

PCLL Conversion Examination
January 2011
Examiner's Comments
Commercial Law

The level of English was good and the presentation of the scripts themselves with almost all students writing legibly. Only one student wrote in pencil and only three students scribbled all over their papers with disjointed sentences, cross-referencing and repetition of points.

On a general note, I am pleased to note that students appear to have taken to heart the specific comments in the June 2010 First Examiner's Report in respect of Part B. Students have been encouraged to read around the topics in the Part B syllabus and not to rely on "old notes" from their earlier student days. The results of the Part B exams are therefore particularly encouraging.

The questions in Part A (Sale and Acquisition of Goods) and Part C (Consumer Credit and Protection) usually involve more accessible and generally familiar legal topics that students find easier to understand and read about for themselves. However more students failed in Part C than was the case in January and June 2010 and only a few even attempted Question 2 in Part C on the Hong Kong law relating to misrepresentation.

Part 1 of this Report focuses on the Examiner's General Comments on aspects of the questions in Parts A, B and C that students found most difficult. Part 2 sets out the Examiner's Marking Guide for Students.

Part 1 Examiner's General Comments

- **Part A (Sale and Acquisition of Goods)**
Students seemed comfortable with Question 1 in Part A and the results speak for themselves. Those students who failed in Part A tended to have chosen Question 2 which contains a longer fact pattern and more detail for students to analyze. Many mismanaged their time by repeating large parts of the longer Question 2 to the examiner and also missed essential parts of the question when solving the problem for Tom.

- **Part B (Personal Property)**
From past experience with the January and June 2010 Part B scripts, Part B, in and of itself, is clearly a more difficult and complex syllabus than those of Part A and Part C. The majority of students attempted Question 2 on property rights rather than Question 1 on security rights. Those students who attempted Question 1 on Big Bank and Cronix Limited failed to spot the issues or mismanaged their time. Question 1 was conceptually harder than Question 2 and these accounts for the few number of candidates who attempted to answer Question 1.

- Part C (Consumer Credit and Protection)

Almost all students attempted Question 1 on the possible application of the *Control of Exemption Clauses Ordinance* (cap 71) and problems of exclusion clauses generally with very few attempting Question 2 on the *Misrepresentation Ordinance* (cap 284).

In Part C some students misunderstood or entirely misread the question which they had chosen. They therefore failed to spot almost any of the relevant issues when attempting the question. Some of these students also spent too much time reciting the facts of the question.

Part 2 Examiner's Marking Guide for Students

- Part A: Sale of Goods

Question 1

1. JW – is it a buyer in possession of the ring? It is taking on a “floor plan” – title will pass if section 27(2) SOGO is satisfied – the sale has effect as if JW was a mercantile agent specifically authorized to sell – presumably there is no knowledge of any “lien or other right of possession” in the original owner – price seems reasonable.
2. Tom buys and obtains a voidable title – he will be able to make title to a buyer from him provided that he does so before the title is avoided.
3. Tom has sold to Peter, apparently bona fide – difference in cash price (50,000 60,000) does not seem significant.
4. Peter gives the ring to Molly – Peter has title to it and so can make a valid gift of it.
5. Section 25(2) of LARCO provides that a gift of an engagement ring is subject to a rebuttable presumption that it is an absolute gift – may be rebutted if expressed or implied condition that the ring may be recovered – not clear here whether there is any implied condition.

Question 2

1. Question of implied terms as to fitness for purpose, sale by description and merchantability.
2. Does Tom make known a specific purpose (drain muddy water at Yuen Long)? Is Tom an expert and thus not entitled to rely upon the expertise of the vendor? Is Fred's response an acceptance of contractual liability?
3. What of the piping? There is an express term that the product be packaged in a particular way (12 pieces in box of 3) – *Moore and Landauer* and *Arcos v Ronaasen* suggest that this is a strict condition – are these decisions still applicable today – probably yes because there is a real commercial reason for the requirement.
4. The Scantravator is sold and described as a Mark 3 but has a Mark 2 funnel attached. Is this a breach of description?
5. Does Tom affirm the contract – SOGO section 35 – we are not told how long after it arrives that he discovers the mis-description – he keeps using it for two plus weeks – if

he has affirmed he may be reduced to suing only for breach of warranty (section 55) and not entitled to rescind.

6. Apex is a seller, HKS is a buyer in possession – Tom has taken bona fide and for value – no suggestion of any retention of title - “bailee” not a term of art here– did Tom buy from HKS as if it were a mercantile agent – yes?
7. If no title, then Tom could sue for breach of section 14 - breach of condition as to title - *Rowland v Divall* and recover the full purchase price.
8. Damages – he has lost a lucrative contract – *Hadley v Baxendale* rules one and two -

- Part B – Securities

Question 1

Issues:

1. Charge by Alice over deposit - *Re Chargecard* - section 15A LARCO
2. Lien over Bagmaker exercised by Kowloon Electronics - possessory security - lost by use of the machine? Who has priority over floating charge?
3. "Purchase note" - not a negotiable instrument - nor a retention of title - merely a contractual entitlement to call for delivery - breach sounds in damages - no proprietary interest created - *Re Goldcorp* - *Re Wait* - *Re London Wines*
4. Floating charge generally - operates in equity to secure future property - entitlement depends upon crystallisation.

Question 2

1. Right of finder v occupier - gold coin stuck to wall - degree of annexation - is it a fixture? possessory title to chattels relative - *Armory v Delamirie* - *Bridges v Hawkesworth* - *Parker v British Airways* - *Flack v National Crime Authority* -
2. Delivery to Bob - bailment - gratuitous - duty of care on Bob? Treat the goods with the same care as if they were his own -
3. Right of Amy as finder - duty to report discovery to police? (Theft by finding?) - Delivery to Monte's Jewellery - general v specific lien - no usual general lien -

- Part C – Consumer Protection

Question 1

This question required students to understand the objectives and the limits of *The Control of Exemption Clauses Ordinance* (cap71) and the *Unconscionable Contracts Ordinance* (cap 458)

Many students did not fully appreciate the limits of the 2 Ordinances and simply recited sections without any application of facts. The better students spent some time analyzing whether this is a business to business contract or a consumer contract and identified correctly that this problem does NOT involve an exclusion clause for negligence or personal injury or death. Students who failed also spent too much time listing out the sections in the *Unconscionable Contracts Ordinance* rather than applying the facts.

1. Have the conditions relied upon by FED been incorporated into the contract of carriage between FED and Miss Tung?
 - a) It is necessary that the conditions be brought to the attention of Miss Tung at the time of or before she signs the contract.
 - b) It is NOT necessary that Miss Tung should have read the conditions or that she should have been made subjectively aware of their legal effect.
 - Did FED do what was reasonably sufficient to give other party notice of the conditions
 - AND was Miss Tung AWARE that there was writing or printing on the back? If yes ,then the terms on back have been incorporated as terms of the contract
2. If she DID not know there were any conditions she would not be bound.

If she knew of their existence IS bound and on her own admission she was aware of the facts that there was printing on back of Contract and Airway Bill
“The existence of terms and conditions on the back of the contract and airway bill were drawn in a general way to her attention.” “She did not bother to read them”
If a business person chooses to conduct himself/herself in such a way that he or she does not understand the terms of his contract is immaterial and contract is binding.
3. What is legal position of a party who cannot read English when terms are in English only?
 - a) “Even if she had read them, would not have understood them since she cannot read English.” Immaterial
 - b) On the facts there are no allegations of duress/or *non EST factum* or mistake
 - c) .This is a standard business contract of the usual sort with no unusual or harsh characteristics – there is no question of unconscionability
4. Effect of Clause 1 in Contract and Airway Bill?

Clause 1 makes Miss Tung and Taiwan Recipient jointly and severally liable.
Therefore FED entitled to seek reimbursement from Miss Tung and is NOT obliged to pursue Taiwan customer first.

5, Are 2 identical sets of conditions completely unenforceable by reason of *The Control of Exemption Clauses Ordinance* (cap71)?

The COE does not render invalid or unenforceable all unreasonable terms in contract .It ONLY deals with the enforceability of exemption clauses which seek to exclude a party for breach of contract or for negligence. The clause which FED relies on seeks to impose liability on Miss Tung for payment of transport charges in return for transporting goods .The COE does not apply.

Question 2

This question requires students to look at the law relating to innocent and negligent misrepresentations. The better students also discussed remedies under the *Misrepresentation Ord* (cap 284).

1.

a) Representations can be made

- Verbally (showing the property twice)
- By conduct (in coffee shop)
- In writing (probably not as document from Government says subject to conditions – ambiguous)

b) Is this a “material” representation? Yes, “commercial use” goes to value of property as a restaurant, supermarket, health club etc

2. Why and how is it a representation?

The word “could” is highly ambiguous

– does it mean that it can be in the future after Government permission has been granted or does it mean it can be/ might be used for commercial use in the future by anyone who purchases property?

On first viewing of property Vendor has made a verbal representation using the word “could”.

If the Purchaser understood this to be the second meaning, the later discovery of the fact that the Government still has to approve the change of use makes this verbal representation untrue at the time of making it.

3 *Redgrave v Hurd* (1881) 20 Ch D Jessel MR

If a material representation is calculated to induce a person to enter into a contract it is an inference of law that he was INDUCED by the representation to enter into it.

4. Does Purchaser have to PROVE that if the misrepresentation had not been made he would NOT have made the contract? NO it is sufficient if he can show that his decision was materially influenced by the misrepresentation.

[See *Green Park Properties Ltd v Dorku Ltd* [2000] 2 HKLRD 400]

5. Is there any duty on Charles as representee to check facts for himself?

Or is there a duty to exercise due diligence?

If it can be proved that Charles had knowledge of the facts or he stated clearly in terms or by his conduct that he did not rely on the representation he cannot claim rescission. But if he has no knowledge that statement was untrue – no duty to find out- and no contrary facts to raise suspicion?

[See *Redgrave v Hurd*]

6. What is effect of Clause 13 of Standard Provisional Sale and Purchase Agreement?

See Section 4 *Misrepresentation Ord* (cap 284).

Any clause that excludes or restricts any liability to which a party to a contract may be liable because of a misrepresentation made before the contract was made etc shall have no effect unless it satisfies the requirement of reasonableness under section 3(1) COE (cap 71)

Clause 3 (1) deals with requirement of reasonableness - court or arbitrator must determine that the clause was fair and reasonable in all circumstances.

Probably very UNFAIR and UNREASONABLE for a Purchaser to ask questions of a Vendor and then to have a clause negate all responsibility for information given before contract signed.