PCLL Conversion Examination
June 2016
Examiner's Comments
Civil Procedure

General Comments

Overall, candidates performed very well in this sitting of the Civil Procedure Conversion Examination. There were a number of exceptionally well written papers which demonstrated a strong understanding of the legal principles balanced with a thorough discussion of the facts of the problem question. For the most part, candidates were able to properly identify the issues being examined and went down the correct path in their answers.

Having said that, during the marking it appeared that there were some common problem areas which caused some candidates difficulties. In particular, there were a few common mistakes which are worth noting here, especially for candidates planning to sit for this exam in the future:

1. Insufficient discussion of the facts (i.e. poor "application") – This is by far the most common reason why some candidates performed poorly on the examination. The importance of a detailed discussion of the facts cannot be stressed enough as usually the bulk of the marks lie in how the candidate applies the legal principles to the facts. Failure to apply the legal principles to the facts cost many candidates very dearly. In a practical subject such as civil procedure, the legal principles do not exist in a vacuum. After setting out a concise statement of the law, candidates must be able to demonstrate that they actually understand how those principles work by applying them to the fact pattern.

   A good example of why application is so important is Question 4 of this examination paper. Most candidates had little difficulty in setting out very comprehensive summaries of the rules relating to 'discovery', 'relevance' and 'privilege'. However, when it came time to actually apply those principles to Documents C and D, it became quite apparent that many candidates had no understanding of how the principles they had just cited actually work.

   Also, many candidates gave lopsided answers which spent pages reciting lots of legal principles but then barely a few lines about the facts. Since a large portion of marks fell in the application step, these unbalanced answers were unlikely to attract a passing mark. The facts in the examination paper are put there for a reason, please use them in your answers.

2. Poor allocation of time / discussion – A number of candidates spent far too much time writing lengthy answers to questions which were worth relatively few marks and then having very short answers for questions which were worth more marks

(therefore missing out on marks unnecessarily). Candidates should take care to note the weighting of marks for each question and budget their time accordingly.

Some specific comments about the individual questions are set out below.

Question 1(A)

Overall this question was well answered.

This was a small question about the commencement of proceedings. Candidates were expected, at a minimum, to identify the next document as the Acknowledgment of Service with reference to the rules and requirements under O.12, rr.1 & 3 RHC. Exceptional answers would also discuss the deadlines for filing based on the actual facts of the case as well as the procedural consequence(s) of failing to file this document.

Common mistakes by candidates who performed poorly included: (i) failing to identify the correct document; or (ii) taking a "guessing game" approach and simply writing out a long list of as many documents as they could think of hoping that one of them would be right. Such an approach not only did not attract many marks but wasted valuable time that could have been better spent elsewhere.

Question 1(B)

Overall the performance on this question was average / slightly above average.

This was another small question. Candidates were expected to discuss their knowledge of the Statement of Truth and also the CJR. Average answers would explain the reason that the Statement of Truth was required with reference to O.41A. A few exceptional answers went on to discuss the likely consequences with reference to the facts. Options ranged from contacting the other side to ask them to rectify the situation (saves the costs of legal proceedings), applying to court compel the Plaintiff to verify or fix this irregularity under O.41A, r.8 or O.2, r.3, or the extreme act of applying to court to strike out under O.41A, r.6.

Question 1(C)

Most candidates were able to identify that a request "for further and better particulars" would be the most appropriate procedure to use. Candidates were expected to set out the rules and procedure and then apply those to the facts at hand. Again, it was not sufficient to simply set out the rules for requesting FBPs. Candidates who performed well went on to explain <u>why</u> those missing particulars are relevant and necessary in the context of the overall story and issues being argued by both sides in the proceedings. Some exceptional candidates even tried to give a brief description of examples of requests that they would make.

Some credit was also given for candidates who considered the use of interrogatories (although given the early stage of the proceedings, a request for FBPs would be more suitable).

Common mistakes amongst candidates who performed poorly included: (i) failing to identify either of the above procedures; (ii) failed to apply the principles to the facts of the case properly; (iii) suggested waiting for discovery to happen first before filing the defence.

Question 2

Overall, candidates performed very well on this question.

The question itself was quite straightforward and directed candidates to discuss the issue of injunctions. Candidates who did well gave a well-balanced answer by first setting out a clear and concise summary of the relevant legal principles for mandatory injunctions and then delivered a good analysis of the facts of the case in hand with detailed references to the specific facts in the problem and explaining how and why those facts could hurt or help the client as they went through each step of the analysis.

Candidates who performed poorly made mistakes such as: (i) giving a lopsided answer that simply recited many miscellaneous legal principles about injunctions and little to no application the facts; (ii) hastily concluding that damages would be sufficient and the application would fail on that ground alone, and skipping the other steps of *American Cyanamid* or discussing other points; (iii) a few candidates went completely off target, despite the very clear instructions in the problem, and decided not to talk about injunctions at all and talked about various other interlocutory applications, such as striking out.

Question 3(A)

This question related to security for costs. Candidates who performed well were able to spot that the requirements under O.23, r.1(1)(a)-(d) RHC were likely not met on the facts of this case and therefore the proper legal basis for obtaining security was under the new Companies Ordinance (Cap.622). Those candidates would then set out the relevant facts which helped support their case under the Companies Ordinance (for example, the various financial troubles of RFL). The facts fit the requirements of the Companies Ordinance quite neatly and candidates had little difficulty setting out their answers after they identified the proper approach.

Candidates who performed poorly made mistakes such as: (i) not being aware of the new Companies Ordinance and trying to force an answer into O.23 anyways; (ii) relying on the provisions of the old Companies Ordinance; (c) suggesting an incorrect alternative procedure (perhaps because they recognized that O.23 did not apply and were not aware of the Companies Ordinance) such as interim payments, mareva injunctions, making a sanctioned offer/payment or relying on the costs provisions under O.62 RHC.

Question 3(B)

Overall, candidates performed well on this question.

This question required candidates to demonstrate their awareness of mediation and the emphasis which the Court will place on the parties to attempt mediation concurrently with litigation. Simply listing out generic advantages and disadvantages of mediation was insufficient. The key to performing well on this problem was, again, in the application. Candidates who did very well were able to link those advantages and disadvantages of mediation to the facts given and the specific concerns raised by the client.

Many candidates who performed poorly simply did not apply any facts and only listed out some generic advantages/disadvantages of mediation. Also some candidates failed to show any knowledge of mediation at all and simply identified other methods of settlement (negotiation, arbitration, sanctioned offers/payments, etc.). It should be noted that the facts lean heavily towards advising that the client at least attempt mediation. For those candidates who were of the view that mediation should not be attempted, they would need show that they were aware of the severe consequences of not attempting mediation and those candidates would have to provide very compelling reasons to justify this advice (Reasons such as: (i) that the parties are unlikely to settle; (ii) the client wants her day in court, are not good reasons).

Question 4

Overall, candidates appeared to have the greatest difficulty with this question.

The question itself is quite straightforward and very common in practice. Candidates were asked to explain how to deal with Documents C and D during discovery. Candidates were expected to explain the legal principles of discovery (for example, O.24 RHC, the test of relevance, the scope of discovery, the relevant type(s) of privilege, the dominant purpose test, the possibility of redaction) and then apply those principles to Documents C and D and discuss whether those documents should be disclosed and the procedure for doing so (for example, in which part of the list of documents, redaction, etc.).

This question demonstrates why so many marks are given in the application of the law to the facts. Most candidates were able to recite lots of the law. However, when it came time to use those principles on Documents C and D, many candidates were simply unable to clearly explain what should happen to those documents. It was quite clear that they had no understanding of how the law they had just recited actually work.

Many candidates just declared that those documents were relevant or irrelevant without any good explanation about why and what facts supported that conclusion. Similarly, many candidates gave confused answers about which type(s) of privilege might apply, often confusing the different types of privilege or referring to self-incrimination

principles. A number of candidates also spent far too much time discussing whether there was possession, custody or power when that was really not an issue and should have been dealt with very briefly. Further, many candidates did not complete their answer and did not explain how those documents should be dealt (i.e. where in the list of documents they should be placed).