

PCLL CONVERSION EXAMINATION JANUARY 2015

Title of Paper: Civil Procedure
Date: 6 January 2015
Time: 9:30 a.m. – 9:45 a.m. (Reading Time)
9:45 a.m. – 12:45 p.m.

Instructions

1. Write your **candidate number** on the cover of each answer book.
Do **NOT** write your name on the answer book.
2. Start each answer on a separate page of the answer book.
3. Write your answers only in the answer books provided.
4. This is a 3 hour examination. You have an additional 15 minutes for reading.
Do **NOT** begin writing in your answer books until you are instructed to do so.
5. The passing mark for this paper is 50 marks.
6. This is an open book examination.
7. This paper consists of 8 pages. The paper contains a total of 4 questions worth a total of 100 marks.
8. You must answer **ALL** questions.

**DO NOT OPEN THIS QUESTION BOOK
UNTIL YOU ARE TOLD TO DO SO**

PCLL Conversion Examination January 2015

Civil Procedure

BACKGROUND

You are a solicitor in the firm of Strawberry & Co (“Strawberry”). Strawberry is acting for Watermelon Co. Ltd. (“WM”). WM’s managing director, Apple Green (“AG”) has just met with your supervising partner, Star Fruit. Your supervising partner gives you a note of the meeting (**DOCUMENT A**).

Question 1 (24 marks)

- (a) Based on the information acquired from **DOCUMENT A ONLY**, advise AG and WM whether the writ was validly served. In doing so, refer to the relevant law and reference to the facts set out in Document A. **(10 marks)**
- (b) Based on the information acquired from **DOCUMENT A ONLY**, advise AG and WM on pre-action considerations and whether WM should seek redress against Grapevine Ltd and if so, how should it do so? State what further information you need, if any. **(14 marks)**

Question 2 (30 marks)

At paragraph 10 in Document A, AG said she “*is worried that WM will have no real recourse against GKL even if WM successfully defends the action against GKL*”. Based on the information acquired from **DOCUMENT A ONLY**, advise AG and WM whether there is/are any application(s) which WM may make to address AG’s concerns and the procedure(s) and merits of making such application(s). State what further information you need, if any. **(30 marks)**

Question 3 (30 marks)

Assume it is now April 2015. The action continues and pleadings have now closed. The parties are proceeding with the discovery process.

In the pleadings, GKL alleges that WM had breached warranty 16.3 of the Agreement by supplying to GKL the Hoovers which were counterfeit and that at the time of entering the Agreement on 1 November 2014, WM knew or had reason to suspect that the Hoovers were actually in breach of Pineapple’s intellectual property rights. WM denies these allegations and in its defence, pleads that the Hoovers were genuinely manufactured by Pineapple. AG tells you that WM was in the course of obtaining certificates from Grapevine Ltd. to prove the authenticity of the Hoovers.

- (a) Advise AG and WM of WM’s discovery obligations. **(8 marks)**

- (b) AG passes to you Documents B, C and D. Advise AG and WM whether **DOCUMENTS B, C and D** need to be disclosed by WM during discovery. If such document(s) need(s) to be disclosed, where should they be listed in WM's List of Documents? **(16 marks)**
- (c) In light of your advice in 3(b) above, advise AG and WM what WM should do now in order to protect its position in the action. **(6 marks)**

Question 4 (16 marks)

In order to support its claim, AG told you that she is trying to locate an expert who would be able to examine a sample of the Hoovers to confirm that they were genuinely manufactured by Pineapple Inc. AG told you that in order to win the case, she is prepared to pay the expert a sum of money to secure a supportive opinion from the expert.

- (a) Is WM allowed to adduce expert evidence to support its case? If so, when should such application be made? Advise AG and WM accordingly. **(6 marks)**
- (b) Comment on AG's suggestion to "*pay the expert a sum of money to secure a supportive opinion from the expert*". In doing so, refer to the relevant law and procedure. **(10 marks)**

DOCUMENT A

Strawberry & Co. Meeting Note

Date: 5 January 2015

Client: Watermelon Co. Ltd.

Matter: Dispute with Golden Kiwi Limited

Prepared by: Star Fruit (Partner)

1. This morning, I met with Ms. Apple Green (“AG”), who is the managing director of Watermelon Co. Ltd. (“WM”). WM is a Hong Kong company, specializing in trading in high technology products and gadgets like high definition televisions, smartphones, computers, and electrical appliances.
2. AG told me that in September 2014, Pineapple Inc. launched its new product the “Automatic Hoover 6” which enabled users to remote control the hoover. AG said that she was fortunate enough to be able to source a large number of the “Automatic Hoover 6”s from its supplier, Grapevine Ltd, at a reduced price of HK\$7,500 per set (the normal retail price being around HK\$10,000 each). In turn, AG managed to find a buyer for these hoovers. The buyer was Golden Kiwi Limited (“GKL”), a New Zealand company which operates a representative office and a warehouse in Hong Kong.
3. AG advised me that on 1 November 2014, WM entered into a written agreement with GKL (the “Agreement”) whereby WM agreed to sell and deliver 1,000 sets of the “Automatic Hoover 6” manufactured by Pineapple Inc. (the “Hoovers”) to GKL by 30 November 2014 at a price of HK\$9,000 per set (i.e. total contractual price of HK\$9,000,000). AG explained that the Agreement was signed by her daughter, Amy Green (“Amy”) for and on behalf of WM. Amy is the sales manager and a director of WM.
4. On 30 November 2014, WM duly delivered the Hoovers to GKL’s warehouse in Hong Kong.
5. Surprisingly, on 2 January 2015, when AG was still in Japan, Amy advised her that a writ of summons was received in HCA No. 13 of 2015. The writ was personally served on Amy, when Amy was leaving her apartment for work on the morning of 2 January. At the time, Amy had just left her apartment building in Mid-levels (which was where she resided) and was about to head to WM’s office in Admiralty (which was also WM’s registered office address).

6. In the action, GKL claimed against WM for damages in the sum of HK\$10,000,000 for WM's breach of warranty 16.3 of the Agreement, alleging that the Hoovers were not genuinely manufactured by Pineapple Inc. but instead, were counterfeits.
7. According to AG, in the Agreement, WM gave the following warranty to GKL:

“16.3 The Seller represents and warrants that Seller has the rights to sell the Products and that the Products do not infringe any intellectual property rights of any third party.”

(NB: the Seller is WM and the Products refer to the Hoovers.)
8. AG said that she was very shocked to hear about the writ of summons. She therefore immediately cut short her holiday and returned from Japan yesterday. She explained that the Hoovers were sourced from Grapevine Ltd, WM's usual supplier. There was no written contract with Grapevine Ltd. Although Raspberry Grape (CEO of Grapevine Ltd.) did represent to her that the Hoovers were authentic ones from Pineapple Inc., AG is not sure whether she should believe what Raspberry Grape had said. In any event, she believed that at the time the Agreement was entered into, there was no reason to suspect that the Hoovers were counterfeits. AG said she was using one of the Hoovers sourced from Grapevine Ltd herself and she believes that they were genuinely manufactured by Pineapple Inc.
9. According to AG, GKL still owes WM HK\$3,000,000 under the Agreement. Such sum was due to be paid by GKL to WM on 7 December 2014 (7 days after delivery of the Hoovers) but GKL failed to make payment of the said sum despite several chasers by WM. AG believed that GKL commenced the current action to delay payment of the remaining amount of HK\$3,000,000 to WM.
10. AG said that she is very worried about the costs that would be incurred to defend this claim. According to AG, GKL is a registered non-Hong Kong company. It rents its representative office premises in Tsimshatsui and the only property it owns in Hong Kong is a small warehouse premises in Sheung Shui, New Territories. AG believes that GKL's business is not doing well since it is actually going through the trouble of commencing this claim in order to delay/avoid payment of the \$3,000,000 to WM. AG is worried that WM will have no real recourse against GKL even if WM successfully defends the action against GKL.
11. AG wants to instruct the firm to assist WM in the action.

DOCUMENT B

From: Amy Green [mailto: amy@watermelon.com.hk]
Sent: 1 April 2015 11:15
To: apple@watermelon.com.hk
Subject: Claim from Golden Kiwi

Dear Mom,

You have asked me to dig out my files and emails in relation to the Golden Kiwi claim. You will recall that last week, I have passed you everything I have already. However, as I was going through my emails today, I noticed the attached email from Grapevine and letter from Pineapple to Grapevine. I think I may have overlooked the email and the letter from Pineapple when I signed the contract with Golden Kiwi on 1 November 2014. What should we do now? As I am flying out to Seoul this afternoon, can you please forward this email to our solicitors to seek their advice about what we should do?

Mom, I am very sorry about this. But since I understand that Grapevine has settled the matter with Pineapple, I don't think the attached are at all relevant to Golden Kiwi's claim?

Amy

DOCUMENT C

From: Raspberry Grape [mailto: r_grape@grapevineltd.com]
Sent: 25 October 2014 22:49
To: amy@watermelon.com.hk
Subject: New Products from Pineapple

STRICTLY PRIVATE AND CONFIDENTIAL – PRICE SENSITIVE

Dear Amy,

Hope this email finds you well. I am writing to let you know of a new product from Pineapple which I should be able to source, again at an attractive discounted price for your company only. This is the new GPhone 7S. I am sure you are aware that this will be a well sought-after product which will launch soon in November. I am able to source around 1,000 - 1,500 sets of 64GB GPhone 7Ss in metallic gold for you at the price of HK\$5,880 each (normal retail price: HK\$6,000). You will of course know that once the phone is launched by Pineapple, prices are expected to go up to around \$10,000 each within the first week. So please keep this information strictly confidential as I am only able to offer this deal to your company only, as you are our longstanding and trustworthy partner. Please get back to me about this ASAP. This is a golden opportunity which you should not miss.

On another note, we have received the attached letter from Pineapple Inc. today. It relates to the 1,000 Automatic Hoover 6s which we supplied to you recently. I understand you will be entering into a contract about them soon so I send this letter to you for your reference. We are handling this matter with Pineapple and you should in no way be concerned about the allegations therein. As you know, we are Pineapple's authorised dealer.

Regards,
Raspberry
Raspberry Grape
CEO, Grapevine Ltd

P.S. Do get back to me soon about the GPhone deal and remember our dinner appointment tomorrow night at 8p.m. - I am able to find some very yummy hairy crabs direct from Yangcheng Hu!

DOCUMENT D

Pineapple Inc.

Grapevine Ltd.
12D Orange Industrial Building
Shumshuipo
Kowloon
Hong Kong

23 October 2014

Dear Sirs,

“Automatic Hoover 6”

Despite the fact that you are our authorized dealer, we recently became aware that you are selling alleged counterfeit copies of our “Automatic Hoover 6”.

Since we are the sole owner of the intellectual property rights in the “Automatic Hoover 6”, we demand that you immediately cease from selling the said counterfeit copies. You should also notify us of how many copies of such counterfeit copies you have already sold and the price at which they were sold. In addition, please provide written assurances to us that you have complied with these demands and will not in the future, sell any such counterfeit copies.

Unless we hear from you within the next 14 days, we have no choice but to withdraw your authorized dealership of our products.

Yours faithfully

Lemon Meringue

Lemon Meringue
For and on behalf of
Pineapple Inc.

END OF PAPER