
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

Your long-standing client, Johnson Chow, is the managing director of Stark Industries Limited (“Stark Industries”), a Hong Kong company. He had previously instructed you to handle various litigation and proceedings concerning shareholders’ disputes and boardroom disputes arising out of or concerning his other companies and business partners in Hong Kong. On 20 April 2017, you received the following email from him.

Dear Roger,

Sorry to have missed your return call this afternoon. I am off to Beijing for a business meeting and will be out of town until early next week. As I have mentioned to you earlier on WhatsApp, I just want to kick-off this litigation in relation to the share held by Stark Industries in the Hong Kong company called Brilliant Win Company Limited (“Brilliant Win”) without further ado. Please issue the proceedings in the High Court for me this week.

In 2013 I reached a deal with one of my former business partners Cecil Li in relation to using my company Stark Industries to hold the 1 share of Brilliant Win (representing its entire issued shareholding) for the benefit of me, Cecil Li and his wife Alexa Li in equal one-third shares. Brilliant Win is a corporate vehicle for acquiring and holding various luxurious landed properties in Hong Kong.

Well. You know me long enough and you would know perfectly well that I don’t care about these trust arrangements. What I was interested in are the business opportunities out there in the real estate market by pooling in the resources of Cecil Li and his wife to acquire and invest in luxurious penthouses in Hong Kong, including those on the Peak, South Side and nearby Jardine’s Lookout and Mount Butler.

As you will understand, I think it’s high time for the luxury property market in Hong Kong to depreciate and I have discussed with Cecil Li and his wife about the idea of liquidating part of the real estate portfolio held under Brilliant Win.

To my great surprise, they rejected my idea and insisted that I would have no say in whatever business decisions what Brilliant Win would make and that I do not actually have any entitlement to the real estate investments carried out by Brilliant Win over the past 3 years.

I was furious at their response. I told them that I have also provided good advice to them and Brilliant Win as to the choices of penthouses that Brilliant Win should have bought and as such, they made good money out of heeding my good advice and I should be entitled to an equal entitlement in the rise of the overall value of real estate portfolio.

Cecil Li nonetheless turned me down. He said the share held by Stark Industries in Brilliant Win was only a share held on trust with Cecil and his wife being the only beneficiaries. Cecil also asked his secretary to show me various documents claiming that they all support the idea of a trust arrangement for Cecil and his wife only.

I think it's all a sham. I am pretty sure that these documents whatever they are called, the Trust Deed or accounting documents, are recent fabrications by Cecil and his wife and it's simply fraud on me with the purpose of pocketing all the profits that Brilliant Win made in the real estate investment. I see no prospect that we can talk things out. I don't care how much that is going to cost me. I have the money ready and I just want to see them in Court!

I was shown a document by Cecil entitled as "Deed of Trust" dated 24 July 2013 made by Stark Industries as "Trustee" with the settlor. Clause 16(a) of the Trust Deed reads as follows:

"The Trust Fund meansall further money, investment or other property paid or transferred by any person or persons to or placed under the control of and (in either case) accepted by the Trustee as additions to the Trust Fund to be held on trust for Cecil Li and Alexa Li".

I recognize that the signature endorsed by me on behalf of Stark Industries in this Deed of Trust. I think that's my signature. But I don't think the document is real. It must be the case that Cecil Li or his wife had fabricated or manufactured this in order to pre-empt me from getting my rightful entitlement from the real estate investment. As to how and when they did this, I do not know...but please make sure you tell the Court that this is fraud on me... I have never agreed to this Deed of Trust...

I am also quite sure that Cecil Li and his lawyers would try to make use of some accounting documents and audited reports of Brilliant Win.

It was clearly agreed between me, Cecil Li and his wife that all three of us would be the beneficiaries of the trust.

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 me, 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 O/S and supporting documents for my endorsement this week then.

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

JOHNSON

The Questions

Question 1 (5 marks)

Assume that (for the purposes of this Question 1 only) you are a very close friend of Cecil Li and his wife, and they have donated substantial sums of money to a charity whose board of trustees you serve on. However, neither you nor your firm have acted for either of them before, nor have you ever discussed any matters with Cecil Li or his wife which relate to Johnson Chow's instructions.

Please state what are the relevant matters to consider, and/or what steps you should take (if any), to decide whether it would be suitable for you to act for Johnson Chow. Give reasons.

Question 2 (5 marks)

Assume that (for the purposes of this Question 2 only) upon receiving the 20 April 2017 email, you recall that in fact you had signed your name as a witness to Johnson Chow's signature on the Deed of Trust on 24 July 2013.

Should you act for Johnson Chow in this matter? Give reasons.

Question 3 (4 marks)

Assume that (for the purposes of this Question 3 only):

- (1) You are a very experienced litigation solicitor, but have only recently become a solicitor advocate. Although previously you had handled numerous very large and complex cases, your experience as an advocate is limited to a handful of 2 to 3 day trials where the amount involved was around HK\$5 to 10 million.
- (2) The real properties owned by Brilliant Win are together easily worth a few hundred million dollars, and the trial is likely to be highly complex and last for approximately 15 to 20 days.
- (3) Nevertheless, Johnson Chow has told you that: *"In this upcoming litigation, I want you to be my solicitor and my sole solicitor advocate both in handling the case and conducting the trial. I know you don't have much experience in*

conducting trials. But I need somebody to confide in and fight for me for every inch in the court room.”

Should you act for Johnson Chow in: (i) handling the case up to trial; and (ii) conducting the trial? What should you advise Johnson Chow to do? Give reasons.

Question 4
(3 marks)

Johnson Chow wants you to commence legal action in Hong Kong immediately and seek a court declaration that he, Cecil Li and Alexa Li are the equal beneficial owners of the 1 share in Brilliant Win, with one-third interests each, and that the Deed of Trust is a forgery. Acting in accordance with his instructions, who would be the necessary parties in this action? Who would you cite as the plaintiff and the defendants?

Question 5
(5 marks)

Johnson Chow explicitly asks you to institute this proceeding by way of an Originating Summons. In your experience, however, you understand and anticipate that there would be numerous factual disputes to be resolved at the trial of this action and that originating summons may not be the appropriate originating process. What advice would you give to Johnson Chow in this regard? What would be the more appropriate mode for commencing legal action and why?

Question 6
(8 marks)

Assume that you have advised Johnson Chow (correctly or not) that the matter should be instituted by issuing a Writ and Statement of Claim, and he has accepted your advice. You will note from the email of Johnson Chow that he asked you to plead that Cecil Li and his wife forged the Deed of Trust, and that in due course he wishes to challenge the authenticity of some of the documents produced by Cecil Li and his wife.

- a) What advice would you give to Johnson Chow before pleading that Cecil Li and his wife forged the Deed of Trust? **(4 marks)**
- b) If the case proceeds to trial, and Johnson Chow insists on challenging the authenticity of the documents adduced by Cecil Li, what procedural steps should you take to inform the court of such a stance? **(4 marks)**

Question 7
(5 marks)

Assume that, for the purpose of this Question 7 only, you are taking over this matter from another firm of solicitors, they had commenced the action by way of Originating Summons and (for reasons unknown) had by consent agreed with other parties that the action should *not* be converted into a writ action. You are now preparing the directions for the first hearing date of the Originating Summons. You foresee that it is impossible for the court to resolve these substantial factual disputes on affidavit without cross-examination.

- a) How can you subject the deponents of the affidavits (in particular Cecil Li) to cross-examination? **(2 marks)**
- b) What directions should you seek from the trial judge at the directions hearing of the Originating Summons in light of the substantial disputes as to facts? **(2 marks)**
- c) Pursuant to which Order of the Rules of the High Court? **(1 mark)**

Question 8
(2 marks)

For the purposes of this Question 8 and Question 9 only:

- (1) Assume that the matter has continued to progress, and that you are now at the stage of preparing the list of documents for discovery.
- (2) Amongst the material Johnson Chow has provided to you is an email dated 25 July 2013 from Cecil Li to Johnson Chow stating “*It was good to see you yesterday, sorry again that I did not have time to have coffee. Are you free next Tuesday?*”
- (3) You have shown this 25 July 2013 email to Johnson Chow. Johnson Chow has told you that it has nothing to do with the Deed of Trust. Johnson Chow explained that he had played tennis with Cecil Li in the afternoon on 24 July 2013. Johnson Chow suggested having coffee afterwards, but Cecil Li was in a hurry to return home.

Should you disclose the 25 July 2013 email? Give reasons.

Question 9
(4 marks)

For the purposes of this Question 9 only:

- (1) Assume the 3 matters stated in Question 8 above.
- (2) Assume that you have come to a firm view (correctly or not) that it is your duty to disclose the 25 July 2013 email.
- (3) Johnson Chow now insists that, despite your firm view, you must not disclose the 25 July 2013 email and refuses to authorize you to do so.

What should you do? Give reasons.

Question 10
(6 marks)

For the purposes of this Question 10 only:

- (1) This matter has gone to trial and the Court has ruled in favour of Cecil Li and his wife.
- (2) A few days after the Court's judgment, Johnson Chow discovered a handwritten memo stored in his cabinets some 3 years ago, recording that Cecil Li and his wife agreed that Johnson Chow holds a one-third interest in Brilliant Win via the holding of 1 share through Stark Industries. Cecil Li and his wife also signed on this handwritten memo.
- (3) Such memo was not adduced as evidence before the judge hearing the trial.

Johnson Chow now wishes to appeal against the judgment of the learned judge and adduce this written memo as new evidence on appeal.

- a) What steps should be taken by you to appeal against the judgment of the trial judge heard in the High Court? **(2 marks)**
- b) Assuming for the purpose of this question only that the action was heard in the District Court instead and judgment was also in favour of Cecil Li and his wife, what steps should be taken by Johnson Chow to appeal against such a decision of the District Court? **(2 marks)**

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- c) What should be done to adduce the written memo as new evidence upon the hearing of the appeal? What would be the “test” applicable in determining whether such new evidence should be admitted? (**2 marks**)

Question 11
(3 marks)

Ignore the matters described in Question 10 above, save that the judge at first instance has handed down judgment in favour of Cecil Li and his wife. Johnson Chow has asked you to advise on the merits of an appeal.

Assume that you have come to the firm view (correctly or not) that Johnson Chow has no prospects of success on appeal, and you have advised Johnson Chow accordingly. Nevertheless, Johnson Chow insists that you prepare a notice of appeal. Should you prepare the notice of appeal? Give reasons.

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