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**HIGHER RIGHTS OF AUDIENCE ASSESSMENT**

**IN RESPECT OF CIVIL PROCEEDINGS**

**THE WRITTEN EXAMINATION**

# Question paper

**Time allowed: 2 hours 30 minutes**

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### **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. 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.
4. Candidates must not remove this question paper from the examination room.

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## The Case

You act for Jon Smith, a long-standing client who owns a boat building business incorporated in Hong Kong under the name of South Asia Cruising (Pvt) Limited. Jon Smith wishes to sue a company also incorporated in Hong Kong called Marine Technologies (Pvt) Limited and sends you the following email which sets out his instructions.

*Hi –*

*You know that I have a fantastic reputation in South East Asia for building racing boats, a reputation built up over the last 20 years. This time around, however, I could be in deep trouble unless you are able to fix things for me.*

*On 24 January 2014, I had lunch on Lantau with Benjamin Ho, the sales director of Marine Technologies. I told him that I needed resin to make hi-speed sailing dinghies. After some discussion we shook hands on the deal. I agreed to purchase 200 x 50 gallon drums of specialist polyester resin just released on the market from his company at a cost of HK\$40,000 per drum. The polyester resin that I purchased is mixed with glass fibre and used in the construction of complex curved structures.*

*I recall asking Benjamin Ho whether this new polyester resin was “temperamental”, that is, whether it was likely to cause me any trouble in the construction process. Benjamin Ho said, and I remember his words: “This resin is a real advance in every respect. Only a fool could mess it up and you’re no fool.”*

*Also at the lunch on Lantau was my girlfriend, Lucy Chan, who you may remember was an Olympic sailor. Lucy recalls the conversation. She will say that Benjamin Ho assured me that the new polyester resin required no special treatment or attention in the construction process.*

*The great sadness is that Lucy Chan has just been diagnosed with cancer. She is, however, incredibly brave. She recognises that it is highly unlikely that she will still be alive if we have to go to trial in this matter in 18 months or so but she wishes to make a witness statement as early as possible. Can we use it if she does pass away before trial?*

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*I paid in advance for the polyester resin and it was delivered to me. I then used it in the construction of 25 racing dinghies. The moulds were made by my company, the design being my own. All 25 dinghies were built at my Lantau factory and sold in June, July and August 2014.*

*However, within 2 to 3 months I started to receive complaints to the effect that the structure of the dinghies, after exposure to sun and sea, had started to go soft in places. This meant that the dinghies did not sail as fast nor could they be handled as accurately. In three instances the softness was so marked that it gave way under the water pressure while sailing and led to catastrophic leaking.*

*I believe that the problem must have been the result of insufficient testing of this new polyester resin designed by Marine Technologies. Either that or the company's general manufacturing standards are not of sufficiently high quality.*

*All 25 dinghies that I sold have been returned to me. I sold each of them for HK\$1,500,000, a total of HK\$37,500,000. However, with the purchasers threatening to sue me, I had no option but to refund each of them in full. In order to do so I had to increase my loan facilities with the bank and I am pretty much at breaking point. Fortunately, this fiasco does not appear to have had any adverse effect on my ongoing sales of dinghies and cruise boats.*

*My accounts show that each dinghy cost me HK\$500,000 to build and to test. My profit, therefore, was HK\$1 million per dinghy. I have lost all of that profit, a total of HK\$25 million. That's what I want you to sue for, my loss of profits. Also, can we not claim some sort of general damages for my loss of reputation?*

*This case is obviously going to require an expert on our side. I want you to employ Monty Pylon. He is one of the best Marine engineers in the business and is an honorary professor at the Macau Technology Institute. I trained under him and we have been very close friends for 20 years or more. I know he will support our case.*

*As to the dinghies that were returned to me, I still have five left, including one which sustained the catastrophic leak. The rest I have got rid of as they were taking up too much space. What about this last five? Would it be a good idea to dispose of these remaining dinghies?*

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*In late September 2014, I can't remember the exact date, I telephoned Benjamin Ho to tell him that we had a disaster on our hands. He told me that the new polyester resin had been sold to a number of other boat builders in Thailand and that there had been no trouble with it. He said that I had to be at fault. During our conversation he made the following allegations:*

- A. that I had combined an incorrect ratio of polyester resin to catalyst during the building process, or*
- B. the ambient temperature during the process was either far too hot or far too cold, or*
- C. the humidity during the process was excessive.*

*I of course denied each of these allegations, saying that my reputation spoke for itself.*

*As to the allegation that I must have combined incorrect ratios, I will of course deny it. However I am a little worried because I left most of the mixing process to my nephew, Hugo Smith, who has only been with my company since March 2014 and, while he has a degree in zoology, he's not the most practical of people. Between us, he is very disorganised and if he wasn't a relative I would have sacked him within a week or two. I appreciate now that I should have supervised him more closely. I am on a sales trip in the United States at the moment and will be away for the next couple of months. Can you take a statement from him? Have a word in his ear and tidy up his evidence. We still have the instruction manual that sets out the correct ratios and you need to go through it with him, getting him to confirm that he followed it exactly.*

*As to the issue of the ambient temperature, at no point during our discussions did Benjamin Ho tell me that I had to be careful in this regard. Yes, it was fairly hot at the time when the building of the dinghies was taking place. It was July and August. But the dinghies were constructed in large sheds to keep them out of the weather and during the building process we kept the doors open so that there was a through breeze.*

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*As to the issue of humidity, as I have said, we had a good through breeze and while there were one or two storms during the building period there was no leaking of rainwater into the sheds.*

*Since speaking with Benjamin Ho, I have spoken with other boat builders. One in particular is in Taiwan, Ming Sailing. The CEO of the company tells me that he bought some of the old resin from Marine Technologies and that the results were poor. He too had to accept the return of several boats because the hulls had gone soft in parts. The CEO is prepared to come to court to explain what happened in order to back me up. However, there is the question of getting him across to Hong Kong and he really doesn't want to give evidence in court. Is it possible perhaps to make some private arrangement to pay the CEO a sum of money – depending of course on how useful you think his evidence will be at trial? This case means everything to me and if I have to pay then I will do it.*

*I should add that I have discovered that Benjamin Ho has a string of previous convictions for driving whilst disqualified and driving without insurance. I want you to bring this up to show the court what sort of man he is.*

*Lastly, I am really keen for you to be the trial advocate in this case. I know you have told me that you have only just acquired higher rights and you haven't done a fully-fledged trial in ages. But I am not worried about your expressed lack of confidence.*

*That just leaves the question of your fees. Because things are so tough for me at the moment, I suggest that I give you HK\$20,000 to meet your ongoing expenses and should we be successful in recovering any damages, I will give you 30%. How does that sound?*

*I look forward to working with you.*

*Jon Smith*

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**Question 1**  
**(7 marks)**

One of your first steps is to see Lucy Chan in order to take a witness statement from her. She tells you candidly that she has a life expectancy of only six months.

- i. Will her statement be admissible at trial? If so, what weight, if any, is the trial judge likely to place upon her written evidence? [5 marks]
- ii. How would one overcome the risk of less than full weight being given to her statement? Give reasons for your answer. [2 marks]

**Question 2**  
**(6 marks)**

Jon Smith is keen for you to instruct Monte Pylon as the expert in the case. Could you use him? Equally importantly, would you use him?

**Question 3**  
**(4 marks)**

Will you be able to use Benjamin Ho's previous convictions at trial and, if so, to what purpose?

**Question 4**  
**(3 marks)**

Would it be a good idea to dispose of the five remaining dinghies? Give reasons.

**Question 5**  
**(6 marks)**

In respect of the CEO of Ming Sailing –

- i. Will his evidence be admissible at trial? [3 marks]
- ii. Will you be able to make any payment to him in order to overcome any reluctance on his part to give evidence? [3 marks]

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**Question 6**  
**(3 marks)**

Ethically and/or legally, are you permitted to enter into the arrangement suggested by Jon Smith in order to pay your legal fees?

**Question 7**  
**(9 marks)**

With reference to the The Hong Kong Solicitors' Guide to Professional Conduct and Law Society's Code of Advocacy for Solicitor Advocates and any relevant law, identify the ethical issues, other than the issue identified in Question 5 and Question 6 above, that arise in the email instructions and indicate how you would deal with them.

**Question 8**  
**(5 marks)**

After you had instituted action, the solicitors for Marine Technologies contact you to suggest either of the following -

- i. that the parties enter into mediation in order to try and settle their dispute, or  
**[3 marks]**
- ii. that they engage a single joint expert whose determination will in all respects be binding **[2 marks]**.

Jon Smith is not keen to do either as he wishes to have his day in court and he considers that Benjamin Ho is inherently untrustworthy and likely to find some way of turning matters to his advantage. What advice would you give to him and why?

**Question 9**  
**(7 marks)**

One of your colleagues in the office settles the particulars of claim for Jon Smith. The particulars are set out below. Ignoring purely stylistic points and on the assumption that the facts and dates are correct, in what respects, if any, would you seek to amend the particulars and why? You are not required to draft an amended version.

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DC 1234/2015

**IN THE DISCTRICT COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
DISTRICT COURT ACTION NO. 1234/2015**

Between

SOUTH ASIA CRUISING PRIVATE LIMITED

Plaintiff

And

BENJAMIN HO

Defendant

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**PARTICULARS OF CLAIM**

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The Parties

1. In this case:

- (a) the Plaintiff is, and was at all material times, a private company which builds boats including specialist racing dinghies; and,
- (b) the Defendant is, and was at all material times, sales director of Marine Technologies. The Defendant produces polyester resin. Polyester resin is mixed with glass fibre and used in the construction of complex curved structures, such as racing sailing dinghies.

The Contract

2. On 24 January 2014, the Plaintiff agreed to purchase from the Defendant 200 x 50 gallon drums of polyester resin. Each drum cost HK\$40,000. On 1 March 2014 the Plaintiff paid the full purchase price in the sum of HK\$8 million to the Defendant. On 25 April 2014 the resin was delivered to the Plaintiff at his Lantau factory.

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### Terms

3. The Defendant made the sale in the course of its business and accordingly it was an implied term of the contract that the resin should be:

- (a) reasonably fit for purpose pursuant to the Sale of Goods Ordinance (Cap. 26), section 16(3); and,
- (b) of merchantable quality pursuant to section 16(2) of the same Ordinance.

### Subsequent use of resin

4. The Plaintiff used the resin in the construction of 25 dinghies over the next month. All 25 dinghies were sold in June, July and August 2014 for the price of HK\$1,500,000 each but, about 2 to 3 months after they were launched and were exposed to the sun and sea, they started to go soft in places. The dinghies were returned and each purchaser was fully refunded by the Plaintiff. The dinghies are worthless.

### Breach

5. In breach of the above implied terms the resin was not fit for the required purpose and not of satisfactory quality.

### Loss

6. As a result of the matters set out above the Plaintiff has suffered loss and damage in the sum of HK\$25 million being the loss of profits on 25 dinghies which were made and sold using the resin.

### Interest

7. The Plaintiff is entitled to and claims interest under section 50 of the District Court Ordinance (Cap. 336) on the amount found to be due to the Plaintiff at such rate and for such period as the Court thinks fit.

AND accordingly the Plaintiff claims

- (1) Damages; and,
- (2) Interest pursuant to section 50 of the District Court Ordinance.

*[please assume that it is signed, dated and has a correct statement of truth and backsheet]*

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