Examiners' Comments on the 2023 Examination
Head I: Conveyancing

Examiners advise candidates to note the following:

- No credit is given for copying out a question without any attempt at answering,
- Candidates are given credit for relevant and correct points made in an attempt at answering a question, even if the answer is short or incomplete,
- Candidates should identify all issues raised by the facts of a question and attempt to deal with all issues – for example, candidates have a tendency not to deal fully with priority issues embedded in questions,
- Candidates should apply the law to the facts of each question – see below for examples, and
- Candidates should avoid contradicting their conclusions.

Candidates must answer 4 out of 5 questions. The following is a guide to the issues raised by the 2023 questions. It does not include complete model answers. Candidates should, where necessary, cite legislation and cases.

Question 1.1

Section 51(1) of the Conveyancing and Property Ordinance, Cap. 219 ("CPO") implies the powers contained in the 4th Schedule to the CPO into a legal mortgage. Paragraph 2 of the 4th Schedule to the CPO gives M Bank Ltd as mortgagee the power to take possession on the occurrence of an event of default. Mary, the mortgagor, has failed to pay interest within one month of becoming due. This is an event of default. The facts also state that Mary has failed to pay management charges. This is a breach of a covenant in the mortgage which is also an event of default. The loan is repayable on demand. If M Bank Ltd makes a demand and Mary fails to repay the loan in accordance with the demand, this would also be a breach of covenant which is an event of default. Candidates should apply the CPO events of default to the facts rather than stating all events of default contained in the 4th Schedule to the CPO.

M Bank Ltd takes possession either by obtaining a court order for physical possession or by giving notice to the tenant to pay rent to it. In this case M Bank Ltd has consented to the tenancy agreement which was entered into by Mary after the mortgage. The mortgage was registered within one month after its date and takes priority from the date of creation which is before the date on which the tenancy was created. M Bank Ltd cannot therefore evict the tenant. M Bank Ltd must therefore take possession by collecting rent from the tenant. M Bank Ltd must give notice to the tenant to pay rent to it. A number of candidates did not fully explain these points.

Question 1.2

The tenancy agreement contains a covenant by Mary as landlord to repay the deposit at the end of the term. The issue is whether the burden of this covenant has passed to M Bank Ltd as mortgagee. This covenant to repay has been found to be a personal covenant the burden of which does not pass. Candidates should explain why the covenant is personal.

Candidates might have considered whether, as a condition of consenting to the letting, M Bank Ltd took an assignment of the rent and tenancy deposit in which case M Bank Ltd would be liable to repay the tenancy deposit.

Question 1.3

The issue is whether the burden of the covenants has passed to M Bank Ltd as mortgagee. Mary, the mortgagor, is a successor in title to one of the parties to the Deed of Mutual Covenant ("DMC"). M Bank Ltd as mortgagee derives its title from Mary. Candidates should apply sections 41(3), 41(2) and 40 of the CPO to the three covenants. Covenant 1 has been found to relate to land of the covenantor. Covenant 2 also relates to land. But covenant 3 (to employ Richly Ltd to carry out repairs or renovations) is likely to be a personal covenant. Candidates should explain the difference between covenants relating to land and those that are purely personal.

Richly Ltd is in any event unlikely to be able to enforce covenant 3 because it has not retained any undivided shares in the land.

The burden of the covenant to pay management charges potentially passes to M Bank Ltd whether or not it is in possession. Therefore M Bank Ltd might be liable for the arrears. However, the DMC might show an intention that the burden does not pass by stating that only mortgagees in possession are liable for management charges. Candidates might also refer to case law to answer this question. See *Discovery Bay Services Management Ltd v Buxhaum* [1995] HKDCLR 7 and *Wise Wave Investments Ltd v TKF Services Ltd* [2007] 4 HKLRD 762.

Question 1 was the least popular question.

Question 2.1

Candidates should consider Ad Valorem Duty ("AVD"), Special Stamp Duty ("SSD") and Buyers Stamp Duty ("BSD").

AVD – the permitted user of the property is residential. Under Part 1 of Scale 1 of Head 1(1A) of the First Schedule to the Stamp Duty Ordinance, Cap. 117 ("SDO") AVD at the rate of 15% of the consideration or value of the property is payable unless exemptions apply. However, Scale 2 would apply here provided this is a single residential property and Sunny and Moon are acting on their own behalf because the facts state that they do not own any other residential property, that Sunny is a Hong Kong permanent resident and that he and Moon are a married couple. This makes them closely related within the meaning of the SDO. Under Scale 2 the rate of duty is 3.75%. The agreement must contain a certificate of value.

SSD – candidates should state the relevant dates of acquisition and disposal. The rate of duty is 10% of the consideration or value whichever is higher. There are no exemptions.

BSD - this is payable at the rate of 15% of the consideration or value whichever is higher unless exemptions apply. However, in this case Sunny is a Hong Kong permanent resident and Moon is closely related within the meaning of the SDO and no BSD is payable provided that each is acting on his or her own behalf.

Under the SDO both parties are liable for AVD and SSD and the purchaser is liable for BSD. The agreement, however, makes the purchaser alone liable for AVD and BSD and the vendor liable for SSD.

Provided the formal agreement is signed within 14 days after the provisional agreement, AVD, SSD and BSD are payable on the formal agreement within 30 days after its date and there is no obligation to stamp the provisional agreement.

Candidates performed well on this question. SSD and BSD are no longer in the syllabus, but AVD remains in the syllabus. A number of candidates omitted some information regarding AVD - for example,

- Duty is payable on the consideration or value whichever is higher,
- A certificate of value must be included in the document if the rate of AVD is lower than the maximum rate,
- All parties to the document are liable under the SDO, but the agreement often states that the purchaser alone will pay AVD and
- The time for stamping is within 30 days **after** the date of the document.

Question 2.2

A number of candidates did not answer this part of question 2 or gave very brief answers. Candidates should be able to recognise that ongoing litigation against the owners' corporation ("IO") is a title problem and that the vendor has an obligation to give good title. Candidates might then state what amounts to a good title and realise that the litigation against the IO might result in the purchaser being required to contribute to the cost after completion. Thus the vendor is unable to given an unencumbered title.

A fuller answer to this question would explain that under the Building Management Ordinance, Cap. 344 the IO has power to establish a contingency fund to cover expenditure of an urgent or unexpected nature. The IO also has power to determine the contributions to the fund to be made by each owner. The Deed of Mutual Covenant ("DMC") might provide that the expression "owner" means any owner for the time being which would mean that the purchaser would be liable to contribute to the fund to cover the cost of litigation. The DMC might also provide that a charge may be registered against the undivided shares of any owner who fails to contribute.

The liability to contribute to the fund might be of such magnitude that it exceeds the contemplation of the purchaser in which case the vendor would be unable to give good title. This principle has been extended to cover a situation where there is ongoing litigation against the IO involving much smaller sums when the amount of the liability is unknown.

If the amount of the liability and the contribution due from the owners is known, the purchaser might be obliged to accept the vendor's title if the vendor agrees to give a fortified undertaking to pay the contribution due.

Question 3.1

The Assignment dated 14 January 2010 is within the chain of title period. The vendor can show or prove title with a certified true copy, but since it relates exclusively to the property sold, the vendor must be able to give the purchaser the original on completion.

If the vendor is not in possession of the original, he must give a satisfactory explanation as to the reason – for example, a statutory declaration of loss of title deeds - so that the purchaser is not fixed with constructive notice of a prior interest. The explanation is necessary only if there is a realistic possibility of the successful assertion of a prior interest. The question in every case is whether there is a real risk of an encumbrance affecting the property.

The Release dated 23 May 2005 is more than 15 years old at the date of the agreement. The presumptions in section 13(4A) of the CPO apply. The vendor does not need to produce **the Power of Attorney.**

The vendor must show that the Assignment dated 29 June 2020 has been properly executed by Big Apple Ltd. A deed is required to pass the legal estate. The seal of Big Apple Ltd has been affixed. The vendor must be able to show that it has been affixed in accordance with the company's sealing requirements. The presumptions in sections 20(1), s 23(1) and (2) of the CPO do not apply. Candidates should state the reasons why. The vendor must therefore produce the **sealing provisions of Big Apple Ltd** so that the purchaser can check that the sealing provisions have been complied with and in particular whether the presumption in s 23 of the CPO applies.

Question 3.2

If the rent payable under the tenancy agreement is a market rent, the tenancy agreement, does not need to be registered in order to bind the purchaser. The option to renew, however, is an interest which is separate from the tenancy and which must be registered, failing which it will be void against a subsequent purchaser for value even if the purchaser has notice.

Candidates might mention that under the agreement for sale and purchase, the vendor must give vacant possession on completion and that the vendor cannot do so unless he agrees a surrender with the tenant. The tenant is not obliged to agree and surrender.

Question 4

The provisional agreement ("PA") is binding because it shows an intention to be bound. It does not matter that it has not been registered because registration affects priority and not validity.

The purchaser will not be able to obtain specific performance of the PA if it has been validly terminated or if the purchaser is in breach.

The PA requires the purchaser to sign a formal agreement ("FA"). However, the purchaser has no obligation to sign if the FA contains a new term which is not contained or implied into the PA. In this case the vendor tries to insert into the FA a term requiring the purchaser to complete by way of undertaking. The purchaser is not obliged to accept this term because the PA does not provide for completion by undertaking and the purchaser is entitled to require formal completion which means the simultaneous exchange of the price for the assignment. The purchaser's failure to sign the FA is not therefore a breach by the purchaser.

The vendor's insistence on a new term might amount to repudiation. If the purchaser has accepted the vendor's repudiation, the PA would be terminated. Acceptance must show unequivocally that the purchaser regards the PA as being terminated. The facts in this case do not show this.

The purchaser has failed to pay the further deposit. The question is whether the obligation to pay is linked to signing the FA or whether it is independent. The wording in the PA could indicate that the obligation to pay is independent. Thus the purchaser might be in breach of the PA.

Time is of the essence under the PA.

The vendor alleges that the purchaser was late completing because the balance of purchase price was received after 5pm on the day of completion, but under the PA the purchaser has until midnight to complete. There is no breach on this ground.

Assuming that the purchaser has not breached the PA, he must show that he is ready, willing and able to complete at the time of completion and the date of the hearing for specific performance. Candidates should apply this to the facts which indicate that the purchaser has the purchase price ready. Many candidates mentioned that there are bars to the award of specific performance. A good answer would also state that the facts do not suggest that any bars apply here.

A number of candidates did not refer to the priority issue between the charging order and the PA. Candidates should be able to state the dates of registration. Case law shows that the vendor signed the PA before the charging order was obtained and that when the charging order was obtained, there was nothing to which the charging order could attach. If the purchaser has notice of the charging order, it must pay the balance of purchase price to the chargee.

Question 5

The purchaser can recover the deposit if the vendor has breached the agreement by failing to give or show good title. However, if the purchaser has breached the agreement (and the vendor is not in breach) by failing to complete on time, the vendor can keep the deposit without proving loss provided the deposit is reasonable as earnest money. A deposit equal to 10% of the price has been held to be reasonable. Time is of the essence.

The vendor has a duty to give and show good title. The latter includes an obligation to answer requisitions reasonably raised. Under Condition 7(1) of Part A of the 2nd Schedule to the CPO, the purchaser must raise requisitions no later than 14 days before completion.

Candidates might consider whether the purchaser waived its right to good title after viewing the flat and signing an agreement to buy. However, the agreement provides expressly that the vendor will give good title.

The purchaser's requisitions dated 7 September 2023 are reasonably raised. The alterations made to the entrance to the flat potentially breach the Buildings Ordinance, Cap.123 ("BO"), the BMO and the Deed of Mutual Covenant. ("DMC") However, they are raised out of time. The vendor need not answer them unless they go to the root of the title and even then not, if with due diligence, the purchaser could have discovered them earlier. Candidates should apply these principles and consider whether the requisitions go to the root of the title and whether the purchaser could have raised them earlier. In this connection, candidates might consider that the entrance can easily be restored to its original condition (no walls have been demolished) which would suggest that the requisitions do not go to the root of the title. However, it appears that the vendor has agreed to sell a portion of the common parts which would suggest that the requisitions do go to the root of the title because the vendor cannot give title to the common parts. However, the facts indicate that the problem might have been identified from the plans with the title deeds which the vendor sent to the purchaser within the time limit for raising requisitions. For this reason the vendor might not be obliged to reply to the requisitions.

Even if the vendor is not obliged to reply to the requisitions, the vendor must give good title on completion. The issues are then whether there is a real risk of enforcement action for breach of the BO, the BMO or the DMC or whether there are facts and circumstances to show beyond reasonable doubt that there is no real risk of enforcement action.

Regarding the BO, candidates should refer to the exemption for the need for Building Authority consent to alterations in section 41(3) of the BO. Several candidates suggested that the alterations were not inside the building. The alterations described in the facts are not inside the flat but they are inside the building and the facts suggest that they do not affect the structure because no walls have been demolished.

Regarding the DMC and BMO, the covenant referred to in requisition 1 and section 18 (1)(a) of the BMO both permit consent to be given and consent might have been given. Even if no consent were given, since no enforcement action has been taken for a long period of time, the IO might have waived the right to take enforcement action. Waiver is a possible defence because the

covenant and section 18(1)(a) of the BMO both permit consent to be given. By contrast, if there is a breach of section 18(1)(b) of the BMO, waiver is not possible. If there is waiver, there is no real risk of enforcement action.

When discussing unauthorised building works, some candidates refer to breaches of the Government Lease, the BO, the DMC and the BMO without identifying the specific problem. A good answer would analyse the issue and decide who might take enforcement action.

Although it is possible in this case that no enforcement action will be taken, the vendor cannot sell common parts. However, candidates might mention that the area of the common parts which the vendor has agreed to sell is small in relation to the area of the flat and the vendor might be able to claim that he can give substantial performance and force the purchaser to complete.