

PCLL Conversion Examination

January 2015

Examiner's Comments

Civil Procedure

General Comments

Candidates should be aware that Civil Procedure is a practical subject and the understanding of this subject includes knowledge of the underlying civil procedure rules together with the ability to apply such rules in real life scenarios. As such, for this examination, candidates were required to identify the relevant facts and legal issues, apply the facts to the legal principles and formulate a sensible and logical conclusion to their answers.

Candidates are also reminded to keep up to date with new developments of the law. In particular, the new Companies Ordinance (Cap. 622) had been in force since 2014 and this had some effects on the civil procedure rules (see in particular comments to questions 1(a) and 2 below). Candidates should make sure they keep abreast of these changes. Since the Companies Ordinance (Cap. 622) is relatively new, candidates were not unduly penalised if they did not cite the new provisions on this occasion but for future reference, candidates are reminded to consult textbooks which deal with/cover these new provisions.

There were also some general confusions over the concept of “legal personalities” such that quite a lot of candidates, when answering question 1(a), gave incorrect answers to an otherwise relatively straightforward question. For that question, it was clear that a company was being sued and candidates should discuss the rules regarding service of a writ on a company and whether service on Amy, instead of the company, was valid service. It was apparent from quite a number of answers that candidates did not realize the distinction between the company as a separate legal entity and Amy (who is a senior member of staff of the company). It is advised that candidates should have some general understanding of the different “legal personalities” and business associations which are available and permissible in Hong Kong (e.g. the difference between individuals, partnerships and corporate entities) before they attempt this examination.

Below are some specific comments on each question.

Question 1(a)

For this question, candidates were required to specifically comment on the service of the writ. As indicated above, candidates should discuss the rules regarding service of a writ on a company and whether service on Amy, instead of the company, was valid service. Order 10 rule 1, section 827 of the Companies Ordinance (Cap. 622) and the relevant cases should be discussed. Candidates who did not realise/identify that the action was commenced against WM, a registered Hong Kong company which was a separate legal entity from its shareholders or staff members, generally did not do well for this question.

Question 1(b)

The first part of the question asked candidates to discuss pre-action considerations of whether WM should seek redress from Grapevine. The primary considerations should be whether the case had merits, whether WM wished to preserve its business relations with Grapevine and whether Grapevine was worth suing. Candidates who discussed other relevant considerations were also given credit. The second part of the question then required candidates to discuss joinder of parties under Order 15 rule 4(1) and third party proceedings under Order 16 rule. This question was generally well answered.

Question 2

This was mainly a question on security for costs. The relevant facts which point to such application would be the fact that the plaintiff was a registered non-HK company with warehouse premises in Hong Kong. Candidates were required to discuss Order 23 rule 1(1)(a) and the cases concerning whether the plaintiff was ordinarily resident out of the jurisdiction. The facts also mentioned that GKL's business might not be doing well and as such section 905 of the new Companies Ordinance (Cap. 622) should be discussed. Candidates should be aware that while section 357 of the old Companies Ordinance drew a distinction between companies registered in Hong Kong and "foreign registered companies", the new Companies Ordinance removes this distinction such that the new provision (section 905) is also applicable to foreign companies registered in Hong Kong. As a result, WM could rely on section 905 to request for security for costs against GKL if it appeared by credible testimony that there was reason to believe GKL would be unable to pay WM's costs if WM succeeded in its defence. Candidates were also credited for discussions of other relevant procedures such as WM filing a counterclaim against GKL and settlement.

Question 3(a)

This question required candidates to discuss WM's discovery obligations and was generally well answered.

Question 3(b)

For this question, candidates should focus on the actual contents of the documents and form a conclusion as to whether each of the documents needs to be disclosed in the proceedings and if they were to be disclosed, where they should be listed in the List of Documents.

As documents were being showed to the solicitor by AG, there should be no issue regarding the existence of the documents and whether they were in WM's possession/custody/power.

Document B – apart from relevance, candidates should also discuss whether litigation privilege applied to this document.

Document C – again, candidates should discuss the relevancy of this document and whether the fact that the email was marked “strictly private and confidential” could prevent it from disclosure. Candidates should also discuss the possibility of redacting the irrelevant parts of the document.

Document D – this document is clearly relevant and should be disclosed in Schedule 1 Part 1 of the List of Documents.

Question 3(c)

Candidates were credited for sensible discussions of the relevant procedures/actions to be taken by WM, e.g. leave to issue third party notice, settlement, seeking instructions on the alleged counterfeit product.

Question 4(a)

This question was generally answered well. Most candidates concluded correctly that WM was allowed to adduce expert evidence and that if it desired to do so, it should agree or apply for directions at the case management summons stage of the proceedings.

Question 4(b)

Candidates should discuss the expert’s Code of Conduct (Appendix D of the Rules of the High Court) and the expert’s overriding duty to the court. Most candidates correctly concluded that if AG’s suggestion was to pay an expert to say what she wanted the expert to say (and this was contrary to the expert’s own opinion in relation to the matter), then this would be in breach of the expert’s overriding duty to the court.