

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2022 SUPPLEMENTARY INFORMATION PACKAGE

HEAD I: CONVEYANCING

Contents

- 1. Standards, Syllabus and Reading List (To be provided)**
- 2. Examiners' Comments on the 2019, 2020 and 2021 Examinations**
- 3. Past Examination Papers (2019 to 2021)**

Important: The test paper for Head I Conveyancing:

- 1. is open book. Candidates may bring in and refer to any book, document or other written material**
- 2. has a duration of 3½ hours**
- 3. has no specific reading time allocated**
- 4. contains FIVE questions. Candidates should answer any FOUR questions only.**

- 1. Standards, Syllabus and Reading List
(To be provided)**

2. Examiners' Comments on the 2019, 2020 and 2021 Examinations

Examiners' Comments on the 2019 Examination

Head I: Conveyancing

Question 1

- 1.1 This question is modelled on *Kingdom Miles Limited v Ever Crystal Limited [2018] HKCA 967*.

Although the 2 letters could come within the meaning of a Government Lease, the Vendor can rely on ss 13(3) and 13(4) of the Conveyancing and Property Ordinance ("CPO") for various presumptions. Furthermore, as *De Monsa Investment v Whole Win Management Fund (2013) 16 HKCFAR 419* demonstrates, it is not necessary to have every missing document to be accounted for by secondary evidence. Ultimately, it is a question of whether there is any real risk that the Purchaser is not receiving a good title. On the facts of the question, the 2 letters do not seem to affect title because i) the approved terms have already been set out in a previous letter included in the Conditions of Grant; ii) the 2 letters are not even included in a copy of the Conditions of Grant; and iii) it is unimaginable that the Government would assert that there were other terms in the 2 letters of which the Lands Department appears to have no record. The risk of a successful assertion of unknown encumbrances and obligations under the Conditions of Grant is not real, if any.

- 1.2 The agreement for sale is subject to Ad Valorem Stamp Duty under Part 1 of Scale 1 of Head 1(1A) of the Stamp Duty Ordinance ("SDO") unless the Purchaser is a Hong Kong Permanent resident who does not beneficially own another residential property in Hong Kong and is acquiring the Property for his own benefit. The rate under Scale 1 is 15%. If Scale 2 applies, then, with a certificate of value and assuming that the market price is also the purchase price, the applicable rate is 3.75%. Liability for Special Stamp Duty also arises because the Vendor has owned the Property for more than 12 but less than 36 months. The applicable rate in this question is 10%. Liability for Buyer's Stamp Duty should also be considered. Under the Stamp Duty Ordinance the Vendor and Purchaser are jointly and severally liable for Ad Valorem Duty and Special Stamp Duty but the Purchaser alone is liable for Buyer's Stamp Duty. As the provisional and formal agreements are in conformity and not more than 14 days apart, the formal agreement should therefore be stamped within 30 days after its date. The assignment attracts nominal duty of HK\$100.
- 1.3 Form 2 of the Third Schedule to the CPO provides that time shall in every respect be of the essence of the agreement. Both the 'de minimus' rule and the defence of 'accident' do not apply in Hong Kong and this means that any delay in the payment and completion by the Purchaser can be treated by the Vendor as a repudiation of the agreement and the deposit can be forfeited.

Question 2

- 2.1 This question is modelled on *Gain Hero Finance Limited v Winland Finance Limited [2019] HKCFI 771*.

From the wording of the Instrument, the subject matter of the Instrument was money representing proceeds of sale to be received by Debby and not Debby's interest in the Property despite the fact that the Instrument was registered.

Although there was a delivery of the title documents, such delivery was intended only to provide security for the assignment of the proceeds of sale. Such delivery did not support the existence of an agreement to create an equitable charge.

On the other hand, the Charging Order Nisi and Charging Order Absolute registered by Yasahi are charges on the property itself by virtue of ss 20A and 20B of the High Court Ordinance. Hence, the Charging Orders have priority over the unregistrable interest of Winterland over the sale proceeds of the Property under the Instrument.

- 2.2 This variation of the question is modelled on *Si You Choi Kam v Wealth Credit Limited [2018] HKCA250*.

Johnny may argue that there is a resulting trust in his favour because of his payment of all monies relating to the Property. If he succeeds, Debby will have no beneficial interest in the Property and the Charging Orders on Debby will not affect the Property but are only means to enforce payment of a judgment debt.

When Johnny seeks a declaration of resulting trust in his favour from the Court, he should address the following issues: a) principle of presumed equality; b) the parties' shared intention, actual, inferred or implied; and c) counter-presumption of advancement.

In terms of priority, the resulting trust is good against the whole world except a bona fide purchaser of the legal estate for value without notice. Yasahi, holder of the Charging Orders is not such a purchaser because the Charging Orders have effect as equitable charges. Furthermore, no fresh consideration was given when the Charging Orders were obtained.

Question 3

- 3.1 Initially, the interest was equitable under the relevant Government Conditions of Sale. Under s 14(1) of the CPO, there is deemed grant of legal interest upon compliance with the Conditions. As the Government Grant was dated after 1 January 1970, a certificate of compliance registered in the Land Registry is sufficient to convert to a legal estate. However, certificate of compliance is not the only way of proving compliance and other acceptable evidence includes a note of compliance endorsed by the Government (s 14(3)(b) of CPO) and the entry of a note of compliance on the register itself (s 14(3)(a) of CPO).
- 3.2 The Vendor has an obligation to prove the precise number of undivided shares that he is selling (*Yip Ngan Yee and Others v Chan Tsz Yam and Others (CACV 442/2000)*). A vendor can rely on the first assignment to prove how the undivided shares are allocated and other acceptable evidence includes a Memorandum of Shares, a control card and a sub-division register in the Land Registry (*Goldjet International Limited v Ling Ki Wai and Others [1997] HKCFE 551*).
- 3.3 An occupation permit is required to prove that the building has been properly built and can be occupied and the Purchaser is entitled to its production according to *Lui Kwok Wai v Chan Yiu Hong (3246/94)*. For buildings constructed before the present provisions of the Buildings Ordinance on 1 June 1956, when there was no occupation permit, the issue to consider is whether the lack of occupation permit will give rise to any real risk of enforcement action by the Building Authority.
- 3.4 By meeting Nancy as an occupant at the Flat, the Purchaser has acquired constructive notice of any interest that she may have in the Flat. (*Wong Chim Ying v Cheng Kam Wing [1991] HKCA 299*). If Nancy can prove any financial contribution towards the purchase price, the presumption of a resulting trust will arise in her favour.

The counter-presumption of advancement also applies to a woman and her children. However, such presumption is a rather weak concept and can be rebutted on comparatively slight evidence (*Suen Shu Tai v Tam Fung Tai [2014] 4 HKLRD 436, CA*) and *Lee Tso Fong v Kwok Wai Sun and Another [2008] HKCFI 563*).

On the other hand, if Nancy has an equitable interest in the Property and is aware of the sale of the Property to the Purchaser, she has a duty to speak out, otherwise, she may be estopped from asserting her interest against the Purchaser (*Mo Ying v Brilllex Development Limited FAMV 48/2015*).

Question 4

4.1 Buildings Ordinance

S 14 of the Buildings Ordinance (“BO”) provides that all building works require the approval of plans by the Building Authority and its consent for the commencement of the building works. Building works is defined in s 2 of the BO. No retrospective consent can be given. A breach of s 14 will mean that the Building Authority may take enforcement action unless the works qualify as minor works under s 14AA of the BO or exempted works under s 41(3) of the BO, as certified to be such by an authorized person (*Chung Kwok Yiu Ringo v Leung Chi Shing and Another [1996] HKCFI 264*).

The Deed of Mutual Covenant (“DMC”) and the Building Management Ordinance (“BMO”)

The DMC will have to be looked at to see whether the partition wall is defined as part of the common areas or parts. Furthermore, s 2 of and paragraph 1 of the First Schedule to the BMO provides that “common parts” include load bearing walls and other structural supports. If the partition wall is a common area/part, then by reason of s 34I of the BMO, the approval by a resolution of the owners’/management committee is required before works can be carried out to it (*Central Management Limited v Light Field Investment Limited and Another [2011] 2 HKLD 34*).

If the partition wall is not load bearing, then the first assignment of both Flats must be checked to ascertain whether the developer has any reservation of its ownership. If not, then the partition wall will be regarded as co-owned by the owner of the 2 Flats (*The Incorporated Owners of Westlands Garden v Oey Chiou Ling and Another [2011] 2 HKLRD 421*).

Legal Charge

As Part C of the Second Schedule to the CPO is incorporated, if the works were not carried out in compliance with the legal requirements, there will be a breach of clauses (a), (b), (c)(ii) and (iv) of that Part C. Tiger Bank's consent is required pursuant to clause (f) of the said Part C and if there is any breach, Tiger Bank will be entitled to go into possession of the Property and/or sell it.

- 4.2 The Vendor must give full and frank disclosure and must not mislead the Purchaser and must disclose the defects of which he has actual and constructive notice. The limitation clause must be widely drafted to cover the defect and must provide for the Purchaser to (i) be aware of the legal consequence; ii) accept the possible defect in title; and iii) waive his right to raise any requisition or reject title because of it (*Jumbo King Limited v Faithful Property Limited [1999] 4 HKC 707*).

Question 5

- 5.1 S 5(2) of the Powers of Attorney Ordinance (“PAO”) provides that where a power of attorney has been revoked and a person, without knowledge of the revocation, deals with the donee of the power, the transaction between them shall, in favour of that person, be as valid as if the power had then been in existence.

The conclusive presumption of non-revocation under s 5(4)(a) of the PAO is not available to the Purchaser because the Power of Attorney was dated more than 1 year from the date of the Assignment from Mark Lee to the Vendor Vincent Chan.

The conclusive presumption under s 5(4)(b) of the PAO is also not available because the Statutory Declaration was made by the donee as opposed to the person dealing with the donee (*WOC Finance Co. Limited v Wong On Cheong Investment Co. Limited (2000) HCMP No. 7316/99*).

The Purchaser should therefore require the Vendor Vincent Chan to make a statutory declaration for non-revocation before or within 3 months from the date of completion of the present sale and purchase.

Alternatively, Mark Lee, as donor, can confirm the non-revocation of the Power of Attorney.

- 5.2 The Vendor can rely on s 13(4A) of the CPO to refuse production as the 2002 Assignment was made more than 15 years before the Agreement.

The Vendor can also rely on the ground held in *Lee Kim Ha v Yip Moo Chiu [1990] HKCLR 29* that a power of attorney under which a purchaser has executed an assignment does not need to be produced since the assignment passes title even without the signature of the purchaser.

- 5.3 According to Condition 7(1) of Part A of the Second Schedule to the CPO, requisition must be raised as soon as practicable after delivery of the title deeds and in any event not later than 14 days before completion. The Additional Requisition therefore appears to be raised out of time.

This time limit does not apply if the Purchaser was unaware of the title problem from the title deeds and the defect goes to the root of title.

Although extensive unauthorized structure has been held to go to the root of title, partitioning of a floor and an unauthorized swimming pool have been held in 2 separate cases as not going to the root of title. In the present case, given the small size of the Glasshouse, it does not appear that the defect goes to the root of title.

Furthermore, as the Purchaser had inspected the Property and that the Additional Requisition was based on comparing the plan of the Assignment which was delivered to the Purchaser nearly 2 months before completion, the Purchaser should have been aware of the defect.

- 5.4 Good title can be given if a vendor is able to offer substantial performance but there may be some abatement of the purchase price (*Goldful Way Development Limited v Wellstable Development Limited [1999] 1 HKLRD 563*).

Given the small size of the Glasshouse which covers about 2% of the total area of the Property, the Vendor should be able to offer substantial performance unless the Purchaser found the Property especially attractive because of the Glasshouse (though this would only be convincing if this had been made known prior to the purchase).

Examiners' Comments on the 2020 Examination

Head I: Conveyancing

Question 1

- 1.1 This question requires candidates to consider whether there is a concluded oral agreement between Vince as vendor and Philip as purchaser (*World Food Fair v Hong Kong Island Development Ltd* [2007] 1 HKLRD 498). The parties have agreed all essential terms. Assuming that there is a concluded oral agreement, candidates must consider whether there is a sufficient written memorandum of the agreement within section 3 of the Conveyancing and Property Ordinance, Cap. 219 (the 'CPO') signed by or on behalf of the vendor. The vendor is the party refusing to complete and against whom the agreement is to be enforced.

The vendor has not signed anything, but the receipt for the deposit has been signed by the vendor's solicitor. The receipt contains details of the property and the parties and the price is ascertainable from the reference to the deposit. The receipt does not refer to the agreed completion date, the stakeholder provision or that the property is sold with vacant possession. The latter is implied and the omission is immaterial. The purchaser could waive the stakeholder provision. In addition, the letter from the purchaser's solicitor may be joined with the receipt because the receipt refers to the transaction ('agreed to be sold') (*Timmins v Moreland Street Property Company Ltd* [1958] Ch 110). Oral evidence may therefore be introduced to identify the transaction and the letter which contains the completion date and a reference to the stakeholder provision. Candidates should consider whether the vendor's solicitor is his lawful agent (*Fauzi Elias v George Sahely & Co (Barbados) Ltd* [1983] 1 AC 646).

Candidates might also consider whether the oral agreement is enforceable in equity by virtue of the doctrine of part performance. However, the facts do not indicate that there is an act by the purchaser that points to the existence of a contract. The answer should therefore focus on the application of section 3 CPO.

- 1.2 The answer depends on the construction of Clause 2(ii) of the Provisional Agreement (the 'PA') (*Man Sun Finance International Corporation Ltd v Lee Ming Ching Stephen* [1993] 1 HKC 113) the wording of which makes payment independent of signing the formal agreement (*See To Keung v Sunnyway Ltd* [2009] 5 HKLRD 300). Time for payment is of the essence (*Sun Lee Kyong Sil v Jia Weili* [2010] 2 HKLRD 30).
- 1.3 The PA has not been replaced by a formal agreement. Clause 8 of the PA deals with failure of the vendor to complete ('If the Vendor fails to complete the sale ...'). This clause excludes the purchaser's right to damages and specific performance (*Wong Lai Fan v Lee Ha* [1992] 1 HKLRD 125) provided the vendor 'immediately' (*Yuen Pok International Enterprise Ltd v Valle Agnes Mallari* [2012] 3 HKC 314, CA) returns 'deposits paid' and also pays compensation. Candidates should consider whether the vendor can rely on Clause 8. In this case the vendor has not paid the purchaser any compensation and the completion

date has passed (*Man Sun Finance International Corporation Ltd v Lee Ming Ching Stephen*).

Candidates should also consider whether the agreed compensation amounts to liquidated damages or a penalty and what remedies are available to the purchaser if the vendor cannot rely on Clause 8 of the PA (*Chan Yuen Ka Crystal v Chu Cheong Kit Raymond* [2009] HKEC 1705).

Number of candidates who attempted this question – 127. Passing rate 77%.

Question 2

- 2.1 The vendor, Lee Holdings Ltd, has agreed to give vacant possession on completion. It is therefore implied that Pansy Poon as purchaser may inspect once prior to completion (*Twinkle Step Investment Ltd v Smart International Industrial Ltd* [1999] 3 HKLRD 521). The vendor has breached the contract by failing to allow the purchaser to inspect. The vendor might also have breached the contract by failing to give vacant possession on time. Time is expressly of the essence and the de minimis rule does not apply (*Union Eagle Ltd v Golden Achievement Ltd* [1997] 1 HKLRD 366). However, the de minimis rule applies to the giving of vacant possession and the question is whether the packing cases amount to substantial prevention or interference with enjoyment of the right of possession (*Grandwide Ltd v Bonaventure Textiles Ltd* [1990] 2 HKC 154, CA).

Since the vendor is in breach, the vendor cannot terminate the agreement. The purchaser can accept the breach and treat herself as discharged or alternatively waive the breach and apply for specific performance. In order to obtain specific performance, the agreement must not have been terminated – for example, by the purchaser starting proceedings to recover her deposit and damages, as advised by her solicitor. Specific performance is not excluded by Form 2 of the Third Schedule to the CPO. The purchaser must show that she is ready, willing and able to complete by showing that she has in the past performed all her obligations and that she is ready to pay the balance of purchase price (*Lau Suk Ching Peggy v Ma Hing Lam* [2010] 4 HKC 215, CFA). The award is discretionary. Pansy must come with clean hands and without delay. The court will decline to award specific performance if the vendor can show substantial hardship.

- 2.2 The purchaser with priority will obtain specific performance. At common law where the equities are equal the first in time prevails. Pansy Poon is first in time and she enjoys priority over Betty Bau. Arguably, however, the equities would not be equal if Pansy had not protected her interest by registering her agreement at the Land Registry.

If priority is determined under the Land Registration Ordinance, Cap 128, (the ‘LRO’) priority would be determined according to the dates of registration under s 3(1) of the LRO. In *Chu Kit Yuk v Country Wide Industrial Ltd* [1995] 2 HKLR 162, priority in a similar case was determined by applying the common law rule although both agreements in that case had been registered.

The purchaser with lower priority might still obtain specific performance if she can show substantial hardship (*Chu Kit Yuk v Country Wide Industrial Ltd*).

- 2.3 A deed is required under s 4 of the CPO. The vendor, Lee Holdings Ltd, has not executed the Assignment under its common seal. Candidates should therefore consider whether the method of execution by Lee Holdings Ltd complies with sections 128 and 127 of the Companies Ordinance, Cap. 622. Under section 128 a deed must be executed under s 127, be expressed to be executed as a deed and be delivered as a deed. Delivery is presumed under s 128(3) provided the deed is executed in accordance with section 127.

Under s 127 a company may execute a deed by having it signed by its sole director on behalf of the company. In this case it is not clear that Tony Lee is the sole director of the company. Furthermore the attestation clause does not state that the Assignment is executed as a deed.

The purchaser should require the Assignment to be expressed to be executed as a deed and also require evidence of Tony Lee's capacity.

Number of candidates attempting this question - 109. Passing rate 53%.

Question 3

- 3.1 The interest under the Conditions of Sale (an agreement for lease) was originally equitable because the agreement for lease was enforceable by the equitable remedy of specific performance. Under s 14(1) CPO the equitable interest has been converted to a legal estate and a Government Lease deemed issued on compliance with the conditions precedent. S 14(3) CPO applies because the Conditions of Sale are dated after 1 January 1970. A certificate of compliance has been issued and registered and compliance is deemed (*Tai Wai Kin v Cheung Wan Wah Christina* [2004] 3 HKC 198).
- 3.2 In order to prove title the vendor must show certified true copies of the Conditions of Sale under s 13(1) and (2) CPO and the Deed of Mutual Covenants (the 'DMC') under s 13(1) (b) and (2) of the CPO. To give title the vendor need not hand over the originals on completion because these documents do not relate exclusively to the property sold: S 13A(1)(a) and (b) of the CPO.

The facts show that the Assignment dated 31 July 2005 is the intermediate root of title. To prove title the vendor must produce a certified true copy, but because this Assignment relates solely to the property sold, the vendor must on completion be able to hand over the original under s 13A(1)(b) CPO or give a satisfactory explanation as to why he is not in possession of the original (*Leung Kwai Lin v Wu Wing Kuen* [2001] 4 HKCFAR 55). The explanation would usually be made by the person last in possession of the original and must satisfy the purchaser beyond reasonable doubt that there is no prior unwritten equitable charge by deposit of title deeds. The explanation is essential to giving good title

unless the absence of the original does not indicate a realistic possibility of some transaction affecting the land which could affect the purchaser (*De Monsa Investments Ltd v Whole Win Management Fund Ltd* [2013] HKEC 1162). As the Assignment is the intermediate root dealing solely with the property sold, the vendor must explain why he is not in possession of the original.

- 3.3 Candidates should consider whether the roof is a common part. If the DMC is silent, the facts indicate that under s 2 and the First Schedule to the Building Management Ordinance, Cap.344, (the 'BMO') the roof is a common part. As an order has been made against the roof under s 24 of the Buildings Ordinance, Cap. 123, (the 'BO') the Building Authority has power to demolish the illegal structure under s 24(3) of the BO, recover the cost from the owners under s 24(4) BO and register a memorial of a certificate of the cost against the roof under s 33(9) of the BO. The effect of the registration of the certificate is that the cost of removal constitutes a first charge on the roof.

If the roof is a common part, all co-owners must contribute to fund the cost of demolition. If an owner's liability to contribute is of such magnitude that it would exceed anything a reasonable purchaser would have contemplated when agreeing to buy the property, the vendor's title will be defective (*All Ports Holdings Ltd v Grandfix Ltd* [2001] 2 HKLRD 630 applying *Chi Kit Co Ltd v Lucky Health International Enterprise Ltd* (2000) 3 HKCFAR 268). As he has agreed to give good title, the vendor must prove beyond reasonable doubt (*MEPC v Christian Edwards* [1981] AC 205) that his title is not defective. The cost of complying with an order under s 24 of the BO is not an ordinary running expense and is likely to be beyond the contemplation of a reasonable purchaser.

Lack of registration of the order under s 24 of the BO is immaterial because the registration of a certificate of the cost of demolition under s 33(9) of the BO is not a precondition for registration of a charge. If the cost of complying with the order is known and is not of great magnitude, the purchaser might be required to complete if the vendor gives a fortified undertaking to pay the appropriate contribution to the cost of complying with the order (*Lam Mee Hing v Chiang Shu Yin* [1995] 3 HKC 247).

Number of candidates attempting this question - 120. Passing rate 58%.

Question 4

- 4.1 Candidates should consider the alterations that have been carried out and whether they breach the BO, the BMO or the DMC for May Court (the 'DMC'). If there is any breach, the vendor might nevertheless be able to give good title if he can put forward facts and circumstances to show beyond reasonable doubt that there is no real risk of enforcement action (*MEPC v Christian Edwards*).

The demolition of two internal walls separating Flat 15A from the corridor amounts to building works within s 2 of the BO for which prior consent of the Building Authority (the 'BA') is required, failing which the BA can take enforcement action against the owner of

Flat 15A. As the walls are inside the building, no prior consent would be required if the walls do not affect the structure of the building: s 41(3) of the BO. The vendor would have to produce expert evidence to prove that the walls do not affect the structure. If the walls affect the structure, there is a real risk of enforcement action even though the breach of the BO occurred many years ago (*Spark Rich (China) Ltd v Valrose Ltd* [2006] 2 HKC 589, CA) because demolition would have affected the structural safety of the building.

If the demolished walls affect the structure of the building, there is a breach of covenant 1 of the DMC and for the reasons mentioned above, a real risk of enforcement action under the DMC.

If the demolished walls are common parts, there is a breach of covenant 2 of the DMC. The DMC does not state that the walls are common parts and in the absence of other evidence (for example, in a document registered in the Land Registry), the walls would be common parts under s 2 and Schedule 1 of the BMO which provides that walls enclosing a common area (the corridors) and structural walls are common parts.

However, consent to demolition of the walls could have been given under covenant 1. The fact that consent could be given also leads to the possibility that the owners' corporation might have waived the breach by tolerating the breach for many years. If the vendor could prove waiver, arguably the vendor could show that there is no real risk of enforcement action and be able to give good title. Even if the defence of waiver is not available, assuming that the walls are common parts only because they enclose a common area (and not because they are structural), the vendor might be able to show that there is no real risk of enforcement action and be able to give good title.

The incorporation of part of the corridor into Flat 15A breaches covenant 1 of the DMC and s 34I (1) of the BMO. In either case consent could have been given to the incorporation of the corridor in which case there would be no breach of covenant. If the owners' corporation takes enforcement action, the defence of waiver is available and as mentioned above, in these circumstances the vendor is likely be able to show that there is no real risk of enforcement action. Even if the defence of waiver is not available the vendor might still be able to show that there is no real risk of enforcement action and be able to give good title. On the difference between waiver and 'no real risk' see *Pak Wai Ching v Secretary for Justice* HCMP 255/2003 (unreported).

The incorporation of part of the corridor into Flat 15A also potentially breaches s 34(1)(b) of the BMO if it creates a nuisance or hazard. In the case of a breach of s 34(1)(b) of the BMO, the vendor is unlikely to be able to show that there is no real risk of enforcement action.

When the purchaser inspected Flat 15A, the vendor might have agreed to sell that part of the corridor which has been incorporated into Flat 15A. However, the vendor cannot give title to common parts of the building (*Profit World Trading v Ho So Yung* [2011] 2 HKLRD 773). The vendor's title would be defective for this reason.

A small amount of credit was given for answers which correctly dealt with restoration of Flat 15A to its original condition before completion. If the vendor can remove the defects before completion and give substantial performance, the purchaser might be obliged to complete with a reduction in the price (*Goldful Way Development Ltd v Wellstable Development Ltd* [1999] 1 HKLRD 563). The vendor might, however, be unable to give substantial performance if he has agreed to sell part of the corridor. If the demolished walls are structural, reinstatement is also likely to take time and the vendor must be able to give good title on the agreed completion date. Time is of the essence.

- 4.2 The purpose of Clause 12 is to limit the vendor's obligation to give and show good title and to force on the purchaser a title which might be defective or defeasible by virtue of 'unauthorised alterations or illegal structures'. To be effective the wording of Clause 12 must be wide enough to cover the defect. But even if the wording is wide enough, the vendor must not mislead the purchaser. Clause 12 is considered in the light of the factual matrix and overall the purchaser must understand the risk that he is required to take (*Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279).

The problems with the title have been dealt with in question 4.1. A good answer would consider whether the words used in Clause 12 cover the defects identified. Arguably the reference to 'unauthorised alterations or illegal structures' refers to alterations that are unauthorised under the BO, the DMC and the BMO (breaches of s 34I of the BMO are treated as breaches of the DMC) (*Channel Green Ltd v Huge Grand Ltd* [2015] 1 HKLRD 655). The wording might not cover an agreement by the vendor to sell common parts.

A good answer would also consider whether the vendor knew about the defects. The facts indicate that the vendor did not carry out the alterations and that the title deeds do not include a layout plan which might assist with identifying the alterations. When the purchaser inspected Flat 15A and saw Clause 12 he might have been suspicious that there were unauthorised alterations and the vendor might have the same suspicion, but if there is no other evidence that the vendor actually knew about the defects, the vendor might not have any more knowledge than the purchaser and be able to rely on Clause 12 (*Jumbo King Ltd v Faithful Properties Ltd*) except in relation to the sale of common parts. If the vendor knew about the defects, however, nothing but the most explicit wording would absolve him from his duty to give and show good title. Arguably the wording in this case is not sufficiently explicit.

Number of candidates attempting this question - 109. Passing rate 56%.

Question 5

- 5.1 The permitted user of the property is residential. The Agreement to be made on 5 November 2020 will attract Ad Valorem Stamp Duty ('AVD'), Special Stamp Duty ('SSD') and Buyers' Stamp Duty ('BSD') unless exemptions apply.

Under s 29BD(2) of the Stamp Duty Ordinance, Cap.117 (the 'SDO') Scale 2 rates of AVD apply because Sam and Sunny are closely related to each other (as defined in s 29AD of the SDO) and to Victor provided each of Sam and Sunny is acting on his own behalf. It does not matter that Sam and Sunny are not Hong Kong permanent residents or that Sam owns another residential flat. Paragraph j of Scale 2 applies. The AVD is HK\$850,000. The Agreement must contain a certificate of value at HK\$21,739,120.

Under s 29CA (10) of the SDO, no SSD is payable even though the sale takes place within 3 years of Victor's purchase because the purchasers, Sam and Sunny, are the children of the vendor, Victor.

Under s 29CB(2)(c) of the SDO, no BSD is payable because Sam and Sunny are closely related to Victor provided they are acting on their own behalf.

The missing information is whether Sam and Sunny are acting on their own behalf.

- 5.2 AVD is payable on the Agreement under s 29BA(a) and Part 1 of Scale 1 of Head 1 (1A) of the First Schedule to the SDO at the rate of 15% of the price.

SSD is payable on the Agreement. The exemption from SSD referred to above in the answer to question 5.1 is not available because Sophia is not related to the vendor, Victor. The date of Victor's acquisition is 4 May 2019 and the date of his disposal will be 5 November 2020. Under Part 2 Head 1(1B) of the First Schedule to the SDO, the rate of SSD is 10% of the price of HK\$21 million (sections 29CA (5)(6)(7) and (8) of the SDO).

BDS is payable on the Agreement. Sophia is a Hong Kong Permanent resident but Sam is not and Sam is not closely related to Sophia. Under s29CB(1) and Head 1(1C) of the First Schedule to the SDO, BSD is payable at the rate of 15% of the price of HK\$21 million.

- 5.3 Victor and Wendy were joint tenants. On the death of one of them the flat passes by survivorship to the other. In this case the order of their deaths is unknown and under s 11 of the CPO, the younger is deemed to survive the elder. Information about the ages of Victor and Wendy is required. If for example, Wendy was younger than Victor, the flat would pass to Wendy by survivorship and then to Sunny under Wendy's will.

The joint tenancy might have been severed in the joint lifetimes of Victor and Wendy. In particular the charging order might have automatically severed the joint tenancy in equity. In *Ho Wai Kwan v Chan Hon Kuen* [2015] HKEC 132, the court held that a charging order did not effect an equitable severance, but the matter is not without doubt.

If the joint tenancy has been severed, Wendy's interest would pass by her will to Sunny and Victor's interest would pass by his will to Sam.

Number of candidates attempting this question - 86. Passing rate 30%.

**Examiners' Comments on
the 2021 Examinations
(To be provided)**

3. Past Examination Papers from 2019 to 2021

**2019 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

HEAD I: CONVEYANCING

Tuesday, 29 October 2019



2019 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

On 9 April 2019, the Vendor and the Purchaser entered into a preliminary sale and purchase agreement in respect of a house in Shek O, Hong Kong ("the Property") for HK\$16 million. The parties entered into a formal sale and purchase agreement on 16 April 2019 ("the Agreement"). The Agreement was substantially in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance (Cap. 219) ("the Ordinance") and contained the terms which may be incorporated by reference in Part A of the Second Schedule to the Ordinance and that:

- a. *Completion shall take place before 5:30 pm on 13 June 2019 at the office of the Vendor's solicitors in Admiralty. However, parties may complete by way of solicitors' undertakings.*

- b. *The Purchaser shall pay all the stamp duty.*

On 3 May 2019, the Vendor's solicitors delivered the title deeds to the Purchaser's solicitors. The title starts with Conditions of Grant, a certified true copy of which from the Land Registry was included in the title deeds. The certified true copy of the Conditions of Grant contained a bundle of documents and included a number of items of correspondence between the grantee and the Government, among which was one dated 21 October 1923 which set out the terms of the grant as formally approved. The intermediate root of title is an assignment dated 8 February 1957. The Vendor became the owner of the Property pursuant to an assignment dated 19 September 2016.

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

On 7 May 2019, the Purchaser's solicitors raised requisitions on title. The following remained outstanding up to the date of completion:

"Please let us have the following letters relating to the Conditions of Grant referred to in the recitals of the Assignment dated 8 February 1957:

- (i) Letter dated 22 November 1923; and*
- (ii) Letter dated 29 December 1924."*

Questions:

Answer the following questions giving reasons for your answers:

- 1.1 Explain how the Vendor's solicitors should respond.** (12 marks)
- 1.2 Assume that the parties proceeded to completion, explain how the different documents effecting the sale and purchase of the Property would be stamped.** (8 marks)
- 1.3 For the purposes of this part, the parties agreed in advance to complete the sale and purchase by way of solicitors' undertakings. On 13 June 2019, the messenger of the Purchaser's solicitors left his office in Wanchai with the cheque for completion but failed to reach the office of the Vendor's solicitors in time due to the closure of the Admiralty MTR**

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

station after a protest the day before. The Vendor's solicitors refused to accept the cheque which arrived late, saying that the agreed time for completion had passed. **Explain who has repudiated the Agreement.**

(5 marks)

Question 2 (25 marks)

A written instrument ("the Instrument") was made and signed by Debby in favour of Winterland Finance Limited ("Winterland") on 8 June 2018. The Instrument recited that:

- (1) *Debby was the registered owner of a certain flat ("the Property");*
- (2) *Debby was indebted to Winterland for HK\$1.2 million; and*
- (3) *Debby had agreed to execute an assignment of the proceeds of sale, or part thereof, to be received by Debby in respect of the Property for the due payment to Winterland of the sum of HK\$1.2 million, with a proviso for re-assignment.*

On request of a manager of Winterland, Debby deposited certain title deeds, which were exclusive to the Property, with Winterland before the execution of the Instrument. The Instrument was then registered in the Land Registry against the Property on 30 June 2018. So far, Debby had repaid only a total sum of slightly over HK\$200,000.

On 4 May 2019, Yasahi International Limited ("Yasahi") as unpaid creditor obtained a judgment against Debby ("the Judgment"). On 29 May 2019, in enforcement and execution of the Judgment, Yasahi obtained a Charging Order Nisi against the Property. It was registered on 14 June 2019. On 4 July 2019, the Charging Order was made absolute. The Charging Order Absolute was registered on 24 July 2019.

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

Questions:

2.1 Between Winterland and Yasahi, which one has priority over the other's interest in the Property? Explain your answer.

(15 marks)

2.2 Assume for this part only that the Property was owned by Debby and her husband Johnny as joint tenants and there was no such dealing and transaction with Winterland. Johnny paid all deposits, balance of purchase price, legal costs and incidental expenses in acquiring the Property. Debby did not contribute any monies in the purchase of the Property. Johnny also paid all the mortgage repayments for the Property. The Charging Order Nisi and the Charging Order Absolute in favour of Yasahi were obtained on the basis of a debt owed by Debby to Yasahi. **Advise Johnny.**

(10 marks)

Question 3 (25 marks)

Jimmy Kim ("the Purchaser") has just signed a binding Agreement for Sale and Purchase ("the Agreement") to purchase a residential flat ("the Flat") and a carpark ("the Carpark") of Evergreen Building in Kowloon Tong from their present owner ("the Vendor"). The land where Evergreen Building now stands is held from the Government of the Hong Kong Special Administrative Region under an Agreement and Conditions of Sale No. 10021 dated 24 October 1972.

The Agreement signed by the Purchaser with the Vendor includes the following terms:

- (1) *The Vendor will sell with a good title.*
- (2) *Completion will take place on 2 December 2019, when vacant possession of the Flat and the Carpark will be delivered.*

Questions:

Answer the following questions with reference to relevant statutory provisions and case authorities:

- 3.1 What is the nature of the interest, legal estate or equitable interest, now held under the relevant Government Grant? If further information is required to answer this question, state what it is and the reason(s) it is required.**

(5 marks)

(See the next page for a continuation of Question 3)

3.2 The Deed of Mutual Covenant governing Evergreen Building does not provide for the exact allocation of shares to the Flat and the Carpark. **Is it necessary for the Vendor to show such allocation? If so, how can this be done?**

(6 marks)

3.3 For the purposes of this question 3.3 only, you are to assume that both the Agreement and Conditions of Sale No. 10021 were dated and Evergreen Building was erected in 1940. **Should the Purchaser accept title to the Flat and the Carpark if no Occupation Permit is found in the title deeds and documents supplied by the Vendor?**

(4 marks)

3.4 When the Purchaser went to inspect the Flat, he met an occupant there called Nancy, who was introduced to him as the Vendor's mother. **Should the Purchaser's solicitor raise any requisition on title owing to the Purchaser's meeting with Nancy? Would your answer still be the same if Nancy had been informed about the purpose of the Purchaser's visit when they met but she said nothing?**

(10 marks)

Question 4 (25 marks)

Harmony Company Limited ("Harmony") owns two adjacent flats, namely, Flats A and B, of Golden Mansion ("Flats A and B"). Both flats have been charged to Tiger Bank Ltd. ("Tiger Bank") under and by virtue of a Legal Charge similar in form to Form 5 of the Third Schedule to the Conveyancing and Property Ordinance (Cap. 219).

Harmony is planning to remove a part of the partition wall between Flats A and B and install in its place a door and a door frame ("the planned works") in order to enhance the use of both flats.

Questions:

Answer the following questions giving reasons for your answers:

- 4.1 Would you advise Harmony to seek approval/consent before commencing any of the planned works in light of the provisions of the Buildings Ordinance (Cap. 123), the Building Management Ordinance (Cap. 344) and the Legal Charge, and the provisions which the Deed of Mutual Covenant governing Golden Mansion may contain? If so, why and from whom should such approval/consent be obtained?**

(20 marks)

(See the next page for a continuation of Question 4)

4.2 For the purposes of this question 4.2 only, assume that Harmony had carried out the planned works without having obtained any approval/consent as mentioned in question 4.1 above even if such approval/consent were needed. Marvellous Company Limited ("Marvellous") is keen to buy both Flats A and B and has specifically requested Harmony not to restore the flats to their original state and condition. **How and why will you draft the Agreement for Sale and Purchase of both flats to ensure that Marvellous will not be entitled to rely on the lack of any required approval/consent as ground to reject title? (There is no need to draft any contract clause to answer this question.)**

(5 marks)

Question 5 (25 marks)

On 3 October 2019, Vincent Chan ("the Vendor") entered into a binding agreement ("the Agreement") to sell a house with a garden (measuring 5,000 square feet in total) known as House 5, Greenhill Peninsula, Repulse Bay, Hong Kong ("the Property") to Peter Wong ("the Purchaser") for a consideration of HK\$80 million with completion on 5 December 2019. The Agreement is substantially identical in form to Form 2 of the Third Schedule to the Conveyancing and Property Ordinance (Cap. 219). The Purchaser has inspected the Property before signing the Agreement. You are the Vendor's solicitor.

On 8 October 2019, the title deeds of the Property were delivered to the Purchaser's solicitor and they included, among other documents, originals of the following:

- (i) Assignment with Plan attached ("the 2002 Assignment") dated 1 March 2002 from Giant Lake Company Limited as vendor to Mark Lee as purchaser. The 2002 Assignment was executed by Karen Lee as attorney of Mark Lee.
- (ii) Assignment ("the 2015 Assignment") dated 1 April 2015 from Mark Lee as vendor to the Vendor as purchaser. The 2015 Assignment was executed by Karen Lee as attorney of Mark Lee.
- (iii) Power of Attorney ("the Power of Attorney") dated 1 December 2012 from Mark Lee to Karen Lee authorizing her to sell the Property and execute an assignment in relation to such sale.

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

- (iv) Statutory Declaration ("the Statutory Declaration") dated 1 April 2015 made by Karen Lee declaring that she had no knowledge of any revocation of the Power of Attorney.

The Purchaser's solicitor raised the following requisitions on 14 October 2019.

Requisition 1

"We note that the Assignment dated 1 April 2015 was executed by Mark Lee, the vendor named therein, by his attorney Karen Lee under a power of attorney dated 1 December 2012. Please provide evidence that the said power of attorney was valid and not revoked at the time of the execution of the said Assignment dated 1 April 2015.

Requisition 2

We note that the Assignment dated 1 March 2002 was executed by Mark Lee, the purchaser named therein, by his attorney Karen Lee. Please let us have the relevant power of attorney authorizing Karen Lee to execute the said Assignment dated 1 March 2002 and evidence of non-revocation of such power of attorney."

Questions:

Answer the following questions giving reasons for your answers:

- 5.1 How will you answer Requisition 1? If further document(s) need to be obtained to answer Requisition 1, identify such document(s).**

(8 marks)

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

5.2 On what grounds can the Vendor refuse production of the requested power of attorney mentioned in Requisition 2?

(4 marks)

5.3 On 2 December 2019, the Purchaser's solicitor raised the following additional requisition ("the Additional Requisition").

"We note that there has been erected on the garden of the Property a glasshouse covering an area of approximately 100 square feet which is not shown on the plan annexed to the first assignment of the Property dated 1 March 2002. Please let us have the building authority's approval for the erection of the said glasshouse."

Is the Purchaser too late to raise the Additional Requisition? Give reasons for your answer.

(9 marks)

5.4 Assume that the Purchaser's solicitor raised the Additional Requisition at the same time as Requisitions 1 and 2 on 14 October 2019 and the Vendor, conceding that the erected glasshouse ("the Glasshouse") is an illegal structure, is willing to demolish the same. However, the Purchaser insists on the retention of the Glasshouse and the production of the building authority's approval for its erection.

Advise the Vendor whether he can insist on demolishing the Glasshouse and refuse to accede to the Purchaser's requests but still be able to give good title to the Property.

(4 marks)

END OF TEST PAPER

**2020 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

HEAD I: CONVEYANCING

Tuesday, 27 October 2020



2020 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

On 1 September 2020, Vince Ku (“Vince”) agreed orally with Philip Shi (“Philip”) to sell his flat known as Flat 5B, Wah Hing Mansions, 7 Oaklands Lane, Hong Kong to Philip for the sum of HK\$15 million with vacant possession on completion on 5 October 2020. They also agreed that Philip would pay a 10% deposit to be held by Vince’s solicitors as stakeholder and released to Vince on completion. Vince and Philip each instructed solicitors to act for them. They told their respective solicitors all the terms that had been agreed as set out above.

On 2 September 2020, Philip’s solicitors wrote to Vince’s solicitors as follows:

“Dear Sirs,

We enclose a cheque for HK\$1,500,000 drawn on the Kowloon Bank Ltd. by our client, Philip Shi and payable to your firm as stakeholder in respect of the sale and purchase of Flat 5B, Wah Hing Mansions, 7 Oaklands Lane, Hong Kong (the “Property”). This sum is 10% of the agreed price for the Property and is paid as a deposit to be held by your firm as stakeholder pending completion of the sale on 5 October 2020. Please send us a receipt for this sum together with the draft agreement for sale and purchase.”

Philip’s solicitors signed this letter.

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

On 4 September 2020, Vince’s solicitors sent Philip’s solicitors a receipt for the deposit which reads as follows:

“Received from Philip Shi the sum of HK\$1,500,000 being the 10% deposit on Flat 5B, Wah Hing Mansions, 7 Oaklands Lane, Hong Kong agreed to be sold by Vince Ku to Philip Shi.”

Vince’s solicitors signed this receipt. Subsequently Vince refused to proceed with the sale and he returned the deposit to Philip.

Questions:

Answer the following questions giving reasons for your answers:

1.1 Advise Philip whether he can enforce the oral agreement against Vince.

(15 marks)

1.2 Assume that instead of the correspondence above, Vince (the “Vendor”) and Philip (the “Purchaser”) had signed a binding provisional agreement (the “Provisional Agreement”) for the sale and purchase of Flat 5B, Wah Hing Mansions, 7 Oaklands Lane, Hong Kong. The Provisional Agreement includes the following terms:

“2. The purchase price shall be HK\$15,000,000 to be paid in the following manner:

(i) An initial deposit of HK\$150,000 shall be payable to the Vendor’s solicitor as stakeholder on the signing of this agreement,

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

- (ii) *A further deposit of HK\$1,350,000 shall be payable to the Vendor's solicitor as stakeholder on 14 September 2020, that date being on or before the signing of a formal agreement,*
- (iii) *The balance of the purchase price shall be payable to the Vendor's solicitor as agent for the Vendor on completion,*
- (iv) *The initial and further deposits shall be released to the Vendor on completion.*

.....

8. *If the Vendor fails to complete the sale in the manner herein contained, the Vendor shall immediately compensate the Purchaser with a sum equivalent to the amount of the deposits paid as liquidated damages together with the refund of the deposits paid and the Purchaser shall not take any further action to claim damages or to enforce specific performance."*

1.2(a) Assume that it is 14 September 2020 and the Vendor and the Purchaser have not agreed on the terms of the formal sale and purchase agreement.

Is the Purchaser obliged to pay the further deposit?

(4 marks)

1.2(b) Assume that on 14 September 2020, the Purchaser had nevertheless paid the further deposit but that the parties had failed to sign a formal agreement. Neither party alleges a breach for this failure. On 5 October 2020, the Vendor failed to complete and returned to the Purchaser only the initial and further deposits. **Is the Purchaser entitled to any other remedies against the Vendor?**

(6 marks)

Question 2 (25 marks)

On 30 June 2020, Lee Holdings Limited (“Lee Holdings”) as vendor entered into a binding agreement to sell the legal estate in Flat 3A, Pine Court (the “Property”) to Pansy Poon (“Pansy”) as purchaser for the price of HK\$65 million. Pansy paid a deposit of HK\$6.5 million. The agreement is substantially in the same form as the agreement in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219. Lee Holdings agreed to give vacant possession on completion. Completion was due to take place by 5 p.m. on Friday, 23 October 2020.

Pansy asked Tony Lee (“Tony”), the sole director of Lee Holdings, to allow her to see the Property before completion but Tony refused. Nevertheless, Pansy went to the Property at 4:55 p.m. on Friday, 23 October 2020. When Pansy knocked on the entrance door to the Property, Tony answered the door but did not allow Pansy to go in and inspect. Nevertheless, from the entrance Pansy could see that there were a number of packing cases in the living room and it appeared that they could not be removed by 5 p.m. Tony told Pansy that he would remove the packing cases as soon as possible. However, Pansy did not complete her purchase.

This morning the solicitor for Lee Holdings informed Pansy’s solicitor that Pansy had repudiated the agreement by failing to complete. Lee Holdings had therefore accepted Pansy’s repudiation, terminated the agreement and forfeited Pansy’s deposit. Pansy’s solicitor has now advised Pansy to sue Lee Holdings for damages and to recover her deposit.

Questions:

Answer the following questions giving reasons for your answers:

2.1 Can Pansy obtain specific performance of the agreement? (14 marks)

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

2.2 How would your answer to question 2.1 above change if this morning Lee Holdings had entered into a binding agreement to sell the Property to Betty Bau?

(6 marks)

2.3 Assume for the purpose of this question only that Pansy completes her purchase. Lee Holdings has executed the Assignment in favour of Pansy as follows:

Signed by Tony Lee on behalf of Lee Holdings Ltd.)

in the presence of:) *Tony Lee*

There is no witness.

Should Pansy require any further evidence of proper execution of the Assignment by Lee Holdings?

(5 marks)

Question 3 (25 marks)

By virtue of a binding Agreement for Sale and Purchase (the “Agreement”) signed two weeks ago, Pearl Wong (“Pearl”) agreed to purchase the office unit of Steven Sun (“Steven”) known as Room C, 8th Floor, Joyous Commercial Building, Sheung Wan, Hong Kong (the “Property”) which provides, amongst other things, that a good title will be sold and completion will take place on 1 December 2020.

The title documents which affect the Property are as follows (in chronological order):

- (1) Agreement and Conditions of Sale No. UB8938 dated 2 January 2002
- (2) Occupation Permit dated 5 August 2004
- (3) Deed of Mutual Covenants dated 17 September 2004 (Memorial No. UB6543920)
- (4) Certificate of Compliance dated 20 November 2004 (Memorial No. UB7659430)
- (5) Assignment with Plan dated 28 December 2004 (Memorial No. UB7852931)
- (6) Assignment dated 31 July 2005 (Memorial No. UB8654210)
- (7) Mortgage dated 8 October 2006 (Memorial No. 06100804367890)
- (8) Receipt on Discharge of a Charge dated 9 October 2019 (Memorial No. 19100998743276)

Items (1) to (4) inclusive of the above list affect the whole of Joyous Commercial Building (the “Building”) and items (5) to (8) relate solely to the Property. Items (5) and (6) both provide that the Property is sold subject to and with the benefit of item (3).

(See the next page for a continuation of Question 3)

Questions:

Answer the following questions giving reasons for your answers:

3.1 What kind of interest, legal or equitable, is held under the Agreement and Conditions of Sale No. UB8938?

(3 marks)

3.2 Must Steven produce the originals of items (1), (3) and (6), namely, the Agreement and Conditions of Sale No. UB8938, the Deed of Mutual Covenants Memorial No. UB6543920 and the Assignment Memorial No. UB8654210 to prove and give good title? Will Pearl be entitled to reject title if the originals of these documents have all been lost?

(12 marks)

3.3 Pearl has just discovered that the Building Authority issued an order last week to the co-owners of the Building under section 24 of the Buildings Ordinance, Cap.123 regarding an unauthorised structure on the roof of the Building. There is no such entry in the latest land search in respect of the Property obtained from the Land Registry this morning. Neither the ownership nor the exclusive right to use the roof has ever been specifically assigned to any party. **What impact, if any, will such an order have on the title to the Property? If you require further information to answer this question, state what information you need and why you need it.**

(10 marks)

Question 4 (25 marks)

In September 2020, Stan as vendor and Patrick as purchaser signed an agreement for sale and purchase (the “Agreement”) of Flat 15A, May Court (“Flat 15A”) for a consideration of HK\$30 million. May Court is a block of 30 residential flats built in 1973. Patrick inspected Flat 15A before signing the Agreement and liked it because it is very spacious. Completion is due to take place on 30 November 2020.

The Agreement is substantially in the same form as the agreement in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219 except that it also contains the following Clause 12:

“The Purchaser has inspected Flat 15A and will not raise any requisitions or object to title in connection with any unauthorised alterations or illegal structures at Flat 15A.”

There is a Deed of Mutual Covenants for May Court (the “DMC”). The DMC contains a definition of common parts. This definition states that corridors and lift lobbies are common parts, but it does not say anything about internal walls. The DMC includes the following covenants:

- “1. No owner will alter the common parts of May Court without the prior consent of the building manager.*
- 2. No owner will make any structural alterations to any part of May Court.”*

The owners of May Court incorporated in 1993.

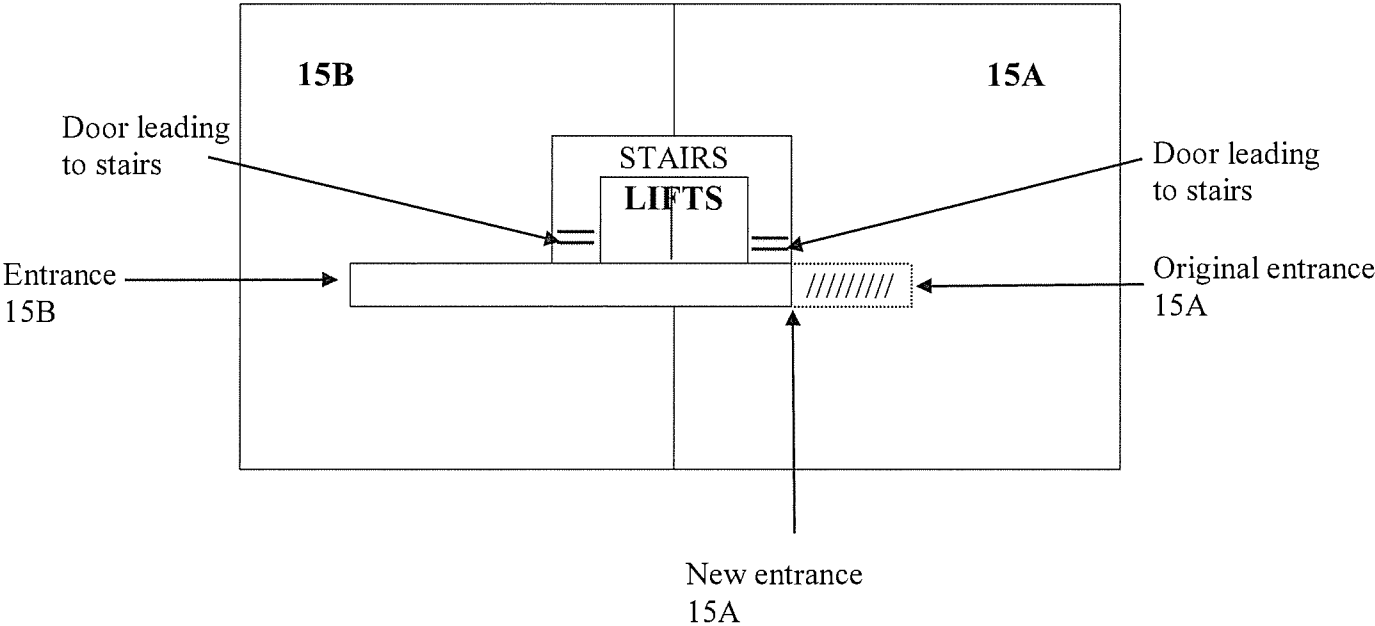
After signing the Agreement, Patrick discovered that in 1995, Stan’s predecessor in title had demolished two walls inside May Court separating Flat 15A from the corridor and had moved the entrance to Flat 15A. The walls that have been demolished are shown by dotted lines on the plan below, which was drawn by Patrick’s surveyor, and the original and new entrances are marked. The effect of these alterations is that a portion

(See the next page for a continuation of Question 4)

of the corridor shown hatched black on the plan has been incorporated into Flat 15A.

Last week Stan’s solicitor sent Patrick’s solicitor the title deeds. The deeds do not include a layout plan. Patrick’s solicitor immediately raised requisitions including a requisition asking Stan’s solicitor for evidence that the alterations do not breach the Buildings Ordinance, Cap. 123 or the DMC. Stan’s solicitor has refused to answer this requisition on the ground that the Agreement contains Clause 12.

Plan of 15th Floor, May Court



Questions:

Answer the following questions giving reasons for your answers:

- 4.1 Analyse the ways in which the above facts indicate that Stan’s title might be defective. (15 marks)

- 4.2 Explain the effect of Clause 12 of the Agreement on the Vendor’s duty to give and show title. (10 marks)

Question 5 (25 marks)

Victor Siu (“Victor”) is planning to sell his solely-owned property at Mid-Levels, Hong Kong (the “Property”). He first bought the Property by signing a Provisional Agreement for Sale and Purchase on 4 May 2019, signing a Formal Agreement for Sale and Purchase on 18 May 2019 and executing an Assignment on 28 June 2019.

Victor’s sons, Sam and Sunny, both of whom are not Hong Kong permanent residents, are interested in buying the Property for the price of HK\$21 million. According to the Deed of Mutual Covenants, the Government Grant and the Occupation Permit relating to the Property, its user is residential. Sam already owns a residential flat in Wanchai, Hong Kong.

Victor, Sam and Sunny are planning to sign an Agreement for Sale and Purchase of the Property (the “Agreement”), which will be the only agreement signed by the parties on 5 November 2020. The Agreement will include a term that completion will take place on 27 November 2020.

Questions:

Answer the following questions giving reasons for your answers:

5.1 Will any ad valorem and/or other stamp duties be payable on the Agreement? If so, what is/are the amount(s) payable? If you require further information to answer this question, state what information you need and why you need it.

(11 marks)

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

5.2 Sam has an unmarried partner, Sophia, who is a Hong Kong permanent resident. How, if at all, will your answer to Question 5.1 above differ if, instead of selling to Sam and Sunny, Victor sells the Property (on the same terms) to Sam and Sophia?

(7 marks)

5.3 Victor also owns a flat (the “Flat”) with his wife, Wendy, as joint tenants. Victor has made a valid will naming Sam as the sole executor and beneficiary of his estate. Sunny is the sole executor and beneficiary of Wendy’s estate under her valid will. Owing to his financial difficulties, Victor started borrowing from Vampire Credit Company Limited (“Vampire”) earlier this year. Last month Vampire obtained and registered a charging order against the Flat in respect of Victor’s unpaid debts. Victor and Wendy died in a car crash yesterday and the order of their deaths is unknown. **Who will now own the Flat? If you require further information to answer this question, state what information you need and why you need it.**

(7 marks)

END OF TEST PAPER

**2021 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

HEAD I: CONVEYANCING

Tuesday, 26 October 2021



2021 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

In June 2014, Patrick Poon (“Patrick”) bought Flat 2A, Astrid Court (“Flat 2A”) from Vicki Vong (“Vicki”). Astrid Court is a block of 30 residential flats built in 1984. There is a Deed of Mutual Covenant (the “DMC”) which does not contain a definition of common parts and does not state who owns the external walls. The owners of Astrid Court incorporated in 1986. Astrid Court is managed by Good Management Ltd.

The DMC includes the following covenants:

- “1. No owner will alter the external appearance of Astrid Court without the prior consent of the building manager.
2. No owner will make any structural alterations to any part of Astrid Court.”

In July 2021, Patrick received a letter from the owners’ corporation complaining about the following alterations made to Flat 2A in 2001 by Vicki, who was the owner of Flat 2A at the time. The letter states:

“The living room windows of Flat 2A have been enlarged by cutting the external walls of Astrid Court and inserting larger window frames. These alterations breach the terms of the DMC. Please reinstate the windows of Flat 2A to their original size and condition as soon as possible.”

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

When looking at Astrid Court from ground level, Patrick can see that his living room windows are larger than those of other flats in Astrid Court. The exterior of Astrid Court does not therefore have a uniform appearance. Nevertheless, Patrick has refused to comply with the letter from the owners' corporation.

Question:

Answer the following question giving reasons for your answers:

Advise Patrick whether the owners' corporation can obtain an injunction forcing him to carry out the reinstatement work described above and on the likelihood of the court granting an injunction. If you need more information to advise Patrick, state what information you need.

(25 marks)

Question 2 (25 marks)

In 2017, Harry and Wendy bought a residential flat known as 6B, Flower Gardens (the “Flat”) in their joint names. The price was HK\$14 million. To fund their purchase, Harry and Wendy used HK\$2 million of their own savings and Wendy’s father contributed HK\$2 million. Harry and Wendy also borrowed HK\$10 million from the Goodwill Bank Ltd. (“Goodwill”). The loan from Goodwill is secured by a first legal mortgage (the “Mortgage”) of the Flat and is repayable by equal monthly instalments of principal and interest. The Mortgage is substantially in the same form as Form 5 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219. Harry and Wendy moved into the Flat on the day on which they completed their purchase and mortgage of the Flat.

In 2020, Wendy’s father became ill and he moved into the Flat with Harry and Wendy. In May 2021, Harry lost his job. In June 2021, Harry, Wendy and Wendy’s father moved out of the Flat into cheaper accommodation. Harry and Wendy let the Flat to Tom for a term of two years starting on 1 July 2021 under a written tenancy agreement signed by all parties. The tenancy agreement is not registered in the Land Registry. Harry and Wendy did not obtain the consent of Goodwill to the tenancy agreement. Tom discovered this in August 2021 and stopped paying rent. As a result, Harry and Wendy have been unable to pay Goodwill the instalments of principal and interest due in September and October 2021.

Goodwill wants to sell the Flat with vacant possession. An employee of Goodwill has said that he would like to buy the Flat and is willing to pay HK\$14 million.

(See over the page for a continuation of Question 2)

Question:

Answer the following question giving reasons for your answers:

Advise Goodwill on its rights to take possession and sell the Flat with vacant possession to one of its employees at the price stated free from any interests that Tom or Wendy's father might have. Include in your answer advice as to the duties owed by Goodwill to Harry and Wendy, and the remedies available to them if Goodwill breaches those duties.

(25 marks)

Question 3 (25 marks)

Yesterday, 25 October 2021, Pansy signed a binding Agreement for Sale and Purchase (the “Agreement”) with Simon to purchase his property known as Flat A, 15th Floor, Wonderful Garden, Causeway Bay, Hong Kong (the “Property”). The Agreement includes a term that a good title will be sold.

The list of title documents (the “List”) for the Property is as follows:

- (1) Government Lease of Inland Lot No. 123 dated 7 April 1934
- (2) Occupation Permit dated 9 December 2004 (Memorial No. UB8435088)
- (3) Deed of Mutual Covenant dated 7 January 2005 (Memorial No. UB8457286)
- (4) Assignment with Plan dated 10 February 2005 (Memorial No. UB8654210)
- (5) Assignment dated 8 September 2009 (Memorial No. 0909080735498)
- (6) Assignment dated 10 November 2015 (Memorial No. 1511107548319)
- (7) Mortgage dated 10 November 2015 (Memorial No. 1511107548320)
- (8) Deed of Release dated 8 October 2016 (Memorial No. 16100804367206)
- (9) Mortgage dated 8 October 2016 (Memorial No. 16100804367207)
- (10) Deed of Release dated 9 October 2019 (Memorial No. 19100998743571)

Questions:

Answer the following questions giving reasons for your answers:

3.1 Identify from the List the intermediate root of title in respect of the Property.

(4 marks)

(See over the page for a continuation of Question 3)

3.2 Should Pansy accept title to the Property if Simon is unable to produce the originals of items (3), (6) and (7) of the List? Item (3) does not relate exclusively to the Property but items (6) and (7) do. For the purposes of answering this question, assume that item (8) was duly executed by the Mortgagee named therein and that it fully released and discharged the Property from item (7).

(14 marks)

3.3 Explain whether or not item (10) of the List has been duly executed if it was sealed with the common seal of Prosperity Bank Ltd. (the Mortgagee named in both items (9) and (10) of the List) and signed by Alan Wong and Barbara Chan whose capacities are not stated.

(7 marks)

Question 4 (25 marks)

On 1 September 2021, Peter Wong (“Peter”) inspected Flat 15A, Wealthy Court and the roof above Flat 15A (the “Property”). The roof is accessible by a spiral staircase leading from the living room of Flat 15A. Later that day, Peter signed a provisional agreement to buy the Property from Vera Lee (“Vera”) and he paid the initial deposit. A copy of the provisional agreement is attached.

On 5 September 2021, Vera’s solicitor sent Peter’s solicitor a draft formal agreement for sale and purchase and the title deeds. On the same day, Peter met his solicitor and described the Property to him. Peter’s solicitor advised Peter that the spiral staircase might have been constructed after the Occupation Permit for Wealthy Court (the “OP”) was issued and that its construction might not have been authorised by the Building Authority (the “BA”) under the Buildings Ordinance, Cap. 123 (the “BO”). The OP does not refer to the staircase. Peter’s solicitor also advised him that the BA’s consent to the staircase would be required if it was constructed after the issue of the OP because its construction involves cutting the roof slab. Peter’s solicitor has also read the Deed of Mutual Covenant for Wealthy Court (the “DMC”) which includes the following covenant:

“No owner will make any alterations to Wealthy Court which breach the terms of the Buildings Ordinance, Cap. 123”

On 7 September 2021, Peter’s solicitor informed Vera’s solicitor that he was concerned that the spiral staircase might be unauthorised under the BO and that as a result the staircase might also breach the DMC. Vera’s solicitor replied on 8 September 2021, saying that neither he nor Vera had any information about the spiral staircase, but that it was present when Vera bought the Property in 1970. On 9 September 2021, Peter’s solicitor informed Vera’s solicitor that Vera’s title is defective and that Peter would not sign the formal agreement or pay the further deposit.

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

On 10 September 2021, Vera's solicitor wrote to Peter's solicitor saying that the BA had inspected Wealthy Court (including the Property) in 1988 when the Government Lease was renewed and that he would be able to provide written evidence of this before completion. In the same letter, Vera's solicitor also said that since 1970, the BA had not complained about any unauthorised building works on the Property.

Despite this reply, Peter did not sign the formal agreement or pay the further deposit on 14 September 2021 and Peter has now demanded that Vera return his deposit.

Question:

Answer the following question giving reasons for your answers:

Advise Vera whether she can terminate the provisional agreement and forfeit Peter's initial deposit.

(25 marks)

(See the next page for a continuation of Question 4)

Provisional Agreement for Sale and Purchase referred to in Question 4

THIS AGREEMENT is made on 1 September 2021

Between

(1) Vera Lee of House A, No. 47, Strawberry Road, Hong Kong (the “Vendor”);

and

(2) Peter Wong of Flat 6A, Red Gardens, 10 Prince Edward Road, Kowloon (the “Purchaser”)

The Vendor and the Purchaser agree as follows:

1. The Vendor shall sell and the Purchaser shall purchase Flat 15A and the roof above Flat 15A, Wealthy Court, 10 South Road, Hong Kong (the “Property”).
2. The purchase price is HK\$50 million which shall be paid by the Purchaser to the Vendor in the following manner:
 - (a) HK\$7 million on the signing of this agreement as initial deposit,
 - (b) HK\$3 million on the signing of a formal agreement for sale and purchase on or before 14 September 2021 as the further deposit,
 - (c) HK\$40 million upon completion on or before 30 March 2022 as the balance of the purchase price.

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

3. The Purchaser will attend at the offices of the Vendor's solicitor on or before 14 September 2021 to sign the formal agreement for sale and purchase.
4. Should the Purchaser fail to sign the formal agreement for sale and purchase in the manner herein contained, the initial deposit shall be forfeited to the Vendor who shall then be entitled at his absolute discretion to sell the Property to anyone he thinks fit and the Vendor shall not sue the Purchaser for any liabilities and/or damages caused by the Purchaser's default.
5. Should the Vendor after receiving the initial deposit paid hereunder fail to sign the formal agreement for sale and purchase in the manner herein contained, the Vendor shall immediately compensate the Purchaser with a sum equivalent to the amount of the initial deposit as liquidated damages together with the refund of the initial deposit and the Purchaser shall not take any further action to claim damages or specific performance.
6. The Purchaser will pay the stamp duty in connection with this transaction.

Signed *Vera Lee*

Signed *Peter Wong*

Question 5 (25 marks)

Yesterday, 25 October 2021, Rose and her sister Daisy signed an Agreement for Sale and Purchase (the “Agreement”) with Oliver (who is not related to them in any way by blood or marriage) to purchase his flat in Quarry Bay, Hong Kong (the “Flat”) for HK\$6,380,000. The Agreement is the only agreement signed by Rose, Daisy and Oliver in connection with this transaction.

Rose is a Hong Kong permanent resident but Daisy is not. According to the government grant, the deed of mutual covenant and the occupation permit relating to the Flat, its user is “domestic”.

When Oliver first bought the Flat, he signed an Agreement for Sale and Purchase on 1 December 2018 (the “Acquisition Agreement”). The Acquisition Agreement was the only agreement signed by Oliver in connection with his purchase. Pursuant to the Acquisition Agreement, Oliver executed an Assignment on 7 January 2019. In the Acquisition Agreement and the Assignment dated 7 January 2019, Oliver was the sole purchaser named therein.

The Agreement includes terms that Oliver is selling a good title and that completion will take place on 11 January 2022.

Questions:

Answer the following questions giving reasons for your answers:

5.1 Will the Agreement attract ad valorem and/or other stamp duties? If so, how much will such stamp duties be? If you need more information to answer the question, state what information you need and why you need it.

(15 marks)

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

5.2 The building of which the Flat forms part is over 30 years old. Notices (the “Notices”) have just been issued under sections 30B and 30C of the Buildings Ordinance, Cap. 123 requiring mandatory inspection of the said building and window inspection of the Flat. **Explain the impact, if any, the Notices may have on the title to the Flat.**

(10 marks)

END OF TEST PAPER