

## Examiners' Comments on the 2009 Examination

### Head I: Conveyancing

Overall performance on this paper was very good. Candidates know the law and are able to apply it. The odd candidate missed out a question or part of a question. In these cases, it was difficult for the candidate to earn enough marks on the questions attempted to reach the pass mark.

Credit is given for the correct identification of issues, correct statements of the law and the application of the law to the facts. Candidates should refer to relevant legislation and cases.

#### Question 1

- 1.1 This concerns s 3 of the Conveyancing and Property Ordinance Cap.219. Candidates must consider whether Victor or his lawful agent has signed a memorandum of the oral agreement. Victor's solicitor has implied authority to sign letters on behalf of Victor. The letter signed by Victor's solicitor does not contain all the agreed terms. Candidates should consider whether another document can be joined or whether the missing terms are implied.
- 1.2 Candidates should discuss whether the agreement attracts stamp duty, the rate of duty, the time for payment, the liability (both parties liable) and the obligation to sign an agreement containing certain information set out in s 29B(5) Stamp Duty Ordinance Cap. 117.

#### Question 2

- 2.1 M Bank Ltd derives title from Alvin who is a party to the Deed of Mutual Covenant. Candidates should consider whether the burden of covenants passes to M Bank Ltd. This requires a discussion of ss 40 and 41(3) and (2) Conveyancing and Property Ordinance and in particular whether the three covenants relate to land or are purely personal.
- 2.2 The burden of positive covenants does not pass to tenants. Candidates should consider whether the three covenants are positive or restrictive.
- 2.3 Candidates should consider ss 41(2) and (3) Conveyancing and Property Ordinance and in particular whether Wealthy Ltd has land to benefit. Candidates should also consider whether covenants can be enforced between the original parties to the Deed of Mutual Covenant.

### Question 3

- 3.1 Candidates should consider whether Vera is obliged to reply to Peter's requisition. In this connection candidates should consider Vera's contractual obligations (and in particular those contained in Part A of the Second Schedule to the Conveyancing and Property Ordinance), the effect of Clause 12 and whether it limits Vera's obligation to reply to Peter's requisition on the spiral staircase and whether Peter has waived the right to raise requisitions on the spiral staircase by signing the agreement after inspecting the property. Candidates should also consider briefly whether the requisition is properly raised and for this reason should consider whether the consent of the Building Authority is required to the construction of the spiral staircase under the Buildings Ordinance Cap. 123.
- 3.2 Candidates should consider whether there is any breach by Vera of the covenants for title implied in the assignment from Vera to Peter and Vera's qualified liability under the covenants. The facts indicate that one of Vera's predecessors in title breached the Government Lease.

### Question 4

- 4.1 Candidates should recognise that the clause is inconsistent with the terms of the binding provisional agreement and consider its impact on the Purchaser. In this connection it is relevant that the clause may have the effect of excluding the Purchaser's remedies for misrepresentation, that the Purchaser has not inspected the flat and that the Vendor told the Purchaser the floor area of the flat.
- 4.2 The option should be registered at the Land Registry to protect its priority. Candidates should discuss s 3(2) Land Registration Ordinance Cap. 128 and consider the effect of the Purchaser's notice of the option and his agreement with the tenant.
- 4.3 The provisional agreement is binding. Candidates should consider whether failure by the Purchaser to sign the provisional agreement would amount to breach. In this connection, the provisional agreement does not include an obligation to sign the formal agreement and the vendor sent the formal agreement only two days before the date referred to as the date for signing.

### Question 5

- 5.1 The land is in the New Territories. Candidates should be familiar with the legislation by which the option to renew is exercised and the legislation extending New Territories leases that expired in 1997.

- 5.2 This requires discussion of the nature of the interest held under Conditions, the effect of compliance with conditions precedent under s 14(1) Conveyancing and Property Ordinance and the provisions regarding deemed compliance in s 14(3).
- 5.3 In this case, there is deemed compliance with the conditions precedent on the commencement of the Conveyancing and Property Ordinance.
- 5.4 This requires discussion of section 5(2) of the Conveyancing and Property Ordinance, the application of the doctrine of notice in determining the priority between various land interests and, the need to obtain written confirmation from Polly's mother that she waives her rights in favour of the mortgagee. She should be independently advised when giving her waiver or consent. Candidates might also discuss the presumption of advancement and whether in this case the mortgagee would be deemed to have notice of the mother's interest when the mortgage is created.
- 5.5 The purchaser cannot rely on ss 20(1) and 23A(2) of the Conveyancing and Property Ordinance. Although the Vendor has produced the Articles, the Purchaser cannot rely on ss 23 or 23A(1). The next step is for the Purchaser to require the Vendor to produce a certified copy of the board resolution authorising Nicholas Chan and Nicola Wong to witness the affixing of the seal. The title will be defective if evidence of due execution is unavailable.
- 5.6 Candidates should consider ss 20(1) and 23 Conveyancing and Property Ordinance and whether s 20(1) applies to a foreign company.

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