

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2021 SUPPLEMENTARY INFORMATION PACKAGE

HEAD I: CONVEYANCING

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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 (5th Edition) (LexisNexis) (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
 - Whether there is a 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 payable under the Stamp Duty Ordinance, Cap. 117 (SDO) in connection with immovable property

- Whether Ad Valorem Stamp Duty is payable on an agreement for sale and purchase, nomination or assignment and the application of the scales of duty in Heads 1(1) and 1(1A) of the First Schedule to the SDO to determine the rate of duty payable
- Whether an agreement for sale and purchase, nomination or assignment attracts Special Stamp Duty and the rate payable
- Whether an agreement for sale and purchase, nomination or assignment attracts Buyer's Stamp Duty and the rate payable

- In connection with the above, provisions relating to Hong Kong permanent residents and provisions relating to ‘closely related persons’ as defined in the SDO
- Who is liable for the stamp duty
- The time limits for stamping
- Certificates of value
- The right to obtain a refund of stamp duty paid if an agreement for sale and purchase is cancelled, annulled, rescinded or not performed.

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], [15-210] - [15-219], [15-232] - [15-368]
Hong Kong Taxation	For (g)		Pages 939 - 954
Land Law in Hong Kong		Chapter 2	

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

HK Conveyancing Chapter 12

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
- Forms 4 and 5 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]
Land Law in Hong Kong	Chapter 7	Pages 415-508

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2. Examiners' Comments on the 2018, 2019 and 2020 Examinations

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 [2014] 4 HKLRD 436, CA*) 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 Brilllex 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).

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 Step 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%.

3. Past Examination Papers from 2018 to 2020

**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

**2020 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

HEAD I: CONVEYANCING

Tuesday, 27 October 2020



2020 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

On 1 September 2020, Vince Ku (“Vince”) agreed orally with Philip Shi (“Philip”) to sell his flat known as Flat 5B, Wah Hing Mansions, 7 Oaklands Lane, Hong Kong to Philip for the sum of HK\$15 million with vacant possession on completion on 5 October 2020. They also agreed that Philip would pay a 10% deposit to be held by Vince’s solicitors as stakeholder and released to Vince on completion. Vince and Philip each instructed solicitors to act for them. They told their respective solicitors all the terms that had been agreed as set out above.

On 2 September 2020, Philip’s solicitors wrote to Vince’s solicitors as follows:

“Dear Sirs,

We enclose a cheque for HK\$1,500,000 drawn on the Kowloon Bank Ltd. by our client, Philip Shi and payable to your firm as stakeholder in respect of the sale and purchase of Flat 5B, Wah Hing Mansions, 7 Oaklands Lane, Hong Kong (the “Property”). This sum is 10% of the agreed price for the Property and is paid as a deposit to be held by your firm as stakeholder pending completion of the sale on 5 October 2020. Please send us a receipt for this sum together with the draft agreement for sale and purchase.”

Philip’s solicitors signed this letter.

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

On 4 September 2020, Vince’s solicitors sent Philip’s solicitors a receipt for the deposit which reads as follows:

“Received from Philip Shi the sum of HK\$1,500,000 being the 10% deposit on Flat 5B, Wah Hing Mansions, 7 Oaklands Lane, Hong Kong agreed to be sold by Vince Ku to Philip Shi.”

Vince’s solicitors signed this receipt. Subsequently Vince refused to proceed with the sale and he returned the deposit to Philip.

Questions:

Answer the following questions giving reasons for your answers:

1.1 Advise Philip whether he can enforce the oral agreement against Vince.

(15 marks)

1.2 Assume that instead of the correspondence above, Vince (the “Vendor”) and Philip (the “Purchaser”) had signed a binding provisional agreement (the “Provisional Agreement”) for the sale and purchase of Flat 5B, Wah Hing Mansions, 7 Oaklands Lane, Hong Kong. The Provisional Agreement includes the following terms:

“2. The purchase price shall be HK\$15,000,000 to be paid in the following manner:

(i) An initial deposit of HK\$150,000 shall be payable to the Vendor’s solicitor as stakeholder on the signing of this agreement,

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

- (ii) *A further deposit of HK\$1,350,000 shall be payable to the Vendor's solicitor as stakeholder on 14 September 2020, that date being on or before the signing of a formal agreement,*
- (iii) *The balance of the purchase price shall be payable to the Vendor's solicitor as agent for the Vendor on completion,*
- (iv) *The initial and further deposits shall be released to the Vendor on completion.*

.....

8. *If the Vendor fails to complete the sale in the manner herein contained, the Vendor shall immediately compensate the Purchaser with a sum equivalent to the amount of the deposits paid as liquidated damages together with the refund of the deposits paid and the Purchaser shall not take any further action to claim damages or to enforce specific performance."*

1.2(a) Assume that it is 14 September 2020 and the Vendor and the Purchaser have not agreed on the terms of the formal sale and purchase agreement.

Is the Purchaser obliged to pay the further deposit?

(4 marks)

1.2(b) Assume that on 14 September 2020, the Purchaser had nevertheless paid the further deposit but that the parties had failed to sign a formal agreement. Neither party alleges a breach for this failure. On 5 October 2020, the Vendor failed to complete and returned to the Purchaser only the initial and further deposits. **Is the Purchaser entitled to any other remedies against the Vendor?**

(6 marks)

Question 2 (25 marks)

On 30 June 2020, Lee Holdings Limited (“Lee Holdings”) as vendor entered into a binding agreement to sell the legal estate in Flat 3A, Pine Court (the “Property”) to Pansy Poon (“Pansy”) as purchaser for the price of HK\$65 million. Pansy paid a deposit of HK\$6.5 million. The agreement is substantially in the same form as the agreement in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219. Lee Holdings agreed to give vacant possession on completion. Completion was due to take place by 5 p.m. on Friday, 23 October 2020.

Pansy asked Tony Lee (“Tony”), the sole director of Lee Holdings, to allow her to see the Property before completion but Tony refused. Nevertheless, Pansy went to the Property at 4:55 p.m. on Friday, 23 October 2020. When Pansy knocked on the entrance door to the Property, Tony answered the door but did not allow Pansy to go in and inspect. Nevertheless, from the entrance Pansy could see that there were a number of packing cases in the living room and it appeared that they could not be removed by 5 p.m. Tony told Pansy that he would remove the packing cases as soon as possible. However, Pansy did not complete her purchase.

This morning the solicitor for Lee Holdings informed Pansy’s solicitor that Pansy had repudiated the agreement by failing to complete. Lee Holdings had therefore accepted Pansy’s repudiation, terminated the agreement and forfeited Pansy’s deposit. Pansy’s solicitor has now advised Pansy to sue Lee Holdings for damages and to recover her deposit.

Questions:

Answer the following questions giving reasons for your answers:

2.1 Can Pansy obtain specific performance of the agreement? (14 marks)

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

2.2 How would your answer to question 2.1 above change if this morning Lee Holdings had entered into a binding agreement to sell the Property to Betty Bau?

(6 marks)

2.3 Assume for the purpose of this question only that Pansy completes her purchase. Lee Holdings has executed the Assignment in favour of Pansy as follows:

Signed by Tony Lee on behalf of Lee Holdings Ltd.)

in the presence of:) *Tony Lee*

There is no witness.

Should Pansy require any further evidence of proper execution of the Assignment by Lee Holdings?

(5 marks)

Question 3 (25 marks)

By virtue of a binding Agreement for Sale and Purchase (the “Agreement”) signed two weeks ago, Pearl Wong (“Pearl”) agreed to purchase the office unit of Steven Sun (“Steven”) known as Room C, 8th Floor, Joyous Commercial Building, Sheung Wan, Hong Kong (the “Property”) which provides, amongst other things, that a good title will be sold and completion will take place on 1 December 2020.

The title documents which affect the Property are as follows (in chronological order):

- (1) Agreement and Conditions of Sale No. UB8938 dated 2 January 2002
- (2) Occupation Permit dated 5 August 2004
- (3) Deed of Mutual Covenants dated 17 September 2004 (Memorial No. UB6543920)
- (4) Certificate of Compliance dated 20 November 2004 (Memorial No. UB7659430)
- (5) Assignment with Plan dated 28 December 2004 (Memorial No. UB7852931)
- (6) Assignment dated 31 July 2005 (Memorial No. UB8654210)
- (7) Mortgage dated 8 October 2006 (Memorial No. 06100804367890)
- (8) Receipt on Discharge of a Charge dated 9 October 2019 (Memorial No. 19100998743276)

Items (1) to (4) inclusive of the above list affect the whole of Joyous Commercial Building (the “Building”) and items (5) to (8) relate solely to the Property. Items (5) and (6) both provide that the Property is sold subject to and with the benefit of item (3).

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

Questions:

Answer the following questions giving reasons for your answers:

3.1 What kind of interest, legal or equitable, is held under the Agreement and Conditions of Sale No. UB8938?

(3 marks)

3.2 Must Steven produce the originals of items (1), (3) and (6), namely, the Agreement and Conditions of Sale No. UB8938, the Deed of Mutual Covenants Memorial No. UB6543920 and the Assignment Memorial No. UB8654210 to prove and give good title? Will Pearl be entitled to reject title if the originals of these documents have all been lost?

(12 marks)

3.3 Pearl has just discovered that the Building Authority issued an order last week to the co-owners of the Building under section 24 of the Buildings Ordinance, Cap.123 regarding an unauthorised structure on the roof of the Building. There is no such entry in the latest land search in respect of the Property obtained from the Land Registry this morning. Neither the ownership nor the exclusive right to use the roof has ever been specifically assigned to any party. **What impact, if any, will such an order have on the title to the Property? If you require further information to answer this question, state what information you need and why you need it.**

(10 marks)

Question 4 (25 marks)

In September 2020, Stan as vendor and Patrick as purchaser signed an agreement for sale and purchase (the “Agreement”) of Flat 15A, May Court (“Flat 15A”) for a consideration of HK\$30 million. May Court is a block of 30 residential flats built in 1973. Patrick inspected Flat 15A before signing the Agreement and liked it because it is very spacious. Completion is due to take place on 30 November 2020.

The Agreement is substantially in the same form as the agreement in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219 except that it also contains the following Clause 12:

“The Purchaser has inspected Flat 15A and will not raise any requisitions or object to title in connection with any unauthorised alterations or illegal structures at Flat 15A.”

There is a Deed of Mutual Covenants for May Court (the “DMC”). The DMC contains a definition of common parts. This definition states that corridors and lift lobbies are common parts, but it does not say anything about internal walls. The DMC includes the following covenants:

- “1. No owner will alter the common parts of May Court without the prior consent of the building manager.*
- 2. No owner will make any structural alterations to any part of May Court.”*

The owners of May Court incorporated in 1993.

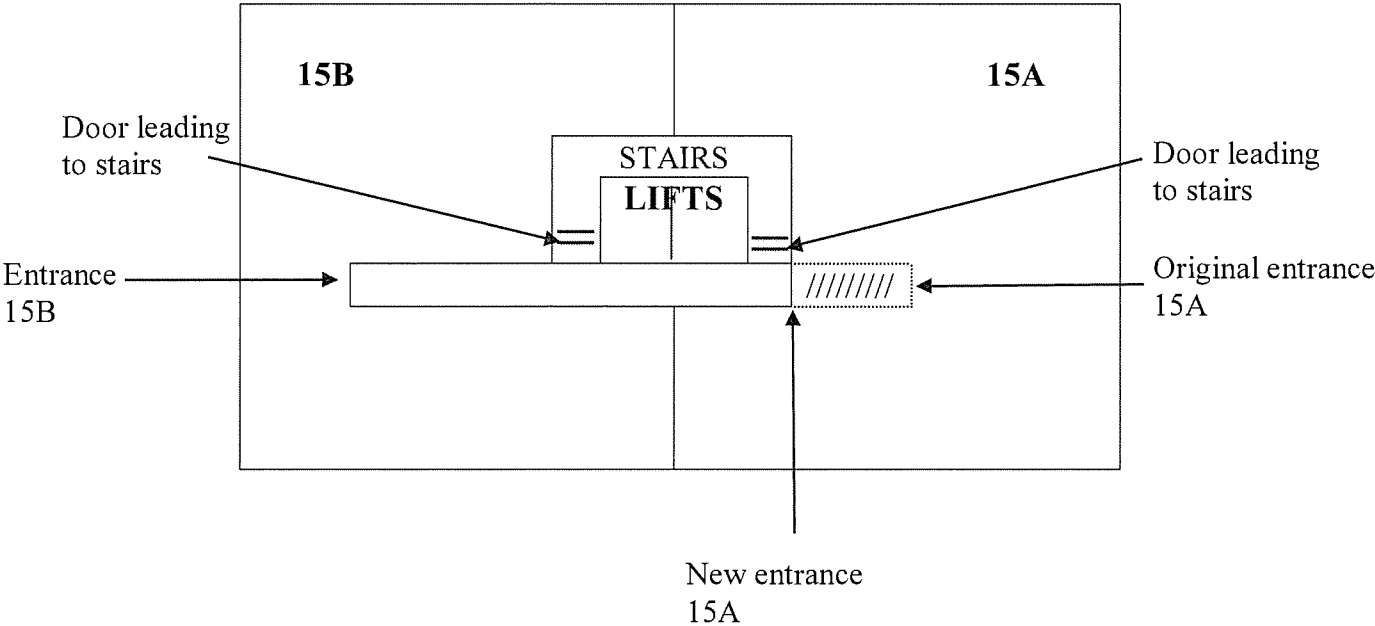
After signing the Agreement, Patrick discovered that in 1995, Stan’s predecessor in title had demolished two walls inside May Court separating Flat 15A from the corridor and had moved the entrance to Flat 15A. The walls that have been demolished are shown by dotted lines on the plan below, which was drawn by Patrick’s surveyor, and the original and new entrances are marked. The effect of these alterations is that a portion

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

of the corridor shown hatched black on the plan has been incorporated into Flat 15A.

Last week Stan’s solicitor sent Patrick’s solicitor the title deeds. The deeds do not include a layout plan. Patrick’s solicitor immediately raised requisitions including a requisition asking Stan’s solicitor for evidence that the alterations do not breach the Buildings Ordinance, Cap. 123 or the DMC. Stan’s solicitor has refused to answer this requisition on the ground that the Agreement contains Clause 12.

Plan of 15th Floor, May Court



Questions:

Answer the following questions giving reasons for your answers:

- 4.1 Analyse the ways in which the above facts indicate that Stan’s title might be defective. (15 marks)

- 4.2 Explain the effect of Clause 12 of the Agreement on the Vendor’s duty to give and show title. (10 marks)

Question 5 (25 marks)

Victor Siu (“Victor”) is planning to sell his solely-owned property at Mid-Levels, Hong Kong (the “Property”). He first bought the Property by signing a Provisional Agreement for Sale and Purchase on 4 May 2019, signing a Formal Agreement for Sale and Purchase on 18 May 2019 and executing an Assignment on 28 June 2019.

Victor’s sons, Sam and Sunny, both of whom are not Hong Kong permanent residents, are interested in buying the Property for the price of HK\$21 million. According to the Deed of Mutual Covenants, the Government Grant and the Occupation Permit relating to the Property, its user is residential. Sam already owns a residential flat in Wanchai, Hong Kong.

Victor, Sam and Sunny are planning to sign an Agreement for Sale and Purchase of the Property (the “Agreement”), which will be the only agreement signed by the parties on 5 November 2020. The Agreement will include a term that completion will take place on 27 November 2020.

Questions:

Answer the following questions giving reasons for your answers:

5.1 Will any ad valorem and/or other stamp duties be payable on the Agreement? If so, what is/are the amount(s) payable? If you require further information to answer this question, state what information you need and why you need it.

(11 marks)

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

5.2 Sam has an unmarried partner, Sophia, who is a Hong Kong permanent resident. How, if at all, will your answer to Question 5.1 above differ if, instead of selling to Sam and Sunny, Victor sells the Property (on the same terms) to Sam and Sophia?

(7 marks)

5.3 Victor also owns a flat (the “Flat”) with his wife, Wendy, as joint tenants. Victor has made a valid will naming Sam as the sole executor and beneficiary of his estate. Sunny is the sole executor and beneficiary of Wendy’s estate under her valid will. Owing to his financial difficulties, Victor started borrowing from Vampire Credit Company Limited (“Vampire”) earlier this year. Last month Vampire obtained and registered a charging order against the Flat in respect of Victor’s unpaid debts. Victor and Wendy died in a car crash yesterday and the order of their deaths is unknown. **Who will now own the Flat? If you require further information to answer this question, state what information you need and why you need it.**

(7 marks)

END OF TEST PAPER