

Examiners' Comments on the 2016 Examination

Head I: Conveyancing

Question 1

- 1.1 Candidates should consider whether the external walls are common parts under s 2 and the first schedule to the Building Management Ordinance (BMO) and the duty of the owners corporation to repair them under s 18(1)(a) of the BMO. Candidates should also consider whether the Mark can enforce the DMC. In this connection see *Grenville House v The IO of Grenville House* [1978] HKLR 235.
- 1.2 Candidates should consider s 40 BMO and whether the DMC also gives rights to inspect exclusive use areas.
- 1.3 The burden of this covenant passes to Mark under s 41(3) Conveyancing and Property Ordinance. Remedies available to the owners corporation include rights under sections 19, 23 and 24 BMO.
- 1.4 There is potentially a breach of the nuisance covenant in the DMC. The benefit and burden of this covenant runs with the land. The owners corporation has a duty to enforce the DMC under s 18(1)(c) BMO, but Mark also has the right to bring an action under the DMC. Mark may claim an injunction and damages.
- 1.5 This question requires a discussion of s 17 (1)(b) BMO and the case of *Chi Kit Company Ltd v Lucky Health International Enterprise Ltd* [2002] 2 HKLRD 503.

Question 2

- 2.1 The vendor is required to produce an occupation permit: *Lui Kwok Wai v Chan Yiu Hung* [1995] 1 HKC 197. Candidates should also consider *Forever Business Ltd v Long Surplus Investment Ltd* [2007] HKLRD.
- 2.2
 - (a) The slope maintenance order is an encumbrance on title which the vendor is required to remove by completion. The obligation to maintain slopes is contained in the Government Grant and potentially affects all owners who must pay the cost of complying with the order. If the order is not complied with, the Buildings Department may carry out the work and recover costs under sections 32A and 33 of the Buildings Ordinance.
 - (b) The purchaser should find out from the vendor the cost of complying with the order and the contribution required from the owner of the flat being sold. If the vendor undertakes to pay the contribution and a sum of money is retained out of the proceeds of sale to cover it the purchaser could

complete the purchase. See *Luk Stanley Ho Chang v Fook Man Finance Company Ltd* 2006 CACV 131.

- 2.3 The issue is whether the purchaser has waived her right to good title. This depends on whether the purchaser is aware of the facts and legal consequences, accepts the possible defect in title arising from the lack of consent under the Buildings Ordinance to the alteration and communicates her acceptance to the vendor.
- 2.4 The Assignment must be by deed, but a seal is not required in this case because the Assignment will be executed after 3 March 2014. Candidates should consider s 127(3)(a), 127(5) and 127(3) of the Companies Ordinance Cap. 622 (CO). Candidates should also consider s 128(1) (a), (b) and (c) and 128(2) CO.

Question 3

- 3.1 The purchaser is liable for ad valorem stamp duty on the Provisional Agreement (PA) at the rate of 8.5 % of the consideration or value of the property (the purchaser is not a Hong Kong permanent resident). The duty should be paid within 30 days of the date of the Provisional Agreement or within 30 days of any formal agreement replacing the provisional agreement if the formal agreement is signed not more than 14 days after the provisional agreement. The purchaser must also pay Buyers Stamp Duty at the rate of 15% within the same time limit.
- 3.2 Mr Santos could nominate a limited company to take up the assignment but the nomination would also attract ad valorem stamp duty. However, Mr Santos could nominate a trustee to take up the assignment. The nomination is not a chargeable agreement under s 29 AB(1) Stamp Duty Ordinance.
- 3.3 Candidates should consider whether the parties to the PA are bound to sign a formal agreement . See *Wise Think Global Ltd v Finance Worldwide Ltd* (2012) CACV 10/2011, *See To Keung v Sunny Way Ltd* [2009] 5 HKLRD 300 and *Yuen Pok Enterprise Ltd v Valle Agnes* CACV 228/2011. Candidates should also consider whether payment of the further deposit is linked to or independent of signing the formal agreement.
- 3.4 On the right to inspect the property before completion, see *Twinkle Step Investment Ltd v Smart International Industries Ltd* [1999] 4 HKC 441. On completion by undertaking see *Chong Kai Tai v Lee Gee Kee* [1997] 1 HKC 359.

Question 4

- 4.1 (a) Candidates should state the dates of registration of the agreement and charging order . The agreement has priority, but the purchaser must apply

the balance of purchase price to pay off the charging order: *Ho King Yim v Lau King Mo* [1980] HKLR 42.

- (b) The answer is the same even though the charging order has priority because when the agreement was signed the equitable interest in the property passed to the purchaser and the vendor has no property to which the charging order can attach.
- 4.2 Industrial purposes must involve manufacturing: *Mexx Consolidated Far East Ltd v AG* [1987] 1210. Marketing and sales do not involve manufacturing, but the courts will consider whether these are uses ancillary to making plastic flowers (*Raider Ltd v Secretary for Justice* [2000] 3 HKLRD 300, CFA) and also the extent of the offending use (*Shields v Chan* [1972] HKLR 121). Breach of the Conditions gives the Government the right to re-enter.
- 4.3 The vendor normally pays management charges up to and including the date of completion and apportionments between the vendor and purchaser are paid on completion. The facts in this question are based on *Wise Wave Investments Ltd v TKF Management Services Ltd* in which the vendor agreed to pay substantial arrears of management charges only after completion and it was held that the arrears amounted to a defect in title.

Question 5

- 5.1 The issue is whether the structure is a fixture or chattel. The vendor can remove a chattel before completion, but a fixture belongs to the land and is sold with it unless the agreement for sale and purchase provides to the contrary. Candidates should consider the intention with which the structure was brought on to the land by applying the degree and purpose of annexation tests. The cases of *Elitestone v Morris* [1997] 2 All ER 513 and *Goldful Way v Wellstable Development Ltd* [1998] 4 HKC 679 are relevant.

Some candidates considered whether the vendor can give substantial performance if he removes the structure. This is relevant if the structure is a fixture.

- 5.2 The structure potentially breaches the height restriction in the Conditions. As to whether there is a real risk of re-entry, the Government has power under the Government Rights (Re-Entry and Vesting Remedies) Ordinance to re-enter a single unit of the offending owner. In this connection *Jumbo Gold Investment Ltd v Yuen Cheong Leung Warren* (2000) 3 HKCFAR 52 can be distinguished.

Candidates should also consider breaches of the Deed of Mutual Covenant and Buildings Ordinance which carry a risk of enforcement action. The real risk test should be applied.