

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.