

**2021 OVERSEAS LAWYERS  
QUALIFICATION EXAMINATION**

**HEAD III: COMMERCIAL  
AND COMPANY LAW**

Thursday, 18 November 2021





# 2021 Overseas Lawyers Qualification Examination

## Head III: Commercial and Company Law

### Question 1 (25 marks)

Superb Music Limited ("Company"), a Hong Kong company, is a leading piano manufacturer in Asia. The Company has three directors who are also its only shareholders, Amy Chua ("Amy"), Mary Bong ("Mary") and Isaac Newman ("Isaac"). They provided shareholders' loans to the Company (Amy in the amount of HK\$10,000,000, Mary in the amount of HK\$5,000,000 and Isaac in the amount of HK\$7,000,000).

On 16 March 2020, Innovative Bank provided a HK\$50 million 5-year term loan facility to the Company secured by a charge over the Company's accounts receivables. The debenture contains a provision that prohibits the assignment of the Company's accounts receivables without the prior written consent of Innovative Bank. Proceeds of the collected accounts receivables must be paid into a separate designated bank account at Innovative Bank.

On 29 April 2020, the Company granted an "all-monies" floating charge over all of its assets, book debts and undertakings in favour of Amy to secure all personal loans provided by Amy to the Company. On the same day, the Company transferred a factory building in Tsuen Wan ("Factory") to Ronald Dunn ("Ronald"), Amy's husband, for HK\$7,000,000, which was HK\$31,000,000 lower than the market value of the Factory (independently valued in April 2020). Amy explained that Ronald had "supported the Company in many ways without pay for many years" and that "the sale was a nice gesture".

*(See over the page for a continuation of Question 1)*

Ocean Bank has for many years provided an overdraft (“OD”) facility to the Company with a pre-approved standby credit limit of up to HK\$40,000,000. Ocean Bank has agreed to provide a further OD facility to the Company (with pre-approved standby credit limit of up to HK\$30,000,000) if some form of security is given. On 4 March 2020, the Company granted an “all-monies” floating charge over all of its assets, book debts and undertakings in favour of Ocean Bank (“Ocean Bank Debenture”) to secure the previously unsecured loan of HK\$40,000,000 and the new HK\$30,000,000 OD facility that was provided to the Company at the same time as the execution of the Ocean Bank Debenture. The table below shows movements of funds in the Company’s OD facility account with Ocean Bank from 4 March 2020 onwards:

Date	Deposit (HK\$)	Withdrawal (HK\$)	Balance (HK\$)
4 March 2020			40,000,000 OD
12 March 2020	3,000,000		37,000,000 OD
4 April 2020		10,000,000	47,000,000 OD
27 April 2020		20,000,000	67,000,000 OD
9 June 2020	2,000,000		65,000,000 OD

Since early 2020, a competitor of the Company, Tony’s Piano, introduced a new product (“Piano Max”) that became extremely popular in Asia. The Company’s market shrank rapidly as many parents bought the Piano Max for their children. On 18 August 2020, Ocean Bank appointed a receiver in accordance with the terms of its debenture (an event that crystallized the Ocean Bank Debenture).

*(See the next page for a continuation of Question 1)*

On 27 August 2020, a trade creditor petitioned the court to wind up the Company.

The Company's liquidator, Felix Chau, was informed of the following:

- (i) The Company has the following assets: accounts receivables (worth HK\$10,000,000), inventory (worth HK\$25,000,000), factory machinery (worth HK\$5,000,000) and cash at bank (worth HK\$3,000,000).
- (ii) The Company has 5 unsecured trade creditors, who are owed HK\$20,000,000 in total.
- (iii) The Company owes 12 employees a total of HK\$8,000,000 for wages in arrears.
- (iv) Evidence shows that the Company was insolvent and unable to pay its debts during April 2020.

The Company made no early repayment to Innovative Bank in connection with the term loan facility.

**Question:**

You act for the Company's liquidator, Felix Chau, who has drawn your attention to all of the above points. **Prepare a letter of advice to the liquidator, addressing the rights and priorities of all the creditors of the Company.**

For the purpose of this question, assume that there is no negative pledge clause in any of the debentures or charges.

**(25 marks)**

**[25 marks in total]**

## **Question 2 (25 marks)**

Fad & Trend Ltd. (the “Company”) is a private company incorporated in Hong Kong. Its main business is trading of high-end fashion imported from Italy.

The Company is owned by three shareholders, namely Peter Wong (“Peter”), David Chan (“David”) and Mary Ng (“Mary”). David is the husband of Mary. The share capital of the Company is HK\$1 million, comprising 100,000 shares. All shares were issued to the shareholders and were fully paid up. Peter is holding 70% of the issued shares and each of David and Mary is holding 15% of the issued shares. The three shareholders are also the only directors of the Company. The articles of association of the Company does not fix the maximum number of directors that the Company may appoint. There is no shareholders’ agreement between the shareholders.

Since April 2020, the business of the Company deteriorated sharply. Peter is not happy with the way that the Company is managed. Although he is the largest shareholder, he is always outvoted by David and Mary at board meetings. Peter intends to appoint his two sons to be additional directors of the Company, but he envisages that this idea will be opposed by David and Mary.

For the purpose of this Question, you should assume that the Company adopts the Model Articles for Private Companies Limited by Shares set out in Schedule 2 to the Companies (Model Articles) Notice (Cap. 622H) as its articles of association.

*(See the next page for a continuation of Question 2)*

## Questions:

- (a) Explain to Peter whether there is any mechanism by which the Company can appoint the additional directors. In light of the facts set out above, can Peter rely on such mechanisms? If so, are there any steps that he needs to take in order to give effect to such mechanisms?

(12 marks)

- (b) Peter (in the capacity as a shareholder) wishes to convene a general meeting of the Company to appoint the additional directors. Is there any mechanism to empower Peter to do so?

(8 marks)

- (c) Peter eventually proceeded to convene the general meeting himself (in the capacity of a shareholder). He sent a notice of the meeting to all shareholders of the Company and the meeting was supposed to take place on 23 August 2021. To his disappointment, David and Mary did not attend the general meeting as scheduled. Peter responded by adjourning the general meeting to 30 September 2021 at the same time and in the same place. David and Mary did not attend the adjourned general meeting either. The adjourned meeting was only attended by Peter and he passed an ordinary resolution purportedly in accordance with the articles of the Company to appoint the two additional directors.

**Can David and Mary challenge the validity of the ordinary resolution?**

(5 marks)

[25 marks in total]

### **Question 3 (25 marks)**

Laurel Properties Limited (“Listco”) is a company listed on the main board of The Stock Exchange of Hong Kong Limited. Mega Grand Limited (“MGL”) is a substantial shareholder of Listco. Each of ABC Property Management Limited (“ABC”) and Brick House Limited (“Target”) is a wholly-owned subsidiary of MGL.

Target owns a building in Hong Kong. ABC is a property management company. MGL is selling 100% of the shares in Target to Listco (the “Acquisition”). ABC is currently providing property management services (the “Services”) to Target and will continue to provide the Services from completion of the Acquisition. All consideration in respect of the Acquisition and provision of the Services will be settled in cash.

The applicable percentage ratio in respect of the Acquisition under the Listing Rules is above 25%, but below 100%.

#### **Questions:**

- (a) Identify the numerator and denominator to be used to calculate the size tests under the Listing Rules.**

**(10 marks)**

- (b) Identify classifications of the transactions relating to the Acquisition and the provision of the Services under the Listing Rules and explain the applicable compliance requirements for those transactions under the Listing Rules.**

**(15 marks)**

**[25 marks in total]**



## **Question 4 (25 marks)**

### **Part A**

John is the chief financial controller of Gold Ltd. (the “Company”), a company listed on the Growth Enterprise Market of The Stock Exchange of Hong Kong Limited. The Company’s principal business is operating restaurants under a franchise granted by a global well-known catering company. The franchise is vital to the operations of the business for the Company. The franchise is about to expire in December 2021 and negotiations for the renewal of franchise between the management of the Company and the franchisor have been ongoing. John was also involved in the negotiation process. After rounds of negotiations, the management of the Company confirmed that they could not renew the franchise with the franchisor. The failure to renew the franchise would have a material adverse impact to the operations of the business. Considering this, John sold all shares in the Company before such information is announced to the public and he made a small gain from the sale. He also disclosed such confidential information to his close friend, Maggie. Maggie also sold the shares in the Company immediately after John disclosed such confidential information to her. When the announcement about failure to renew the franchise is published by the Company, the share price of the Company dropped by 20%.

### **Question:**

- (a) **Are John and Maggie liable under Part XIII of the Securities and Futures Ordinance, Cap. 571? Give reasons.**

**(13 marks)**

*(See over the page for a continuation of Question 4)*

## **Part B**

Alicia and Wayne are colleagues in the same asset management company. Seeing the potential in asset management industry, they intend to set up their own asset management company (the “Company”) in Hong Kong to carry out the business of asset management. Both of them will be the shareholders of the Company holding 50:50 equity. The day-to-day management and operations of the Company will be jointly managed by both of them. The Company intends to serve professional clients in and outside Hong Kong.

Alicia and Wayne need you to advise them on the legislation, procedure and licensing requirements involved in setting up an asset management company.

### **Question:**

- (b) Prepare a memorandum of advice for Alicia and Wayne to advise on the legislation requirement, procedures and licensing requirements involved.**

**(12 marks)**

**[25 marks in total]**

## **Question 5 (25 marks)**

### **Part A**

You attend a meeting together with your supervising partner. You meet with Sally who is a new client. Sally briefs you on an acquisition which is currently under discussion. Sally has had preliminary discussions and is looking to instruct your firm to negotiate and complete the acquisition.

The business Sally intends to acquire is a small boutique retail grocery store. This is currently run by David. David is the current owner of Quality French Products Limited (“QFP”). QFP has two lines of business. The first line of business is the importation of fine French foods for supply to supermarkets and other grocery stores in Hong Kong (“Wholesale Business”). The second line of business is running a boutique grocery store in Sai Kung, New Territories, Hong Kong (“Retail Business”).

Sally has read a preliminary due diligence report prepared by David’s accountants. QFP has recently come under some financial pressure and David wants the Retail Business to be sold to raise some further funds. This will also help with some concerns that the Retail Business is in competition with customers of the Wholesale Business. The due diligence report reveals that there is an ongoing dispute between QFP and the Inland Revenue Department of the Government of the Hong Kong Special Administrative Region (“Inland Revenue”). The Inland Revenue is claiming that QFP has under paid tax of approximately HK\$2,000,000. The due diligence report also contains details of another dispute which involves allegations raised by a customer of the Retail Business that the product she bought resulted in her getting food poisoning and being hospitalised. Sally has said that the transaction will be subject to her doing

*(See over the page for a continuation of Question 5)*

her own financial, commercial and legal due diligence. However, in principle, she has agreed that she will buy all of the assets and known liabilities in connection with the Retail Business, but she is not prepared to take over any liabilities in connection with the disputes referred to above or any other unknown liabilities.

David has said that QFP has incorporated a new wholly-owned subsidiary called French Retail Mart Limited (“FRM”). QFP will transfer all assets and trading liabilities in connection with the Retail Business to FRM (except for the liabilities in connection with the disputes and unknown liabilities). QFP will then sell the entire issued share capital of FRM to Sally. It is anticipated that completion of the share sale will occur in approximately three months, by which time QFP will have completed the transfer of the Retail Business to FRM.

**Question:**

- (a) Following the meeting, your supervising partner asks you to prepare a memorandum outlining contractual provisions and statutory procedures to be recommended to reduce the risk of Sally and FRM taking on liabilities in connection with the disputes and other unknown liabilities. **Prepare the memorandum, assuming that the transaction will proceed based on the structure outlined above.**

**(14 marks)**

**Part B**

Three months later, the sale of the entire issued shares in FRM from QFP to Sally has just completed.

*(See the next page for a continuation of Question 5)*

**Question:**

- (b) Prepare a list of post-completion matters which need to be dealt with following completion of the share sale.**

**(6 marks)**

**Part C**

It is now two months after completion.

Patrick has been an employee at the Retail Business for two years. His employment agreement was transferred from QFP to FRM before completion of the share sale. The sale and purchase agreement contained a provision whereby Sally guaranteed that Patrick would receive his discretionary bonus which is now payable. Sally has some concerns about Patrick's working practices and intends to terminate his employment. Sally has discussed these concerns with David confidentially and David agrees to vary the terms of the sale and purchase agreement to delete this obligation.

Bernie has been supplying French wines to the Retail Business for at least five years before completion of the share sale. The sale and purchase agreement contained a warranty which states that Bernie would not increase his prices in the 12-month period after completion. Bernie has issued a notice to FRM with a revised price list showing an increase of 20% of all prices.

*(See over the page for a continuation of Question 5)*

**Questions:**

**(c) Can Patrick enforce the sale and purchase agreement against Sally?**

**Give reasons.**

**(3 marks)**

**(d) Can Sally enforce the sale and purchase agreement against Bernie?**

**Does Sally have any other remedy? Give reasons.**

**(2 marks)**

**[25 marks in total]**

**END OF TEST PAPER**