PCLL Conversion Examination
June 2017
Examiner's Comments
Civil Procedure

General Comments

The examination was relatively straightforward but this has not been reflected by the candidates' performance. Somehow, at this examination, it appeared that many candidates had not fully revised for all the topics covered in the examination.

The main reasons for the failures were, as usual, in relation to (i) unfamiliarity with and/or misunderstanding of the procedures discussed, (ii) the failure to apply the relevant facts to the legal principles and (iii) copying of large chunks of materials from textbooks instead of answering directly the questions posed.

When revising for this topic, candidates are encouraged to try to understand the purpose of each of the procedures examined under the syllabus; what the procedures are intended to be used for and how the procedures could be applied. Candidates are also encouraged to read the cases so as to understand how the procedures could be used in real life scenarios.

Below are some specific comments on each question.

Question 1(a)

This question required candidates to discuss the differences between a final judgment and an interlocutory judgment. Candidates who did well were able to distinguish the difference. First of all, the Plaintiff has a mixed claim – a liquidated claim and an unliquidated claim. The final judgment in the case related to the Plaintiff's liquidated claim and interlocutory judgment related to the Plaintiff's claim for unliquidated damages. Since the amount of unliquidated damages were yet to be determined, the hearing on 5 July 2017 was to assess the damages of the Plaintiff's unliquidated claim.

Some candidates did not recognize the difference at all and hence were not able to answer the question satisfactorily.

Question 1(b)

This is a simple question. If Jets wished to set aside the default judgment, it should make an application straight away. The documents required were a summons and a supporting affidavit. This was all that was required for this question. Surprisingly, many candidates were not able to answer this simple question. However, examiners still credited correct answers if they were covered in parts (a) or (c) of this question.

Question 1(c)

First of all, candidates were expected to discuss whether the default judgment was regular or irregular. Many candidates jumped to the conclusion that the default judgment was regular (or vice versa) without explaining why. In fact the default judgment should be a regular one because the Plaintiff complied with all the procedures – i.e. service was proper, the acknowledgement of service should have been due on 24 April 2017 and the default judgment was entered on 28 April. Hence the default judgment seems to be a regular one. Candidates should then go on to discuss the appropriate test and the requirements which the Defendant would need to show in order to set aside a regular default judgment. Candidates who did well were able to discuss the facts of the case and came up with logical conclusions in relation to the merits of the application.

Question 2(a)

Candidates were expected to identify Order 18 rule 19 and discuss the 4 grounds under this rule, with application of the facts. For example, candidates were expected to discuss whether there was a case to strike out the Statement of Claim for disclosing no reasonable cause of action. Since no evidence would be admissible on this ground, the court would need to examine the Statement of Claim to determine whether there is a legal basis for the claim and whether a triable issue would be disclosed. Sensible candidates would ask to see the Statement of Claim before coming up with a conclusion. Candidates should then discuss the remaining 3 grounds under Order 18 rule 19 and consider whether, given the facts of the case, the Defendant could rely on these grounds to strike out the Statement of Claim. Again, there should be some application of the facts and conclusions should be formed as to the merits of such applications. Many candidates were not able to answer this question in such a detailed manner.

Question 2(b)

This was an open-ended question and gave much room for candidates to discuss the relevant procedures that could be invoked by the Defendant. These include counterclaiming for the remaining sum due from the Plaintiff under the contract (i.e. HK$5 million). Candidates could also discuss whether it would be advisable to obtain a summary judgment for this counterclaim. Other procedures to encourage settlement could also be discussed, e.g. settlement negotiations, making sanctioned payments and offers and mediation. Not many candidates were able to answer this question in a detailed manner.

Question 3

For this question, candidates were required to discuss the discoverability of the different documents/types of documents as set out in the question. In the first place, a lot of candidates misread the question and did not discuss Document A at all. For these candidates, several marks would have been missed because of this. Some candidates also did not answer the question – "*If such documents need to be disclosed, advise your partner where they should be listed in the List of Documents".*

Otherwise, this was generally a question which a lot of candidates did well in although occasionally, the examiners identified some instances where there had been some misunderstandings of the discovery principles. Discovery is in fact an important procedure in civil litigation and candidates are encouraged to fully understand the issues arising out of this topic.

For Document A – the issues to be discussed was whether the document was truly a "without prejudice" document – i.e. was there a genuine attempt to settle the proceedings or was it just a threat?

For Category B – the main issue was relevance. These documents were mainly the contractual documents and correspondence in relation to negotiation of the contract. The main issue in this case was whether the VMI software was defective. In light of this, are these documents relevant to the issues in dispute? Candidates were required to discuss this issue.

For Category C – the main issue was whether the documents would be covered by legal advice privilege or litigation privilege. Again the examiners required some discussion of the facts.

For Category D – one should discuss the relevance of the documents – the design documents and the marketing documents. As mentioned above, since the main issue was whether the VMI software was defective, would all of these documents be relevant to the issues in dispute? Candidates were also required to address the client's concern about the confidentiality of these documents which they claim to be trade secrets.

For Category E – candidates were required to discuss whether the documents were covered by litigation privilege and the dominant purpose of these documents.

Question 4(a)

Candidates were required to discuss the procedure and section 58(1) of the Evidence Ordinance and cases such as *Ip Sau Lin v. Hospital Authority [2009] 2 HKC 383* – i.e. was the expertise necessary, relevant and of probative value? Many candidates touched on these issues but generally they were not fully addressed.

Question 4(b)

Most candidates did well for this question and were able to identify the expert's duty to the Court and discussed the Code of Conduct for Experts and the statement of truth.

Question 4(c)

Not many candidates were able to address fully all the issues, namely, the likely costs order should be that Sharks should pay the costs of the entire proceedings to Jets. Candidates should then go on to discuss the appropriate basis of the costs order and discussing whether a wasted costs order would be warranted. Again, there should be some application of the facts of the case.