

**2019 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD III: COMMERCIAL
AND COMPANY LAW**

Wednesday, 20 November 2019



2019 Overseas Lawyers Qualification Examination

Head III: Commercial and Company Law

Question 1 (25 marks)

Future Printing Limited ("Company"), a Hong Kong company, is a leading manufacturer of printing paper in Hong Kong. Donald Wong and Mike Lo are the directors and shareholders of the Company. They provided shareholders' loans to the Company (Donald in the amount of HK\$20,000,000 and Mike in the amount of HK\$6,000,000).

On 17 April 2017, the Company borrowed HK\$7,000,000 (a seven-year term loan facility) from Mighty Bank secured by a fixed charge over all delivery vans owned by the Company ("Mighty Bank Fixed Charge"). Due to an administrative oversight, the Mighty Bank Fixed Charge was not registered under the Companies Ordinance (Cap. 622). Nothing was done to rectify the error.

The Company's financial position worsened as many offices in Hong Kong have gone paperless. The Company was in desperate need of capital to diversify its business. On 12 February 2018, Brilliant Bank provided a HK\$35,000,000 4-year term loan facility to the Company secured by a charge over the Company's accounts receivables. The debenture contains a provision that prohibits the assignment of the Company's book debts without the prior written consent of Brilliant Bank. Proceeds of the collected book debts must be paid into a separate designated bank account managed by Brilliant Bank.

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

On 7 April 2018, the Company transferred an office building in Tai Wai ("Office") to Janice Wong, the wife of Donald Wong, for HK\$9,000,000, which was HK\$21,000,000 lower than the market value of the Office (independently valued in April 2018). Donald said Janice had done a lot for the Company without remuneration and the sale of the Office was a way for the Company to show its "appreciation" for her contribution.

On 26 April 2018, the Company granted an "all-monies" floating charge over all of its assets, book debts and undertakings in favour of Mike Lo to secure all personal loans provided by Mike to the Company.

Shark Bank has for many years provided an overdraft facility to the Company with a pre-approved standby credit limit of up to HK\$30,000,000. Shark Bank provided a further overdraft facility to the Company (with pre-approved standby credit limit of up to HK\$20,000,000) provided that some form of security is given. On 3 March 2018, the Company granted an "all-monies" floating charge over all of its assets, book debts and undertakings in favour of Shark Bank ("Shark Bank Debenture") to secure the previously unsecured loan of HK\$30,000,000 and a new HK\$20,000,000 overdraft facility that was provided to the Company at the same time as the execution of the Shark Bank Debenture. The table below shows movements of funds in the Company's overdraft ("OD") facility account with Shark Bank from 3 March 2018 onwards:

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

Date	Deposit (HK\$)	Withdrawal (HK\$)	Balance (HK\$)
3 March 2018			30,000,000 OD
13 March 2018		4,000,000	34,000,000 OD
20 March 2018	10,000,000		24,000,000 OD
9 April 2018		2,000,000	26,000,000 OD
19 April 2018		20,000,000	46,000,000 OD
5 August 2018	3,000,000		43,000,000 OD

On 6 August 2018, the business of the Company suffered a devastating blow as a fire broke out in the Company's factory in Fanling, New Territories, destroying the whole production line. On 8 August 2018, Shark Bank appointed a receiver in accordance with its debenture (an event that crystallized the Shark Bank Debenture).

On 21 August 2018, a trade creditor filed with the court a petition to wind up the Company.

The liquidator, Mandy Wan, has learned the following information:

- (i) The Company has the following assets: book debts (worth HK\$8,000,000), inventory (worth HK\$20,000,000), delivery vans (worth HK\$1,000,000) and cash at bank (worth HK\$2,000,000).
- (ii) The Company owes 10 employees a total of HK\$7,000,000 for wages in arrears.

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

- (iii) The Company has 3 unsecured trade creditors, who are owed HK\$15,000,000 in total.
- (iv) Evidence shows that the Company was insolvent and unable to pay its debts during April 2018.

The Company made no early repayment to Brilliant Bank in connection with the term loan facility.

For the purpose of this question, assume that there are no negative pledge clauses in any of the debentures or charges.

Question:

You act for the Company's liquidator, Mandy Wan, who has drawn your attention to all of the above points. **Prepare a letter of advice to the liquidator, addressing the rights and priorities of all the creditors of the Company.**

[25 marks in total]

Question 2 (25 marks)

Listco A is a company incorporated in Hong Kong with limited liability, the shares of which are listed on the Main Board of The Stock Exchange of Hong Kong Limited (the "Stock Exchange").

Listco C is an exempted company incorporated in Bermuda with limited liability, the shares of which are also listed on the Main Board of the Stock Exchange.

Listco A and Listco C are both indirectly controlled by the Chan Family Trust - a private discretionary trust set up by Dr. Eddie Chan.

Subco B, a direct wholly-owned subsidiary of Listco A, is planning to enter into a sale and purchase agreement (the "Sale and Purchase Agreement") with Subco D, a direct wholly-owned subsidiary of Listco C, to purchase the entire equity interest of Targetco for HK\$1,800,000,000 (the "Acquisition").

Targetco is a company incorporated in the British Virgin Islands and indirectly wholly-owned by Listco C. Its principal business is investment holding and it is, through its subsidiaries, the indirect beneficial owner of various adjoining ground floor shops on Queen's Road East, Hong Kong (the "Property").

You are told that one or more of the applicable percentage ratios (as defined in the Listing Rules) in respect of the Acquisition are greater than 25% but all of them are less than 100%.

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

Questions:

Advise Listco A:

- (a) **the implications that shall arise under the Listing Rules for the Acquisition and the steps Listco A must take to comply with the Listing Rules;**

(8 marks)

- (b) **what role should Ms. Daisy Chan, executive Chair of Listco A as well as the daughter of Dr. Eddie Chan and an eligible beneficiary of the Chan Family Trust, play within Listco A in connection with the Acquisition?**

(2 marks)

- (c) **given the nature of the Acquisition (and, in particular, the implications arising under the Listing Rules for the Acquisition), what conditions precedent and practical terms should appear in the Sale and Purchase Agreement for the benefit of Listco A?**

(12 marks)

- (d) **What purpose does the Listing Rules serve for transactions such as the Acquisition?**

(3 marks)

[25 marks in total]

Question 3 (25 marks)

Great Flyer Company Ltd. (the "Company") is a private company incorporated in Hong Kong in 2010 by Mr. and Mrs. Chow ("the Chows"). Initially the Chows were the only shareholders and directors of the Company which is engaged in the business of trading. The initial share capital of the Company was HK\$2,000,000. The total number of issued shares was 20,000 (the Chows subscribed 10,000 shares each at \$100 per share). All issued shares were fully paid up.

The Company performed quite well in the first few years after its incorporation. However in 2014, it experienced serious cash flow problems. In order to keep the business of the Company afloat, the Chows approached their uncle, Jimmy Chow, a wealthy businessman. Jimmy eventually invested HK\$3,000,000 in the Company by subscribing for 30,000 new shares (at the price of \$100 per share) in the Company. As a result, the issued share capital of the Company was increased to HK\$5,000,000. Jimmy became a 60% majority shareholder of the Company and the Chows together hold the remaining 40%. The Chows remain the only directors of the Company as Jimmy was not interested in running the Company. There is no shareholders' agreement between Jimmy and the Chows. During the period from 2016 to 2018, the Company was successful and Jimmy received substantial dividends.

In August 2019, Jimmy indicated his intention to transfer all his shares in the Company to his girlfriend, Jay. The Chows did not support the idea as they were worried that Jay would interfere with the management of the Company. Instead, they offered to buy out Jimmy's shares in the Company at market price but this was rejected by Jimmy.

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

Note:

In this question, you should:

- (1) assume that the Company (as defined below) adopts the Model Articles for Private Companies Limited by Shares set out in Schedule 2 to the Companies (Model Articles) Notice (Cap. 622H) as its articles of association;
- (2) fully explain your answers with reasons for each part (including where applicable the relevant legislative provisions and necessary steps involved).

Questions:

Part A

- (a) The Chows warned Jimmy that if he insisted on transferring his shares to Jay, they would do everything to prevent Jay from becoming a member of the Company. **Can the Chows do this?**

(5 marks)

Part B

In view of the uncooperative behaviour of the Chows, Jimmy is considering taking control of the Company. He plans to remove the Chows as directors of the Company.

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

- (b) Is he entitled to do so? If so, advise him on the procedures and steps that he should follow or take under the Companies Ordinance and the articles of the Company to achieve this.**

(15 marks)

Part C

- (c) Are there any possible procedures or steps that the Chows can follow or take if they wish to resist any attempt to remove them as directors by Jimmy? Will these procedures and steps be effective?**

(5 marks)

[25 marks in total]

Question 4 (25 marks)

Part A

Marcus is the husband of Mandy. Marcus is the chief financial controller of ABC Ltd., a company listed on the Growth Enterprise Market of The Stock Exchange of Hong Kong Limited. ABC Ltd. intends to acquire a project company which in turn holds a piece of land in a residential district with good potential. Being the chief financial controller of ABC Ltd., Marcus possesses confidential and financial information in relation to this acquisition. He informed his wife, Mandy of this. Mandy subsequently gave this confidential information to her brother, Simon. Simon and Mandy together acquired shares of ABC Ltd. However, as a result of a change in circumstances, the acquisition was suspended. Prior to the suspension, Marcus informed them that the acquisition was to be suspended. Simon and Mandy sold the shares of ABC Ltd. and avoided losses arising from the drop in share price of ABC Ltd. caused by the suspension.

Question:

- (a) **Are Marcus, Mandy and Simon liable under Part XIII of the Securities and Futures Ordinance, Cap. 571?**

(13 marks)

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

Part B

Alfred and Minnie are secondary school classmates and worked in different asset management companies. Recently, they had the idea of setting up their own asset management company (the "Company") in Hong Kong to carry out the business of asset management and securities trading regulated activities. Alfred and Minnie will be the shareholders of the Company. However, the day-to-day management and operations of the Company will be mainly dealt with by Alfred. The Company intends to serve professional clients in and outside Hong Kong.

Alfred and Minnie are not familiar with the legislation, procedure and licensing requirements involved. They engage you to advise them in preparation of setting up an asset management company.

Question:

- (b) **Prepare a memorandum of advice for Alfred and Minnie on the regulatory procedures involved.**

(12 marks)

[25 marks in total]

Question 5 (25 marks)

Part A

Mary and Juliet own 50% each of the entire issued shares in Pots & Pans (Holdings) Limited ("Holdings"), which is a company incorporated in the British Virgin Islands. In turn, Holdings owns 100% of the entire issued shares in Pots & Pans (Trading) Limited ("Trading"), which is a company incorporated in Hong Kong. The business of Trading is to source domestic kitchen equipment from the PRC and to supply to UK-based distributors and retailers. Trading employs 40 people in its offices in Kwun Tong, Kowloon.

Mary and Juliet have been introduced to George who owns 100% of the entire issued shares in Kitchen Mart Limited ("Kitchen Mart"), a company incorporated in Hong Kong. Kitchen Mart also sources domestic kitchen equipment from the PRC and supplies it to German-based distributors and retailers. Kitchen Mart employs 5 people in its offices in Wanchai. Kitchen Mart has successfully operated for 20 years since its incorporation.

Mary and Juliet are interested in buying Kitchen Mart (indirectly, through Trading as the buyer) as it will give them a customer base in Germany. At some point in the future, they would look to close the Wanchai office and move Kitchen Mart's staff to Trading's office in Kwun Tong. George is 58 years old and looking to retire, but he had not until now had a concrete succession plan. George has agreed to sell the entire issued share capital of Kitchen Mart to Trading for a total consideration of HK\$20,000,000. Of this, HK\$15,000,000 is payable on completion, and HK\$5,000,000 is payable on the first anniversary of completion.

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

James is the financial director of Kitchen Mart and has been in the company with George since its incorporation. James is not a party to the sale and purchase agreement. Notwithstanding, as a result of James' loyalty to Kitchen Mart, George has negotiated a provision in the sale and purchase agreement as follows:

"Trading agrees to pay James a bonus of HK\$1,000,000 on or before 6 months following the date of completion."

There is a separate provision in the sale and purchase agreement as follows:

"Each of George and James agrees that he will not, for a period of 2 years following completion, directly or indirectly deal with any person, who is at the date of completion, a customer of Kitchen Mart."

James resigned from Kitchen Mart just three months after completion and set up his own small company in competition with Kitchen Mart. He has taken a small customer from Kitchen Mart as a customer of his new company.

Mary and Juliet have come to you after completion for advice in connection various issues arising out the transaction.

They do not want Trading to pay the bonus to James as referred to above. In addition, they wish to enforce the provision whereby James agreed not to deal with customers.

Questions:

(a) Is Trading liable to pay the bonus to James? Explain your answer.

(3 marks)

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

(b) Can Trading enforce the provision against James whereby he agreed not to deal with customers?

(2 marks)

(c) What is the Register of Significant Controllers? How should it be updated as a result of completion, what detail is to be included and is it open to public inspection? Explain your answer.

(10 marks)

Part B

It is now 11 months after completion, and HK\$5,000,000 (being the balance of the consideration) is due to be paid to George one month from now. Trading does not have sufficient cash reserves to pay the balance. However, as a result of Kitchen Mart winning new customers in Germany, Kitchen Mart has had a very profitable year and has enough cash to pay the balance.

Question:

(d) Can Kitchen Mart lawfully pay the balance of the consideration to George? If so, explain any applicable procedures which Kitchen Mart would need to go through. Is there an alternative mechanism?

(10 marks)

[25 marks in total]

END OF TEST PAPER