
2012 OVERSEAS LAWYERS QUALIFICATION EXAMINATION

HEAD I: CONVEYANCING

Friday, 2 November 2012



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TEST PAPER

2 November 2012

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.

2012 Overseas Lawyers Qualification Examination

Head I: Conveyancing

Question 1 (25 marks)

On 20 September 2012 Mr. Poon (the “Purchaser”) entered into a binding Agreement for Sale and Purchase (the “Agreement”) to buy Flat 12B, Bauhinia Court and the roof above Flat 12B (the “Property”) from Vicki Vong (the “Vendor”). Completion will take place on 14 November 2012. The Purchaser inspected the Property before entering into the Agreement and noticed that the roof above Flat 12 B is accessed by a spiral staircase leading from the Flat to the roof. The Purchaser is a first-time buyer.

The Agreement contains the following clauses:

12. *The Purchaser has inspected the Property and buys with full knowledge of all alterations and additions made to the Property and will not raise any requisition or objection or annul the sale or claim any compensation or damages from the Vendor in connection with any title defect caused by any alterations or additions to the Property which might breach the Buildings Ordinance Cap. 123 or the Deed of Mutual Covenant for Bauhinia Court (the “DMC”).*
13. *Subject to Clause 12, the Vendor agrees to give good title to the Property.*

Later the Purchaser’s surveyor advised that the spiral staircase was added after the approval of the building plans for Bauhinia Court and that the construction of the staircase required the consent of the Building Authority under the Buildings Ordinance. The construction of the spiral staircase might also breach Clause 23 of the DMC which provides ‘no owner will make any structural alterations to his flat’.

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

On 5 October 2012 the Purchaser's solicitor sent the following requisition to the Vendor's solicitor.

Please send us evidence that the consent of the Building Authority was obtained to the construction of the staircase as required under s 14 of the Buildings Ordinance and that there is no breach of Clause 23 of the DMC.

Relying on Clause 12, the Vendor's solicitor refused to reply to this requisition, but the solicitor said that the Vendor has not herself made any alterations to the Property.

Questions:

1.1 Advise the Purchaser whether he must complete the Agreement
(20 marks)

1.2 Assume that the Agreement does not include Clause 12, that the sale and purchase was completed by the Vendor assigning the Property to the Purchaser as beneficial owner and that the Purchaser discovers the breaches of the Buildings Ordinance and DMC after completion. Does the Purchaser have any remedy against the Vendor or anyone else?

(5 marks)

Give reasons for all your answers.

Question 2 (25 marks)

Sally owns Flat 19D, Villa Majestico (the “Flat”). On 1 September she had a meeting with Peter at which Peter agreed to buy the Flat for HK\$6.8 million. They also agreed that two window-type air conditioners would be included in the sale and that if the sale had not been completed by 20 October, then Peter would be entitled to occupy the Flat as licensee. This was because the lease of the flat that Peter was then renting would expire on that date.

Sally then wrote to her solicitors telling them of the terms of the agreement and asking them to deal with the sale. This letter did not, however, refer to the air conditioners or to the possibility of Peter being granted a licence from 20 October. Sally’s solicitors prepared a draft contract and submitted it to Peter’s solicitors under cover of a letter labelled ‘subject to contract’.

On 17 October, Tina offered Sally HK\$7 million for the Flat. Sally accepted and her solicitors informed Peter’s solicitors that they had been instructed that their client no longer wished to proceed with the sale of the Flat to Peter.

Questions:

2.1 Is there a contract for the sale of the Flat to Peter?

(5 marks)

2.2 Assuming that there is a contract, can Peter enforce it against Sally?

(12 marks)

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

2.3 Peter told Sally that he wanted to carry out internal alterations ‘in readiness for moving in on completion of the purchase’. Sally agreed and, on 11 October, she gave Peter the keys. His contractors then demolished an internal partition wall between the kitchen and living area. **Does this arrangement have any bearing on the question of whether or not the contract is enforceable by either party (assuming that a contract exists)?**

(8 marks)

Give reasons for all your answers.

Question 3 (25 marks)

Your firm acts for a married couple, Adam and Eve Pang (together the “Purchaser”) who last week entered into a binding Agreement for Sale and Purchase (the “Agreement”) with Jack So to purchase Jack’s flat in Shatin, the New Territories (the “Flat”). The Agreement is in the same form as Form 2 of the Third Schedule to the Conveyancing and Property Ordinance Cap. 219.

The title deeds relating to the Flat include the following:

- (1) Government Lease dated 22 July 1940 for a term of 75 years commencing from 1 July 1898 together with a right of renewal for a further term of 24 years less the last 3 days thereof.
- (2) Receipt on Discharge of a Charge (the “Receipt”) dated 1 April 2000 executed by the Thailand-based Bangkok Bank Limited (the “Bangkok Bank”) by its lawful attorney Mr. Ricky Chaiphom pursuant to a special Power of Attorney dated 30 April 1999 (the “Power of Attorney”) executed by the Bangkok Bank in his favour.
- (3) Assignment dated 8 August 2005 (the “Assignment”) by a former owner, Get Rich Company Limited, in favour of Jack So and sealed with the company seal of Get Rich Company Limited and signed by an Emily Chan whose capacity is not mentioned.

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

Questions:

- 3.1 What is the interest, an equitable interest or a legal estate, held by Jack So under the Government Lease? For how much longer will the interest last?**
(3 marks)
- 3.2 What investigations and enquiries will you make in connection with the Power of Attorney?**
(6 marks)
- 3.3 What investigations and enquiries will you make in connection with the execution of the Assignment?**
(6 marks)
- 3.4 What is the impact, if any, on Jack So's ability to sell the Flat with good title if he has mislaid the originals of the Receipt and the Assignment?**
(7 marks)
- 3.5 If, soon after completion of their purchase of the Flat as joint tenants, Adam Pang dies, can Eve Pang alone sell the Flat with good title? If so, what supporting evidence, if any, will she need to produce?**
(3 marks)

Give reasons for all your answers.

Question 4 (25 marks)

Elegant Gardens (the “Building”) is a block of 24 residential flats which was developed by Elegant Ltd. in 1996. Elegant Ltd. sold individual flats in the Building (each sale is a sale of undivided shares in the land and the Building together with the exclusive use of a particular flat).

In the first assignment of Flats 1 and 2 to Alex Au, Elegant Ltd. reserved to itself the right to the exclusive use of all flats except Flats 1 and 2. After the first assignment, Elegant Ltd. entered into a Deed of Mutual Covenant (the “DMC”) with Alex Au and the manager of the Building, Best Management Ltd. Elegant Ltd. completed all subsequent flat sales and made the assignments ‘subject to and with the benefit of the DMC’.

The DMC does not contain any description of the common parts of the Building. The DMC provides that the building manager will enforce the DMC on behalf of the owners. The DMC contains the following covenants:

- (1) Every owner will pay monthly management charges in respect of his flat.
- (2) No owner will make any structural alterations to his flat.
- (3) No owner will make any alterations to the common parts of the Building.

The DMC also provides that the building manager can register a charge against the undivided shares of an owner to secure payment of unpaid management fees.

In 1998 the owners of the Building incorporated under the Building Management Ordinance Cap. 344.

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

Questions:

- 4.1 Flat 3 is owned by Barry who has failed to pay the monthly management charges for three months. **Can Covenant (1) be enforced against Barry? If so, explain the methods by which the Incorporated Owners of Elegant Gardens (the “IO”) can enforce payment against Barry.**
- (8 marks)**
- 4.2 Cary, who owns Flat 4, has cut the external walls of his flat to enlarge the windows. Many other owners have done the same and no action has been taken against them. However, Cary has created windows that are significantly larger than those belonging to other owners and the IO want to obtain an injunction against Cary to force him to reinstate the external walls. **Advise the IO.**
- (10 marks)**
- 4.3 Derek, who bought Flats 1 and 2 from Alex Au, has demolished the internal non-loadbearing partition wall separating Flats 1 and 2. **Has Derek breached the DMC?**
- (7 marks)**

Give reasons for each answer.

Question 5 (25 marks)

On 3 October 2012 Sam So (“Sam”) and Paula Poon (“Paula”) entered into a preliminary agreement in English only (the “Agreement”), a copy of which is attached, whereby Sam agreed to sell Paula his residential flat known as Flat 10, Blue Gardens, 10 Blue Road, Hong Kong (the “Flat”) for a consideration of HK\$6,000,000. Paula has not inspected the Flat, but the estate agent who introduced the parties has given Paula details of the floor area.

Sam has a mortgage on the Flat in favour of the Goodwill Bank Ltd. (“Goodwill”). This will be discharged on completion. The purchase will be financed by a loan from the East West Bank Ltd. (“East West”) which will take a legal mortgage over the Flat.

Questions:

5.1.1 The draft formal agreement prepared by Sam’s solicitors 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 Property 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.

Explain the effect of this clause in this case and advise Paula whether to accept or reject it.

(5 marks)

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

5.1.2 Neither the Tenancy Agreement nor the Option to Renew referred to in Clause 5 of the Agreement is registered at the Land Registry. **Is Paula bound by the Tenancy Agreement and the Option to Renew?**

(5 marks)

5.1.3 Assume that the parties did not sign a formal agreement, but that neither party alleges a breach of the Agreement on this ground. Assume that Paula has paid the further deposit as required by Clause 2b of the Agreement. **If Paula subsequently fails to complete the Agreement on the completion date, what remedies are available to Sam?**

(5 marks)

5.1.4 Paula plans to nominate Poon Properties Ltd. to take up the assignment on completion. Paula owns the whole of the issued share capital in Poon Properties Ltd. **Explain Paula's stamp duty liability on the Agreement and the nomination.**

(4 marks)

5.2 Assume that a formal agreement is not signed, but that the sale and purchase is completed by way of undertaking. You act for Paula, Poon Properties Ltd. and East West. You have prepared a legal mortgage by Poon Properties Ltd. in favour of East West. Poon Properties Ltd. has executed the mortgage and you have drawn down the loan. You hold the mortgage.

On the day of completion you send the balance of purchase price (in split cheques payable to Goodwill and Sam) to Sam's solicitors on their undertaking to return within 21 days the assignment in favour of Poon Properties Ltd. executed by Sam and the discharge from Sam's mortgage executed by Goodwill.

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

There is a delay and after 30 days you have not received the documents from Sam's solicitors. **Explain the problems caused by the delay and the action that you should take to protect the interests of Poon Properties Ltd. and East West.**

(6 marks)

Give reasons for each of your answers.

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

Provisional Agreement for Sale and Purchase for Question 5

THIS AGREEMENT is made on 3 October 2012

Between

- (1) Sam So of 6, Prince Gardens, 6 Prince Road, Hong Kong (the “Vendor”) and
- (2) Paula Poon of 5, Rose Gardens, 5 Rose Road, Hong Kong (the “Purchaser”)

The Vendor and the Purchaser agree as follows:

1. The Vendor shall sell and the Purchaser shall purchase Flat 10, Blue Gardens, 10 Blue Road (the “Property”).
2. The purchase price is HK\$6,000,000 which the Purchaser will pay to the Vendor in the following manner:
 - (a) HK\$60,000 on the signing of this agreement as initial deposit,
 - (b) HK\$540,000 on the signing of a formal agreement for sale and purchase on 15 October 2012 as further deposit,
 - (c) HK\$5,400,000 on completion on or before 3 November 2012 as the balance of the purchase price.
3. Should the Purchaser fail to complete the purchase in the manner herein contained the initial deposit shall be forfeited to the Vendor who shall then be entitled at his absolute discretion to sell the Property to anyone he thinks fit and the Vendor shall not sue the Purchaser for any liabilities or damages caused by the Purchaser’s default.

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

