

**2004 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

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

Tuesday, 9 November 2004



HEAD I: CONVEYANCING AND LANDLORD AND TENANT

TEST PAPER

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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:
 - Question 1 in Answer Book 1
 - Question 2 in Answer Book 2
 - Question 3 in Answer Book 3
 - Question 4 in Answer Book 4
 - Question 5 in Answer Book 5
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.

2004 Overseas Lawyers Qualification Examination

Head I: Conveyancing and Landlord and Tenant

Question 1 (20 marks)

Hilda Chan is the registered owner of Lot 6789 in DD 132 in Tuen Mun (“the Property”), which was assigned for value to her in 1968 (“the Assignment”). The Property was included in a Block Government Lease (“the Lease”) granted in 1905 for a term of 75 years from 1 July 1898, with an option to renew for one further term of 24 years less the last 3 days. The Property was demised as padi, and was subject to a covenant not to build without a licence from the Government. The Lease recited that the Property was subject to a mortgage in favour of one Man Tsong Shau.

In 1970 Hilda erected on the Property a two-storey residential building, which is occupied by Hilda and her two children. The construction costs were paid for by Hilda and her children in equal shares. In 1990 Hilda’s brother, Fred, began to use part of the Property as a “lorry park”.

Hilda wishes to sell the Property as soon as possible for the best price obtainable.

Questions:

Advise Hilda:

- (a) Whether she still has any interest under the Lease. (2 marks)
- (b) Assuming that the Assignment to Hilda is missing, whether she may rely upon a Registered Memorial of the Assignment as proof of title under section 13 of the Conveyancing and Property Ordinance. (4 marks)
- (c) Whether use of part of the Property as a “lorry park” constitutes a defect in title. (3 marks)
- (d) Whether title to the Property is defeasible.
- You may assume that the 1970 building is exempt from the Buildings Ordinance (Application to the New Territories) Ordinance, Cap 121. (5 marks)
- (e) Whether the above facts reveal any encumbrances on title and, if so, how these may be cleared off the title. (6 marks)

Give reasons for your answers to each of the above questions.

Question 2 (20 marks)

By a binding provisional agreement (“the Agreement”), dated 25 September 2004, Chiu (“the Vendor”) contracted to sell Flat A, Third Floor, Healthy Heights, Quarry Bay, Hong Kong, together with car park no. 32 (“the Property”) to Stanley So (“the Purchaser”).

Under the Agreement, the purchase price of HK\$3 million was payable in the following manner:

- An initial deposit of HK\$50,000 payable (and paid) on signing the Agreement;
- A further deposit of HK\$250,000 payable upon the signing of an Agreement for Sale and Purchase (“the formal agreement”) on or before 2 October 2004;
- The balance of the purchase price payable on or before the completion date of 1 November 2004.

The Agreement was in the usual terms, and included the following clause:

Clause 6: Should the Vendor after receiving the initial deposit paid hereunder fail to complete the sale in the manner herein contained the Vendor shall immediately compensate the Purchaser with a sum equivalent to the amount of the initial deposit as liquidated damages together with the refund of the initial deposit.

On 30 September 2004, the Vendor’s solicitors sent a draft formal agreement to the Purchaser’s solicitors, together with documents of title relating to the Property, including an Assignment dated 4 April 1984. Clause 5 of the draft formal agreement provided that title should commence with Conditions of Sale, dated 20 March 1973 (“the Conditions of Sale”), and an Assignment on Sale, dated 24 February 1992 (“the Assignment”). The Purchaser’s solicitors deleted clause 5 and returned the draft formal agreement to the Vendor’s solicitors on 2 October 2004.

On the same date, the Purchaser’s solicitors sent a cheque for HK\$250,000 as further deposit, to be released upon signing of the formal agreement yet to be agreed between the parties.

The Purchaser’s solicitors raised three requisitions on 4 October 2004:

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

1. We note from our perusal of the title documents that the Conditions of Sale prohibit any alteration to the car park layout plan as approved by the Building Authority and registered in the Land Registry, except with the prior written consent of the Director of Lands. Please supply a certified true copy of the registered plan.
2. The Assignment was executed by the Vendor company under its common seal and signed by one director only. Please supply a copy of the Board Resolution provided for by the Articles of Association to prove due execution of the Assignment.
3. The Power of Attorney executed in 1977 appointed Samuel Siu lawful attorney of the Property. That Power contains no provision authorizing the attorney to assign the Property by way of gift. However, by an Assignment dated 25 March 1979 and registered by memorial no. 115789 the Property was disposed of by the attorney by way of gift. Please cure this defect in title.

The Vendor's solicitors sent the following replies by letter dated 10 October 2004:

1. The Vendor is not prepared to supply the car park layout plan since it does not affect title to the Property.
2. There is no need to supply the requested resolution since due execution was presumed by s. 23 of the Conveyancing and Property Ordinance, Cap. 219.
3. The root of title of the Property is the Assignment. Any deed or document before that date is irrelevant.

These replies were unacceptable to the Purchaser's solicitors who repeated the requisitions on 12 October 2004. The Vendor's solicitors responded on 20 October 2004 stating that they had answered the requisitions and would not entertain any further exchanges. On 28 October 2004 they sent a further letter reminding the Purchaser's solicitors of the completion date, and requesting a draft assignment for their approval.

The Purchaser's solicitors replied on 30 October 2004 saying that, in the absence of satisfactory replies to their requisitions, no draft assignment could be delivered. The Vendor's solicitors did not reply.

On 1 November 2004, the Purchaser's solicitors tendered a cheque for the balance of the purchase price, and an assignment duly executed by the Purchaser for completion on that date. The cheque and the assignment were returned by the Vendor's solicitors on instructions from their client. Completion did not take place.

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

On 2 November 2004, in reliance upon Clause 6, the Vendor's solicitors returned the cheque for the further deposit and paid HK\$100,000 to the Purchaser's solicitors, and requested return of all title documents. The Purchaser's solicitors wrote on the same day stating that the Vendor's actions evinced an intention not to be bound by the Agreement, and that the Purchaser intended to issue proceedings for specific performance and damages.

Questions:

- (a) Who is in breach of the Agreement? (14 marks)
- (b) What remedies, if any, are available to the Purchaser on the above facts? (6 marks)

Give reasons for your answers to (a) and (b) above.

Question 3 (20 marks)

You act for John Ho (“the Purchaser”) who signed a formal agreement (“the Agreement”) on 20 September 2004 to purchase from Howard Cheung (“the Vendor”) Flat D, 8th Floor, Handsome Mansion, 26 Fa Po Street, Kowloon, Hong Kong (“the Property”) for HK\$5 million. Completion is to take place on 10 November 2004. The Agreement was registered in the Land Registry on 15 October 2004.

The Vendor acquired the Property from his father, Patrick, under a Deed of Gift dated 4 April 2003. Patrick is still alive.

Clause 4 of the Agreement provides that the Vendor will give good title to the Property free from encumbrances. Clause 6 states that the Property is sold as it stands.

The Property includes an enclosed laundry area, with a concrete floor slab and windows set on top of a concrete parapet, which does not appear on the approved building plans of the Property.

On 22 September 2004, Hung Sang Bank obtained judgment against the Vendor for non-payment of a guarantee. A charging order nisi, obtained on 12 October 2004, was registered on 17 October 2004, and the charging order absolute was registered on 28 October 2004.

Questions:

- (a) What defects in title, if any, are revealed by the above facts? (10 marks)
- (b) What steps, if any, can the Vendor take to cure any defects identified in (a) above? (10 marks)

Give reasons for your answers to each of the above questions.

- (c) Shop B is leased to Henry Lee ("Lee"). Jake Fung, who owns the first floor, has complained to the OC that Lee has blocked off access to the rear of the Building by using the whole of the yard for storage purposes. The OC has taken no action on the complaint.

What action would you advise Jake Fung to take on the above facts?
(5 marks)

Give reasons for your answers to each of the above questions.

Question 5 (20 marks)

Charmaine Chung (“Charmaine”) is the registered owner of Flat 303 in Grand Court, Pokfulam, Hong Kong (“the Premises”). Grand Court was constructed in 1999. In March 2003, Charmaine orally agreed to let the Premises to her friend Teresa Fung (“Teresa”) for residential purposes only. Teresa went into possession on 1 April 2003 and pays a monthly rental of HK\$20,000. Teresa has since made openings in the external wall of the Premises, and inserted windows in the openings, both without Charmaine’s consent.

On 1 September 2004 Fiona Lam (“Fiona”) signed a binding preliminary agreement in the office of an estate agent Edward Lee (“Edward”), to purchase the Premises. Completion is set for 12 November 2004. Under the preliminary agreement, vacant possession of the Premises will be given upon completion.

Acting as Charmaine’s agent, Edward informed Fiona that on 5 July 2004 a Form CR 101 was given to Teresa’s 22 year-old sister, Jessica, who lived in the premises with Teresa. The CR 101 stated that Teresa’s tenancy would terminate on 1 November 2004. Edward told Fiona that since Teresa had not replied to the notice, she had no right to stay on in the Premises after 1 November 2004. Fiona was content with this since she did not intend to move into the Premises until 1 December 2004. Unknown to Charmaine or Edward, Teresa was working in Canada on 5 July and does not return to Hong Kong until 5 November 2004.

Form CR 101 was completed and signed by Edward. In the paragraph for opposing a new tenancy, Edward inserted the statement: “the tenant will not be granted a new tenancy since the landlord wishes to live in the flat herself.” The form was signed by Edward “as agent of the landlord”. The form was accompanied by a letter which stated Charmaine’s name in full and recited the fact that Edward was acting as Charmaine’s agent in serving Form CR 101 in accordance with the Landlord and Tenant (Consolidation) Ordinance, Cap.7.

Questions:

- (a) **Can Teresa apply to the Lands Tribunal under the Landlord and Tenant (Consolidation) Ordinance (Cap 7) for a new tenancy on the above facts?**
(12 marks)
- (b) **On what grounds, if any, may Fiona oppose the grant of a new tenancy to Teresa?**
(6 marks)
- (c) **Would your answers to (a) and (b) above be any different if Teresa were using part of the Premises as a hairdressing salon?**
(2 marks)

Give reasons for your answers to each of the above questions.

END OF TEST PAPER