

**2003 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

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

Tuesday, 28 October 2003



HEAD I: CONVEYANCING AND LANDLORD AND TENANT

TEST PAPER

28 October 2003

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. You must answer ALL questions.**
- 4. You must answer:**
 - Questions 1 and 2 in Answer Book 1**
 - Questions 3 and 4 in Answer Book 2**
 - Question 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 to 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.**

2003 Overseas Lawyers Qualification Examination

Head I: Conveyancing and Landlord and Tenant

Question 1 (20 marks)

By a formal sale and purchase agreement (“the Agreement”) dated 5 June 2003, Ming Products Ltd (“the Vendor”) agreed to sell a restaurant with a cockloft (“the property”) in Commercial Building, Kowloon, to Fine Foods Ltd (“the Purchaser”) for HK\$40 million. At the time of the Agreement, the property was occupied by King Prawns Ltd (“the Tenant”) under a lease due to expire on 15 August 2003. The Tenant is a wholly owned subsidiary of the Vendor. A representative of the Purchaser visited the property before signing the Agreement but was unable to go up into the cockloft because it was being used for storage by the Tenant. On signing the agreement, the Purchaser paid a deposit of HK\$10 million.

The Agreement contained all essential terms including the following clauses:

1. The Vendor shall show and give good title to the property.
2. Any requisitions or objections in respect of the title to the property shall be delivered in writing by the Purchaser’s Solicitors to the Vendor’s Solicitors within 7 working days after the date of receipt of the title deeds to the property by the Purchaser’s Solicitors, otherwise the same shall be considered as waived.
3. Completion shall take place on 16 September 2003 before 5:00 pm.
4. Time shall in every respect be of the essence of this Agreement.
5. If the Purchaser shall fail to complete the purchase the Vendor shall be entitled to forfeit the deposit in full absolutely as agreed damages.
6. Should the Vendor fail to complete the sale, all moneys paid by the Purchaser pursuant to the provisions of this Agreement shall be returned to the Purchaser who shall also be entitled to recover from the Vendor damages sustained by the Purchaser by such failure on the part of the Vendor.

The Vendor’s solicitors sent the title deeds to the property on 5 August 2003. The Tenant moved out on 15 August 2003. After an inspection of the property by the Purchaser’s surveyor on 18 August 2003, the Purchaser’s solicitors raised the following requisition on 19 August 2003:

(See over the page for a continuation of Question 1)

Following an inspection of the property it appears that the area of the cockloft has been extended and the cockloft void has been enclosed contrary to the approved plans. Please supply written proof that the extension and enclosure are exempted works under the Buildings Ordinance or that the necessary approvals were granted by the Building Authority.

The Vendor's solicitors replied on 23 August 2003:

The requisition is out of time. In accordance with clause 2 of the Agreement your client is deemed to have accepted our client's title.

The Purchaser's solicitors were not satisfied with this reply and repeated the requisition on 28 August 2003. On 1 September 2003, the Vendor's solicitors sent a without prejudice letter stating that the Vendor would reinstate the property in conformity with the approved plans. There was no reply to this letter. On 15 September 2003, the Vendor's solicitors sent a further letter, enclosing photographs of the completed work and an Architect's Report certifying that the reinstatement work had been completed satisfactorily. On 16 September 2003, the Purchaser's solicitors wrote to the Vendor's solicitors stating that the Vendor had repudiated the Agreement by failing to show and give good title in accordance with clause 1 of the Agreement and requested the return of the deposit. Further, completion did not take place at the scheduled time. The Vendor then forfeited the deposit.

Question:

Can the Purchaser recover the deposit?

(20 marks)

Give reasons for your answer.

Question 2 (20 marks)

Re: Shop B, 1/F, together with a flat roof on the first floor of Globe Building, Hong Kong (“the property”)

You have received instructions from James Ko, Managing Director of Finewave Ltd (“Finewave”), in the purchase of the above property from Kwikshave Ltd (“Kwikshave”). Globe Building is a 12 storey commercial building.

The property is more fully described in a formal sale and purchase agreement, dated 15 March 2003, as “All That one equal undivided 100th share or part of and in All That piece or parcel of ground registered in the Land Registry as Inland Lot No 8648 And of and in the messuages erections and buildings thereon now known as "Globe Building" No. 16 Ford Road, Hong Kong (“the said building”), together with the sole and exclusive right and privilege to hold use occupy and enjoy All That Shop B on the First Floor together with the flat roof on the First Floor of the said building.”

Kwikshave has agreed to give good title to the property, which will be shown in accordance with Section 13 of the Conveyancing and Property Ordinance.

Perusal of the title deeds and documents supplied by Kwikshave reveals the following title diagram (see overleaf):

(See over the page for a continuation of Question 2)

Shop B, 1/F, together with a flat roof on the first floor of Globe Building, Hong Kong
("the property")

Title diagram (based on deeds and documents supplied)

Crown Lease 999 years from 11.7.1893



Bon Bon Developments Ltd ("Bon Bon")

Occupation Permit dated 10.10.1975

Deed of Mutual Covenant dated 10.11.1975, Memorial No 1221222

Assignment on sale by Bon Bon of the property to Freda Ling dated 10.12.1975,
Memorial No 1234111



Assignment on sale by Freda Ling to Vera Li dated 2.11.1982, Memorial No 2266010



Death of Vera Li on 15.5.1984. Grant of Probate to Charles Li dated 2.4.1985 Memorial
No 3334444



Assignment on sale by Charles Li to Milly Fung dated 3.3.1986, Memorial No 4004400



Legal charge to XL Bank Ltd dated 3.3.1986,
Memorial No 4004401



Release dated 3.10.1991, Memorial No 5055005



Assignment on sale by Milly Fung to Quickcurl Ltd dated 10.6.1994, Memorial No
6667777



Assignment on sale by Quickcurl Ltd to Kwikshavc dated 6.4.1998, Memorial No
7667744



Agreement for sale and purchase to Finewave dated 15.3.2003

You may ignore the title between the Crown Lease and Bon Bon

(See over the page for a continuation of Question 2)

Questions:

- (a) Identify the intermediate root of title document. (1 mark)
- (b) What title problem, if any, is raised by the fact that the Deed of Mutual Covenant did not allot undivided shares to the property? (3 marks)
- (c) The schedule of property annexed to the Grant of Probate Memorial No 3334444 referred to the shop but did not mention the flat roof on the first floor.

Should you raise a requisition on title in respect of Memorial No 3334444? Give reasons for your answer. (2 marks)

- (d) In her will, Vera Li gave all her residuary estate after payment of debts, estate duty, funeral and testamentary expenses to her son, Gary, absolutely. The will also provided that the executor may not sell or otherwise dispose of any of the assets forming any part of the residuary estate before Gary attained 18.

On the assumption that Gary was under 18 at the time of the sale, what title problem, if any, arises in respect of Assignment Memorial No 4004400? Give reasons for your answer. (3 marks)

- (e) The Release Memorial No 5055005 was executed on behalf of the XL Bank Ltd by Mr Tang Lin Ho under a power of attorney dated 12.12.1989. The relevant power of attorney has not been produced.

What requisition(s) should the purchaser raise and how should the vendor satisfy such requisition(s)? (4 marks)

- (f) Assignment Memorial No 7667744 was executed by Quickcurl Ltd as follows:

“Sealed with the Common Seal of the Company and signed by James Ng one of its directors.”

- (i) What title problem arises in respect of the above mode of execution? (2 marks)
- (ii) What should the vendor do to enable you to approve the title? (4 marks)
- (g) How would your answer to question (f) differ, if at all, if the agreement for sale and purchase between Kwikshave and Finewave were made today? (1 mark)

Question 3 (20 marks)

Answer both Part A and Part B of this question:

Part A

Land Development Ltd ["LDL"] is a property development company registered in Hong Kong. The company recently purchased section F of Inland Lot 454 ("the Land"), which was originally demised by the Government in 1870 for a term of 999 years. The government lease contains a covenant to erect one or more European style residences only. Eight, 10 and 12-storey buildings have been erected on other sections of Inland Lot 454 since the early 1950s. The Building Authority has recently approved plans for the demolition of a 6-storey building erected on the Land in 1955, and for a 20-storey building to be erected in its place. LDL has now received a letter from the Lands Department informing the company that the proposed development would constitute a breach of the covenant but that the government would be willing to grant a modification of the Government Lease so far as it affects the Land in return for a premium.

Question:

Advise LDL on how it should respond to the letter from the Lands Department.

(5 marks)

Part B

A 20-storey building ("the building") has now been erected on the Land. The Occupation Permit for the building permits the use of the ground floor for shops, the first floor for offices for non-domestic use, and 2 flats per floor for domestic use from the second to the 20th floor. The building also has 8 spaces for loading and unloading. LDL partitioned the ground floor into 6 shops and one utility room. All the necessary approvals were obtained for this work.

LDL divided the Land and the building into 200 equal undivided parts or shares. The shares were allocated in the following manner:

- 10 shares to each of the 6 shops on the ground floor.
- 60 shares to the first floor.
- 2 shares to each of the flats on the 2nd to 20th floor.
- 4 shares to the spaces for loading and unloading.

No shares have ever been allocated to the utility room or to the main roof of the building.

(See over the page for a continuation of Question 3)

In the first assignment, LDL assigned 2 shares to Basil Wong, together with the sole and exclusive right and privilege to hold use occupy and enjoy flat B on the third floor of the building. The assignment excepted and reserved for LDL and its assigns and the owners for the time being of the other shares, the exclusive right to possess the whole of the ground and first floors, all the other flats, and the main roof of the building, "save and except the common areas as defined in the Deed of Mutual Covenant ("the DMC") to be entered into by the parties hereto or which are intended for common use". On the same date, LDL and Basil Wong executed the DMC which was later registered in the Land Registry. The DMC expressly granted to LDL and its assignees "the absolute right and liberty to change the name of the building at any time without reference to any other owner". The definition of common areas in the DMC includes the spaces for loading and unloading but does not refer to the utility or to the main roof of the building. The DMC further provides for the appointment of a manager with power to enforce its provisions and includes the following covenant:

No owner shall make any structural alteration to any unit of which he is the owner.

The building is managed by Discreet Property Management Ltd.

Answer the following questions:

- (a) After the first assignment, LDL assigned 60 shares to FLC Ltd ("FLC") together with the exclusive right to possess the whole of the ground floor.

Advise FLC whether it can claim the right to exclusive possession of the utility room.

(5 marks)

- (b) LDL then sold 60 shares to Fred Ko together with the exclusive right to possess the whole of the first floor. The assignment also transferred the right to re-name the building, subject to and with the benefit of, the DMC. Fred Ko recently gave notice to Discreet Property Management of his intention to change the name of the building 7 days from the date of delivery of the notice.

Advise the other co-owners what action, if any, they may take against Fred Ko.

(2 marks)

- (c) LDL sold its remaining 74 shares to Jennie Kwok, together with the exclusive right to possess all the remaining flats except for Flat B on the third floor and the main roof. LDL has now agreed to sell the main roof to Carla Wong.

Can LDL give good title to the main roof?

(2 marks)

(See over the page for a continuation of Question 3)

(d) Basil Wong has now assigned his interest in the Land and building to Charles Lai, who has made openings in the external wall of flat 3B and inserted windows in the openings.

(i) What action, if any, could LDL take against Charles Lai?

(2 marks)

(ii) What action, if any, could Discreet Property Management Ltd take against Charles Lai?

(4 marks)

Give reasons for your answers to all the above questions.

Question 4 (20 marks)

Sam Ha (“Sam”) is the registered owner of a flat in Tai Tam, Hong Kong (“the property”). In May 2002, Sam agreed to mortgage the property to the Sun Hing Bank Ltd as security for general banking facilities. On 15 May 2002, the Bank instructed Sam’s solicitor, Fred Lim, to prepare an “all monies” first legal charge (“the Legal Charge”) in respect of facilities for the time being agreed as HK\$5 million, repayable on demand. The Legal Charge recited the agreement of the Bank to provide the facilities “to such extent and upon such terms and conditions as shall from time to time be mutually agreed between the parties.” The Bank has made a number of further advances to Sam. The total indebtedness under the loan is now HK\$8 million.

Clause 5 of the Legal Charge provides that Sam shall not without the prior written consent of the Bank at any time during the continuance of the Legal Charge assign sub-divide charge underlet part with possession or in any manner otherwise deal with or dispose of the property or any part thereof or any interest therein or enter into any agreement or arrangement so to do.

In November 2002, without informing the Bank, Sam let the property to Harriet So (“Harriet”) for a term of 2 years commencing on 1 December 2002. Harriet pays the monthly rent into Sam’s account with the Bank. On 1 September 2003, Sam informed the Bank that he could no longer pay principal or interest on the loan. At a meeting on 3 September 2003, Sam told the Bank that he had leased the property to Harriet. On 4 September 2003, the Bank’s solicitors wrote to Harriet informing her that their client was not bound by the tenancy agreement, and demanded rent from her in the exercise of its rights as mortgagee. Harriet has paid the rent but refuses to leave the property.

Questions:

- (a) **Can the Bank sell the property with vacant possession?** (10 marks)
- (b)(i) **What duties, if any, would the Bank owe to Sam in the sale of the property?** (5 marks)
- (ii) **How would the proceeds of sale be applied?** (2 marks)
- (c) The Bank has now agreed to sell the property to Charles Lai for HK\$6 million, its current market value. The formal agreement is in Form 2 of the Third Schedule to the *Conveyancing and Property Ordinance*.
- (i) **Can the Bank insist upon completion by undertakings?** (2 marks)
- (ii) **Should the Bank prepare a release/discharge of the Legal Charge?** (1 mark)

Give reasons for your answers to all the above questions.

Question 5 (20 marks)

Answer both Part A and Part B of this question:

Part A

On 21 October 2001, James Fung let flat 2A in Shun Tong Mansions, Wan Chai, to Sally So for 2 years. The lease provided that the premises should be used for residential purposes only. Sally uses part of the flat as a photographer's studio. On 18 July 2003, James sent Form CR 101 to Sally stating that the tenancy would be terminated on 21 October 2003. The notice further stated that James would oppose the grant of a new tenancy to Sally on the ground that he wanted to live in the flat himself. The notice, which was served by registered post, was collected by Sally on 22 July 2003.

Questions:

- (a) **Can Sally ignore the notice?** (12 marks)
- (b) **If Sally applies to the Lands Tribunal for a new tenancy, can James oppose the new tenancy on the ground that Sally has broken the terms of the tenancy?** (2 marks)

Part B

On 1 June 2002, Ling Properties Ltd let commercial premises to Garoupa Seafoods under a written tenancy agreement for 2 years from 5 June 2002 at the current market rent. The lease contained an option to renew the tenancy for a further period of 1 year, exercisable not later than 6 months before the expiration of the current lease. The lease contained a provision requiring Garoupa Seafoods to pay a rental deposit "to be held by the landlord throughout the currency of the tenancy agreement free of any interest to the tenant." The deposit is repayable at the end of the term, subject to the right of the landlord to deduct sums on account of any breach of covenant or condition in the lease.

On 1 September 2003, Ling Properties agreed to sell the premises to Clore Holdings Ltd, completion to take place on 1 December 2003. The agreement for sale and purchase was registered in the Land Registry on 15 September 2003.

Question:

What effect, if any, would the sale have on Garoupa Seafoods' rights under the lease? (6 marks)

Give reasons for your answers to Parts A and B.

END OF TEST PAPER