

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2024 SUPPLEMENTARY INFORMATION PACKAGE

HEAD I: CONVEYANCING

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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

Overseas Lawyers Qualification Examination

Head I: CONVEYANCING

Standards, Syllabus and Reading List

STANDARDS

Candidates will be expected:-

- (a) to be familiar with the basic concepts and rules of land law, and conveyancing law and practice;
- (b) to be familiar with the practice and procedures of conveyancing in Hong Kong; and
- (c) to be able to respond to problems by identifying the issues, applying relevant law, giving suitable practical advice and by recommending or taking such action as is appropriate in the circumstances including, where appropriate, drafting or amending conveyancing documents.

The test paper for this Head of the Examination is set at the standard expected of a newly qualified (day one) solicitor in Hong Kong who has completed a law degree (or its equivalent), the professional training course (PCLL) and a two year traineeship prior to admission.

SYLLABUS AND DIRECTED READING

The textbooks for Conveyancing are:

Judith Sihombing, Hong Kong Conveyancing Law (9th ed) (LexisNexis 2022) (HK Conveyancing)

Butterworths Hong Kong Conveyancing and Property Law Handbook (5th Edition) (LexisNexis) (Handbook). Reference should be made to relevant sections and schedules of the annotated Conveyancing and Property Ordinance (Cap 219) of the Handbook

Alice Lee and S.H. Goo, Land Law in Hong Kong (5th Practitioner Edition) (LexisNexis 2022) (Land Law in Hong Kong)

Reference should also be made to relevant articles in Hong Kong Lawyer, Law Society Circulars, and relevant ordinances and cases.

1. Legal Framework of Conveyancing in Hong Kong

- (a) The system of landholding in Hong Kong
- (b) The system of conveyancing, including registration under the Land Registration Ordinance
- (c) The meaning of “land”
 - The distinction between fixtures and chattels
- (d) The demarcation of land
 - Sectioning and subdivision
- (e) Government Leases and Conditions
 - **Government leases**
 - Grantee’s interest under a Government lease
 - Standard terms in a Government lease including restrictions on alienation
 - Premium and Government rent
 - User restrictions
 - Obligations of the Government
 - Variation of Government leases
 - **Conditions**
 - The different types of Conditions
 - Grantee’s interest under Conditions
 - Standard Conditions including restrictions on alienation and obligations to create a Deed of Mutual Covenant
 - Modification of the Conditions
 - Conversion of equitable interest into legal estate
 - The certificate of compliance
 - **Termination of Government Lease/Conditions**
 - Re-entry by Government
 - Relief against re-entry
 - Resumption by Government (excluding assessment of compensation)

Essential Reading

HK Conveyancing

Chapter 1

Paragraphs [1-1] - [1-18],
[1-23] - [1-27], [1-42] - [1-44],
[1-50] - [1-54], [1-71] - [1-94],
[1-221] - [1-224]

HK Conveyancing	Chapter 2	Paragraphs [2-1] - [2-19], [2-51] - [2-77], [2-84], [2-95] - [2-104], [2-116] - [2-144]
	Chapter 8	Paragraphs [8-1] - [8-19], [8-370] - [8-394]
Land Law in Hong Kong	Chapter 1	Paragraphs [1-1] - [1-42], [1-62] - [1-70]
	Chapter 9	Paragraphs [9-39], [9-66] - [9-75]
	Chapter 10	Paragraphs [10-32] - [10-37]

2. Deeds of Mutual Covenant

(a) The system of multi-unit development ownership in Hong Kong

- The nature of the interests of unit owners; tenants in common holding undivided shares with right of exclusive occupation of a particular unit
- The need for a Deed of Mutual Covenant and the steps taken to create one

(b) Guidelines for Deeds of Mutual Covenant

- The binding nature of Deeds of Mutual Covenant on signatories and non-signatories
- Common terms in Deeds of Mutual Covenant including the allocation (or pairing) of undivided shares, restrictions on re-allocation and common parts

(c) Enforceability of covenants in the Deed of Mutual Covenant against successors in title to owners and against tenants and occupiers

(d) Enforcement of the Deed of Mutual Covenant

(e) The Building Management Ordinance Cap. 344

- Section 2 and Schedule 1 - the definition of common parts, ss14, 16, 17, 18, 19, 23, 24, 25, 34H, 34I and 40

Essential Reading

HK Conveyancing

Land Law in Hong Kong Chapters 8 and 16

3. Title

(a) The Nature of Title to be made or given

- **Distinction between the duty to show and the duty to give a good title**
 - What constitutes a good title
- **Duty to show and give a good title**
 - Contract terms relating to the giving and showing of title
 - Variation of duty by express term in sale and purchase agreement
 - Whether there is a need to produce the originals of deeds dealing solely with the property sold
- **Factors that will vitiate a good title including**
 - Title not in vendor
 - Registered encumbrances
 - Unregistered encumbrances
 - Latent and patent encumbrances
 1. Occupiers rights
 2. Nominations
 3. Mortgages and Charges
 4. Notices and Orders from Government or Competent Authority
 - Defeasible titles including
 1. Breach of Government Lease/Conditions
 2. Substantial enforcement action by Building Authority
 3. Breach of Deed of Mutual Covenant
 4. Under the Bankruptcy Ordinance
 - Matters of mere conveyance
 - Pre-intermediate root defects

(b) Proof of title

- The statutory provisions
 1. The ultimate root - Government Lease/Conditions
 2. The intermediate root
 3. The chain of title (Candidates should be able to read a title diagram)
- Use of recitals in proving title
- Missing and illegible title deeds
- Proof of due execution of documents
 1. Presumptions in aid of proof
 2. Execution of deeds by individuals
 3. Execution of deeds by corporations
 4. Execution of deeds under a power of attorney
 5. Proof of non-revocation of power of attorney
 6. Execution of documents abroad

- Checking signatures for consistency
- Discrepancies in property description
- Time considerations in showing and giving title
- Requisitions on title
 1. Time within which requisitions may be raised
 2. Provision giving vendor the right to annul sale where he is unwilling or unable to answer the requisition
- Acceptance of title
- The vendor and purchaser summons procedure
- Retention of title deeds pending completion

Essential Reading

HK Conveyancing	Chapter 3	Paragraphs [3-322] - [3-349]
	Chapter 5	Paragraphs [5-193] - [5-204], [5-218] - [5-232], [5-247] - [5-273]
	Chapter 8	Paragraphs [8-1] - [8-37], [8-48] - [8-394]
	Chapter 9	Paragraphs [9-1] - [9-196], [9-216] - [9-219]
	Chapter 11	Paragraphs [11-237] - [11-243]

4. The Contract of Sale

(a) Form of the agreement

- Note or memorandum
- Part performance
- Preliminary, Provisional and Formal Agreements
- Form 2 of the Third Schedule to the Conveyancing and Property Ordinance

(b) Preliminary agreements

- Does the preliminary agreement constitute a binding agreement?
- Common terms including implied terms

(c) Conditional agreements

- Effect of 'Subject to contract' heading

(d) The formal sale and purchase agreement

- The relationship between the preliminary or provisional and formal agreement
- Common conditions in the formal agreement
 1. Outgoings
 2. Insurance
 3. Condition of property
 4. Title
 5. Documents of title
 6. Payment of deposit and purchase price
 7. Easements and appurtenant rights
 8. Requisitions
 9. Vendor's warranties
 10. Failure by purchaser
 11. Failure by vendor
 12. Completion
 13. Time of essence
 14. Fixtures, fittings and chattels
 15. Entry into possession prior to completion
 16. Conditions in Part A of the Second Schedule to the Conveyancing and Property Ordinance
 17. Sales with vacant possession and sales subject to tenancies, dealing with the deposit paid by the tenant to the landlord
 18. Exclusion of liability for misdescription and misrepresentation.

(e) Signing of contract

(f) Breach of contract

- Remedies for breach
 1. Damages
 2. Rescission
 3. Specific performance
 4. Liquidated damages clauses and penalty clauses
 5. Forfeiture of deposit and relief against forfeiture

(g) Stamp Duty payable under the Stamp Duty Ordinance, Cap. 117 (SDO) in connection with immovable property

- Whether Ad Valorem Stamp Duty is payable on an agreement for sale and purchase, nomination or assignment and the rates of duty payable
- Who is liable for the stamp duty
- The time limits for stamping
- Certificates of value
- The right to obtain a refund of stamp duty paid if an agreement for sale and purchase is cancelled, annulled, rescinded or not performed.

Essential Reading

HK Conveyancing	For (a) (b) (c) (d) & (e)	Chapter 4	Paragraphs [4-1] - [4-206]
		Chapter 6	Paragraphs [6-19] - [6-135], [6-161] - [6-236]
HK Conveyancing	For (f)	Chapter 11	Paragraphs [11-1] - [11-42], [11-57] - [11-203], [11-220] - [11-395]
HK Conveyancing	For (g)	Chapter 10	Paragraphs [10-7] - [10-30]
Land Law in Hong Kong		Chapter 2	

5. The Assignment

(a) The form of the assignment

(b) Contents of the assignment

- Date
- Parties
- Recitals
- Consideration and receipt clause
- Covenants for title
- Words of grant
- Parcels
- Easements
- Exceptions and Reservations
- Habendum
- Apportionment of Government rent
- Covenants
- Stamp duty and certificates of value

(c) Form 1 of the Third Schedule to the Conveyancing and Property Ordinance

Essential Reading

HK Conveyancing	Chapter 6	Paragraphs [6-237] - [6-321], [6-356] - [6-364]
Land Law in Hong Kong	Chapter 2	Paragraphs [2-52] - [2-53]

6. Mortgages and Charges

(a) Nature of mortgages and charges

(b) Form of the mortgage or charge

(c) Types of mortgage

(d) Contents of a legal mortgage or charge

- Covenants of mortgagor
- Events of Default under the Fourth Schedule to the Conveyancing and Property Ordinance
- Forms 4 and 5 of the Third Schedule to the Conveyancing and Property Ordinance

(e) Registration and priority

(f) Remedies of legal mortgagee

- Sale
- Foreclosure
- Possession
- Appointment of a receiver
- Action on the covenant to repay

Essential Reading

HK Conveyancing	Chapter 7	Paragraphs [7-1] - [7-14], [7-18] - [7-45], [7-60] - [7-64], [7-90] - [7-101], [7-129] - [7-139], [7-303] - [7-315], [7-373] - [7-386], [7-393] - [7-470], [7-488] - [7-579]
Land Law in Hong Kong	Chapter 13	Paragraphs [13-1] - [13-25], [13-70] - [13-156]

7. Completion

(a) Methods of completion

- Completion in person (Formal completion)
- Completion by post
- Completion by undertaking
- The Law Society's series of undertakings

(b) The Time for completion

(c) Registration and Priority

- Which documents are registrable?
- Time within which registration must be effected
- The effect of registration and failure to register
- The manner of registration

Essential Reading

HK Conveyancing	Chapter 10	Paragraphs [10-1] - [10-30], [10-134] - [10-240]
	Chapter 12	
Land Law in Hong Kong	Chapter 7	Paragraphs [7-1] - [7-149]

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2. Examiners' Comments on the 2021, 2022 and 2023 Examinations

Examiners' Comments on the 2021 Examination Head I: Conveyancing

Question 1

The facts state that the windows of a residential flat have been enlarged. The external walls have been cut and larger window frames have been installed. From the exterior of the building Patrick, the current owner, can see that his windows are larger than those of other flats and that the exterior does not have a uniform appearance. The enlargement was made by a previous owner in 2001. The facts set out two relevant covenants in the Deed of Mutual Covenant (DMC). See below for details of the covenants. The owner's corporation has recently complained about breaches of the DMC and asked Patrick to reinstate the windows to their original size and condition

Question: 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.

Candidates must identify and discuss the following issues:

1. **Breach of the DMC.** There is potentially a breach of covenant 1 of the DMC (no owner will alter the external appearance of the building without the prior consent of the building manager). There is a breach of covenant 2 of the DMC (no owner will make any structural alterations to any part of the building) because the external wall is structural (*IO of Elite Gardens v Profit More Co Ltd* [2002] 2HKLRD 518). There is also potentially a breach of s 34I(1)(a) of the Building Management Ordinance, Cap. 344 (BMO) (no owner will convert common parts to his own use without the prior consent of the management committee) (*Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond* [2008] 1 HKC 59) because the external walls are common parts. Candidates should explain why the external walls might be common parts. In conclusion, there is a breach of covenant 1 of the DMC. There might be other breaches depending on whether any consents were given. Evidence is needed about this.
2. **Standing of the owners' corporation.** The owners' corporation has standing to enforce the DMC under section 18(1)(c) of the BMO and must, to the exclusion of the individual owners, take any action in relation to the common parts.
3. **Is Patrick, the current owner, liable for breaches committed by a previous owner?** The burden of the covenants runs with the land under s 41(3) of the Conveyancing and Property Ordinance, Cap. 219 (CPO). Under s 41(2)(a) of the CPO, the covenants relate to something done on the land and the burden is intended to run under s 40 CPO. The DMC might include express terms that the burden passes. Patrick has also adopted the breaches and maintained them (*IO of Fortune Mansion Tsuen Wan v Chiu Ng Ling* [2010] 2 HKC 67, CA and *IO of Marina Cove v Chu Kam Tai* [2012] 2 HKLRD 107, CA).

4. **Can Patrick raise the defence of acquiescence?** Toleration of the breach for many years (since 2001) by the owners' corporation might amount to acquiescence. This defence is available in relation to a breach of covenant 1 and section 34I(1)(a) of the BMO because in both cases consent could be given to the alterations (*IO of Freder Industrial Centre v Gringo Ltd* [2016] 1 HKLRD 190). The defence is not available in relation to a breach of covenant 2 because the owners' corporation has a statutory duty to enforce the DMC (*IO of Hoi Luen Industrial Centre v Ohashi Chemical Industries (Hong Kong) Ltd* [1995] 2 HKLRD 448).
5. **What is the likelihood of the owners' corporation obtaining an injunction?** The owners' corporation would require a mandatory injunction. The grant of an injunction is discretionary and the general principles for obtaining a mandatory injunction are set out in *Redland Bricks Ltd v Morris and Anor* [1970] AC 652. The owners' corporation must show that grave damage will accrue to it in future and that damages are not a sufficient remedy. The court will also take into account the cost of complying with the injunction compared with the harm suffered by other owners. Candidates should apply these principles to the facts and state what further evidence is needed to support the owners' corporation's case. An injunction might be refused because a long time has elapsed since the breaches occurred (*IO of Shan Kwong Towers Phase II v Lee Suet Ching* [2007] 4 HKLRD 567).
6. **Other relevant points.** The cutting of the external walls without the consent of the Building Authority (BA) would breach the Buildings Ordinance, Cap. 123 (BO). A breach of the BO might also breach the DMC.

Question 2

The facts state that Harry and Wendy bought a residential flat (price – HK\$14 million) in their joint names using their own savings, a contribution from Wendy's father and a loan from the Goodwill Bank. The latter is secured by a first legal mortgage of the flat. The loan from Goodwill is repayable by equal monthly instalments of principal and interest and the mortgage is substantially in the same form as Form 5 of the Third Schedule to the CPO. Harry and Wendy moved in to the flat when they bought it. Wendy's father moved in later. They all moved out in 2021 and the flat was let to Tom for two years under a written, but unregistered, tenancy agreement. Goodwill's consent to the letting was not obtained. Harry and Wendy have not paid any instalments of principal and interest since September 2021. Goodwill wants to sell the flat with vacant possession and an employee of Goodwill is interested in buying it for HK\$14 million.

Question: 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.

Candidates must discuss the following issues, some of which are identified in the question, but some of which are not:

1. **Goodwill's powers under the mortgage.** The legal mortgage includes implied powers to take possession and sell under paragraph 8 of the Fourth Schedule to the CPO. These are exercisable on the occurrence of an event of default. Candidates should state the relevant events of default that apply in this case.
2. **Possession.** Goodwill can immediately start proceedings for possession under Order 88 of the Rules of the High Court, Cap. 4A.
3. **Possession and priority - the tenancy.** Goodwill has the power to take possession and can obtain possession against the tenant provided that Goodwill has priority and did not consent to the letting. The facts state that Goodwill did not consent. Does Goodwill have priority over the tenant? Goodwill's mortgage is created first but it must be registered at the Land Registry, failing which it would be void against the tenant under section 3(2) of the Land Registration Ordinance, Cap. 128 (LRO). The tenancy does not need to be registered. A number of candidates failed to discuss this priority question.
4. **Possession and priority - Wendy's father.** Wendy's father might have an unwritten interest in the flat by virtue of his contribution to the price, although the presumption of advancement from Wendy's father to Wendy might apply. Any interest of Wendy's father is equitable and unwritten and therefore unregistrable. Goodwill has priority provided Goodwill claims as a bona fide purchaser for value of the legal estate without notice of the equitable interest. Occupation by Wendy's father at the date the mortgage was created would amount to notice, but the facts state that Wendy's father was not in occupation.
5. **Goodwill's duties owed to Harry and Wendy.** Goodwill must exercise its powers in good faith to obtain repayment of the loan (*Downsview Nominees Ltd v First City Corporation* [1993] 2 WLR 86) and must take reasonable care to obtain the true market value of the flat (*Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 WLR 1207). Goodwill would normally discharge its duty to obtain the true market value by obtaining expert advice on the mode of sale and the price (*Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349, PC). Goodwill may choose the timing of the sale. (*China & South Sea Bank v Tan* [1990] 1 AC 536). Goodwill may not sell to itself (*Tang Ying Ki v Maxtime Transportation Ltd* [1996] 3 HKC 257), but may sell to one of its employees although such a sale might make it more difficult for Goodwill to prove that it has discharged its duty to obtain the true market value (see *Tse Kwong Lam v Wong Chit Sen* regarding a sale to a director of the mortgagee).
6. **Harry's and Wendy's remedies against Goodwill.** Goodwill is liable in damages for breach of its duty to obtain the true market value. If Goodwill does not act in good faith or there is some irregularity (for example, no event of default), Harry and Wendy would be able to obtain an injunction to restrain the sale. A sale at undervalue is not an irregularity for which an injunction is available (*Lord Waring v London and Manchester Assurance Co Ltd* [1935] CH 310).

Question 3

The facts state that on 25 October 2021 Pansy signed a binding agreement for sale and purchase to buy Simon's flat. The agreement provides that Simon will sell a good title. The facts give a list of title deeds for the flat.

3.1 Question: Identify from the list the intermediate root of title in respect of the flat. The answer is the Assignment dated 10 February 2005 Memorial Number UB 8654210. Candidates should refer to section 13(1)(a)(ii) of the CPO and add that the Assignment is an assignment dated at least 15 years before the current agreement for sale and purchase and that it must deal with the whole estate which is sold under the agreement.

3.2 Question: Should Pansy accept title to the flat if Simon is unable to produce the originals of the Deed of Mutual Covenant dated 7 January 2005(DMC) (which relates to other property as well as the flat sold), an Assignment dated 10 November 2015 and a Mortgage dated 10 November 2015 (both of which relate exclusively to the flat). The Mortgage has been fully released under a Deed of Release dated 8 October 2016.

Candidates should discuss Simon's duty both to give title and to prove title and apply the law to each of the deeds referred to.

The DMC. This is dated before the intermediate root, but if the interest power or obligation it has created is not shown to have ceased or expired and the flat is sold subject to the DMC (this is normally the case), Simon must produce it. Simon can both prove title and give title with a certified true copy because the DMC does not relate exclusively to the flat sold: sections 13(1)(b) and (2) and 13A(1)(b) of the CPO.

Assignment and Mortgage both dated 10 November 2015. These are both dated after the intermediate root. Simon can prove title with certified true copies: section 13(2) of the CPO. In order to give title, Simon must on completion hand over the originals of both deeds because they relate exclusively to the flat sold: section 13A(1)(b) of the CPO. If Simon is unable to hand over the originals, he must provide a satisfactory explanation for his inability to do so (*Leung Kwai Lin Cindy v Wu Wing Kuen* [2001] HKCFA 65). The explanation would usually be in the form of a statutory declaration by the person who last had custody of the deeds (*Choi Ka Yin v Wong Siu Hung* HCMP 1728/2006). The explanation should give clear and cogent evidence to satisfy the purchaser that the flat is not subject to an unwritten equitable mortgage by deposit of title deeds. However, Pansy can only refuse to complete if the absence of the originals of these deeds indicates a realistic possibility of some transaction affecting the flat sold which would affect Pansy if she accepts title (*De Monsa Investments Ltd v Whole Win Management Fund Ltd* [2013] HKEC 1162). The declaration is required only to remove a doubt which would arise by reason of the missing deed (*Zhang Xueshuai v Lai Chan Wing* [2015] 2 HKC 125). The ultimate test is whether there is a real risk of a successful assertion of an encumbrance on the title (*Kingdom Miles Ltd v Ever Crystal Ltd* [2018] HKCA 967). Candidates should apply these principles to the Assignment and Mortgage.

3.3 Question: A Deed of Release dated 9 October 2019 has been sealed with the seal of the mortgagee, Prosperity Bank Ltd and signed by Alan Wong and Barbara Chan whose capacities are not stated. Explain whether or not the Deed of Release has been duly executed.

Simon, as vendor, must give and show good title and show that all deeds in the chain of title are properly executed. The question is always whether Pansy, as purchaser, can rely on the deed alone or whether she requires additional evidence. If she requires additional evidence, she must be able to explain why she is entitled to this.

Section 23A(2) CPO does not apply because the Deed is less than 15 years old at the date of the agreement. Section 20(1) of the CPO does not apply because the capacities of the signatories are not stated. Simon must produce the sealing requirements of Prosperity Bank Ltd to enable Pansy to compare them with the method of execution to check that the Deed was executed by Prosperity Bank Ltd in accordance with its sealing requirements. Section 23A(1) of the CPO does not assist because the Release is executed after 9 May 2003. Pansy might be able to rely on the presumption of due execution under s 23 of the CPO (a document appearing on its face to be properly executed is presumed properly executed) but is unlikely to be able to do so here because the capacities of the signatories are not stated. Section 23 of the CPO can be relied on only if the sealing requirements are strictly adhered to (*Grand Trade Development Ltd v Bonance International Ltd* CACV 1002/2000) Simon must therefore produce further evidence of proper execution by Prosperity Bank Ltd. For example, if the sealing requirements state that a board resolution is required to authorise sealing, Simon must produce a certified true copy of the resolution authorising Alan Wong and Barbara Chan to sign. If this is required, but Simon cannot produce it, title may be defective. If the method of execution is not in accordance with the sealing requirements, title may also be defective (*Li Ying Ching v Air-Sprung (Hong Kong) Ltd* [1996] 4 HKC 418).

Question 4

The facts state that Peter inspected a flat in Wealthy Court which includes a spiral staircase leading from the flat to the rooftop above the flat and on 1 September 2021, Peter signed a binding provisional agreement (PA) to buy the flat and the rooftop from Vera, the vendor. Note - it is possible for the exclusive use of a rooftop or part of a rooftop to be owned by an individual owner.

Peter describes the flat and rooftop and spiral staircase to his solicitor. Peter's solicitor is concerned that the spiral staircase might have been constructed after the Occupation Permit (OP) for the flat was issued and that its construction might not have been authorised by the Building Authority (BA) under the BO. In addition, the DMC for Wealthy Court provides that no owner will make any alterations which breach the BO. Candidates must recognise that the facts do not state whether the staircase was built before or after the issue of the OP.

Peter's solicitor tells Vera's solicitor that he is concerned that the spiral staircase might be unauthorised. Vera's solicitor replies that neither he nor Vera has any information about the spiral staircase but that it was present when Vera bought the flat and rooftop. Later Vera's solicitor tells Peter's solicitor that he has information which proves that the BA inspected the flat and rooftop in

1988 and that he will provide evidence of this before completion. Vera's solicitor also tells Peter's solicitor that the BA has not since complained about any unauthorised building works at the flat or rooftop. Eventually Peter refuses to sign the formal agreement or pay the further deposit on 14 September 2021, the date provided in the PA.

The PA provides for the price to be paid in three stages, an initial deposit (which exceeds 10% of the price for the flat and rooftop) on the signing of the PA, a further deposit "on the signing of a formal agreement" and the balance on completion. Clause 4 of the PA provides that Peter will sign the formal agreement by 14 September 2021.

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

This is a complex fact pattern which requires candidates to decide whether Peter has breached the PA, whether Vera might be able to give good title by completion and whether Vera can forfeit Peter's deposit. Candidates must identify and discuss the following issues:

1. **The PA is binding.** The words used ("the Vendor shall sell and the Purchaser shall purchase") show intention to be bound. Vera, as vendor, has an implied obligation to give and show good title. This means that Vera must show by proper conveyancing evidence that her title is not defective or defeasible. Her implied obligation is to give good title on completion. Under section 13 of the CPO, she must also produce title deeds showing a chain of title. She must also answer requisitions reasonably raised by Peter.
2. **Building works** (described in section 2 of the BO) carried out after the issue of the OP require the prior consent of the BA. The cutting of a roof slab amounts to building works for which BA consent would be required. If BA consent is not obtained, the BA can under section 24 of the BO take enforcement action against the owner. The threat of enforcement action makes Vera's title defective or defeasible. The cutting of the roof slab is not "in" the building and does not come within section 41(3) of the BO. A breach of the BO breaches the DMC and the threat of enforcement action under the DMC also makes title defective or defeasible. From the facts it appears that Peter cannot be certain that the BO and DMC have been breached and he seems to have insufficient information to raise a proper requisition.
3. **What is good title?** A good title is not a perfect title. If Vera can put forward facts and circumstances to show beyond reasonable doubt that the risk of enforcement action by the BA under the BO or by other owners under the DMC is fanciful, the court will find that Vera's title is good (*MEPC Ltd v Christian Edwards* [1981] AC 205 and *Spark Rich (China) Ltd v Valrose Ltd* CACV 249/1998). Candidates should apply these principles to the facts. See *Kok Chong Ho v Double Value Developments Ltd* [1993] 2 HKLR 423. Candidates should also consider whether Vera might be able to put forward facts and circumstances to show that there is no real risk of enforcement action by other owners under the DMC.

4. **When must Vera give good title?** Vera must prove her title within a reasonable time before completion and give good title on completion. Therefore Peter cannot rescind before completion unless it is clear that Vera cannot remedy any defects in title (*A Mayson Development Co Ltd v Betterfit Ltd* [1992] 2 HKC 533). Candidates should consider the possibility that the defects are not irremediable. Peter's refusal to sign the formal agreement might amount to insistence on a new term (that Vera must give good title before completion) might amount to repudiation of the PA (*Chu Wing Nin v Ngan Hing Cheung* (unreported) HCA 9409/1991).
5. **Must Peter sign the formal agreement on 14 September 2021?** Clause 4 of the PA requires Peter to sign the formal agreement. Clause 2 (b) requires Peter to pay the further deposit "on the signing of the formal agreement" (see *Link Brain Ltd v Fujian Finance Co Ltd* [1990] 2 HKLR 353). Time is of the essence (*Wong Wai Chi Ann v Cheung Kwok Fung Wilson* [1996] 3 HKC 287). Assuming that the formal agreement drafted by Vera's solicitor contains the express terms of the PA and any implied terms and no new terms, Peter's failure to sign the formal agreement and pay the further deposit on the due date amounts to repudiation by Peter which would give Vera the right to terminate the PA (see *Yuen Pok International Enterprise Ltd v Valle Agnes Mallari* CACV 228/2011).
6. **Can Vera forfeit Peter's initial deposit?** Under Clause 5 of the PA, Vera can forfeit Peter's initial deposit without proving loss provided that the deposit is a reasonable amount objectively providing security against non-performance by Peter. Ten per cent of the price has been held to be a reasonable amount. In this case the initial deposit exceeds ten per cent of the price, but Vera might be able to show exceptional circumstances justifying a larger deposit (*Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234). Candidates should give an example of exceptional circumstances. If Vera cannot justify taking a larger deposit, she must return the whole of the initial deposit and sue for damages. Clause 4 of the PA excludes Vera's right to claim damages only if she can forfeit the initial deposit. A few candidates failed to consider the issue of forfeiting the initial deposit.

Question 5

The facts state that Rose and Daisy signed an agreement for sale and purchase dated 25 October 2021 (Agreement) to buy Oliver's flat. Oliver is not related to Rose or Daisy. This is the only agreement signed between the parties. Rose is a Hong Kong permanent resident (HKPR) but Daisy is not. The user of the flat is domestic. Oliver agrees to sell a good title and completion will take place on 11 January 2022.

Oliver bought that flat under an agreement dated 1 December 2018. This was the only agreement he signed. The assignment pursuant to the agreement is dated 7 January 2019. Oliver was the sole purchaser.

5.1 Question: Will the agreement for sale and purchase 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.

Candidates must consider ad valorem duty (AVD) (identified in the question), Special Stamp Duty (SSD) and Buyer's Stamp Duty (BSD). Candidates should from their knowledge of stamp duty know that in a transaction involving residential property, they must consider SSD and BSD as well as AVD.

1. **AVD.** Under s 29BA(a) and Part 1 of Scale 1 of Head 1(1A) of the First Schedule to the Stamp Duty Ordinance, Cap. 117 (SDO) the Agreement, which relates to residential property, is chargeable with ADV at the rate of 15% of the consideration or value (whichever is higher) unless exemptions apply. In this case Rose is a HKPR and she and Daisy are closely related (within section 29AD of the SDO). Provided they are acting on their own behalf and neither beneficially owns any other residential property (information is needed on these questions), they may claim AVD at Scale 2 rates (section 29BA(a) and paragraph (h) of Scale 2 of Head 1(1A) of the First Schedule to the SDO - HK\$ 180,000 + HK\$38,000). The Agreement must be certified according to section 29G of the SDO (that the total value of the transaction does not exceed HK\$6,720,000).
2. **SSD.** Oliver acquired the flat on 1 December 2018 (section 29CA(5)(a)(i) of the SDO). He disposed of the flat on 25 October 2021 (section 29CA(7)(a) of the SDO) which is after the expiry of 12 months from his date of acquisition but within a period of 36 months from his date of acquisition. SSD at the rate of 10% of the consideration (or value whichever is higher) is payable (section 29CA(1) and Head 1(1B), Part 2(c) of the First Schedule to the SDO – HK\$ 638,000).
3. **BSD.** Under s 29CB(1) and Head 1(1C) of the First Schedule to the SDO, BSD at the rate of 15% of the consideration (or value whichever is higher) is payable. However, Rose is a HKPR and she and Daisy are closely related (see above) and no BSD is payable under section 29CB(2)(b) provided each of them is acting on her own behalf (information is needed on this question).

5.2 The building of which the flat forms part is more than 30 years old. Notices have just been issued under sections 30B and 30C of the BO requiring mandatory inspection of the building and window inspection of the flat.

Question: Explain the impact, if any, the notices may have on the title to the flat.

Candidates must identify and deal with the following issues:

1. Oliver as vendor has agreed to sell a good title. He must prove beyond reasonable doubt that the purchasers will not be at risk of a successful assertion against them of an encumbrance (*MEPC Ltd v Christian Edwards* [1981] AC 205 and *Spark Rich (China) Ltd v Valrose Ltd* CACV 249/1998).
2. In *To Yung Sing Herman v Szeto Chak Mei and Others* [2018] HKCFI 1506, the court considered cases concerning notices issued under sections 24 and 26 of the BO. Under section 24 (3), the BA has the power to demolish or alter illegal structures, recover the costs from the owner (under s 24(4) of the BO) and register a memorial of a certificate

against the title of the property under s 33(9) of the BO upon which the costs constitute a first charge on the property. Where such an order is made against the common parts of a building, the apportioned costs of demolition or alteration may be charged against the titles of all the co-owners potentially making all titles defective (*Active Keen Industries Ltd v Fok Chi Keong* [1994] 1 HKLR 396). In *All Ports Holdings v Grandfix Ltd* [2001] 2 HKLRD 630 the Court of Appeal held that a section 26 order created a potential blot on title.

3. By analogy with orders issued under sections 24 or 26 of the BO, undischarged notices under sections 30B or 30C of the BO created a potential blot on title which, if not satisfactorily dealt with by Oliver, would entitle the purchasers to rescind the agreement.
4. If the notices were not registered, this would make no difference because registration is not a pre-condition for registration of a charge under s 33(9) of the BO (*Ip Fong Keng v Fong Yu Shing and Ip Lai Kwan* [2019] HKCFI 1677).

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Examiners' Comments on the 2022 Examination

Head I: Conveyancing

Candidates must identify the legal issues from the facts given, state the law relating and apply the law to the facts to reach an answer to the question. Many of the questions contain multiple issues.

Most candidates would improve their performance by improving the way in which they apply the law to the legal issues to reach an answer.

Question 1

Can Sandy as vendor enforce an oral agreement for sale and purchase against Peter the purchaser?

Comments

1. Is there a concluded oral agreement for sale and purchase of the property? If there is, is it enforceable at law or in equity through the doctrine of part performance?
2. Candidates should consider whether there is a concluded oral agreement. The parties have agreed all essential terms and additional terms. On the facts there could be a concluded agreement.
3. Is the agreement enforceable at law? The facts state that the parties did not sign an agreement as required under section 3(1) of the Conveyancing and Property Ordinance ("CPO"). Alternatively, under s 3(1) of the CPO the oral agreement must be evidenced by a note or memorandum signed by the party to be charged or his lawful agent. Peter is the party to be charged, because the question asks if Sandy can enforce the agreement against Peter.
4. Candidates should apply section 3(1) of the CPO to the facts. Most candidates recognised that the solicitors' letters might amount to a memorandum of the oral agreement, but many candidates failed to deal specifically with the letter written by Peter's solicitor dated 11 March 2022. Candidates should examine this letter and decide whether it amounts to a memorandum of the oral agreement. This letter dated 11 March does not identify the vendor by name, nor does it mention the completion date or the air conditioners.
5. Candidates should continue by considering whether the letter dated 10 March 2022 (signed by Sandy's solicitor) can be joined with the letter of 11 March 2022. The letter of 10 March does refer to the name of the vendor and the completion date. The rule on joinder is that the letter signed by the party to be charged or his agent must contain some express or implied reference to the letter to be joined or some express or implied reference to the transaction. Candidates should look at the words used in the letter dated 11 March and apply the tests. The words do not refer to the letter dated 10 March or a sale or an agreement.

6. Since the letters do not refer to the air conditioners, any memorandum is potentially incomplete. This should lead candidates to discuss first whether the air conditioners are fixtures by applying the appropriate tests. If they are fixtures, they are included in the sale even if not expressly referred to. A number of candidates failed to deal with this issue. Alternatively, Sandy (the party who wants to enforce the oral agreement), might submit to the terms of the oral agreement and include them in the sale. A number of candidates also missed this point.
7. If it is not possible to join the letter dated 10 March with that dated 11 March, candidates should consider whether Sandy can enforce the oral agreement through the doctrine of part performance.
8. Candidates must therefore look at acts done by Sandy, the plaintiff, and state and apply the test from *Steadman v Steadman* [1976] AC 536. Sandy has given Peter possession and permission to clean the property and has instructed solicitors. The giving of possession usually satisfies the test and is regarded as a classic act of part performance: instructing solicitors is not by itself regarded as an act of part performance. In *Ng Yuk Pui Kelly v Ng Lai Ling Winnie* [2021] HKCFA 40, the Court of Final Appeal looked at the cumulative effect of the acts relied on and all the circumstances of the case. Candidates should also apply these principles to the facts. This means that the acts of giving possession and permission to clean might be considered together with the act of instructing solicitors.

Question 2

Pansy as purchaser has failed to complete a written agreement for sale and purchase on time. The agreement contains a clause (Clause 12) limiting Vicki's obligation to give good title. Can Vicki as vendor claim damages being the difference between the contract price of the property and the price at the date of completion?

Comments

Candidates should be familiar with the form of agreement for sale and purchase set out in Form 2 of the Third Schedule to the CPO in which the terms set out in Part A of the Second Schedule to the CPO are incorporated by reference.

1. The issue is whether Pansy has breached the agreement by failing to complete on time. Time is expressly of the essence under the agreement (see Form 2 of the Third Schedule to the CPO). If Pansy is in breach, Vicki is entitled to claim damages from Pansy. The measure of damages should be considered. However, if Vicki's title is defective and she cannot rely on Clause 12 to limit her obligation to give good title, Pansy would not be in breach and she could recover her deposit.

2. As the wall separating the two flats is structural, under the Buildings Ordinance, Cap 123 (“BO”), the Building Authority (“BA”) must consent to the cutting of this wall. The facts state that Vicki obtained BA consent and gave evidence of this to Pansy before Pansy signed the agreement. However, the cutting of this wall breaches the Deed of Mutual Covenant (“DMC”) because it is structural. Candidates should also apply the Building Management Ordinance, Cap. 344 and decide if the wall is a common part and therefore whether the DMC restriction on making alterations to common parts has also been breached. A few candidates answered this question without making it clear that there are breaches of the DMC.
3. A breach of the DMC potentially makes title defective or defeasible because it would expose Pansy to the threat of a lawsuit. However, title is affected only if there is a real risk of enforcement action. Candidates should then consider whether Vicki can put forward facts and circumstances to show beyond reasonable doubt that there is no real risk of enforcement action. Applying the law to the facts, Vicki might argue that since the BO has not been breached, there is no real risk of enforcement action under the DMC.
4. Alternatively, Vicki might seek to rely on Clause 12 of the Agreement to limit her obligation to give good title. Most candidates stated the tests from *Jumbo King Ltd v Faithful Properties Ltd* [1999] 4 HKC 707, CFA which are relevant to a limiting clause. The tests require candidates to consider whether the words used cover the defect and whether Vicki has misled Peter. In this connection many candidates recognised that the words used in Clause 12 would cover breaches of the DMC as well as any breaches of the BO and Government Lease. When considering whether Vicki has misled Peter, candidates should consider whether Vicki knew about the breach. Applying this question to the facts, the breach of the DMC might be identifiable from the DMC and an inspection of the Property. At the date on which the agreement was signed, Vicki has access to the deeds and the Property, but neither Pansy nor her solicitor has seen the deeds. If Vicki knows about the breach of the DMC, candidates must then decide whether Clause 12 contains words that are explicit enough to enable Pansy to understand the risk of possible enforcement of the DMC. Applying this to the facts, candidates might argue that the words of Clause 12 do not specifically identify a breach of the DMC. However, candidates might make an alternative argument based on the words used in Clause 12, the inspection and the Vicki’s disclosure that she obtained BA consent to the cutting of the wall.
5. If Pansy is in breach, Vicki has suffered loss flowing from the breach. At common law the loss is assessed at the date of the breach – i.e. the contract price less the value of the Property at the date of completion. Under Condition 10 of Part A of the Second Schedule to the CPO, the loss is the contract price less the resale price.
6. If candidates decide that Vicki is in breach, candidates might add that Pansy has not suffered any loss but that she can recover her deposit.

Question 3

There is a binding agreement for sale and purchase of a flat in Joyful Place between Pat as purchaser and Sam as vendor. Sam agrees to sell a good title.

Comments

Question 3.1

The intermediate root of title is Mortgage Memorial No. UB 4716738. Reasons – see section 13(1)(a)(ii) of the CPO. In practice, Assignment Memorial No. UB4716737 might be used.

Question 3.2

Can Sam give good title in the following circumstances?

Missing certified true copy of the Occupation Permit (“OP”). If the property was built before 1 June 1956, there might be no OP. The date of the Government lease (29 June 1973) indicates that the property was likely built after 1956. The OP shows satisfactory completion of a new building. Sam must produce a certified true copy in order to give and show good title. A certified true copy will suffice, because the OP relates to all flats in Joyful Place. Sam can obtain a certified true copy from the Building Authority.

Missing Assignment with Plan Memorial No. UB2578323. Sam must produce this to show title even though it is a pre-intermediate root document if later documents refer to the plan attached to this assignment. See section 13(1)(b) CPO. Sam can both show and give good title with a certified true copy. See sections 13(2) and 13A(1)(b) of the CPO.

Missing Mortgage Memorial No. UB4716738. This is the intermediate root. See Question 3.1 above. Sam can show title with a certified true copy under section 13(2) of the CPO. In order to give good title at completion, Sam must hand over the original which relates exclusively to the property sold. Candidates must refer to case law and explain the reason for this. If the original is lost, Sam must explain how it was lost. If he is unable to do so, Pat can only refuse to complete if there is a realistic possibility of some transaction relating to the property sold that could affect the purchaser. Applying this to the facts, candidates should note that the mortgage has been released thereby making the risk of a successful assertion by the mortgagee unreal.

Question 3.3

The issue is whether Sam alone can sell the property following the death of his wife Susan. Sam and Susan bought the property as joint tenants. Sam can sell the property as the surviving joint tenant provided the joint tenancy was not severed in their joint lifetimes. He must show evidence of Susan’s death. The facts state that a charging order in respect of Sam’s debts was registered against the property before Susan’s death and also discharged before her death. The issue is whether the charging order severed the joint tenancy. There is conflicting case law on this point and a good answer would deal with the decisions in *Malahon Credit Co Ltd v Siu Chun Wah Alice*

[1988] 1 HKLR 196 and *Ho Wai Kwan v Chan Hon Kuen* [2015] HKEC 132. See also *Ego Finance Ltd v Cham Kin Man* [2018] HKDC 741. If the joint tenancy was severed by the charging order, Susan's personal representative must sell Susan's share of the property.

Question 4

There is a binding provisional agreement for the sale and purchase of a flat with domestic use between Sylvia as vendor and Ben and Brenda as purchasers. The agreement is dated 21 October 2022. The parties agree to sign a formal agreement on or before 3 November 2022. The question asks whether the formal agreement will attract stamp duty, if so, how much and who will pay?

Comments

Question 4.1

Candidates should consider, Ad Valorem Stamp Duty ("AVD"), Buyer's Stamp Duty ("BSD") and Special Stamp Duty ("SSD"). The terms of the agreement state who is liable for any stamp duty. If duty is payable, answers should state the amount.

AVD – the property is residential property, but is it a single residential property within section 29(A)(1) of the Stamp Duty Ordinance, Cap.117 ("SDO")?

Under section 29BA(a) and Part 1 of Scale 1 of the First Schedule to the SDO, the formal agreement is chargeable with stamp duty at the rate of 15% of the price or the value (whichever is higher unless exemptions apply).

Under sections 29BB(1) and (3) of the SDO Scale 2 applies because Ben and Brenda are closely related (section 29AD) provided each is acting on his own behalf and is not the beneficial owner of any other residential property in Hong Kong. See section 29BB(1)(b) and consider the evidence that they must supply. See also paragraph (k) of Scale 2 of Head 1 (1A) of the First Schedule to the SDO for details of the rate.

SSD

Sylvia acquired the property on 4 August 2021 and disposed of it on 21 October 2022 (sections 29CA(5)(a)(i) and 29CA(7)(a) of the SDO). Under section 29CA(1) and Head 1(1B), Part 2(c) of the First Schedule to the SDO, SSD is payable at the rate of 10% of the consideration or the value whichever is higher.

BSD

Ben is a Hong Kong Permanent Resident. Brenda is not but she is closely related to Ben. See 3.1 above. Under section 29CB(2)(b), there is an exemption from BSD provided each is acting on his own behalf. Evidence of this is required under section 29CB(2) of the SDO.

Question 4.2

Before signing the agreement, Ben and Brenda met Sylvia's father at the property. Does this meeting have an impact on title?

1. The issues are whether Frank has an unwritten equitable interest in the property which would bind Ben and Brenda. Priority between Frank and Ben and Brenda is governed by the common law doctrine of notice which applies because any interest that Frank has would be unwritten. Under this doctrine, Ben and Brenda would have notice of any interest of an occupier of the property.
2. Frank might have acquired an interest under a resulting or constructive trust. A good answer would explain the concepts concisely and include a reference to the presumption of advancement.
3. The question then is whether Frank is an occupier. 'Occupation' requires some degree of permanence. Candidates should apply this to the facts. Candidates should also consider Frank's silence or inaction concerning any interest that he might have.

Question 5

Paula as purchaser requires completion in person of an agreement for sale and purchase which is in Form 2 of the Third Schedule to the CPO. Victor as vendor agrees to give good title and to prove title in accordance with section 13 of the CPO. On completion, Victor's solicitor is unable to hand over the original or a certified true copy of a power of attorney relating to the title and Paula refuses to complete. Later Paula requires specific performance, but Victor has sold the property to a third party.

Comments

1. The question requires a discussion of Paula's entitlement to the original or a certified true copy of the power of attorney in question. See and apply section s13(1)(a) and (c) of the CPO. A good answer would also refer to Conditions 8 and 9 of Part A of the Second Schedule to the CPO.
2. Victor must show title before completion (sufficiently well in advance of completion) and give title on completion. Time is expressly of the essence.
3. Paula is entitled to completion in person but the midnight rule applies. Candidates should consider whether Paula must wait until midnight on the day of completion to give Victor time to hand over the power of attorney. A number of candidates missed this point.
4. On the facts, Paula is unlikely to have breached the agreement and provided that she is not in breach, she may apply for specific performance. Most candidates were able to state the requirements including the requirement that Paula must be ready willing and able to complete. Candidates should apply this requirement to the facts.

5. As Victor has sold the property to a third party, the question of priority between the two purchasers should be discussed. A number of candidates failed to consider priority. It seems appropriate to consider priority at common law – where the equities are equal, the first in time prevails and under s3(1) of the Land Registration Ordinance, Cap. 128. See *Chu Kit Yuk v Country Wide Industrial Ltd* [1995] 1 HKC 363.
6. Many candidates mentioned that Paula might not be able to obtain specific performance even if she has priority, if Lily can show exceptional hardship. Candidates should apply this principle to the facts.

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Examiners' Comments on the 2023 Examination

Head I: Conveyancing

Examiners advise candidates to note the following:

- No credit is given for copying out a question without any attempt at answering,
- Candidates are given credit for relevant and correct points made in an attempt at answering a question, even if the answer is short or incomplete,
- Candidates should identify all issues raised by the facts of a question and attempt to deal with all issues – for example, candidates have a tendency not to deal fully with priority issues embedded in questions,
- Candidates should apply the law to the facts of each question – see below for examples, and
- Candidates should avoid contradicting their conclusions.

Candidates must answer 4 out of 5 questions. The following is a guide to the issues raised by the 2023 questions. It does not include complete model answers. Candidates should, where necessary, cite legislation and cases.

Question 1.1

Section 51(1) of the Conveyancing and Property Ordinance, Cap. 219 (“CPO”) implies the powers contained in the 4th Schedule to the CPO into a legal mortgage. Paragraph 2 of the 4th Schedule to the CPO gives M Bank Ltd as mortgagee the power to take possession on the occurrence of an event of default. Mary, the mortgagor, has failed to pay interest within one month of becoming due. This is an event of default. The facts also state that Mary has failed to pay management charges. This is a breach of a covenant in the mortgage which is also an event of default. The loan is repayable on demand. If M Bank Ltd makes a demand and Mary fails to repay the loan in accordance with the demand, this would also be a breach of covenant which is an event of default. Candidates should apply the CPO events of default to the facts rather than stating all events of default contained in the 4th Schedule to the CPO.

M Bank Ltd takes possession either by obtaining a court order for physical possession or by giving notice to the tenant to pay rent to it. In this case M Bank Ltd has consented to the tenancy agreement which was entered into by Mary after the mortgage. The mortgage was registered within one month after its date and takes priority from the date of creation which is before the date on which the tenancy was created. M Bank Ltd cannot therefore evict the tenant. M Bank Ltd must therefore take possession by collecting rent from the tenant. M Bank Ltd must give notice to the tenant to pay rent to it. A number of candidates did not fully explain these points.

Question 1.2

The tenancy agreement contains a covenant by Mary as landlord to repay the deposit at the end of the term. The issue is whether the burden of this covenant has passed to M Bank Ltd as mortgagee. This covenant to repay has been found to be a personal covenant the burden of which does not pass. Candidates should explain why the covenant is personal.

Candidates might have considered whether, as a condition of consenting to the letting, M Bank Ltd took an assignment of the rent and tenancy deposit in which case M Bank Ltd would be liable to repay the tenancy deposit.

Question 1.3

The issue is whether the burden of the covenants has passed to M Bank Ltd as mortgagee. Mary, the mortgagor, is a successor in title to one of the parties to the Deed of Mutual Covenant (“DMC”). M Bank Ltd as mortgagee derives its title from Mary. Candidates should apply sections 41(3), 41(2) and 40 of the CPO to the three covenants. Covenant 1 has been found to relate to land of the covenantor. Covenant 2 also relates to land. But covenant 3 (to employ Richly Ltd to carry out repairs or renovations) is likely to be a personal covenant. Candidates should explain the difference between covenants relating to land and those that are purely personal.

Richly Ltd is in any event unlikely to be able to enforce covenant 3 because it has not retained any undivided shares in the land.

The burden of the covenant to pay management charges potentially passes to M Bank Ltd whether or not it is in possession. Therefore M Bank Ltd might be liable for the arrears. However, the DMC might show an intention that the burden does not pass by stating that only mortgagees in possession are liable for management charges. Candidates might also refer to case law to answer this question. See *Discovery Bay Services Management Ltd v Buxhaum* [1995] HKDCLR 7 and *Wise Wave Investments Ltd v TKF Services Ltd* [2007] 4 HKLRD 762.

Question 1 was the least popular question.

Question 2.1

Candidates should consider Ad Valorem Duty (“AVD”), Special Stamp Duty (“SSD”) and Buyers Stamp Duty (“BSD”).

AVD – the permitted user of the property is residential. Under Part 1 of Scale 1 of Head 1(1A) of the First Schedule to the Stamp Duty Ordinance, Cap. 117 (“SDO”) AVD at the rate of 15% of the consideration or value of the property is payable unless exemptions apply. However, Scale 2 would apply here provided this is a single residential property and Sunny and Moon are acting on their own behalf because the facts state that they do not own any other residential property, that Sunny is a Hong Kong permanent resident and that he and Moon are a married couple. This makes them closely related within the meaning of the SDO. Under Scale 2 the rate of duty is 3.75%. The agreement must contain a certificate of value.

SSD – candidates should state the relevant dates of acquisition and disposal. The rate of duty is 10% of the consideration or value whichever is higher. There are no exemptions.

BSD - this is payable at the rate of 15% of the consideration or value whichever is higher unless exemptions apply. However, in this case Sunny is a Hong Kong permanent resident and Moon is closely related within the meaning of the SDO and no BSD is payable provided that each is acting on his or her own behalf.

Under the SDO both parties are liable for AVD and SSD and the purchaser is liable for BSD. The agreement, however, makes the purchaser alone liable for AVD and BSD and the vendor liable for SSD.

Provided the formal agreement is signed within 14 days after the provisional agreement, AVD, SSD and BSD are payable on the formal agreement within 30 days after its date and there is no obligation to stamp the provisional agreement.

Candidates performed well on this question. SSD and BSD are no longer in the syllabus, but AVD remains in the syllabus. A number of candidates omitted some information regarding AVD - for example,

- Duty is payable on the consideration or value whichever is higher,
- A certificate of value must be included in the document if the rate of AVD is lower than the maximum rate,
- All parties to the document are liable under the SDO, but the agreement often states that the purchaser alone will pay AVD and
- The time for stamping is within 30 days **after** the date of the document.

Question 2.2

A number of candidates did not answer this part of question 2 or gave very brief answers. Candidates should be able to recognise that ongoing litigation against the owners' corporation ("IO") is a title problem and that the vendor has an obligation to give good title. Candidates might then state what amounts to a good title and realise that the litigation against the IO might result in the purchaser being required to contribute to the cost after completion. Thus the vendor is unable to give an unencumbered title.

A fuller answer to this question would explain that under the Building Management Ordinance, Cap. 344 the IO has power to establish a contingency fund to cover expenditure of an urgent or unexpected nature. The IO also has power to determine the contributions to the fund to be made by each owner. The Deed of Mutual Covenant ("DMC") might provide that the expression "owner" means any owner for the time being which would mean that the purchaser would be liable to contribute to the fund to cover the cost of litigation. The DMC might also provide that a charge may be registered against the undivided shares of any owner who fails to contribute.

The liability to contribute to the fund might be of such magnitude that it exceeds the contemplation of the purchaser in which case the vendor would be unable to give good title. This principle has been extended to cover a situation where there is ongoing litigation against the IO involving much smaller sums when the amount of the liability is unknown.

If the amount of the liability and the contribution due from the owners is known, the purchaser might be obliged to accept the vendor's title if the vendor agrees to give a fortified undertaking to pay the contribution due.

Question 3.1

The Assignment dated 14 January 2010 is within the chain of title period. The vendor can show or prove title with a certified true copy, but since it relates exclusively to the property sold, the vendor must be able to give the purchaser the original on completion.

If the vendor is not in possession of the original, he must give a satisfactory explanation as to the reason – for example, a statutory declaration of loss of title deeds - so that the purchaser is not fixed with constructive notice of a prior interest. The explanation is necessary only if there is a realistic possibility of the successful assertion of a prior interest. The question in every case is whether there is a real risk of an encumbrance affecting the property.

The Release dated 23 May 2005 is more than 15 years old at the date of the agreement. The presumptions in section 13(4A) of the CPO apply. The vendor does not need to produce **the Power of Attorney**.

The vendor must show that the Assignment dated 29 June 2020 has been properly executed by Big Apple Ltd. A deed is required to pass the legal estate. The seal of Big Apple Ltd has been affixed. The vendor must be able to show that it has been affixed in accordance with the company's sealing requirements. The presumptions in sections 20(1), s 23(1) and (2) of the CPO do not apply. Candidates should state the reasons why. The vendor must therefore produce the **sealing provisions of Big Apple Ltd** so that the purchaser can check that the sealing provisions have been complied with and in particular whether the presumption in s 23 of the CPO applies.

Question 3.2

If the rent payable under the tenancy agreement is a market rent, the tenancy agreement, does not need to be registered in order to bind the purchaser. The option to renew, however, is an interest which is separate from the tenancy and which must be registered, failing which it will be void against a subsequent purchaser for value even if the purchaser has notice.

Candidates might mention that under the agreement for sale and purchase, the vendor must give vacant possession on completion and that the vendor cannot do so unless he agrees a surrender with the tenant. The tenant is not obliged to agree and surrender.

Question 4

The provisional agreement (“PA”) is binding because it shows an intention to be bound. It does not matter that it has not been registered because registration affects priority and not validity.

The purchaser will not be able to obtain specific performance of the PA if it has been validly terminated or if the purchaser is in breach.

The PA requires the purchaser to sign a formal agreement (“FA”). However, the purchaser has no obligation to sign if the FA contains a new term which is not contained or implied into the PA. In this case the vendor tries to insert into the FA a term requiring the purchaser to complete by way of undertaking. The purchaser is not obliged to accept this term because the PA does not provide for completion by undertaking and the purchaser is entitled to require formal completion which means the simultaneous exchange of the price for the assignment. The purchaser’s failure to sign the FA is not therefore a breach by the purchaser.

The vendor’s insistence on a new term might amount to repudiation. If the purchaser has accepted the vendor’s repudiation, the PA would be terminated. Acceptance must show unequivocally that the purchaser regards the PA as being terminated. The facts in this case do not show this.

The purchaser has failed to pay the further deposit. The question is whether the obligation to pay is linked to signing the FA or whether it is independent. The wording in the PA could indicate that the obligation to pay is independent. Thus the purchaser might be in breach of the PA.

Time is of the essence under the PA.

The vendor alleges that the purchaser was late completing because the balance of purchase price was received after 5pm on the day of completion, but under the PA the purchaser has until midnight to complete. There is no breach on this ground.

Assuming that the purchaser has not breached the PA, he must show that he is ready, willing and able to complete at the time of completion and the date of the hearing for specific performance. Candidates should apply this to the facts which indicate that the purchaser has the purchase price ready. Many candidates mentioned that there are bars to the award of specific performance. A good answer would also state that the facts do not suggest that any bars apply here.

A number of candidates did not refer to the priority issue between the charging order and the PA. Candidates should be able to state the dates of registration. Case law shows that the vendor signed the PA before the charging order was obtained and that when the charging order was obtained, there was nothing to which the charging order could attach. If the purchaser has notice of the charging order, it must pay the balance of purchase price to the chargee.

Question 5

The purchaser can recover the deposit if the vendor has breached the agreement by failing to give or show good title. However, if the purchaser has breached the agreement (and the vendor is not in breach) by failing to complete on time, the vendor can keep the deposit without proving loss provided the deposit is reasonable as earnest money. A deposit equal to 10% of the price has been held to be reasonable. Time is of the essence.

The vendor has a duty to give and show good title. The latter includes an obligation to answer requisitions reasonably raised. Under Condition 7(1) of Part A of the 2nd Schedule to the CPO, the purchaser must raise requisitions no later than 14 days before completion.

Candidates might consider whether the purchaser waived its right to good title after viewing the flat and signing an agreement to buy. However, the agreement provides expressly that the vendor will give good title.

The purchaser's requisitions dated 7 September 2023 are reasonably raised. The alterations made to the entrance to the flat potentially breach the Buildings Ordinance, Cap.123 ("BO"), the BMO and the Deed of Mutual Covenant. ("DMC") However, they are raised out of time. The vendor need not answer them unless they go to the root of the title and even then not, if with due diligence, the purchaser could have discovered them earlier. Candidates should apply these principles and consider whether the requisitions go to the root of the title and whether the purchaser could have raised them earlier. In this connection, candidates might consider that the entrance can easily be restored to its original condition (no walls have been demolished) which would suggest that the requisitions do not go to the root of the title. However, it appears that the vendor has agreed to sell a portion of the common parts which would suggest that the requisitions do go to the root of the title because the vendor cannot give title to the common parts. However, the facts indicate that the problem might have been identified from the plans with the title deeds which the vendor sent to the purchaser within the time limit for raising requisitions. For this reason the vendor might not be obliged to reply to the requisitions.

Even if the vendor is not obliged to reply to the requisitions, the vendor must give good title on completion. The issues are then whether there is a real risk of enforcement action for breach of the BO, the BMO or the DMC or whether there are facts and circumstances to show beyond reasonable doubt that there is no real risk of enforcement action.

Regarding the BO, candidates should refer to the exemption for the need for Building Authority consent to alterations in section 41(3) of the BO. Several candidates suggested that the alterations were not inside the building. The alterations described in the facts are not inside the flat but they are inside the building and the facts suggest that they do not affect the structure because no walls have been demolished.

Regarding the DMC and BMO, the covenant referred to in requisition 1 and section 18 (1)(a) of the BMO both permit consent to be given and consent might have been given. Even if no consent were given, since no enforcement action has been taken for a long period of time, the IO might have waived the right to take enforcement action. Waiver is a possible defence because the

covenant and section 18(1)(a) of the BMO both permit consent to be given. By contrast, if there is a breach of section 18(1)(b) of the BMO, waiver is not possible. If there is waiver, there is no real risk of enforcement action.

When discussing unauthorised building works, some candidates refer to breaches of the Government Lease, the BO, the DMC and the BMO without identifying the specific problem. A good answer would analyse the issue and decide who might take enforcement action.

Although it is possible in this case that no enforcement action will be taken, the vendor cannot sell common parts. However, candidates might mention that the area of the common parts which the vendor has agreed to sell is small in relation to the area of the flat and the vendor might be able to claim that he can give substantial performance and force the purchaser to complete.

3. Past Examination Papers from 2021 to 2023

**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

**2022 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

HEAD I: CONVEYANCING

Tuesday, 25 October 2022



2022 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

In March 2022, Sandy Li (“Sandy”) and Peter Poon (“Peter”) negotiated the terms on which Peter would buy Sandy’s shop at Ground Floor, 122 Red Road, Central, Hong Kong. Sandy’s shop includes a small open yard to the rear (Sandy’s shop and open yard are together referred to as the “Shop”). Eventually Sandy and Peter agreed orally that Sandy would sell the Shop to Peter for a consideration of HK\$200 million with completion on 1 August 2022. They also agreed orally that the sale would include two split-level air conditioners currently installed in the Shop. The air handling units are inside the shop and are connected by pipes leading to the condensers which are located in the open yard.

Sandy and Peter each instructed solicitors to act for them in connection with the sale and purchase and on 10 March 2022, Sandy’s solicitor sent Peter’s solicitor the following letter:

“Dear Sirs,

We act for Sandy Li who has agreed to sell the shop and open yard to the rear of the shop at Ground Floor, 122 Red Road, Central, Hong Kong to Peter Poon for a consideration of HK\$200 million with completion on 1 August 2022. Please confirm that you have instructions to act for Peter Poon.”

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

Sandy's solicitor signed the above letter. On 11 March 2022, Peter's solicitor replied as follows:

"Dear Sirs,

We confirm that we have instructions to act for Peter Poon in connection with his negotiations to buy the shop and open yard to the rear of the shop at Ground Floor, 122 Red Road, Central, Hong Kong for a consideration of HK\$200 million. Please send us a draft agreement for sale and purchase for approval."

Peter's solicitor signed the above letter. Neither letter contains any reference to the air conditioners.

At Peter's request, Sandy gave Peter keys to the Shop on 15 March 2022 so that Peter could draw up plans for fitting it out. With Sandy's permission, Peter also started cleaning the Shop in preparation for fitting it out. On the same day, Peter paid Sandy a deposit of HK\$1 million. Sandy and Peter agreed that this would eventually be part of the deposit that Peter would pay Sandy when they signed the sale and purchase agreement.

Sandy's solicitor sent a draft sale and purchase agreement to Peter's solicitor on 21 March 2022. Despite repeated requests by Sandy's solicitor, Peter did not sign the sale and purchase agreement. On 15 July 2022, Peter informed Sandy that he no longer wants to buy the Shop. Peter returned the keys to Sandy.

Question:

Answer the following question giving reasons for your answer:

Can Sandy enforce the oral agreement for sale and purchase against Peter?

(25 marks)

Question 2 (25 marks)

On 30 June 2022, Pansy Bo (“Pansy”) as purchaser and Vicki Vong (“Vicki”) as vendor entered into a binding agreement for sale and purchase (the “Agreement”) whereby Pansy agreed to buy Vicki’s Flats, i.e. 15A and 15B, Pine Court, 20 Pine Road, Hong Kong (Flats 15A and 15B are together referred to as the “Property”) for a consideration of HK\$30 million. Completion was due to take place on 3 October 2022. Under the Agreement, Pansy paid Vicki a deposit of HK\$3 million. Pansy particularly likes the Property because it is very big.

The Agreement is substantially in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219. It includes the following clauses 12 and 13:

“12. The Purchaser has inspected the Property and will not raise any requisitions or object to title in connection with any unauthorised alterations or illegal structures at the Property.

13. Subject to Clause 12, the Vendor agrees to give good title to the Property.”

As mentioned above, the Property consists of two adjoining flats – Flats 15A and 15B. Vicki bought them in 2010 and converted them into the Property, which is a single large flat. Vicki did this by cutting the structural wall (assume that the wall is structural) which separates Flat 15A from Flat 15B, to make an opening which connects the two flats. The opening is 4 feet wide. Vicki obtained approval from the Building Authority (“BA”) under the Buildings Ordinance, Cap. 123 to cut the structural wall and make this opening. Before Pansy signed the Agreement, Vicki showed her a certified true copy of the written approval from the BA.

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

Vicki's solicitor sent Pansy's solicitor the title deeds on 15 July 2022. Pansy's solicitor then discovered that the Deed of Mutual Covenants for Pine Court (the "DMC") contains the following covenants:

"1. No owner will make any structural alterations to any part of Pine Court.

2. No owner will make any alterations to the common parts of Pine Court."

The DMC does not contain a definition of common parts.

Pansy's solicitor raised a requisition asking for evidence that consent had been obtained under the DMC to making an opening in the structural wall separating Flat 15A from Flat 15B. Vicki's solicitor replied that Vicki had not obtained any such consent, but pointed out that the BA had consented to Vicki making the opening and that the Agreement includes clause 12.

Pansy did not complete her purchase on 3 October 2022 on the grounds that Vicki's title is defective due to Vicki's breach of the DMC and that clause 12 does not effectively limit Vicki's obligation to give good title. Vicki's solicitor wrote to Pansy's solicitor saying that the Agreement is terminated and that Vicki has kept the deposit of HK\$3 million. The current market value of the Property is HK\$24 million.

Question:

Answer the following question giving reasons for your answer:

Can Vicki claim damages from Pansy equal to the difference between the consideration stated in the Agreement and the current market value of the Property?

(25 marks)

Question 3 (25 marks)

On 24 October 2022, Pat signed a binding Agreement for Sale and Purchase (the “Agreement”) with Sam to purchase his property known as Flat D, 12th Floor, Joyful Place, Wanchai, Hong Kong (the “Property”). The Agreement includes a term that a good title will be sold.

All the title documents set out in the list below (the “List”), except items (1) and (2), relate exclusively to the Property:

- (1) Agreement and Conditions of Sale No. 11213 dated 29 June 1973
- (2) Deed of Mutual Covenant dated 20 September 1983 (Memorial No. UB2482499)
- (3) Assignment with Plan dated 16 April 1984 (Memorial No. UB2578323)
- (4) Mortgage dated 18 May 1984 (Memorial No. UB2578367)
- (5) Agreement for Sale and Purchase dated 30 November 1990 (Memorial No. UB4657494)
- (6) Receipt on Discharge of a Charge dated 10 January 1991 (Memorial No. UB4716736) endorsed on Mortgage Memorial No. UB2578367
- (7) Assignment dated 10 January 1991 (Memorial No. UB4716737)
- (8) Mortgage dated 10 January 1991 (Memorial No. UB4716738)
- (9) Release (of Mortgage Memorial No. UB4716738) dated 18 December 2020 (Memorial No. 20122086598712)

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.

(3 marks)

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

3.2 Sam has lost the following:

- A certified true copy of the occupation permit for Joyful Place,
- the original Assignment with Plan Memorial No. UB2578323 (Item (3) of the List), and
- the original Mortgage Memorial No. UB4716738 (Item (8) of the List).

Sam does not plan to provide Pat with these documents. **How, if at all, does this affect Sam's obligations under the Agreement?**

(15 marks)

3.3 Sam first bought the Property with his wife, Susan. They are the purchasers under Assignment Memorial No. UB4716737 (Item (7) of the List) which they executed as joint tenants. Susan died on 17 May 2022. **To what extent will Sam's right to deal with the Property be affected if a Charging Order *nisi* and a Charging Order absolute in respect of Sam's unpaid debts were dated and registered against the Property at the Land Registry on 16 March 2021 and 2 July 2021 respectively and they were subsequently discharged by a Discharge dated and registered at the Land Registry on 3 December 2021?**

(7 marks)

Question 4 (25 marks)

Ben Ma (“Ben”) is a Hong Kong permanent resident but his wife, Brenda Ma (“Brenda”) is not. On 21 October 2022, they entered into a binding written Provisional Agreement for Sale and Purchase (the “Provisional Agreement”) to purchase as joint tenants a property in Happy Valley (the “Property”) from its present owner, Sylvia Smith (“Sylvia”), who is not related to them in any way, at the price of HK\$22 million. According to the Land Registry search, Sylvia entered into an Agreement for Sale and Purchase as the purchaser of the Property on 4 August 2021. The government grant, deed of mutual covenant and occupation permit relating to the Property provide for its user to be “domestic”.

Before signing the Provisional Agreement, Ben and Brenda met Frank, Sylvia’s father, when they went to inspect the Property. During their meeting (the “Meeting”), Frank told Ben and Brenda that he was staying at the Property whilst his own flat was under renovation. He also showed them round the Property and negotiated the purchase price with them.

The terms of the Provisional Agreement (in which Sylvia was defined as the “Vendor” and Ben and Brenda together as the “Purchaser”) include the following:

- “1. *The Vendor will sell a good title to the Purchaser.*

2. *An initial deposit equivalent to 5% of the purchase price was paid by the Purchaser to the Vendor upon the signing of the Provisional Agreement.*

3. *A further deposit equivalent to 5% of the purchase price will be payable by the Purchaser to the Vendor on or before 3 November 2022.*

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

4. *The balance of purchase price will be payable by the Purchaser to the Vendor at completion on or before 1 December 2022.*
5. *The Formal Agreement for Sale and Purchase will be signed on or before 3 November 2022.*
6. *Each party will pay his or her or their own legal costs. Registration fees and all forms of stamp duty (except any special stamp duty that may be payable in respect of this transaction) will be paid by the Purchaser.*
7. *The Vendor will pay any special stamp duty that may be payable in respect of this transaction.”*

Questions:

Answer the following questions giving reasons for your answers:

- 4.1 Will the Formal Agreement for Sale and Purchase, if signed within the time limit, attract ad valorem and/or other stamp duties? If so, how much will they be and who will pay them? If you require further information to prepare the answer, state what it is and why you require it.**

(15 marks)

- 4.2 Explain the impact, if any, the Meeting may have on the title to the Property.**

(10 marks)

Question 5 (25 marks)

On 1 September 2022, Victor as vendor and Paula as purchaser entered into a binding agreement (the “Agreement”) whereby Victor agreed to sell Paula his flat known as 6B, Bauhinia Court, 6 Bauhinia Road, Hong Kong (the “Property”) for a consideration of HK\$18 million with completion on 10 October 2022. The Agreement is substantially in the Form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219. Clause 4 of the Agreement provides:

“4. Completion shall take place at the offices of the Vendor’s solicitor on 10 October 2022.”

The Agreement also includes the following clause 12:

“12. The Vendor will give good title and will prove title in accordance with section 13 of the Conveyancing and Property Ordinance, Cap. 219.”

The Property was built in 1984. During title investigation, Paula’s solicitor asked Victor’s solicitor for a certified true copy of a power of attorney dated 2 July 2015 (the “Power of Attorney”) under which an Assignment of the Property dated 3 August 2015 was executed by the attorney of Raymond Wong as vendor in favour of Victor as purchaser. Victor’s solicitor said that he would later supply a certified true copy of the Power of Attorney. Paula’s solicitor asked for the original or a certified true copy to be supplied on or before completion. All other title deeds supplied by Victor’s solicitor are in order.

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

One week before completion, Victor's solicitor suggested that completion take place by way of undertaking. He sent Paula's solicitor a completion statement requiring the balance of purchase price to be paid in two cashier orders as follows:

1. One made payable to Victor's mortgagee for the account of Victor to discharge Victor's mortgage, and
2. one made payable to Victor's solicitor's firm.

Five days before completion, Paula's solicitor told Victor's solicitor that he wanted to complete in person. Paula's solicitor made an appointment to meet at the offices of Victor's solicitor at 4.30 p.m. on 10 October 2022. Paula's solicitor and Paula attended this appointment with two cashier orders as instructed. Victor's solicitor held an assignment of the Property executed by Victor and a discharge from Victor's mortgage executed by Victor's mortgagee, but Victor's solicitor did not hold the original or a certified true copy of the Power of Attorney dated 2 July 2015. Victor's solicitor told Paula's solicitor that he would give an undertaking to supply a certified true copy within 14 days. As instructed by Paula, Paula's solicitor refused to complete.

On 18 October 2022, Victor's solicitor obtained the Power of Attorney and on the same day, Victor entered into a binding agreement to sell the Property to Lily Leung ("Lily"). The sale was completed on 24 October 2022 and Lily moved into the Property immediately. Bauhinia Court is next to Bauhinia Hospital. Lily particularly wanted to move to Bauhinia Court because she has a serious illness for which she is receiving regular treatment at Bauhinia Hospital.

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

Question:

Answer the following question giving reasons for your answer:

Advise Paula whether she can obtain specific performance of the Agreement.

(25 marks)

END OF TEST PAPER

**2023 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

HEAD I: CONVEYANCING

Wednesday, 25 October 2023



2023 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

In 1994, Richly Ltd. developed a block of 40 residential flats on Inland Lot No. 456. The block is called “Richly Gardens”. Richly Ltd. paired one equal undivided share of and in Inland Lot No. 456 and of and in Richly Gardens with each flat and sold all 40 flats. Alfred bought one equal undivided share of and in Inland Lot No. 456 together with the right to the exclusive use of Flat 1.

Richly Ltd. and Alfred then entered into a Deed of Mutual Covenant (the “DMC”) which includes the following covenants by them:

1. *that they will pay monthly management charges in respect of their exclusive use areas;*
2. *that they will contribute proportionately according to their exclusive use areas to the cost of maintaining, repairing and renovating the common parts of Richly Gardens; and*
3. *that they will employ Richly Ltd. to carry out the work in the event that they want to carry out any renovation or repairs to the common parts of Richly Gardens.*

The DMC was registered in the Land Registry. Richly Gardens is managed by Richly Management Ltd. The owners have not incorporated.

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

Betty bought from Richly Ltd. one equal undivided 40th share of and in Inland Lot No. 456 and of and in Richly Gardens together with the right to the exclusive use of Flat 2 (“Flat 2”) “subject to and with the benefit of the DMC”. In 2010, Betty sold Flat 2 to Mary also “subject to and with the benefit of the DMC”. Mary financed her purchase by mortgaging Flat 2 to M Bank Ltd. to secure a loan of HK\$10 million (the “Mortgage”). The Mortgage is in the form set out in Form 5 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219. The Mortgage is dated 7 June 2010. M Bank Ltd. registered the Mortgage in the Land Registry within two weeks of its date. The loan is repayable by equal monthly instalments of principal and interest.

With the prior written consent of M Bank Ltd., Mary leased Flat 2 to Tom for a term of 2 years starting on 3 October 2022 at a calendar monthly rent of HK\$60,000 inclusive of management charges (Mary pays the management charges). Tom paid Mary a tenancy deposit of HK\$120,000 and Mary agreed to repay this deposit to Tom at the end of the Lease term subject to deductions for any rent unpaid by Tom.

Since June 2023, Mary has not paid any of the monthly instalments of principal and interest due under the Mortgage. Richly Management Ltd. has informed M Bank Ltd. that Mary has not paid the monthly management charges due under the DMC since January 2023 and that the owners have resolved to renovate the entrance lobby to Richly Gardens. The entrance lobby is a common part.

M Bank Ltd. requires advice as to whether it can evict Tom or collect the rent that Tom pays and whether it is liable to repay the rental deposit to Tom. M Bank Ltd. is also concerned about its liability to pay management charges including the arrears and the liability of the owners to employ Richly Ltd. to renovate the entrance lobby. M Bank Ltd. does not dispute that the entrance lobby is a common part or that renovation is necessary.

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

Question:

Answer the following questions giving reasons for your answers:

Advise M Bank Ltd.:

1.1 whether it can evict Tom from Flat 2 or collect rent from Tom;
(8 marks)

1.2 whether it is liable to repay the tenancy deposit to Tom if M Bank Ltd. evicts Tom or at the end of the Lease term;
(4 marks)

1.3 whether:

- it is liable to pay management charges in respect of Flat 2 including the arrears (If you need more information to answer this question, state what information you need), and**
- the owners are obliged to employ Richly Ltd. to carry out the renovations to the entrance lobby.**

(13 marks)

Question 2 (25 marks)

On 24 October 2023, Sunny Wong (“Sunny”) and his wife, Moon Wong (“Moon”), signed a binding written Provisional Agreement for Sale and Purchase (the “Provisional Agreement”) to purchase as joint tenants a flat in Festival Building in Wanchai, Hong Kong (the “Property”) from Oliver Rock (“Oliver”), who is not related to them in any way, at the price of HK\$12 million. Sunny and Moon own a ground floor shop in Mongkok but do not own any other immovable property in Hong Kong. Sunny is a Hong Kong permanent resident but Moon is not. The source of funds for their purchase is the money they have jointly inherited from Sunny’s late father’s estate.

When Oliver bought the Property, he signed a Provisional Agreement for Sale and Purchase dated 17 October 2022 and a Formal Agreement for Sale and Purchase dated 31 October 2022. The permitted user of the land upon which Festival Building stands is “non-industrial” according to the government grant. Under the relevant deed of mutual covenant and occupation permit, the permitted user of the Property is “domestic”.

The Provisional Agreement includes the following terms:

1. *The Vendor will sell a good title to the Purchaser.*
2. *Completion will take place on or before 1 December 2023.*
3. *The purchase price of the Property is HK\$12,000,000.00 which shall be paid by the Purchaser to the Vendor in the manner as follows:*
 - (a) *an initial deposit in the sum of HK\$600,000.00 shall be paid upon the signing of this Agreement;*

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

- (b) *a further deposit in the sum of HK\$600,000.00 shall be paid on or before 7 November 2023; and*
- (c) *the balance of purchase price in the sum of HK\$10,800,000.00 shall be paid upon completion on or before 1 December 2023.*
4. *The parties will sign a formal agreement for sale and purchase on or before 7 November 2023.*
5. *Should the Vendor fail to complete the sale of the Property in accordance with the terms of this Agreement, all monies and deposits paid by the Purchaser pursuant to this Agreement shall be returned to the Purchaser.*
6. *Each party will pay their own legal costs. Registration fees and all forms of stamp duty (except any special stamp duty that may be payable in respect of this transaction) will be paid by the Purchaser.*
7. *The Vendor will pay any special stamp duty that may be payable in respect of this transaction.*

Questions:

Answer the following questions giving reasons for your answers:

- 2.1 Will the Formal Agreement for Sale and Purchase, if signed on or before 7 November 2023, attract ad valorem and/or other stamp duties? If so, how much will the duties be, who is liable to pay them and when must they be paid?**

(15 marks)

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

2.2 Assume for the purposes of this question only that today is 30 November 2023 and that the parties to the Provisional Agreement signed the Formal Agreement for Sale and Purchase on 7 November 2023. The Formal Agreement for Sale and Purchase contains the same Clause 1 as in the Provisional Agreement. Assume also that Sunny and Moon have today discovered that the Incorporated Owners of Festival Building have been involved in several pieces of litigation. **Are Sunny and Moon entitled to rescind the Formal Agreement for Sale and Purchase and recover the initial and further deposits? If you need more information to answer this question, state what information you need and why you need it.**

(10 marks)

Question 3 (25 marks)

On 20 October 2023, Ben Wong (“Ben”) entered into a binding Agreement for Sale and Purchase (the “Agreement”) with Sandra Lee (“Sandra”) to purchase her flat in Causeway Bay, Hong Kong (the “Flat”). The Agreement is in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219 and in addition provides expressly for a good title to be sold.

The list below (the “List”) sets out in chronological order the title deeds which affect the Flat and which have been registered at the Land Registry. All of them, except for items (1), (2) and (3), relate exclusively to the Flat.

- (1) Government Lease dated 2 April 1936
- (2) Occupation Permit dated 9 May 2000
- (3) Deed of Mutual Covenant dated 19 June 2000
- (4) Assignment with Plan dated 16 August 2000 in favour of John Chan
- (5) Mortgage dated 16 August 2000 in favour of Tiger Bank Limited
- (6) Release dated 23 May 2005 of the abovementioned Mortgage in favour of Tiger Bank Limited, which was executed by Randy So as attorney of Tiger Bank Limited
- (7) Assignment dated 14 January 2010 in favour of Big Apple Limited
- (8) Assignment dated 29 June 2020 in favour of Sandra Lee, which was sealed with the common seal of Big Apple Limited and signed by David Watson who is described as “Director”

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

Questions:

Answer the following questions giving reasons for your answers:

3.1 Is Sandra obliged to provide all or any of the following:

- the original of the Assignment dated 14 January 2010;
- the power of attorney in favour of Randy So; and
- the sealing provisions of Big Apple Limited?

If Sandra is obliged to provide any of the above but cannot do so, what else can she do to fulfil her obligations under the Agreement?

(18 marks)

3.2 Assume that Terry Tai (“Terry”) entered into a written tenancy agreement (the “Tenancy Agreement”) with Sandra on 1 September 2022 to rent the Flat at HK\$28,000 per month for a term of three years starting on 1 September 2022 and that the Tenancy Agreement contains an option (the “Option”) for Terry to renew his tenancy for another two years upon the expiry of the existing term. **How, if at all, will the Agreement affect Terry’s rights under the Tenancy Agreement which contains the Option?**

(7 marks)

Question 4 (25 marks)

On 25 September 2023, Vince Vong (“Vince”) as vendor and Peter Poon (“Peter”) as purchaser signed a provisional agreement for sale and purchase (the “PA”) in respect of Flat 3B, Green Gardens, Hong Kong (the “Property”), a residential flat built in 1998. A copy of the PA is attached. Peter did not register this in the Land Registry.

Vince owns the Property in his sole name and does not have a mortgage.

On 27 September 2023, Vince’s solicitor sent Peter’s solicitor a draft formal agreement for sale and purchase and the title deeds to the Property. The draft formal agreement is in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219 except that Clause 4 provides that completion will take place by way of solicitors’ undertakings.

Peter did not accept Clause 4 but, despite negotiations between the parties and their solicitors, Vince refused to change it. As a result, Peter did not sign the formal agreement or pay the further deposit by 5 October 2023. On 6 October 2023, Vince’s solicitor wrote to Peter’s solicitor saying that Peter had repudiated the PA. Peter’s solicitor replied stating that Vince had repudiated the PA and that Peter reserved all his rights under the PA.

However, Peter wanted to complete his purchase. On 20 October 2023, Peter’s solicitor informed Vince’s solicitor that Peter would complete the PA on the completion date. On 24 October 2023, Peter’s solicitor sent Vince’s solicitor a cashier order for HK\$9,900,000 (representing the balance of purchase price and the further deposit) made payable to Vince together with an Assignment of the Property in favour of Peter for execution by Vince. Vince refused to complete because Peter had not signed the formal

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

agreement or paid the further deposit by 5 October 2023 and also because the cashier order arrived at 5.15 p.m. instead of during normal working hours which, Vince's solicitor alleges, ended at 5.00 p.m. Vince's solicitor therefore returned the cashier order and the Assignment to Peter's solicitor.

On 18 October 2023, Big Credit Ltd. obtained a charging order nisi against Vince which was registered against the Property on 19 October 2023.

Question:

Answer the following question giving reasons for your answer:

Can Peter obtain specific performance of the PA?

(25 marks)

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

Provisional Agreement for Sale and Purchase

THIS AGREEMENT is made on 25 September 2023

*Between the Vendor - Vince Vong of Flat 3B, Green Gardens, 16 Green Road,
Hong Kong and
the Purchaser - Peter Poon of Flat 12B, Crimson Court, 12 Crimson
Road, Kowloon*

The Vendor and the Purchaser agree as follows:

- 1. The Vendor sells and the Purchaser purchases 3B, Green Gardens, 16 Green Road, Hong Kong (the 'Property').*
- 2. The purchase price is HK\$10,000,000.00 which shall be paid by the Purchaser in the following manner:*
 - (a) HK\$ 100,000.00 to the Vendor on the signing of this agreement as initial deposit,*
 - (b) HK\$ 900,000.00 as further deposit to the Vendor on 5 October 2023 this date being on or before the signing of a formal agreement for sale and purchase,*
 - (c) HK\$ 9,000,000.00 being the balance of purchase price on completion.*
- 3. The parties will on or before 5 October 2023 sign a formal agreement for sale and purchase.*
- 4. Completion will take place on 24 October 2023.*

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

5. *Should the Vendor after receiving the initial deposit paid hereunder fail 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 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 to enforce specific performance.*
6. *The Purchaser will pay the stamp duty in connection with this transaction.*

Vince Vong

Signed

Peter Poon

Signed

Question 5 (25 marks)

On 31 July 2023, Pansy inspected Flat 6A, Pine Court, Hong Kong (the “Property”). The Property is residential with a floor area of 500 square feet. It was built in 1983. Vicki, the owner of the Property, was present. Vicki informed Pansy that the previous owner had moved the entrance door to the Property into the corridor and in so doing had incorporated approximately 10 square feet of the corridor into the Property. No walls were demolished during this alteration. Vicki pointed out that other owners of flats in Pine Court had also moved their entrance doors and incorporated parts of the corridors into their properties. Vicki said that this alteration makes the Property more spacious.

On 4 August 2023, Vicki as vendor and Pansy as purchaser entered into a formal agreement for sale and purchase of the Property (the “Agreement”) for a consideration of HK\$12 million. Pansy paid Vicki a deposit of HK\$1,200,000. The Agreement is in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219 and also includes a term that Vicki will give good title to the Property. Completion was due to take place on 11 September 2023.

On 8 August 2023, Vicki’s solicitor sent the title deeds to Pansy’s solicitor. These include the Deed of Mutual Covenant for Pine Court (the “DMC”) and an assignment of the Property with a floor plan showing the original position of the entrance door to the Property. The DMC provides that corridors are common parts of Pine Court. Pansy’s solicitor raised requisitions on 10 August 2023 and Vicki’s solicitor answered them on 16 August 2023.

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

In early September 2023, Pansy informed her solicitor that she did not want to complete her purchase of the Property. Pansy's solicitor therefore wrote to Vicki's solicitor on 7 September 2023 with three further requisitions asking for evidence that:

1. the moving of the entrance door to the Property does not breach the Deed of Mutual Covenant for Pine Court which restricts alterations made to the common parts without the consent of the building manager;
2. the moving of the entrance door to the Property does not breach section 34I of the Building Management Ordinance, Cap 344; and
3. the moving of the entrance door to the Property does not breach the Buildings Ordinance, Cap.123.

Vicki's solicitor refused to answer the requisitions raised on 7 September 2023 on the grounds that they were raised out of time and that Pansy knew that the entrance door had been moved into the corridor before she entered into the Agreement. Pansy did not complete her purchase on 11 September 2023.

There is an owners' corporation for Pine Court.

Question:

Answer the following question giving reasons for your answer:

Advise Pansy whether she can recover the deposit she paid under the Agreement.

(25 marks)

END OF TEST PAPER