

November 2014

**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 Mary Wong. She is a long-standing, very litigious and very rich client. She wishes to sue Deepdive Pools Limited for breach of contract. There is no written contract. The dispute centres upon whether your client, Mary Wong, and Deepdive Pools orally agreed upon the depth of a swimming pool that has now been built for Mary Wong in her Sai Kung house. The only information available to you at this stage is the following email which Mary Wong has just sent to you.

*21 February 2014*

*Dear John,*

*I have to go to Los Angeles today for a few weeks on business. I am sorry I don't have time to see you. I am sure you want to draft the Statement of Claim and issue a writ without delay. We have known each other for many years and you have my permission to sign all relevant documents on my behalf using the information in this email. If anything is missing I am sure you can think of something suitable to fill in the gaps. Basically, what happened is as follows.*

*On the 1<sup>st</sup> September last year I met with David Li (Li Hang Suk) of Deepdive Pools at my house in Sai Kung – 32, Sai Kung Terrace, Sai Kung. Deepdive specializes in constructing luxury swimming pools and spas. David is the Managing Director and major shareholder.*

*We walked around the grounds of my house and verbally agreed that Deepdive would build a heated swimming pool for me on the land in the front of the house overlooking the sea with a full brick surround. We agreed a figure of HK\$1.5 million. As I have known David's family for a long time, I did not think to get anything in writing. We had tea and agreed the details orally.*

*I distinctly recall that it was agreed that the swimming pool would be 3 metres deep at its maximum depth in the diving area. Work started in mid-September and was completed in February of this year. I was away for virtually all of this time managing a project in Beijing. When the work was completed, I inspected the pool with David Li. Everything appeared to be in order. I therefore paid in full. It was only in March of this year, while friends were staying with me, that we noticed that the pool did not appear to be deep enough in the diving area. I arranged for it to be measured and to my horror discovered it was only 2.5 metres deep and not 3 metres deep as agreed. To be fair, in all other respects, the pool is just fine.*

*I telephoned David Li on the 7<sup>th</sup> March of this year to complain but he was adamant that we had agreed on a depth of 2.5 metres only. Since then he has refused to speak to me.*

*However, my neighbour and good friend, Melanie Smith, has told me that she met David Li at a dinner party just before he commenced work on my swimming pool and he told her that my pool was to be 3 metres deep in the diving area which probably meant having to blast away some rock. Unfortunately, Melanie has returned permanently with her family to Sydney, Australia.*

*Melanie also told me that she knew of 3 other people in the Sai Kung area who have had swimming pools built by Deepdive. In each case they have told her that they had angry disputes with David Li over the dimensions of their swimming pool.*

*Melanie can be contacted in Sydney and is prepared to give a statement setting out these matters. However, she does not wish to return as she is not at all well and is under constant medical care in Sydney. I hope her statement will be sufficient and I am sure you can convince the court.*

*To be frank the pool is perfectly useable at 2.5 metres in depth. Nobody I know is a keen swimmer. In addition, the pool has beautiful hand-made Afghan tiles which are irreplaceable. But that is not the point. I have not received what I paid for. I therefore want you to put in the writ that the pool is unusable because of the lack of specified depth and that it will be necessary to have it demolished so that a new pool can be constructed to the correct depth.*

*To help you, I have employed the services of another swimming pool builder, Tom Forsyth, who has been to my house and will be able to give evidence that the depth of my pool is only 2.5 metres as opposed to 3 metres.*

*One matter which could be very important is that I happen to know that David Li, who is married with 3 children, has been having an affair with his brother's wife. I suggest that you drop this fact during the course of cross-examination of him. I know it will shock him, put him off his stride and will weaken his credibility.*

*I recall you telling me that you have just qualified as a higher court advocate although you haven't tried a case in the higher courts yet. But I would like you to conduct the case for me in the Court of First Instance as I know that, whether rusty or not, you will exploit all the information that I have given you in this email.*

*Finally, although I have no intention of constructing a new swimming pool, I am told by Tom Forsyth that the cost of constructing a new pool to the same standard and to the proper depth of 3 metres in the diving area will be HK\$2 million. This is the amount that I wish you to claim.*

*Please don't delay. I don't want letters; just sue. And if David Li defends, go for summary judgment.*

*Best wishes,*

*Mary*

*Mary Wong*

**Question 1**  
**(10 Marks)**

- a) Identify any hearsay statements in the email and explain why they are hearsay. (2 Marks)
- b) Are hearsay statements admissible at trial? If so, on what basis? (2 Marks)
- c) Assuming the hearsay statements are admissible, what weight, if any, would you give to them for the purposes of advising Mary Wong of her chances of success? (6 Marks)

**Question 2**  
**(7 Marks)**

- a) Assuming that Melanie Smith's evidence is admissible, will she be able to give her evidence by way of a statement only? If so, can she nevertheless be compelled to testify and to face cross-examination? If so, is there any way she can testify without returning to Hong Kong? What steps can Deepdive take in relation to it? (5 Marks)
- b) Is there a need to obtain expert evidence from Tom Forsyth or can the matter be dealt with without the need for his testimony? What advice would you give to Mary Wong? (2 Marks)

**Question 3**  
**(13 Marks)**

Identify the ethical issues that arise in Mary Wong's email and indicate how you would deal with them.

**Question 4**  
**(2 Marks)**

Mary Wong insists that you should issue a writ without a letter of demand being sent first. She also insists that you should apply for summary judgment if an appearance to defend is entered. What would you advise her and why?

**Question 5**  
**(4 Marks)**

You are instructed to claim damages of HK\$2 million for reconstruction of a new pool. Does the fact that Mary Wong has informed you that she has no intention of proceeding to build a new pool influence this claim? If so, how would you proceed by way of your claim in order to protect her?

**Question 6**  
**(3 Marks)**

Deepdive suggests that an attempt be made to mediate this dispute. Mary Wong is reluctant to do so. What would you advise her and why?

**Question 7**  
**(4 Marks)**

Mary Wong delivers to you a document which belongs to the other side and which is prejudicial to the case of Deepdive. She will not tell you how she obtained it but wishes you to use it at trial. Can you use it at trial? What steps can the other side take?

**Question 8**  
**(1 Mark)**

At the time of trial Mary Wong has recently given birth and needs to breast feed her child every 3 hours. What do you do to assist her?

**Question 9**  
**(6 Marks)**

One of your colleagues has drawn up the first draft of the Statement of Claim as set out below. Ignoring purely stylistic points, and on the assumption that the dates and facts are correct, in what respects, if any would you amend them and why?

Please note: you are *not* required to draft an amended version of the Statement of Claim.

HCA 123/2014

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
HIGH COURT ACTION NO. 123 of 2014**

BETWEEN

Mary Wong

Plaintiff

And

Deepdive Pools Private Limited

Defendant

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STATEMENT OF CLAIM

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1. The Plaintiff is, and was at all material times, the owner of the house and grounds situated at 32, Sai Kung Terrace, Sai Kung, Hong Kong. ("the property")
2. The defendant is, and was at all material times, a company specializing in the construction of luxury swimming pools and spas.
3. By a contract made on 1<sup>st</sup> September 2013 ("the contract") the defendant agreed to construct a luxury swimming pool and spa in the grounds of the property for the plaintiff.
4. It was an implied term of the contract, pursuant to section 5 of the Supply of Services (Implied Terms) Ordinance (Cap. 457) that the Defendant would construct the swimming pool using reasonable skill and care.
5. In breach of the contract the defendant has failed to exercise reasonable skill and care in the construction of the swimming pool in that it is only 2.5 metres deep as opposed to the agreed depth of 3 metres.
6. The cost to the plaintiff of constructing a new swimming pool to make good the Defendant's failure to exercise reasonable skill and care is the sum of HK\$2 million.
7. The Plaintiff is entitled to claim interest on such sum found due and at such rate and for such period as the Court deems fit pursuant to s. 49 of the District Court Ordinance (Cap. 336)



Accordingly the Plaintiff claims:

1. The sum of HK\$2 million
2. Interest; and
3. Costs

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

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EXAMINATION ROOM**