

**2002 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD I: CONVEYANCING
AND LANDLORD AND TENANT**

Tuesday, 22 October 2002





HEAD I: CONVEYANCING AND LANDLORD AND TENANT

TEST PAPER

22 October 2002

Instructions to Candidates

1. The duration of the examination is 3 hours and 30 minutes.
2. This is an open-book examination.
3. There are FIVE questions in this paper. You must answer ALL questions.
4. You must answer:
 - Questions 1 and 2 in Answer Book 1
 - Question 3 in Answer Book 2
 - Questions 4 and 5 in Answer Book 3
5. Each question has the value noted on the question paper. You are urged to apportion your time in accordance with the relative value of each question. No marks can be awarded to a question for which there is no attempted answer.
6. Do not take either this question paper or any answer books with you when you leave the examination room.

2002 Overseas Lawyers Qualification Examination

Head 1: Conveyancing and Landlord and Tenant

Question 1 (20 marks)

You act for James Ko (“the purchaser”) who entered into a preliminary agreement with Cecilia Tong (“the vendor”) on 22 March 2002 for the purchase of the ground floor and cockloft of a building in Kowloon (“the property”) for HK\$70 million. A copy of the agreement signed by the parties is attached.

Answer the following questions:

- (a) On 2 April 2002 the vendor’s solicitors sent a draft formal agreement to you which included, inter alia, the following terms:

Clause 3

The Vendor does not warrant or represent that the property and every structure therein or thereto is erected in all respects in compliance with the Buildings Ordinance and/or its subsidiary legislation.

Clause 4

The Purchaser shall not be entitled to raise any requisition or objection by reason of or in connection with any contravention of the Buildings Ordinance and/or its subsidiary legislation.

The property contains the following structural alterations:

- A ground floor extension of 0.5 metres beyond the boundary shown on the approved plans, extending for the whole length of the ground floor; and
- Extension of the floor area of the cockloft by the use of concrete slabs to fill in a void previously designated on the plans as a laundry drying area.

Question:

Explain whether you would accept or reject clauses 3 and 4. Give reasons for your answers, including an explanation of the effect of each of the clauses.

(4 marks)

(See over the page for questions 1(b), (c) and (d))

- (b) Prior to signing the preliminary agreement, the purchaser, an experienced property investor, inspected the ground floor of the premises, but not the cockloft. The parties did not sign a formal agreement on 5 April 2002. On 19 April 2002, the vendor's solicitors gave written notice to you that your client would be allowed to rescind the preliminary agreement within 7 days of the date of the letter if it should be discovered within that time that the alterations were unauthorised. The letter went on to state that the purchaser would be deemed to have agreed to purchase the property, notwithstanding the existence of the alteration works, if no notice of rescission was received within those 7 days.

On 12 September 2002 you raised a requisition seeking evidence of approval for the alterations. On 17 September 2002, you received the following reply:

"Your client inspected the premises prior to signing the preliminary agreement and has therefore accepted our client's title notwithstanding the unauthorised alterations. In any event, since your requisition was not raised within 7 days of our letter of 19 April 2002, our client is under no obligation to answer the requisition."

Question:

Explain whether this is a satisfactory reply to the requisition. (4 marks)

- (c) ***For the purposes of this part only***, assume that a formal sale and purchase agreement was eventually signed on 24 May 2002, in order to comply with the obligations under the preliminary agreement. The formal agreement was in the same terms as the preliminary agreement.

Question:

Could the vendor refuse to answer the requisition raised on 12 September 2002? Give reasons for your answer. (4 marks)

- (d) The formal agreement contains a clause that completion should take place at the offices of the vendor's solicitors on 12 October 2002 between the hours of 9:00am and 5:00pm. The property is subject to existing mortgages which the vendor has agreed to discharge on or before completion. On 7 October 2002, you sought directions from the vendor's solicitors on how the balance of the purchase price should be split in favour of the vendor and other persons who may be interested. At 3:45pm on 12 October 2002, the vendor's solicitors informed you that the balance of the purchase price should be paid by three cheques.

(See over the page for continuation of question 1(d))

Questions:

- (d) (i) **Would the vendor be entitled to forfeit the deposits and annul the sale if the balance of the purchase price was tendered at 5:10pm? You may assume that the purchaser has paid both the initial deposit and the further deposit. (6 marks)**
- (ii) **If the vendor fails to complete because he is unable to give good title, can the purchaser sue for damages for loss of bargain? (2 marks)**

Give reasons for your answers to questions d(i) and (ii).

(See over the page for the Preliminary Agreement)

PRELIMINARY AGREEMENT

THIS AGREEMENT is made on the 22nd day of March 2002

Between (1) Cecilia Tong of Flat A, 19th Floor, Lucky Court, City Gardens, Prince Road, Kowloon, Hong Kong ("the Vendor")

(2) James Ko of Flat A, Full Moon Mansion, Taikoo Shing, Hong Kong ("the Purchaser")

1. The Vendor will sell and the Purchaser will purchase All That the Ground Floor including the cockloft of International Building, 100 Nathan Road, Kowloon, Hong Kong ("the Property").
2. The consideration is HK\$70,000,000.00 which shall be paid by the Purchaser to the Vendor as follows :
 - (a) HK\$7,000,000.00 shall be paid upon signing hereof as initial deposit;
 - (b) HK\$7,000,000.00 shall be paid upon signing the formal agreement for sale and purchase on or before 5th April 2002 as further deposit; and
 - (c) HK\$56,000,000.00 shall be paid upon completion of the sale and purchase on or before 12th October 2002.
3. Upon completion, the Vendor shall deliver vacant possession of the Property to the Purchaser or his nominees or sub-purchasers free from encumbrances.
4. Each part shall pay their own legal costs but the Purchaser shall pay the stamp duty on this transaction.
5. The Property is sold to the Purchaser on "as is" basis.

Signed by the Vendor

Cecilia Tong

Signed by the Purchaser

James Ko

Received from the Purchaser the said initial deposit of HK\$7,000,000.00

Cecilia Tong
the Vendor

Question 2 (20 marks)

- (a) June Lee purchased a flat and a car-parking space in a multi-storey building in Causeway Bay in 1998. She paid the 10% deposit but her mother, Sarah, is paying the mortgage instalments. By a formal sale and purchase agreement, dated 26 August 2002, June agreed to sell the flat and car-parking space to Ben Tang. Completion was scheduled for 5 October 2002.

When Ben visited the premises he noticed a Mercedes car in the car-parking space. After complimenting June on her choice of car, June replied: "That's my mother's car. She lives with me."

Question:

Would Ben's title be encumbered if he went ahead with the purchase? Give reasons for your answer. (5 marks)

- (b) The property is subject to an undischarged mortgage which pre-dates the intermediate root of title document.

Question:

How can this defect in title be removed? (4 marks)

- (c) For the purposes of this part only, assume that by 3 October 2002 the vendor had not delivered all the title deeds to Ben's solicitor.

Question:

Could Ben rescind the formal agreement on 4 October 2002? Give reasons for your answer. (3 marks)

- (d) **If it is discovered that a *lis pendens* had been registered after the agreement was registered but before an Assignment was executed, should Ben refuse to hand over the balance of the purchase money to June? Give reasons for your conclusion. (6 marks)**

(See over the page for question 2(e))

- (e) The sale and purchase agreement was registered in the Land Registry on 20 September 2002. On 18 September 2002, the Kwong Ka Bank obtained a charging order nisi which was registered in the Land Registry on 25 September 2002. The charging order absolute was registered on 3 October 2002. On 5 October 2002 June assigned the property to Ben as beneficial owner. The Assignment was registered on 12 October 2002.

Question:

**If Ben pays the money owing to the chargee, can he recover it from June?
Give reasons for your answer. (2 marks)**

Question 3 (20 marks)

You have been instructed by Fiona Lam in the purchase of Flat A, 4th Floor, Happy Mansions, Aberdeen, Hong Kong, together with a car parking space. Under the formal sale and purchase agreement, dated 2 September 2002, the vendor agreed to show title in accordance with section 13 of the Conveyancing and Property Ordinance (Cap 219).

On perusing the title deeds and documents delivered to you by the vendor's solicitors, you note that:

- (a) The lot of land on which the premises are situated is held under Conditions of Sale dated 25 March 1973. The vendor has not produced a Certificate of Compliance.

Question:

Formulate an appropriate requisition and explain why you would raise a requisition on these facts. (4 marks)

- (b) The land is subject to a condition in the Conditions of Sale that the approved car park layout plan should not be changed without the prior written approval of the Director of Lands. You raise a requisition seeking a certified true copy of the car park layout plans, registered in the Land Registry. The vendor replied by producing a Certificate of Compliance.

Question:

Explain whether this is a satisfactory reply to the requisition. (4 marks)

- (c) An Assignment on Sale, dated 5 May 1991, was executed under a power of attorney. The power of attorney is missing.

Question:

What should the vendor do to enable you to approve title? (4 marks)

(See over the page for questions 3(d) and (e))

- (d) The mode of execution in an Assignment on Sale by a limited company as vendor, dated 1 July 1995, was in the following form:

'Sealed with the Common Seal of the Company and signed by Basil Tsui, its director.'

You raise a requisition asking for documentary evidence proving due execution of the Assignment.

Question:

Is this a proper requisition? Give reasons for your answer. (4 marks)

- (e) The vendor refuses to supply a copy of the Articles of Association, stating that the Assignment is deemed to be duly executed by virtue of the following extract from the Articles of Association which has been sent to you:

'Every document required to be sealed with the Seal of the Company shall be deemed to be properly executed if sealed with the Seal of the Company and signed by the Chairman of the Board, or such person or persons as the Board may from time to time authorise for such purpose.'

Question:

Explain whether this is a satisfactory answer to the requisition in question (d) above. (4 marks)

Question 4 (20 marks)

Answer both parts of questions:

Part A

Mr Chan is the owner of Lot No 382, a large piece of land in Demarcation District 399 in the New Territories. The lot is held under a Block Crown Lease dated 27 March 1905. This lease contains a covenant 'not to convert any ground expressed to be demised as agricultural or garden ground into use for building purposes other than for the proper occupation of the ground as agricultural or garden without the previous licence of the government.'

Mr Chan proposes to divide the land into two sections, erect a 20 storey residential building on each part, and sell the flats.

Question:

Mr Chan seeks your advice as to whether there will be any legal obstacles to his proposed scheme. Explain what preliminary steps you would take in order to advise Mr Chan. (10 marks)

Part B

Mr Chan has now completed the development, which is known as Chingkung Gardens. Hilary Fan has agreed to purchase 20/1000th parts or shares of and in the land, together with the right to exclusive possession of Apartment C on the top floor and the roof ('the property'). The property is sold 'subject to and with the benefit of a Deed of Mutual Covenant'.

The DMC was executed by the developer, Mr Chan, and Mr Jonas Wong. The Schedule to the DMC notionally divided the estate into 1000 shares but no shares were allocated to the roof.

The estate is managed by Formfair Property Management Ltd.

The DMC includes the following covenants:

- (1) The owner or owners for the time being of each of the undivided shares in the building agree to be bound by and observe the covenants contained in this Deed.
- (2) Each owner shall contribute to the cost of managing the building.

(See over the page for questions in Part B)

Answer the following questions :

- (a) The property was assigned to Hilary Fan in September 2001.

Hilary wishes to know whether she can assign the roof but keep the shares. Advise her, giving reasons for your advice. (4 marks)

- (b) On 1 December 2001, Hilary Fan leased the premises to John Ho for a period of two years. In January 2002 she began a two-year teaching appointment in Australia. Hilary has failed to pay the management fees for 3 months.

Can Formfair sue Hilary Fan or John Ho for the arrears? Give reasons for your answer. (6 marks)

Question 5 (20 marks)

On 1 November 1994, Henry Chan let Flat A on the ground floor of Hang Lung Building, Kennedy Town, Hong Kong ('the premises') to Carol Lee for a term of 2 years at a monthly rent of HK\$15,000 ('the tenancy agreement'). The lease was renewed in 1996, 1998 and 2000 on the same terms, except for rent. There is no provision in the tenancy agreement specifying the uses to which the premises may be put. The Occupation Permit for the building, dated 1 March 1961, specified commercial use for the first three floors and residential user for the remaining 9 floors.

The tenancy agreement contains a covenant by Carol to keep the interior part of the premises in good repair, and reserves a right of re-entry for breach of covenant.

Under a separate licence agreement signed at the same time as the tenancy agreement, Henry gave Carol permission to use a small hut at the rear of the premises as a photographer's studio 'for as long as the lease of the premises continues' ('the licence').

Since 1996 Carol has used two of the three bedrooms in the premises, comprising 30% of the ground floor area of the flat, for storing photographic equipment.

Carol has not paid any rent for the last 3 months, and the premises are in disrepair. Henry wants to recover possession of the premises and the hut as soon as possible.

Questions:

Advise Henry what action he may take to terminate the tenancy and the licence. In your answer you should:

- (a) **consider all relevant alternatives, and set out the relevant procedures applicable to each. Explain what further information, if any, you may need in order to advise Henry. (14 marks)**

and

- (b) **state what Carol should do if she wants a new tenancy of the premises and of the hut, and explain the relevant procedures. (6 marks)**

END OF TEST PAPER