

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE WRITTEN EXAMINATION

Question paper

Time allowed: 2 hours 30 minutes

YOU MUST NOT OPEN THIS PAPER UNTIL YOU ARE TOLD TO DO SO

Permitted materials

- Hong Kong Civil Procedure (the Hong Kong White Book);
- The Hong Kong Solicitors' Guide to Professional Conduct (Vol. 1) published by the Law Society; and
- The Law Society's Code of Advocacy for Solicitor Advocates

PLEASE READ THE FOLLOWING INSTRUCTIONS CAREFULLY

1. This written examination comprises one part of the assessment for higher rights of audience. There are 50 marks allocated for this examination.
2. Candidates may use their own copies of permitted materials. This is so even though they may contain annotations or highlighting provided this has been done in the ordinary course of use and reference. However, extra materials, for example, notes prepared specifically for this examination are not to be included. In the event of a dispute between the invigilator and a candidate, the decision of the invigilator shall be final.
3. Candidates must ensure that their answers provided in the examination scripts are legible to the examiners. If a candidate's handwriting is considered illegible, his/ her written examination script will be assessed on the basis of the legible parts only and the marks awarded accordingly.
4. If, in answering any question in this examination, a significant ignorance of the code of ethics governing solicitors and/or solicitor advocates is revealed, the Higher Rights Assessment Board may determine that it should result in a failure of the overall assessment irrespective of the candidate's marks otherwise.
5. Candidates must not remove this question paper from the examination room.

The Case

You have recently been approached by a potential client, Brian Lee (“Mr. Lee”). Mr. Lee is of a humble background. He together with his wife and two children currently reside in a flat located in the Sham Shui Po district. Mr. Lee said his relatives had previously instructed you for matrimonial and probate matters and now he wants to instruct you to act for him to claim adverse possession to the flat that his family is now possessing. On 20 March 2018, you received the following email from him.

Dear Michael,

As discussed over the telephone, I have recently received a number of inquiries from a major land developer who had expressed interest in acquiring the flat that my family and I are currently residing. As you know, I have been living in this flat since I was a kid. At the time, my parents and my other siblings were also occupants of the flat. As I understand, most of our neighbours’ flats had already been acquired by the land developer in light of the prime location of this 60-year old building in Sham Shui Po. I have heard that the land developer plans to apply for compulsory acquisition of other flats once it has acquired 80% of the undivided shares in the building and will pull down the entire building for re-development. It has been widely reported in the newspapers that the land developer intends to erect and build an estate comprising more than 500 studio flats in the original lot.

In the course of negotiation as to price of my flat with the land developer, I then realized that my parents (now deceased) and I do not have a proper title to the flat i.e. my parents and I are not the registered paper owners of the flat. I gathered from my friends and colleagues there are ways such as “adverse possession” which would enable long-time occupants of the flat like me and my family to acquire the flat. Is that possible from your perspective? I really do not want to miss out this golden opportunity to sell my flat to the land developers. I wanted to liquidate the flat so that I would have sufficient cash to buy a new property with 2 bedrooms at least and to enable my eldest son to further his studies in the U.K. I want you to start this legal proceeding to claim adverse possession for me in relation to the flat. Please quote me your fees and issue the court proceedings as soon as possible, preferably by the end of this week.

As you are aware, I am the sole bread-winner of the family and I have a rather limited budget for this court action. Can we have a deal about your fees? For example, if you manage to secure a victory for me in this action for adverse possession, I am willing to pay on top of our agreed fees say 15% more as bonus and gratuity payment to your firm in light of the successful outcome. If in the unfortunate event that the claim is not successful, you can agree to charge only say 50% of the agreed fees.

During our telephone conversation last week, I can have the option of commencing the proceedings in the District Court or in the High Court. What is the difference between the two courts? Is it generally cheaper to commence legal action in the District Court? If that is the case, given my limited budget, I would prefer to commence the proceedings in the District Court.

I remember you also told me that according to the land search of the flat, there are two registered owners of the flat namely a Mr. Lee Jen Lu and Madam Chan Shuk Fan. However, I do not recall their names. Neither I have met or seen either one of the registered owners. I have never heard late parents mention the registered owners to me. Since childhood, I have always thought the flat belonged to my parents. I confirm that I have never heard or seen my parents paying rents or any licence fees to anyone including the above registered owners. I also confirm that since I have been residing in the flat with my wife and children in the 1990s, I have never entered into any tenancy agreements or lease with anyone including the registered owner. No one has ever approached us to demand any payment of rents or licence fees. Throughout these years, it was my parents and myself who had been responsible for paying all of the utilities fees including electricity, government rates and water and gas expenses.

It was only until last year that there are some representatives of the land developer who knocked on our door and inquired if we are interested to sell our flat to it.

Michael, you remember you mentioned to me that some steps need to be taken to locate the registered owners? Is that a must or necessary? I have never seen them and believe that more likely that they are now deceased and so it would be meaningless to spend time locating the registered owners. Can we dispense with that? Are there other quicker

ways to proceed with the action and obtain judgment in a speedy manner?

I am quite keen to issue the court proceedings in Hong Kong by the end of this week. As in the previous litigation you did for my relatives, I want to do it the faster route. I remember you told me that proceeding with an Originating Summons should be able to secure an earlier hearing date. That's what I want. Please get ready the papers for my endorsement this week then.

In this up and coming litigation, I also want you to be my solicitor and my solicitor advocate.

BRIAN LEE

The Questions

Question 1

(3 marks)

Brian Lee wants you to commence legal action in Hong Kong immediately and seek a court declaration that he has by reason of his adverse possession of the Flat for more than 20 years acquired an adverse possessory title to the Flat. Assuming for the purposes of this question only that both of the registered owners namely Lee Jen Lu and Chan Shuk Fan are now deceased, and you know that personal representatives have been appointed in Hong Kong for their respective estates, but you do not know whether the deceased died with a will or not:

- (a) How would you find out whether the deceased died with a will or not? (1 mark)
- (b) Who would you cite as the proper defendants to the action if both Lee and Chan died without wills? (1 mark)
- (c) Who would you cite as the proper defendants to the action if both Lee and Chan died with wills? (1 mark)

Question 2

(5 marks)

Assume for the purpose of this question only, that in fact the firm where you had previously worked was the firm who acted for the two registered owners Lee Jen Lu and Chan Shuk Fan in the conveyancing transaction when they acquired the flat in 1960s. In this situation, state whether or not you can act for Brian Lee in the intended adverse possession action and give your reasons.

Question 3

(3 marks)

Assume for the purpose of this question only that Brian Lee insists that this action should be brought in the District Court and not in the High Court. How would you advise Brian Lee?

Question 4
(8 marks)

Assume for the purpose of this question only that: (i) you have instructions to commence the legal action by way of Originating Summons (in general form) in the High Court; (ii) the two registered owners of the Flat are still alive but you have no information as to their whereabouts. The only instruction from Brian Lee is that the two registered owners are permanent residents of Hong Kong and have remained in Hong Kong at all material times.

- (a) If your firm is unable to effect personal service of the Originating Summons on the two registered owners, please advise Brian Lee as to what steps can be taken. (4 marks)
- (b) Assuming the Defendants have acknowledged service, what further documents would be required under the Rules of the High Court to be served on the two registered owners before the first hearing? What needs to be served when the hearing date of the Originating Summons has been fixed? (4 marks)

Question 5
(4 marks)

Assume that, for the purpose of this question only: (i) both of the registered owners are deceased; (ii) no grant of probate or administration has been made. Who you would suggest to be appointed by the Court to accept service on behalf of the deceased and what steps need to be taken to appoint such person to effect service?

Question 6
(8 marks)

Assume for the purposes of this question only that: (i) you commenced the proceedings by Writ indorsed with the Statement of Claim, seeking a declaration; and (ii) the two registered owners are alive, you had properly served them, but they failed to respond or file an acknowledgment of service.

- (a) Please advise Brian Lee on each procedural step necessary in order to apply for default judgment, starting from when the defendants failed to file an acknowledgment of service in time. (4 marks)

- (b) Assuming that you and Brian anticipate that the Defendants will not show up at the hearing, please advise Brian Lee as to what principles the Court would apply when deciding whether to grant default judgment, and what matters it would consider. (4 marks)

Question 7

(5 marks)

Assume for the purposes of this question only that: (i) you commenced the proceedings by Writ indorsed with the Statement of Claim, seeking a declaration for the necessary relief; (ii) the Defendants have instructed solicitors and given notice of intention to defend; (iii) the Defendants have not yet filed their pleaded Defences, but in correspondence the Defendants have made various factual assertions that would (if true) be a complete defence to your client's claim; and (iv) Brian Lee is unable to provide you with conclusive evidence that the aforesaid factual assertions are untrue.

Brian Lee requests your advice on whether to apply for summary judgment.

Question 8

(6 marks)

Assume for the purposes of this question only that the intended legal action of Brian Lee has now proceeded to trial in the High Court, and on the day before the first day of the trial, Brian Lee informed you of something which has not been mentioned in his witness statements. You are of the view that the new instruction is material, but is a concise matter that does not need to be adduced by way of a supplemental witness statement.

- (a) Please state the relevant rule under the Rules of the High Court pursuant to which you as the Solicitor Advocate can apply to the trial judge to allow the witness (Brian Lee) to amplify his witness statement and address the court on this new matter. (2 marks)
- (b) Please state the relevant principles which the Court would apply in determining whether to permit Brian Lee to mention this new matter in examination-in-chief and the matters which the Court is likely to find relevant. (4 marks)

Question 9

(4 marks)

- (a) Are you permitted to agree to represent Brian Lee on the basis of the 'deal' for your fees, as described in his email of 20 March 2018? (2 marks)
- (b) The fee Brian Lee is able to pay you is much less than you consider to be appropriate. You tell Mr Lee this but he insists that he could not find anybody else who he trusts to represent him. What are the relevant professional obligations that affect your decision whether to accept his instructions? (2 marks)

Question 10

(4 marks)

Assume for the purposes of this question only that: (i) Brian Lee's parents are still alive and are 80 years of age; (ii) Brian Lee has approached you to act on behalf of his parents, who are the proper plaintiffs in the intended proceedings for adverse possession not Brian Lee; (iii) you have never spoken to or communicated with Brian Lee's parents in person.

What are your professional obligations when deciding whether to accept instructions to act on behalf of Brian Lee's parents?

**YOU MUST NOT REMOVE THIS QUESTION PAPER
FROM THE EXAMINATION ROOM**