

Examiners' Comments on the 2017 Examination

Head I: Conveyancing

Question 1

- 1.1 Candidates should discuss the vendor's common law duty to hand over original title deeds on completion which is explained in *De Monsa Investments Ltd v Whole Win Management Fund Ltd* [2013] 5 HKC 350, CFA and explain the potential problems caused by missing original deeds (unwritten equitable mortgage by deposit of deeds). In this case the vendor has produced certified true copies of deeds and the question of secondary evidence does not arise. However, in this case the absence of any deeds for the past 20 years requires an explanation and the statutory declaration offered is unsatisfactory.
- 1.2 The vendor must give good title on completion, but the purchaser can rescind before completion if the defect is so fundamental that it cannot be remedied before completion: *A-Mayson Development Co Ltd v Betterfit Ltd* [1992] 2 HKC 533. Clause 6 of the agreement provides for liquidated damages. Candidates should consider whether the amount of the liquidated damages is a genuine pre-estimate of the damage caused by the vendor's breach or whether it amounts to a penalty.
- 1.3 The provisional and formal agreements are chargeable with Ad Valorem Stamp Duty under Head 1(1A) of the Stamp Duty Ordinance at Scale 1 on the consideration or value whichever is higher. Scale 2 applies if the purchaser is a Hong Kong permanent resident who does not beneficially own another property in Hong Kong. Buyer's Stamp Duty at 15% of the consideration or value is payable if the purchaser is not a Hong Kong permanent resident acting on his own behalf.

The formal agreement is signed within 14 days of the provisional agreement and the duty is therefore payable on the formal agreement and the provisional agreement is exempt.

The assignment attracts duty of \$100.

Both parties are liable to pay the duty but the agreement provides that the purchaser will pay all duty. The duty is payable within 30 days of the date of the relevant document.

Question 2

- 2.1 The requisition is properly raised because the cutting of the roof slab amounts to building works for which consent is required under the Buildings Ordinance. Candidates should discuss sections 24 and 33 of the Buildings Ordinance and

whether there is a real risk of enforcement applying the test in *Spark Rich (China) Ltd v Valrose Ltd* [2006] 2 HKC 589, CA.

The cutting of the roof slab also breaches the Deed of Mutual Covenant. Candidates should consider whether this is a structural alteration. The owners' corporation has a duty to enforce the Deed of Mutual Covenant and cannot waive the breach.

Clause 12 might exclude the purchaser's right to object to title. Candidates should apply the tests set out in *Jumbo King Ltd v Faithful Properties Ltd* [1999] 4 HKC 707, CFA and consider the wording of clause 12 and whether the vendor knew about the defect in which case only the most explicit wording will absolve the vendor from his duty to give good title. Candidates might have considered whether the defect could be discovered by comparing any plan on the title deeds with the property.

- 2.2 Failure to give good title amounts to repudiation by the vendor. The purchaser can accept the repudiation, treat himself as discharged and recover his deposit and damages representing the difference between the cost of buying a similar property at the date of the breach and the contract price or the court might assess damages at another date if appropriate: *Johnson v Agnew* [1980] AC 367. The purchaser can also claim the costs in connection with the new purchase but not the costs on the abortive purchase. The purchaser must take steps to mitigate his loss.

Question 3

- 3.1 The provisional agreement is binding. The vendor must give good title free from encumbrances on completion. By requiring the vendor to remove an encumbrance (register the cancellation of the First Agreement) before completion, the purchaser is attempting to impose a new term on the vendor and his insistence on the new term amounts to repudiation: *Chu Wing Ning v Ngan Hing Cheung* (1992) HCA 9409/1991.

The vendor is entitled to treat himself as discharged and to keep the initial deposit. The purchaser has breached the contract and cannot obtain specific performance.

- 3.2 Candidates should consider clause 7 which is the vendor's escape clause and in particular whether the clause excludes the purchaser's remedy of specific performance. Assuming that clause 7 does exclude specific performance, candidates should consider what the clause requires the vendor to do. The clause requires the vendor to 'immediately' refund the deposits paid and pay compensation equal to the deposits paid. As to the 'deposits paid' candidates should consider *Wise Think Global Ltd v Finance Worldwide Ltd* (2013) 16 HKCFAR 799.

In this case the vendor has not complied with Clause 7 and the purchaser can claim specific performance. He must show that he is ready willing and able to complete: *Lau Suk Ching Peggy v Ma Hing Lam* [2010] 4 HKC 215, CFA.

- 3.3 The stakeholder holds money independently of the vendor or purchaser and applies it according to the agreement when a particular event occurs. Before the event the stakeholder may not release the money to either party without the consent of the other party.

Question 4

- 4.1 Candidates should consider the execution of the Power of Attorney by Bingo Ltd and s 23A(1) of the Conveyancing and Property Ordinance. Candidates should also consider whether there is evidence of non-revocation of the Power of Attorney and section 5(2) and 5(4)(b) of the Powers of Attorney Ordinance.
- 4.2 Candidates should discuss *Sera Ltd v Excelling Profit Investments Ltd* [1992] 2 HKC 262.
- 4.3 Candidates should consider whether the occupier has an unwritten equitable interest in the flat under an implied trust and the issue of priority between any such interest and the purchaser's interest: *Wong Chim Ying v Cheng Kam Wing* [1991] 2 HKLR 253.
- 4.4 Candidates should consider whether the occupier's silence amounts to estoppel which can be relied on by the purchaser to avoid being fixed with constructive notice of the occupier's interest: *Mo Ying v Brilllex Development Ltd* FAMV 48/2015.
- 4.5 The vendor must be able to show how the undivided shares are paired with the flat that he is selling. The undivided shares represent the owner's proprietary interest in the flat. If the Deed Of Mutual Covenant does not set out the pairing of shares, the vendor must produce other evidence of the pairing – for example the control card at the Land Registry .

Question 5

- 5.1 Billy is a successor in title to one of the parties to the Deed of Mutual Covenant and the burden of covenants passes to him under s 41(3) of the Conveyancing and Property Ordinance (CPO) provided the covenant relates to land of the covenantor and the burden is expressed or intended to pass (ss41(2)(a) and (b) and 40 CPO).

The resolution binds the owners under s 14 Building Management Ordinance (BMO) and the Management Committee has power to determine the contributions due from owners under s 21 BMO.

- Enforcement action – action for money due, charge in respect of unpaid sums under s 19 BMO, distraint under s 24 BMO and recovery from occupier under s 23 BMO.
- 5.2 Under s 41(5) CPO the burden of positive covenants does not pass to tenants, but the owners' corporation can recover the sums due from the tenant under s 23 BMO up to the amount of rent due from the tenant. The tenant can deduct the amount paid from the rent he pays to his landlord.
 - 5.3 This is a question of construction of the Deed of Mutual Covenant and first assignment in context to determine the intention of the parties: *Leung Po Kwan v Tung Kam Sheung* [2011] 3 HKC 84, CA.
 - 5.4 Breach of s 34I BMO. Under s 16 and 18 BMO the owners' corporation alone has the power to enforce the DMC in relation to the common parts of the building.
 - 5.5 The Management Committee might have approved the conversion of common parts to private use. The Management Committee could therefore have acquiesced in the breach . The question is whether standing by and allowing the common parts to be used for many years amounts to acquiescence. A mandatory injunction might be refused on the grounds of acquiescence: *IO of Freder Industrial Centre v Gringo Ltd* [2016] HKEC 418, CA.

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