

Examiners' Comments on the 2021 Examination

Head I: Conveyancing

Question 1

The facts state that the windows of a residential flat have been enlarged. The external walls have been cut and larger window frames have been installed. From the exterior of the building Patrick, the current owner, can see that his windows are larger than those of other flats and that the exterior does not have a uniform appearance. The enlargement was made by a previous owner in 2001. The facts set out two relevant covenants in the Deed of Mutual Covenant (DMC). See below for details of the covenants. The owner's corporation has recently complained about breaches of the DMC and asked Patrick to reinstate the windows to their original size and condition

Question: Advise Patrick whether the owners' corporation can obtain an injunction forcing him to carry out the reinstatement work described above and on the likelihood of the court granting an injunction. If you need more information to advise Patrick, state what information you need.

Candidates must identify and discuss the following issues:

1. **Breach of the DMC.** There is potentially a breach of covenant 1 of the DMC (no owner will alter the external appearance of the building without the prior consent of the building manager). There is a breach of covenant 2 of the DMC (no owner will make any structural alterations to any part of the building) because the external wall is structural (*IO of Elite Gardens v Profit More Co Ltd* [2002] 2HKLRD 518). There is also potentially a breach of s 34I(1)(a) of the Building Management Ordinance, Cap. 344 (BMO) (no owner will convert common parts to his own use without the prior consent of the management committee) (*Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond* [2008] 1 HKC 59) because the external walls are common parts. Candidates should explain why the external walls might be common parts. In conclusion, there is a breach of covenant 1 of the DMC. There might be other breaches depending on whether any consents were given. Evidence is needed about this.
2. **Standing of the owners' corporation.** The owners' corporation has standing to enforce the DMC under section 18(1)(c) of the BMO and must, to the exclusion of the individual owners, take any action in relation to the common parts.
3. **Is Patrick, the current owner, liable for breaches committed by a previous owner?** The burden of the covenants runs with the land under s 41(3) of the Conveyancing and Property Ordinance, Cap. 219 (CPO). Under s 41(2)(a) of the CPO, the covenants relate to something done on the land and the burden is intended to run under s 40 CPO. The DMC might include express terms that the burden passes. Patrick has also adopted the breaches and maintained them (*IO of Fortune Mansion Tsuen Wan v Chiu Ng Ling* [2010] 2 HKC 67, CA and *IO of Marina Cove v Chu Kam Tai* [2012] 2 HKLRD 107, CA).

4. **Can Patrick raise the defence of acquiescence?** Toleration of the breach for many years (since 2001) by the owners' corporation might amount to acquiescence. This defence is available in relation to a breach of covenant 1 and section 34I(1)(a) of the BMO because in both cases consent could be given to the alterations (*IO of Freder Industrial Centre v Gringo Ltd* [2016] 1 HKLRD 190). The defence is not available in relation to a breach of covenant 2 because the owners' corporation has a statutory duty to enforce the DMC (*IO of Hoi Luen Industrial Centre v Ohashi Chemical Industries (Hong Kong) Ltd* [1995] 2 HKLRD 448).
5. **What is the likelihood of the owners' corporation obtaining an injunction?** The owners' corporation would require a mandatory injunction. The grant of an injunction is discretionary and the general principles for obtaining a mandatory injunction are set out in *Redland Bricks Ltd v Morris and Anor* [1970] AC 652. The owners' corporation must show that grave damage will accrue to it in future and that damages are not a sufficient remedy. The court will also take into account the cost of complying with the injunction compared with the harm suffered by other owners. Candidates should apply these principles to the facts and state what further evidence is needed to support the owners' corporation's case. An injunction might be refused because a long time has elapsed since the breaches occurred (*IO of Shan Kwong Towers Phase II v Lee Suet Ching* [2007] 4 HKLRD 567).
6. **Other relevant points.** The cutting of the external walls without the consent of the Building Authority (BA) would breach the Buildings Ordinance, Cap. 123 (BO). A breach of the BO might also breach the DMC.

Question 2

The facts state that Harry and Wendy bought a residential flat (price – HK\$14 million) in their joint names using their own savings, a contribution from Wendy's father and a loan from the Goodwill Bank. The latter is secured by a first legal mortgage of the flat. The loan from Goodwill is repayable by equal monthly instalments of principal and interest and the mortgage is substantially in the same form as Form 5 of the Third Schedule to the CPO. Harry and Wendy moved in to the flat when they bought it. Wendy's father moved in later. They all moved out in 2021 and the flat was let to Tom for two years under a written, but unregistered, tenancy agreement. Goodwill's consent to the letting was not obtained. Harry and Wendy have not paid any instalments of principal and interest since September 2021. Goodwill wants to sell the flat with vacant possession and an employee of Goodwill is interested in buying it for HK\$14 million.

Question: Advise Goodwill on its rights to take possession and sell the flat with vacant possession to one of its employees at the price stated free from any interests that Tom or Wendy's father might have. Include in your answer advice as to the duties owed by Goodwill to Harry and Wendy, and the remedies available to them if Goodwill breaches those duties.

Candidates must discuss the following issues, some of which are identified in the question, but some of which are not:

1. **Goodwill's powers under the mortgage.** The legal mortgage includes implied powers to take possession and sell under paragraph 8 of the Fourth Schedule to the CPO. These are exercisable on the occurrence of an event of default. Candidates should state the relevant events of default that apply in this case.
2. **Possession.** Goodwill can immediately start proceedings for possession under Order 88 of the Rules of the High Court, Cap. 4A.
3. **Possession and priority - the tenancy.** Goodwill has the power to take possession and can obtain possession against the tenant provided that Goodwill has priority and did not consent to the letting. The facts state that Goodwill did not consent. Does Goodwill have priority over the tenant? Goodwill's mortgage is created first but it must be registered at the Land Registry, failing which it would be void against the tenant under section 3(2) of the Land Registration Ordinance, Cap. 128 (LRO). The tenancy does not need to be registered. A number of candidates failed to discuss this priority question.
4. **Possession and priority - Wendy's father.** Wendy's father might have an unwritten interest in the flat by virtue of his contribution to the price, although the presumption of advancement from Wendy's father to Wendy might apply. Any interest of Wendy's father is equitable and unwritten and therefore unregistrable. Goodwill has priority provided Goodwill claims as a bona fide purchaser for value of the legal estate without notice of the equitable interest. Occupation by Wendy's father at the date the mortgage was created would amount to notice, but the facts state that Wendy's father was not in occupation.
5. **Goodwill's duties owed to Harry and Wendy.** Goodwill must exercise its powers in good faith to obtain repayment of the loan (*Downsview Nominees Ltd v First City Corporation* [1993] 2 WLR 86) and must take reasonable care to obtain the true market value of the flat (*Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 WLR 1207). Goodwill would normally discharge its duty to obtain the true market value by obtaining expert advice on the mode of sale and the price (*Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349, PC). Goodwill may choose the timing of the sale. (*China & South Sea Bank v Tan* [1990] 1 AC 536). Goodwill may not sell to itself (*Tang Ying Ki v Maxtime Transportation Ltd* [1996] 3 HKC 257), but may sell to one of its employees although such a sale might make it more difficult for Goodwill to prove that it has discharged its duty to obtain the true market value (see *Tse Kwong Lam v Wong Chit Sen* regarding a sale to a director of the mortgagee).
6. **Harry's and Wendy's remedies against Goodwill.** Goodwill is liable in damages for breach of its duty to obtain the true market value. If Goodwill does not act in good faith or there is some irregularity (for example, no event of default), Harry and Wendy would be able to obtain an injunction to restrain the sale. A sale at undervalue is not an irregularity for which an injunction is available (*Lord Waring v London and Manchester Assurance Co Ltd* [1935] CH 310).

Question 3

The facts state that on 25 October 2021 Pansy signed a binding agreement for sale and purchase to buy Simon's flat. The agreement provides that Simon will sell a good title. The facts give a list of title deeds for the flat.

3.1 Question: Identify from the list the intermediate root of title in respect of the flat. The answer is the Assignment dated 10 February 2005 Memorial Number UB 8654210. Candidates should refer to section 13(1)(a)(ii) of the CPO and add that the Assignment is an assignment dated at least 15 years before the current agreement for sale and purchase and that it must deal with the whole estate which is sold under the agreement.

3.2 Question: Should Pansy accept title to the flat if Simon is unable to produce the originals of the Deed of Mutual Covenant dated 7 January 2005(DMC) (which relates to other property as well as the flat sold), an Assignment dated 10 November 2015 and a Mortgage dated 10 November 2015 (both of which relate exclusively to the flat). The Mortgage has been fully released under a Deed of Release dated 8 October 2016.

Candidates should discuss Simon's duty both to give title and to prove title and apply the law to each of the deeds referred to.

The DMC. This is dated before the intermediate root, but if the interest power or obligation it has created is not shown to have ceased or expired and the flat is sold subject to the DMC (this is normally the case), Simon must produce it. Simon can both prove title and give title with a certified true copy because the DMC does not relate exclusively to the flat sold: sections 13(1)(b) and (2) and 13A(1)(b) of the CPO.

Assignment and Mortgage both dated 10 November 2015. These are both dated after the intermediate root. Simon can prove title with certified true copies: section 13(2) of the CPO. In order to give title, Simon must on completion hand over the originals of both deeds because they relate exclusively to the flat sold: section 13A(1)(b) of the CPO. If Simon is unable to hand over the originals, he must provide a satisfactory explanation for his inability to do so (*Leung Kwai Lin Cindy v Wu Wing Kuen* [2001] HKCFA 65). The explanation would usually be in the form of a statutory declaration by the person who last had custody of the deeds (*Choi Ka Yin v Wong Siu Hung* HCMP 1728/2006). The explanation should give clear and cogent evidence to satisfy the purchaser that the flat is not subject to an unwritten equitable mortgage by deposit of title deeds. However, Pansy can only refuse to complete if the absence of the originals of these deeds indicates a realistic possibility of some transaction affecting the flat sold which would affect Pansy if she accepts title (*De Monsa Investments Ltd v Whole Win Management Fund Ltd* [2013] HKEC 1162). The declaration is required only to remove a doubt which would arise by reason of the missing deed (*Zhang Xueshuai v Lai Chan Wing* [2015] 2 HKC 125). The ultimate test is whether there is a real risk of a successful assertion of an encumbrance on the title (*Kingdom Miles Ltd v Ever Crystal Ltd* [2018] HKCA 967). Candidates should apply these principles to the Assignment and Mortgage.

3.3 Question: A Deed of Release dated 9 October 2019 has been sealed with the seal of the mortgagee, Prosperity Bank Ltd and signed by Alan Wong and Barbara Chan whose capacities are not stated. Explain whether or not the Deed of Release has been duly executed.

Simon, as vendor, must give and show good title and show that all deeds in the chain of title are properly executed. The question is always whether Pansy, as purchaser, can rely on the deed alone or whether she requires additional evidence. If she requires additional evidence, she must be able to explain why she is entitled to this.

Section 23A(2) CPO does not apply because the Deed is less than 15 years old at the date of the agreement. Section 20(1) of the CPO does not apply because the capacities of the signatories are not stated. Simon must produce the sealing requirements of Prosperity Bank Ltd to enable Pansy to compare them with the method of execution to check that the Deed was executed by Prosperity Bank Ltd in accordance with its sealing requirements. Section 23A(1) of the CPO does not assist because the Release is executed after 9 May 2003. Pansy might be able to rely on the presumption of due execution under s 23 of the CPO (a document appearing on its face to be properly executed is presumed properly executed) but is unlikely to be able to do so here because the capacities of the signatories are not stated. Section 23 of the CPO can be relied on only if the sealing requirements are strictly adhered to (*Grand Trade Development Ltd v Bonance International Ltd* CACV 1002/2000) Simon must therefore produce further evidence of proper execution by Prosperity Bank Ltd. For example, if the sealing requirements state that a board resolution is required to authorise sealing, Simon must produce a certified true copy of the resolution authorising Alan Wong and Barbara Chan to sign. If this is required, but Simon cannot produce it, title may be defective. If the method of execution is not in accordance with the sealing requirements, title may also be defective (*Li Ying Ching v Air-Sprung (Hong Kong) Ltd* [1996] 4 HKC 418).

Question 4

The facts state that Peter inspected a flat in Wealthy Court which includes a spiral staircase leading from the flat to the rooftop above the flat and on 1 September 2021, Peter signed a binding provisional agreement (PA) to buy the flat and the rooftop from Vera, the vendor. Note - it is possible for the exclusive use of a rooftop or part of a rooftop to be owned by an individual owner.

Peter describes the flat and rooftop and spiral staircase to his solicitor. Peter's solicitor is concerned that the spiral staircase might have been constructed after the Occupation Permit (OP) for the flat was issued and that its construction might not have been authorised by the Building Authority (BA) under the BO. In addition, the DMC for Wealthy Court provides that no owner will make any alterations which breach the BO. Candidates must recognise that the facts do not state whether the staircase was built before or after the issue of the OP.

Peter's solicitor tells Vera's solicitor that he is concerned that the spiral staircase might be unauthorised. Vera's solicitor replies that neither he nor Vera has any information about the spiral staircase but that it was present when Vera bought the flat and rooftop. Later Vera's solicitor tells Peter's solicitor that he has information which proves that the BA inspected the flat and rooftop in

1988 and that he will provide evidence of this before completion. Vera's solicitor also tells Peter's solicitor that the BA has not since complained about any unauthorised building works at the flat or rooftop. Eventually Peter refuses to sign the formal agreement or pay the further deposit on 14 September 2021, the date provided in the PA.

The PA provides for the price to be paid in three stages, an initial deposit (which exceeds 10% of the price for the flat and rooftop) on the signing of the PA, a further deposit "on the signing of a formal agreement" and the balance on completion. Clause 4 of the PA provides that Peter will sign the formal agreement by 14 September 2021.

Question: Advise Vera whether she can terminate the provisional agreement and forfeit Peter's initial deposit.

This is a complex fact pattern which requires candidates to decide whether Peter has breached the PA, whether Vera might be able to give good title by completion and whether Vera can forfeit Peter's deposit. Candidates must identify and discuss the following issues:

1. **The PA is binding.** The words used ("the Vendor shall sell and the Purchaser shall purchase") show intention to be bound. Vera, as vendor, has an implied obligation to give and show good title. This means that Vera must show by proper conveyancing evidence that her title is not defective or defeasible. Her implied obligation is to give good title on completion. Under section 13 of the CPO, she must also produce title deeds showing a chain of title. She must also answer requisitions reasonably raised by Peter.
2. **Building works** (described in section 2 of the BO) carried out after the issue of the OP require the prior consent of the BA. The cutting of a roof slab amounts to building works for which BA consent would be required. If BA consent is not obtained, the BA can under section 24 of the BO take enforcement action against the owner. The threat of enforcement action makes Vera's title defective or defeasible. The cutting of the roof slab is not "in" the building and does not come within section 41(3) of the BO. A breach of the BO breaches the DMC and the threat of enforcement action under the DMC also makes title defective or defeasible. From the facts it appears that Peter cannot be certain that the BO and DMC have been breached and he seems to have insufficient information to raise a proper requisition.
3. **What is good title?** A good title is not a perfect title. If Vera can put forward facts and circumstances to show beyond reasonable doubt that the risk of enforcement action by the BA under the BO or by other owners under the DMC is fanciful, the court will find that Vera's title is good (*MEPC Ltd v Christian Edwards* [1981] AC 205 and *Spark Rich (China) Ltd v Valrose Ltd* CACV 249/1998). Candidates should apply these principles to the facts. See *Kok Chong Ho v Double Value Developments Ltd* [1993] 2 HKLR 423. Candidates should also consider whether Vera might be able to put forward facts and circumstances to show that there is no real risk of enforcement action by other owners under the DMC.

4. **When must Vera give good title?** Vera must prove her title within a reasonable time before completion and give good title on completion. Therefore Peter cannot rescind before completion unless it is clear that Vera cannot remedy any defects in title (*A Mayson Development Co Ltd v Betterfit Ltd* [1992] 2 HKC 533). Candidates should consider the possibility that the defects are not irremediable. Peter's refusal to sign the formal agreement might amount to insistence on a new term (that Vera must give good title before completion) might amount to repudiation of the PA (*Chu Wing Nin v Ngan Hing Cheung* (unreported) HCA 9409/1991).
5. **Must Peter sign the formal agreement on 14 September 2021?** Clause 4 of the PA requires Peter to sign the formal agreement. Clause 2 (b) requires Peter to pay the further deposit "on the signing of the formal agreement" (see *Link Brain Ltd v Fujian Finance Co Ltd* [1990] 2 HKLR 353). Time is of the essence (*Wong Wai Chi Ann v Cheung Kwok Fung Wilson* [1996] 3 HKC 287). Assuming that the formal agreement drafted by Vera's solicitor contains the express terms of the PA and any implied terms and no new terms, Peter's failure to sign the formal agreement and pay the further deposit on the due date amounts to repudiation by Peter which would give Vera the right to terminate the PA (see *Yuen Pok International Enterprise Ltd v Valle Agnes Mallari* CACV 228/2011).
6. **Can Vera forfeit Peter's initial deposit?** Under Clause 5 of the PA, Vera can forfeit Peter's initial deposit without proving loss provided that the deposit is a reasonable amount objectively providing security against non-performance by Peter. Ten per cent of the price has been held to be a reasonable amount. In this case the initial deposit exceeds ten per cent of the price, but Vera might be able to show exceptional circumstances justifying a larger deposit (*Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234). Candidates should give an example of exceptional circumstances. If Vera cannot justify taking a larger deposit, she must return the whole of the initial deposit and sue for damages. Clause 4 of the PA excludes Vera's right to claim damages only if she can forfeit the initial deposit. A few candidates failed to consider the issue of forfeiting the initial deposit.

Question 5

The facts state that Rose and Daisy signed an agreement for sale and purchase dated 25 October 2021 (Agreement) to buy Oliver's flat. Oliver is not related to Rose or Daisy. This is the only agreement signed between the parties. Rose is a Hong Kong permanent resident (HKPR) but Daisy is not. The user of the flat is domestic. Oliver agrees to sell a good title and completion will take place on 11 January 2022.

Oliver bought that flat under an agreement dated 1 December 2018. This was the only agreement he signed. The assignment pursuant to the agreement is dated 7 January 2019. Oliver was the sole purchaser.

5.1 Question: Will the agreement for sale and purchase attract ad valorem and/or other stamp duties? If so, how much will such stamp duties be? If you need more information to answer the question, state what information you need and why you need it.

Candidates must consider ad valorem duty (AVD) (identified in the question), Special Stamp Duty (SSD) and Buyer's Stamp Duty (BSD). Candidates should from their knowledge of stamp duty know that in a transaction involving residential property, they must consider SSD and BSD as well as AVD.

1. **AVD.** Under s 29BA(a) and Part 1 of Scale 1 of Head 1(1A) of the First Schedule to the Stamp Duty Ordinance, Cap. 117 (SDO) the Agreement, which relates to residential property, is chargeable with ADV at the rate of 15% of the consideration or value (whichever is higher) unless exemptions apply. In this case Rose is a HKPR and she and Daisy are closely related (within section 29AD of the SDO). Provided they are acting on their own behalf and neither beneficially owns any other residential property (information is needed on these questions), they may claim AVD at Scale 2 rates (section 29BA(a) and paragraph (h) of Scale 2 of Head 1(1A) of the First Schedule to the SDO - HK\$ 180,000 + HK\$38,000). The Agreement must be certified according to section 29G of the SDO (that the total value of the transaction does not exceed HK\$6,720,000).
2. **SSD.** Oliver acquired the flat on 1 December 2018 (section 29CA(5)(a)(i) of the SDO). He disposed of the flat on 25 October 2021 (section 29CA(7)(a) of the SDO) which is after the expiry of 12 months from his date of acquisition but within a period of 36 months from his date of acquisition. SSD at the rate of 10% of the consideration (or value whichever is higher) is payable (section 29CA(1) and Head 1(1B), Part 2(c) of the First Schedule to the SDO – HK\$ 638,000).
3. **BSD.** Under s 29CB(1) and Head 1(1C) of the First Schedule to the SDO, BSD at the rate of 15% of the consideration (or value whichever is higher) is payable. However, Rose is a HKPR and she and Daisy are closely related (see above) and no BSD is payable under section 29CB(2)(b) provided each of them is acting on her own behalf (information is needed on this question).

5.2 The building of which the flat forms part is more than 30 years old. Notices have just been issued under sections 30B and 30C of the BO requiring mandatory inspection of the building and window inspection of the flat.

Question: Explain the impact, if any, the notices may have on the title to the flat.

Candidates must identify and deal with the following issues:

1. Oliver as vendor has agreed to sell a good title. He must prove beyond reasonable doubt that the purchasers will not be at risk of a successful assertion against them of an encumbrance (*MEPC Ltd v Christian Edwards* [1981] AC 205 and *Spark Rich (China) Ltd v Valrose Ltd* CACV 249/1998).
2. In *To Yung Sing Herman v Szeto Chak Mei and Others* [2018] HKCFI 1506, the court considered cases concerning notices issued under sections 24 and 26 of the BO. Under section 24 (3), the BA has the power to demolish or alter illegal structures, recover the costs from the owner (under s 24(4) of the BO) and register a memorial of a certificate

against the title of the property under s 33(9) of the BO upon which the costs constitute a first charge on the property. Where such an order is made against the common parts of a building, the apportioned costs of demolition or alteration may be charged against the titles of all the co-owners potentially making all titles defective (*Active Keen Industries Ltd v Fok Chi Keong* [1994] 1 HKLR 396). In *All Ports Holdings v Grandfix Ltd* [2001] 2 HKLRD 630 the Court of Appeal held that a section 26 order created a potential blot on title.

3. By analogy with orders issued under sections 24 or 26 of the BO, undischarged notices under sections 30B or 30C of the BO created a potential blot on title which, if not satisfactorily dealt with by Oliver, would entitle the purchasers to rescind the agreement.
4. If the notices were not registered, this would make no difference because registration is not a pre-condition for registration of a charge under s 33(9) of the BO (*Ip Fong Keng v Fong Yu Shing and Ip Lai Kwan* [2019] HKCFI 1677).

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