Examiners' Comments on the 2020 Examination
Head I: Conveyancing

Question 1

1.1 This question requires candidates to consider whether there is a concluded oral agreement between Vince as vendor and Philip as purchaser (*World Food Fair v Hong Kong Island Development Ltd* [2007] 1 HKLRD 498). The parties have agreed all essential terms. Assuming that there is a concluded oral agreement, candidates must consider whether there is a sufficient written memorandum of the agreement within section 3 of the Conveyancing and Property Ordinance, Cap. 219 (the 'CPO') signed by or on behalf of the vendor. The vendor is the party refusing to complete and against whom the agreement is to be enforced.

The vendor has not signed anything, but the receipt for the deposit has been signed by the vendor's solicitor. The receipt contains details of the property and the parties and the price is ascertainable from the reference to the deposit. The receipt does not refer to the agreed completion date, the stakeholder provision or that the property is sold with vacant possession. The latter is implied and the omission is immaterial. The purchaser could waive the stakeholder provision. In addition, the letter from the purchaser's solicitor may be joined with the receipt because the receipt refers to the transaction ('agreed to be sold') (*Timmins v Moreland Street Property Company Ltd* [1958] Ch 110). Oral evidence may therefore be introduced to identify the transaction and the letter which contains the completion date and a reference to the stakeholder provision. Candidates should consider whether the vendor's solicitor is his lawful agent (*Fauzi Elias v George Sahely & Co (Barbados) Ltd* [1983] 1 AC 646).

Candidates might also consider whether the oral agreement is enforceable in equity by virtue of the doctrine of part performance. However, the facts do not indicate that there is an act by the purchaser that points to the existence of a contract. The answer should therefore focus on the application of section 3 CPO.

1.2 The answer depends on the construction of Clause 2(ii) of the Provisional Agreement (the 'PA') (*Man Sun Finance International Corporation Ltd v Lee Ming Ching Stephen* [1993] 1 HKC 113) the wording of which makes payment independent of signing the formal agreement (*See To Keung v Sunnyway Ltd* [2009] 5 HKLRD 300). Time for payment is of the essence (*Sun Lee Kyong Sil v Jia Weili* [2010] 2 HKLRD 30).

1.3 The PA has not been replaced by a formal agreement. Clause 8 of the PA deals with failure of the vendor to complete ('If the Vendor fails to complete the sale …'). This clause excludes the purchaser's right to damages and specific performance (*Wong Lai Fan v Lee Ha* [1992] 1 HKLRD 125) provided the vendor 'immediately' (*Yuen Pok International Enterprise Ltd v Valle Agnes Mallari* [2012] 3 HKC 314, CA) returns 'deposits paid' and also pays compensation. Candidates should consider whether the vendor can rely on Clause 8. In this case the vendor has not paid the purchaser any compensation and the completion

date has passed (*Man Sun Finance International Corporation Ltd v Lee Ming Ching Stephen)*.

Candidates should also consider whether the agreed compensation amounts to liquidated damages or a penalty and what remedies are available to the purchaser if the vendor cannot rely on Clause 8 of the PA (*Chan Yuen Ka Crystal v Chu Cheong Kit Raymond* [2009] HKEC 1705).

Number of candidates who attempted this question – 127. Passing rate 77%.

Question 2

2.1 The vendor, Lee Holdings Ltd, has agreed to give vacant possession on completion. It is therefore implied that Pansy Poon as purchaser may inspect once prior to completion (*Twinkle* Ste*p Investment Ltd v Smart International Industrial Ltd* [1999] 3 HKLRD 521). The vendor has breached the contract by failing to allow the purchaser to inspect. The vendor might also have breached the contract by failing to give vacant possession on time. Time is expressly of the essence and the de minimis rule does not apply (*Union Eagle Ltd v Golden Achievement Ltd* [1997] 1 HKLRD 366). However, the de minimis rule applies to the giving of vacant possession and the question is whether the packing cases amount to substantial prevention or interference with enjoyment of the right of possession (*Grandwide Ltd v Bonaventure Textiles Ltd* [1990] 2 HKC 154, CA).

Since the vendor is in breach, the vendor cannot terminate the agreement. The purchaser can accept the breach and treat herself as discharged or alternatively waive the breach and apply for specific performance. In order to obtain specific performance, the agreement must not have been terminated – for example, by the purchaser starting proceedings to recover her deposit and damages, as advised by her solicitor. Specific performance is not excluded by Form 2 of the Third Schedule to the CPO. The purchaser must show that she is ready, willing and able to complete by showing that she has in the past performed all her obligations and that she is ready to pay the balance of purchase price (*Lau Suk Ching Peggy v Ma Hing Lam* [2010] 4 HKC 215, CFA). The award is discretionary. Pansy must come with clean hands and without delay. The court will decline to award specific performance if the vendor can show substantial hardship.

2.2 The purchaser with priority will obtain specific performance. At common law where the equities are equal the first in time prevails. Pansy Poon is first in time and she enjoys priority over Betty Bau. Arguably, however, the equities would not be equal if Pansy had not protected her interest by registering her agreement at the Land Registry.

If priority is determined under the Land Registration Ordinance, Cap 128, (the 'LRO') priority would be determined according to the dates of registration under s 3(1) of the LRO. In *Chu Kit Yuk v Country Wide Industrial Ltd* [1995] 2 HKLR 162, priority in a similar case was determined by applying the common law rule although both agreements in that case had been registered.

The purchaser with lower priority might still obtain specific performance if she can show substantial hardship (*Chu Kit Yuk v Country Wide Industrial Ltd).*

2.3 A deed is required under s 4 of the CPO. The vendor, Lee Holdings Ltd, has not executed the Assignment under its common seal. Candidates should therefore consider whether the method of execution by Lee Holdings Ltd complies with sections 128 and 127 of the Companies Ordinance, Cap. 622. Under section 128 a deed must be executed under s 127, be expressed to be executed as a deed and be delivered as a deed. Delivery is presumed under s 128(3) provided the deed is executed in accordance with section 127.

Under s 127 a company may execute a deed by having it signed by its sole director on behalf of the company. In this case it is not clear that Tony Lee is the sole director of the company. Furthermore the attestation clause does not state that the Assignment is executed as a deed.

The purchaser should require the Assignment to be expressed to be executed as a deed and also require evidence of Tony Lee's capacity.

Number of candidates attempting this question - 109. Passing rate 53%.

Question 3

3.1 The interest under the Conditions of Sale (an agreement for lease) was originally equitable because the agreement for lease was enforceable by the equitable remedy of specific performance. Under s 14(1) CPO the equitable interest has been converted to a legal estate and a Government Lease deemed issued on compliance with the conditions precedent. S 14(3) CPO applies because the Conditions of Sale are dated after 1 January 1970. A certificate of compliance has been issued and registered and compliance is deemed (*Tai Wai Kin v Cheung Wan Wah Christina* [2004] 3 HKC 198).

3.2 In order to prove title the vendor must show certified true copies of the Conditions of Sale under s 13(1) and (2) CPO and the Deed of Mutual Covenants (the 'DMC') under s 13(1) (b) and (2) of the CPO. To give title the vendor need not hand over the originals on completion because these documents do not relate exclusively to the property sold: S 13A(1)(a)and (b) of the CPO.

The facts show that the Assignment dated 31 July 2005 is the intermediate root of title. To prove title the vendor must produce a certified true copy, but because this Assignment relates solely to the property sold, the vendor must on completion be able to hand over the original under s 13A(1)(b) CPO or give a satisfactory explanation as to why he is not in possession of the original (*Leung Kwai Lin v Wu Wing Kuen* [2001] 4 HKCFAR 55). The explanation would usually be made by the person last in possession of the original and must satisfy the purchaser beyond reasonable doubt that there is no prior unwritten equitable charge by deposit of title deeds. The explanation is essential to giving good title

unless the absence of the original does not indicate a realistic possibility of some transaction affecting the land which could affect the purchaser (*De Monsa Investments Ltd v Whole Win Management Fund Ltd* [2013] HKEC 1162). As the Assignment is the intermediate root dealing solely with the property sold, the vendor must explain why he is not in possession of the original.

3.3 Candidates should consider whether the roof is a common part. If the DMC is silent, the facts indicate that under s 2 and the First Schedule to the Building Management Ordinance, Cap.344, (the 'BMO') the roof is a common part. As an order has been made against the roof under s 24 of the Buildings Ordinance, Cap. 123, (the 'BO') the Building Authority has power to demolish the illegal structure under s 24(3) of the BO, recover the cost from the owners under s 24(4) BO and register a memorial of a certificate of the cost against the roof under s 33(9) of the BO. The effect of the registration of the certificate is that the cost of removal constitutes a first charge on the roof.

If the roof is a common part, all co-owners must contribute to fund the cost of demolition. If an owner's liability to contribute is of such magnitude that it would exceed anything a reasonable purchaser would have contemplated when agreeing to buy the property, the vendor's title will be defective (*All Ports Holdings Ltd v Grandfix Ltd* [2001] 2 HKLRD 630 applying *Chi Kit Co Ltd v Lucky Health International Enterprise Ltd* (2000) 3 HKCFAR 268). As he has agreed to give good title, the vendor must prove beyond reasonable doubt (*MEPC v Christian Edwards* [1981] AC 205) that his title is not defective. The cost of complying with an order under s 24 of the BO is not an ordinary running expense and is likely to be beyond the contemplation of a reasonable purchaser.

Lack of registration of the order under s 24 of the BO is immaterial because the registration of a certificate of the cost of demolition under s 33(9) of the BO is not a precondition for registration of a charge. If the cost of complying with the order is known and is not of great magnitude, the purchaser might be required to complete if the vendor gives a fortified undertaking to pay the appropriate contribution to the cost of complying with the order (*Lam Mee Hing v Chiang Shu Yin* [1995] 3 HKC 247).

Number of candidates attempting this question - 120. Passing rate 58%.

Question 4

4.1 Candidates should consider the alterations that have been carried out and whether they breach the BO, the BMO or the DMC for May Court (the 'DMC'). If there is any breach, the vendor might nevertheless be able to give good title if he can put forward facts and circumstances to show beyond reasonable doubt that there is no real risk of enforcement action *(MEPC v Christian Edwards).*

The demolition of two internal walls separating Flat 15A from the corridor amounts to building works within s 2 of the BO for which prior consent of the Building Authority (the 'BA') is required, failing which the BA can take enforcement action against the owner of

Flat 15A. As the walls are inside the building, no prior consent would be required if the walls do not affect the structure of the building: s 41(3) of the BO. The vendor would have to produce expert evidence to prove that the walls do not affect the structure. If the walls affect the structure, there is a real risk of enforcement action even though the breach of the BO occurred many years ago (*Spark Rich (China) Ltd v Valrose Ltd* [2006] 2 HKC 589, CA) because demolition would have affected the structural safety of the building.

If the demolished walls affect the structure of the building, there is a breach of covenant 1 of the DMC and for the reasons mentioned above, a real risk of enforcement action under the DMC.

If the demolished walls are common parts, there is a breach of covenant 2 of the DMC. The DMC does not state that the walls are common parts and in the absence of other evidence (for example, in a document registered in the Land Registry), the walls would be common parts under s 2 and Schedule 1 of the BMO which provides that walls enclosing a common area (the corridors) and structural walls are common parts.

However, consent to demolition of the walls could have been given under covenant 1. The fact that consent could be given also leads to the possibility that the owners' corporation might have waived the breach by tolerating the breach for many years. If the vendor could prove waiver, arguably the vendor could show that there is no real risk of enforcement action and be able to give good title. Even if the defence of waiver is not available, assuming that the walls are common parts only because they enclose a common area (and not because they are structural), the vendor might be able to show that there is no real risk of enforcement action and be able to give good title.

The incorporation of part of the corridor into Flat 15A breaches covenant 1 of the DMC and s 34I (1) of the BMO. In either case consent could have been given to the incorporation of the corridor in which case there would be no breach of covenant. If the owners' corporation takes enforcement action, the defence of waiver is available and as mentioned above, in these circumstances the vendor is likely be able to show that there is no real risk of enforcement action. Even if the defence of waiver is not available the vendor might still be able to show that there is no real risk of enforcement action and be able to give good title. On the difference between waiver and 'no real risk' see *Pak Wai Ching v Secretary for Justice* HCMP 255/2003 (unreported).

The incorporation of part of the corridor into Flat 15A also potentially breaches s 34(1)(b) of the BMO if it creates a nuisance or hazard. In the case of a breach of s 34(1)(b) of the BMO, the vendor is unlikely to be able to show that there is no real risk of enforcement action.

When the purchaser inspected Flat 15A, the vendor might have agreed to sell that part of the corridor which has been incorporated into Flat 15A. However, the vendor cannot give title to common parts of the building (*Profit World Trading v Ho So Yung* [2011] 2 HKLRD 773). The vendor's title would be defective for this reason.

A small amount of credit was given for answers which correctly dealt with restoration of Flat 15A to its original condition before completion. If the vendor can remove the defects before completion and give substantial performance, the purchaser might be obliged to complete with a reduction in the price (*Goldful Way Development Ltd v Wellstable Development Ltd* [1999] 1 HKLRD 563). The vendor might, however, be unable to give substantial performance if he has agreed to sell part of the corridor. If the demolished walls are structural, reinstatement is also likely to take time and the vendor must be able to give good title on the agreed completion date. Time is of the essence.

4.2 The purpose of Clause 12 is to limit the vendor's obligation to give and show good title and to force on the purchaser a title which might be defective or defeasible by virtue of 'unauthorised alterations or illegal structures'. To be effective the wording of Clause 12 must be wide enough to cover the defect. But even if the wording is wide enough, the vendor must not mislead the purchaser. Clause 12 is considered in the light of the factual matrix and overall the purchaser must understand the risk that he is required to take (*Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279*).*

The problems with the title have been dealt with in question 4.1. A good answer would consider whether the words used in Clause 12 cover the defects identified. Arguably the reference to 'unauthorised alterations or illegal structures' refers to alterations that are unauthorised under the BO, the DMC and the BMO (breaches of s 34I of the BMO are treated as breaches of the DMC) (*Channel Green Ltd v Huge Grand Ltd* [2015] 1 HKLRD 655). The wording might not cover an agreement by the vendor to sell common parts.

A good answer would also consider whether the vendor knew about the defects. The facts indicate that the vendor did not carry out the alterations and that the title deeds do not include a layout plan which might assist with identifying the alterations. When the purchaser inspected Flat 15A and saw Clause 12 he might have been suspicious that there were unauthorised alterations and the vendor might have the same suspicion, but if there is no other evidence that the vendor actually knew about the defects, the vendor might not have any more knowledge than the purchaser and be able to rely on Clause 12 (*Jumbo King Ltd v Faithful Properties Ltd)* except in relation to the sale of common parts. If the vendor knew about the defects, however, nothing but the most explicit wording would absolve him from his duty to give and show good title. Arguably the wording in this case is not sufficiently explicit.

Number of candidates attempting this question - 109. Passing rate 56%.

Question 5

5.1 The permitted user of the property is residential. The Agreement to be made on 5 November 2020 will attract Ad Valorem Stamp Duty ('AVD'), Special Stamp Duty ('SSD') and Buyers' Stamp Duty ('BSD') unless exemptions apply.

Under s 29BD(2) of the Stamp Duty Ordinance, Cap.117 (the 'SDO') Scale 2 rates of AVD apply because Sam and Sunny are closely related to each other (as defined in s 29AD of the SDO)and to Victor provided each of Sam and Sunny is acting on his own behalf. It does not matter that Sam and Sunny are not Hong Kong permanent residents or that Sam owns another residential flat. Paragraph j of Scale 2 applies. The AVD is HK$850,000. The Agreement must contain a certificate of value at HK$21,739,120.

Under s 29CA (10) of the SDO, no SSD is payable even though the sale takes place within 3 years of Victor's purchase because the purchasers, Sam and Sunny, are the children of the vendor, Victor.

Under s 29CB(2)(c) of the SDO, no BSD is payable because Sam and Sunny are closely related to Victor provided they are acting on their own behalf.

The missing information is whether Sam and Sunny are acting on their own behalf.

5.2 AVD is payable on the Agreement under s 29BA(a) and Part 1 of Scale 1 of Head 1 (1A) of the First Schedule to the SDO at the rate of 15% of the price.

SSD is payable on the Agreement. The exemption from SSD referred to above in the answer to question 5.1 is not available because Sophia is not related to the vendor, Victor. The date of Victor's acquisition is 4 May 2019 and the date of his disposal will be 5 November 2020. Under Part 2 Head 1(1B) of the First Schedule to the SDO, the rate of SSD is 10% of the price of HK$21 million (sections 29CA (5)(6)(7) and (8) of the SDO).

BDS is payable on the Agreement. Sophia is a Hong Kong Permanent resident but Sam is not and Sam is not closely related to Sophia. Under s29CB(1) and Head 1(1C) of the First Schedule to the SDO, BSD is payable at the rate of 15% of the price of HK$21 million.

5.3 Victor and Wendy were joint tenants. On the death of one of them the flat passes by survivorship to the other. In this case the order of their deaths is unknown and under s 11 of the CPO, the younger is deemed to survive the elder. Information about the ages of Victor and Wendy is required. If for example, Wendy was younger than Victor, the flat would pass to Wendy by survivorship and then to Sunny under Wendy's will.

The joint tenancy might have been severed in the joint lifetimes of Victor and Wendy. In particular the charging order might have automatically severed the joint tenancy in equity. In *Ho Wai Kwan v Chan Hon Kuen* [2015] HKEC 132, the court held that a charging order did not effect an equitable severance, but the matter is not without doubt.

If the joint tenancy has been severed, Wendy's interest would pass by her will to Sunny and Victor's interest would pass by his will to Sam.

Number of candidates attempting this question - 86. Passing rate 30%.

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