

PCLL CONVERSION EXAMINATION JUNE 2015

Title of Paper: Civil Procedure
Date: 24 June 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 9 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 June 2015

Civil Procedure

BACKGROUND

You are a trainee solicitor and your firm is acting for Golden Kingdom Ltd. (“GKL”). GKL’s managing director, May Siu (“MS”) met with your supervising partner, Dan Ko, on 1 May 2015. The note of the meeting is appended hereto as **DOCUMENT A**.

Question 1 (25 marks)

For this question, assume it is now 1 May 2015 and you have just received **DOCUMENTS A and B** from your partner.

- (a) MS is keen to recover GKL’s losses as soon as possible. Based on the information acquired from **DOCUMENTS A and B ONLY**, advise MS and GKL of the pre-action considerations which GKL should take into account when considering whether to commence action against Lotus and/or Wang’s. In your view, against whom should GKL seek redress? **(16 marks)**

- (b) As per the advice from your partner, if GKL were to commence action against Wang’s then it would need to arrange for the writ of summons to be served out of the jurisdiction. Based on the information acquired from **DOCUMENTS A and B ONLY**, advise GKL whether it is likely to succeed in an application for leave to serve the writ of summons issued against Wang’s out of the jurisdiction. **(9 marks)**

Question 2 (25 marks)

MS and GKL have subsequently decided to commence action against Lotus only. On 15 May 2015, GKL commenced an action against Lotus in the Court of First Instance, claiming a sum of HK\$ 20 million for damages for breach of warranties. In the writ of summons, GKL also claimed damages for loss of reputation as a result of being involved in the gutter oil scandal and demanded a written apology from Lotus (the “Written Apology”). The writ of summons endorsed with a Statement of Claim was served on Lotus’ registered office address on 15 May 2015. The process server left it at the premises of Lotus’ registered office. Assume it is now **25 May 2015**. MS is keen to resolve the matter as soon as possible and seeks your advice as to the following:

- (a) She is aware that on 15 May 2015, Chow, who is the sole director and shareholder of Lotus, was on a business trip in Taiwan. To date, Lotus has not yet filed an acknowledgement of service of the writ of summons. Was the writ validly served? Can GKL now file a default judgment against Lotus? **(15 marks)**

- (b) (Assume an Acknowledgement of Service had been filed and served.) She has heard that there is a way to dispose of actions quickly called summary judgment. What is this? Is it possible to apply for summary judgment against Lotus and is this application likely to succeed? **(10 marks)**

Question 3 (25 marks)

Assume it is now December 2015. Lotus eventually filed an acknowledgement of service of the writ of summons. The action proceeded and pleadings have now closed.

On 14 December 2015, Lotus made a sanctioned payment into court in the sum of HK\$5 million in full and final settlement of all causes of action (i.e. the whole claim) against it in the proceedings. It is your partner's estimate that if GKL succeeds in the action, GKL should be able to recover damages in the region of HK\$12 – 15 million.

- (a) Given the advice from your partner, advise MS and GKL of the pros and cons of accepting the sanctioned payment into court. In particular, MS also wants to know whether GKL can still obtain the Written Apology from Lotus if GKL accepts the sanctioned payment into court. **(15 marks)**
- (b) If GKL does not accept sanctioned payment into court, MS wants to know what GKL can do to resolve the matter as soon as possible without a trial. What would be your recommendation to MS/GKL in this regard? **(10 marks)**

For this question, you only need to take into account the facts as set out in questions 1-3 above and in **DOCUMENTS A and B.**

Question 4 (25 marks)

It is now 12 May 2016. GKL did not accept Lotus' sanctioned payment into court and the matter proceeded to trial. The case is now at trial. The judge has just heard the parties' evidence and the parties are about to close their cases.

MS approaches you and your partner during the break and shows you an email appended hereto as **DOCUMENT C.** MS explained that GKL was suffering a cash flow problem at the time the email was written and she was desperate to settle the proceedings as soon as possible before GKL's legal costs escalated. She did not receive any reply to this email and hence she did not show it to you or your partner at the time. Now that the judge is about to make a ruling in respect of the case, MS is concerned that Lotus may show this letter to the judge to persuade the judge to award damages in the region of HK\$10 million, instead of what GKL should be entitled to (which she expected would be more than HK\$10 million).

MS also tells you and your partner that she is aware that Lotus is currently closing down all its operations in Hong Kong. MS is concerned that Chow is shutting down Lotus'

operations in Hong Kong with a view to evading the consequences of the likely judgment which might be awarded against Lotus in the current proceedings. MS gives you and your partner the following information:

- (i) Lotus owns 2 company cars registered in Lotus' name – a 2015 Toyota Prius and a 2012 Honda Fullsize minivan;
- (ii) Lotus is owed several trade debts from 2-3 of its longstanding customers totalling around HK\$3 million;
- (iii) MS is aware that Lotus has several bank accounts in Hong Kong but she is not sure of the balance of those accounts;
- (iv) Lotus rents its registered office premises in a Kwun Tong Factory building. This serves as Lotus' office and warehouse. According to MS, Lotus stores most of its stock here;
- (v) Chow owns his matrimonial home together with his wife. This is a flat in Tin Hau which they bought in 2010 at HK\$10 million. The flat is subject to a mortgage to the Hong Kong Bank; and
- (vi) MS thinks that Lotus may own 1-2 carpark spaces in Kwun Tong but she is not too sure about this.

As GKL's counsel is about to go back into court with your partner, your partner instructs you to review the information provided by MS and:

- (a) advise him whether GKL would need to now disclose the email (**DOCUMENT C**) as part of GKL's ongoing discovery obligations (**10 marks**); and
- (b) advise him as to the likely enforcement actions that could be taken by GKL against Lotus if GKL were to obtain judgment in its favour (**15 marks**).

DOCUMENT A

A Firm Meeting Note

Date: 1 May 2015

Client: Golden Kingdom Limited

Matter: Product Liability Dispute

Prepared by: Dan Ko (“DK”) (Partner)

1. This morning, I met with Ms. May Siu (“MS”), who is the managing director of Golden Kingdom Ltd. (“GKL”). GKL is a Hong Kong company, which owns and operates the brand name “Dim Sum Queen”. “Dim Sum Queen” is a range of pre-packed frozen dim sum products on sale in supermarkets in Hong Kong and overseas. MS said that when she was young, she had worked in a dim sum restaurant, and had sold dim sum in a dim sum trolley. Thereafter, she had worked very hard to build up the “Dim Sum Queen” brand name. She is therefore very concerned about the image of “Dim Sum Queen” after the recent gutter oil scandal in Hong Kong.
2. MS advised me that GKL used to source its lard from Lotus Limited (“Lotus”). Lotus is the local distributor of foodstuffs manufactured by Wang’s Enterprises Corporation, a large Taiwanese food produce company (“Wang’s), which is listed on the Taiwan Stock Exchange. Prior to November 2014, GKL used the lard produced by Wang’s and sourced from Lotus to produce around 40% of its “Dim Sum Queen” products. MS confirmed that all its dim sum products were produced from its factory in Hong Kong.
3. Last September, it was discovered that a number Taiwanese oil manufacturers used gutter oil in the production of cooking oil and lard. As a lot of Hong Kong food manufacturers sourced its cooking oil and lard from Taiwan, the Hong Kong Centre for Food Safety had since then conducted tests on many food product samples in Hong Kong and had to arrange for recall of those products which had been tested to contain gutter oil. These products included pineapple buns, mooncakes, noodles and dim sum products manufactured by well-known companies in Hong Kong.
4. As MS prides herself as the manufacturer of safe and healthy dim sum, in October 2014, GKL was put under a lot of pressure by competitors in the industry to submit 2 of its most popular products – shrimp dumplings and BBQ pork buns – for voluntary testing.

5. On 15 October 2014, samples of the “Dim Sum Queen” brand shrimp dumplings and BBQ pork buns were submitted to an independent laboratory – Great Victoria Labs HK Ltd – for testing. On 20 October 2014, the results were available and unfortunately, the test results indicated that both food product samples contained gutter oil.
6. Given the test results and upon legal advice from its solicitors at the time, in November 2014, GKL notified the Centre for Food Safety and a voluntary recall was carried out for all of “Dim Sum Queen” shrimp dumplings and BBQ pork buns that were on sale at the time. At the same time, GKL submitted another 8 different food product samples for testing. All these 10 food samples came from the dim sum which were made with lard manufactured by Wang’s.
7. The test results of the further testing of the 8 food samples were available on 10 November 2014 and unfortunately, the tests results indicated that all 8 food product samples contained gutter oil. GKL again immediately reported this to the Centre for Food Safety and again product recalls were carried for all these 8 types of dim sum.
8. MS confirmed that the product recalls took place not only in Hong Kong but also overseas, where the products in question were also sold. Subsequent to the gutter oil scandal, GKL has now sourced its lard from a local manufacturer at a higher price. MS said that she has arranged for the new source of lard to be tested and she is now 100% satisfied that this new source of lard is free of gutter oil. She is now working very hard to re-build the “Dim Sum Queen” brand image.
9. In early April 2015, GKL was finally able to tally its losses over the gutter oil scandal and MS told me that GKL suffered the following losses:
 - a. Costs in conducting the worldwide product recalls – around HK\$1.5 million
 - b. Total amount of “Dim Sum Queen” dim sum which contained gutter oil and were unsold / in respect of which refunds had to be given – around HK\$ 3 million
 - c. Drop in sales (both Hong Kong and worldwide) since the gutter oil scandal to March 2015 – around HK\$10 million. Sales have picked up again since March 2015 as a result of the numerous promotional campaigns carried out by GKL in Hong Kong and worldwide to re-build the “Dim Sum Queen” brand image
 - d. Costs incurred for the numerous the promotional campaigns – around HK\$5 million
 - e. Unused lard purchased from Lotus prior to the gutter oil scandal – around HK\$500,000

Total losses: around HK\$20 million

10. MS is keen to recover these losses. MS explained that Lotus had been GKL's supplier of lard since 2010 to November 2014 and this was subject to Lotus' Purchasing Terms and Conditions (extracted in **Document B**). MS confirmed that GKL did not enter into any contract with Wang's.
11. Some time in April this year, when MS called Fung Chow ("Chow"), the director of Lotus, to talk to him about the losses suffered by GKL as a result of the defective quality of the lard supplied by Lotus, Chow denied liability. Chow told MS that Lotus should not be responsible and asked MS to make a claim directly against Wang's as it was Wang's who manufactured the lard with gutter oil and that Lotus was just the distributor and not the manufacturer. Chow also said that Lotus had limited assets and therefore there was no point for GKL to go after Lotus.
12. MS wants to instruct the firm to assist GKL in this matter and asked me for his preliminary advice. I advised MS that GKL might have a claim against Lotus for breach of warranties and a claim against Wang's in tort. If GKL wished to pursue Wang's, then GKL would need to arrange for the writ of summons to be served out of the jurisdiction.

Dan Ko

DK

DOCUMENT B

Extract of Lotus' Purchasing Terms and Conditions

1. These general purchasing terms and conditions ("PT&C") shall apply to all orders for foodstuffs manufactured by Wang's Enterprises Corporation (the "Goods") by Golden Kingdom Limited (the "Buyer") from Lotus Limited (the "Seller"), the authorized distributor of the Goods in Hong Kong.

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Warranties

7. The Seller warrants, in respect of every order placed by the Buyer under these PT&C that:
 - 7.1 The Seller has the right to sell the Goods;
 - 7.2 The Goods are all manufactured by Wang's Enterprises Corporation, No. 74 Shengchan Road, East District, Tainan City, Taiwan; and
 - 7.3 The Goods are free from any defect making their quality unsatisfactory, which defect(s) would not be apparent on reasonable inspection of the Goods.

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Governing Law and Jurisdiction

10. All orders for the supply of the Goods under these PT&C shall be governed by and construed in accordance with the laws of Hong Kong. The parties agree to submit any dispute arising out of or in connection with these PT&C or any orders placed thereunder to the non-exclusive jurisdiction of the Courts of the Hong Kong SAR.

DOCUMENT C

From: May Siu [mailto: siumay@dimsumqueen.com.hk]
Sent: 16 December 2015 15:49
To: Fung Chow [fungchow@lotushk.com.hk]
Subject: High Court action

STRICTLY PRIVATE AND CONFIDENTIAL – WITHOUT PREJUDICE

Dear Fung,

My lawyers have told me that you have recently made a payment into court in the sum of HK\$ 5 million. I do not accept this sum. This sum does not reflect the losses suffered by my company in the gutter oil scandal. However, in an attempt to settle this matter once and for all, my company will be willing to accept HK\$ 10 million from you to settle this matter now as I know you probably will not have more than \$10 million to offer us anyway! If you are willing to pay this sum now, then my company will not insist upon the written apology. Please give it serious consideration as this offer is very generous indeed.

Regards,
May

P.S. My lawyers have told me that this offer is privileged from disclosure during the proceedings so there is no need to show this email to the lawyers and the court. Let's try and settle this between you and me and leave the solicitors out of this.

END OF PAPER