

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, including those computer printed hard copies. 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, a 90-year old lady Madam Lee Shook Ha (“Madam Lee”). Madam Lee is a devoted Christian. Since the passing of her husband 2 years ago, Madam Lee spends most of her time in carrying out community services work by her church. Recently, it has been discovered by the daughter of Madam Lee that the legal title of a luxurious apartment of Madam Lee situated on the Peak worth of at least HK\$80 million was transferred to a couple Mr. and Mrs. Chan free of consideration. According to Madam Lee’s daughter, this couple Mr. and Mrs. Chan are friends whom Madam Lee had encountered at her church. Mr. and Mrs. Chan would accompany Madam Lee to church every Sunday and the three of them would have dinner on a regular basis every week. According to Madam Lee, she has been providing financial assistance to Mr. and Mrs. Chan, and also allowed the couple to stay rent-free in Madam Lee’s flat, because Madam Lee deeply sympathized with the couple, whose only son was killed in a serious traffic accident 4 years ago. Over the past 4 years, the couple suffered serious psychological illness and shock resulting from the death of their only child and needed to shoulder hefty medical bills for attending regular sessions with psychiatrists in Hong Kong and overseas.

Madam Lee’s daughter is concerned that her mother transferred the title of her home on the Peak without proper legal advice and had done so due to the misrepresentation and deceit of the couple Mr. and Mrs. Chan. Upon consulting her daughter and her son-in-law, Madam Lee now wants to instruct you to act for her to claim and seek the recovery of her flat and other relief including that the transfer to Mr. and Mrs. Chan be declared null and void and set aside accordingly.

On 22nd March 2019, you received the following email from Madam Lee.

Dear [Your Name],

I understand that my daughter Matilda has got in touch with you previously regarding my potential lawsuit in relation to my home in Hong Kong situated on the Peak. I purchased the flat in Cambridge Court, on the Peak, with my late husband Simon as joint-tenants in 1980s. It was my matrimonial home and was the place where Matilda was born and spent her childhood until our family emigrated to Canada in 1995. The flat was thereafter left vacant and used occasionally as a holiday home during summer time when our family came back to Hong Kong to see our relatives and friends.

After the passing of Simon a few years ago, I decided to relocate back to Hong Kong so that I could spend more time with Matilda and my son-in-law Nathan and of course my two little grandsons. Given that Matilda and Nathan have to work full-time as corporate lawyers here, they invited me to stay with them at their home in Happy Valley to help look after my two grandsons with the assistance of the domestic helpers.

As you may know, I am a devoted Christian. Since relocating back to Hong Kong, I joined the Sunday services of the St. Catherine's Church in Central. Over the years, I got to know and had met many new friends here in Hong Kong, who have at all times been a great company of mine and we hang out together regularly to go to the movies, go shopping and have lunch gatherings and dinners together.

John and Sue Chan are a young couple who I met in the Church. They are very devoted members of the Church and spend substantial amounts of their time participating in the community services and volunteer work for the Church. Unfortunately, about 4 years ago, their only son James was killed in a traffic accident in Hong Kong. After the accident, both John and Sue have suffered from depression until now. They need to undergo clinical psychological treatments and therapy every week. Our friends also told me that Sue still hasn't recovered fully and is unable to return to work. John lost his job too and has to make a living by doing some freelance ad-hoc translation work for some newspapers and magazines in Hong Kong.

I deeply sympathized with their situation and the loss of their only child. I tried to help by whatever means to sooth and alleviate the difficulties and challenges they face. From 2014 onwards, I therefore let them to stay at the Cambridge Court flat for as long as they wanted.

In light of the huge medical expenses that Sue and John had to pay every month, I also decided to make use of my savings to help them out temporarily. I recall in around 2016, I wrote Sue a cheque in the amount of HK\$1 million to pay for the medical fees and hospital charges.

In around 2017, John told me that he had to undergo cataract operations for both of his eyes. Since he had done Lasik treatment to correct his short-sightedness before, there might be further complications to his cataract operations and he was very worried about having the operations to be conducted in a public hospital. He consulted various friends in the United States, and decided to have the cataract operations carried out in New York. In order to do that, he would need about HK\$2 million for the operation. Without any hesitation, I lent John a sum of HK\$2 million through bank TT transfer.

As to the transfer of title of my flat to Sue and John, my recollection and account of the events is this. It was never my intention to transfer the legal title and gift the ownership of the Cambridge Court flat to Sue and John. It was my only home in Hong Kong and it has great sentimental value to me. I have never had the idea of disposing of the flat. This was also the reason why, after our family had emigrated to Canada, we did not sell the flat and had all along kept it as a second home in Hong Kong for the occasional use by our family.

I recall on one day in 2017, John called me and told me that both he and Sue would like to renew their passports. However, the government would need them to provide an address proof before they can apply for the same. John then asked if I minded if they used the Cambridge Court flat as their residential address when renewing their passports. Without any hesitation, I said "of course not, please feel free to use it!" I also said that if there were any matters which I could assist with, or if they needed me as a contact person or referee, I would be more than happy to be one. The following day, Sue and John they took me out for lunch in Central to thank me, and after that, invited me to attend their solicitors' office to sign some "standard forms" for the purpose of giving my permission for them to use my flat as their residential proof. I recall that

the lawyers were very efficient. The entire process took no more than 5 minutes. I was only told that those were the necessary forms for John and Sue and I just needed to sign on them, which I did. The lawyers thanked me for my co-operation and we left the solicitors' office in less than 15 minutes' time.

I didn't realise that those papers that I signed were, in fact, legal documents with the effect that the legal title and ownership of my flat would be transferred and assigned to Sue and John free of any consideration. It was never my intention that the Cambridge Court flat would be gifted to them free of charge. All along, it was my intention and my husband's intention that the same would be left to Matilda and her children upon the deaths of myself and my husband.

I think we need to act quickly as I am told that Sue and John have been taking active steps to sell the flat in the open market. I would want you to issue proceedings as soon as possible for me to get back my flat and to invalidate whatever transfer or assignment that I had signed and made under the wrong impression and misrepresentation of Sue and John.

The Questions

Question 1 **(2 marks)**

You discover that Madam Lee signed the documents transferring title of the Cambridge Court flat at your former law firm when you were still a member of that firm.

What should you do? Please give reasons.

Question 2 **(3 marks)**

Assume for the purpose of this question only that the Cambridge Court flat is located in North Point and is worth HK\$8,000,000. Madam Lee thinks that the District Court is the best place to commence her legal proceedings against Sue and John. Madam Lee's daughter informed you that the annual rateable value of the property at Cambridge Court which is HK\$258,000. Before you decide whether or not to accede to client's request to commence legal proceedings in the District Court, how would you advise Madam Lee?

Question 3 **(5 marks)**

- (a) Assume for the purpose of this question and question 4 only that, after filing and service of the Writ of Summons (indorsed with Statement of Claim) for Madam Lee in the High Court, you discovered that in fact, Sue and John had already commenced a District Court action against Madam Lee for, inter alia, a declaration that the former be declared the true legal beneficial owners of the Cambridge Court flat. Pursuant to which section of the District Court Ordinance can you make a formal application for the transfer of the District Court proceedings to be heard in the High Court? (1 mark)
- (b) Assuming that you are successful in securing a transfer of the aforesaid District Court action by Sue and John to the High Court, to save time and costs, Madam Lee has instructed you to take out necessary applications to the Court so that there will not be two trials over the same subject matter. What application can be made to the Court to save Madam Lee from going through two trials and

pursuant to which relevant rules of the High Court? What matters will the Court take into account? (4 marks)

Question 4
(7 marks)

In the Statement of Claim which you have prepared for Madam Lee, as part of the factual background it is her pleaded case that Sue and John had asked Madam Lee if they could use the Cambridge Court flat as their residential address when renewing their passports.

In the Defence of Sue and John, they had originally expressly admitted this. Before Madam Lee has filed her Reply, Sue and John have applied for leave to amend their Defence to the effect that this statement is denied. In their affidavit in support of their application, they said that they had admitted this fact by mistake.

- (a) What matters would the Court take into account in deciding whether the amendment application should be granted? (3 marks)
- (b) If you acted for Sue and John, what would Sue and John's grounds be for supporting the amendment? (4 marks)

Question 5
(7 marks)

Assume for the purpose of this question only that you act for Sue and John. Madam Lee's proceeding has now been instituted in the High Court. Shortly after the exchange of witness statements, you discovered that the witness statement of Madam Lee contained and referred to a number of the "without prejudice" correspondences between the parties. The effect of the correspondence is not favourable to Sue and John.

- (a) What advice would you give to Sue and John in relation to these privileged documents? (3 marks)
- (b) What are the essential facts that Sue and John need to prove to establish that the correspondence is subject to without prejudice privilege? (4 marks)

Question 6

(3 marks)

Assume for the purpose of this question only that a specific discovery hearing set down for 3 hours has been fixed in consultation with your diary. 1 month before the hearing, you realise that it clashes with an important social engagement.

- (a) Assume for this paragraph (a) that you have not been able to find any advocate or counsel to take over the specific discovery hearing. What should you do? Please give reasons. (1 mark)
- (b) Assume for this paragraph (b) that your firm has another solicitor advocate who is sufficiently competent and has availability to take up the specific discovery hearing. What should you do? Please give reasons. (2 marks)

Question 7

(5 marks)

Assume for the purpose of this question only the following matters. You act for Sue and John. The matter has now proceeded to trial before a High Court judge with 8 days reserved. You were only informed the night before the 1st day of the trial that the solicitors of Madam Lee had, earlier that day, unilaterally inserted into the Court's trial bundles many of the correspondences between the parties marked "without prejudice", which are highly damaging to the case of Sue and John. After advice, Sue and John decided that if the judge has read the without prejudice correspondence, they wish the trial to be adjourned to a different judge. What steps should you as the Solicitor Advocate take?

Question 8
(9 marks)

Assume for the purpose of this question only that you are at the stage of proceedings where the directions for discovery and exchange of witness statements have been complied with, and there will be a case management conference in 2 months. You consider that there are further interlocutory applications that need to be made. You were told a few days ago by the daughter of Madam Lee that Madam Lee has just been diagnosed with terminal cancer and her doctor expects that Madam Lee can only live for another 1-2 years. It is Madam Lee's wish that the trial commence as soon as possible and preferably in summer time of 2019.

- (a) What application can be made on her behalf to expedite the matter so that trial can be completed as soon as practicable? (1 mark)
- (b) What matters will the Court take into account in deciding whether or not to grant such application? (4 marks)
- (c) Assume that unfortunately Madam Lee had passed away before trial, however she has given a witness statement. To what extent can Madam Lee's estate (and the Court) rely on the statement in support of her case. Please give reasons. (4 marks)

Question 9
(3 marks)

Assume for the purpose of this question only that the intended legal action of Madam Lee has now proceeded to trial, and on the day before the 1st day of the trial, Madam Lee revealed an important document which has never been mentioned or disclosed to you before. The document is not in Madam Lee's favour.

What procedural steps should you as the Solicitor Advocate take?

Question 10
(3 marks)

Assume for the purpose of this question only that you act for Sue and John. In the oral closing submissions of Madam Lee, Madam Lee's counsel refers to various news articles showing that Sue and John were suspected of perpetrating a similar fraud on other elderly people. These news articles have been disclosed in discovery, but were not put to Sue or John by Madam Lee's solicitor advocate during cross-examination.

- (a) Was it proper for Madam Lee's solicitor advocate to do this? Please give reasons. (1 mark)
- (b) What should you do? Please give reasons. (2 marks)

Question 11
(3 marks)

Assume for the purpose of this question only that you act for Sue and John. The trial of Madam Lee's action has been completed and judgment has been handed down, and Sue and John have been ordered to transfer the Cambridge Court flat back to Madam Lee. Sue and John's application to a single Justice of Appeal in the Court of Appeal for stay of execution of the judgment pending appeal was dismissed.

- (a) You are now instructed to appeal against the decision of the single Justice of Appeal. Pursuant to which relevant Rule of the High Court should the appeal be made? (1 mark)
- (b) Assuming that you take the view that the Court of Appeal would not find any error of law or principle in the single Justice of Appeal's decision, what are the prospects of success in the appeal against the decision of a single Justice of Appeal? (2 marks)

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