

PCLL Conversion Examination
June 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 the Civil Procedure 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. Therefore, candidates who just copied the relevant procedure/rule into the answer booklet would most likely fail this examination.

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 question 2(a) below). Candidates should make sure they keep abreast of these changes. Since this point was covered in the Examiner's Report to the January 2015 examination, on this occasion and on future occasions, candidates will be penalised if they demonstrate that they did not keep up-to-date with the relevant legislative provisions.

Again, there were some general confusions over the concept of "legal personalities" which led to incorrect answers to question 4(b). It is advised again 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.

In addition, in this examination, some candidates were confused over the general causes of action available to the plaintiff. Despite paragraph 12 of the Attendance Note in the examination paper specifically stating that the plaintiff "might have a claim against Lotus for breach of warranties and a claim against Wang's in tort", some candidates, when answering questions 1(a), 1(b) and 2(b) still commented on the fact that there was a contract between the plaintiff and Wang's when this is clearly factually incorrect. For future purposes, candidates are reminded to read the question paper carefully. Civil Procedure is not a subject which could be studied in a vacuum. Apart from the concept of "legal personalities" as mentioned above, candidates should also have a firm grasp of the law of contract and the law of tort.

Below are some specific comments on each question.

Question 1(a)

For this question, candidates were required to write about pre-action considerations. As with the past, candidates who just copied out a standard list would not do very well. On this occasion, the standard list which most candidates quoted included merits, Legal Aid and costs only proceedings – out of this list, only the first point was relevant. Candidates were expected to look at the facts of the case and tailor their discussions to the relevant factors only – e.g. merits, whether the intended defendants were worth suing, enforceability of a potential judgment against Wang’s. Apart from pre-action considerations, candidates were also asked whether the plaintiff should take action against Lotus or Wang’s. There is no standard answer for this part of the question but candidates who were able to give a recommendation and support it with good reasons would be credited.

Question 1(b)

This question required candidates to write about the possibility of an application to serve the writ out of the jurisdiction on Wang’s. Candidates should have discussed (not just list out) the requirements for such application, being:

- (i) the intended defendant is out of the jurisdiction (and its whereabouts);
- (ii) there is a good arguable case that the case falls within one or more of the grounds as set out in Order 11 rule 1(1) of the Rules of the High Court;
- (iii) there is a serious issue to be tried; and
- (iv) Hong Kong is clearly the appropriate forum.

Candidates were expected to apply the facts and discuss whether, given the facts of the case, each of the above requirements have been fulfilled. In marking this question, examiners noted that many candidates mis-interpreted (ii) above and generally just discussed whether there was a good arguable case. This is not the correct approach. They should have discussed whether there was a good arguable case that one or more of the grounds as set out in Order 11 rule 1(1) of the Rules of the High Court would apply.

Question 2(a)

This is a two-fold question. The first part is to discuss whether the writ was validly served. Whilst this part of the question was generally well answered, with many candidates coming to the correct conclusion that the writ was validly served, some candidates still relied upon the old section 356 of the Companies Ordinance (Cap. 32) instead of the new section 827 of the Companies Ordinance (Cap. 622).

The second part of the question – whether the plaintiff could file a default judgment – was generally very well answered. Many candidates were able to correctly conclude that since the deadline to acknowledge service of the writ has not yet expired, the plaintiff could not yet enter default judgment.

Question 2(b)

Again, this question was generally well answered. Candidates were required to discuss whether a summary judgment application was likely to succeed and they were credited for sensible discussions with logical conclusions.

Question 3(a)

Most candidates just discussed the effect of not accepting the sanctioned payment (i.e. Order 22 rule 23 of the Rules of the High Court). However, they should also specifically discuss the pros and cons of accepting the sanctioned payment e.g. pros – being paid \$5million and costs up to the acceptance at an earlier stage, earlier resolution of the case, eliminating the risks of litigation; and cons – forgoing the opportunity of obtaining a larger award at trial, not being able to obtain the written apology (since the sanctioned payment was made in satisfaction of the whole of the plaintiff’s claim).

Question 3(b)

In order to resolve the matter without a trial, GKL could consider other methods of settlement like making a sanctioned offer, settlement negotiations and mediation. Many candidates just talked about one method and did not give a recommendation to the client (as required by the question).

Question 4(a)

Some candidates just discussed the general discovery obligations. Instead they should have considered whether the document was “without prejudice” and whether it was “privileged from disclosure”.

Question 4(b)

The candidates who did very well for this question talked about each asset that was listed and whether it could be enforced against and if so, how (i.e. using which method of enforcement). E.g. for the first listed asset of the company cars – good candidates stated that the cars could be enforced by using a writ of fi fa and discussed whether this was possible, whether they were tools of trade, etc. Candidates who did not do well for this question only talked about the methods of enforcing generally without applying their answers to the facts of the case.

It is noteworthy that despite previous reminders, candidates still stated that a charging order could be applied against the Tin Hau flat. This is clearly wrong as the Tin Hau flat was not Lotus’ property. Please see above note regarding “legal personalities”.