Wong.
- Many candidates did well for this part of the question.

### **Question 5(c)**

- This question required candidates to go through briefly the procedures required to take the case to trial, e.g. issuance of the writ, pleadings, discovery, exchange of witness statements and experts' reports. Candidates generally answered this question well and were able to explain the procedures e.g. timetabling questionnaire, case management summons, case management conference, pre-trial review etc.

### **Question 5(d)**

- The answers to the question were generally satisfactory and candidates were able to discuss the relevant procedures e.g. making sanctioned offers of settlement to try to provoke an earlier settlement of the case, without prejudice negotiations for settlement, mediation, summary judgment.

### **Question 6(a)**

- It is likely that William had applied for a garnishee order against her Bank of China account. Candidates should briefly explain what a garnishee order is and the effects of the same. Candidates generally did well for this question

### **Question 6(b)**

- Since the summary judgment was a judgment made by a Master of the District Court, an appeal should be made to a judge in chambers of the District Court (Order 58 rule 1(1) Rules of the District Court ("RDC")). Not many candidates recognised this.
- It also appears that Lydia may be out of time in her appeal and unless she obtains leave to extend the deadline for her appeal application. In such applications, the court would consider the merits of the intended appeal and the reasons for the delay. In absence of further information, the fact that she had no time to instruct solicitors may not be a good excuse. Not many candidates discussed this issue.

### **Question 6(c)**

- The appropriate methods of enforcement should be discussed. Many candidates did well and were able to recognise that William would not be able to carry out any enforcement procedure against the husband's assets.

- In relation to the bank accounts, most candidates were also able to distinguish between the bank account in London and the bank account in Hong Kong.