

Examiners' Comments on the 2019 Examination

Head I: Conveyancing

Question 1

- 1.1 This question is modelled on *Kingdom Miles Limited v Ever Crystal Limited [2018] HKCA 967*.

Although the 2 letters could come within the meaning of a Government Lease, the Vendor can rely on ss 13(3) and 13(4) of the Conveyancing and Property Ordinance ("CPO") for various presumptions. Furthermore, as *De Monsa Investment v Whole Win Management Fund (2013) 16 HKCFAR 419* demonstrates, it is not necessary to have every missing document to be accounted for by secondary evidence. Ultimately, it is a question of whether there is any real risk that the Purchaser is not receiving a good title. On the facts of the question, the 2 letters do not seem to affect title because i) the approved terms have already been set out in a previous letter included in the Conditions of Grant; ii) the 2 letters are not even included in a copy of the Conditions of Grant; and iii) it is unimaginable that the Government would assert that there were other terms in the 2 letters of which the Lands Department appears to have no record. The risk of a successful assertion of unknown encumbrances and obligations under the Conditions of Grant is not real, if any.

- 1.2 The agreement for sale is subject to Ad Valorem Stamp Duty under Part 1 of Scale 1 of Head 1(1A) of the Stamp Duty Ordinance ("SDO") unless the Purchaser is a Hong Kong Permanent resident who does not beneficially own another residential property in Hong Kong and is acquiring the Property for his own benefit. The rate under Scale 1 is 15%. If Scale 2 applies, then, with a certificate of value and assuming that the market price is also the purchase price, the applicable rate is 3.75%. Liability for Special Stamp Duty also arises because the Vendor has owned the Property for more than 12 but less than 36 months. The applicable rate in this question is 10%. Liability for Buyer's Stamp Duty should also be considered. Under the Stamp Duty Ordinance the Vendor and Purchaser are jointly and severally liable for Ad Valorem Duty and Special Stamp Duty but the Purchaser alone is liable for Buyer's Stamp Duty. As the provisional and formal agreements are in conformity and not more than 14 days apart, the formal agreement should therefore be stamped within 30 days after its date. The assignment attracts nominal duty of HK\$100.
- 1.3 Form 2 of the Third Schedule to the CPO provides that time shall in every respect be of the essence of the agreement. Both the 'de minimus' rule and the defence of 'accident' do not apply in Hong Kong and this means that any delay in the payment and completion by the Purchaser can be treated by the Vendor as a repudiation of the agreement and the deposit can be forfeited.

Question 2

- 2.1 This question is modelled on *Gain Hero Finance Limited v Winland Finance Limited [2019] HKCFI 771*.

From the wording of the Instrument, the subject matter of the Instrument was money representing proceeds of sale to be received by Debby and not Debby's interest in the Property despite the fact that the Instrument was registered.

Although there was a delivery of the title documents, such delivery was intended only to provide security for the assignment of the proceeds of sale. Such delivery did not support the existence of an agreement to create an equitable charge.

On the other hand, the Charging Order Nisi and Charging Order Absolute registered by Yasahi are charges on the property itself by virtue of ss 20A and 20B of the High Court Ordinance. Hence, the Charging Orders have priority over the unregistrable interest of Winterland over the sale proceeds of the Property under the Instrument.

- 2.2 This variation of the question is modelled on *Si You Choi Kam v Wealth Credit Limited [2018] HKCA250*.

Johnny may argue that there is a resulting trust in his favour because of his payment of all monies relating to the Property. If he succeeds, Debby will have no beneficial interest in the Property and the Charging Orders on Debby will not affect the Property but are only means to enforce payment of a judgment debt.

When Johnny seeks a declaration of resulting trust in his favour from the Court, he should address the following issues: a) principle of presumed equality; b) the parties' shared intention, actual, inferred or implied; and c) counter-presumption of advancement.

In terms of priority, the resulting trust is good against the whole world except a bona fide purchaser of the legal estate for value without notice. Yasahi, holder of the Charging Orders is not such a purchaser because the Charging Orders have effect as equitable charges. Furthermore, no fresh consideration was given when the Charging Orders were obtained.

Question 3

- 3.1 Initially, the interest was equitable under the relevant Government Conditions of Sale. Under s 14(1) of the CPO, there is deemed grant of legal interest upon compliance with the Conditions. As the Government Grant was dated after 1 January 1970, a certificate of compliance registered in the Land Registry is sufficient to convert to a legal estate. However, certificate of compliance is not the only way of proving compliance and other acceptable evidence includes a note of compliance endorsed by the Government (s 14(3)(b) of CPO) and the entry of a note of compliance on the register itself (s 14(3)(a) of CPO).
- 3.2 The Vendor has an obligation to prove the precise number of undivided shares that he is selling (*Yip Ngan Yee and Others v Chan Tsz Yam and Others (CACV 442/2000)*). A vendor can rely on the first assignment to prove how the undivided shares are allocated and other acceptable evidence includes a Memorandum of Shares, a control card and a sub-division register in the Land Registry (*Goldjet International Limited v Ling Ki Wai and Others [1997] HKCFE 551*).
- 3.3 An occupation permit is required to prove that the building has been properly built and can be occupied and the Purchaser is entitled to its production according to *Lui Kwok Wai v Chan Yiu Hong (3246/94)*. For buildings constructed before the present provisions of the Buildings Ordinance on 1 June 1956, when there was no occupation permit, the issue to consider is whether the lack of occupation permit will give rise to any real risk of enforcement action by the Building Authority.
- 3.4 By meeting Nancy as an occupant at the Flat, the Purchaser has acquired constructive notice of any interest that she may have in the Flat. (*Wong Chim Ying v Cheng Kam Wing [1991] HKCA 299*). If Nancy can prove any financial contribution towards the purchase price, the presumption of a resulting trust will arise in her favour.

The counter-presumption of advancement also applies to a woman and her children. However, such presumption is a rather weak concept and can be rebutted on comparatively slight evidence (*Suen Shu Tai v Tam Fung Tai [2014] 4 HKLRD 436, CA*) and *Lee Tso Fong v Kwok Wai Sun and Another [2008] HKCFI 563*).

On the other hand, if Nancy has an equitable interest in the Property and is aware of the sale of the Property to the Purchaser, she has a duty to speak out, otherwise, she may be estopped from asserting her interest against the Purchaser (*Mo Ying v Brilllex Development Limited FAMV 48/2015*).

Question 4

4.1 Buildings Ordinance

S 14 of the Buildings Ordinance (“BO”) provides that all building works require the approval of plans by the Building Authority and its consent for the commencement of the building works. Building works is defined in s 2 of the BO. No retrospective consent can be given. A breach of s 14 will mean that the Building Authority may take enforcement action unless the works qualify as minor works under s 14AA of the BO or exempted works under s 41(3) of the BO, as certified to be such by an authorized person (*Chung Kwok Yiu Ringo v Leung Chi Shing and Another [1996] HKCFI 264*).

The Deed of Mutual Covenant (“DMC”) and the Building Management Ordinance (“BMO”)

The DMC will have to be looked at to see whether the partition wall is defined as part of the common areas or parts. Furthermore, s 2 of and paragraph 1 of the First Schedule to the BMO provides that “common parts” include load bearing walls and other structural supports. If the partition wall is a common area/part, then by reason of s 34I of the BMO, the approval by a resolution of the owners’/management committee is required before works can be carried out to it (*Central Management Limited v Light Field Investment Limited and Another [2011] 2 HKLD 34*).

If the partition wall is not load bearing, then the first assignment of both Flats must be checked to ascertain whether the developer has any reservation of its ownership. If not, then the partition wall will be regarded as co-owned by the owner of the 2 Flats (*The Incorporated Owners of Westlands Garden v Oey Chiou Ling and Another [2011] 2 HKLRD 421*).

Legal Charge

As Part C of the Second Schedule to the CPO is incorporated, if the works were not carried out in compliance with the legal requirements, there will be a breach of clauses (a), (b), (c)(ii) and (iv) of that Part C. Tiger Bank's consent is required pursuant to clause (f) of the said Part C and if there is any breach, Tiger Bank will be entitled to go into possession of the Property and/or sell it.

- 4.2 The Vendor must give full and frank disclosure and must not mislead the Purchaser and must disclose the defects of which he has actual and constructive notice. The limitation clause must be widely drafted to cover the defect and must provide for the Purchaser to (i) be aware of the legal consequence; ii) accept the possible defect in title; and iii) waive his right to raise any requisition or reject title because of it (*Jumbo King Limited v Faithful Property Limited [1999] 4 HKC 707*).

Question 5

- 5.1 S 5(2) of the Powers of Attorney Ordinance (“PAO”) provides that where a power of attorney has been revoked and a person, without knowledge of the revocation, deals with the donee of the power, the transaction between them shall, in favour of that person, be as valid as if the power had then been in existence.

The conclusive presumption of non-revocation under s 5(4)(a) of the PAO is not available to the Purchaser because the Power of Attorney was dated more than 1 year from the date of the Assignment from Mark Lee to the Vendor Vincent Chan.

The conclusive presumption under s 5(4)(b) of the PAO is also not available because the Statutory Declaration was made by the donee as opposed to the person dealing with the donee (*WOC Finance Co. Limited v Wong On Cheong Investment Co. Limited (2000) HCMP No. 7316/99*).

The Purchaser should therefore require the Vendor Vincent Chan to make a statutory declaration for non-revocation before or within 3 months from the date of completion of the present sale and purchase.

Alternatively, Mark Lee, as donor, can confirm the non-revocation of the Power of Attorney.

- 5.2 The Vendor can rely on s 13(4A) of the CPO to refuse production as the 2002 Assignment was made more than 15 years before the Agreement.

The Vendor can also rely on the ground held in *Lee Kim Ha v Yip Moo Chiu [1990] HKCLR 29* that a power of attorney under which a purchaser has executed an assignment does not need to be produced since the assignment passes title even without the signature of the purchaser.

- 5.3 According to Condition 7(1) of Part A of the Second Schedule to the CPO, requisition must be raised as soon as practicable after delivery of the title deeds and in any event not later than 14 days before completion. The Additional Requisition therefore appears to be raised out of time.

This time limit does not apply if the Purchaser was unaware of the title problem from the title deeds and the defect goes to the root of title.

Although extensive unauthorized structure has been held to go to the root of title, partitioning of a floor and an unauthorized swimming pool have been held in 2 separate cases as not going to the root of title. In the present case, given the small size of the Glasshouse, it does not appear that the defect goes to the root of title.

Furthermore, as the Purchaser had inspected the Property and that the Additional Requisition was based on comparing the plan of the Assignment which was delivered to the Purchaser nearly 2 months before completion, the Purchaser should have been aware of the defect.

- 5.4 Good title can be given if a vendor is able to offer substantial performance but there may be some abatement of the purchase price (*Goldful Way Development Limited v Wellstable Development Limited [1999] 1 HKLRD 563*).

Given the small size of the Glasshouse which covers about 2% of the total area of the Property, the Vendor should be able to offer substantial performance unless the Purchaser found the Property especially attractive because of the Glasshouse (though this would only be convincing if this had been made known prior to the purchase).