

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2023 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, Hong Kong Conveyancing Law (9th ed) (LexisNexis 2022) (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 (5th Practitioner Edition) (LexisNexis 2022) (Land Law in Hong Kong)

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 1

Paragraphs [1-1] - [1-18],
[1-23] - [1-27], [1-42] - [1-44],
[1-50] - [1-54], [1-71] - [1-94],
[1-221] - [1-224]

HK Conveyancing	Chapter 2	Paragraphs [2-1] - [2-19], [2-51] - [2-77], [2-84], [2-95] - [2-104], [2-116] - [2-144]
	Chapter 8	Paragraphs [8-1] - [8-19], [8-370] - [8-394]
Land Law in Hong Kong	Chapter 1	Paragraphs [1-1] - [1-42], [1-62] - [1-70]
	Chapter 9	Paragraphs [9-39], [9-66] - [9-75]
	Chapter 10	Paragraphs [10-32] - [10-37]

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

Land Law in Hong Kong Chapters 8 and 16

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

(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 3	Paragraphs [3-322] - [3-349]
	Chapter 5	Paragraphs [5-193] - [5-204], [5-218] - [5-232], [5-247] - [5-273]
	Chapter 8	Paragraphs [8-1] - [8-37], [8-48] - [8-394]
	Chapter 9	Paragraphs [9-1] - [9-196], [9-216] - [9-219]
	Chapter 11	Paragraphs [11-237] - [11-243]

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) (d) & (e)	Chapter 4	Paragraphs [4-1] - [4-206]
		Chapter 6	Paragraphs [6-19] - [6-135], [6-161] - [6-236]
HK Conveyancing	For (f)	Chapter 11	Paragraphs [11-1] - [11-42], [11-57] - [11-203], [11-220] - [11-395]
HK Conveyancing	For (g)	Chapter 10	Paragraphs [10-7] - [10-30]
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 6	Paragraphs [6-237] - [6-321], [6-356] - [6-364]
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Land Law in Hong Kong	Chapter 2	Paragraphs [2-52] - [2-53]
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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 7	Paragraphs [7-1] - [7-14], [7-18] - [7-45], [7-60] - [7-64], [7-90] - [7-101], [7-129] - [7-139], [7-303] - [7-315], [7-373] - [7-386], [7-393] - [7-470], [7-488] - [7-579]
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Land Law in Hong Kong	Chapter 13	Paragraphs [13-1] - [13-25], [13-70] - [13-156]
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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

HK Conveyancing	Chapter 10	Paragraphs [10-1] - [10-30], [10-134] - [10-240]
	Chapter 12	
Land Law in Hong Kong	Chapter 7	Paragraphs [7-1] - [7-149]

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2. Examiners' Comments on the 2020, 2021 and 2022 Examinations

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 to 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%.

Examiners' Comments on the 2021 Examination

Head I: Conveyancing

Question 1

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

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

Candidates must identify and discuss the following issues:

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

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

Question 2

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

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

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

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

Question 3

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

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

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

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

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

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

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

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

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

Question 4

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

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

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

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

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

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

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

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

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

Question 5

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

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

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

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

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

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

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

Candidates must identify and deal with the following issues:

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

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

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

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Examiners' Comments on the 2022 Examination

Head I: Conveyancing

Candidates must identify the legal issues from the facts given, state the law relating and apply the law to the facts to reach an answer to the question. Many of the questions contain multiple issues.

Most candidates would improve their performance by improving the way in which they apply the law to the legal issues to reach an answer.

Question 1

Can Sandy as vendor enforce an oral agreement for sale and purchase against Peter the purchaser?

Comments

1. Is there a concluded oral agreement for sale and purchase of the property? If there is, is it enforceable at law or in equity through the doctrine of part performance?
2. Candidates should consider whether there is a concluded oral agreement. The parties have agreed all essential terms and additional terms. On the facts there could be a concluded agreement.
3. Is the agreement enforceable at law? The facts state that the parties did not sign an agreement as required under section 3(1) of the Conveyancing and Property Ordinance ("CPO"). Alternatively, under s 3(1) of the CPO the oral agreement must be evidenced by a note or memorandum signed by the party to be charged or his lawful agent. Peter is the party to be charged, because the question asks if Sandy can enforce the agreement against Peter.
4. Candidates should apply section 3(1) of the CPO to the facts. Most candidates recognised that the solicitors' letters might amount to a memorandum of the oral agreement, but many candidates failed to deal specifically with the letter written by Peter's solicitor dated 11 March 2022. Candidates should examine this letter and decide whether it amounts to a memorandum of the oral agreement. This letter dated 11 March does not identify the vendor by name, nor does it mention the completion date or the air conditioners.
5. Candidates should continue by considering whether the letter dated 10 March 2022 (signed by Sandy's solicitor) can be joined with the letter of 11 March 2022. The letter of 10 March does refer to the name of the vendor and the completion date. The rule on joinder is that the letter signed by the party to be charged or his agent must contain some express or implied reference to the letter to be joined or some express or implied reference to the transaction. Candidates should look at the words used in the letter dated 11 March and apply the tests. The words do not refer to the letter dated 10 March or a sale or an agreement.

6. Since the letters do not refer to the air conditioners, any memorandum is potentially incomplete. This should lead candidates to discuss first whether the air conditioners are fixtures by applying the appropriate tests. If they are fixtures, they are included in the sale even if not expressly referred to. A number of candidates failed to deal with this issue. Alternatively, Sandy (the party who wants to enforce the oral agreement), might submit to the terms of the oral agreement and include them in the sale. A number of candidates also missed this point.
7. If it is not possible to join the letter dated 10 March with that dated 11 March, candidates should consider whether Sandy can enforce the oral agreement through the doctrine of part performance.
8. Candidates must therefore look at acts done by Sandy, the plaintiff, and state and apply the test from *Steadman v Steadman* [1976] AC 536. Sandy has given Peter possession and permission to clean the property and has instructed solicitors. The giving of possession usually satisfies the test and is regarded as a classic act of part performance: instructing solicitors is not by itself regarded as an act of part performance. In *Ng Yuk Pui Kelly v Ng Lai Ling Winnie* [2021] HKCFA 40, the Court of Final Appeal looked at the cumulative effect of the acts relied on and all the circumstances of the case. Candidates should also apply these principles to the facts. This means that the acts of giving possession and permission to clean might be considered together with the act of instructing solicitors.

Question 2

Pansy as purchaser has failed to complete a written agreement for sale and purchase on time. The agreement contains a clause (Clause 12) limiting Vicki's obligation to give good title. Can Vicki as vendor claim damages being the difference between the contract price of the property and the price at the date of completion?

Comments

Candidates should be familiar with the form of agreement for sale and purchase set out in Form 2 of the Third Schedule to the CPO in which the terms set out in Part A of the Second Schedule to the CPO are incorporated by reference.

1. The issue is whether Pansy has breached the agreement by failing to complete on time. Time is expressly of the essence under the agreement (see Form 2 of the Third Schedule to the CPO). If Pansy is in breach, Vicki is entitled to claim damages from Pansy. The measure of damages should be considered. However, if Vicki's title is defective and she cannot rely on Clause 12 to limit her obligation to give good title, Pansy would not be in breach and she could recover her deposit.

2. As the wall separating the two flats is structural, under the Buildings Ordinance, Cap 123 (“BO”), the Building Authority (“BA”) must consent to the cutting of this wall. The facts state that Vicki obtained BA consent and gave evidence of this to Pansy before Pansy signed the agreement. However, the cutting of this wall breaches the Deed of Mutual Covenant (“DMC”) because it is structural. Candidates should also apply the Building Management Ordinance, Cap. 344 and decide if the wall is a common part and therefore whether the DMC restriction on making alterations to common parts has also been breached. A few candidates answered this question without making it clear that there are breaches of the DMC.
3. A breach of the DMC potentially makes title defective or defeasible because it would expose Pansy to the threat of a lawsuit. However, title is affected only if there is a real risk of enforcement action. Candidates should then consider whether Vicki can put forward facts and circumstances to show beyond reasonable doubt that there is no real risk of enforcement action. Applying the law to the facts, Vicki might argue that since the BO has not been breached, there is no real risk of enforcement action under the DMC.
4. Alternatively, Vicki might seek to rely on Clause 12 of the Agreement to limit her obligation to give good title. Most candidates stated the tests from *Jumbo King Ltd v Faithful Properties Ltd* [1999] 4 HKC 707, CFA which are relevant to a limiting clause. The tests require candidates to consider whether the words used cover the defect and whether Vicki has misled Peter. In this connection many candidates recognised that the words used in Clause 12 would cover breaches of the DMC as well as any breaches of the BO and Government Lease. When considering whether Vicki has misled Peter, candidates should consider whether Vicki knew about the breach. Applying this question to the facts, the breach of the DMC might be identifiable from the DMC and an inspection of the Property. At the date on which the agreement was signed, Vicki has access to the deeds and the Property, but neither Pansy nor her solicitor has seen the deeds. If Vicki knows about the breach of the DMC, candidates must then decide whether Clause 12 contains words that are explicit enough to enable Pansy to understand the risk of possible enforcement of the DMC. Applying this to the facts, candidates might argue that the words of Clause 12 do not specifically identify a breach of the DMC. However, candidates might make an alternative argument based on the words used in Clause 12, the inspection and the Vicki’s disclosure that she obtained BA consent to the cutting of the wall.
5. If Pansy is in breach, Vicki has suffered loss flowing from the breach. At common law the loss is assessed at the date of the breach – i.e. the contract price less the value of the Property at the date of completion. Under Condition 10 of Part A of the Second Schedule to the CPO, the loss is the contract price less the resale price.
6. If candidates decide that Vicki is in breach, candidates might add that Pansy has not suffered any loss but that she can recover her deposit.

Question 3

There is a binding agreement for sale and purchase of a flat in Joyful Place between Pat as purchaser and Sam as vendor. Sam agrees to sell a good title.

Comments

Question 3.1

The intermediate root of title is Mortgage Memorial No. UB 4716738. Reasons – see section 13(1)(a)(ii) of the CPO. In practice, Assignment Memorial No. UB4716737 might be used.

Question 3.2

Can Sam give good title in the following circumstances?

Missing certified true copy of the Occupation Permit (“OP”). If the property was built before 1 June 1956, there might be no OP. The date of the Government lease (29 June 1973) indicates that the property was likely built after 1956. The OP shows satisfactory completion of a new building. Sam must produce a certified true copy in order to give and show good title. A certified true copy will suffice, because the OP relates to all flats in Joyful Place. Sam can obtain a certified true copy from the Building Authority.

Missing Assignment with Plan Memorial No. UB2578323. Sam must produce this to show title even though it is a pre-intermediate root document if later documents refer to the plan attached to this assignment. See section 13(1)(b) CPO. Sam can both show and give good title with a certified true copy. See sections 13(2) and 13A(1)(b) of the CPO.

Missing Mortgage Memorial No. UB4716738. This is the intermediate root. See Question 3.1 above. Sam can show title with a certified true copy under section 13(2) of the CPO. In order to give good title at completion, Sam must hand over the original which relates exclusively to the property sold. Candidates must refer to case law and explain the reason for this. If the original is lost, Sam must explain how it was lost. If he is unable to do so, Pat can only refuse to complete if there is a realistic possibility of some transaction relating to the property sold that could affect the purchaser. Applying this to the facts, candidates should note that the mortgage has been released thereby making the risk of a successful assertion by the mortgagee unreal.

Question 3.3

The issue is whether Sam alone can sell the property following the death of his wife Susan. Sam and Susan bought the property as joint tenants. Sam can sell the property as the surviving joint tenant provided the joint tenancy was not severed in their joint lifetimes. He must show evidence of Susan’s death. The facts state that a charging order in respect of Sam’s debts was registered against the property before Susan’s death and also discharged before her death. The issue is whether the charging order severed the joint tenancy. There is conflicting case law on this point and a good answer would deal with the decisions in *Malahon Credit Co Ltd v Siu Chun Wah Alice*

[1988] 1 HKLR 196 and *Ho Wai Kwan v Chan Hon Kuen* [2015] HKEC 132. See also *Ego Finance Ltd v Cham Kin Man* [2018] HKDC 741. If the joint tenancy was severed by the charging order, Susan's personal representative must sell Susan's share of the property.

Question 4

There is a binding provisional agreement for the sale and purchase of a flat with domestic use between Sylvia as vendor and Ben and Brenda as purchasers. The agreement is dated 21 October 2022. The parties agree to sign a formal agreement on or before 3 November 2022. The question asks whether the formal agreement will attract stamp duty, if so, how much and who will pay?

Comments

Question 4.1

Candidates should consider, Ad Valorem Stamp Duty ("AVD"), Buyer's Stamp Duty ("BSD") and Special Stamp Duty ("SSD"). The terms of the agreement state who is liable for any stamp duty. If duty is payable, answers should state the amount.

AVD – the property is residential property, but is it a single residential property within section 29(A)(1) of the Stamp Duty Ordinance, Cap.117 ("SDO")?

Under section 29BA(a) and Part 1 of Scale 1 of the First Schedule to the SDO, the formal agreement is chargeable with stamp duty at the rate of 15% of the price or the value (whichever) is higher unless exemptions apply.

Under sections 29BB(1) and (3) of the SDO Scale 2 applies because Ben and Brenda are closely related (section 29AD) provided each is acting on his own behalf and is not the beneficial owner of any other residential property in Hong Kong. See section 29BB(1)(b) and consider the evidence that they must supply. See also paragraph (k) of Scale 2 of Head 1 (1A) of the First Schedule to the SDO for details of the rate.

SSD

Sylvia acquired the property on 4 August 2021 and disposed of it on 21 October 2022 (sections 29CA(5)(a)(i) and 29CA(7)(a) of the SDO). Under section 29CA(1) and Head 1(1B), Part 2(c) of the First Schedule to the SDO, SSD is payable at the rate of 10% of the consideration or the value whichever is higher.

BSD

Ben is a Hong Kong Permanent Resident. Brenda is not but she is closely related to Ben. See 3.1 above. Under section 29CB(2)(b), there is an exemption from BSD provided each is acting on his own behalf. Evidence of this is required under section 29CB(2) of the SDO.

Question 4.2

Before signing the agreement, Ben and Brenda met Sylvia's father at the property. Does this meeting have an impact on title?

1. The issues are whether Frank has an unwritten equitable interest in the property which would bind Ben and Brenda. Priority between Frank and Ben and Brenda is governed by the common law doctrine of notice which applies because any interest that Frank has would be unwritten. Under this doctrine, Ben and Brenda would have notice of any interest of an occupier of the property.
2. Frank might have acquired an interest under a resulting or constructive trust. A good answer would explain the concepts concisely and include a reference to the presumption of advancement.
3. The question then is whether Frank is an occupier. 'Occupation' requires some degree of permanence. Candidates should apply this to the facts. Candidates should also consider Frank's silence or inaction concerning any interest that he might have.

Question 5

Paula as purchaser requires completion in person of an agreement for sale and purchase which is in Form 2 of the Third Schedule to the CPO. Victor as vendor agrees to give good title and to prove title in accordance with section 13 of the CPO. On completion, Victor's solicitor is unable to hand over the original or a certified true copy of a power of attorney relating to the title and Paula refuses to complete. Later Paula requires specific performance, but Victor has sold the property to a third party.

Comments

1. The question requires a discussion of Paula's entitlement to the original or a certified true copy of the power of attorney in question. See and apply section s13(1)(a) and (c) of the CPO. A good answer would also refer to Conditions 8 and 9 of Part A of the Second Schedule to the CPO.
2. Victor must show title before completion (sufficiently well in advance of completion) and give title on completion. Time is expressly of the essence.
3. Paula is entitled to completion in person but the midnight rule applies. Candidates should consider whether Paula must wait until midnight on the day of completion to give Victor time to hand over the power of attorney. A number of candidates missed this point.
4. On the facts, Paula is unlikely to have breached the agreement and provided that she is not in breach, she may apply for specific performance. Most candidates were able to state the requirements including the requirement that Paula must be ready willing and able to complete. Candidates should apply this requirement to the facts.

5. As Victor has sold the property to a third party, the question of priority between the two purchasers should be discussed. A number of candidates failed to consider priority. It seems appropriate to consider priority at common law – where the equities are equal, the first in time prevails and under s3(1) of the Land Registration Ordinance, Cap. 128. See *Chu Kit Yuk v Country Wide Industrial Ltd* [1995] 1 HKC 363.
6. Many candidates mentioned that Paula might not be able to obtain specific performance even if she has priority, if Lily can show exceptional hardship. Candidates should apply this principle to the facts.

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3. Past Examination Papers from 2020 to 2022

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.”*

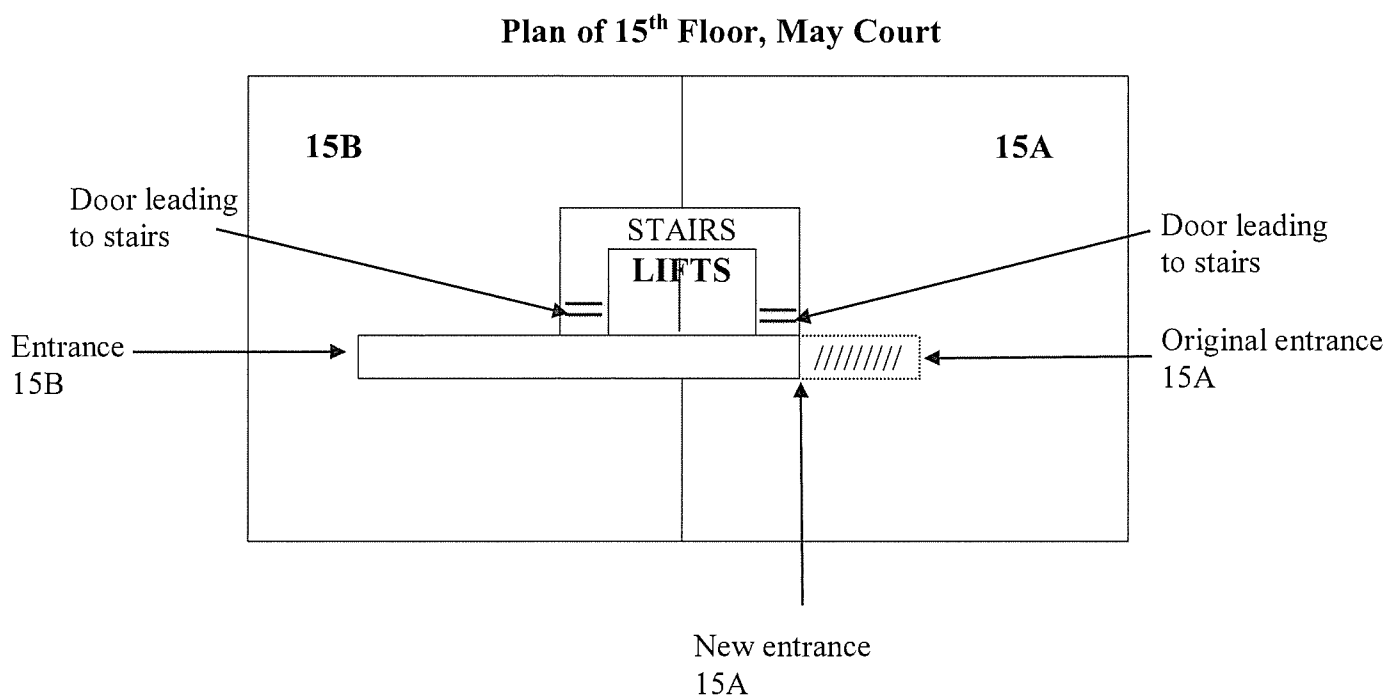
The owners of May Court incorporated in 1993.

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.



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

2021 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD I: CONVEYANCING

Tuesday, 26 October 2021



2021 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

In June 2014, Patrick Poon (“Patrick”) bought Flat 2A, Astrid Court (“Flat 2A”) from Vicki Vong (“Vicki”). Astrid Court is a block of 30 residential flats built in 1984. There is a Deed of Mutual Covenant (the “DMC”) which does not contain a definition of common parts and does not state who owns the external walls. The owners of Astrid Court incorporated in 1986. Astrid Court is managed by Good Management Ltd.

The DMC includes the following covenants:

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

In July 2021, Patrick received a letter from the owners’ corporation complaining about the following alterations made to Flat 2A in 2001 by Vicki, who was the owner of Flat 2A at the time. The letter states:

“The living room windows of Flat 2A have been enlarged by cutting the external walls of Astrid Court and inserting larger window frames. These alterations breach the terms of the DMC. Please reinstate the windows of Flat 2A to their original size and condition as soon as possible.”

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

When looking at Astrid Court from ground level, Patrick can see that his living room windows are larger than those of other flats in Astrid Court. The exterior of Astrid Court does not therefore have a uniform appearance. Nevertheless, Patrick has refused to comply with the letter from the owners' corporation.

Question:

Answer the following question giving reasons for your answers:

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

(25 marks)

Question 2 (25 marks)

In 2017, Harry and Wendy bought a residential flat known as 6B, Flower Gardens (the “Flat”) in their joint names. The price was HK\$14 million. To fund their purchase, Harry and Wendy used HK\$2 million of their own savings and Wendy’s father contributed HK\$2 million. Harry and Wendy also borrowed HK\$10 million from the Goodwill Bank Ltd. (“Goodwill”). The loan from Goodwill is secured by a first legal mortgage (the “Mortgage”) of the Flat and is repayable by equal monthly instalments of principal and interest. The Mortgage is substantially in the same form as Form 5 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219. Harry and Wendy moved into the Flat on the day on which they completed their purchase and mortgage of the Flat.

In 2020, Wendy’s father became ill and he moved into the Flat with Harry and Wendy. In May 2021, Harry lost his job. In June 2021, Harry, Wendy and Wendy’s father moved out of the Flat into cheaper accommodation. Harry and Wendy let the Flat to Tom for a term of two years starting on 1 July 2021 under a written tenancy agreement signed by all parties. The tenancy agreement is not registered in the Land Registry. Harry and Wendy did not obtain the consent of Goodwill to the tenancy agreement. Tom discovered this in August 2021 and stopped paying rent. As a result, Harry and Wendy have been unable to pay Goodwill the instalments of principal and interest due in September and October 2021.

Goodwill wants to sell the Flat with vacant possession. An employee of Goodwill has said that he would like to buy the Flat and is willing to pay HK\$14 million.

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

Question:

Answer the following question giving reasons for your answers:

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

(25 marks)

Question 3 (25 marks)

Yesterday, 25 October 2021, Pansy signed a binding Agreement for Sale and Purchase (the “Agreement”) with Simon to purchase his property known as Flat A, 15th Floor, Wonderful Garden, Causeway Bay, Hong Kong (the “Property”). The Agreement includes a term that a good title will be sold.

The list of title documents (the “List”) for the Property is as follows:

- (1) Government Lease of Inland Lot No. 123 dated 7 April 1934
- (2) Occupation Permit dated 9 December 2004 (Memorial No. UB8435088)
- (3) Deed of Mutual Covenant dated 7 January 2005 (Memorial No. UB8457286)
- (4) Assignment with Plan dated 10 February 2005 (Memorial No. UB8654210)
- (5) Assignment dated 8 September 2009 (Memorial No. 0909080735498)
- (6) Assignment dated 10 November 2015 (Memorial No. 1511107548319)
- (7) Mortgage dated 10 November 2015 (Memorial No. 1511107548320)
- (8) Deed of Release dated 8 October 2016 (Memorial No. 16100804367206)
- (9) Mortgage dated 8 October 2016 (Memorial No. 16100804367207)
- (10) Deed of Release dated 9 October 2019 (Memorial No. 19100998743571)

Questions:

Answer the following questions giving reasons for your answers:

3.1 Identify from the List the intermediate root of title in respect of the Property.

(4 marks)

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

3.2 Should Pansy accept title to the Property if Simon is unable to produce the originals of items (3), (6) and (7) of the List? Item (3) does not relate exclusively to the Property but items (6) and (7) do. For the purposes of answering this question, assume that item (8) was duly executed by the Mortgagee named therein and that it fully released and discharged the Property from item (7).

(14 marks)

3.3 Explain whether or not item (10) of the List has been duly executed if it was sealed with the common seal of Prosperity Bank Ltd. (the Mortgagee named in both items (9) and (10) of the List) and signed by Alan Wong and Barbara Chan whose capacities are not stated.

(7 marks)

Question 4 (25 marks)

On 1 September 2021, Peter Wong (“Peter”) inspected Flat 15A, Wealthy Court and the roof above Flat 15A (the “Property”). The roof is accessible by a spiral staircase leading from the living room of Flat 15A. Later that day, Peter signed a provisional agreement to buy the Property from Vera Lee (“Vera”) and he paid the initial deposit. A copy of the provisional agreement is attached.

On 5 September 2021, Vera’s solicitor sent Peter’s solicitor a draft formal agreement for sale and purchase and the title deeds. On the same day, Peter met his solicitor and described the Property to him. Peter’s solicitor advised Peter that the spiral staircase might have been constructed after the Occupation Permit for Wealthy Court (the “OP”) was issued and that its construction might not have been authorised by the Building Authority (the “BA”) under the Buildings Ordinance, Cap. 123 (the “BO”). The OP does not refer to the staircase. Peter’s solicitor also advised him that the BA’s consent to the staircase would be required if it was constructed after the issue of the OP because its construction involves cutting the roof slab. Peter’s solicitor has also read the Deed of Mutual Covenant for Wealthy Court (the “DMC”) which includes the following covenant:

“No owner will make any alterations to Wealthy Court which breach the terms of the Buildings Ordinance, Cap. 123”

On 7 September 2021, Peter’s solicitor informed Vera’s solicitor that he was concerned that the spiral staircase might be unauthorised under the BO and that as a result the staircase might also breach the DMC. Vera’s solicitor replied on 8 September 2021, saying that neither he nor Vera had any information about the spiral staircase, but that it was present when Vera bought the Property in 1970. On 9 September 2021, Peter’s solicitor informed Vera’s solicitor that Vera’s title is defective and that Peter would not sign the formal agreement or pay the further deposit.

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

On 10 September 2021, Vera's solicitor wrote to Peter's solicitor saying that the BA had inspected Wealthy Court (including the Property) in 1988 when the Government Lease was renewed and that he would be able to provide written evidence of this before completion. In the same letter, Vera's solicitor also said that since 1970, the BA had not complained about any unauthorised building works on the Property.

Despite this reply, Peter did not sign the formal agreement or pay the further deposit on 14 September 2021 and Peter has now demanded that Vera return his deposit.

Question:

Answer the following question giving reasons for your answers:

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

(25 marks)

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

Provisional Agreement for Sale and Purchase referred to in Question 4

THIS AGREEMENT is made on 1 September 2021

Between

(1) Vera Lee of House A, No. 47, Strawberry Road, Hong Kong (the “Vendor”);

and

(2) Peter Wong of Flat 6A, Red Gardens, 10 Prince Edward Road, Kowloon (the “Purchaser”)

The Vendor and the Purchaser agree as follows:

1. The Vendor shall sell and the Purchaser shall purchase Flat 15A and the roof above Flat 15A, Wealthy Court, 10 South Road, Hong Kong (the “Property”).
2. The purchase price is HK\$50 million which shall be paid by the Purchaser to the Vendor in the following manner:
 - (a) HK\$7 million on the signing of this agreement as initial deposit,
 - (b) HK\$3 million on the signing of a formal agreement for sale and purchase on or before 14 September 2021 as the further deposit,
 - (c) HK\$40 million upon completion on or before 30 March 2022 as the balance of the purchase price.

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

3. The Purchaser will attend at the offices of the Vendor's solicitor on or before 14 September 2021 to sign the formal agreement for sale and purchase.
4. Should the Purchaser fail to sign the formal agreement for sale and purchase in the manner herein contained, the initial deposit shall be forfeited to the Vendor who shall then be entitled at his absolute discretion to sell the Property to anyone he thinks fit and the Vendor shall not sue the Purchaser for any liabilities and/or damages caused by the Purchaser's default.
5. Should the Vendor after receiving the initial deposit paid hereunder fail to sign the formal agreement for sale and purchase in the manner herein contained, the Vendor shall immediately compensate the Purchaser with a sum equivalent to the amount of the initial deposit as liquidated damages together with the refund of the initial deposit and the Purchaser shall not take any further action to claim damages or specific performance.
6. The Purchaser will pay the stamp duty in connection with this transaction.

Signed *Vera Lee*

Signed *Peter Wong*

Question 5 (25 marks)

Yesterday, 25 October 2021, Rose and her sister Daisy signed an Agreement for Sale and Purchase (the “Agreement”) with Oliver (who is not related to them in any way by blood or marriage) to purchase his flat in Quarry Bay, Hong Kong (the “Flat”) for HK\$6,380,000. The Agreement is the only agreement signed by Rose, Daisy and Oliver in connection with this transaction.

Rose is a Hong Kong permanent resident but Daisy is not. According to the government grant, the deed of mutual covenant and the occupation permit relating to the Flat, its user is “domestic”.

When Oliver first bought the Flat, he signed an Agreement for Sale and Purchase on 1 December 2018 (the “Acquisition Agreement”). The Acquisition Agreement was the only agreement signed by Oliver in connection with his purchase. Pursuant to the Acquisition Agreement, Oliver executed an Assignment on 7 January 2019. In the Acquisition Agreement and the Assignment dated 7 January 2019, Oliver was the sole purchaser named therein.

The Agreement includes terms that Oliver is selling a good title and that completion will take place on 11 January 2022.

Questions:

Answer the following questions giving reasons for your answers:

- 5.1 Will the Agreement attract ad valorem and/or other stamp duties? If so, how much will such stamp duties be? If you need more information to answer the question, state what information you need and why you need it.**

(15 marks)

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

- 5.2** The building of which the Flat forms part is over 30 years old. Notices (the “Notices”) have just been issued under sections 30B and 30C of the Buildings Ordinance, Cap. 123 requiring mandatory inspection of the said building and window inspection of the Flat. **Explain the impact, if any, the Notices may have on the title to the Flat.**

(10 marks)

END OF TEST PAPER

2022 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD I: CONVEYANCING

Tuesday, 25 October 2022



2022 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

In March 2022, Sandy Li (“Sandy”) and Peter Poon (“Peter”) negotiated the terms on which Peter would buy Sandy’s shop at Ground Floor, 122 Red Road, Central, Hong Kong. Sandy’s shop includes a small open yard to the rear (Sandy’s shop and open yard are together referred to as the “Shop”). Eventually Sandy and Peter agreed orally that Sandy would sell the Shop to Peter for a consideration of HK\$200 million with completion on 1 August 2022. They also agreed orally that the sale would include two split-level air conditioners currently installed in the Shop. The air handling units are inside the shop and are connected by pipes leading to the condensers which are located in the open yard.

Sandy and Peter each instructed solicitors to act for them in connection with the sale and purchase and on 10 March 2022, Sandy’s solicitor sent Peter’s solicitor the following letter:

“Dear Sirs,

We act for Sandy Li who has agreed to sell the shop and open yard to the rear of the shop at Ground Floor, 122 Red Road, Central, Hong Kong to Peter Poon for a consideration of HK\$200 million with completion on 1 August 2022. Please confirm that you have instructions to act for Peter Poon.”

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

Sandy's solicitor signed the above letter. On 11 March 2022, Peter's solicitor replied as follows:

"Dear Sirs,

We confirm that we have instructions to act for Peter Poon in connection with his negotiations to buy the shop and open yard to the rear of the shop at Ground Floor, 122 Red Road, Central, Hong Kong for a consideration of HK\$200 million. Please send us a draft agreement for sale and purchase for approval."

Peter's solicitor signed the above letter. Neither letter contains any reference to the air conditioners.

At Peter's request, Sandy gave Peter keys to the Shop on 15 March 2022 so that Peter could draw up plans for fitting it out. With Sandy's permission, Peter also started cleaning the Shop in preparation for fitting it out. On the same day, Peter paid Sandy a deposit of HK\$1 million. Sandy and Peter agreed that this would eventually be part of the deposit that Peter would pay Sandy when they signed the sale and purchase agreement.

Sandy's solicitor sent a draft sale and purchase agreement to Peter's solicitor on 21 March 2022. Despite repeated requests by Sandy's solicitor, Peter did not sign the sale and purchase agreement. On 15 July 2022, Peter informed Sandy that he no longer wants to buy the Shop. Peter returned the keys to Sandy.

Question:

Answer the following question giving reasons for your answer:

Can Sandy enforce the oral agreement for sale and purchase against Peter?

(25 marks)

Question 2 (25 marks)

On 30 June 2022, Pansy Bo (“Pansy”) as purchaser and Vicki Vong (“Vicki”) as vendor entered into a binding agreement for sale and purchase (the “Agreement”) whereby Pansy agreed to buy Vicki’s Flats, i.e. 15A and 15B, Pine Court, 20 Pine Road, Hong Kong (Flats 15A and 15B are together referred to as the “Property”) for a consideration of HK\$30 million. Completion was due to take place on 3 October 2022. Under the Agreement, Pansy paid Vicki a deposit of HK\$3 million. Pansy particularly likes the Property because it is very big.

The Agreement is substantially in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219. It includes the following clauses 12 and 13:

“12. The Purchaser has inspected the Property and will not raise any requisitions or object to title in connection with any unauthorised alterations or illegal structures at the Property.

13. Subject to Clause 12, the Vendor agrees to give good title to the Property.”

As mentioned above, the Property consists of two adjoining flats – Flats 15A and 15B. Vicki bought them in 2010 and converted them into the Property, which is a single large flat. Vicki did this by cutting the structural wall (assume that the wall is structural) which separates Flat 15A from Flat 15B, to make an opening which connects the two flats. The opening is 4 feet wide. Vicki obtained approval from the Building Authority (“BA”) under the Buildings Ordinance, Cap. 123 to cut the structural wall and make this opening. Before Pansy signed the Agreement, Vicki showed her a certified true copy of the written approval from the BA.

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

Vicki's solicitor sent Pansy's solicitor the title deeds on 15 July 2022. Pansy's solicitor then discovered that the Deed of Mutual Covenants for Pine Court (the "DMC") contains the following covenants:

"1. No owner will make any structural alterations to any part of Pine Court.

2. No owner will make any alterations to the common parts of Pine Court."

The DMC does not contain a definition of common parts.

Pansy's solicitor raised a requisition asking for evidence that consent had been obtained under the DMC to making an opening in the structural wall separating Flat 15A from Flat 15B. Vicki's solicitor replied that Vicki had not obtained any such consent, but pointed out that the BA had consented to Vicki making the opening and that the Agreement includes clause 12.

Pansy did not complete her purchase on 3 October 2022 on the grounds that Vicki's title is defective due to Vicki's breach of the DMC and that clause 12 does not effectively limit Vicki's obligation to give good title. Vicki's solicitor wrote to Pansy's solicitor saying that the Agreement is terminated and that Vicki has kept the deposit of HK\$3 million. The current market value of the Property is HK\$24 million.

Question:

Answer the following question giving reasons for your answer:

Can Vicki claim damages from Pansy equal to the difference between the consideration stated in the Agreement and the current market value of the Property?

(25 marks)

Question 3 (25 marks)

On 24 October 2022, Pat signed a binding Agreement for Sale and Purchase (the “Agreement”) with Sam to purchase his property known as Flat D, 12th Floor, Joyful Place, Wanchai, Hong Kong (the “Property”). The Agreement includes a term that a good title will be sold.

All the title documents set out in the list below (the “List”), except items (1) and (2), relate exclusively to the Property:

- (1) Agreement and Conditions of Sale No. 11213 dated 29 June 1973
- (2) Deed of Mutual Covenant dated 20 September 1983 (Memorial No. UB2482499)
- (3) Assignment with Plan dated 16 April 1984 (Memorial No. UB2578323)
- (4) Mortgage dated 18 May 1984 (Memorial No. UB2578367)
- (5) Agreement for Sale and Purchase dated 30 November 1990 (Memorial No. UB4657494)
- (6) Receipt on Discharge of a Charge dated 10 January 1991 (Memorial No. UB4716736) endorsed on Mortgage Memorial No. UB2578367
- (7) Assignment dated 10 January 1991 (Memorial No. UB4716737)
- (8) Mortgage dated 10 January 1991 (Memorial No. UB4716738)
- (9) Release (of Mortgage Memorial No. UB4716738) dated 18 December 2020 (Memorial No. 20122086598712)

Questions:

Answer the following questions giving reasons for your answers:

3.1 Identify from the List the intermediate root of title in respect of the Property.

(3 marks)

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

3.2 Sam has lost the following:

- A certified true copy of the occupation permit for Joyful Place,
- the original Assignment with Plan Memorial No. UB2578323 (Item (3) of the List), and
- the original Mortgage Memorial No. UB4716738 (Item (8) of the List).

Sam does not plan to provide Pat with these documents. **How, if at all, does this affect Sam's obligations under the Agreement?**

(15 marks)

3.3 Sam first bought the Property with his wife, Susan. They are the purchasers under Assignment Memorial No. UB4716737 (Item (7) of the List) which they executed as joint tenants. Susan died on 17 May 2022. **To what extent will Sam's right to deal with the Property be affected if a Charging Order *nisi* and a Charging Order absolute in respect of Sam's unpaid debts were dated and registered against the Property at the Land Registry on 16 March 2021 and 2 July 2021 respectively and they were subsequently discharged by a Discharge dated and registered at the Land Registry on 3 December 2021?**

(7 marks)

Question 4 (25 marks)

Ben Ma (“Ben”) is a Hong Kong permanent resident but his wife, Brenda Ma (“Brenda”) is not. On 21 October 2022, they entered into a binding written Provisional Agreement for Sale and Purchase (the “Provisional Agreement”) to purchase as joint tenants a property in Happy Valley (the “Property”) from its present owner, Sylvia Smith (“Sylvia”), who is not related to them in any way, at the price of HK\$22 million. According to the Land Registry search, Sylvia entered into an Agreement for Sale and Purchase as the purchaser of the Property on 4 August 2021. The government grant, deed of mutual covenant and occupation permit relating to the Property provide for its user to be “domestic”.

Before signing the Provisional Agreement, Ben and Brenda met Frank, Sylvia’s father, when they went to inspect the Property. During their meeting (the “Meeting”), Frank told Ben and Brenda that he was staying at the Property whilst his own flat was under renovation. He also showed them round the Property and negotiated the purchase price with them.

The terms of the Provisional Agreement (in which Sylvia was defined as the “Vendor” and Ben and Brenda together as the “Purchaser”) include the following:

- “1. The Vendor will sell a good title to the Purchaser.*
- 2. An initial deposit equivalent to 5% of the purchase price was paid by the Purchaser to the Vendor upon the signing of the Provisional Agreement.*
- 3. A further deposit equivalent to 5% of the purchase price will be payable by the Purchaser to the Vendor on or before 3 November 2022.*

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

4. *The balance of purchase price will be payable by the Purchaser to the Vendor at completion on or before 1 December 2022.*
5. *The Formal Agreement for Sale and Purchase will be signed on or before 3 November 2022.*
6. *Each party will pay his or her or their own legal costs. Registration fees and all forms of stamp duty (except any special stamp duty that may be payable in respect of this transaction) will be paid by the Purchaser.*
7. *The Vendor will pay any special stamp duty that may be payable in respect of this transaction."*

Questions:

Answer the following questions giving reasons for your answers:

- 4.1 Will the Formal Agreement for Sale and Purchase, if signed within the time limit, attract ad valorem and/or other stamp duties? If so, how much will they be and who will pay them? If you require further information to prepare the answer, state what it is and why you require it.**

(15 marks)

- 4.2 Explain the impact, if any, the Meeting may have on the title to the Property.**

(10 marks)

Question 5 (25 marks)

On 1 September 2022, Victor as vendor and Paula as purchaser entered into a binding agreement (the “Agreement”) whereby Victor agreed to sell Paula his flat known as 6B, Bauhinia Court, 6 Bauhinia Road, Hong Kong (the “Property”) for a consideration of HK\$18 million with completion on 10 October 2022. The Agreement is substantially in the Form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219. Clause 4 of the Agreement provides:

“4. Completion shall take place at the offices of the Vendor’s solicitor on 10 October 2022.”

The Agreement also includes the following clause 12:

“12. The Vendor will give good title and will prove title in accordance with section 13 of the Conveyancing and Property Ordinance, Cap. 219.”

The Property was built in 1984. During title investigation, Paula’s solicitor asked Victor’s solicitor for a certified true copy of a power of attorney dated 2 July 2015 (the “Power of Attorney”) under which an Assignment of the Property dated 3 August 2015 was executed by the attorney of Raymond Wong as vendor in favour of Victor as purchaser. Victor’s solicitor said that he would later supply a certified true copy of the Power of Attorney. Paula’s solicitor asked for the original or a certified true copy to be supplied on or before completion. All other title deeds supplied by Victor’s solicitor are in order.

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

One week before completion, Victor's solicitor suggested that completion take place by way of undertaking. He sent Paula's solicitor a completion statement requiring the balance of purchase price to be paid in two cashier orders as follows:

1. One made payable to Victor's mortgagee for the account of Victor to discharge Victor's mortgage, and
2. one made payable to Victor's solicitor's firm.

Five days before completion, Paula's solicitor told Victor's solicitor that he wanted to complete in person. Paula's solicitor made an appointment to meet at the offices of Victor's solicitor at 4.30 p.m. on 10 October 2022. Paula's solicitor and Paula attended this appointment with two cashier orders as instructed. Victor's solicitor held an assignment of the Property executed by Victor and a discharge from Victor's mortgage executed by Victor's mortgagee, but Victor's solicitor did not hold the original or a certified true copy of the Power of Attorney dated 2 July 2015. Victor's solicitor told Paula's solicitor that he would give an undertaking to supply a certified true copy within 14 days. As instructed by Paula, Paula's solicitor refused to complete.

On 18 October 2022, Victor's solicitor obtained the Power of Attorney and on the same day, Victor entered into a binding agreement to sell the Property to Lily Leung ("Lily"). The sale was completed on 24 October 2022 and Lily moved into the Property immediately. Bauhinia Court is next to Bauhinia Hospital. Lily particularly wanted to move to Bauhinia Court because she has a serious illness for which she is receiving regular treatment at Bauhinia Hospital.

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

Question:

Answer the following question giving reasons for your answer:

Advise Paula whether she can obtain specific performance of the Agreement.

(25 marks)

END OF TEST PAPER