

THE LAW SOCIETY OF HONG KONG
OVERSEAS LAWYERS QUALIFICATION EXAMINATION
2025 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 (6th 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- 22],
[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	Chapter 3
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 rates of duty payable

- 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] Note that this reading does not include subsequent amendments to the Stamp Duty Ordinance, Cap. 117.
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]
Land Law in Hong Kong	Chapter 2	Paragraphs [2-52] - [2-53]

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] - [7-65], [7-90] - [7-101], [7-129] - [7-139], [7-303] - [7-315], [7-373] - [7-386], [7-393] - [7-476], [7-488] - [7-579]
Land Law in Hong Kong	Chapter 13	Paragraphs [13-1] - [13-25], [13-70] - [13-156]

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 2022, 2023 and 2024 Examinations

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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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 Buxbaum* [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 give 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.

Examiners' Comments on the 2024 Examination

Head I: Conveyancing

Examiners advise Candidates to note the following:

- identify all issues raised by the facts of a question and deal with all issues;
- read the facts carefully;
- apply the law to the facts of each question – see below for examples and
- avoid contradicting conclusions.

Candidates must answer 4 out of 5 questions. The following is a guide to the issues raised by the 2024 questions. It does not include complete model answers. Candidates should, where necessary, cite legislation and cases.

Question 1

The person who owns (or has the right to the exclusive use) of the roof and external walls is responsible for their maintenance under the terms of the Deed of Mutual Covenant (DMC). If they are common parts, the owners' corporation is responsible for maintaining them under section 18(1)(a) of the Building Management Ordinance, Cap. 344 (BMO).

The First Assignment reserves exclusive use of the roof and external walls to the developer, but the DMC states that external walls are common parts. The DMC is silent on the question of exclusive use or ownership of the roof.

In *Donora Company Limited v Tsuen Kam Centre (IO)* [2024] HKCFA 3 the CFA explained that the common intention (as to ownership) of the developer and the first purchaser is to be determined by looking at the first assignment and the DMC together. However, the recitals to the DMC (set out in the question) indicate that the DMC is the primary document to be considered when determining which parts of a building are common parts. In addition the CFA stated that the purpose of the assignment is to assign undivided shares and that the exclusive use covenants are in the DMC. To determine who owns the roof and external walls therefore, the DMC must be interpreted using the usual principles of contractual interpretation.

The DMC states expressly that the external walls are common parts. It is well established that the roof membrane is a common part.

With regard to the roof, In *Donora Company Limited v Tsuen Kam Centre (IO)* the Court of Final Appeal considered the following points in relation to the DMC to determine whether parts of a building are exclusive use areas or common parts:

- Does the developer have exclusive use of the roof or a limited right? Do flat owners have rights over the roof?
- Does the roof benefit all owners?
- Does the developer own undivided shares: Section 2 of the BMC defines owner as a person who owns undivided shares and the DMC contains a similar definition.

Candidates will probably conclude that the roof is a common part.

The question asks how Mary can force the person responsible to maintain the roof and external walls. Section 16 of the BMO provides that only the owners' corporation can take action in relation to the common parts. However, in this case Mary can take action in relation to the common parts because the harm caused by leakage from the roof is specific to Mary.

Mary requires a mandatory injunction against the owners' corporation. The principles set out in *Redland Bricks Limited v Morris and Anor* [1970] AC 652 should be applied. In this connection it should be noted that the failure to repair is a continuing breach and that Mary's flat has been seriously damaged.

Question 2

Has Peter breached the Agreement by failing to complete on time. Time is of the essence. Alternatively, has Vera breached the Agreement by failing to give or show good title?

Subject to Clause 12 of the Agreement, Vera has a duty to give and show good title. Breach of the DMC or the Buildings Ordinance, Cap.123 (BO) leading to a real risk of enforcement action would make title defective or defeasible. The demolition of an external wall would be a structural alteration which breaches the restriction in the DMC. If the consent of the Building Authority has not been obtained, there would also be a breach of the BO. There might also be a breach of any plot ratio restrictions in the Conditions of Sale and a breach of section 34I of the BMO if the consent of the management committee has not been obtained. Therefore the requisition raised on 2 September 2024 is reasonably raised.

However, Vera's obligations might be limited by Clause 12 of the Agreement. The principles set out in *Jumbo King Limited v Faithful Properties Limited* [1999] 4 HKC 707, CFA must be applied to determine whether Clause 12 is effective. Therefore candidates should have considered the wording of Clause 12 and the factual matrix (title deeds including a plan were shown to the purchaser **before** he signed the Agreement, Peter had inspected the house and Vera had also mentioned that alterations had been made by the previous owner).

An additional problem is that Vera seems to be selling part of a common garden to which she has no title. Does Clause 12 cover this title defect?

Candidates should reach a conclusion based on their application of the principles to the facts.

If the conclusion is that Vera cannot rely on Clause 12, Vera might nevertheless rely on substantial performance.

If Vera is able to rely on Clause 12, she will be able to keep Peter's deposit provided that it is reasonable as earnest money. The deposit exceeds 10% of the price and Vera will be able to keep it only if the circumstances justify a larger deposit. Candidates should refer to the facts of the case. One relevant fact that might justify a larger deposit is the five month elapse of time between the Agreement and completion.

If Vera cannot rely on Clause 12, she must return the deposit to Peter.

The conclusion regarding the deposit should be consistent with findings as to whether Vera or Peter is in breach.

Question 3.1

For stamp duty purposes the user of the property is non-residential: section 29A(1) of the Stamp Duty Ordinance, Cap. 117 (SDO). The Provisional Agreement (PA) is an “agreement for sale”: sections 2(1) and 29A (1) and (2) of the SDO.

The rates of ad valorem stamp duty that apply after 26 November 2020 are in Scale 2 of Head 1(1A) of the First Schedule to the SDO. The applicable rate is 3% of the consideration or value, whichever is higher. The document must include a certificate of value because the PA does not attract the highest rate of ad valorem stamp duty.

Provided that the Formal Agreement (FA) is signed within 14 days after the date of the PA, and stamped within 14 days of the date of the FA. the obligation to stamp the PA is discharged.

Under section 4(3) and Head 1(1A) of the First Schedule to the SDO the vendor and purchaser are jointly and severally liable to pay ad valorem stamp duty, but Clause 6 of the PA provides for the purchaser to pay.

Question 3.2

Section 21 of the BO Provides that a new building may not be occupied unless an occupation permit (OP) has been issued. The OP is evidence that the terms of the BO have been complied with. If no OP has been issued and the building was erected before 1 June 1956 (the date on which the current version of the BO came into force) the test to be applied is whether there is a real risk of enforcement action by the Building Authority.

When investigating title in this case, the purchaser needs to know the date on which the building was built.

Question 3.3

When selling a unit in a multistorey building, the vendor is usually bound to give and show good title and must be able to show how undivided shares have been allocated. Evidence of the reallocation of shares might be in a sub-DMC. A sub-DMC would also contain exclusive use covenants and provide for the rights and obligations of the owners of reallocated shares as to use management and maintenance of common areas and liability for management charges payable under the DMC.

Reallocation of undivided shares is permitted unless expressly restricted under the DMC.

Question 4.1

Initially the interest under the Agreement and Conditions of Sale (Conditions) was equitable. The Conditions are an agreement for lease. Under s 14(1) of the CPO there is deemed grant of a legal interest on compliance with the Conditions. In this case a legal estate is deemed granted because the Conditions are dated after 1 January 1970 and a certificate of compliance has been issued and registered in the Land Registry.

Question 4.2

The Assignment dated 13 July 2013 is within the chain of title period of 15 years s 13(1)(a)(i) of the CPO. This Assignment does not relate exclusively to the Flat and Rose as vendor may both prove and give title with a certified true copy: sections 13(2) and 13A(1)(b) of the CPO.

Rose may prove title using certified true copies of the Mortgage dated 8 October 2015 and the Release dated 14 September 2023, but when giving title on completion she must produce the originals: section 13A(1)(b) of the CPO. If the originals have been lost or Rose is not otherwise in possession of them, she must provide a satisfactory explanation of the reasons so that Jack as purchaser is not fixed with constructive notice of any prior unwritten equitable charge. In the absence of a satisfactory explanation, Jack can refuse to complete only if the absence of the originals indicates a realistic possibility of an interest affecting the land which would affect him. Candidates should apply this test to the Mortgage (which has been discharged) and the Release.

Question 4.3

Rose, the vendor, holds a legal estate in the Flat provided she acquired her interest by deed: s 4(1) of the CPO. Maria might have acquired an unwritten equitable interest in the Flat (for example, by providing part of the purchase price). Candidates should consider the presumption of advancement in general and specifically with regard to a mother and her children.

The common law doctrine of notice should be applied to determine priority between Maria and Jack and candidates should discuss whether the purchaser has actual or constructive notice of any interest that Maria might have and the importance of obtaining Maria's written consent to the sale.

Question 5

Under section 13 (1)(c) of the CPO Victor must produce the Power of Attorney dated 3 September 2012 (POA) to prove title because the vendor in the Assignment dated 5 September executed under the POA and the Assignment was executed less than 15 years before the date of the Agreement for Sale and Purchase (Agreement) (note it is the date of the Assignment which is relevant). Victor may prove title using a certified true copy: section 13(2) of the CPO.

Victor must prove title before completion and give title on completion. Time is of the essence and the de minimis rule does not apply. The parties have agreed that Victor need not produce the original POA. Pansy is not obliged to accept an undertaking from Victor's solicitor to produce a certified true copy of the POA after completion. Therefore, Victor has repudiated the Agreement. In these circumstances Victor may not terminate the Agreement or keep the deposit.

In order to obtain specific performance, Pansy must not terminate the Agreement by accepting Victor's breach or starting proceedings for recovery of her deposit or damages. Candidates should discuss what would amount to acceptance of Victor's breach.

Pansy must show that she is ready willing and able to complete. Candidates should discuss what this means.

The award of specific performance is discretionary. Candidates should apply the discretionary bars. For example, the facts do not show any hardship on Victor's part. However, the facts do show a competing interest that might have priority over Victor's interest which would make specific performance impossible.

In relation to priority, many candidates applied the terms of the Land Registration Ordinance, Cap. 128 and concluded that Felix had priority. In *Chu Ki Yuk v Country Wide Industrial Limited* [1995] 2 HKLR 162 the common law rule of priority (where the equities are equal the first in time prevails) was applied to determine priority between two valid agreements for sale and purchase. Candidates might consider whether the equities are equal in this case.

3. Past Examination Papers from 2022 to 2024

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

2023 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD I: CONVEYANCING

Wednesday, 25 October 2023



2023 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

In 1994, Richly Ltd. developed a block of 40 residential flats on Inland Lot No. 456. The block is called “Richly Gardens”. Richly Ltd. paired one equal undivided share of and in Inland Lot No. 456 and of and in Richly Gardens with each flat and sold all 40 flats. Alfred bought one equal undivided share of and in Inland Lot No. 456 together with the right to the exclusive use of Flat 1.

Richly Ltd. and Alfred then entered into a Deed of Mutual Covenant (the “DMC”) which includes the following covenants by them:

1. *that they will pay monthly management charges in respect of their exclusive use areas;*
2. *that they will contribute proportionately according to their exclusive use areas to the cost of maintaining, repairing and renovating the common parts of Richly Gardens; and*
3. *that they will employ Richly Ltd. to carry out the work in the event that they want to carry out any renovation or repairs to the common parts of Richly Gardens.*

The DMC was registered in the Land Registry. Richly Gardens is managed by Richly Management Ltd. The owners have not incorporated.

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

Betty bought from Richly Ltd. one equal undivided 40th share of and in Inland Lot No. 456 and of and in Richly Gardens together with the right to the exclusive use of Flat 2 (“Flat 2”) “subject to and with the benefit of the DMC”. In 2010, Betty sold Flat 2 to Mary also “subject to and with the benefit of the DMC”. Mary financed her purchase by mortgaging Flat 2 to M Bank Ltd. to secure a loan of HK\$10 million (the “Mortgage”). The Mortgage is in the form set out in Form 5 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219. The Mortgage is dated 7 June 2010. M Bank Ltd. registered the Mortgage in the Land Registry within two weeks of its date. The loan is repayable by equal monthly instalments of principal and interest.

With the prior written consent of M Bank Ltd., Mary leased Flat 2 to Tom for a term of 2 years starting on 3 October 2022 at a calendar monthly rent of HK\$60,000 inclusive of management charges (Mary pays the management charges). Tom paid Mary a tenancy deposit of HK\$120,000 and Mary agreed to repay this deposit to Tom at the end of the Lease term subject to deductions for any rent unpaid by Tom.

Since June 2023, Mary has not paid any of the monthly instalments of principal and interest due under the Mortgage. Richly Management Ltd. has informed M Bank Ltd. that Mary has not paid the monthly management charges due under the DMC since January 2023 and that the owners have resolved to renovate the entrance lobby to Richly Gardens. The entrance lobby is a common part.

M Bank Ltd. requires advice as to whether it can evict Tom or collect the rent that Tom pays and whether it is liable to repay the rental deposit to Tom. M Bank Ltd. is also concerned about its liability to pay management charges including the arrears and the liability of the owners to employ Richly Ltd. to renovate the entrance lobby. M Bank Ltd. does not dispute that the entrance lobby is a common part or that renovation is necessary.

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

Question:

Answer the following questions giving reasons for your answers:

Advise M Bank Ltd.:

1.1 whether it can evict Tom from Flat 2 or collect rent from Tom;
(8 marks)

1.2 whether it is liable to repay the tenancy deposit to Tom if M Bank Ltd. evicts Tom or at the end of the Lease term;
(4 marks)

1.3 whether:

- **it is liable to pay management charges in respect of Flat 2 including the arrears (If you need more information to answer this question, state what information you need), and**
- **the owners are obliged to employ Richly Ltd. to carry out the renovations to the entrance lobby.**

(13 marks)

Question 2 (25 marks)

On 24 October 2023, Sunny Wong (“Sunny”) and his wife, Moon Wong (“Moon”), signed a binding written Provisional Agreement for Sale and Purchase (the “Provisional Agreement”) to purchase as joint tenants a flat in Festival Building in Wanchai, Hong Kong (the “Property”) from Oliver Rock (“Oliver”), who is not related to them in any way, at the price of HK\$12 million. Sunny and Moon own a ground floor shop in Mongkok but do not own any other immovable property in Hong Kong. Sunny is a Hong Kong permanent resident but Moon is not. The source of funds for their purchase is the money they have jointly inherited from Sunny’s late father’s estate.

When Oliver bought the Property, he signed a Provisional Agreement for Sale and Purchase dated 17 October 2022 and a Formal Agreement for Sale and Purchase dated 31 October 2022. The permitted user of the land upon which Festival Building stands is “non-industrial” according to the government grant. Under the relevant deed of mutual covenant and occupation permit, the permitted user of the Property is “domestic”.

The Provisional Agreement includes the following terms:

1. *The Vendor will sell a good title to the Purchaser.*
2. *Completion will take place on or before 1 December 2023.*
3. *The purchase price of the Property is HK\$12,000,000.00 which shall be paid by the Purchaser to the Vendor in the manner as follows:*
 - (a) *an initial deposit in the sum of HK\$600,000.00 shall be paid upon the signing of this Agreement;*

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

- (b) *a further deposit in the sum of HK\$600,000.00 shall be paid on or before 7 November 2023; and*
- (c) *the balance of purchase price in the sum of HK\$10,800,000.00 shall be paid upon completion on or before 1 December 2023.*
4. *The parties will sign a formal agreement for sale and purchase on or before 7 November 2023.*
5. *Should the Vendor fail to complete the sale of the Property in accordance with the terms of this Agreement, all monies and deposits paid by the Purchaser pursuant to this Agreement shall be returned to the Purchaser.*
6. *Each party will pay 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:

- 2.1 Will the Formal Agreement for Sale and Purchase, if signed on or before 7 November 2023, attract ad valorem and/or other stamp duties? If so, how much will the duties be, who is liable to pay them and when must they be paid?**

(15 marks)

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

- 2.2** Assume for the purposes of this question only that today is 30 November 2023 and that the parties to the Provisional Agreement signed the Formal Agreement for Sale and Purchase on 7 November 2023. The Formal Agreement for Sale and Purchase contains the same Clause 1 as in the Provisional Agreement. Assume also that Sunny and Moon have today discovered that the Incorporated Owners of Festival Building have been involved in several pieces of litigation. **Are Sunny and Moon entitled to rescind the Formal Agreement for Sale and Purchase and recover the initial and further deposits? If you need more information to answer this question, state what information you need and why you need it.**

(10 marks)

Question 3 (25 marks)

On 20 October 2023, Ben Wong (“Ben”) entered into a binding Agreement for Sale and Purchase (the “Agreement”) with Sandra Lee (“Sandra”) to purchase her flat in Causeway Bay, Hong Kong (the “Flat”). The Agreement is in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219 and in addition provides expressly for a good title to be sold.

The list below (the “List”) sets out in chronological order the title deeds which affect the Flat and which have been registered at the Land Registry. All of them, except for items (1), (2) and (3), relate exclusively to the Flat.

- (1) Government Lease dated 2 April 1936
- (2) Occupation Permit dated 9 May 2000
- (3) Deed of Mutual Covenant dated 19 June 2000
- (4) Assignment with Plan dated 16 August 2000 in favour of John Chan
- (5) Mortgage dated 16 August 2000 in favour of Tiger Bank Limited
- (6) Release dated 23 May 2005 of the abovementioned Mortgage in favour of Tiger Bank Limited, which was executed by Randy So as attorney of Tiger Bank Limited
- (7) Assignment dated 14 January 2010 in favour of Big Apple Limited
- (8) Assignment dated 29 June 2020 in favour of Sandra Lee, which was sealed with the common seal of Big Apple Limited and signed by David Watson who is described as “Director”

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

Questions:

Answer the following questions giving reasons for your answers:

3.1 Is Sandra obliged to provide all or any of the following:

- **the original of the Assignment dated 14 January 2010;**
- **the power of attorney in favour of Randy So; and**
- **the sealing provisions of Big Apple Limited?**

If Sandra is obliged to provide any of the above but cannot do so, what else can she do to fulfil her obligations under the Agreement?

(18 marks)

3.2 Assume that Terry Tai (“Terry”) entered into a written tenancy agreement (the “Tenancy Agreement”) with Sandra on 1 September 2022 to rent the Flat at HK\$28,000 per month for a term of three years starting on 1 September 2022 and that the Tenancy Agreement contains an option (the “Option”) for Terry to renew his tenancy for another two years upon the expiry of the existing term. How, if at all, will the Agreement affect Terry’s rights under the Tenancy Agreement which contains the Option?

(7 marks)

Question 4 (25 marks)

On 25 September 2023, Vince Vong (“Vince”) as vendor and Peter Poon (“Peter”) as purchaser signed a provisional agreement for sale and purchase (the “PA”) in respect of Flat 3B, Green Gardens, Hong Kong (the “Property”), a residential flat built in 1998. A copy of the PA is attached. Peter did not register this in the Land Registry.

Vince owns the Property in his sole name and does not have a mortgage.

On 27 September 2023, Vince’s solicitor sent Peter’s solicitor a draft formal agreement for sale and purchase and the title deeds to the Property. The draft formal agreement is in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219 except that Clause 4 provides that completion will take place by way of solicitors’ undertakings.

Peter did not accept Clause 4 but, despite negotiations between the parties and their solicitors, Vince refused to change it. As a result, Peter did not sign the formal agreement or pay the further deposit by 5 October 2023. On 6 October 2023, Vince’s solicitor wrote to Peter’s solicitor saying that Peter had repudiated the PA. Peter’s solicitor replied stating that Vince had repudiated the PA and that Peter reserved all his rights under the PA.

However, Peter wanted to complete his purchase. On 20 October 2023, Peter’s solicitor informed Vince’s solicitor that Peter would complete the PA on the completion date. On 24 October 2023, Peter’s solicitor sent Vince’s solicitor a cashier order for HK\$9,900,000 (representing the balance of purchase price and the further deposit) made payable to Vince together with an Assignment of the Property in favour of Peter for execution by Vince. Vince refused to complete because Peter had not signed the formal

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

agreement or paid the further deposit by 5 October 2023 and also because the cashier order arrived at 5.15 p.m. instead of during normal working hours which, Vince's solicitor alleges, ended at 5.00 p.m. Vince's solicitor therefore returned the cashier order and the Assignment to Peter's solicitor.

On 18 October 2023, Big Credit Ltd. obtained a charging order nisi against Vince which was registered against the Property on 19 October 2023.

Question:

Answer the following question giving reasons for your answer:

Can Peter obtain specific performance of the PA?

(25 marks)

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

Provisional Agreement for Sale and Purchase

THIS AGREEMENT is made on 25 September 2023

*Between the Vendor - Vince Vong of Flat 3B, Green Gardens, 16 Green Road,
Hong Kong and
the Purchaser - Peter Poon of Flat 12B, Crimson Court, 12 Crimson
Road, Kowloon*

The Vendor and the Purchaser agree as follows:

- 1. The Vendor sells and the Purchaser purchases 3B, Green Gardens, 16 Green Road, Hong Kong (the 'Property').*
- 2. The purchase price is HK\$10,000,000.00 which shall be paid by the Purchaser in the following manner:*
 - (a) HK\$ 100,000.00 to the Vendor on the signing of this agreement as initial deposit,*
 - (b) HK\$ 900,000.00 as further deposit to the Vendor on 5 October 2023 this date being on or before the signing of a formal agreement for sale and purchase,*
 - (c) HK\$ 9,000,000.00 being the balance of purchase price on completion.*
- 3. The parties will on or before 5 October 2023 sign a formal agreement for sale and purchase.*
- 4. Completion will take place on 24 October 2023.*

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

5. *Should the Vendor after receiving the initial deposit paid hereunder fail 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 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 to enforce specific performance.*
6. *The Purchaser will pay the stamp duty in connection with this transaction.*

Signed Vince Vong

Signed Peter Poon

Question 5 (25 marks)

On 31 July 2023, Pansy inspected Flat 6A, Pine Court, Hong Kong (the “Property”). The Property is residential with a floor area of 500 square feet. It was built in 1983. Vicki, the owner of the Property, was present. Vicki informed Pansy that the previous owner had moved the entrance door to the Property into the corridor and in so doing had incorporated approximately 10 square feet of the corridor into the Property. No walls were demolished during this alteration. Vicki pointed out that other owners of flats in Pine Court had also moved their entrance doors and incorporated parts of the corridors into their properties. Vicki said that this alteration makes the Property more spacious.

On 4 August 2023, Vicki as vendor and Pansy as purchaser entered into a formal agreement for sale and purchase of the Property (the “Agreement”) for a consideration of HK\$12 million. Pansy paid Vicki a deposit of HK\$1,200,000. The Agreement is in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219 and also includes a term that Vicki will give good title to the Property. Completion was due to take place on 11 September 2023.

On 8 August 2023, Vicki’s solicitor sent the title deeds to Pansy’s solicitor. These include the Deed of Mutual Covenant for Pine Court (the “DMC”) and an assignment of the Property with a floor plan showing the original position of the entrance door to the Property. The DMC provides that corridors are common parts of Pine Court. Pansy’s solicitor raised requisitions on 10 August 2023 and Vicki’s solicitor answered them on 16 August 2023.

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

In early September 2023, Pansy informed her solicitor that she did not want to complete her purchase of the Property. Pansy's solicitor therefore wrote to Vicki's solicitor on 7 September 2023 with three further requisitions asking for evidence that:

1. the moving of the entrance door to the Property does not breach the Deed of Mutual Covenant for Pine Court which restricts alterations made to the common parts without the consent of the building manager;
2. the moving of the entrance door to the Property does not breach section 34I of the Building Management Ordinance, Cap 344; and
3. the moving of the entrance door to the Property does not breach the Buildings Ordinance, Cap.123.

Vicki's solicitor refused to answer the requisitions raised on 7 September 2023 on the grounds that they were raised out of time and that Pansy knew that the entrance door had been moved into the corridor before she entered into the Agreement. Pansy did not complete her purchase on 11 September 2023.

There is an owners' corporation for Pine Court.

Question:

Answer the following question giving reasons for your answer:

Advise Pansy whether she can recover the deposit she paid under the Agreement.

(25 marks)

END OF TEST PAPER

2024 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD I: CONVEYANCING

Monday, 21 October 2024



2024 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

Elegant Gardens (the “Building”) is a block of 30 residential flats built in 1975 on Inland Lot No. 1234 (the “Lot”). The first assignment in 1975 (the “First Assignment”) by the developer of the Building (the “Developer”) assigns the exclusive use of Flat 1A to the First Purchaser and reserves to the Developer the exclusive use of all other parts of the Building including the roof and external walls.

The deed of mutual covenant for the Building (the “DMC”) was made in 1975 immediately after the First Assignment. The parties to the DMC are the Developer, the First Purchaser and the Building Manager. One of the recitals to the DMC states that the purpose of the DMC is to regulate the interests, rights and obligations of the owners. The DMC sets out the undivided share allocation and pairs each of the flats with one equal undivided 30th share of and in the Lot and the Building. There are no shares paired with the external walls or the roof and the Developer has not retained any undivided shares.

The flat owners incorporated in 1982.

The DMC includes the following terms:

“The DMC reserves to the Developer:

- the exclusive right to use the roof of the Building for advertising purposes.”*

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

The DMC provides that:

- “• *owners may not place anything on the roof of the Building except with the consent of the Building Manager;*
- *owners will maintain their exclusive use areas;*
- *the common parts of the Building include the external walls and all parts over which no exclusive use rights have been granted (there is no mention of the roof);*
- *that an owner is a person in whom undivided shares are vested for the time being.”*

Mary owns a flat on the top floor of the Building. In June this year, water started leaking into Mary’s flat seriously damaging the walls and the floor and some of Mary’s furniture. As a result, Mary has been unable to use two of the bedrooms in her flat. Mary has obtained expert advice that there is damage to the external walls directly outside her flat and also to the membrane and surface tiles on the roof. Mary’s adviser has said that water has leaked into Mary’s flat through the damaged parts of the external walls and the damaged part of the roof.

Mary has asked the Developer to maintain the roof, but the Developer has refused. Mary has also asked the Building Manager to maintain the external walls and roof but no work has been done. The Building Manager has told Mary that the Developer is responsible for the roof. The DMC does not state who is responsible for maintaining the roof or external walls.

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

Question:

Answer the following question giving reasons for your answer:

Who is responsible for maintaining the roof and external walls and how can Mary force the person responsible to maintain them?

(25 marks)

Question 2 (25 marks)

On 20 May 2024, Peter as purchaser (the “Purchaser”) entered into a binding Agreement for Sale and Purchase (the “Agreement”) to buy House Number 3, Green Gardens, Green Road, Sai Kung, Hong Kong (the “House”) from Vera (the “Vendor”) for a consideration of HK\$16 million. The House is on a development of 12 houses with a common garden. Peter paid Vera a deposit of HK\$2 million. Completion was due to take place on 17 October 2024.

The development known as Green Gardens is held from the Government under an Agreement and Conditions of Sale dated 1 July 1996. There is a Deed of Mutual Covenant for Green Gardens (the “DMC”) which restricts owners from making structural alterations to the houses. The Buildings Ordinance, Cap.123 (the “BO”) applies to Green Gardens.

Peter inspected the House before entering into the Agreement. It has a floor area of 2,100 square feet. Peter particularly liked the living room on the ground floor. At one end of the living room and forming part of it is an area of approximately 80 square feet covered with a glass roof and extending into the common garden of Green Gardens by about 5 feet. With this extension, the living room has a total floor area of 400 square feet. Peter is buying the House for his own occupation and told Vera that the large, light-filled living room will make the House a very comfortable home. Vera told Peter that she thought that the previous owner of the House had changed the layout of the living room.

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

Vera's solicitor sent the title deeds of the House to Peter's solicitor before Peter signed the Agreement. The title deeds include an assignment of the House to which is attached a layout plan. The Agreement includes the following clauses:

"12. The Purchaser has inspected the House and buys with full knowledge of alterations and additions made to the House and, notwithstanding anything to the contrary in this Agreement, will not raise any requisition or objection or annul the sale or claim any compensation or damages from the Vendor in connection with any title defect caused by any alterations or additions to the House which might breach the BO or the DMC or the Agreement and Conditions of Sale for Green Gardens.

13. Subject to Clause 12 the Vendor agrees to give good title to the House."

The Agreement is otherwise in the form of agreement set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219.

Immediately after Peter had signed the Agreement, Peter's solicitor raised requisitions which Vera's solicitor answered.

On 2 September 2024, after receiving a surveyor's report, Peter's solicitor raised the following further requisition:

"The Purchaser's surveyor has advised us that the living room of the House has been extended beyond the original external wall of the House into a garden which is a common part of Green Gardens, that the original external wall of the House has been demolished and a glass roof and wall added over the extended area. Please send us evidence that the consent of the Building Authority was obtained to this extension under the BO and that there is no breach of the restriction in the DMC against owners making structural alterations."

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

Vera's solicitor did not reply to this requisition but stated that Vera relies on Clause 12 of the Agreement. Vera's solicitor also stated that Vera had not herself made any alterations to the House. Peter did not complete his purchase on 17 October 2024.

Question:

Answer the following question giving reasons for your answer:

Can Vera keep Peter's deposit?

(25 marks)

Question 3 (25 marks)

On 3 October 2024, Jolly Co. Ltd. (“Jolly”) signed a binding written Provisional Agreement for Sale and Purchase (the “Provisional Agreement”) to purchase from Simon Chan (“Simon”) a unit (the “Unit”) of Lucky Industrial Building (the “Building”), which stands on Aberdeen Inland Lot No. 28, Hong Kong Island, Hong Kong (the “Lot”).

The government grant relating to the Building (the “Government Grant”) provides that the permitted user of the Lot is “industrial”. According to the deed of mutual covenant governing the Building (the “Deed of Mutual Covenant”), the permitted user is also “industrial”.

Neither the Government Grant nor the Deed of Mutual Covenant contains any clause that allows or forbids any owner from partitioning or subdividing any part of the Building.

The Provisional Agreement includes the following terms:

- “1. *The Vendor will sell a good title to the Purchaser.*

2. *Completion will take place on or before 20 December 2024.*

3. *The purchase price of the Unit is HK\$8,800,000.00 which will be paid by the Purchaser to the Vendor in the manner as follows:*
 - (a) *an initial deposit in the sum of HK\$440,000.00 will be paid upon the signing of this Agreement;*

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

- (b) *a further deposit in the sum of HK\$440,000.00 will be paid on or before 16 October 2024; and*
- (c) *the balance of purchase price in the sum of HK\$7,920,000.00 will be paid upon completion on or before 20 December 2024.*
4. *The parties will sign a formal agreement for sale and purchase on or before 16 October 2024.*
5. *Should the Vendor fail to complete the sale of the Unit in accordance with the terms of this Agreement, all monies and deposits paid by the Purchaser pursuant to this Agreement will be returned to the Purchaser.*
6. *Each party will pay their own legal costs. The Purchaser will pay the registration fees and all forms of stamp duty where applicable.”*

Questions:

Answer the following questions giving reasons for your answers:

- 3.1 If the Formal Agreement for Sale and Purchase was signed on or before 16 October 2024, will any stamp duty be payable and if so, how much? When will such stamp duty be payable and who will be responsible to pay it?**

(10 marks)

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

3.2 Simon owns the Unit free of mortgage and thinks that no occupation permit has ever been issued in respect of the Building. **If Simon's view is correct, what impact, if any, might the absence of an occupation permit have on the title to the Unit? If you require further information to answer this question, state what it is and the reasons why such information is required.**

(7 marks)

3.3 The Deed of Mutual Covenant has allocated 39/2,080 undivided shares of and in the Lot and the Building to the Unit. Jolly plans (after its completion of the Unit and subject to the necessary consents having been obtained from the Building Authority and the Building Manager) to subdivide the Unit into three smaller units. **Is Jolly entitled to subdivide the Unit? If so, in what ways, if at all, can the creation of a sub-deed of mutual covenant assist Jolly in fulfilling its obligations as the vendor in any future sale of the subdivided units?**

(8 marks)

Question 4 (25 marks)

On 13 July 2012, Rose Chan (“Rose”) bought, free of mortgage, both a flat (the “Flat”) and a car parking space (the “Car Parking Space”) in Fantastic Building in Wanchai, Hong Kong by executing (as the purchaser) a deed of assignment with Plan (the “Assignment”).

On 2 April 2015, Rose sold the Car Parking Space to another flat owner of Fantastic Building.

On 21 October 2024, Rose entered into a binding Agreement for Sale and Purchase (the “Agreement”) with Jack Lee (“Jack”) to sell to him the Flat. The Agreement, which is in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance, Cap. 219, contains an additional clause which expressly provides for Rose to prove and give a good title.

The list below sets out in chronological order the title deeds which affect the Flat and which have been registered at the Land Registry. Only items (6) and (7) relate exclusively to the Flat.

- (1) Agreement and Conditions of Sale No. UB2804 dated 2 March 1999
- (2) Occupation Permit dated 16 January 2012
- (3) Certificate of Compliance dated 4 May 2012
- (4) Deed of Mutual Covenant dated 7 June 2012
- (5) The Assignment
- (6) Mortgage dated 8 October 2015 in favour of Lion Bank Limited
- (7) Release dated 14 September 2023 of the abovementioned Mortgage executed by Lion Bank Limited in favour of Rose

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

Questions:

Answer the following questions giving reasons for your answers:

4.1 What is the nature of the interest, legal estate or equitable interest, now held under the Agreement and Conditions of Sale No. UB2804?

(5 marks)

4.2 How, if at all, can Rose fulfil her contractual obligation to prove and give a good title if the originals of the Assignment, the Mortgage dated 8 October 2015 and the Release dated 14 September 2023 are missing?

(12 marks)

4.3 What should Jack's solicitors do if Jack tells them that when he went to inspect the Flat before signing the Agreement, he met Maria there, who was introduced to him as Rose's mother? If you require further information to answer this question, state what it is and the reason(s) why such information is needed.

(8 marks)

Question 5 (25 marks)

On 2 July 2024, Victor as vendor entered into a binding agreement (the “Agreement”) to sell Flat 3A, Pine Court, Hong Kong (the “Property”) to Pansy as purchaser for the price of HK\$10 million. Pansy paid a deposit of HK\$1 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. Completion was due to take place on 10 October 2024.

In the process of proving and investigating title, Pansy required Victor to give her a certified true copy of a Power of Attorney dated 3 September 2012 (the “Power of Attorney”) under which Thomas Au as attorney for the vendor executed the assignment in favour of Victor. That assignment is dated 5 September 2012. Victor’s solicitor gave Pansy’s solicitor an ordinary copy of the Power of Attorney and said that he would obtain a certified true copy before completion on 10 October 2024. The parties agreed that Victor need not produce the original.

By 9 October 2024, Victor’s solicitor was still unable to produce a certified true copy of the Power of Attorney. Pansy suggested that the completion date be delayed to allow Victor’s solicitor extra time to produce the document. However, Victor refused and said that his solicitor would give his personal undertaking to produce a certified true copy of the Power of Attorney within 10 days after completion on 10 October 2024. Pansy did not accept this arrangement and did not complete on 10 October 2024.

On 14 October 2024, Victor’s solicitor informed Pansy’s solicitor that Pansy had repudiated the Agreement by failing to complete, that Victor had accepted the repudiation, terminated the Agreement and kept Pansy’s deposit. Pansy’s solicitor replied immediately and informed Victor’s solicitor that Victor had repudiated the Agreement and that Pansy reserved all her rights under the Agreement.

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

The price of the Property has gone up since 2 July 2024 when the Agreement was signed. Pansy's solicitor advised her to accept Victor's repudiation, to recover her deposit and sue for damages.

Pansy's solicitor did not register the Agreement in July 2024. On 18 October 2024, Pansy's solicitor sent the Agreement to the Land Registry for registration. A recent search against the Property in the Land Registry shows that on 15 October 2024, Victor entered into a binding agreement to sell the Property to Felix. Felix' agreement was sent to the Land Registry for registration on 21 October 2024.

Question:

Answer the following question giving reasons for your answer:

Can Pansy obtain specific performance of the Agreement?

(25 marks)

END OF TEST PAPER