

PCLL CONVERSION EXAMINATION JANUARY 2010

Title of Paper : Civil Procedure
Date : 5 January 2010
Time : 9:30 a.m. – 9:45 a.m. (Reading Time)
9:45 a.m. – 12:45 p.m.

Instructions

1. Write your **candidate number** on the cover of each answer book. Do **NOT** write your name on the answer book.
2. Start each answer on a separate page of the answer book.
3. Write your answers only in the answer books provided.
4. This is a three-hour examination.
5. This is an open book examination.
6. Reading time for this paper is 15 minutes. Do **NOT** begin writing in your answer books during this period until you are instructed to do so.
7. This paper consists of 6 pages, including Part A and Part B. A total of 100 marks may be awarded.
8. Part A consists of four short questions. Candidates must answer ALL four questions. Part A is worth 40 marks.
9. Part B consists of two long questions. Candidates must answer ALL two questions. Part B is worth 60 marks.
10. The passing mark for this paper is 50 marks.

**DO NOT OPEN THIS QUESTION BOOK
UNTIL YOU ARE TOLD TO DO SO**

PCLL Conversion Examination January 2010

Civil Procedure

PART A

Question 1 (10 marks)

Ronald and Justin entered into 2 contracts on 10 September 2009 and 5 October 2009 respectively for the sale of computers by Ronald to Justin. Justin required the computers for onward sale to his customer in Thailand.

In respect of the first contract entered into between Ronald and Justin on 10 September 2009 (the “First Contract”), Justin paid a deposit of HK\$200,000. Ronald delivered the computers to Justin on 10 October 2009. Justin still owes Ronald the sum of \$300,000 under the First Contract, such sum being due and owing to Ronald since 10 November 2009.

In respect of the second contract entered into between Ronald and Justin on 5 October 2009 (the “Second Contract”), Justin paid a deposit of HK\$300,000. Ronald delivered the computers to Justin on 5 November 2009. Justin still owes Ronald the sum of \$400,000 under the Second Contract, such sum being due and owing to Ronald since 5 December 2009.

Justin did not make payment of the outstanding sums under the First and Second Contracts (totalling HK\$700,000) as Justin was in financial difficulty. Justin does not dispute the sum of HK\$300,000 under the First Contract. However, in respect of the Second Contract, Justin claimed that the computers were delivered late by Ronald and that some of those computers were defective. As a result, Justin had to pay some damages to his customer in Thailand. He therefore refused to pay Ronald the sum of HK\$400,000 outstanding under the Second Contract until Ronald agreed to reimburse him the damages he paid to his customer in Thailand.

As a result of Justin’s non-payment of the outstanding sums under the First and Second Contracts, yesterday, Ronald issued a Writ of Summons endorsed with a Statement of Claim against Justin in the District Court. Ronald claimed against Justin for the outstanding sum of HK\$700,000 under the First and Second Contracts together with interest and costs. The Writ was served personally on Justin yesterday.

Given his financial difficulties, Justin does not want to expend too much costs to defend the proceedings. Advise Justin what he should do in respect of the proceedings to best protect his interests. Briefly explain your answer.

Question 2 (10 marks)

In May 2009, Amy, who was 10 years old at the time, suffered from substantial personal injuries as a result of a traffic accident which occurred outside her school. Amy was run over by a lorry driven by Daniel. At the time of the accident, Daniel was driving the lorry in the course of his employment with Park Industrial Limited (“PIL”).

In November 2009, Amy’s father, Steven, commenced an action in the High Court as Amy’s next friend, seeking damages in the sum of HK\$6.5 million against Daniel (as the 1st Defendant) and PIL (as the 2nd Defendant).

Yesterday, PIL made a sanctioned payment into court in the sum of \$4 million, such sum being in satisfaction of all Amy's causes of action in the proceedings. A Notice of Sanctioned Payment was served on Amy and Steven's solicitors yesterday,

Advise Amy and Steven:

- (a) **what they would need to do if they decide to accept PIL's sanctioned payment (4 marks);**
- (b) **of the consequence(s) if they decide to accept PIL's sanctioned payment (3 marks); and**
- (c) **of the costs consequences if they decide that they do not wish to accept PIL's sanctioned payment. (3 marks)**

Question 3 (10 marks)

Grace is one of your acquaintances.

On 21 December 2009, Audrey issued a Writ of Summons endorsed with a Statement of Claim in the District Court against Grace, for the recovery of a loan in the sum of HK\$500,000 together with interest and costs. According to Audrey's Statement of Claim, on 1 April 2009, Audrey and Grace entered into a written loan agreement whereby Audrey agreed to lend Grace the sum of HK\$500,000 and Grace agreed to repay the said sum of HK\$500,000 to Grace on 1 October 2009 together with interest at a rate of 25% per annum. Despite repeated chasers, Grace failed to repay the said sum to Audrey.

Grace came to you for advice yesterday and informed you that:

- (i) She did borrow HK\$500,000 from Audrey but she did not have any money to repay the loan at the moment, nor does she have the funds to instruct solicitors to represent her in the proceedings. She wanted to buy some time and so she has decided to defend the proceedings in person. She was told by one of her friends that all she would need to do to defend the proceedings is to file a Defence before the deadline stipulated in the District Court Rules.
- (ii) She did enter into a written loan agreement with Audrey as pleaded in the Statement of Claim. In order to defend the proceedings, she decided that she would file a Defence consisting of bare denials to deny everything that is pleaded in the Statement of Claim.
- (iii) In addition, she said that since she would be denying the existence of the written loan agreement in her Defence, she would shred her copy of the written loan agreement and tell the Court that it does not exist.

Grace wanted to seek your views about her plans above.

Comment on Grace's plans sets out in (i) to (iii) and in particular, advise Grace whether she should be carrying out such plans. Briefly explain your answer.

Question 4 (10 marks)

Last month, Kowloon Bank obtained a judgment in the High Court in the sum of HK\$4 million together with interest against Honour Trading Limited (“HTL”). The Kowloon Bank comes to you for advice in relation to the enforcement of the judgment against HTL. The Kowloon Bank has the following information about HTL’s financial status:

- (i) HTL rents its office premises in Central. The premises appear to be vacant.
- (ii) HTL owns a warehouse unit in Kwai Chung. It is planning to sell such warehouse premises for HK\$2 million.
- (iii) HTL’s director and shareholder, Mary, owns a flat in Yuen Long. The current market price of this flat is around HK\$2 million but it is subject to an outstanding mortgage of HK\$1 million.
- (iv) HTL has a bank account with the North Asia Bank with around HK\$50,000 credit balance.
- (v) HTL may own other assets but the Kowloon Bank does not have further information about these.

Advise the Kowloon Bank of the most effective way(s) to enforce the judgment against HTL. Please briefly explain your answer and state, if you consider it necessary, what further information you would need in order to answer the question.

PART B

Question 5 (30 marks)

In January 2009, Bright Cosmetics Inc. (“BCI”), a cosmetics company in Japan, brought proceedings in the High Court of Hong Kong against Max Faces Limited (“MFL”) for damages in the sum of HK\$5 million for trademark and copyright infringement. BCI alleged that MFL’s logo was similar to that of BCI’s and that MFL had thus infringed BCI’s trademark and copyright.

According to Paul, the director of MFL, MFL and BCI are competitors in the Hong Kong market. Paul believes that BCI’s claims are without merit and that even if BCI succeeds in its claim, BCI’s claim for damages in the sum of HK\$5 million is grossly exaggerated and cannot be substantiated. Paul believes that BCI commenced its claim against MFL in Hong Kong with the primary aim of damaging MFL’s reputation in Hong Kong.

So far, BCI had been slow in pursuing its claim and only after various extensions of time had it filed its Statement of Claim, Reply and List of Documents. During the conduct of the proceedings, BCI’s lawyers were generally uncooperative and refused to discuss matters with MFL’s lawyers.

The next step in the proceedings was for the parties to exchange witness statements yesterday. Yesterday, BCI’s lawyers sent a letter to MFL’s lawyers informing MFL that BCI were not able to comply with the Court’s direction to exchange witness statements on 4 January 2010.

- (a) **Paul is aware that some reforms to Hong Kong’ Civil Procedure rules were put in place in Hong Kong last year to assist litigants to gain easier and speedier access to justice. In particular, Paul is aware that litigants would have to conduct cases in line with some objectives. Paul wants to know what these**

objectives are and whether the reforms to the Civil Procedure rules would help MFL in any way. Please advise Paul of the same. (10 marks)

- (b) **Paul wants to know what MFL could do to (i) penalise BCI for non-compliance with the Court’s direction to exchange witness statements on 4 January 2010 and (ii) to compel BCI to exchange its witness statements with MFL as soon as possible. (10 marks)**
- (c) **Generally, Paul wants to know whether there is anything else which MFL could do to put pressure on BCI to settle and/or discontinue and/or withdraw the case against MFL. Advise Paul accordingly. (10 marks)**

For each of questions (a) to (c) above, please explain your answer and state, if you consider it necessary, what further information you would need in order to answer the question.

Question 6 (30 marks)

Trouble Motors Limited (“Trouble”) is a Hong Kong company which manufactures and distributes motor vehicles. Gary, Trouble’s newly appointed managing director and your friend, comes to you for advice. He tells you the following:

- (i) In April 2009, Trouble introduced for sale into the market a new model TM5 convertible. Its first customer was Adam, who purchased one at the price of \$1.5 million.
- (ii) On 2 September 2009, Trouble was served at its registered office with a Writ of Summons specially endorsed with a Statement of Claim issued by Adam against Trouble, seeking damages in the sum of \$1.5 million for breach of the contract of sale as the TM5 convertible (the “Vehicle”) was not of merchantable quality. The Statement of Claim alleges that on 15 May 2009, whilst Adam was driving the Vehicle along Bonham Road, the Vehicle failed to brake despite Adam applying both the hand brake and the foot brake. The Vehicle collided with a tree and was severely damaged beyond repair. Adam was fortunately not injured.
- (iii) Gary said that he was advised by Trouble’s solicitors that the next step in the proceedings would be discovery and that Trouble had to provide all documents in relation to the proceedings to its solicitors. Gary is worried that he would have to disclose the following documents to Adam, which may damage Trouble’s case in the proceedings and which may be leaked to the general public to damage Trouble’s reputation:
- (1) A newspaper cutting dated 15 November 2008, reporting that another type of vehicle manufactured by Trouble, the TX4 Automatic, had faults in its air-bag system.
 - (2) A letter written from Adam to Trouble dated 25 May 2009, demanding compensation for the damaged Vehicle; and Trouble’s letter to Adam in response, dated 30 June 2009, apologising for the accident and offering to replace the Vehicle with another vehicle manufactured by Trouble at Adam’s choice, in full and final settlement of Adam’s claims provided that Adam agreed to keep the

matter confidential. Adam did not respond to Trouble's letter.

(3) A report dated 15 June 2009 which was marked "Strictly Confidential" from an independent engineer, David, who was commissioned by Trouble to investigate into the accident. According to David's report, he found that the accident might have been caused by a defect in a spare part in the Vehicle coupled with a design fault. David further found that similar spare parts in the other TM5 convertibles manufactured by Trouble so far were also defective and so advised that Trouble should not further sell any TM5 convertibles until the spare part problem was fixed and until Trouble looked into the design problem.

(4) A letter from Trouble's solicitors dated 2 July 2009 advising Trouble on the recall of the TM5 convertibles containing the defective spare parts.

(a) Please advise Trouble whether the documents listed in (1) to (4) above need to be disclosed by Trouble in the course of the proceedings and if so, whether Adam would be able to publicise those documents to the general public. Please explain your answer and state, if you consider it necessary, what further information you would need in order to answer the question. (15 marks)

Last week, Gary found out the following:

(i) The defective spare parts used in the Vehicle and the other TM5 convertibles were supplied to Trouble by Imperfect Inc., a US company with no branch office in Hong Kong.

(ii) Gary looked through the files in relation to the development and design of the TM5 convertible and realised that the vehicle was originally designed by Flawless Design Co Ltd. ("Flawless"), a company registered in Hong Kong. It appeared from the files that Flawless' design was later modified by Trouble's own design team headed by Rachel. Gary, however, is not sure of the extent to which Flawless' original design was modified by Rachel and whether the alleged design fault in the TM5 convertible was due to a fault in Flawless' original design or due to the modifications made by Rachel. It appears that all of Trouble's files in relation to the design of the TM5 convertible had gone missing. Gary tried to contact Flawless to obtain the original design sketches and further information from Flawless but Flawless has refused to provide Trouble with further information. Rachel has resigned from Trouble last year and cannot be located. Gary believes that he must obtain further information from Flawless in order to find out which party was at fault in respect of the design problem of the TM5 convertible.

(b) In light of the abovementioned information and Gary's concerns above, please advise Gary/Trouble of the legal procedures and investigations which Trouble should take to best advance Trouble's interests in the proceedings. (15 marks)

~ End of Examination Paper ~