

2024 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD I: CONVEYANCING

Monday, 21 October 2024



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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