PCLL Conversion Examination
January 2020
Examiner's Comments
Civil Procedure

General comments

This round of Civil Procedure Conversion examinations saw many successes.

As always, candidates who identified the legal issues found themselves on the right track. In marking the scripts the examiners asked themselves several basic questions. Had candidates competently identified the issues and law - be it any combination of statute, rule or case, etc - relevant to the examination questions? Then, and most importantly, did they *apply* this law to generate advice on the specific facts the examiners asked them?

I shall set out here some of the examiners' observations on how candidates tackled the questions. Candidates did many things well. I shall focus more on where some candidates fell short, so that they can learn for the future.

Question 1

The question attracted many marks. Candidates who did well in it were well on their way to a pass.

Despite the length and detail of the fact pattern, some candidates chose to focus on pre-action considerations that were not particularly relevant to the facts. They discussed, for instance, whether the lawyers involved in it were competent. They recommended conflict checks. Such standard considerations are of course relevant. But they did not gravitate towards the substantial facts that the examination paper presented. The worst candidates obviously pulled out a washing list of standard pre-action considerations. Their answers barely referred to any of the facts in the question. They could have written their answers without ever having seen the examination paper.

By contrast good candidates identified and discussed the relevant pre-action issues. The merits of the case, for instance. (Unlike previous iterations of similar questions, this year's question allowed candidates to canvass both merit-based and non-merit based considerations.) The interests of both parties, for another. Good candidates spotted and discussed the considerations and the fact(s) relevant to them. At the top level candidates couched their points more or less in three steps. They identified the relevant pre-action consideration. They identified the fact(s) relevant to these considerations. Then they *applied* those facts to the situation, discussing what their impact or importance was. Take, for example, the straightforward issue of the relevant court in which to start proceedings, if indeed Bauhinia Pacific (BP) chose to do so. The best candidates identified this issue. They identified the quantum of the claim – an enormous HK$1,170,000,000. Then they applied this, saying that this sum dwarfs the minimum quantum of claim necessary to begin proceedings in the High Court (HK$3m).

The examiners were open-minded about how exactly candidates applied any given factor. One could have suggested, for instance, that the uncertain HKCAA findings would make proceedings risky for BP. BP would be better off invoking alternative dispute resolution procedures. Another candidate might have picked up on the same point but argued that this factor should incline BP towards rather than away from litigation as BP must, particularly in light of other recent misfortunes it has suffered, clear its name and show decisiveness in the face of challenge. Either application, and others, attracted marks. So what mattered was not so much the direction but the depth of application.

Finally, some candidates spent an inordinate amount of time writing treatises on alternative dispute resolution. The examination paper expressly asked candidates to discuss this factor. It did this explicitly to give them a chance to apply the facts to this issue. Virtually all candidates discussed ADR. But the question asked candidates to discuss ADR "briefly" (emphasis not added). Candidates who wrote pages and pages gained all the marks to be had. But in doing so they lost time on identifying and applying other factors. Many of these and other candidates also wrote great expositions on ADR in isolation, without applying them to the facts. This practice also attracted minimum credit.

Question 2

Quite a few candidates scored well in this question. But by far this was the most unsatisfactorily answered question of the whole examination paper – even by many who scored well in it.

How did that happen? The mistake was a schoolboy error: candidates, despite being at the end of their academic careers and on the cusp of entering the professional stage, chose to answer the question they wanted to answer instead of the question the examination paper asked.

Suppose the question had not been in an examination paper. Suppose that it was a question your supervising partner asks you in her office during your internship or training contract. She asks, in this situation, "…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 prospect of success of relying on those grounds are." (My emphasis.)

It could not be any clearer that while this question asks about the prospect of success of BP serving out of the jurisdiction, it asks– and asks only – about the first limb of the test of service out, of the gateway provisions under O.11, r.1(1).

Suppose, then, that sitting in your supervising partner's office, you reply: "Well, let me tell you about the three-limbed test for service out…" What would your supervising partner say? She would answer, "I didn't ask you that. I asked you only about the first limb." You answer: "No, no. It's a three-limbed test. Let me tell you about them all and apply them to the facts!"

Imagine what your supervising partner will think of you then and what your career prospects will be.

I hasten to add that in this examination the examiners adopted a generous approach that no employer will. The examiners did not deduct marks for this astonishingly widespread error. What many candidates did, however, was to bleed time by writing large tracts of answers to a question that the examination paper did not ask. From this the examiners could not save them.

Please avoid this most rudimentary error that no one should be committing at this advanced stage of their endeavours. Please exercise judgement, confidence and care, reading and answering precisely exactly what questions ask, exactly as you would were you asked them by your client, a supervising partner, an opponent or a judge.

Of the analyses that we read, the best candidates focused in detail on O.11, r.1(d). (In particular, the best candidates applied in detail ground d(iii) and, particularly, on whether "by implication" the contract in question was governed by Hong Kong law.)

Some candidates identified and applied ground 1(f). That is wrong. Ground (f) applies exclusively to claims founded in tort. Question 2 was clear that the proceedings are for breach of warranty. So the claim was only in contract.

Question 3

The examination paper's third question was couched in several paragraphs without its constituents being sliced and diced for candidates. Nevertheless, virtually all candidates picked up the question's three parts. Most candidates scored well on the third part. Many scored quite well on the second. Many did badly on the first.

In reverse order, the answer to Molly's third observation is of course that BP cannot apply for security for costs. Only defendants can. BP is the plaintiff. A minority of candidates did not spot this point. They went off on a tangent assessing the grounds for getting security under O.23, r.1.

On Molly's second observation, a number of candidates dealt with only one of the sub-questions, i.e. on the outcome of the summary judgment application or costs. Good candidates could score perfect marks in this part of the question. They pointed out that there are in fact four possible outcomes to summary judgment and what these are. They pointed out the different cost consequences of these; that both outcomes and costs are not binary issues.

Molly's first comment gave candidates the greatest difficulty. Many candidates forced a wrong reading of the question. They said that the rumour is "just a rumour". In saying this they ignored the next sentence, which was its root: "[I]f this happens, the appropriate course of action…" (Emphasis added.) So the question was premised on that rumour being true.

Many other candidates also chose to ignore the phrasing of the question and decided to answer the question as one that asked whether BP would succeed in an application for summary judgment against BP. They waxed on about the statutory scheme and case law on summary judgment. This attracted no marks.

Instead, the best answer to this question is simply that if the rumour is true summary judgment would just not be appropriate. For there would be no need to show that Oyster PLC has "no defence" in the qualitative sense because Oyster PLC would have admitted fault! In such cases, said the ablest candidates, the appropriate measure would be to seek judgment by admission. An interim payment is also an option if, for instance, "fault" refers to liability and there are outstanding issues of quantum or costs.

Question 4

The examination paper's last question was on various aspects of discovery.

Most candidates did quite well on the chunkiest sub-question that asked about the discoverability and inspectability of Document B. In this part of the question candidates considered the relevant tests of relevance and the privilege and applied them.

The second part of the question was not as big as the first. But neither was it a small question. On this, many candidates wrote a great deal about follow-up discovery mechanisms such as specific discovery and further and better discovery. But note the wording of the question. It asked whether there are "other follow-up discovery issues that arise from these proceedings" (my emphasis). These words again required application to the facts. So if your supervising partner asks you this, it is not much of an answer to say, well, we can always apply for specific discovery or X or Y". What matters is, if you use these mechanisms, exactly for what you would use them. In this case the examiners credited discussion on getting the reports to which Document B referred, for instance. Getting the full HKCAA report was another area of discussion. Fewer candidates picked up these points.

Many candidates did reasonably or well in the last part of this question. They identified and applied the joining, for instance, of Lamassu Systems Limited (as a defendant under O.15, r.4 or via O.16 as a third party). Injured plaintiff passengers joining the existing parties to proceedings as defendants was another area of discussion.