
**1998 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD I: CONVEYANCING
AND LANDLORD AND TENANT**

Monday, 26 October 1998



HEAD I : CONVEYANCING AND LANDLORD AND TENANT

TEST PAPER

26 October 1998

Instructions to Candidates

- 1. The duration of the examination is 3 hours and 30 minutes.**
- 2. This is an open-book examination.**
- 3. There are FIVE questions in this paper. EACH must be answered.**
- 4. Answer Questions 1 and 2 in Answer Book 1.
Answer Question 3 in Answer Book 2.
Answer Questions 4 and 5 in Answer Book 3.**
- 5. Each question has the value noted on the question paper. You are urged to apportion your time in accordance with the relative value of each question. No marks can be awarded for a question for which there is no attempted answer.**
- 6. Do not take either this question paper or any answer books with you when you leave the examination room.**

1998 Overseas Lawyers Qualification Examination

Head I : Conveyancing and Landlord and Tenant

Question 1 (20 marks)

Part A (12 marks)

Inland Lot No 1313 is situated in Pokfulam. The Lot was leased by the Government in 1950 to Wealthy Construction Co Ltd. The Government lease for the lot contained a restrictive covenant which stated 'No building other than a private dwelling house may be constructed on the site without the consent of the Government'. In 1952 the company constructed a low-rise block of flats on the site. In 1960 the whole block of flats was purchased by Enterprising Co Ltd whose intention was to demolish the low-rise block of flats and construct a high-rise block of flats on the site. The managing director of Enterprising Co Ltd wrote to the Lands Department in 1960 asking whether the department had any objection to his company erecting a high-rise block of flats on the site. He received the following reply:

'We have no present objection to your company erecting a block of flats provided the block does not exceed six stories in height.'

In 1962 Enterprising Co Ltd erected a block of flats of six stories on the site.

In 1972 the site was acquired by Quick Construction Ltd, who demolished the block of flats and constructed a new six-storey block of flats on the site which they called 'Scenic Mansions'. An occupation permit was issued by the Building Authority.

Several sites in the near vicinity to Scenic Mansions had similar restrictive covenants in their Government leases and low-rise multi-storey buildings had been erected on those sites.

It is now 1998. Quick Construction Ltd has just received the following letter from the Department of Lands:

'Dear Sir

Re Inland Lot No 1313: Scenic Mansions

We have to inform you that the Government Lease issued in 1950 in respect of the above lot contained a restrictive covenant to the effect that 'no building other than a private dwelling house might be erected on the site without the consent of the Government'.

It is our view that by constructing a six-storey block of flats on the site without Government consent there has been a breach of this covenant. You must therefore demolish the block of flats or obtain a variation of the restrictive covenant. If you fail to do so, Government is entitled to re-enter the site.

Yours faithfully

Director of Lands'

You are a solicitor who has been consulted by the managing director of Quick Construction Ltd.

Answer the following questions:

- 1. Your client wishes to know whether there are any arguments whereby he can resist having to demolish the block of flats.**

Advise him of any relevant arguments, providing authority.

Your client has decided to seek a variation of the restrictive covenant. Your research reveals a circular issued by the Lands Department in 1994 which says:

'Developments in Pokfulam

In order to increase the density of population in Pokfulam the Lands Department will consider favourably applications for variation of restrictive covenants in Government leases in respect of property in Pokfulam so as to increase the height of the building. An appropriate premium will be payable in return for such variation. Provided that an increase in height beyond six stories will not be permitted.

Signed

Director of Lands'

On behalf of your client you make application for a variation of the restrictive covenant. The Lands Department, however, replies that your application is rejected. No explanation is given.

- 2. Your client seeks your advice as to whether he should apply to the Court of First Instance to have the decision set aside by way of judicial review.**

Advise him.

Please go to next page for Part B of Question 1

Question 1 (continued)

PART B (8 marks)

Your client Philip has just agreed by way of an open contract to purchase Flat C on the fifth floor of Modern Villas in Kowloon. Having inspected the building your client tells you that there are five flats on each of the ten floors of the building. You have carried out a search of the title deeds and have discovered that the occupation permit issued in 1990 provides for only four flats on the first four floors of the building and five flats on the other six floors.

Your search of the register also shows that a remedial order under section 27A of the Buildings Ordinance was registered in the Land Registry last month against the property under which the co-owners of Modern Villas are required to carry out stabilisation work to the slope behind Modern Villas. The existence of this order was not disclosed to your client.

Since property prices are falling your client asks whether either of these facts entitles him to rescind the sale and purchase agreement.

Advise him.

Question 2 (20 marks)

The vendor, who owns the first floor of a commercial building in Kowloon, has agreed to sell to your client the whole of the first floor comprising 20 equal undivided 100th shares of and in the building. The building which comprises five floors is held under conditions of grant dated 1964.

The formal sale and purchase agreement contains, inter alia, the following clauses:

1. The vendor agrees to give and show good title to the premises.
2. The purchaser agrees to pay by way of deposit 25% of the purchase price to be paid to the vendor's solicitor as stakeholder.
3. Completion shall take place at the vendor's solicitor's office on 15th October at or before 4.30 pm.
4. Time is of the essence of the agreement.
5. The vendor agrees to give vacant possession of the premises at the date of completion.
6. The purchaser shall take the property with full knowledge of its physical condition as it stands.
7. The purchaser must raise requisitions as soon as possible after delivery of the title deeds and in any event at least 14 days before the date fixed for completion.
8. If the vendor defaults the purchaser is entitled only to receive the return of his deposit plus an equivalent sum by way of liquidated damages.
9. Upon any default by the purchaser the vendor shall be entitled to forfeit the deposit.

Answer the following questions:

- (a) The deed of mutual covenant dated 1986 shows that 20 undivided shares have been allocated to the first floor, but does not show how the remaining 80 shares in the building have been allocated. **Is the purchaser permitted to rescind the agreement on the grounds that the vendor is unable to show how the remaining 80 shares in the building have been allocated?**
- (b) At the date of completion the purchaser finds that five window-type air-conditioners (in good working order) have not been removed from the premises and there is a double-bed in one of the bedrooms. **Is the purchaser permitted to rescind the agreement for this reason?**

- (c) On inspecting the premises the purchaser finds that the plaster on the ceiling in three of the offices is peeling from the ceilings. Further, his inspection shows that one of the load-bearing walls has been demolished to make a larger work area. **Can the purchaser rescind because of these factors?**
- (d) The vendor in purported compliance with section 13 of the Conveyancing and Property Ordinance delivers the title deeds to the purchaser on September 15th. The purchaser discovers that the certificate of compliance dated 1966 is missing and on October 5th raises a requisition requiring the production of the original or a certified copy of the certificate of compliance. The vendor refuses to answer the requisition on the grounds that it is raised out of time. **Does the purchaser have the right to rescind on this ground?**
- (e) The purchaser's solicitor upon inspection of the computerised register discovers that a car-park layout plan dated in the pre-intermediate root period has been registered. He raises a requisition on September 20th requiring the vendor to supply a certified copy of the plan. The vendor replies that he cannot produce the original plan or a certified copy. **Does the purchaser have the right to rescind the contract for this reason?**
- (f) On October 12th the purchaser notifies the vendor that completion must be by way of formal completion. The vendor insists upon completion by undertaking. **Is the vendor within his rights?**
- (g) The purchaser's clerk arrives at the office of the vendor's solicitor with the completion cheque at 5.00 pm on October 15th. The vendor refuses to accept the cheque and forfeits the purchaser's deposit. **Is the vendor within his rights? Are there any arguments available to the purchaser to resist this forfeiture?**
- (h) Now assume that the purchaser's clerk arrives with his cheque at 2.00 pm on October 15th but the vendor refuses to complete. The market is rising steeply and the vendor wishes to sell to a person who has offered more. The vendor offers to return the deposit in accordance with clause 8 of the sale and purchase agreement and to pay a sum equal to the deposit by way of liquidated damages. **Can the purchaser instead obtain specific performance of the agreement?**

Question 3 (20 marks)

Allan Au is a recent arrival in Hong Kong. He has been in occupation of a flat in Luxury Block Flats (LBF) as licensee, 'minding' the flat whilst the tenant Sam So has been on leave out of Hong Kong. Allan and Sam were school mates in the UK. LBF is a large multi-storey building in Garden Road.

The owner of the flat is Tom To. Tom is short of money and has not paid management fees for the last quarter. Tom wants to sell the flat and tells Allan that he is interested in selling it to him.

A friend tells Allan that he can find out details of Tom's title by a search in the Land Registry. Allan does this and discovers that several instruments have been registered; one relates to a charge in favour of Happy Bank, and another is a Deed of Mutual Covenant [DMC]. Allan then instructs your firm to act on his behalf. Tom's solicitor sends a draft Sale and Purchase Agreement [SPA] to Peter Poon, your principal. Before he decides to buy, Allan wants to know the answer to several questions. Peter has asked you to prepare the answers to them.

ANSWER EACH PART (a) to (c).

- (a) Tom's solicitor sends a draft Sale and Purchase Agreement [SPA] to Peter; the draft SPA, contains the following title details :

'Flat 10, Luxury Block Flats, Caine Road, Pokfulam:

together with 100 equal undivided 1200th shares of and in Flat 10, and of and in Section A of Inland Lot No 1234

together with right of occupation of Flat 10

together with the benefit of all rights, rights of way, easements and privileges as set out in the Deed of Mutual Covenant'.

Tom's solicitor indicates that a certified copy of the deeds will be available if Allan proceeds with the purchase.

Allan is concerned about this description and wants to know what interests and rights he would obtain if he purchases the flat.

- (b) **Assuming Tom has not paid various management fees, Allan wants to know what liability he will have for unpaid fees if he purchases the flat.**
- (c) The registered charge, which Allan discovered in the Land Registry, contained two clauses of interest to Allan. These are :
1. Tom could not create a further charge without the consent of Happy Bank; and
 2. only Tom, or a tenant whose lease had been approved by Happy Bank, could occupy the land.

The charge further provided that if Tom (or his tenant) breached these clauses, Happy Bank could foreclose.

Allan also discovers that the management company is in the process of charging Tom's flat for non-payment of management fees by Tom.

In view of this information, Allan asks Peter

- i. what interest he would get if he goes ahead with the purchase ? Will his earlier occupation as licensee cause him any problems ? and**
- ii. to explain, whether and if so, how, the management company can charge Tom's flat without his involvement in the charge.**

Question 4 (20 marks)

On 14 December 1996 Pansy Shum entered into an informal written agreement for sale and purchase ('the informal agreement'-Document 1) to sell her residential flat at Taikoo Shing to Willie Woo for a consideration of HK\$13,000,000. (The informal agreement contained details of the property, the vendor, the purchaser and the agreed price and stated that the parties would sign a formal agreement within 14 days. The agreement also provided that completion would take place in January 1997, that time is of the essence and that the purchaser would pay all stamp duty in connection with the transaction. The informal agreement contained no other terms.) Willie Woo then decided that he wanted to purchase the flat in the name of a limited company. He formed a company called Willie Woo Investments Limited. Willie is the sole beneficial owner of all the issued share capital of Willie Woo Investments Limited. On 20 December 1996 Pansy and Willie signed a cancellation agreement ('the cancellation agreement' - Document 2) cancelling the informal agreement. On 28 December 1996 Pansy then signed a formal agreement for sale and purchase ('the formal agreement' - Document 3) to sell the flat to Willie Woo, Investments Limited. The purchase price was the same as the price stated in the informal agreement. The terms of the formal agreement are as set out in Form 2 of the 3rd Schedule to the CPO and are otherwise consistent with the informal agreement.

The sale of the flat was completed by assignment ('the assignment' - Document 4) on 28 January 1997. The flat was mortgaged by way of first legal mortgage ('the mortgage' - Document 5) to the Eastern Bank Limited to secure a loan of HK\$10,000,000.

On 17 June 1997 Willie Woo Investments Limited assigned the flat ('the second assignment' - Document 6) subject to the mortgage to Better Investments Limited. Willie Woo, also owns all the issued share capital of Better Investments Limited.

In January 1998 Better Investments Limited redeemed the mortgage and a release was executed ('the release' - Document 7). In February 1998 Better Investments Limited went into voluntary liquidation and assigned the flat ('the third assignment' - Document 8) in specie to Willie Woo its sole shareholder.

- (a) **Explain how stamp duty is charged on each of the 8 documents referred to in the fact situation.** (12 marks)
- (b) Assume that it is now January 1997 and that Willie Woo Investments Limited intends to complete its purchase of the flat on the terms of the formal agreement. On the day of completion Willie inspects the flat for the purchaser and finds that it is occupied by a tenant. Willie Woo Investments Limited does not want to purchase the flat subject to a tenancy despite the fact that the property has gone up in price.

Explain whether Willie Woo Investments Limited can refuse to complete, whether it is entitled to claim any damages or costs from Pansy and how those damages and costs (if any) would be assessed.

(8 marks)

Question 5 (20 marks)

In November 1996 Rudy Wong let a small flat - Flat 5A on the 5th floor of Kelly Gardens (the premises) - to Caesar Kan for a term of 2 years from 1 December 1996 at a monthly rent of HK\$18,000 inclusive of management charges. At the time, this was higher than the rents payable by tenants of other flats in Kelly Gardens. Kelly Gardens was built in 1986.

Caesar paid Rudy a deposit equivalent to three times the monthly rent. They signed a written tenancy agreement in which Caesar as tenant gave certain covenants including the following:

'not to breach the terms of the Deed of Mutual Covenant relating to Kelly Gardens'

The tenancy agreement also contained a right for the landlord to re-enter upon breach of covenant by the tenant.

Caesar is a hairdresser and he has been using the premises as his hairdressing salon despite a restriction in the Deed of Mutual Covenant against using the premises for any purpose other than residential purposes. Last week a small fire broke out at the premises when Caesar overloaded the electrical circuit when eight hairdryers were being used on the premises at the same time. Caesar managed to extinguish the fire but there was some smoke damage to the walls of the premises. In addition, the smoke from the fire set off the sprinklers in the corridor on the 5th floor causing some water damage in the corridor.

Rudy wants to obtain possession of the premises as soon as possible. He has not so far taken any action to do so.

Answer the following questions:

- (a) **Consider whether the tenancy is subject to the Landlord and Tenant (Consolidation) Ordinance and advise Rudy whether he needs to give any notice to terminate the tenancy and obtain possession against Caesar. If there is more than one alternative, state all possible alternatives. If you need further information in order to advise Rudy, say what information you need. (10 marks)**
- (b) **Advise Rudy whether he can obtain possession by any other means and of any difficulties he might encounter. (5 marks)**
- (c) **Advise Sophia Leung who also lives on the 5th floor of Kelly Gardens whether she can take any action against Caesar in respect of the damage to the corridor. (5 marks)**

END OF TEST PAPER