

November 2013

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. 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.

The Case

You act for Cut Above Limited, a long-standing client whose managing director and majority shareholder is Janet Ma.

Cut Above is intending to sue Deeprinse Ltd. There is a written contract but the dispute centres upon whether Deeprinse gave certain assurances to Janet Ma which induced her to enter the contract on behalf of her company. You have not yet issued proceedings.

The only information available to you at this stage is the following letter which Janet Ma has just sent to you.

Cut Above Limited

26 September 2013

150 Lockhart Road
Wanchai
Hong Kong

Dear

I am off on holiday to Cebu tomorrow for two weeks. I know you want to draft the particulars of claim. Please sign it on behalf of the company and, if I have left any information out, just use your common sense to supply the necessary details. I trust your judgment. It seems to me that this is a clear case of fraud but I will leave it to you as to how to put the case.

As you know, I have been the Managing Director of Cut Above since 2001 when I founded it (changing from a sole trader to company status). The company owns three hairdressing salons on Hong Kong Island.

I did a deal with Laurence Depp of Deeprinse on 14 March of last year. Laurence owns and controls Deeprinse. Deeprinse had two hair salons in Tsim Sha Tsui and wanted to downsize to one. It had advertised that one of its salons was for sale in the Standard. This was an ideal opportunity for me and my company because we wanted to expand across the harbor to capture some of the thriving young professional market there.

Following several weeks of negotiations, on 14 March, Laurence and I met up for lunch at Grappa's in Pacific Place to talk about the written contract we were about to sign. I was very concerned about the salon which he intended to keep. It was nearby to the one which I was hoping to buy and, although I was quite happy for it to keep trading, I was adamant that Laurence should not work there. He had a high profile in the type of market which I was aiming for and I did not want to compete with his personal reputation. I was content for other Deeprinse staff to run the remaining salon.

Laurence assured me repeatedly and in very clear terms that he was effectively retiring and that he would only work at the salon in emergencies. Based on this assurance I agreed to pay HK\$5 million for the salon, which Deeprinse was divesting itself of, and duly signed the contract at the lunch. The purchase was completed on 1 June of last year. I did not think of amending the contract to include the fact that Laurence would not be working in the remaining salon except in emergencies (such as when no staff turned up).

My husband, Eddie Wong, went to the lunch with me and heard the assurances given by Laurence. As you know, tragically Eddie suffers from multiple sclerosis. He is quadriplegic and is a wheelchair user. He is able to stay awake and concentrate for short periods only and his speech is slow and difficult to understand (only his carer and myself can work out what he is saying) but his hearing is fine. Eddie's eyesight is poor as well but he is intellectually totally unimpaired.

Nicola Clegg, originally from Australia and my senior stylist, was also at the lunch meeting. Although she was in the bathroom when Laurence gave me his assurances, I have spoken to her since and she is quite happy to go to court to support my version of what was said.

In fact, Laurence Depp continued to work full time in Deeprinse's remaining salon since June and this had such an effect on Cut Above's new business in Tsim Sha Tsui such that it was never profitable. Based on my business plan and my accountant's projections, Cut Above should have been making about HK\$750,000 net profit in the first year at the newly acquired salon given the figures I had seen during our negotiations. I have now contracted to sell the salon to cut the company's losses.

Of course, Depp is now denying that any such discussion about his effective retirement ever took place. On this point, however, I recently recruited a junior stylist who used to work for Deeprinse but was told to go because he did not get on with Depp and was dismissed. His name is Abdullah Al Rafsin. He has told me that when he was at Deeprinse, he saw that Depp came into work on a full time basis over the last year. He also told me that he had had a conversation with Laurence Depp in which Depp revealed to him that he had never intended to retire. Unfortunately, Abdullah will probably not be able to testify as he is leaving Hong Kong permanently to join his family in Lebanon.

Abdullah has also told me that there is another stylist who may be able to help; her name is Kate Mok. She still works at Deeprinse and I understand that she has already

been interviewed by their solicitors and may be called by them to testify. Please speak to her to see what she knows (her mobile number is 98315646).

I have enclosed a newspaper article from 4 years ago [*note to candidates - not reproduced for this examination*] which reports that Laurence Depp was convicted of tax fraud. I am relying upon you to exploit this at trial so as to cast him in a bad light with the judge. Please also find enclosed a copy of a letter from Depp's accountant to Depp dated 1st March last year [*note to candidates – not reproduced for this examination*] in which he is clearly advised that he will have insufficient funds to retire within the next three years. Don't ask me how I got hold of this but suffice it to say he did not give it to me!

By the way, a friend of mine called Angie Yuen is willing to help. She runs two salons in Kowloon and can give evidence about the effect of personal reputations and their effect on profitability in this type of business; let me know if you want to call her. We can agree some sort of deal on her expenses should her evidence turn out to be decisive. She can also give evidence about a similar situation which happened to her, although it did not involve Deeprinse. She was given an assurance that a competitor would retire if she bought his salon. It turned out that he did not and this severely damaged her profitability.

I am very keen that you act as Cut Above's advocate at any trial even though you have never done a High Court trial; I am sure that your experience doing all those "interims" as you have described them over the past 3 months will stand you in good stead. As I mentioned to you before, I would have to think about taking my business away from your firm if you are not able to act as the company's advocate.

Yours sincerely

Janet

Janet Ma

QUESTION 1

(8 marks in total)

On the assumption that Abdullah Al Rafsin is unable to attend the trial for the reason mentioned in the letter:

- a. Do you wish to adduce Abdullah's evidence? Why or why not? **(1 mark)**
- b. Can a witness statement from him still be adduced? If so, how? **(2 marks)**
- c. What steps may Deeprinse take in relation to it? **(2 marks)**
- d. What weight may be attached to it by the trial judge? Set out the reasoning for your answer **(3 marks)**

QUESTION 2

(6 marks)

Will the proposed evidence of Angie Yuen be admissible at trial? Set out the reasoning for your answer.

QUESTION 3

(16 marks)

With reference to the Law Society's Code of Advocacy for Solicitor Advocates, and any relevant law, identify the ethical issues that arise in the letter and indicate how you would deal with such issues.

QUESTION 4

(2 marks)

Janet Ma is keen to obtain a court order stopping Laurence Depp from working full time in Deeprinse's remaining salon. Acting for Cut Above, what would you advise and why?

QUESTION 5

(2 marks)

Deeprinse suggests that Cut Above participates in a mediation. Acting for Cut Above, what would you advise and why?

QUESTION 6

(3 marks)

Acting for Cut Above, you receive a report from a firm of accountants which you had commissioned. The report concludes that the lack of profitability at the salon acquired from Deeprinse was due to Cut Above's poor management and disastrous advertising campaigns rather than due to Mr. Depp's continued presence in the market. What would you do with the report and why?

QUESTION 7

(2 marks)

You wish to adduce under cross-examination that Laurence Depp had no intention to retire when he gave his assurances to Janet Ma that he was going to retire. How do you achieve this? Can he legitimately refuse to answer?

QUESTION 8

(6 marks)

As the solicitor advocate for Cut Above will you call Eddie Wong, if so, what steps will you take with regard to the evidence of Eddie Wong? Set out the reasoning for both parts of your answer.

QUESTION 9

(5 marks)

One of your colleagues has settled the first draft of Cut Above's Statement of Claim as set out on the following pages. Ignoring purely stylistic points and on the assumption that the facts and dates are correct, in what respects, if any, would you amend it and why? [You are not required to draft an amended version].

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
HIGH COURT ACTION NO 25 OF 2013**

BETWEEN

Janet Ma

Plaintiff

and

Deeprinse Limited

Defendant

STATEMENT OF CLAIM

1. In or about February 2012 the defendant advertised for sale the goodwill of a hairdressing business called 'Cut in Heaven' situated at the ground floor of Ha Yung Building, Harbour Close, Tsim Sha Tsui, together with fixtures and fittings and stock in trade as at the date of sale ["the Salon"].
2. In March 2012, the plaintiff entered into negotiations with the defendant with a view to purchasing the Salon. During the negotiations on 14 March 2012, in order to induce the plaintiff to enter into a contract to purchase the Salon, Laurence Depp, the majority shareholder and managing director of the defendant, acting for and on behalf of the defendant, orally represented to Janet Ma, the managing director and majority shareholder of the plaintiff, who was acting for and on behalf of the plaintiff, at Grappa's restaurant in Pacific Place, Queensway, that as at the date of sale of the Salon, he intended to retire from the hairdressing business and that he would only work in emergencies at the defendant's other salon in Tsim Sha Tsui area known as 'Smart Cut' ["the Representation"].
3. Induced by and in reliance upon the Representation the plaintiff entered into a written contract dated 14 March 2012 with the defendant by which the plaintiff agreed to purchase the Salon from the defendant for the sum of HK\$5 million. Completion of the purchase was on 1 June 2012.
4. The Representation amounted to a collateral warranty, in consideration of which the plaintiff entered into the contract.
5. The Representation was in fact false and the defendant was in breach of the collateral warranty in that Laurence Depp did not and has not retired from full time work at the defendant's remaining salon, Smart Cut.
6. As a result of the matters set out above the plaintiff has suffered loss and damage.

And the plaintiff claims:

1. Damages for fraudulent misrepresentation or breach of warranty
2. Interest
3. Costs

[Candidates may assume that the signature, statement of truth and service details are properly set out]

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