

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2020 SUPPLEMENTARY INFORMATION PACKAGE

HEAD I: CONVEYANCING

Contents

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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 and Michael Wilkinson, Hong Kong Conveyancing Law (8th ed) (LexisNexis 2018) (HK Conveyancing)

Butterworths Hong Kong Conveyancing and Property Law Handbook (4th Edition) (LexisNexis 2015) (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 (4th Practitioners' Edition) (LexisNexis 2015) (Land Law in Hong Kong)

Ayesha Macpherson Lau and Michael Olesnicky, Hong Kong Taxation: Law & Practice 2018-19, The Chinese University Press (HK Taxation)

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 2	Paragraphs [2-1] - [2-176], [2-214] - [2-235]
Land Law in Hong Kong	Chapter 1	Pages 10-31

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	Chapter 4	Paragraphs [4-1] - [4-93], [4-99] - [4-382]
HK Conveyancing	Chapter 12	Paragraphs [12-222] - [12-308]
Land Law in Hong Kong	Chapter 8 Chapter 16	Pages 525-576

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
 - The 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

Essential Reading

HK Conveyancing Chapters 5 and 6 Paragraphs [5-1] - [5-264],
[6-121] - [6-126],
[6-161] - [6-182]

(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 6	Paragraphs [6-1] - [6-576]
	Chapter 15	Paragraphs [15-225] - [15-231]

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 and Certificates of Value

Essential Reading

HK Conveyancing	For (a) (b) (c) and (e)	Chapter 8	Paragraphs [8-1] - [8-113], [8-150] - [8-205]
HK Conveyancing	For (d)	Chapter 8 Chapter 11	Paragraphs [8-269] - [8-274]
HK Conveyancing	For (f)	Chapter 8 Chapter 15	Paragraphs [8-244] - [8-268] Paragraphs [15-1] - [15-20], [15-104] - [15-188],

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

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
- Form 4 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 13	Paragraphs [13-1] - [13-14], [13-16] - [13-17], [13-31] - [13-44], [13-61] - [13-85], [13-92] - [13-94], [13-99] - [13-112], [13-127] - [13-157], [13-170] - [13-209]
Land Law in Hong Kong	Chapter 13	Pages 783-789, 832-868 and 869-888

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

On completion

HK Conveyancing	Chapter 14	Paragraphs [14-1] - [14-62], [14-80] - [14-141]
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On registration

HK Conveyancing	Chapter 14	Paragraphs [14-155] - [14-263]
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2. Examiners' Comments on the 2017, 2018 and 2019 Examinations

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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Examiners' Comments on the 2018 Examination

Head I: Conveyancing

Question 1

- 1.1 The agreement does not provide for completion by undertaking and the purchaser can insist on formal completion. The requirements of formal completion should be stated. Time is of the essence and the vendor has repudiated the agreement because she was not ready to hand over the assignment executed by the vendor or the discharge from the vendor's mortgage. Specific performance is available for breach of contracts for the sale of land. The requirements should be stated and the priority between the first and second purchasers should be discussed.
- 1.2 The beneficial owner covenants are implied into the assignment by the vendor who assigns as beneficial owner. These include a covenant that the Deed of Mutual Covenant has been observed up to the date of the assignment. However, the vendor's liability is qualified and she is not liable for her predecessor's breach unless she received the flat by way of gift. If the vendor's predecessor in title gave the beneficial owner covenants, the benefit runs with the land under s 35(1B) of the Conveyancing and Property Ordinance Cap. 219 (CPO).

Question 2

- 2.1 The vendor has agreed to give and show good title. Good title is one which the purchaser can hold against any challenger subject to the test in *MEPC v Christian Edwards* [1981] AC 205. Executors have power to sell the flat in the course of administration but not to one of the executors. The sale is voidable at the instance of the beneficiaries. The sale might also be in breach of trust and is in breach of the self-dealing rule. The vendor has notice of the defect in title because the relevant documents are registered at the Land Registry. The vendor must answer a requisition regarding this problem even if the problem occurs before the intermediate root of title.
- 2.2 The vendor might raise the defence of laches. This means that the test in *MEPC v Christian Edwards* should be applied. The cases of *Tang Ying Kin v Maxtime Transportation Limited* [1996] 1 HKLRD 150 and *Leonart Limited v Turn Fine Development Ltd* HCMP 432/2001 could be considered.
- 2.3 The agreement for sale is subject to Ad Valorem Stamp Duty under Part 1 of Scale 1 of Head 1(1A) of the Stamp Duty Ordinance Cap. 117 unless Peter is a Hong Kong Permanent resident who does not beneficially own another residential property in Hong Kong and is acquiring the flat for his own benefit. Liability for Special Stamp Duty also arises because the vendor has owned the flat for less than 36 months. Liability for Buyer's Stamp Duty should also be considered. Under the Stamp Duty Ordinance the vendor and purchaser are jointly and severally liable for Ad Valorem Duty and Special Stamp Duty but the purchaser alone is liable for Buyer's Stamp Duty. The facts state that the provisional and formal agreements are in conformity and not more than 14 days apart. The formal agreement should therefore be stamped within 30 days after its date. The assignment attracts nominal duty of HK\$100.

Question 3

- 3.1 A deed is required to pass the legal estate. The vendor company must execute the assignment in accordance with the requirements of its articles: s 127(2) of the Companies Ordinance Cap. 622 (CO). Alternatively the vendor can execute the assignment under s 127(3) (a) of the CO by having it signed by its sole director. Under s 128(1)(a) (b) and (c) of the CO the vendor may execute a deed by executing the assignment in accordance with s 127, expressing it to be executed as a deed and delivering it as a deed. Delivery is presumed under s 128(2).
- 3.2 The vendor must prove that all mortgages have been discharged. Section 56 CPO should be explained. The manager of the mortgagee bank has apparent authority to sign a receipt on behalf of the mortgagee.
- 3.3 The vendor has a duty to give good title. The question requires consideration of whether the main lobby and external walls are common parts which the owners' corporation is liable to maintain under s 18(1)(a) of the Building Management Ordinance Cap. 344 (BMO). Owners are liable to contribute to the owners' corporation's funds and the liability of each owner to pay passes to their successors in title. A purchaser might be liable to complete if the vendor undertakes to pay any additional contribution required in connection with ongoing litigation against the corporation and the vendor also sets aside part of the proceeds of sale to be held by his solicitor until payment is made in full. However, there is a blot on title if the liability to contribute to the corporation's funds is extraordinary in view of its magnitude. The cases of *Chu Kit Yuk v Lucky Health International Enterprise Ltd* [2002] 2 HKLRD 503 and *Gigabillion Asia Pacific Ltd v Sino Dynamic International Ltd* CACV 98/2014 should be considered.
- 3.4 The option to renew the lease must be registered to protect its priority: *Chiap Hua Flashlights Ltd v Markfaith Investment Ltd* (1990) 2 WLR 451. The effect of ss 3(2) and 4 of the Land Registration Ordinance Cap. 128 (LRO) should be considered.

Question 4

- 4.1 The Deed of Mutual Covenant might state who is responsible for repairs to the roof. Liability might depend on who owns it. The Deed of Mutual Covenant reserves exclusive use of the roof to the developer, but the developer owns no undivided shares and cannot enforce its exclusive use right: *Sky Heart Ltd v Lee Hysan Estate Co Ltd* [1997-8] 1 HKCFAR 318. Hence the owners' corporation might own the roof. Section 34H and the case of *Green v Grace Ltd v IO of Wang Lung Industrial Building* [2015] 5 HKLRD 170 should be considered. In addition the liability of the owners' corporation for repairs under s 18(1)(a) of the BMO should be considered.
- 4.2 The corridor is likely to be a common part under the BMO. If so, the encroachment breaches s 34I of the BMO and possibly the express terms of the Deed of Mutual Covenant. Sections 16 and 18(1) (c) of the BMO should be considered. Alice is liable for the breach as she is an 'owner'. In addition she has adopted and maintained the breach. The breach occurred many years ago and other owners have also encroached into the corridor. The question of acquiescence by the owners' corporation should be considered. Acquiescence is possible in respect of a breach of s 34I BMO because the

section permits consent to be given to conversion of common parts to an owner's use. A long history of tolerance of breaches by the owner's corporation might amount to acquiescence: *IO of Freder Centre Ltd v Gringo Ltd* [2016] 2 HKLRD 190. The principles for granting a mandatory injunction in *Redland Bricks v Morris* [1970] AC 652 should be considered. The principles were applied in *IO of Shan Kwong Towers Phase II v Lee Suet Ching* [2007] 4 HKLRD 567.

Question 5

- 5.1 The powers implied into a legal charge under s 51(4) of the CPO should be considered. Non-payment of interest for one month after it becomes due is an event of default which makes the implied power of sale exercisable.
- 5.2 The power of sale must be exercised by the mortgagee in good faith for the purpose of obtaining repayment. The mortgagee has a duty to take reasonable care to obtain the true market value of the flat and is liable in damages under s 52 CPO to the mortgagor for breach of its duty, but the title of the purchaser from the mortgagee is not affected. The mortgagor can obtain an injunction to restrain the sale if there is some impropriety, but a sale at undervalue does not seem to be enough.
- 5.3 Wendy might have an unwritten interest in the flat by virtue of her contribution to the price. The priority of her interest is governed by common law rules. However, the mortgage was created to finance the purchase of the flat and in *Abbey National Building Society v Cann* [1990] 2 WLR 832 it was held that the acquisition and the mortgage are simultaneous transactions so that there is no time when the purchaser (and Wendy's equitable interest) is acquired free from the mortgage.
- 5.4 The proceeds of sale are applied in accordance with s 54 CPO. The payment of several lenders depends on their priority under the LRO and tacking under s 45 CPO.

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Examiners' Comments on the 2019 Examination

Head I: Conveyancing

Question 1

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

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

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

Question 2

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

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

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

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

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

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

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

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

Question 3

- 3.1 Initially, the interest was equitable under the relevant Government Conditions of Sale. Under s 14(1) of the CPO, there is deemed grant of legal interest upon compliance with the Conditions. As the Government Grant was dated after 1 January 1970, a certificate of compliance registered in the Land Registry is sufficient to convert to a legal estate. However, certificate of compliance is not the only way of proving compliance and other acceptable evidence includes a note of compliance endorsed by the Government (s 14(3)(b) of CPO) and the entry of a note of compliance on the register itself (s 14(3)(a) of CPO).
- 3.2 The Vendor has an obligation to prove the precise number of undivided shares that he is selling (*Yip Ngan Yee and Others v Chan Tsz Yam and Others (CACV 442/2000)*). A vendor can rely on the first assignment to prove how the undivided shares are allocated and other acceptable evidence includes a Memorandum of Shares, a control card and a sub-division register in the Land Registry (*Goldjet International Limited v Ling Ki Wai and Others [1997] HKCFE 551*).

- 3.3 An occupation permit is required to prove that the building has been properly built and can be occupied and the Purchaser is entitled to its production according to *Lui Kwok Wai v Chan Yiu Hong (3246/94)*. For buildings constructed before the present provisions of the Buildings Ordinance on 1 June 1956, when there was no occupation permit, the issue to consider is whether the lack of occupation permit will give rise to any real risk of enforcement action by the Building Authority.
- 3.4 By meeting Nancy as an occupant at the Flat, the Purchaser has acquired constructive notice of any interest that she may have in the Flat. (*Wong Chim Ying v Cheng Kam Wing [1991] HKCA 299*). If Nancy can prove any financial contribution towards the purchase price, the presumption of a resulting trust will arise in her favour.

The counter-presumption of advancement also applies to a woman and her children. However, such presumption is a rather weak concept and can be rebutted on comparatively slight evidence (*Suen Shu Tai v Tam Fung Tai (2015) 18 HKCFAR 491*) and *Lee Tso Fong v Kwok Wai Sun and Another [2008] HKCFI 563*).

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

Question 4

4.1 Buildings Ordinance

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

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

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

If the partition wall is not load bearing, then the first assignment of both Flats must be checked to ascertain whether the developer has any reservation of its ownership. If not, then the partition wall will be regarded as co-owned by the owner of the 2 Flats (*The*

Incorporated Owners of Westlands Garden v Oey Chiou Ling and Another [2011] 2 HKLRD 421).

Legal Charge

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

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

Question 5

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Past Examination Papers from 2017 to 2019

**2017 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

HEAD I: CONVEYANCING

Thursday, 2 November 2017



2017 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

On 4 October 2017 Virginia (the "Vendor") entered into a binding provisional sale and purchase agreement (the "PSPA") whereby she agreed to sell her flat (the "Property") in Repulse Bay to Percy (the "Purchaser") for \$25 million. The Purchaser paid a preliminary deposit of \$250,000 and a further deposit of \$2,250,000. No formal agreement was ever signed but neither party alleges a breach of the PSPA on this ground. Virginia bought the Property in 1983.

The PSPA contains, inter alia, the following terms:

1. *The Vendor agrees to give good title to the Property and will hand over to the Purchaser on completion the original title deeds to the extent required by the common law.*
2. *Completion shall take place on 16 November 2017 at the Vendor's solicitor's office and shall be carried out by way of solicitor's undertakings.*
3. *Time is of the essence.*
4. *The Vendor shall assign the Property as beneficial owner.*
5. *If the Purchaser fails to complete the sale and purchase, the whole of the deposit shall be forfeited by the Vendor.*
6. *If the Vendor fails to complete the sale, all money paid by the Purchaser shall be returned to the Purchaser with damages in the amount of \$5,000,000.*

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

7. *The Purchaser will pay all stamp duty in connection with this transaction.*

The Vendor's solicitor subsequently discovered that the Vendor did not have any of the original title deeds executed during the last 20 years and therefore supplied to the Purchaser certified true copies together with a statutory declaration stating that neither the Vendor nor her solicitor is able to explain the absence of the originals.

Questions:

Answer the following questions giving reasons for your answers:

1.1 In this transaction is the Vendor able to discharge her duty to hand over the original title deeds on completion?

(10 marks)

1.2 Assuming that the Vendor has breached her duty with regard to the original title deeds, advise the Purchaser whether the Purchaser can rescind before completion and recover the damages referred to in clause 6 of the PSPA.

(7 marks)

1.3 Assume for the purpose of this question only that the parties signed a formal sale and purchase agreement on 14 October 2017. Advise the Purchaser how much stamp duty is payable and when it must be paid.

(8 marks)

Question 2 (25 marks)

On 21 August 2017 Paul Poon ("Paul") as purchaser entered into a binding Agreement for Sale and Purchase (the "Agreement") to buy Flat 15A, Hibiscus Court, 25 Prince Edward Road, Kowloon and the roof above Flat 15A (Flat 15A and the roof above it are together referred to as the "Property"). The vendor under the Agreement is Vicki Vong ("Vicki"). Completion is due to take place on 14 November 2017. The owners of Hibiscus Court incorporated in 1985.

Paul inspected the Property before signing the Agreement and Vicki showed him an internal spiral staircase leading from Flat 15A to the roof above it. The roof can also be accessed by a common staircase.

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 12 of the Agreement provides as follows:

The Vendor gives no warranties that the Property complies with the Buildings Ordinance Cap. 123 or the Building Regulations and the Purchaser shall not be entitled to raise any requisition or objection or to rescind this agreement or to annul the sale or to claim any compensation or damages from the Vendor in connection with any breach of the Buildings Ordinance or the Building Regulations.

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

The title deeds were delivered to Paul's solicitor on 25 August 2017. Paul's solicitor received a report from Paul's surveyor and on 5 September 2017 raised requisitions including the following requisition:

Paul has been advised by his surveyor that the construction of the spiral staircase leading from the living room of Flat 15A to the roof above is not shown on the approved building plans and that its construction required Building Authority consent because the roof slab was cut. Please send us evidence that the consent of the Building Authority was obtained to its construction. Clause 8 of the Deed of Mutual Covenant ("DMC") for Hibiscus Court also prohibits structural alterations. Please also provide evidence that the DMC has not been breached.

Clause 8 of the DMC provides that owners will not make structural alterations to any part of Hibiscus Court.

On 6 September 2017 Vicki's solicitor replied as follows:

Our client drew Paul's attention to the spiral staircase when he inspected the Property. In addition your attention is drawn to clause 12 of the Agreement. Accordingly we are not obliged to reply to this requisition. However, Vicki wishes us to point out that the spiral staircase was present when she bought the Property in 1990 and that she has not received any complaints from anyone.

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

Questions:

Answer the following questions giving reasons for your answers:

2.1 Has Vicki breached the Agreement?

(18 marks)

2.2 Assuming that Vicki has breached the Agreement by failing to give good title, explain whether Paul can terminate the Agreement and claim damages and explain how the damages will be calculated.

(7 marks)

Question 3 (25 marks)

On 12 October 2017 Sandy So ("Sandy") as vendor and Peter Poon ("Peter") as purchaser entered into the attached provisional agreement for the sale and purchase of Flat 3A, Pine Court, 3 Pine Road, Hong Kong (the "Property"). Sandy and Peter each instructed a solicitor and Sandy's solicitor prepared the draft formal agreement which was sent to Peter's solicitor on 16 October 2017. In the meantime Peter's solicitor had searched against the Property in the Land Registry and discovered that an uncompleted agreement for sale and purchase dated 15 September 2017 (the "First Agreement") is registered.

When asked about the First Agreement, Sandy's solicitor told Peter's solicitor that it had been cancelled and that a cancellation agreement would be signed and registered shortly. Peter's solicitor asked for the cancellation agreement to be registered before Peter would sign the formal agreement or pay the further deposit. Sandy's solicitor said that this was not possible and asked for the formal agreement to be signed by 24 October 2017.

On 20 October 2017 Peter's solicitor wrote to Sandy's solicitor as follows:

Our client insists that a cancellation agreement in respect of the First Agreement be registered against the Property before he will sign the formal agreement or pay the further deposit.

On 21 October 2017 Sandy's solicitor replied as follows:

The cancellation agreement in respect of the First Agreement will be registered as soon as possible but not before 24 October 2017. Nevertheless, please ask your client to sign the formal agreement and pay the further deposit by 24 October 2017.

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

Peter did not sign the formal agreement or pay the further deposit on 24 October 2017 and on 25 October 2017 Sandy's solicitor wrote to Peter's solicitor saying that Peter had breached the terms of the provisional agreement and that Sandy had forfeited Peter's deposit.

Questions:

Answer the following questions giving reasons for your answers:

3.1 Can Peter claim specific performance of the provisional agreement?

(8 marks)

3.2 Assume for the purposes of this question that Peter signed the formal agreement drafted by Sandy's solicitor and that on 24 October 2017 Peter's solicitor sent the signed formal agreement to Sandy's solicitor with a cheque made payable to Sandy's solicitor for the further deposit. The signed formal agreement and cheque were sent under cover of a letter which imposed on Sandy's solicitor an undertaking to return the formal agreement signed by the vendor within 5 days. Sandy's solicitor paid the cheque for the further deposit into his client account, but on 1 November 2017 Sandy's solicitor wrote to Peter's solicitor saying that Sandy did not want to proceed. Sandy's solicitor returned to Peter's solicitor a cheque for the total sum of HK\$1,400,000 representing the sum of the initial deposit, the further deposit and compensation equal to the initial deposit. **Can Peter claim specific performance of the provisional agreement?**

(12 marks)

3.3. What are the duties of a stakeholder ?

(5 marks)

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

Provisional Agreement for Sale and Purchase referred to in Question 3

THIS AGREEMENT is made on 12 October 2017

Between the Vendor - Sandy So of Flat D, 16th Floor, Red Mansions, 15 Red Road, Hong Kong; and

the Purchaser - Peter Poon of Flat 6A, Blue Gardens, 12 Blue Road, Kowloon

The Vendor and the Purchaser agree as follows:

1. The Vendor shall sell and the Purchaser shall purchase Flat 3A, Pine Court, 3 Pine Road, Hong Kong (the 'Property').
2. The purchase price is HK\$12,000,000.00 which shall be paid by the Purchaser to the Vendor in the following manner:
 - (a) HK\$200,000.00 as initial deposit to the Vendor on the signing of this agreement,
 - (b) HK\$1,000,000.00 as further deposit to the Vendor's solicitor as stakeholder on the signing of a formal agreement for sale and purchase on 24 October 2017,
 - (c) HK\$10,800,000.00, being the balance of purchase price, on completion.
3. The parties shall sign the formal agreement for sale and purchase on or before 24 October 2017.

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

4. The Vendor's solicitor may release the further deposit to the Vendor provided that the balance of the purchase price is sufficient to discharge the existing legal charge.
5. Completion will take place on 29 November 2017.
6. If the Purchaser shall fail to complete the purchase in accordance with the terms and conditions herein contained, the deposit(s) paid by the Purchaser shall be absolutely forfeited by the Vendor and the Vendor shall then be entitled at his absolute discretion to resell the property and the Purchaser shall not then sue the Vendor for any liabilities or damages or enforce specific performance.
7. If the Vendor shall fail to complete the sale in accordance with the terms and conditions herein contained, the Vendor shall immediately refund the deposit(s) paid by the Purchaser and pay to the Purchaser a sum equivalent to the said deposit(s) and this agreement shall be terminated.
8. The Purchaser will pay the stamp duty in connection with this transaction.

Sandy So

Signed _____

Peter Poon

Signed _____

Question 4 (25 marks)

By virtue of a binding Provisional Agreement for Sale and Purchase (the "Agreement") signed last week, Rose Lee agreed to purchase Simon Wong's residential flat in Happy Building, Kowloon (the "Flat").

The Agreement includes the following terms:

- (1) *The Vendor shall sell and the Purchaser shall buy a good title.*
- (2) *Completion shall take place on or before 20 December 2017.*
- (3) *Vacant possession shall be delivered on or before completion.*

Your firm represents Rose Lee. The law firm of Hide & Seek represents Simon Wong.

Questions:

Answer the following questions giving reasons for your answers:

4.1 The following are found among the title deeds supplied by Hide & Seek:

- (i) The original of the Release (the "Release") dated 15 April 2003 by Bingo Bank Ltd. (the "Bank") in favour of Simon Wong, who was named as the borrower in a Mortgage dated 30 June 2002 in favour of the Bank. The Release was executed by Tom Chan as an Attorney of the Bank.

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

- (ii) A certified copy of the Power of Attorney (the "Power of Attorney") dated 1 April 2002 executed by the Bank (as a company incorporated in Hong Kong) appointing Tom Chan as its attorney to execute, amongst other things, releases and reassignments. The Power of Attorney was sealed with the common seal of the Bank and signed by Billy Kwong whose capacity is not mentioned.

The Articles of Association of the Bank supplied by Hide & Seek provide: 'The seal of the Bank must be affixed only in the presence of its Managing Director and be authorized by the board of directors.'

No board resolution of the Bank has been supplied. **Will it be necessary for you to raise any requisitions to ensure due execution of the Release and the Power of Attorney?**

(7 marks)

4.2 Would your answer to question 4.1 above be different if, instead of being a company incorporated in Hong Kong, the Bank was incorporated in the British Virgin Islands?

(3 marks)

4.3 Before signing the Agreement, Rose Lee visited and inspected the Flat. When she was at the Flat, she saw a photograph taken by Simon Wong with his mother Mabel. Simon told Rose that Mabel also resided at the Flat with him. **Would you raise a requisition in light of this information to protect Rose's interest?**

(6 marks)

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

4.4 Would any part of your answer to question 4.3 above be different if, instead of seeing her photograph with Simon Wong, Rose met Mabel in person at the Flat and was introduced to her as a prospective purchaser, but Mabel gave no response and hurried off to work?

(4 marks)

4.5 Would you raise a requisition if the Deed of Mutual Covenant relating to Happy Building has allocated $1/20^{\text{th}}$ equal undivided share of and in Happy Building and the land upon which it stands to the first flat sold by the developer (which is not the Flat) and the remaining $19/20^{\text{th}}$ equal undivided shares to the developer itself? If further information is required to enable you to answer this question, state what it is and the reasons that this information is needed.

(5 marks)

Question 5 (25 marks)

The Deed of Mutual Covenant ("DMC") of Blossom Villa (the "Building") provides that the owners of undivided shares in the Building must pay a management charge. The DMC which was made in 1997, requires all owners to contribute to the management charge in proportion to the number of undivided shares in the Building that they own. The DMC also provides that all sums due from an owner under its terms that are unpaid are to be charged on the defaulting owner's shares and provides that the building manager can register a memorandum of the charge in the Land Registry against a defaulting owner's undivided shares. The owners of the Building incorporated in 2003.

Alana was the first owner of flat 19A in the Building (the "Flat") having bought it in 1998. In 2013, Alana sold the Flat to Billy. Billy granted a two-year lease of the Flat to Tina in December 2015.

In 1998, when Alana bought the Flat, the developer agreed to sell Alana a parking space in the basement car park of the Building. Alana did not like the space that was offered. The developer offered her an alternative space and Alana accepted it. Alana was worried because, at the time that she chose it, the space was not physically marked as a car parking space, unlike the space that she had rejected. The developer told Alana not to worry. The developer promised to mark the space as a parking space and ensure that she was issued with a car parking permit. Alana paid HK\$200,000 for the space. As promised, the space was marked out and Alana was issued with a car parking permit. Billy was issued with a permit when he bought the Flat and car parking space in 2013.

The developer sold to another purchaser the car parking space originally offered to Alana. Alana, and then Billy, used the car parking space allocated to Alana until May 2017. The Management Committee then wrote to Billy claiming that the space lay within the common parts of the Building. The Management Committee required Billy to stop using the space.

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

In July 2016, the Owners' Corporation validly resolved to carry out renovation works at the Building. The total cost of the renovation works was HK\$2 million. Once the renovation works were complete, the Management Committee issued demands to owners demanding each owner's contribution to the cost of the renovation works. Billy was served with a demand for HK\$100,000; this was his share of the costs calculated in accordance with the terms of the DMC. Despite repeated demands Billy has not paid the HK\$100,000 demanded.

Questions:

Answer the following questions giving reasons for your answers:

- 5.1 Is Billy liable to pay the Management Committee's demand for HK\$100,000 and if so, what remedies are available to the Owners' Corporation if Billy continues to refuse to pay the HK\$100,000? (7 marks)**
- 5.2 Can the Owners' Corporation validly insist that Tina pays the HK\$100,000 if Billy refuses to do so? (5 marks)**
- 5.3 Advise Billy as to how he can determine whether the car parking space falls within the common parts. (3 marks)**
- 5.4 If the car parking space falls within the common parts, what is the legal basis for any action by the Owners' Corporation requiring Billy to cease using the space? (3 marks)**
- 5.5 Does Billy have any possible defence or defences? (7 marks)**

END OF TEST PAPER

2018 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD I: CONVEYANCING

Thursday, 25 October 2018



2018 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

On 20 August 2018, Vera as vendor and Paul as purchaser entered into an agreement (the "Agreement") whereby Vera would sell Paul her flat known as Flat 3B, Grand Gardens (the "Flat") for a consideration of HK\$18 million with completion on 20 October 2018. The Agreement is substantially in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219. Vera agreed expressly to give good title. Clause 4 of the Agreement provides as follows:

Completion shall take place at the office of the Vendor's solicitor at 5 p.m. on 20 October 2018.

Two weeks before the date of completion, Vera's solicitor suggested to Paul's solicitor that completion should take place by way of undertaking. Vera's solicitor sent Paul's solicitor a completion statement showing the balance of purchase price to be paid on completion and instructed Paul's solicitor to pay the balance of purchase price by way of two cashier orders as follows:

1. Made payable to Vera's mortgagee for the account of Vera to discharge Vera's mortgage.
2. Made payable to Vera's solicitor's firm.

One week before the date of completion, Paul's solicitor told Vera's solicitor that he did not agree to complete by way of undertaking.

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

On 19 October 2018, Paul's solicitor made an appointment with Vera's solicitor to complete at 4:45 p.m. on 20 October 2018 and on 20 October 2018 Paul's solicitor attended at the office of Vera's solicitor with two cashier orders as instructed. Vera's solicitor did not by 5 p.m. hold an assignment executed by Vera and a discharge executed by Vera's mortgagee. Paul's solicitor refused to complete. On 22 October 2018, Vera entered into a binding provisional agreement to sell the Flat to Betty.

Questions:

Answer the following questions giving reasons for your answers:

1.1 Advise Paul whether he can obtain specific performance of the Agreement.
(20 marks)

1.2 Assume that the sale and purchase was completed and that Vera as beneficial owner assigned the Flat to Paul. After completion, the building manager of Grand Gardens gave Paul notice to reinstate a structural internal partition wall separating the living room in the Flat from one of the bedrooms. This demolition was carried out before Paul bought the Flat. It breaches a covenant in the Deed of Mutual Covenant for Grand Gardens which provides that no owner will make any structural alterations. Paul telephoned Vera who told Paul that she did not demolish the wall. **Does Paul have a remedy against Vera or anyone else?**

(5 marks)

Question 2 (25 marks)

Pursuant to a provisional agreement dated 28 September 2018, Victor entered into a formal agreement to sell his residential flat in North Point (the "Flat") to Peter for HK\$10 million. Victor agreed expressly to give and show good title.

From the computer record of documents registered in the Land Registry and the title deeds provided, the Flat was first assigned by way of a sale to Lai Kun in 1991. Lai Kun died in 2000. The Grant of Probate of Lai Kun's will (the "Grant") shows that he left all his property to his son, Lai Chung, who was an infant at that time. The Grant also reveals that his executors were Felix Chen and Francis Chen. The register shows that in 2002, the Flat was assigned by Felix Chen and Francis Chen as executors to Felix Chen at what appears to have been an undervalue. In 2009, Felix Chen assigned the Flat by way of sale to Emma Yau who assigned the Flat by way of sale to Victor in June 2016.

Questions:

Answer the following questions giving reasons for your answers:

- 2.1 Explain how Peter can challenge Victor's title. (14 marks)**
- 2.2 Explain to any extent your answer would be different if the devolution of Lai Kun's estate took place more than two decades ago. (4 marks)**
- 2.3 Assume that Victor and Peter proceed to completion. Explain how the different documents effecting the sale and purchase of the Flat would be stamped. (7 marks)**

Question 3 (25 marks)

Super Company Limited ("Super") was incorporated in Hong Kong in March 2005 and has only one director, David Wong. Super has just signed a binding agreement (the "Agreement") to sell to Oliver Pang (the "Purchaser") its property (the "Property"), which forms part of Marigold Mansion, Wanchai, Hong Kong.

The terms of the Agreement include the following:

- (1) *Super will sell a good title to the Purchaser.*
- (2) *The Property is sold subject to a tenancy agreement (the "Tenancy Agreement") dated 1 April 2017 in favour of Terry Tai for three years at a monthly rent of HK\$28,000.*
- (3) *Completion will take place on 3 December 2018.*

The Articles of Association of Super include the following:

"The Common Seal of the company shall be affixed in the presence of one or two of its directors."

Questions:

Answer the following questions giving reasons for your answers:

- 3.1 Explain Super's possible mode(s) of execution of the forthcoming assignment at completion.** There is no need to draft any clause to answer this question. **(6 marks)**

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

3.2 Among the title deeds produced by Super, there is a receipt on discharge of a charge (the "Receipt") dated 8 May 2016 signed by Fred Chan, who is described as "manager of Rich Bank Ltd.". The Receipt is annexed to a mortgage memorial no. 05120500480038 executed by Super on 8 December 2005 in favour of Rich Bank Ltd.

The Receipt reads as follows:

"Rich Bank Ltd. hereby acknowledges receipt of all monies secured by the annexed Mortgage registered in the Land Registry by Memorial No. 05120500480038."

Should the Purchaser's solicitors raise any requisition on title to ensure due execution of the Receipt by Rich Bank Ltd.?

(5 marks)

3.3 Explain the impact, if any, on title if the Purchaser has just discovered that the owners' corporation of Marigold Mansion (the "Corporation") is currently involved in several litigation matters, which include a claim for compensation from an elderly watchman employed by the Corporation (who fell, whilst performing his duties, on a slippery floor of the main lift lobby of Marigold Mansion) as well as some contractual disputes with companies recently engaged to undertake renovation work on the external walls of Marigold Mansion.

(10 marks)

3.4 Explain the impact, if any, on title if the Tenancy Agreement contains an option for Terry Tai to renew the tenancy for a further term of two years upon expiry of the present term.

(4 marks)

Question 4 (25 marks)

In January 2016, Alice bought Flat 16A (the "Flat") on the top floor of Marina Court (the "Building") from David. The Building is a block of 30 residential flats built in 1973. Alice inspected the Flat before she signed an agreement to buy it and David told Alice that in 2000, he had moved the front door of the Flat and incorporated into the Flat three feet of the corridor immediately outside the Flat. David pointed out that many other owners had done the same and that no action has ever been taken against him or any other owners.

There is a Deed of Mutual Covenant for the Building (the "DMC"). The DMC does not contain a definition of common parts. The DMC sets out the undivided share allocation which pairs each of the flats with one equal undivided 30th share of and in the land and the Building. The DMC grants exclusive use rights over each of the 30 flats and reserves to the developer the exclusive use of the roof of the Building. There are no other exclusive use areas. There are no undivided shares paired with the roof and the developer did not retain any undivided shares. The owners of the Building formed an owners' corporation in 1980 and there is also a building manager. Under the DMC, an owner is the person in whom the undivided shares in the premises are vested for the time being.

In August this year, water started leaking into Alice's flat from the roof due to a failure to repair the tiles on the roof's surface. Alice contacted the building manager and asked the manager to arrange for the developer to carry out repairs. However, despite Alice's complaints to the building manager and the developer, the roof has not been repaired and the leakage has continued.

Alice recently received a letter from the owners' corporation complaining that she has encroached into the corridor outside the Flat and asking her to restore the front door of the Flat to its original position.

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

Questions:

Answer the following questions giving reasons for your answers:

4.1 Who is responsible for repairing the roof? (10 marks)

4.2 Can the owners' corporation obtain an injunction against Alice to force her to restore the front door of the Flat to its original position?

(15 marks)

Question 5 (25 marks)

Harry and Wendy live at Flat 3B, Harbour View (the "Flat") which was bought in 2015 for HK\$10,000,000. Wendy paid 50% of the price of the Flat but the Flat was bought in Harry's sole name. ABC Bank Limited ("ABC") loaned Harry 50% of the price which was secured by a first legal mortgage of the Flat. The loan is repayable by equal monthly instalments of principal and interest.

Harry has not paid the monthly instalments for six months and ABC intends to sell the Flat. ABC has found a buyer, Boris, who has offered HK\$7,500,000 for the Flat. ABC intends to accept this offer but Harry thinks that it is too low.

Questions:

Answer the following questions giving reasons for your answers:

- 5.1 Can ABC exercise the power of sale? (4 marks)**
- 5.2 Is there any basis on which Harry might stop the sale of the Flat from going ahead or on which he might later claim compensation? (10 marks)**
- 5.3 Is ABC subject to any interest that Wendy might have in the Flat? (4 marks)**
- 5.4 In 2017, ABC lent a further HK\$2,000,000 to Harry and in 2016, DEF Bank Ltd ("DEF") lent Harry HK\$1,000,000 on the security of a second legal mortgage of the Flat. If the proceeds of sale are not enough to cover all of Harry's indebtedness, in what order will ABC and DEF be paid out? (7 marks)**

END OF TEST PAPER

2019 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD I: CONVEYANCING

Tuesday, 29 October 2019



2019 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

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

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

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

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

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

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

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

Questions:

Answer the following questions giving reasons for your answers:

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

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

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

(5 marks)

Question 2 (25 marks)

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

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

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

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

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

Questions:

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

(15 marks)

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

(10 marks)

Question 3 (25 marks)

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

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

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

Questions:

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

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

(5 marks)

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

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

(6 marks)

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

(4 marks)

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

(10 marks)

Question 4 (25 marks)

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

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

Questions:

Answer the following questions giving reasons for your answers:

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

(20 marks)

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

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

(5 marks)

Question 5 (25 marks)

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

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

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

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

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

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

Requisition 1

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

Requisition 2

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

Questions:

Answer the following questions giving reasons for your answers:

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

(8 marks)

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

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

(4 marks)

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

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

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

(9 marks)

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

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

(4 marks)

END OF TEST PAPER