

Examiners' Comments on the 2005 Examination

Head I: Conveyancing

The following notes are written to give candidates some insight as to the expectations of the examiners. The overall impression is that most candidates are well prepared and have a good knowledge of Hong Kong conveyancing law including a good grasp of case law. However, not all candidates were able to deal with some of the more practical questions and the stamp duty issues in Questions 4(b) and 5(b) were not spotted by a large number of candidates. Where advice is given on issues to be addressed in answers, the advice is not intended to be a complete answer to a question.

Candidates were required to answer 4 out of 5 questions.

Question 1

This was the least popular question. Parts (a) and (b) are very practical.

In Question 1(a) many answers did not contain any reference to the need to stamp the Assignment. It should be stamped before it is sent to Western's solicitors. Alternatively, Western's solicitors should be given the funds and the questionnaire to enable them to stamp the Assignment. Note that the question says that China House is a 'commercial building'. Ad valorem stamp duty is payable on the Assignment if the permitted use is non-residential.

In Question 1(b) possible answers include making sure that the Agreement for Sale and Purchase is registered at the Land Registry and registering Western's mortgage even before the Assignment and Discharge are dated and registered.

Question 1(c) was not well done. Polar should make sure that Value executes the Assignment in accordance with Polar's Articles of Association and that a copy of the Articles is placed with the title deeds to assist title investigation in the future. Alternatively the Assignment might be executed in such a manner that a title investigator will be able to rely on the presumptions in sections 20(1) and 23 of the Conveyancing and Property Ordinance ('CPO').

Question 2

The range of marks was significant (between 4 and 20). Many candidates answered all parts well. But the marks show that some candidates performed poorly on one or more parts.

Question 2(a) tests fundamental principles regarding the need to sell undivided shares with exclusive use rights, when a subdivision of undivided shares is necessary and the possible restrictions on subdivision.

Question 2(b) tests an ability to apply s 41(5) CPO and an ability to apply the rules of priority as between a mortgagee and a tenant

Question 2(c) tests knowledge of the mortgagee's duties when exercising its power of sale. This topic is often covered at LLB level. This part was generally well done.

Question 3

The range of marks is significant (between 2 and 22).

Question 3(d) gave the most difficulty because title passes even if Blackwood Limited as purchaser does not properly execute the 1985 Assignment. Otherwise most candidates demonstrated a good detailed knowledge of the law.

Question 4

Candidates dealt well with Question 4(a) which is concerned with a difficult area of law.

A significant number of candidates could not answer Question 4(b). In practice Peony would nominate the limited company to take up the Assignment. Condition 12 of Part A of the Second Schedule to the CPO (incorporated by reference into Form 2 of the Third Schedule). This has stamp duty implications because the property is a 'house' and the nomination is therefore a chargeable agreement which attracts ad valorem stamp duty. The question does not expressly require stamp duty advice but in practice a solicitor should spot from these facts that stamp duty is an issue (an expensive issue in this case because the consideration is HK\$120,000,000).

Question 4(c) was well done.

Question 5

Questions 5(c) and (e) were well done.

In Question 5(a) some candidates did not recognise that the provisional agreement does not exclude formal completion.

In Question 5(b) a significant number of candidates did not know that a certificate of value must be included in a chargeable agreement for sale and purchase (is of residential property) when the consideration is below the threshold at which stamp duty at the standard rate becomes payable (HK\$6,720,000).

In Question 5(d) some candidates did not recognise that the vendor has a duty to give good title on completion and not before.

#94575