

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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