

## Examiners' Comments on the 2011 Examination

### Head I: Conveyancing

These notes are a guide for candidates preparing for Head 1 of the Overseas Lawyers Qualification Examinations. They are not complete answers to the examination questions.

#### Question 1

1.1 Candidates should consider whether the vendor has breached the agreement. They should refer to contract terms which require the vendor to give and show good title. They should also refer to Condition 7 of Part A of the Second Schedule to the Conveyancing and Property Ordinance Cap. 219 (CPO) and recognise that the requisition raised on 25 October 2011 is out of time.

Candidates should apply the law relating to late requisitions. The vendor is required to answer requisitions raised out of time if they go to the root of title, but not if the purchaser could with due diligence have raised them within the time provided by the agreement. Most candidates knew the law, but a number did not attempt to apply the law to the facts.

Candidates should also consider the vendor's duty to give good title, the decision in *Flywin Co Ltd v Strong & Associates Ltd* [2002] 5 HKCFAR 356 and whether the vendor is able to give good title.

1.2 Candidates should consider whether the vendor can give substantial performance and whether the vendor can show that any reinstatement has been properly and competently carried out. See the decisions in *Profit World Trading Ltd v Ho So Yung* [2010] 3 HKLRD 705 and *Cashew Holdings Ltd v Pacific Success Enterprise Ltd* [2004] 2 HKC 594. In addition candidates should recognise that the agreement makes time of the essence.

#### Question 2

2.1 The discharge of Beta Ltd's mortgage is dated after the assignment by Beta Ltd to the purchaser. Beta Ltd sold as beneficial owner and in these circumstances is estopped from denying his title: *Cali Enterprises Ltd v Chongmark Ltd* [1986] HKLR 816.

2.2 The purchaser is unable to rely on s 20(1) CPO or s 23A(2) CPO. The purchaser should ask the vendor to produce the articles of Beta Ltd. As the capacity of the signatory is not stated, the purchaser is unlikely to be able to rely on s 23 CPO and further evidence of proper execution by Beta Ltd may be required.

2.3 The lease does not need to be registered to protect its priority: the proviso to s 3(2) Land Registration Ordinance Cap. 128 (LRO). The option must be registered, failing which it is void against a subsequent bona fide purchaser or mortgagee for value: s 3(2) LRO.

Candidates should consider the possibility of the option being registered before the agreement for sale and purchase and sections 3(1), 4 and 5 LRO.

2.4 All personal representatives named in the grant of probate must join in the sale: s 54 Probate and Administration Ordinance Cap. 10 (PAO). However, a sole surviving personal representative can sell. Personal representatives hold the property as joint tenants: s 9(3) CPO.

Candidates should also consider the decision in *Chun Hon Wai v Junichi Takashima* [2000] 2 HKLRD 482 and s 66 PAO. The assignment should be made by the personal representatives in the course of administration.

2.5 The agreement provides that the vendor is selling a legal estate. The purchaser requires evidence that the equitable interest under the Conditions of Sale has been converted to a legal estate and that the Government lease is deemed issued.

### Question 3

3.1 The question concerns section 3 CPO. Candidates should consider whether there is a concluded oral agreement for sale and purchase which is evidenced in writing and signed by or on behalf of the vendor who is the party to be charged.

Candidates must consider whether the letter dated 5 August 2011 contains all the agreed terms and whether the vendor's solicitor is her lawful agent. The letter contains no reference to the completion date, vacant possession or carpets and curtains and candidates should deal with each of these points. It is also necessary to apply the rules for joining the letter dated 3 August with that dated 5 August. See *Timmins v Moreland Street Property Co Ltd* [1958] Ch 10.

3.2 Candidates should explain that there is a potential defect in title. Candidates should advise the vendor to limit her obligation to give title by inserting a properly drafted limiting clause in the agreement for sale and purchase. See *Jumbo King Ltd v Faithful Properties Ltd* [1999] 3 HKLRD 757, CFA. In this case the vendor knows that there is defect in title and will not be able to rely on any limiting clause if she misleads the purchaser.

### Question 4

4.1 The question concerns the mortgagee's power of sale under a legal mortgage. Candidates must consider the terms of the power of sale implied by s 51 CPO and whether there is an event of default by the mortgagor. In addition candidates should recognise that Ben has priority over the mortgagee, because he has an unwritten equitable lease. The common law priority rules should be applied.

Candidates should consider the mortgagee's duty, which is owed to the mortgagor and any subsequent mortgagee, to take reasonable care to obtain the market price. Candidates should also consider how the mortgagee can discharge its duty in the conduct of the sale. In this connection see *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349. Regarding the timing of the sale see *China South Seas Bank Ltd v George Tan* [1990] 2 WLR 56. Candidates should consider the effect of s 53(1) CPO.

4.2 The question concerns the decision in *Financial and Investment Services for Asia Ltd v Baik Wah International Trading Co Ltd* [1985] HKLR 103. Candidates should also consider the dates of registration of the mortgage in favour of Hopeful and Wily's charging order.

## Question 5

5.1 Time is of the essence under the agreement. The purchaser has breached the agreement by not arranging to have sufficient funds in his account to meet the deposit cheque when presented.

5.2 The purchaser must pay ad valorem stamp duty on the agreement within 30 days after its date or, if the agreement is replaced within 14 days by another agreement between the same parties and on the same terms, within 30 days after the date of the later agreement. The property is residential (permitted use). The rate is lower than the standard rate and a certificate of value should be given. The purchaser is liable for special stamp duty if he disposes of the property within 24 months after acquisition.

5.3 The vendor has disposed of the flat within 24 months after acquisition and is liable for special stamp duty.

5.4 The answer depends on the construction of Clause 3 of the agreement. The vendor seems to be entitled to forfeit only the initial deposit. The clause excludes other remedies.

5.5 The answer depends on the construction of clause 4 of the agreement. The purchaser's remedy of specific performance is excluded. However, arguably the vendor must return the initial deposit and an equivalent sum by the date for signing the formal agreement. See *Man Sun Finance (International) Corp Ltd v Lee Ming Ching* [1993] 1 HKC 113.

5.6 In the absence of any agreement to the contrary, either party can insist on the simultaneous exchange of the balance of purchase price for the assignment in favour of the purchaser.

5.7 The vendor is sub-selling and should give the covenants for title given by a person selling as confirmor. See s 35(1)(d) CPO. Under the agreement it is implied that the vendor will give the appropriate covenants for title.