PCLL Conversion Examination
January 2016
Examiner's Comments
Civil Procedure

General comments

Many candidates did well in this sitting of the Civil Procedure Conversion paper. Some achieved astonishingly highly marks. The examiners found marking most papers a straightforward exercise. Most candidates finished the paper. Moreover, candidates' handwriting was, almost without exception, excellent! This made awarding marks easier.

As always, candidates who identified the legal issues found themselves on the right track. In marking the papers the examiners asked themselves a number of basic questions. Had candidates competently identified the issues and law - be it any combination of statute, rule or case, etc - relevant to the examination questions? Then, did they *use* this law to generate their best advice on the specific questions the examiners asked them?

I shall set out here some of the examiners' observations on how candidates tackled the questions. In doing so I shall focus more on where candidates fell, so that they can learn for the future. At the risk of stating the obvious, candidates did many things well. I shall also give some examples of this.

Question 1

Candidates recognised that this first question was about pre-action considerations. Specifically, it asked students what Mrs Chan should consider in deciding whether or not to sue the defendants, WW and T. This question did not involve much law. Candidates needed to discuss pre-action considerations that were relevant to the case at hand. The question attracted a large number of marks. Doing it well put candidates in a position in which they were well on their way to a pass.

Unfortunately, a proportion of candidates still made two schoolboy errors. In many cases this led to them hemorrhaging marks.

The first mistake was more understandable. In bringing up pre-action considerations, some candidates wheeled out what was obviously a pre-prepared list. They copied this out unreflectively. In doing so they brought up considerations that were peripheral, rather than central, to the fact pattern. For instance, they asked whether the parties' lawyers are competent to act. They asked whether there were any conflicts of interest. Interestingly but frustratingly, a good number of candidates chose to consider whether costs-only proceedings were appropriate here. There was really nothing on this issue in the facts – if anything could be said, it was that there was no indication at all that the parties would even conceive of agreeing the issues and limiting their dispute to one over costs. The issue was not a meaningful one.

So while peripheral considerations were relevant in a broad sense, they attracted few, if any, marks. There were plenty of others for the taking. The fact pattern gave many clues by setting out plenty of details on particular topics. The plaintiff's financial means, for instance. The defendants' financial means also. What the examiners wanted candidates to do was to focus on these meaty and most relevant factors first and most. Others – legal aid, limitation, venue of the court – were not irrelevant. But as a matter of judgment, on the facts they were relevant but not as substantial. The worst answers looked as if they could have fitted any fact pattern at all. This did not do. Application requires tailoring, judgement and analysis. The more extensive this was, the better candidates did.

The second error was less excusable. The question could not have been clearer: "In giving your advice, do <u>not</u> consider the merits of the claim(s)…" (emphasis not added). But a number of candidates insisted on doing precisely that. Perhaps, as unequivocal as this instruction was, candidates did not read the question clearly enough. Perhaps they did but felt the need nevertheless to discuss merits. Attempts to cloak merits in other words – discussing "the cause of action", "the strength of the evidence", "prospects of success" – were hopeless.

Question 2

The paper's second question asked students to comment on a draft letter from opponents. The letter was replete with errors. Many candidates scored well on picking these up, referring where necessary to the relevant provisions of O.18 of the RHC. The examiners gave some marks where candidates' conclusions were correct even if their reasoning was not quite to the point.

Question 3

Many candidates scored highly on this question. Virtually everyone identified the issue (which was unsurprising, given that the paper pretty much gave this). Candidates generally set out the law (O.14, r.1 "no defence" and case law interpreting this) competently.

The quality of the application of the law to the facts varied. Candidates who did badly hardly referred to the facts at all. Candidates who did reasonably well discussed the numbers – that there was a 90% chance Mrs Chan's condition arose from drinking contaminated water but that there remained a 10% chance of it having come from mosquitoes. More sophisticated candidates picked up on other facts and discussed them in the context of other elements of tort (for instance Mrs Chan's smoking habit, which could arguably impact on causation or at least give rise to an argument of contributory negligence) or the difficulties in calculating loss / quantum. As always, candidates' conclusions (most of which were that an application for summary judgment was not likely to succeed) mattered less than the reasoning. A bald conclusion without reasoning garnered virtually no marks.

Some candidates committed a needless mistake: they set out, some in a lot of detail, the procedure on applying for summary judgment. These detailed mechanics attracted no marks. The question asked candidates to advise on whether Mrs Chan would succeed in such an application. It did not at all ask how to apply for it. The former is an evaluative question. The latter is a mechanical procedural one that requires little more than copying

out the relevant rules. Again, candidates must answer what they are asked and not what they would like to be asked.

Question 4

This paper's final question was a large question on discovery.

Some candidates lost quite a few marks on this question, perhaps in part because they were running short on time. Most correctly set out the relevant test under O.24, r.1 and the *Peruvian Guano* test. Candidates applied the test with varying success. Those who did not do so well made a number of mistakes:

(i) Some candidates did not pick up on the issue of whether the document was in Mrs Chan's "possession, custody or power" (O.24, r.1(1)), i.e. that while her niece, Cherry, held it, Mrs Chan could quite easily get it.

(ii) Most candidates did quite well in discussing whether the document was relevant in *Peruvian Guano* terms. Their discussion on privilege, however, was on the whole much more superficial. Candidates should have considered two forms of privilege: legal advice and litigation. To do this adequately they needed to set out the elements of these tests and apply them, one by one, to the facts. They needed to do this accurately and comprehensively. So they had to state the tests fully. They could not afford to confuse the limbs of the tests (for instance by stating that legal advice privilege requires litigation to have been contemplated, which is wrong). Stating the tests wrongly inevitably leads to incorrect application of them.

(iii) Worst of all, some candidates begged the question. For instance, after discussing whether the document was relevant, they discussed whether it was privileged. But rather than going through the tests in any detail, they simply posed, rather than answered, the issue: "If the document is privileged…" This goes no way towards answering the question. It simply restates it.

(iv) Finally, as in question 3, some students spilled considerable amounts of ink setting out the mechanics of discovery under O.24. The question asked candidates to advise on the discoverability and inspectability of the document. It did not at all ask how discovery works generally. Candidates who carpet-bomb in this way should see that they gain nothing by it except to waste time. The examiners set their questions precisely and expect candidates to focus on exactly what is asked. Put yourself in the position of a trainee solicitor whose supervisor asks whether a document is discoverable and inspectable. What is that supervisor going to say when the trainee answers, "Well, the mechanics of discovery are as follows…" and then effectively reads out O.24? The obvious and immediate response will be, "That is not what I asked. I asked you whether this document is, first, discoverable and, second, inspectable. Please answer that." The examiners' approach to the question is no different.