PCLL Conversion Examination

January 2023 Examiner's Comments

Commercial Law

PART A
QUESTION 1

(a) Many answers were confused about the nature of a hire purchase agreement . It is not a contract for the sale of goods , it is only a hiring with an option to purchase . Therefore S27(2) SOGO could not apply and no title could pass to Tony under S27(2) SOGO . As the title had not been fed at the time Tony terminated the agreement the key point to make was that Rowland v Divall applied –there was a total failure of consideration and as the rules on acceptance are inapplicable Tony was entitled to a full refund of the price . Credit was also given for a discussion of S14 (1)SOGO.

(b) The question asked specifically as to whether the buyer of the app had rights under S16 SOGO . The better answers correctly stated that the most likely answer was 'no' as HK is likely to follow English authorities that have held that software which never exists in a tangible form by being downloaded onto a disk is not tangible and therefore fails the test that it is goods.

(c)

(i). It should have been identified there was a clear breach of S15 SOGO description, de minimis was unlikely to apply and the general rule is that you cannot accept part of the goods and reject the rest S13(3) SOGO. However, S32 (3) SOGO –the buyer got some of the goods contracted for mixed with goods of a different description-is an exception which gives the buyer a choice of rejecting all , keeping all or only keeping those goods which are in accordance with the contract. Many answers ignored the fact that there was no indication in the question there were three separate contracts and erroneously applied S32 (1) to the short delivery of medium and S32 (2) to the over delivery of small shirts .

(ii). The key point here was whether the re-sale to Silver meant that the buyer Golden had accepted the shirts. If this was case then Golden could not reject the shirts . The better answers referred to S37 (1) (b) SOGO that while the resale was an act inconsistent with the seller's ownership this is subject to S37 (2) SOGO and there can be no acceptance until the buyer has had a reasonable opportunity to examine the goods. The better answers then raised different possibilities e.g. if the shirts had been sent directly to the sub-buyer by the seller there would have been no chance for the buyer to examine as in Molling v Dean

(iii). The key point here was everything depended on whether the contract was severable . If non-severable then if the first instalment was defective and the buyer rejected it the contract would come to an end on the basis there was a breach of the implied condition of merchantable quality . However if it was severable then while the buyer could reject the first instalment this did not bring the contract automatically to an end and whether the buyer could refuse to take the second instalment would depend on whether there had been repudiation of the contract by the seller S33(2) SOGO. What amounts to repudiation should have been discussed(Munro v Meyer) and applied to

the facts

(iv). Most answers correctly identified that one possible measure of damages was the difference between the contract price and the market price on the date of delivery S53(3) SOGO but few answers addressed the other issues:

i. As there was an anticipatory breach if the buyer chose to end the contract on the date the seller informed the buyer the goods were not going to be delivered the buyer was under an obligation to mitigate its loss by buying at once on a rising market .

ii. The loss of profit on the sub -sale would be ignored if there were an available market where the buyer could purchase replacement goods in order to fulfill the sub -sale.

QUESTION 2

(a) On the assumption the seller was not at fault for the goods being stolen (credit was given for discussing bailment if there had been fault), good answers should have referred to the general rule the risk was with the owner S22 SOGO and then discussed the passing of property rules S18 -20 SOGO. The general quality of the application was poor; many answers divided the goods into two contracts one for specific goods and one for unascertained goods when the question clearly stated there was only one contract. This meant that as part of the goods were clearly unascertained -the goods to be manufactured were future goods and future goods are always unascertained - the contract was overall a contract for unascertained goods . This meant that good answers should have focused on S20 R5 SOGO and whether the goods had been unconditionally appropriated to the contract. Any sensible application to the facts received full credit. Answers should have then concluded that if ownership and risk had passed to the buyer it was liable to pay the price but the buyer would be entitled to a recover the deposit and not have to pay the balance if ownership and risk was still with the seller.

(b) The main point to identify was that under S22 SOGO if delivery had been delayed due to the buyer's fault the risk of accidental loss or damage is borne by the buyer.

(c) Assuming that there was no negligence on the part of Food the right to a refund again depended on who was the owner . If Gladys was the owner, she bore the risk S22 SOGO. On the facts the goods were clearly specific and thus rule 1 applied, property and risk passed when the contract was made. S20 Rule 2 SOGO did not apply –the goods were in a deliverable state –the only outstanding obligation was to deliver the goods. Few answers referred to S19 SOGO property in specific goods passes when the parties intended it to pass e.g. on delivery and the likelihood that this provision would apply as the court would most likely have sympathy with a consumer buyer.

(d) This was a question about whether title passed under the nemo dat rules . The relevant provision was S27 (2) SOGO –resell by a buyer in possession. Good answers went through all the requirements and concluded it was unlikely to apply as one of the requirements is the sale must take place as if the buyer was acting as a mercantile agent and thus the sale had to be in the ordinary course of business of a mercantile agent – a sale during business hours and from business premises. This was not the case as the sale took place at a dinner party.

(e) This was also a question about title, answers should have concluded that title could not pass to EF under S25 SOGO voidable title as the agreement was rescinded by informing the police before the sale . However as in Newtons of Wembley v Williams, title could pass under S27 (2) SOGO if all the conditions required under this provision were satisfied. Credit was also given for reference to market overt. However, the facts are unclear as to where the sale took place.

PART B
QUESTION 1a. and 1b.

The answers to each part of the question required an understanding of the rules and legislations that are applicable and the application to the given facts. Just merely citing the case name and/or the legislation with no or little application will not score many marks in the answer.

Question 1a.

For this part of the question, student need to describe and explain what is a lien and how it is different to a pledge, in particular raising the differences that a pledge is generally and usually created due to an agreement and that the formation of a pledge focuses on the transfer of possession while a lien focuses on the retention of a possession. The case of *Hammonds* v *Barclays* could have been used to illustrate the point. The answer would also need further discussion on whether and why DHL have a lien in the given situation and that was due to the services that DHL had already provided even if the goods did not arrive at the original destination. The use of proper case law (e.g. *Hatton* v *Car Maintenance*) would also be required.

Question 1b.

This question required the explanation of what is pledge pointing out that a pledge is a possessory security and thereby require the actual transfer of possession for the security to be effective. The discussion that should therefore follow would be that as the truck's possession was never transferred to Overpriced, the security of "pledge" was never perfected and therefore not effective. It was also important to stress that the court will look at the substance of the security to determine the true nature of the security and therefore the label of the agreement does not matter too much.

The next issue would be the discussion of the effect and nature of Clause 5. Clause 5 need to be identified and a definition given as to what is a retention of title clause with proper case law (e.g. *Aluminium Industrie Vasseen* v *Romalpa Aluminium*). The discussion of a normal/standard retention of titles should be explained and how it is in line with sections 19 and 21 of the Sale of Goods Ordinance 9Cap. 26). Clauses 5.1 and 5.2 each need to be discussed also.

For Clause 5.1. by using appropriate case law (e.g. *Aluminium Industrie Vasseen* v *Romalpa Aluminium)* ascertain that it was a normal/standard retention of title, and therefore applicable to situation and come to the conclusion that Overpriced should be able to retain title of the goods and therefore get back the unused 5 tons of turnips.

For Clause 5.2. the answer should recognition that it is a retention of title clause dealing with goods mixed with or made into new items that whether the retention of title would still be applicable would depend on the new object, that whether the essential character have changed. Using appropriate case law (e.g. *Hendy Lennox (Industrial Engines) Ltd* v *Grahame Puttick Ltd*) to show in what situation the retention of title clause would still work and using *Re Peachdart* and the analysis thereof, to show why the turnip cakes are no longer having the essential character and therefore, no longer just "turnips", the retention of title clause would fail.

For Clause 5.3. The discussion should be on whether the clause is actually a retention of title clause or is it a charge pretending to be a retention of title clause. The answer should follow on with a discussion and explanation on how to distinguish a charge to a retention of title clause and appropriate case law must be used (e.g. *Armour* v *Thyssen and Compaq Computers Ltd* v *Abercom Group Ltd.*). The next important part of the answer would be the explanation of the main reason(s) why Clause 5.3 will be considered more likely as a charge rather than a retention of title clause.

QUESTION 2a. and 2b.

The answers to each part of the question required an understanding of the rules and legislations that are applicable and the application to the given facts. Just merely citing the case name and/or the legislation with no or little application will not score many marks in the answer.

***Question 2a.* - The safe deposit box**

The issues and points that should be raised:

- The recognition that there are two possible relationship under the safe deposit box situation – a bailment and a license and in turn explain and define each of bailment a license and the discussion of the differences with an emphasis on the explanation of the particularities of a bailment with the separation of ownership and possession and lack of duty to take care in a license. Some case law such as *Ho Sui Kam* v *On Park Parking* to illustrate the concept of bailment would be appropriate.

- The conclusion to be drawn based on the given facts should be that the relationship is one of license, meaning that B Bank has no additional duty to take care of the items in the safety deposit box, but merely to provide for a "box" to be use.

- The discussion should also include the special nature of the relationship of customer and Bank in a safety deposit box situation, even though it is a license as opposed to a bailment relationship. The bank still has the duty to provide proper security surveillance on the premises, otherwise would be liable with appropriate case law e.g. *Susan Cheah Pik Yee & Ors* v *Mayban Finance Bhd.*

Question 2b.

The main discussion should be:

- Debit of HK$200,000 from wrong bank account
  The answer should discuss and explain the bank and customer relationship which show it is one of contractual creditor and debtor relationship, where the bank is the debtor, and the customer is the creditor and follow with the discussion of the duties that arises due to the bank and customer relationship. There is a duty of the bank, as the debtor of the customer to adhere to the instruction of the customer is relationship to the use of the customer's money/funds. A failure to follow the instructions (provide the instructions are proper and fulfill all requirements (not an issue here)) by the bank would be a breach of the bank and customer relationship/contract. In the current situation asB Bank debiting the wrong account is clearly a breach on the bank's part.

- Informing the wife of the gambling issues and the whereabouts of HK$200,000
  The answer should recognize that the bank and customer relationship also give rise to further obligations and one of which is secrecy and using appropriate case law (e.g. *Tournier* v *National Provincial and Union Bank of England Ltd.*), the answer should explain how the duty applies, e.g. it is continuing and that it involves all matters an information that the bank gain due to or from and in connection with the bank accounts, as such the releasing information as to the reason of the use of the HK$200,000 together with the information regarding Dan's gamble issues were private information and B Bank breached its bank and customer relationship.

- Material alteration from HK$20,000 to HK$200,000
  The answer should explain what will happen if a material alteration accords on a bills of exchange, stating in particular, section 64 of the Bills of Exchange Ordinance ("BOEO"), that a materially altered bill (without the consent of all parties to the bill) will be avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. In

particular, the explanation of what is material alteration according and as referred to s.64(2) of BOEO must be explained.

In application and discussion of the question, an arguement that Elsa, the manager of Second Fitness might be considered to have the authorization to make the changes (but should be noted that it would be a weak argument). The conclusion should be that Second Fitness will still be highly likely not be able to get the money back because of the following reasons:

1 By leaving spaces in the drawing of cheques would mean that Second Fitness did not draw the cheque up to the standard of a reasonable customer (case law e.g. *Young* v *Grote*, *London Joint Stock Bank* v *Macmillian*).

2 A discussion of Dan as a holder in due course and in particular refer to the Proviso of s.64(1) of the BOEO need to be discussed. As part of the discussion, what is and how to become a holder in due course should be discussed, and in particular, referring to sections.2, 27 and 29 of the BOEO. The advantage of a holder in due course should also be discussed. The result of Dan being a holder in due course need to be explained and discussed too.

PART C
QUESTION 1

Most candidates chose to answer Question 1.

a) Candidates generally did quite well in identifying more than one ground that may enable Lisa to rescind her agreements with Ultra Fitness. The relevant grounds that might enable Lisa to have the remedy to rescind the second agreement regarding the 200 personal training sessions include misrepresentation, undue influence and unconscionable contract terms. There does not seem to be any impropriety in respect of the first 20 training sessions purchased by Lisa. Candidates generally identified the key elements that need to be proved for an actionable an misrepresentation claim and apply the facts in their analysis, but most candidates did not discuss the issue as to whether rescission may be subject to bars to rescission and regarding the Court's power to award damages in lieu of rescission if it thinks equitable under s.3(2) of the Misrepresentation Ordinance. Most students also did not discuss briefly the claim which may be based on the different types of misrepresentation claim: fraudulent, negligent or innocent misrepresentation and how they may affect the remedies available.

   For those candidates that discussed the ground of undue influence, most discussed both actual and presumed undue influence under common law and did a reasonably well analysis by applying to the facts of the case. In this case, although there is no special relationship between a personal trainer/fitness centre and its client, there could still be presumed undue influence if it can be proved that trust and confidence was reposed by Lisa and that the purchase of the additional 200 training sessions "calls for an explanation" (*RBS v Etridge (No.2)*). For actual undue influence, there is no need for there to be a transaction that "calls for an explanation", but Lisa needs to prove that Joe had the capacity to influence Lisa and the influence was unduly exercised to bring about the transactions (*Bank of Montreal v Stuart*). Candidates should apply these common law principles to the facts of the case.

   Some candidates relied on the Unconscionable Contract Ordinance ("UCO") and did reasonably well in discussing the key issues that need to be satisfied before the Court may decide if the terms are unconscionable, including that one of the parties must "deal as a consumer" and the list of matters under s.6 of UCO. However, some candidates did not discuss the Court's power under s.5 of UCO which is wider than deciding not to enforce the contract.

b) This question is to consider whether the relevant clause is enforceable given its effect is to exempt Ultra Fitness from liability for personal injuries occurring at the fitness studio. Both the Supply of Services (Implied Terms) Ordinance ("SSO") and Control of Exemption Clauses Ordinance ("CECO") are relevant in this case. This clause can be considered as exempting a supplier's liability under the contract by virtue of the SSO as against a party who deals as a consumer (there's an implied term that supplier of a contract for the supply of service will carry out the service with reasonable care and skill under s.5 of SSO and Lisa in this case is quite clearly dealing as a consumer under s.4 of SSO); and also exempting personal injuries due to negligence under s.7 of CECO. Candidates should apply the facts to discuss our case which should fall within the scope of these provisions and hence this clause would not be enforceable. Most candidates applied CECO, while a lot have missed the relevance of SSO in our case. Some candidates have mistakenly applied the reasonable test under s.7 of CECO, which is only relevant in the case of loss or damage other than liability for death or personal injury resulting from negligence (in which case is not subject to reasonableness).

c) This question concerns with the Money Lenders Ordinance ("MLO"). Candidates should first apply the MLO and common law principles to discuss whether Joe is a money lender under the MLO. Although more facts are needed, Joe was always willing to lend money to his clients to settle the package price and normally charge his clients interest, hence can argue that he is ready and willing to "lend to all and sundry" by lending to his clients (*Premor v Shaw Bros*) and also

under s.2 of MLO. Some candidates did not discuss this issue or just very briefly mention about it. If Joe is a money lender, if he is not licensed (s.7 of MLO), the money lent and interest charged cannot be recovered by Joe (s.23 MLO). Candidates should also discuss whether the s.18 MLO formalities were complied with, if not, the loan cannot be enforced. More information is needed, but from the facts, there was a note signed by Lisa which sets out the payment terms. But these are subject to the Court's power to permit recovery of the loan to the extent it considers equitable (ss.18 and 23 proviso MLO).

Regarding the MLO provisions regarding interest rate, both ss.24 and 25 apply regardless of whether Joe is a money lender, many candidates incorrectly stated that the MLO is not relevant if Joe is not a money lender under the MLO. 50% pa interest rate was not excessive (excessive if above 60% pa under s.24), but it was presumed extortionate under s.25 (above 48% pa but under 60% pa), and if found extortionate, the Court may reopen the transaction to do justice between the parties (s.25(1) MLO). The prohibited excessive interest rate specified under the MLO was lowered from 60% to 48% commencing from 30 December 2022, however, given that the loan was in force in early December 2022, the prohibited interest rate specified at that time (ie 60%) will continue to apply (s.24(3)), hence it doesn't affect this loan. Very few candidates mentioned about these recent amendments to the MLO provisions governing interest rate.

QUESTION 2

Very few candidates chose to answer Question 2 and the question was generally not done very well.

a) Clause 10.1 is a "non-reliance clause" which seeks to exclude or restrict misrepresentation liability of the bank by taking away one of the key elements – reliance - in constituting an actionable misrepresentation claim. There is clearly a false statement of fact on the nature of the Bond made by Frank on behalf of the bank. Under s.4 of Misrepresentation Ordinance ("MO"), any contract term which seeks to exclude or restrict misrepresentation liability would be void unless it satisfies the reasonableness test under s.3 of the Control of Exemption Clauses Ordinance ("CECO") – the list of factors under Schedule 2 of CECO will be taken into consideration. From the facts, although David/Gourmet One seems to have years of investment experience, they have been quite conservative, hence in a much weaker bargaining position; and it is usually David who has been dealing with Frank on Gourmet One's investments, so Morris probably might not have noticed of such clause, one can argue that such non-reliance clause is not a reasonable term in the circumstances and would be void. Many candidates focused their discussion on a possible misrepresentation claim rather than advising Morris as to the legal effect of these clauses in the contract if he would like to seek remedy to cancel the contract, which should be the focus of this question.

Can also argue that these clauses are unconscionable contract terms under the Unconscionable Contract Ordinance ("UCO") which only applies if one of the parties "deals as a consumer" – in this case, while the investment is made by Gourmet One, but Gourmet One operates a chain of restaurants, hence it is arguably not making this investment "in the course of its business"; and whether this banking service falls within "a type ordinarily supplied or provided for private use, consumption or benefit", while banking services (investing in financial products in this case) are often for corporates or wealthy customers, can still use these services for private consumption (*Chang Pui Yin v Bank of Singapore*). The Court will consider the list of matters set out in s.6 of UCO to decide if the terms are unconscionable: from the facts, the terms are contained in a standard form contract which Morris could not negotiate, Morris was not drawn to these terms given that he's not been dealing with investments by Gourmet One, Morris probably has relied on the financial advice provided by their relationship manager. If the Court finds that these contract terms are unconscionable in the circumstances, the Court may refuse to enforce the contract; enforce the remainder of the contract without the unconscionable part; or limit the application of any unconscionable part to avoid unconscionable result (s.5 UCO).

b) According to the rule in *Holme v Burnskill*, guarantor is not bound by the contract where there has been a material variation or alteration in the obligations of the borrower except with the guarantor's consent of such variation or alteration. The alterations to the terms of the loan here are material which includes an increase in loan amount and extension of time for repayment. But this rule can be contracted out by the parties – which is the purpose of this clause and the variations in this case fall within the scope of this clause, hence the guarantee would still be enforceable regardless of the variations, but the increase of the loan amount (4 times the original loan amount) would very likely amount to a new agreement and hence not covered by the wording in the clause (*Triodos Bank NV v Dobbs*). Candidates did generally well for this part of the question.

c) Candidates should discuss briefly the nature of guarantee. Since the guarantee was given at the request of Morris (the debtor), Joseph has an implied contractual right of indemnity from Morris as soon as Joseph has paid the amount guaranteed on Morris' default. Alternatively, Joseph also has the right of subrogation to stand in the shoes of the creditor and take over all the creditor's rights against the debtor (Morris), but in this case, as there is no security given by Morris, it will just be the creditor's right to recover the debt and the indemnity remedy will already ensure full recovery - under common law and also s.15(2) of LARCO.