

**PCLL Conversion Examination**  
**4th January 2010**  
**Examiner's Comments**  
**Commercial Law**

**The Standard of the Examination**

On a general note, candidates who failed in this paper did not analyze the facts in detail, or apply the relevant law to the questions. Furthermore, a number of candidates seemed to rely upon prepared answers which were simply copied without any analysis of whether the question called for the prepared answer at all. For example, with respect to question C which involved a bank taking security, many candidates discussed money-lending and other topics, and the registration of the bank, neither of which arose at all in the question.

In many cases candidates who failed did not even attempt to answer the more difficult parts of the questions and therefore left gaps in their answers for which it was not possible to award any marks at all. Other students failed to identify the difficult points of law rose in the particular questions and assumed that a general "broad brush" approach would suffice. The key requirement for the paper is to (a) identify the relevant legal issues, (b) state concisely the law which applies, and (c) hazard a conclusion on the legal position. In some instances, the precise position may be arguable or unclear and it is sufficient to reason to a conclusion.

This exam is set to assess candidates who seek to apply for PCLL .As such, it is expected that candidates will demonstrate a sound working knowledge of the basic principles of commercial law to the standard achieved in the LLB courses in the 4 year LLB programme in the universities in Hong Kong. It is also expected that students will demonstrate the equivalent standard of problem –solving skills in answering Commercial Law questions. No marks were deducted for poor English or writing skills However in a few cases it was not possible for the examiners to follow the narrative of the scripts because the students wrote in such abbreviated and awkward styles of English and the pages did not follow logically. Students are reminded to ensure that the hand -writing itself and the style of English is accessible to the examiners, and we would encourage students to number their pages logically.

**Part A**

**Question 1**

Tom steals a vintage watch from Fred. Tom as a thief obtains no title to the watch and has at best a fragile possessory interest. Tom sells to Albert but he cannot transfer any title to Albert since the nemo dat rule applies: section 23 SOGO. Thus Albert obtains no title. Albert is thus liable for conversion at the suit of Fred. Albert who is a pawnbroker sells to Felicity at a very low price. Candidates should have discussed sale in market overt (SOGO section

24 which is peculiar to Hong Kong since the equivalent section has been repealed in other jurisdictions) and examined whether it was a “good faith purchase”. Some candidates mistakenly thought that the seller in possession exception applied: *National Employers’ Mutual General Insurance Association v. Jones*. Felicity obtains only a voidable title since the cheque is not met on presentation. Does Albert do enough to “avoid” the title? *Car & Universal Finance Co v. Caldwell*; *Newtons of Wembley* etc – if so, F has no title to pass to Bill – if not, F can make title to Bill – what price was the sale? Bill “gives” the watch to Ethel. Candidates should have discussed the elements of a gift and constructive delivery – what is the subject matter of the gift?

#### Question 2 – “Hong Kong Organic Fruit”

The following issues arise: Is this a sale by sample? Yes, seems to be: SOGO section 17. If so, does the sample conform to the bulk? The sample seems to conform after testing. Is it a condition of the contract, and part of the description, that the goods are in 50 gm bottles? Yes – *Re Moore & Co Ltd and Landaue and Co’s* and *Arcos v. Ronaasen* – so would probably give a right to reject – but goods supplied have been consumed – could reject three remaining bottles. Is it a condition that the pears are from Hunan? Yes – breach of condition as to description – what loss flows? Are the goods fit for the specific purpose of making a dessert? They can be used for a desert but are not so good – also cheaper – Are the goods merchantable according to the description and the price? They are pears but pears from Hainan, not Hunan – also used for a purpose but cheaper – What is the status of the oral representation – “best etc” – is it a mere puff or does it have contractual effect – What are the damages payable assuming breach? Seller is aware of the particular purpose for the pears – viz competition – is the damage too remote? Is it of a kind contemplated at the time of the contract?

### **Part B**

#### Question 1

Students did well on this question as they demonstrated a detailed knowledge of the law relating to possession of title, the position of a finder and the degree of control exerted by the owner over the entire premises. Students who failed this question ignored the relevant authorities and several seemed to copy a prepared answer which was not germane to the question. Cases which could have been discussed included *Parker v British Airways Board* and *Flack v National Crime Authority*. Weaker candidates also ignored the question of a chattel that is “affixed” to land. The better students discussed the main cases in detail and the ambiguities in the law relating to finders of property and legal title/

#### Question 2

This question was divided into 4 parts- students who failed made the following errors:

1. Many students failed to discuss section 15A of LARCO which is a statutory provision peculiar to Hong Kong designed to overcome the problems caused by the decision in *Re Charge Card*.

2. Weaker students did not discuss the equitable nature of the floating charge (as “treating as done that which ought to have been done”). They also failed to identify that a floating charge operates in equity over existing and future property initially as a matter of contract and then conveyance by way of with a constructive trust (*Re Lind*) which fixes upon the property in the hands of the chargor.

Many students explained the meaning of crystallization but were weak on the theory of the floating charge. There was a considerable difference in the quality of the answers to this part of the question and it may be that students have not spent enough time exploring the theoretical nature of the fixed and floating charge in the context of modern commercial law.

3. Ms has sold under retention of title clause and therefore no title has passed to KW and no widgets are caught by the charge, Big Bank may be liable in conversion if it does not return them on demand to MS. Most students spotted the retention of title clause but spent too long talking about mixed goods and the problem of “tracing”. In other words students tended to spend too long on this part of the question and not enough time on questions 1 and 2 above presumably because they felt more confident on retention of title clauses than charges

4. The weaker students failed to identify AM’s lien over the machines which it had taken in for repair, and most did not discuss the operation of the lien. Better candidates analyzed the possessory nature of the retaining lien, and discussed whether or not it would take priority over the charge

### **Part C**

**Q.1** This was a straightforward question requiring students to demonstrate a clear understanding of the *Control of Exemption Clauses Ordinance*, (“CECO”), the *Sale of Goods Ordinance*, (“SOGO” ) and the *Unconscionable Contracts Ordinance* (“UCO”) and to analyze Clause 3 of the Seller’s Invoice closely under the common law *contra proferentem* rule.

Did the clause even become a part of the contract? This is strictly construed against seller of the goods. Assuming that it has become part a part of the contract then Bobby must rely on CECO and SOGO.

Bobby is a consumer under section 4 CECO .Most students noted the significance of CECO section 11 (2) restricting seller from excluding SOGO sections 15, 16 and 17.

- Is the sofa of merchantable quality? Probably yes as it is entirely “useable”
- Is it a sale by description as an Italian made sofa? Yes under SOGO section 15 (sale by description)
- Is it fit for use as implied under SOGO section 16? Yes and note that the sale is by way of is the showroom sample itself so there is no issue under SOGO section 17.

- Is the contract unconscionable under UCO? Probably not see UCO section 6 for a non-exclusive list of what is reasonable in the circumstances such as the relative bargaining power of the parties. Note also the bright red print and no attempt to hide clause 3 in any way on invoice.

Some students, however, wasted their time discussing the tort of deceit and showed a complete lack of understanding of the law relating to consumer protection in Hong Kong law. Marks were deducted for this elementary error. .

## Q 2

This question was loosely based on *Oriental Pearl v Bank of Taiwan* in which the contract purported to exclude civil liability. This is a long and detailed question in which students were expected to demonstrate a clear understanding of the law relating to the exclusion of liability in the context of business contracts.

Clause 6 purports to exclude business liability and negligence and has been incorporated in a standard written contract used by the parties for the past 4 years. Note *L'Estrange v Graucob* and *Parker v South Eastern Railway* – such terms are incorporated if the other party is aware of the clause.

Key issues included a discussion of the some of the following points;

1. Is this a supply of services under *Supply of Services Ord*, (SSO?)

- See section 3 SSO -a contract under which a supplier agrees to carry out a service. Bobby is not a consumer so the court will not have to consider section 8 which directly prohibits exclusion or restriction of liability for breach of contract for consumer. Instead this is an implied term that supplier will carry out services with reasonable care and skill
- Section 3 CECO it is for the court to decide what is “fair and reasonable” and the test of reasonableness is set out in Schedule 2

2. Does CECO apply? See *L'Estrange v Graucob* and *Parker v South Eastern Railway* and note that such a term is incorporated if other party is aware of the clause.

- This is a non-consumer sale falls under section 57 SOGO
- Must be reasonable - any exclusion as to compliance with description/ quality/ or fitness and correspondence IS subject to reasonableness

3. Is HK law the governing law? Section 17 CECO- If yes, court will apply section 7 if negligence liability is excluded; Section 8 CECO if breach of contract, section 9 - unreasonable indemnity

4. Section 7 CECO exclusion of negligence for business liability -Is this a business yes under section 2(3) and (3).This is not an exempted supply contract under section 16 and the contract is not excluded by Schedule 1 CECO

5. Some students commented that UCO does not apply because Bobby is not a consumer and noted *Shum Kit Choi* and the relationship between Bobby Chan and the Company, *Almay Win v Auto Fort*.

## **Q.2**

### Part 2

Does GTC owe a duty of care to Bobby? This is a supply of services under SSO and under SSO section 5 the parties owe a duty to act with reasonable care and skill.

Key issues included the application of section 4 CECO as Bobby is in the course of business and is bound by the clause.

But is Clause 6 effective? See Schedule 2 CECO on how to apply CECO test section 3. Students were expected to discuss section 3 CECO and highlight its application to the facts. To apply section 3 CECO see CECO schedule 2 and note

### **5 points**

- Bargaining power
- Inducement to agree the term
- Should the customer reasonably have known about the clause
- Does the term exclude any relevant liability if some condition not complied with?

The better students highlighted the appropriate facts that the court would apply for the reasonableness test.

The weaker students did not understand the significance of Schedule 2 CECO and failed to analyze the relevant sections of CECO in the context of business.