

## **PCLL CONVERSION EXAMINATION JANUARY 2019**

Title of Paper: Civil Procedure  
Date: 3 January 2019  
Time: 9:30 a.m. – 9:50 a.m. (Reading Time)  
9:50 a.m. – 12:50 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 20 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 20 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 2019

## Civil Procedure

### INSTRUCTIONS TO STUDENTS

**THIS PAPER TRACES THE DEVELOPMENT OF A PIECE OF CIVIL LITIGATION FROM START TO FINISH. THUS THE FACTS DEVELOP AS THE CASE PROGRESSES. ANSWER EACH OF THE QUESTIONS ON THE BASIS OF THE FACTS KNOWN TO YOU AT THE PARTICULAR POINT IN THE LITIGATION AT WHICH THE QUESTION IS ASKED, AND DO NOT INCORPORATE “FUTURE” FACTS IN YOUR ANSWERS**

### ANSWER ALL QUESTIONS

Charles Wong (CW), a sole trader in Hong Kong, entered into a contract in writing on 18 September 2018 with Philippe Camus (PC), also a sole trader, a French citizen resident in Amiens, France, who imports large quantities of goods from the Far East. The contract was for the supply of 20,000 8-sided gold-plated pens at €10 per pen.<sup>1</sup> Payment was to be effected by PC by bank transfer within 28 days of the date of invoice. CW shipped the pens to PC on 30 October 2018 and sent the invoice to PC dated 30 October 2018. PC did not make payment and gave no reason for his failure to do so. CW sent several demands for payment to PC, which went unanswered. CW now wishes to sue PC in Hong Kong for the outstanding price of €200,000 and has instructed you to represent him in the proceedings.

### **I COMMENCEMENT OF PROCEEDINGS TO CLOSE OF PLEADINGS**

- 1 In which Hong Kong court will you issue proceedings on behalf of CW?  
(2 marks)**
- 2 What will you need to establish to the satisfaction of the court in order to obtain leave to issue a writ against and to serve it upon PC in France?  
(8 marks)**
- 3 Prior to making your application for leave, CW’s contacts in France inform him that PC has shut down his business in Amiens, France, and has relocated to Rouen,**

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<sup>1</sup> Assume 1 Euro = 8.9 Hong Kong Dollars.

France, where they believe he has set up a similar business under a different name. CW's contacts are unable to obtain an address for PC.

**What additional court order do you need in order to attempt to effect service of the proceedings on PC? (2 marks)**

**4 How will you suggest to the court that the proceedings may be effectively served on PC? (3 marks)**

**5** Still prior to the application for leave, CW's friend, who works for Sang Heng Bank ("the Bank") in Hong Kong, tells CW that PC maintains a substantial deposit account with the Bank which he often uses for the Hong Kong purchases he makes for his business, and also so that he has cash available for his frequent trips to Hong Kong and the Mainland.

**Explain briefly what CW would need to establish in order to obtain a Mareva injunction freezing PC's money in the account with the Bank. Do you believe the application for a Mareva injunction will succeed? (10 marks)**

**6** The court grants the Mareva injunction and grants leave to issue and serve the writ out of the jurisdictions by the means you have suggested in answer to Question 4. You have your French agents serve the proceedings on PC and PC responds by filing an Acknowledgment of Service giving Notice of his intention to defend the proceedings. CW tells you that a lawyer friend of his has told him overseas litigants can be ordered to provide security for costs.

**Can PC be ordered to provide security for CW's costs of the litigation? Give reasons. (2 marks)**

**7** CW's claim against PC simply pleads the contract for the sale of the pens and the breach by non-payment. PC, representing himself, files a Defence as follows:

*HEADING*

*DEFENCE*

- 1 The Defendant denies all the allegations in the Statement of Claim.*
- 2 The Defendant denies that he entered the contract by signing the same on the Eighteenth of September Two Thousand and Eighteen. There is no such contract.*
- 3 If, which is denied, there is such a contract, the Plaintiff procured the Defendant to sign the same by making a fraudulent misrepresentation that the goods were free from any intellectual property claims.*

*Dated 4 January 2019*

*Signed Philippe Camus*

This is the entire document. You may assume the heading is correct.

**In what ways, if any, does this Defence fail to comply with O18 RHC?**  
**(10 marks)**

Before you file a Reply to the Defence, PC instructs Hong Kong solicitors to represent him. Those solicitors ask you to agree to their amending the Defence and you do agree. Those solicitors file an Amended Defence and Counterclaim for PC's lost profits on the pens. The Defence replaces the plea of fraudulent misrepresentation with a plea in misrepresentation. The Defence also pleads that the contract is unenforceable by reason of illegality, giving particulars that the pens infringe a 3-dimensional trademark registered in France by Parkier Stylo SA ("PS") covering an 8-sided pen.

Your Reply and Defence to Counterclaim denies CW's knowledge of PS's trademark and otherwise joins issue on the allegations in the Defence and Counterclaim.

## **II DISCOVERY AND CASE MANAGEMENT**

**8** Before Discovery of Documents PC sends the following email direct to CW:

*Cher Charles*

*I am truly sorry that this situation over the pens has come about, but there is nothing I can do. If I sell the pens anywhere in the European Union I may be prosecuted for a crime. I have spoken to my friends at Parkier Stylo and they have offered to buy the pens from me at 5 Euros each. They will simply stamp their logo on top of yours. This is the best I can do. If you agree, I will pay the €100,000 to you and we can bring this horrible litigation to an end.*

*I do hope you will see the good sense of this solution.*

*Regards*

*Philippe*

**Is this email either privileged from Discovery or inadmissible? Give reasons.**  
**(4 marks)**

- 9 CW does not accept the proposal in the email.

You advise CW about the Case Management obligations and in particular the desirability of attempting Mediation. CW is adamantly opposed to Mediation as he feels PC has cheated him so that the litigation involves a matter of principle. He instructs you to write a letter to PC's solicitors confirming his refusal to participate in Mediation, which you do as follows:

*Dear Sirs*

***Wong v Camus***

*We are instructed by our client that he sees absolutely no point in making any attempt to resolve this dispute by Mediation. Our client firmly believes that your client has acted dishonourably and that he should bear the entire consequences of the alleged trademark infringement. It therefore seems to our client and to ourselves that there is no scope for settlement.*

*We will complete the Timetabling Questionnaire accordingly.*

*Yours faithfully*

You complete the Timetabling Questionnaire consistently with CW's position on Mediation.

**Is this letter either privileged from Discovery or inadmissible? Give reasons.**  
**(4 marks)**

- 10 **If CW goes on to win the case at trial, what are the possible consequences of his position on Mediation?**  
**(3 marks)**

- 11 Discovery proceeds and you attend at PC's solicitors' office to inspect the documents disclosed in Part 1, Schedule 1 of PC's List of Documents. As you go through the documents you see one document on the Cover Page of which are the words: "COUNSEL'S ADVICE ON LIABILITY, EVIDENCE AND QUANTUM OF DAMAGES".

**What should you do? What should you not do?**  
**(4 marks)**

Case Management Directions are given and complied with. PC's solicitors send you a letter headed Sanctioned Offer in which they make the offer contained in the email set out at Question 8, *ie* €100,000. The Sanctioned Offer also includes interest from 27 November 2018. The Sanctioned Offer is in proper form. You take instructions from CW who refuses to accept the offer and does not wish to make any offer in response.

### III PRE-TRIAL REVIEW, TRIAL AND COSTS

- 12 The Pre-trial Review is then listed for hearing on 11 November 2019. A week before that, a Personal Injury case, which you have in the District Court and which you had intended to conduct yourself, is warned for hearing the following week, *ie* the week commencing 11 November 2019.

**Will you succeed in an application to adjourn the Pre-trial Review? Give reasons. (3 marks)**

- 13 The action is then set down for trial in the Fixture List to commence on 11 February 2020 with 5 days reserved. You now need to prepare the trial bundles. Between the 2 parties, over 1,000 documents were disclosed in the Discovery process.

**What bundles will you need to prepare and lodge with the court prior to the trial? (6 marks)**

- 14 **How should those bundles be presented? (3 marks)**

- 15 On 5 February 2020, CW is seriously injured in a traffic accident and admitted to hospital where he is expected to remain for 3 weeks. His evidence is crucial to his case.

**Will you succeed on an application to adjourn the trial? Give reasons. (3 marks)**

The trial takes place.

#### 16 OUTCOME A

At the conclusion of the trial the judge dismisses CW's claim and awards PC damages of €120,000 on his Counterclaim. PC is also awarded interest on that sum and costs. The court also discharges the Mareva injunction. PC's Counsel then refers the judge to PC's Sanctioned Offer.

**In light of that Sanctioned Offer, what orders can the court make in relation to costs and what factors will the court take into account when considering whether to make such orders? (10 marks)**

#### 17 OUTCOME B

Before the trial PC sold all the pens to PS for €100,000. At the conclusion of the trial the judge awards CW €100,000 and the shipping cost of the pens from Hong

Kong to France of HK\$30,000, which sums, in aggregate, exceed the amount of the Sanctioned Offer and interest. The judge dismisses the Counterclaim. For the purposes of your answer to the following question, please assume that CW changed his position and both parties participated in an unsuccessful Mediation prior to the trial.

**What is the likely costs order the court will make in light of this outcome of the trial?** (5 marks)

#### **IV EXECUTION OF JUDGMENT**

**YOU ARE NOW PC'S SOLICITOR AND THE OUTCOME OF THE TRIAL IS "A", IE CW'S CLAIM HAS BEEN DISMISSED, PC HAS BEEN AWARDED DAMAGES ON HIS COUNTERCLAIM OF €120,000, INTEREST AND COSTS AND THE MAREVA INJUNCTION HAS BEEN DISCHARGED.**

18 CW files Notice of Appeal against the judgment.

**Does the appeal operate as a bar to execution of the judgment?** (2 marks)

19 CW abandons his appeal. You write to CW's solicitors demanding payment of the judgment debt and interest but they reply to say they are no longer instructed by CW. Your demand direct to CW goes unanswered. PC instructs you to execute the judgment. The Business Registration Search discloses CW's residence in Heng Fa Chuen and a Land Office search discloses that the property is in CW's sole name and subject to a mortgage dated 15 May 2016 securing HK\$10 million. You instruct enquiry agents to investigate CW's other assets and their report discloses:

- i. That CW maintains an account with HSBC's Heng Fa Chuen branch with a "healthy" balance.
- ii. That CW runs a Fine Arts business in Hollywood Road as a sole proprietor where there is a large number of valuable items offered for sale.
- iii. That the premises from which CW operates the Fine Arts business are rented.
- iv. That the Fine Arts business was intended to be a joint venture with a person called Cyrus Yuen Ming Kong, also living in Heng Fa Chuen. Yuen failed, however, to make his capital contribution to the business of HK\$5 million for which CW sued and obtained judgment. The judgment has not been paid.

**What steps can you take on PC's behalf to execute the judgment against CW?** (12 marks)

**20** As a result of the Mareva Injunction a number of PC's business dealings in Hong Kong were disrupted or cancelled altogether and he has lost several suppliers.

**By what mechanism can PC reclaim his losses arising from the injunction from CW? (4 marks)**

**~ End of Examination Paper ~**