

PCLL Conversion Examination
June 2010
Examiner's Comments
Commercial Law

The standard of the candidates' scripts was generally much higher than the January 2010 scripts that I had the opportunity of marking and reviewing. The number of fails in Part A and C is impressively low.

In addition to this impressive majority in relation to Parts A and C a large majority of candidates must also be congratulated for spotting the legal issues precisely and presenting coherent legal arguments in a succinct and accurate manner in Part B of this Commercial Law exam. There was also a noticeable improvement in the level of English and the presentation of the scripts themselves with almost all students writing legibly in a clear English style.

Comments on Part A (Sale and Acquisition of Goods) and Part C (Consumer Credit and Protection)

Some candidates who failed in Parts A and C did not even attempt to answer a question or mismanaged their time so that they failed to spot almost any of the relevant issues. On the whole the questions in Part A (Sale and Acquisition of Goods) and Part C (Consumer Credit and Protection) involve more accessible and generally more familiar legal topics that students find easier to understand and read about for themselves. Most students were comfortable with these legal topics and the results speak for themselves

Part B (Personal Property)

Some of the students who failed in Part B also mismanaged their time which is, of course, a general problem for all students facing pressure under exam conditions. However in Part B some of the students were unable to answer the question satisfactorily because they did not understand the question or misread it or did not understand the point of the question which they had chosen. It may be that, quite simply, Part B is a more difficult syllabus for students to absorb with a more obscure focus with which students are not particularly familiar. Some students presumably are new to the topic in depth and may find it difficult to assimilate the legal issues involved in the short time available for studying for this particular exam. Students should perhaps be encouraged to read around the complex syllabus for Personal Property and not to rely on "old notes" from their earlier student days as this is clearly the most difficult area in the exam.

Part A: Sale of Goods

Question 1 (100 marks)

Tom buys a truck from Ace Trucks for HK\$80,000. Ace Trucks has a "floor plan" Arrangement for financing with Big Bank but Big Bank has never taken physical Possession of the trucks. Tom leaves the truck in the garage to his flat with the registration and other papers in the glove box. Fred steals the truck and, pretending to be

Tom sells it to Jack for \$60,000 at the Yuen Long “truck market” which is conducted every Sunday in Yuen Long. Jack drives the truck for a week and then sells it to Albert for \$70,000. Albert pays Jack by cheque and the cheque is dishonoured when Jack cashes it. In the meantime, Albert goes out drinking and loses the truck. He says to his friend, Bill, “Here are the keys – if you find the truck it’s yours”. Bill looks all over TST and finds the truck. Advise all the parties on claims they may have in relation to the truck.

This is a question about legal title to goods and the issue of physical possession and protection of the bona fide purchaser under the Sale of Goods Ordinance (SOGO).

Students were expected to identify the following points

Legal title passed to Big Bank with Ace Trucks keeping physical possession as Bailee – note Pacific Motor Auctions

Can a mere “seller in possession” sell the truck to a bona fide third party (Tom) under section 27 (1)?

Can Fred who steals the truck get any title to the truck and is there sufficient negligence on Tom’s part to create an estoppel?

When Fred the thief sells on the truck to Albert in market overt would section 24 protect Albert as bona fide purchaser? If Albert buys bona fide he gets title BUT note that this is very unclear as Albert’s cheque is dishonored –thus Albert may also be a crook

Assuming Albert has title he loses the truck to Bill on the basis that he makes a constructive delivery to Bill on condition that Bill finds the truck (Thomas v Times Books). It does not matter that delivery and intention are not contemporaneous and when Bill finds the truck the gift is arguably complete

However if we assume that Albert does not have title because of the dishonored cheque AND assuming Tom is a bona fide purchaser, Tom will have the best title in this chain of events

Question 2 (100 marks)

Manuel is a famous Hong Kong painter. He is very interested in entering the Hong Kong Art competition. He wants the very best paint. He goes to Frank’s Paint Shop and says to Frank: “I want you to help me – I need a special red effect for my painting of a sunset for the Art Competition and it must be top quality acrylic paint from Germany. I want 8 tubes of 250 mls because I don’t want to waste paint. I also need an easel”. Frank says, “No problems. May I recommend the “Prague acrylic” for you? It is \$400 for 100 mls; the other paint would probably be just as good but it is only \$200 per 100 mls.”

When the paint is delivered it is in 4 tubes of 500 mls. Upon inquiry, it turns out the paint is not from Germany but from the Czech Republic. The easel has in fact been stolen from the suppliers although Frank did not know this. Manuel uses 400 mls of the paint but it is rather runny for top quality acrylic paint. Two days after he has finished the painting it starts to crack but there is no time to repair the painting. He fails to win the Art Competition, and his reputation suffers badly. He wants to sue Frank. Advise him.

This is a question about implied terms in the Sale of Goods Ordinance and all students were familiar with the fundamental concepts.

Students were expected to identify and discuss

Issues of merchantable quality

The problem of a “sale by description”

Whether Manuel relied on the skill of the seller?

Whether the seller gave a warranty for the paint under section 16?

The significance of *Arcos v Ronaasen* and *Moore v Landaue* in the context of the description of “8 tubes of 250 mls”

The expense of the paint and the problem of being “runny” and cracking

The problem of the easel and section 14 with no title passing to the seller

Hadley v Baxendale – is the loss of Manuel’s reputation too remote?

Part B: Personal Property

Question 1 (100 marks)

Tom is in Jane’s Bakery buying an egg tart when he sees a bracelet lying just behind the Counter. Another customer, Jill, had accidentally dropped it earlier. Tom picks it up and Takes it to Sam’s Vegetable Store where he says to Sam: “I want a large box of your best Leeches in return for this bracelet; is that ok?” Sam says: “Sure” so Tom hands over the bracelet. Sam takes the bracelet and sees that the chain has come loose. Sam takes the bracelet to Jack’s Bracelet Shop where he has already had a pair of earrings repaired Although he has not paid for the repairs. He says to Jack, “Please repair this bracelet for me”. Jack repairs the bracelet and lets his wife, Emma, wear it to a fashion show she attends that night. The next day Sam comes to collect the bracelet but Jack says, “I am holding the bracelet until you pay me for the earring repair”. Jill has given up looking for the bracelet. Advise all the parties on claims which may arise.

This is a problem about ownership and personal property under common law and equity when the consumer protection provided by the Sale of Goods Ordinance cannot apply since no one involved is a consumer or business.

We are therefore examining the law on personal property law under the common law and equity without the advantage of any “modern” legislation when analyzing the fundamental problems inherent in the question.

Students were expected to identify and discuss:

Jill’s ownership of bracelet and whether Tom steals it by finding it or is he just a Bailee of bracelet?

Is Jane entitled to the bracelet as against Tom? She runs the shop and note *Parker v*

British Airways; *Flack v Crime Authority* on the question of Jane’s control

The problem of the nemo dat rule when Tom barter the bracelet to Sam and note that if Tom has no title then there can be no exception to nemo dat rule since we do not have SOGO to protect a consumer

Assuming Tom does have title as finder of the bracelet, and Sam gets good title what is the effect of the lien when Sam takes the bracelet to Jack? Jack will have a special lien over bracelet for cost of repairs but loses it when he allows his wife to wear the bracelet.

Sam had no general lien for all debts including the earrings.

Has Jill abandoned the bracelet? Is such abandonment even possible under the common law? Probably Jill will be able to reclaim it or to sue for detinue or conversion

Question 2 (100 marks)

Brush Manufacturer Ltd (“BM”) is a customer of BigBank and has a factoring arrangement with Ace Factors (“AF”) to whom it assigns all its book debts for value. AF Has discovered that a large number of customers are resisting paying the debts assigned to it because of defects in the brushes.

BigBank has advised BM that it requires security for A loan it intends to make to BM. In particular, it requires:

- (a) a charge over the deposit of HK\$5 million which BM has with BigBank; and
- (b) a floating charge over all the future brushes which BM makes.

BM is also contemplating lending its subsidiary, Kowloon Brushes (“KB”), HK\$5 million on a subordinated basis.

Advise BM on the validity of the proposed security, and how the charge over the future property operates. Advise AF on its position under the assignment. Advise KB on the effect of a subordinated debt arrangement.

This is a question about the assignment of a debt subject to equities under section 9 LARCO , whether the assignee of the debts (Ace) has any defence against the debtors pleading defects in the brushes, the validity of charges over deposit and future inventory, subordinated debt and a creditor postponing its entitlements.

All things being equal the debtors will be entitled to plead the defects in the brushes against Ace

The question also required students to identify and discuss whether the factoring with or without recourse. If it is with recourse then Ace can “give back” the debts and reclaim its factoring fee and only the best students got this point

Is the charge over the deposit valid under section 15 LARCO? Students should explain this important section and the background

Is the charge over future inventory valid? Yes because of the equitable doctrine which treats as done that which ought to be done – hence some sort of trust in favour of the lender would be created as soon as the charge comes into existence.

The promise is enforceable because of the consideration by way of loan given for it Note BCCI No 8 on the question of a subordinated debt even though it seems to contradict the pari passu rule

Note British Eagle where a creditor postpones its entitlement the public policy of pari passu is NOT infringed but if the creditor tries to improve its standing it will be struck down

Part C: Consumer Credit and Protection

Question 1 (100 marks)

Health and Beauty Ltd (“HBL”) is a new company in Hong Kong eager to expand its business in an already competitive market. Mr Wong the new Managing Director for HBL has attended several sales and marketing workshops in Hong Kong and has some ideas for sales and marketing promotions.

He seeks your legal advice on the following proposals as he does not want to be in breach of any Hong Kong law.

1. HBL will solicit customers by sending out a team of 30 young sales people with flyers to hand out on major street corners in Central and Kowloon during rush hour. On each flyer will be an offer of “a free gym membership” to the first 88 customers who attend the HBL Wellness Workshop in Wellington Street, Central between 9a.m. and noon on Saturday July 31st and Saturday August 7th 2010.

2. At these 2 Saturdays Wellness Workshops a team of young sales assistants wearing white coats with special badges marked “Your Personal Wellness and Inner Beauty Consultant” will welcome all attendees with free health food and health beverages. Two personal Wellness and Inner Beauty Consultants will take each individual customer into a private cubicle and suggest particular beauty and wellness products to be purchased together with a one month course of membership for “personalized wellness and beauty treatments” for \$20,000 (HK\$ twenty thousand). Mr Wong tells you that none of HBL’s employees have received any medical training and that all employees will be specifically instructed NOT to claim any medical knowledge.

3. The individual customer who decides to buy the \$20,000 one month course of membership will be asked to pay in full immediately and to sign HBL’s standard contract with the following clause.

“Any money paid to HBL under this contract is non-refundable under Hong Kong law and HBL shall not, under any circumstances, consider claims by you for the return of any deposits or payments made under this contract or made as a result of any unwritten contracts or statements made by HBL employees or agents during the negotiations made prior to this contract but your rights as a consumer are not affected by signing this contract.”

Please advise Mr Wong on whether the proposals outlined above meet with the appropriate consumer protection laws in Hong Kong and what advice, if any, you would give to HBL in this regard.

This is a question about consumer protection legislation in Hong Kong. Students were required to examine each of the proposals to identify whether they are in breach of the current legislation.

Students should identify and discuss:

Proposal 1 –the idea of sending 30 young people onto street with vouchers is only a marketing ploy to attract new customers to visit the premises – no particular problem with this kind of marketing unless the public suffers inconvenience or disturbance of the peace. Of course there is there also the additional question of whether the wording on the flyers constitutes an “offer” versus “an invitation to treat.” Arguably the wording could be construed as an invitation to treat as terms are deliberately kept vague. Equally, however, the first 80 people outside the door could be entitled to their gym membership as they have performed their side of the bargain

Proposal 2 –there is a real risk of successful claims from customers under the Misrepresentation Ordinance since there is no medical advice or training involved. Students should discuss what constitutes a misrepresentation under the Ordinance and the issues involved in proposal 2. Would a customer be able to say that he or she relied on the statements made in the consultation? Or would the company be able to argue a mere puff as in *Dimmock v Hallet*?

Proposal 3- this clause is drafted by our client with a view to protecting the company from any liability for breach of contract. However such a clause must be incorporated into the contract and the validity of the clause will be tested under the Unconscionable Contracts Ordinance (“UCO”) and the Control of Exemption Clauses Ordinance (“CECO). Students should discuss *L’Estrange v Graucob* and *White v John Warwick* to explain the incorporation and the interpretation of such a clause.

Proposal 3 clearly involves a consumer contract for the Supply of Goods and Services under the Supply of Goods and Services Ordinance (“SSO”) with customers dealing as consumers under section 2 SOGO, section 4 CECO, section 3 UCO and section 4 SSO UCO - students should discuss the tests for unconscionability under section 6 UCO and clearly *Shum Kit v Caesar Beauty* and *Hang Seng Credit Card Ltd Tsang* are relevant.

Factors include:

Was the clause necessary for the legitimate business interests of the company?

Did customer read and understand?

Unfair or harsh treatment of customer or any opportunity for discussion or backing –out?

Could customer have acquired same goods and service elsewhere at a better price?

Customer’s remedy for actionable misrepresentation and unconscionability? Rescission and restoration /or such damages that seem reasonable and fair to court

Question 2 (100 marks)

How effective, in your view, is The Money Lenders Ordinance (Cap 163) in offering protection to the general public in Hong Kong?

Discuss with reference to both the particular sections of the ordinance that you consider most relevant and to recent Hong Kong case law to support your answer.

This essay question required students to go into depth and evaluate the strengths and weaknesses of the MLO. The best students explained why and how the MLO is designed to protect the general public dealing with money lenders. “Borrowing” is an integral part of modern life. There is therefore a statutory presumption in favour of the borrower where parties of unequal bargaining power.

Students should explain:

- The registration system
- Section 18
- Section 23
- Section 25
- Exemptions in schedule 1
- The equitable principles that work to make the MLO effective
- Aspects of the case law in , for example, *Cheung Chow v Cheung Ng Sheong*, *Kwok Ying Ming v Chan Kam Chuen* and how the HK courts tend to interpret loan agreements in favour of the money lender when the MLO has been followed between parties of equal bargaining power.
- Extrinsic evidence may be adduced – *Cash Smart Enterprises Ltd*