

## Examiners' Comments on the 2012 Examination

### Head I: Conveyancing

#### Question 1

- 1.1 This question requires a discussion of the vendor's obligation to give good title and answer requisitions reasonably raised. Candidates should in particular consider the effect of Clause 12 which is a limiting clause. A limiting clause must contain wording that is sufficiently wide and precise to cover the defect, but regardless of the words used the vendor must not mislead the purchaser: *Jumbo King v Faithful Properties Ltd* [1999] 4 HKC 707, CFA. Candidates must apply the tests to Clause 12 and consider whether the vendor has any knowledge of the defect and the impact of any such knowledge.

In an appropriate case the court might take into account the purchaser's expertise when deciding whether the purchaser has been misled. Candidates could also mention the possibility of waiver by the purchaser of the right to good title, although there is unlikely to be any waiver in this case.

Some candidates focused on the effect on title of unauthorised building works without considering the effect of Clause 12.

- 1.2 On completion the agreement for sale and purchase merges in the assignment and the purchaser cannot take action under the agreement. The purchaser might be able to sue the vendor for breach of the covenants for title implied into the assignment by the vendor assigning as beneficial owner: s 35(1)(a) and Part II First Schedule to the CPO. The covenants do not include any covenant that there is no breach of the *Buildings Ordinance*.

#### Question 2

- 2.1 The parties must agree on the essential terms of an agreement for sale and purchase (property, parties, price and completion date) and on all the terms they want in their agreement. If the parties have not agreed a completion date, this is a strong indicator of lack of intention to contract: *Kwan Siu Man v Yaacov Ozer* [1999] 1 HKC 150. Some candidates answered question 2.2 in this part of the question.
- 2.2 The agreement must be in writing or evidenced in writing and signed by or on behalf of the party to be charged: s 3 CPO. Candidates should consider whether the letter from Sally to her solicitors is a sufficient memorandum of the oral agreement. That letter contains no reference to the licence or the air conditioners, but these terms benefit Peter who could waive them. Alternatively the air

conditioners might be fixtures and included in the sale even though not expressly referred to in Sally's letter.

The later letter written by her solicitors to Peter's solicitors is marked 'subject to contract' and does not satisfy s 3 CPO.

- 2.3 Assuming that there is a concluded agreement allowing Peter to take possession and alter the flat could amount to part performance of the oral agreement making it specifically enforceable in equity. Candidates should refer to the tests in *Steadman v Steadman* [1976] AC 536 and the decision in *World Food Fair v Hong Kong Island Development Ltd* (2006) 9 HKCFAR 735.

### Question 3

The vendor has a duty to give and show good title.

- 3.1 The Government lease creates a legal estate. The term was renewed automatically by the *New Territories (Renewable Government Leases) Ordinance* and extended automatically under the *New Territories Leases (Extension) Ordinance*.
- 3.2 The purchaser must check the scope, execution and validity of the power of attorney. A special power is strictly construed. A power of attorney would usually be executed under seal. The presumption in s 20(1) CPO applies. However, if the Bangkok Bank does not have a seal, the vendor should supply an opinion as to Thai law that the Power is properly executed. Regarding evidence of non-revocation, s 5(4)(a) *Powers of Attorney Ordinance* applies because the Power was less than 12 months old at the date of the Receipt.
- 3.3 The purchaser cannot rely on s 20(1) or s 23A(2) CPO. The vendor must produce the articles of Get Rich Company Ltd. Section 23 CPO is unlikely to apply because the signatory's capacity is not stated in the assignment, nor does s 23A(1) CPO apply because the assignment is dated after 9 June 2003. The vendor must supply further evidence of execution in accordance with the articles of the company.
- 3.4 Under s 13 CPO the vendor can show title using certified copies of the missing documents which the vendor can buy from the Land Registry. As part of his duty to give good title, the vendor must on completion be able to give the purchaser the originals of documents dealing solely with the property. Alternatively the vendor must give the purchaser a statutory declaration explaining their loss to remove any suspicion of an unwritten equitable mortgage by deposit of deeds. The declaration should be made by the person last in possession of the deeds.
- 3.5 Adam and Eve are joint tenants. On the death of Adam the property passes by survivorship to Eve. Eve alone can sell the property on production of evidence of

Adam's death (for example, a death certificate) which must be registered in the Land Registry.

#### Question 4

- 4.1 Has the burden of covenants passed to Barry who is not a party to the Deed of Mutual Covenant (DMC)? Candidates should consider s 41(3) and 41(2)(a) and (b) *CPO*. In addition candidates should consider s 18(2)(g) and 18(1) *Building Management Ordinance (BMO)* which deal with the rights and duties of the owners incorporated to enforce the DMC. Regarding enforcement by the owners incorporated, candidates should deal with ss 19, 23 and 24 *BMO* and the possibility of an action for money due. A number of candidates did not consider the full range of methods by which the owners incorporated can enforce payment of management charges.
- 4.2 Candidates should consider whether the external walls are common parts and discuss s 2 and the First Schedule to the *BMO*. Candidates should also consider ss 16 and 18(1)(c) *BMO*, the question of waiver and s 41(4)(a)(i) *CPO* and the possibility of the award of a mandatory injunction.
- 4.3 Candidates should consider whether the internal partition wall between two flats is a common part of the building or whether Derek has the exclusive use of the wall: *The Incorporated Owners of Westlands Garden v Oey Chiou Ling* [2011] 2 HKLRD 421 and *Tam Sze Man v The Incorporated Owners of Shan Tsui Court* [2011] 5 HKLRD 434 and s 2 and the First Schedule to the *BMO*.

#### Question 5

- 5.1.1 The preliminary agreement (PA) is binding. Neither party can introduce a new term into the formal agreement (FA) unless the other party agrees. The full agreement clause is not in the PA and it potentially excludes Paul's remedies for misrepresentation and in particular the estate agent's representation regarding the floor area of the property (however, the estate agent is not necessarily Sam's agent). Candidates could consider whether the clause satisfies the test of reasonableness: s 4 *Misrepresentation Ordinance* and s 3(1) *Control of Exemption Clauses Ordinance*. Candidates might advise that the floor area be made a term of the FA if the full agreement clause is included.
- 5.1.2 Paula is bound by the tenancy which does not need to be registered, but the option to renew is void against her if she is a bona fide purchaser for value: s 3(2) and the proviso to s 3(2) *Land Registration Ordinance*. Paula's notice of the unregistered option is irrelevant: s 4 *LRO*. Candidates could consider the position if the holder of the option registers late.

- 5.1.3 Under clause 2(b) of the PA payment of the deposit appears to be linked to signing the formal agreement. Candidates should deal with the construction of Clause 3 and the fact that the further deposit was paid.
- 5.1.4 The PA attracts ad valorem stamp duty because the flat is residential. Duty is payable within 30 days after the date of the PA but if the PA is replaced by an FA agreement within 14 days after the PA, ad valorem duty is payable within 30 days after the later agreement. The nomination attracts ad valorem duty and special stamp duty. The rate of duty in each case is below the basic rate and a certificate of value is required.
- 5.2 The delay in complying with completion undertakings leads to a delay in stamping of the assignment and registration of the assignment in favour of Paula and the mortgage in favour of East West. The former could lead to a stamp duty penalty (however, ad valorem duty should in this case have been paid on the agreement) and the latter to loss of priority (however, the agreement in favour of Paula should have been registered in the Land Registry). To protect the interest of East West, the mortgage should be dated and registered even before the assignment and discharge are registered. Particulars of the mortgage must also be registered at the Companies Registry.

The vendor's solicitor has breached his professional obligations by failing to comply with the undertaking. The vendor is liable for any loss suffered by the purchaser.

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