

BARRISTERS QUALIFICATION EXAMINATION 2020

PAPER V: Civil Procedure and Civil Evidence, and Professional Conduct

Part A (Civil Procedure and Civil Evidence)

QUESTION 1

Albert, in the course of selling a yacht to Billy, represented to Billy that the yacht was 3years old. Billy paid HK\$10million for the yacht. Billy sued Albert for misrepresentation alleging that the yacht was in fact 5years old and claimed damages. Albert denied making a misrepresentation.

Parties exchanged witness statements. Billy said at §33 of the witness statement:

“A few days after I complained to Albert’s brother about being misled on the age of the yacht and said I would sue if I did not get my money back, I ran into Albert in a restaurant downtown. He was already there when I walked in. After I was shown to my table, Albert came over uninvited, sat down and said to me “What do you say we just forget about it?” and he slid the key to his sports car across the table and asked me to take it. I found that insulting and asked him to leave and take his key with him.”

Colin, a secretary who had managed shipping finance documents for Billy for the past 15years, gave a witness statement for Billy. At §30, Colin said:

“Throughout the years, I have handled many shipping mortgage documents, vessel sale and lease back agreements and valuation reports for vessels in the course of my work. The market value of a 3year old yacht that has the same characteristics as the yacht Albert sold to Billy should be around HK\$15million.”

Daisy, a sale and purchase broker with 5years of experience who had recently taken a job with Billy, gave a witness statement for Billy. At §21, Daisy said:

“Speaking from my experience in the broking business, having bought and sold many yachts for past clients, I can say that the going price of a 3year old yacht with substantially similar specifications as the yacht Billy had acquired from Albert is around HK\$15million. By the time that yacht reaches 5years old however the price drops to around HK\$6million.”

Question continued on next page

- (a) Advise Albert whether §33 of Billy's witness statement is admissible. (10marks)
- (b) Advise Albert whether the two paragraphs in Colin's and Daisy's witness statements identified above are admissible. (12marks)
- (c) Advise Albert on the following:
- (i) What are the procedures of applying for permission to file expert evidence? (3marks)
 - (ii) What are the legal principles governing such an application? (5marks)
 - (iii) What are the necessary materials that Albert would need to put together to support such an application? (4marks)
- (d) The Court indicated to the parties it is minded to appoint a single joint expert. Advise Albert on what are the considerations for deciding whether a single joint expert should be appointed. (4marks)
- (e) The Court appointed single joint expert gave a report. Albert is not happy with the report and asks whether he may apply to file his own expert evidence. Advise Albert:
- (i) What are the legal principles governing such an application? (5marks)
 - (ii) What are the factors that the Court may take into account in such an application? (3marks)
 - (iii) If, for whatever reason, Albert does not have permission to file his own expert evidence, what other options does he have? (4marks)

Answers must include all relevant jurisdictional and procedural provisions and be supported by authorities.

[50Marks]

QUESTION 2

Avarice, a Macanese casino, extended a US\$10million facility to Bethany, a “high roller” who is a national of the People’s Republic of China (“Mainland”) and domiciled thereat at all material times. The credit facility is governed by Macanese law and contains a clause that Avarice may bring proceedings in any jurisdiction of its own choosing. The credit facility was secured by a charge over shares of a Hong Kong company that holds a flat in Hong Kong. Bethany did not repay the loan before returning to the Mainland where she has remained to this day. Avarice wants to issue proceedings against Bethany in Hong Kong.

Avarice’s records show that Bethany has an office address in Shanghai, which is the last address of Bethany’s known to Avarice. But Avarice cannot be sure whether she still uses that address. Avarice also knows that Bethany has a business associate Chloe who works and resides in Hong Kong. Avarice hears from the grapevine that Bethany regularly contacts Chloe.

- (a) *Advise Avarice on the law and procedure concerning service of Writ on Bethany.* (12marks)
- (b) *Advise Avarice on the available route(s) to effect service on Bethany.* (12marks)

Avarice served proceedings on Bethany. She failed to give notice of intention to defend. Avarice entered final judgment against Bethany. She then applied to set aside the default judgment alleging that service was irregular. In Bethany’s supporting affirmation, she did not deny signing the credit facility or that she had received US\$10million from Avarice. Bethany did not reveal her defence either. She alluded to making an application under RHC Order 12 rule 8 to dispute jurisdiction but did not descend into the details.

- (c) *Advise Avarice, with regard to Bethany’s supporting affirmation as described, on the law governing an application to set aside a default judgment and the costs orders that the Court may make.* (8marks)

The default judgment was set aside. Bethany accepted service in Hong Kong. Before she was due to file her defence, Avarice’s in house lawyer Derrick mentioned to you for the first time that Chloe had in fact given a personal guarantee to secure the credit facility granted to Bethany. The personal guarantee was executed at the same time as the credit facility.

- (d) *Advise Avarice on the law, procedure and merits on joining Chloe.* (4marks)

Question continued on next page

Having joined Chloe as a defendant, Avarice then applied for summary judgment against both Bethany and Chloe. The Master entered summary judgment against Bethany and Chloe on the principal sum. In respect of the issue of interest, Bethany alleged that the interest rate on the credit facility (50% per annum) was left blank when she signed it and someone must have filled in the figure afterwards. The Master held that was a triable issue and gave unconditional leave to defend.

Both Bethany and Chloe appealed against the Master's decision to enter summary judgment against them on the principal sum.

Avarice then sent its solicitors a confirmation letter signed by Bethany and Chloe, at the same time the credit facility and the guarantee were executed, where they both confirmed that the interest rate of the credit facility would be 50% per annum. Derrick explained that the finance department had only dug up the confirmation letter recently. Avarice wishes to appeal against the Master's decision to grant unconditional leave to defend on the interest issue and adduce the confirmation letter as evidence.

- (e) Advise Avarice of the law and procedure on bringing the appeal and admitting the new evidence. Please also advise on the merits of admitting new evidence. (7marks)**

A Judge of the Court of First Instance dismissed both appeals. Bethany and Chloe appealed to the Court of Appeal. Avarice wishes to appeal to the Court of Appeal as well.

- (f) Advise Avarice of the law and procedure. (7marks)**

Answers must include all relevant jurisdictional and procedural provisions and be supported by authorities.

[50Marks]

Part B (Professional Conduct)

QUESTION 3

Mr. Andy Lo (“Andy”) was called to the Hong Kong Bar in 2018.

At 00:30 on 1 January 2019, Andy was told by a mutual friend that Mr. Ben Lam (“Ben”), a veteran banker, was arrested together with 11 other employees at Z Bank that morning for Conspiracy to Defraud. Ben and the other arrestees were brought to and detained at Central District Police Headquarters. Andy was asked by this mutual friend to go and see how he could help Ben and the other arrestees.

Upon arriving at the police station at 01:30, Andy met two other barristers, Ms. Cindy Chan (“Cindy”) and Mr. Dan Lau (“Dan”), who had also been asked by their mutual friend to attend. Given the early hours, the only solicitor present was Ms. Emma Wong (“Emma”), an associate solicitor from Messrs. Y & Partners. In order to meet and advise all the arrestees as soon as possible, Emma gave Andy, Cindy and Dan each copies of a pro forma (name and HKID to be filled in, then signed) stating that each arrestee was to engage Y & Partners (“the pro forma”). Emma, Andy, Cindy and Dan were to each meet with and advise 3 arrestees separately.

Eventually, the police brought Andy to Ben and two other arrestees, Ms. Flora Cheung (“Flora”) and Mr. Gary Poon (“Gary”). At this stage, the arrestees had yet to meet or otherwise contact Emma. Under Andy’s guidance, Ben, Flora and Gary all signed the pro forma. Andy proceeded to advise them of their rights and accompany each of them in recording a cautioned interview. Later in the morning, Andy returned the signed pro forma to Emma.

Soon after, all of the 12 arrested employees from Z Bank were charged with Conspiracy to Defraud.

On 30 June 2019, the case was set down for mention at the District Court. Andy was instructed by Emma’s law firm to appear for Ben, Flora and Gary. The case was heard in open court and Andy appeared in wig and gown. After the hearing, Andy stepped outside the courtroom and took a picture of himself gesturing towards the courtroom (the “Selfie”). Later that day, he posted the Selfie on his social media Facebook page with the caption “*I will make sure no injustice comes to all of you! The world will realize the truth when each of you step into the witness box.*” The post was visible to Andy’s Facebook Friends but not to the public. It attracted around 100 ‘Likes’ from his friends.

After the police had provided the prosecution’s documents and the unused materials to comply with disclosure, Emma told Andy that the lay clients would like to meet him in a conference (“the conference”) together to hear his views on merits and potential defence strategy. Although Andy’s conference room in chambers was big enough to host the conference, Emma suggested that the conference be held in the Admiralty office of Messrs. Y & Partners as Ben’s family (who lived in Canada) also wished to sit in via the firm’s e-conference facilities. Andy agreed with the arrangement.

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At the conference, Andy advised Flora and Gary that their alleged roles in the conspiracy were “insignificant” compared to Ben’s role, and that their acts were unlikely to attract a substantial term of imprisonment. In the circumstances, Andy suggested that Flora and Gary should consider pleading guilty and offer to give assistance to the prosecution by way of being a prosecution witness, with the hope of receiving a more lenient sentence. Andy advised that their testimonies could be useful for the prosecution to secure a conviction for Mr. Harry Tsang, Z Bank’s regional chairman and a key co-defendant in the proceedings.

After the joint conference, Andy told Ben in private that Flora and Gary’s potential testimonies as prosecution witnesses, coincidentally, also had a real chance of absolving Ben of any criminal involvement. In return for their troubles, Andy suggested Ben to offer Flora and Gary some form of pecuniary advantage.

Ben’s case was eventually set down for a 30-day trial. Andy was briefed to prepare for and attend trial (led by Ian Ives SC) for a lump sum of HK\$200,000. A back sheet was emailed to him ahead of trial. On 1 June 2020, the trial commenced. It ran smoothly and parties concluded their closing submissions by day 25 of trial.

On 31 July 2020, Ben was acquitted of all charges. When Andy and Ben stepped outside court, Ben told Andy that he was very appreciative of his efforts through trial and he wished to pay him an extra HK\$50,000 – either personally or through Y & Partners – to reflect the favourable verdict.

Discuss all issues of professional conduct which may arise from these facts in respect of Andy’s conduct, with reference to the Code of Conduct of the Bar Association of Hong Kong. Please also state how you would deal with the matter(s) in place of Andy.

[50Marks]

QUESTION 4

Brian Bong (“**Brian**”) is a barrister who was called to the Hong Kong bar in 2017. He began his practice at a medium size chambers in Central in 2017, doing a mix of personal injury and general criminal work. He did not otherwise have much experience in the other areas of the law.

In February 2020, with the onset of the COVID-19 pandemic and his practice struggling, Brian decided to downsize and cut costs by renting a small unit in an office building in Wan Chai and set up his own chambers as a sole practitioner.

Despite such measures, Brian still found it difficult to make ends meet.

One day in April 2020, whilst having lunch at a restaurant in Wan Chai, Brian bumped into two of his Hong Kong University (“**HKU**”) friends, Nicola Poon (“**Nicola**”) and Annabel Au (“**Annabel**”).

Nicola studied law at HKU at the same time as Brian. She was called to the Hong Kong bar also in 2017. However, after practicing for 2 years at the bar, she decided that her interest was not really in litigation but rather acting as a mediator. As such, Nicola did not renew her barrister practising certificate in 2020 and was looking for a small office to start her full time mediator practice in Hong Kong.

Annabel did not study law but accounting at HKU. She obtained her Certified Public Accountants qualifications in 2018 and had been practising as a sole proprietor accountant since then from an upmarket office in Central.

With a view to further cutting his overheads, Brian suggested to Nicola and Annabel that they could come and share his office premises in Wan Chai. Nicola and Annabel were both attracted to this idea as they could keep rental overheads down by sharing the premises with Brian. Eventually, Nicola and Annabel began sharing the Wan Chai premises with Brian in May 2020 for the purpose of their respective practices.

Apart from cutting costs, Brian also thought that he should do more marketing to promote his practice in order to generate more business. As setting up a chambers website was too costly for him, he published the following message in his Twitter and Weibo accounts which were accessible by the public:

“I am delighted to announce the setting up of my own chambers earlier this year! I am very experienced in all areas of civil and criminal work, especially in the area of personal injury litigation where I’m one of the best, if not the best junior, in the Hong Kong bar. In fact, I have a 90% success rate in all the personal injury cases that I have been involved in. All my clients have nothing but praise for my work. I’m not trying to blow my own trumpets here, but just like last month, the court published a decision after trial in favour of my client Mr Adam Leung, awarding him a substantial amount in compensation against his employer for an injury suffered to his thumb whilst operating a forklift. My client was so pleased with the result, and my ability to ‘amplify’ to the judge the severity of the pain suffered by him, especially when he had told me in a pre-trial conference that he had in fact felt little pain from the injury.”

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Despite such promotion efforts, Brian did not see much improvement in his practice.

One day in early June 2020, Annabel mentioned to Brian that she had just been served a Writ of Summons endorsed with a 30 page Statement of Claim issued by one of her corporate clients, ABC Ltd, through its solicitors. She told him that she had earlier advised this client to undergo a complex restructuring of its business operations (“**Restructuring**”) in order to avoid certain tax liabilities. However, the Inland Revenue Department (“**IRD**”) regarded such a scheme as more in the nature of tax evasion rather than tax avoidance and imposed a penalty on ABC Ltd. Following the IRD’s decision, some of ABC Ltd’s business partners who were contemplating joint ventures with it had decided not to proceed. ABC Ltd therefore brought this contractual and tortious claim against Annabel in the High Court seeking to recover billions of dollars in damages for the lost opportunities with the potential joint venture partners. Annabel was very worried about the lawsuit and sought advice from Brian.

ABC Ltd is in fact a private company majority owned by Brian’s favourite cousin, Christopher Bong (“**Chris**”). Chris is also the managing director of ABC Ltd, responsible for its daily operations and strategic development. He was the one who liaised on behalf of ABC Ltd with Annabel regarding the Restructuring. A few years ago, Chris transferred a small amount of his shares in ABC Ltd (totalling 2% of the total issued capital of the company currently worth only around HK\$1,000) to Brian as a gift to congratulate Brian’s graduation from law school at HKU. Brian did not otherwise have any managerial or directorship role within ABC Ltd and had never participated in the Restructuring.

Although Brian had no experience in handling accountant’s negligence or complex commercial matters and was uneasy about defending a claim brought by ABC Ltd because of his relationship with Chris, he was attracted by the fees which he could potentially earn in representing Annabel in such a big ticket litigation. As such, after reading the 30page Statement of Claim and having listened to Annabel’s instructions on various allegations raised in that pleading, Brian gave some preliminary oral advice on the merits of the defence to Annabel. When Annabel asked Brian how much he would charge for his preliminary advice, he told her that *“You don’t have to pay me now. I will find you a solicitor and I will include the time that I have spent as part of my fee note to be issued to them.”*

Subsequently, Brian introduced Annabel to Susan Sze (“**Susan**”), a practicing solicitor, and Annabel agreed to engage Susan to represent her in the litigation against ABC Ltd. Susan, on Annabel’s instructions, engaged Brian to draft the Defence and then subsequently to attend a directions hearing before a Master in the High Court in early October 2020 (“**Hearing**”). A week before the Hearing, Susan delivered the backsheet for the Hearing to Brian setting out the various details of the case but she had forgotten to state the brief fee in the backsheet (“**Backsheet**”). Nevertheless, Brian was not concerned about this omission as he had documented the agreed brief fee of HK\$20,000 in his earlier e-mail correspondence with Susan. In the end, Brian attended the Hearing with the Backsheet.

Discuss all issues of professional conduct, which arise on the above facts in respect of Brian’s conduct, with reference to the Code of Conduct of the Bar of the HKSAR.

[50Marks]

BARRISTERS QUALIFICATION EXAMINATION 2020

**PAPER V: CIVIL EVIDENCE, CIVIL PROCEDURE,
PROFESSIONAL CONDUCT AND ADVOCACY**

PART C (ADVOCACY)

HCMA5354 of 2019

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MAGISTRACY APPEAL No. 5354 of 2019
(ON APPEAL FROM ESS No. 1234 of 2019)**

HKSAR	Respondent
v	
STEADY CONSTRUCTION COMPANY LTD	Appellant

**INSTRUCTIONS TO COUNSEL ON APPEAL AGAINST
CONVICTION & SENTENCE**

Counsel is hereby instructed to act on behalf of the Appellant in the above appeal.

Counsel is instructed to draft perfected grounds of appeal against both conviction and sentence and to attend the hearing in the Court of First Instance at 1700 hours on the 6th day of November 2020.

Counsel is directed to the following documents which are attached:

- (1) Statement of Findings setting out the Reasons for Verdict of E. Wong Permanent Magistrate dated 3 November 2019;
- (2) Reasons for Sentence delivered by E. Wong Permanent Magistrate 3 November 2019.

Counsel should note that oral submissions in support of the application are to last no more than 20 minutes.

Please provide a copy of the perfected grounds of appeal, skeleton argument, and authorities if any, to instructing solicitor by **10.00am Hong Kong Time (02:00am GMT) on Friday 6 November 2020**.

Dated this 30 October 2020.

Chin, Cheung and Chan

Solicitors for the Appellant

Reasons for Verdict

1. At trial the defendant corporation Steady Construction Company Limited (“the defendant”) faced one summons, ESS 1234/2019 alleging that on 1 November 2018, on the construction site at the Sky High Residential Tower, in Room 5354, 88/F, 9999 Queen’s Road Central, Hong Kong it, being the contractor responsible for a construction site, failed to take adequate measures to prevent a workman falling from a height of two metres or more. This was contrary to Regulation 38B of the Construction Sites (Safety) Regulations Cap. 59I, which reads, where relevant:

(1) ...the contractor responsible for any construction site shall take adequate steps to prevent any person on the site from falling from a height of 2 metres or more.

(2) For the purpose of paragraphs (1)... "adequate steps" shall include the provision, use and maintenance of one or more of the following-

- (a) working platforms;*
- (b) guard-rails, barriers, toe-boards and fences;*
- (c) coverings for openings;*
- (d) gangways and runs.*

The Prosecution Case

2. The prosecution evidence of the worker PW 1 Chan Faat (53) was that had been tasked at 1630 hours on the day in question with installing a lightbulb into a fitting on the roof of room 5354 at the location. He was provided with a tubular steel working platform fitted with guard rails, barriers, toe-boards and safety fencing, as was shown in the photograph Exhibit P1, the platform floor of which reached a height of 2.5 metres above the floor. The light fitting was at a height of 4.5metres. This was the 25th time that day that he had performed the same procedure using this particular equipment.
3. Chan (PW 1) gave evidence that when he was on the platform at a height of about 2.5 metres and, as he was inserting the light bulb, he sneezed and lost his footing. He had then fallen against the safety fence on the side of the platform, bounced off it and then sat down heavily on the platform, with no injury sustained. He had then stood back up and fitted the lightbulb. It was later that day when he mentioned to his supervisor that he had fallen on the platform, and had nearly gone through the fencing, that Labour Department became involved and the charge was laid against the defendant company.
4. PW 2 Ms. Susannah Wong an Occupational Safety Officer of the Labour Department gave evidence in an expert capacity. There was no dispute raised as to her expertise and I found that in the light of her qualifications and vast experience that she was qualified to testify before this court as an expert on occupational safety matters.

5. She testified that although the use of a working platform as described by PW 1 was standard industry practice, in her considered opinion the use of this type of platform was not sufficient to comply with the law. She said that she thought it would have been a 'lot better' to have used the tubular steel safety platform, with guard rails, barriers, toe boards and fences, together with additional safety nets and with a safety harness and lanyard looped through a fixed and anchored safety line. She said that this would have provided 'total safety' in the event that the worker had slipped through the safety fences on the platform. She was of the opinion that this was why the regulation used the word 'includes' and why she considered that the mere provision of the platform and its ancillaries was a non-compliance with the law.

The Defence Case

6. This was simply that the working platform was perfectly adequate for the job undertaken. DW 1 Ho Kan Lik the site foreman testified that the platform was brand new, was in perfect condition and had been safely used by PW 1 on numerous occasions that day for the purpose of screwing in light bulbs. The defence expert DW 2 Dr. Ho Chung Ming of Safe Site Consultants was of the opinion that the use of such a working platform for this task was standard industry practice. He did not, however, go so far as to say that its use that day meant that the defendant had discharged its responsibilities under the law and was therefore in compliance with the regulation.

Consideration

7. I remind myself that the prosecution brings the charge and that they have the burden of satisfying me that the defendant is guilty to the requisite standard. This means that if there is a reasonable possibility that the defendant is not guilty then I must acquit. Where, as here, a defendant testifies I will look at all the evidence and if it appears that what the defence says is true or may be true then I will not find that issue against the defendant.
8. I consider that the steps the defendant company took that day to prevent the possibility of a fall from a height of two metres or more were adequate. The provision of the working platform and its ancillaries was sufficient to stop the worker falling to the ground, and he did not fall. That is not the end of the matter, however, as the prosecution case is that adequate measures to prevent a potential fall from the platform had not been taken. It had been mere good fortune that PW 1 had not gone through the safety fencing. Had he done so, then the additional measures advocated by PW 2 would have prevented that fall from height. My finding that the measures were adequate is, of course, only my commonsense view of the situation in this case. Commonsense, however is not enough where, as here, we have clear evidence from a qualified expert to the contrary. PW 2 was adamant that the use of the platform was not sufficient compliance with the law, and that the defendant therefore had breached the regulation. She opined that the failure to supply the additional safety measures was in contravention of the regulation.

9. It is trite that, in cases in which an expert witness testifies on an issue, a judge is not simply entitled to determine that he is not assisted on that issue by the expert evidence and that he can then go on to determine the matters himself by the application of commonsense. The expert evidence from the prosecution is on the record and it must be accorded its due place. PW 2 explained her view of the meaning of the regulation and concluded that it had been breached by the defendant. The defence expert did not undermine this evidence from PW 2 in any way by any testimony to the effect that the law had actually been complied with by the defendant. This is a telling factor.

Conclusion

10. I accordingly find that the provision of the working platform as described was insufficient to comply with the defendant's duties under the regulation and therefore that the defendant did not take adequate steps. I find the defendant guilty of the charge as laid.

...

Reasons for Sentence

1. Unsurprisingly no mitigation was offered by the defence. The purpose of these safety regulations is the protection of society. They are drafted so as to ensure that principal contractors such as the defendant supervise and control work on construction sites so as to ensure that public safety is ensured by ensuring that the regulations are observed. These are common offences, and to protect the public, deterrent sentences are required. The Legislature, in its wisdom, has made clear how seriously this type of offence is to be viewed by the courts who are tasked with the protection of workers. Regulation 68 reads:

(1) ...

(2) A person guilty of an offence under paragraph (1) shall-

(a) ...

(g) in respect of a contravention of regulation ...38B(1) ... be liable ... to a fine of \$200000.

2. The defendant has a total of nine previous convictions for similar offences.
3. It is time a message was sent to contractors that they must do more to protect their vulnerable workers.
4. The defendant is fined HK\$ 200,000. I allow three weeks to pay.

E. Wong

Dated this 3rd day of November 2019