PCLL CONVERSION EXAMINATION JUNE 2017

Title of Paper: Civil Procedure
Date: 26 June 2017
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**

Civil Procedure

BACKGROUND

Tony Chan ("Tony") is a budding computer programmer. He recently set up a new Hong Kong company, Jets HK Limited ("Jets") to promote and market his newly developed software – "VMI" (which stands for Virtual Model I). The VMI is a software designed to enhance customer shopping experience.

It functions as follows:

1. The owner of a clothing store first needs to upload photographs of all its clothes designs in different sizes into the VMI system.
2. At the store, a customer could share a photograph of herself to the VMI system.
3. At the store, once a customer chooses a particular item of clothing, using the VMI system, the customer can then virtually try on the selected clothing using a computer tablet, without the need of actually physically trying on the item of clothing in a fitting room.

According to Tony, VMI brings a whole new shopping experience to customers who do not have time or do not like to to try on items of clothing at a store. In the long run, shops can do away with fitting room space, which should reduce operational costs. He was also aiming to market the VMI software to online stores such that those who purchase online could also virtually try on items of clothing without the need to even leave one's home.

When he first marketed this software in June 2016, he was optimistic that he would be able to make a fortune from this software.

On 19 December 2016, Jets signed a contract (the "Contract") with its first client, Sharks Fashion HK Limited ("Sharks"). Sharks is a Hong Kong company which manufactures and retails clothings designed by a famous local designer, Bernardo Pong ("Bernardo"). Bernardo is a young fashion designer and entrepreneur and is keen to introduce VMI to his 4 stores in Hong Kong. He also plans to introduce the VMI software to his upcoming online store, which he was planning to launch in Summer 2017.

Pursuant to the Contract:

1. Sharks was licensed to use the VMI software and (any later updated versions) for a period of 5 years;
2. Jets would provide Sharks with the VMI software for a period of 5 years from 1 January 2017;

3. Jets would provide Sharks with initial consultancy and training to Sharks' staff in relation to the use of the VMI software, together with subsequent regular training and maintenance sessions;

4. Sharks would pay Jets a total consideration of HK$8 million, payable as follows:

    a. A deposit of HK$2 million payable on the day of the signing of the Contract;

    b. HK$1 million payable on 15 January 2017, after the successful installation of the VMI software at Sharks' office premises and its 4 stores;

    c. Thereafter, HK$1 million on 15 February 2017, and thereafter HK$1 million each year, on 1 January 2018, 1 January 2019, 1 January 2020 and 1 January 2021. If Sharks defaults on any of these installment payments, the remainder of the sum owing to Jets under the Contract would fall due immediately.

Pursuant to the Contract, Jets installed the VMI software at Sharks' office premises and 4 stores on 1 January 2017. Jets also provided Sharks with the initial consultancy and training services as agreed. Sharks made payment to Jets in the sum of HK$2 million on 19 December 2016 and HK$1 million on 15 January 2017.

Sharks promoted the use of the VMI software at its 4 stores in Hong Kong in January 2017 and it received positive feedback from its customers. The use of the VMI software was also widely advertised in the local press and as a result, Sharks was able to attract many new customers to its stores in January and February 2017.

Unfortunately, in March 2017, Sharks started to receive complaints from its customers. The main complaint was that the purported images of the customer displayed on the computer tablet after virtually trying on the selected outfits were not realistic. It appeared that the image displayed was not of the actual size and figure of the customer but of a random model, whose size and figure had been previously entered into the VMI system. As a result, customers would buy the selected outfits with satisfaction at the Sharks' stores but when they tried the outfits at home, customers complained that the clothes did not fit and/or did not look good as when the same were virtually tried on using the VMI software. This resulted in Sharks having to make a lot of refunds to its customers in the months of January to March 2017. Sharks relayed such complaints to Jets who immediately made some modifications to the VMI system. However, as a result of the customers' complaints, Sharks withheld the payment of HK$1 million due to Jets on 15 February 2017. Such payment had not been made despite repeated chasers sent from Jets to Sharks.

On 10 April 2017, Sharks instructed solicitors to issue a writ of summons against Jets in the High Court of Hong Kong. The claim by Sharks against Jets is for damages for breach of contract totaling HK$7 million, being a refund of the HK$3 million which Sharks had already paid to Jets for the VMI software under the Contract (alleging that the software did not work), together with damages in the sum of HK$ 4 million, being

damages to loss of business and reputation and administration and operational costs for installing the VMI software and the costs in handling the customers' complaints and refunds.

On 10 April 2017, Sharks' solicitors served the writ of summons on Jets, by leaving a copy of the same at Jets' registered office address in Hong Kong. As Jets did not acknowledge service of the writ of summons, Sharks' solicitors obtained a default judgment against Jets on 28 April 2017.

Question 1 (25 marks)

You are a trainee solicitor and your firm is instructed by Jets. Tony advises you that he had been in and out of Hong Kong during the months of March to June 2017 as he was busy promoting the VMI software in the PRC and Southeast Asia. When he returned to his office yesterday (25 June 2017), he finally opened the mail which had been sitting on his desk since March 2017. Amongst such mail, he noticed the writ of summons in a large brown envelope and in a different large brown envelope, he noticed the default judgment dated 28 April 2017. He also noticed several letters from Messrs. Doc & Co, the solicitors of Sharks, accompanying the writ of summons and the default judgment and a recent letter advising him that a hearing has been fixed to assess damages to be heard on 5 July 2017. According to Tony, the default judgment is for final judgment in the sum of HK$3 million and an interlocutory judgment for damages to be assessed.

Tony further advises you that Jets' registered office address is situated at a shared office space in Causeway Bay. At the premises, he rents a private office space and hires a secretary who he shares with the other tenants. The secretary would answer phone calls and collect his mail, which she would gather and place on his desk. During the months of March to June 2017, although he was in and out of Hong Kong, he did return to his office on irregular intervals when he had to prepare some proposals. Since he was busy, he did not open the mail which piled up on his desk. He said he did not see the need to do so as he transacted all important business through emails and texts which he accessed with this mobile phone. Tony did not believe in using "snail mail" and he said that although he may have noticed the large brown envelopes when he returned to his office in the beginning of May, he thought they were just promotional brochures so he did not open them at all. It was only when he finally had some time at his office yesterday did he open all the mail and found out about the writ of summons and the default judgment.

In relation to Sharks' default in paying the HK$1 million installment due on 15 February 2017, Tony said he had sent them repeated chasers since 16 February 2017 but such payment had not yet been made by Sharks. He is also concerned that the present proceedings is an attempt by Sharks to get out of all its contractual obligations under the Contract. He fears that Sharks would default in making payment of all remaining installments under the Contract.

(a) **Advise Tony and Jets what is a final judgment and what is an interlocutory judgment. What is the hearing to assess damages on 5 July 2017? Why is there such a hearing and what is it for?** **(6 marks)**

(b) **What should Jets do now if it wishes to apply to set aside the default judgment? How should the application be made and what documents would Jets need to file?** **(6 marks)**

(c) **Advise Jets what it needs to show in its application to set aside the default judgment and what are its chances of success?** **(13 marks)**

Question 2 (25 marks)

Assume that it is now 15 August 2017 and Jets has successfully set aside the default judgment. Sharks has just served a statement of claim on Jets, alleging that the VMI software supplied by Jets to Sharks was defective and useless and as such, Sharks is entitled to a refund of the HK$3 million already paid to Jets and additional damages in the sum of HK$4 million as claimed in the writ of summons. In particular, Sharks pleaded that the VMI software was not able to generate real, virtual images of the actual clients, that it was further unable to update the clothing designs of Sharks into the system and that despite requests for technical assistance, Jets' staff had not been able to remedy such defects.

Tony's instructions are that the VMI system is not defective at all. He believes that the alleged failure of the VMI software was because Sharks' staff (despite intensive training) did not know how to use the software and did not provide him with updated clothing designs and specifications to input into the system.

(a) **Tony believes that the entire claim by Sharks is fabricated. He has heard that there is a procedure whereby he could "strike out" Sharks' claim. He wants to know whether he could adopt such a procedure to "strike out" Sharks' claim against Jets. Advise Tony and Jets about the "strike out" procedure and whether it would be advisable for Jets to adopt such procedure in the present proceedings. If you require further documents or information to answer this question, please set out the further documents/information required.** **(13 marks)**

(b) **Given the facts of the case set out in the Background section and above, apart from a "strike out" application, advise Tony and Jets what they could do to defend the proceedings and protect their rights (e.g. to claim back what they are entitled to and to dispose of the proceedings as soon as possible in order to limit their costs exposure in the proceedings).** **(12 marks)**

Question 3 (25 marks)

Assume it is still 15 August 2017. As the proceedings are ongoing, your partner advised Jets of its discovery obligations. Today, Tony, on behalf of Jets, sent to you Document A (attached) and the following categories of documents:

Category B: The Contract together with the email correspondence between Jets and Sharks prior to the signing of the Contract, negotiating the Contract and its terms.

Category C: Correspondence between Jets and Maria Wong ("Maria"). Maria is Tony's friend who is a litigation solicitor. Tony had consulted Maria in relation to the present proceedings in June 2017. The correspondence include emails written from Tony to Maria and Maria's responses to Tony's emails. Tony told you that he had at first consulted Maria and your firm at the same time when he found out about the writ of summons and the default judgment. Maria did not charge Jets for her services as they are very good friends. Maria has ceased giving advice to Jets since July 2017.

Category D: The software design documents, specifications and prototype of the VMI software, including the marketing projections and strategy for the VMI software. Tony is reluctant to disclose these in the proceedings as they are highly confidential trade secrets.

Category E: As a result of the present proceedings, Tony had entered into some email correspondence with his university friend, Riff Lee ("Riff"). Riff is an expert in software production and is currently working with Tony to see whether the VMI software is indeed defective as Sharks claims. Although Tony is confident that his software should not be defective, he wanted to run the software pass Riff such that Riff could endorse the software to ensure that it is fit for further marketing to other potential clients.

For your information, Tony did not respond to Document A.

Briefly advise Tony and Jets about the discoverability of Document A and the above categories of documents (Categories B to E), bearing in mind Tony's concerns and comments set out above. If such documents need to be disclosed, advise your partner where they should be listed in the List of Documents. If you need further information to answer this question, please set out the further information required.
(25 marks)

Question 4 (25 marks)

Assume it is still 15 August 2017. As previously advised, Tony is adamant that there is nothing defective with the VMI software. He believes that Sharks has fabricated its case. He said that he has walked pass one of Sharks' stores in Tsim Sha Tsui yesterday and he

observed that Sharks was still using the VMI software satisfactorily at its Tsim Sha Tsui store. If the VMI software was indeed defective as claimed, Tony believes that Sharks would not still be using it in its stores. Tony also feels that it is unfair that Sharks could claim for a refund against Jets but at the same time, still use the VMI software at its stores.

Despite Tony's confidence in the VMI software, he is determined to win the case because it would be damaging to Jets' reputation if Jets lost the case in court. As such, Tony indicated that he wants to instruct Riff as Jets' expert in the proceedings. According to Tony, Riff is his good friend and should be able to assist Jets in the proceedings. Tony tells you that he has loaned Riff a sum of HK$500,000 last year and thus Riff should be amenable to saying whatever Tony asks him to if Riff were instructed as Jets' expert in the present proceedings.

> (a) **Advise Tony and Jets whether an expert is required in this case and what procedures are to be adopted in order for an expert's evidence to be adduced at trial.** **(7 marks)**

> (b) **Would it be desirable to instruct Riff as Jets' expert in this case and could Tony ensure that Riff would "say whatever Tony asks him to"?**
> **(8 marks)**

> (c) **If, at the conclusion of the trial, the trial judge finds that Sharks did in fact fabricate its case against Jets, what costs order could Jets' counsel ask for in order to address this issue?** **(10 marks)**

(PTO for Document A)

From: Bernardo Pong [mailto: b.pong@sharksfashionhk.com]
Sent: 1 August 2017 15:49
To: Tony Chan [tonyc@jets.com.hk]
Subject: High Court action

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STRICTLY PRIVATE AND CONFIDENTIAL – WITHOUT PREJUDICE

Dear Tony,

Please don't fight this case. You know you can't win. Your company is a small set up. Mine is a huge company. We will do whatever we can to drag on the proceedings and by the time it ends, you would be broke from paying your own lawyers' fees – you already paid huge costs to set aside the default judgment – trust me, you do not want to spend more on lawyers' fees. Let's just try and make a deal and sort this out ourselves. At the end of the day, VMI is a good software. I can help you market it. Please do call me if you are willing to talk about this over a drink. You know my number!

Regards,
Bernardo

P.S. I have marked this email "without prejudice" so you are not allowed to show this letter to the judge. Don't you dare do so!

END OF PAPER