

Examiners' Comments on the 2013 Examination

Head I: Conveyancing

Candidates were required to answer four out of five questions.

Question 1

- 1.1 This requires a discussion of whether there is a concluded oral agreement (have the parties agreed all essential terms and all the terms that they want in their agreement?). In addition candidates should consider whether there is a written memorandum of the oral agreement signed by or on behalf of Shirley which satisfies section 3 of the Conveyancing and Property Ordinance Cap. 219 (CPO). In this connection, Shirley has sent an e-mail message to Barry. Candidates should consider whether the e-mail message contains all the agreed terms and whether it has been signed by Shirley.
- 1.2 If the discussions were 'subject to contract' this shows that the parties were still negotiating and are not bound. The words have continuing effect unless withdrawn.
- 1.3 This requires a discussion of whether specific performance is available to Barry and whether Barry would have priority over a subsequent purchaser.

Question 2

- 2.1 This requires a discussion of the vendor's contractual obligations to give and show title and whether the requisition is proper. In addition, candidates should consider whether the facts indicate that the Government might have waived the breach, or that there is no real risk that the Government will take enforcement action. This requires a discussion of *Jumbo Gold Investment Ltd v Yuen Cheong Leong* [2000] 1 HKLRD 768. In addition candidates should consider whether the vendor has replied satisfactorily to the purchaser's requisition.

Candidates might have considered whether the vendor would be able to annul the sale under Condition 7(2) of Part A 2nd Schedule to the CPO.

- 2.2 This requires a discussion of the concept of merger of the agreement in the assignment on completion and in addition a discussion of the covenants for title implied into the assignment when the vendor assigns as beneficial owner. Candidates should also consider the vendor's qualified liability under the covenants, whether the benefit of covenants for title runs with the land and whether the breach is continuing.

Question 3

This was the least popular question.

- 3.1 This requires a discussion of sections 41(3) and (2) CPO and whether the covenant to pay management charges relates to land of the covenantor. In addition it is necessary to consider whether a mortgagee could, under the terms of the Deed of Mutual Covenant (DMC), be liable for breach of covenant by the mortgagor.
- 3.2 This question was not well done. It requires discussion of the impact on title of an invalid DMC. Candidates should have considered *Polyson Jewellery Co Ltd & Anor v Liu Ong Carlos* [2002] 2 HKC 182.
- 3.3 This requires a discussion of the reallocation of undivided shares so that Alpha can sell undivided shares with exclusive use rights. Candidate should consider whether reallocation is restricted by the DMC and whether a sale of the flat separately from the car park is restricted by the DMC. Without undivided shares, a purchaser would not enjoy a proprietary interest.

Candidates should also consider whether on a sale of reallocated of undivided shares a sub-DMC should be created and the terms that should be included in a sub-DMC.

Candidate should also consider how Alpha will show title by creating certified copies of its title deeds. This is a case in which Alpha can give good title using only certified copies because it is clear in the circumstances that Alpha must retain any original deeds in order to show title to the car park which it retains.

Question 4

- 4.1 The Conditions of Sale give the grantee an equitable interest which is converted to a legal estate under s 14 CPO. Candidates should consider the need for evidence of compliance with the conditions precedent and the need to register the evidence in the Land Registry.
- 4.2 This requires a mention of the Government Leases Ordinance Cap. 40 and Article 120 of the Basic Law.
- 4.3 This requires a discussion of section 23A (2) CPO and section 13 (4A) CPO.
- 4.4 This requires a discussion of the vendor's duty to show title under section 13(1) CPO and whether the vendor can give good title using certified copies of the title deeds. Candidates should consider *De Monsa Investments Ltd v Whole Win Management Fund Ltd* [2013] HKCFA 66.

- 4.5 This requires a discussion of sections 14, 14AA and 41(3) of the Buildings Ordinance Cap. 123 (BO), the impact on title of a breach of the BO and whether there is a real risk of enforcement under the BO.

Question 5

- 5.1 Candidates must consider whether the purchaser is obliged to accept this term in the formal agreement and whether the purchaser has breached the preliminary agreement by failing to sign the formal agreement and pay the further deposit. Candidates might have considered the case of *Yun Pok International Enterprises Ltd v Valle Agnes Mallari* CACV 228/2011.

- 5.2 The preliminary agreement is a chargeable agreement attracting ad valorem duty payable within 30 Days after the date of the agreement. All parties are liable under the Stamp Duty Ordinance Cap. 117. In this case a certificate of value should be included.

The nomination is a chargeable agreement. The nomination is also a disposal on which Special Stamp Duty is payable.

- 5.3 (a) This requires a discussion of the terms implied into a preliminary agreement and the case of *Twinklestep Investment Ltd v Smart International Industries Ltd* (1999) FACV 499.
- (b) This requires a discussion of the practicalities of completion by undertaking, the risks to the purchaser when completion monies are paid to the vendor's solicitor and the Law Society's recommended procedures to protect the purchaser from the risks. The procedures are the split cheque arrangement, Condition 13 of Part A 2nd Schedule to the CPO (which is not contained in the preliminary agreement), s 18(2) CPO, the Law Society's standard completion undertaking letters and the need for the undertakings to be agreed before completion.