

PCLL CONVERSION EXAMINATION JANUARY 2020

Title of Paper: Civil Procedure
Date: 3 January 2020
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 6 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**

Background

You are an associate. Your firm acts for Bauhinia Pacific Airways Ltd (“Bauhinia Pacific”). You have just received a memorandum (**DOCUMENT A**) from your Dispute Resolution Department supervising partner. Please review this and answer the 4 questions below.

Question 1 (30 MARKS)

You meet with Mr Mok for a preliminary meeting on this matter.

With detailed reference ONLY to the facts set out in DOCUMENT A, advise Bauhinia Pacific on whether it should commence proceedings against Oyster PLC. Discuss also briefly in your answer whether there are any viable alternatives to litigation which, with reference to the facts in DOCUMENT A, Bauhinia Pacific should choose instead of embarking on proceedings.

Question 2 (20 MARKS)

Bauhinia Pacific decides to begin proceedings in the High Court against Oyster PLC for selling it substandard fuel, i.e. that Oyster PLC breached a warranty in the Agreement that Etheric was of reasonable quality and was fit for purpose. Bauhinia Pacific claims this breach caused the accident. The Agreement stipulates that service on Oyster PLC must be on its headquarters in London, United Kingdom. There is no dispute over this clause.

Advise your supervising partner on which grounds under RHC O.11, r.1(1) Bauhinia Pacific may rely to support its application to serve out of the jurisdiction and what its prospects of success of relying on those grounds are.

Base your answer on the information in DOCUMENT A, though also identify missing facts that you think you need to answer the question.

Question 3 (16 MARKS)

Molly, the senior partner who is the contact between you and Mr Mok, calls you to discuss the litigation. Despite having practised as a corporate lawyer for thirty years with virtually no litigation experience, she makes a number of observations about the proceedings.

She says she has heard a rumour that Oyster PLC may, for commercial reasons, admit fault in the proceedings. She remarks that if this happens, the appropriate course of action for Bauhinia Pacific to take would be to apply for summary judgment against Oyster PLC.

Molly says that she knows Bauhinia Pacific is concerned about the risk of applying for summary judgment against Oyster PLC. She says that as far as she recalls, a party that applies for summary judgment is either granted it or not, and that the successful party either gets its costs of the application or it does not.

Molly also remarks that an alternative would be for Bauhinia Pacific to apply for security for costs against Oyster PLC.

Advise Molly on the civil procedure aspects of these observations.

Question 4 (34 MARKS)

Pleadings close. The matter progresses to discovery, which the Court has ordered to be completed by 25 March 2020. Mr Mok shows you a letter, **DOCUMENT B**, which he has received from Dr Steve Gong, the CEO of an external Hong Kong airline qualification assurance and testing company, Lamassu Systems Limited, which Bauhinia Pacific has retained over years.

- (i) Is DOCUMENT B discoverable and inspectable? In answering this question you may refer to the contents of DOCUMENT B and DOCUMENT A. (16 marks)**

- (ii) Are there other follow-up discovery issues that arise from these proceedings? (12 marks)**

- (iii) On the basis of the facts set out in DOCUMENT B, are there joinder issues that could arise in the proceedings between Bauhinia Pacific and Oyster PLC? Are there other proceedings that could arise from the accident and who may be parties to these? (6 marks)**

DOCUMENT A

ATTENDANCE NOTE

Date: 3 January 2020

Subject: Bauhinia Pacific Airways Ltd -v- Oyster PLC

1. This morning I took a telephone call from the Chief Executive Officer of Bauhinia Pacific Airways Ltd (“Bauhinia Pacific”), Mr Jack Mok. As you know, Bauhinia Pacific is Hong Kong’s biggest airline and one of its biggest listed companies. You may recall we acted for it in a fiasco three years ago concerning a highly publicised and damaging lawsuit against several of its former pilots whose flying credentials turned out to be fake, a fraud that Bauhinia Pacific - negligently, according to the press - missed over several years. These proceedings are ongoing.
2. Mr Mok told me that in 2018 the world’s largest energy company, Oyster PLC, which is incorporated in the United Kingdom, approached Bauhinia Pacific. This approach was part of Oyster PLC’s worldwide marketing to promote a new fuel product it had just developed. As you may have seen in the media over the last decade or so, environmentalism has become a staple mantra of big business. As a company that has for over a century made its fortune from the fossil fuels that have polluted the earth, Oyster PLC felt it necessary to divert its attention to developing alternative fuels. Sources such as wind, water and solar have come far. Oyster PLC had itself dabbled in investment in solar farms in Spain a couple of years ago. But that project had, for want of interest in investment partners, failed. This had caused Oyster PLC hundreds of millions of US dollars of loss. But the holy grail of environmental fuel consumption is in aircraft technology. This is simply because the vast amounts of power aircrafts require make the reduction or rationalisation of fuel consumption to environmentally meaningful levels very difficult.
3. Oyster PLC promised to change this. It told Bauhinia Pacific that it had over the last few years developed an aircraft fuel it calls “the greatest revolution in petrol-based products”. Oyster PLC calls this fuel Etheric. Etheric, Oyster PLC said, is a product based on fuel materials but that is refined with state of the art technologies. Etheric, Oyster PLC claimed, generates the 100% of output current standard aircraft fuel produces, but in exchange produces only an astonishing 40% of pollutants. This reduction of 60% in pollutant production vastly exceeded the most ambitious aspirations of international conventions. Better yet, Oyster PLC said that the production of Etheric is cheaper than that of conventional fuels by some 20%.
4. This seemed to Bauhinia Pacific all too good to be true. It had over the last year been suffering from a host of internal problems. It had lost hundreds of millions of Hong Kong dollars in a fuel hedge that went wrong, leading to a much-publicised firing of thousands of staff. A number of board members had also resigned over a recent scandal. This involved Bauhinia Pacific’s failure to disclose design defects arising from bespoke modifications it made to the fuel efficiency systems of the aircraft that is involved in the current matter, the Dreammaker, Bauhinia Pacific’s most luxurious and expensive plane. Bauhinia Pacific’s stock price had over the past year dropped a full 25% of its previous value. Stockholder confidence is low.
5. So Etheric seemed a good way both to save costs and to promote the company as an innovative company that honours corporate social responsibility commitments. Via a Sale and Purchase agreement Bauhinia Pacific entered into with Oyster PLC on

15 October 2019 (“the Agreement”), Bauhinia Pacific agreed to purchase from Oyster PLC £4 million of Etheric to cater for the annual fuel needs of a quarter of its entire fleet. Included in these were Bauhinia Pacific’s three Dreammakers. There is no dispute that Bauhinia Pacific fulfilled its payment requirement under the Agreement.

6. Bauhinia Pacific started using Etheric on its Dreammaker fleet in November 2019. All seemed well. The press reported favourably on the company’s move to serve as a good environmental corporate citizen. Etheric appeared efficient and was cheap, even taking into account a recent drop in conventional fuel prices following the discovery of new reserves in the Middle East that has caused Oyster PLC profit forecasts to drop some 5%.
7. But few things come without a cost. As it happens, Bauhinia Pacific’s bet on Etheric and Oyster PLC came at great cost. To Bauhinia Pacific’s and the public’s horror, on 25 November 2019 a Bauhinia Pacific Dreammaker suffered the worst aeronautical accident in the company’s history. That day, the Dreammaker, which was using Etheric as its fuel, was making its descent into Hong Kong. Five miles away, its pilots lost control of the plane, which dropped in altitude at a frightening rate. It went into crash landing mode most suddenly. By some divine grace or inexplicable luck, the Dreammaker made it to the runway. It then skidded to a thunderous stop, its body splitting clean in half. Miraculously the plane did not ignite. Emergency services arrived immediately. Some passengers suffered injuries. But no one died.
8. The ensuing publicity and Hong Kong Civil Aviation Authority (HKCAA) investigation that followed the worst aeronautical accident ever to have occurred on Hong Kong soil is ongoing. The HKCAA has released preliminary findings on the accident. These findings suggest a number and combination of possible causes. They include inclement weather, pilot error and mechanical failure, specifically with the aircraft’s fuel efficiency systems, which appeared to have malfunctioned within seconds of the Dreammaker’s sudden unexpected descent. The HKCAA will release its full report to Bauhinia Pacific around September 2020.
9. Since the accident and the HKCAA’s preliminary report, Bauhinia Pacific has been in correspondence with Oyster PLC. Bauhinia Pacific has reserved its rights to claim against Oyster PLC a staggering HK\$1,170,000,000 in losses over the defective fuel, write off of the Dreammaker involved in the accident, cleanup costs and reputational loss. Oyster PLC denies all liability. It says that of the 15 other international airlines to which it has sold Etheric, none have reported accidents or anomalies resulting from the use of Etheric as their planes’ fuel of choice.
10. Bauhinia Pacific is most concerned about its exposure to this accident, particularly as its other lawyers have advised it that given the circumstances of the accident there is a chance Bauhinia Pacific’s insurance will not cover it.

END OF DOCUMENT A

DOCUMENT B

Lamassu Systems Limited



**23-28/F, 8 Fermat Street,
Science Town
New Territories,
Hong Kong SAR**

From the desk of Steve Gong, Phd, Chief Executive Officer

Mr Jack Mok
Chief Executive Officer
Bauhinia Pacific Airways Ltd
16 Transnational Finance Centre
5 Milton Keynes Road
Central
Hong Kong

15 November 2019

Dear Jack

Semi-annual Dreammaker tests of December 2019

1. It was a great pleasure seeing you at our company's 20th anniversary dinner last week. Thank you for making it. I cannot wait to see you and your family at our Christmas party next week.
2. In the meantime, I write to report that my company's semi-annual tests of Bauhinia Pacific's Dreammaker fleet, which we started in October 2019, are almost complete. I expect the final report to be on your desk around June 2020.
3. So far almost all flight test reports have come back with normal results. There is one small matter, however, that may in time require some attention. Test results on fuel efficiency on your Dreammaker fleets were till the end of October 2019 characteristically normal. Since November 2019, however, my company's engineers have noticed small anomalies in fuel efficiency test results. These generally remain within normal range, taking into account fluctuations in fuel types and qualities, weather conditions and other factors. But obviously we should follow up on these anomalies and any safety implications that could follow. Both our companies are on the line here if anyone gets hurt.

With best wishes to you and your family,

Steve

END OF DOCUMENT B

***** LAST PAGE *****

***** END OF EXAMINATION PAPER *****