

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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