

Examiners' Comments on the 2014 Examination

Head I: Conveyancing

Candidates were required to answer four out of five questions.

Question 1

- 1.1 A legal charge is a legal estate and must be created by deed. It must be registered at the Land Registry within one month after its date to obtain priority from its date. Registration outside this time limit exposes it to loss of priority under s 3(1) or 3(2) of the Land Registration Ordinance (LRO).
- 1.2 Under s 45 Conveyancing and Property Ordinance (CPO) the charge is security for the initial advance and any indebtedness of Brandon to Shatin Bank provided that Shatin Bank is an authorised institution.
- 1.3 Helen may have an interest in the property under a resulting trust. Helen's interest is unwritten and unregistrable and the common law rules of priority are applied to determine priority between Helen's interest and a subsequent interest. In this case the acquisition of the property and the creation of Helen's equitable interest depend on the loan secured by the legal charge. See *Abbey National Building Society v Cann* [1990] 2 WLR 832.
- 1.4 Priority depends on registration and the application of sections 3(1) or 3(2) LRO. The leases is valid between the parties: *Typhoon 8 Research Ltd v Seapower Resources Ltd* [2002] 2 HKLRD 660.
- 1.5 Candidates should be familiar with the power of sale (and the power to take possession) implied into the legal charge under s 51(1) CPO. The powers are exercisable on the occurrence of an event of default – failure to pay interest within one month after becoming due. Candidates should know the duties owed by the mortgagee to the mortgagor when exercising the power of sale and the effect of s 53 (1) CPO.

Question 2

- 2.1 Candidates should consider whether there is a concluded oral agreement for lease and whether Lee and Tang have agreed all essential terms and the terms they want in their agreement. The payment of a deposit and the giving of access for fitting out do not prove the existence of a concluded agreement for lease: *World Food Fair v Hong Kong Island Development Ltd* [2007] 1 HKLD 498.

If there is a concluded oral agreement, candidates should apply s 3 CPO and the law relating to part performance to determine whether or not Tang can enforce the agreement against Lee. Candidates could also consider proprietary estoppel.

- 2.2 The lease must be created by deed. Lee does not have a seal. Lee can execute the lease by having it signed by any two directors (assuming at least two directors) and expressing the lease to be executed as a deed. See sections 127 and 128(1) and the presumption of delivery under s 128(2) of the Companies Ordinance. Candidates should state the manner of execution – Executed and delivered by Lee Estates Ltd as a deed acting by [names of signatories].

Lee could appoint an attorney to execute.

- 2.3 Candidates should consider priority under sections 3(1) and 3(2) LRO and whether s 3(2) might apply in this case.

Question 3

- 3.1 Candidates should consider the conversion of the equitable interest under the Conditions to a legal interest under sections 14(1) and 14(3) CPO.
- 3.2 Candidates should consider the terms of the New Territories Leases (Extension) Ordinance .
- 3.3 Candidates should consider whether sections 23A (2) or 20(1) CPO apply. They do not in this case and the company articles must be called for so that the sealing requirements can be compared with the method of execution. Section 23 CPO should then be applied. Section 23A (1) CPO does not apply in this case. Candidates should consider the position if s 23 does not apply.
- 3.4 Candidates should consider whether there are breaches of the Buildings Ordinance (BO), the Deed of Mutual Covenant and the Building Management Ordinance. In each case Candidates should consider whether there is a real risk of enforcement action. Any breach of the BO or DMC might also breach the Government lease.

Candidates should also consider whether the demolition of the wall comes within the exemption in s 41 (3) BO. If it does there would be no need to obtain Building Authority consent to the demolition of the wall. Candidates should also consider whether the wall is a common part of the building.

Question 4

- 4.1 Candidates must explain Vanessa’s contractual duty to give good title and whether the Legal Charge is an encumbrance on title. This requires candidates to consider the effect of the vacation order, s 3(2) LRO and *Siu Wing Yee Angeline v Earning Yield Ltd* (2013) HCMP 1405/2012.

Candidates should also consider whether the real risk test would apply. If there is an undischarged legal charge, title is bad. However, bearing in mind that the chargee has been wound up, it might be argued that there is no real risk that the Legal Charge will be enforced.

4.2 Candidates should consider sections 55 and 56 CPO.

Question 5

5.1 Candidates should consider the vendor's implied obligation under the provisional agreement (PA) to give good title and to show title in accordance with s 13 CPO.

Candidates should also consider the vendor's duty to reply to requisitions reasonably raised and to reply to requisitions on pre-intermediate root defects: *Lo Hung Biu v Lo Shea Chung* [1997] HKLRD 721.

A Power of Attorney does not in the absence of clear authority enable the attorney to make gifts of his principal's property. Although the vendor does not need to show the power, because the Assignment executed under the power is more than 15 years old at the date of the PA, it appears that s 13(4A) CPO cannot be relied on if the power has been produced and is defective in some way: *Lo Hung Biu v Lo Shea Chung*.

5.2 By failing to give good title, the vendor has repudiated the PA. The purchaser can accept the repudiation, treat herself as discharged, recover her deposit and sue for damages. Alternatively she might affirm the PA and sue for specific performance.

Candidates should discuss the measure of damages, the date of assessment and mitigation. Candidates should also consider the recovery of stamp duty under the Stamp Duty Ordinance.

Clause 4 excludes the purchaser's remedy of specific performance, but the vendor will be unable to rely on it since he has not returned the purchaser's deposit and paid compensation as required by Clause 4.

OLQE Head I Panel

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