

**2009 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

HEAD I: CONVEYANCING

Thursday, 29 October 2009



HEAD I: CONVEYANCING

TEST PAPER

29 October 2009

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.
ANSWER ANY FOUR QUESTIONS ONLY.**
- 4. You must write your answers to each question in a separate answer book.**
- 5. IF YOU ATTEMPT MORE QUESTIONS THAN YOU HAVE BEEN INSTRUCTED TO ANSWER :**
 - (a) THE EXAMINERS WILL MARK ALL QUESTIONS THAT HAVE BEEN ATTEMPTED AND NOT DELETED; AND**
 - (b) IN COMPUTING YOUR FINAL MARK, THE EXAMINERS WILL COUNT THE MARKS FOR THE NUMBER OF QUESTIONS THAT YOU WERE INSTRUCTED TO ANSWER TAKING INTO ACCOUNT THE ANSWERS WITH THE LOWEST SCORES.**
- 6. 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.**
- 7. An examiner will be present for the first 30 minutes of the examination. Any questions relating to the paper must be raised in that period. Questions raised after the first 30 minutes will not be entertained.**
- 8. Do not take either this question paper or any answer books with you when you leave the examination room.**

2009 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

Victor Vong ('Victor') agreed orally to sell a residential flat known as Flat 6 Hibiscus Court, 6 Western Road, Hong Kong (the 'Property') to Paul Poon ('Paul') for HK\$7 million with completion on 2 November 2009. Paul paid Victor a deposit of HK\$70,000 and Victor gave Paul a receipt which states:

Received from Paul Poon a deposit of HK\$70,000 in connection with the sale and purchase of my flat for HK\$7 million.

Victor also agreed to give vacant possession on completion and to give and show good title to the Property. Victor and Paul each instructed solicitors to act and Victor's solicitor wrote the following letter to Paul's solicitor:

I act for Victor Vong who has agreed orally to sell Flat 6 Hibiscus Court, 6 Western Road, Hong Kong to Paul Poon with completion on 2 November 2009. I enclose a draft agreement for sale and purchase.

The letter is not marked 'subject to contract'. Victor's solicitor signed the letter. However, neither Paul nor Victor signed the agreement for sale and purchase.

Questions:

1.1 If Victor now refuses to sell to Paul, can Paul enforce the oral agreement against Victor?

(18 marks)

1.2 Assuming that Paul can enforce the oral agreement, what are Victor's and Paul's obligations in relation to the transaction under the Stamp Duty Ordinance Cap.117?

(7 marks)

Give reasons for all your answers.

Question 2 (25 marks)

Wealthy Ltd developed a block of 40 residential flats on Lot 987. The block is called 'Wealthy Gardens'. Alvin bought one equal undivided 40th share of and in Lot 987 and of and in Wealthy Gardens together with the right to the exclusive use of Flat 1.

Wealthy Ltd and Alvin then executed a Deed of Mutual Covenant for Wealthy Gardens (the 'DMC'). The DMC contains, in addition to other terms, covenants by all owners of undivided shares:

- that they will not allow their exclusive use areas to fall into disrepair; and
- that they will not use the flats for any purpose other than residential purposes; and
- that they will not use any contractor other than Wealthy Ltd to carry out any repairs, improvements or decorations in or to their exclusive use areas.

The DMC also provides that each owner has the right to the exclusive use of the flat allotted to their parcel of undivided shares. The DMC was registered in the Land Registry.

Alvin then charged Flat 1 by way of legal mortgage to M Bank Ltd. Wealthy Ltd sold the remaining 39 flats to individual purchasers who each bought one equal undivided 40th share of and in Lot 987 and of and in Wealthy Gardens together with the right to the exclusive use of a particular flat.

Questions:

2.1 M Bank Ltd is about to enter into possession of Flat 1 under its legal charge and requires advice as to whether the above DMC covenants can be enforced against it. Advise M Bank Ltd.

(15 marks)

2.2 If M Bank Ltd, under the powers contained in the legal charge, takes possession and grants a lease of Flat 1 to Tony, can the DMC covenants be enforced against Tony?

(5 marks)

2.3 Can Wealthy Ltd enforce the DMC covenants against any of the flat owners?

(5 marks)

Give reasons for all your answers.

Question 3 (25 marks)

On 20 August 2009 Peter as purchaser entered into a binding Agreement for Sale and Purchase (the 'Agreement') to buy Flat 15A Hibiscus Court and the roof above Flat 15A, (Flat 15A and the roof above it are together referred to as the 'Property') from Vera as vendor. Completion is due to take place on 14 November 2009. The Agreement is substantially in the form set out in Form 2 of the Third Schedule to the Conveyancing and Property Ordinance Cap. 219 but Clause 12 of the Agreement provides as follows:

The Vendor gives no warranties that the Property complies with the Buildings Ordinance Cap.123 or the Building Regulations. The Purchaser has inspected the Property and accepts in all respects the physical state, condition and finishes of the Property and the Purchaser shall not be entitled to raise any requisition or objection or to rescind this agreement or to annul the sale or to claim any compensation or damages from the Vendor in connection therewith.

Before signing the Agreement, Peter inspected the Property with Vera. Vera showed Peter the access to the roof above Flat 15A via a spiral staircase leading from the living room of Flat 15A. On the roof there is a small structure covering the staircase opening.

The title deeds were delivered to Peter's solicitor on 25 August 2009. Peter's solicitor raised requisitions on title on 26 August 2009 and Vera's solicitor replied satisfactorily on 28 August. However, after receiving a report from Peter's architect, who advised that the spiral staircase and the roof opening above the spiral staircase is not shown on the approved building plans, Peter's solicitor sent the following requisition to Vera's solicitor on 10 October 2009.

Please send us evidence that the consent of the Building Authority was obtained to the construction of the spiral staircase leading from the living room of Flat 15A to the roof above Flat 15A and the structure on the roof.

On 11 October 2009 Vera's solicitor replied as follows:

Vera drew Peter's attention to the spiral staircase when he inspected the Property. In addition your attention is drawn to clause 12 of the Agreement. Accordingly we are not obliged to reply to this requisition. However, Vera wishes us to point out that the spiral staircase was present when she bought the Property in 1990.

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

Questions:

3.1 Can Peter refuse to complete the purchase? (18 marks)

3.2 If the sale and purchase is completed by an assignment and Peter discovers after completion that the roof structure breaches the height restriction in the Government Lease, are any remedies available to him?

(7 marks)

Give reasons for all your answers.

Question 4 (25 marks)

On 20 October 2009 Adam Au (the 'Vendor') entered into a provisional agreement to sell Flat 1 Windy Court, 1 Windy Road (the 'Flat') to Boris Bui (the 'Purchaser'). The Purchaser did not inspect the Flat before signing but the Vendor told the Purchaser that the sale was subject to a written lease for a term of two years. The lease contains an option to renew for a further term of one year at the same rent. The Purchaser spoke to the tenant under the lease over the telephone and assured him that he would honour the lease and the option. The Vendor also told the Purchaser that the Flat has a floor area of 1,000 square feet. A copy of the provisional agreement is attached. The Vendor and the Purchaser have each instructed a solicitor to act and Adam's solicitor has drafted a formal agreement.

The formal agreement contains the following clause:

This Agreement comprises all the terms agreed between the parties hereto and no warranty or representation express or implied is or has been made or given by the Vendor or any person on his behalf relating to the Flat before this Agreement. If any such warranty or representation express or implied has been made the same is withdrawn or deemed to have been withdrawn immediately before the parties entered into this Agreement.

Questions:

- 4.1 Advise the Purchaser whether to accept the above clause. **(7 marks)**
- 4.2 Neither the lease nor the option to renew is registered at the Land Registry. Advise the Purchaser whether he is bound by them. **(9 marks)**
- 4.3 Disregard Questions 4.1 and 4.2 when answering this question. The Vendor's solicitor sent the draft formal agreement to the purchaser's solicitor on 26 October 2009. The Vendor's solicitor has not yet produced the title deeds. The Purchaser wants to delay signing the formal agreement. Is the Purchaser obliged to sign the formal agreement on 28 October? **(9 marks)**

Give reasons for all your answers.

(See the next page for a continuation of Question 4)

Question 4

Provisional Agreement

THIS AGREEMENT is made on the 20 October 2009

Between

(1) The Vendor, Adam Au of Flat A, 3rd Floor, 47 Stubbs Road, Hong Kong;

And

(2) The Purchaser, Boris Bui of Flat 6A Red Gardens, 10 Prince Edward Road, Kowloon.

The Vendor and the Purchaser agree as follows:

1. The Vendor shall sell and the Purchaser shall purchase Flat 1 Windy Court, 1 Windy Road, Hong Kong (the 'Flat').
2. The purchase price is HK\$5,800,000.00 which shall be paid by the Purchaser to the Vendor in the following manner:
 - (a) HK\$58,000.00 on the signing of this agreement as initial deposit,
 - (b) HK\$522,000.00 on the signing of a formal agreement for sale and purchase on 28 October 2009 as the balance of the deposit,
 - (c) HK\$5,220,000.00 upon completion on 20 November 2009 as the balance of the purchase price.
3. The Flat is sold subject to a Tenancy Agreement dated 4 January 2009 between (1) the Vendor as landlord and (2) Terry To as tenant.
4. Should the Purchaser fail to complete the purchase in the manner herein contained the deposit shall be forfeited to the Vendor who shall then be entitled at his absolute discretion to sell the Flat to anyone he thinks fit and the Vendor shall not sue the Purchaser for any liabilities and/or damages caused by the Purchaser's default.
5. 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 and the Purchaser shall not take any further action to claim damages or to enforce specific performance.
6. The Purchaser will pay the stamp duty in connection with this transaction.

Signed *Adam Au*

Signed *Boris Bui*

Question 5 (25 marks)

On 1 April 2009 Polly as purchaser signed an agreement for sale and purchase in respect of a flat (the 'Flat') at Perfect Building (the 'Building') erected on Tuen Mun Town Lot No 839 in the New Territories (the 'Land'). The Land is held from the Hong Kong Government under Conditions of Grant No 409 dated 4 August 1958 (the 'Conditions of Grant') for a term of 75 years from 1 July 1898 with a right of renewal for a further term of 24 years less the last 3 days. The Conditions of Grant contain a restriction against alienation (the 'restriction against alienation') of the whole or any part of the Land before compliance with all conditions precedent contained in the Conditions of Grant.

Questions:

- 5.1 For how long can the interest under the Conditions of Grant be enjoyed?
(3 marks)
- 5.2 What interest, legal or equitable, is held under the Conditions of Grant?
(4 marks)
- 5.3 Will the sale of the flat to Polly be prohibited under the Conditions of Grant in view of the restriction against alienation? If not, when was the prohibition removed?
(3 marks)
- 5.4 Polly intends to borrow 70% of the purchase price on the security of a mortgage of the Flat. She will use her savings to pay 10% of the price and her mother will pay 20% of the price. Polly's mother will be living with her at the Flat after completion. On the basis of this information, what precautionary steps (if any) should Polly's intended mortgagee or its solicitor take?
(6 marks)

(See the next page for a continuation of Question 5)

- 5.5 The title deeds include an Assignment of the Flat dated 14 June 2006 from Good Profits Company Limited ('Good Profits') as vendor. The Assignment has been sealed with the common seal of Good Profits and signed by Nicholas Chan and Nicola Wong whose capacities are not stated.

The Articles of Association of Good Profits provide:

The seal of the Company shall be affixed in the presence of a person or persons authorized by the board of directors.

You act for Polly. Will you raise a requisition regarding execution of the Assignment by Good Profits?

(5 marks)

- 5.6 How would your answer to question 5.5 differ (if at all) if in the Assignment Nicholas Chan and Nicola Wong are described as directors but Good Profits is a company incorporated in the British Virgin Islands?

(4 marks)

Give reasons for all your answers.

END OF TEST PAPER