PCLL Conversion Examination
June 2025 Examiner's Comments
Commercial Law

PART A

General Comment
Most answers that passed were of a very high standard. However many of the fails were extremely poor, not understanding basic concepts, suggesting insufficient preparation for the assessment.

Question 1(a)
Answers were required to identify that the basic measure of damages for non – delivery is the difference between the contract price and the market price on the agreed delivery date S55 (3) SOGO. Applying the principle of White & Carter v McGregor where there is an anticipatory breach there is no obligation to mitigate the loss by buying on a rising market. The loss of profit on the sub-sale would not be taken into account Williams v Agius as BB could mitigate its loss by buying soya beans at HK$7,000 to fulfill the CC contract. This question was generally well attempted.

Question 1(b)
As there was clearly a breach of S16 SOGO the main issue, which many answers overlooked, was whether BB could reject the goods or had there been an acceptance under S37 (1)(b) SOGO - an act inconsistent with S's ownership. Clearly a resale would fall into this category but there can be no such acceptance S37 (6) SOGO until the buyer has had a reasonable opportunity of examining the goods S37 (2) SOGO. On the facts it would seem BB had such a chance – irrelevant they did not take advantage of it Kudos Shipping v Zamira Fashions.

Question 1(c)
S16 SOGO implied conditions as to quality did not apply as there must a sale in the course of a business - the facts clearly indicated this was a private sale. Most candidates failed to identify this point and wrote detailed irrelevant answers on the applicability of S16.

However S15 SOGO applies to all sales. On the facts there was a clear breach of description regarding the mileage.

The remedy for breach of S15 SOGO was a refund if there has been no acceptance. The main issue here was whether a reasonable time had expired S37 (4) SOGO – was three months sufficient? There can be no acceptance until the buyer has had a reasonable chance to examine S37 (2) SOGO but this provision does not apply where, as here, the buyer examined the goods before the contract. Irrelevant that any examination could not have revealed the defect Bernstein v Pamson Motors.

Question 1(d)
As the agreement was a hire purchase contract – no title can pass until payments have been made and the option to purchase exercised. Title cannot pass under any of the nemo dat exceptions, the hirer has not agreed to buy, thus S27(2) SOGO does not apply. Therefore Alice and Barry had no title and none could pass to Cedric.

Cedric could claim a breach of S14 SOGO implied condition seller had the right to sell. However as he has had the car for a long time he had accepted it under S 37(4) SOGO. However under the principle of Rowland v Divall there has been a total failure of consideration - a buyer purchases goods to obtain title not use. If there is a total failure of consideration S13 (3) SOGO – if you accept goods a breach of condition is reduced to a breach of warranty and rejection of the goods is not possible - does not apply. Cedric could therefore obtain a full refund without any allowance being given for use he had of the car. This answer was very poorly attempted by most candidates.

Question 1(e)
Alice has now feed the title, this means; no total failure of consideration-has got title albeit late. Still a breach of S14 (1) SOGO at time of the sale Barry had no right to sell but now the acceptance rules would apply. Cedric has accepted – lapse of a reasonable time – so only remedy is damages but hard to see what loss Cedric has suffered.

Question 2(a) concerned which of the nemo dat exceptions applied
(i) Market overt S24 SOGO. This would be dependent on the sale being at Amanda's premises and these premises coming within the definition of a retail shop Au Muk Shun v Choi Chuen–Yau and other conditions of the rule applying – sale in public part of the shop, during business hours. Sale by a mercantile agent S3 Factors Ordinance - Amanda would seem to be a mercantile agent – but were the goods given to her in that capacity? – arguably yes they were given to her for a purpose connected with a possible sale Pearson v Rose & Young. Sale to Carol must take place in the ordinary course of business of a mercantile agent.

(ii) Identification that S27 (1) SOGO seller in possession is the relevant exception. Amanda has remained in possession even though her status has changed to bailee Pacific Motor Auctions v Motor Credits. However the big issue was whether there has been a delivery to Cindy. On the facts not told of any physical delivery but does the email amount to constructive delivery Michael Gerson v Wilkinson State Securities?

(iii) Identification that the only nemo dat exception that can apply where a theft is involved is market overt S24 SOGO. Cannot apply in (i) hotel room not a sale in a shop but could apply in (ii) for the reasons mentioned in (i) above.

b)(i) For Jack to obtain a refund for the accidental loss of the goods they must be at the risk of WP at the time the accident occurred. Risk of accidental loss is with the owner S22 SOGO unless accident was due to WP's fault then they are liable as a bailee S22 SOGO. Was the tortoise specific or unascertained goods? On the facts clearly unascertained (many answers wrongly stated the tortoise was specific goods thus rendering the rest of their answer incorrect) – at the time the contract was made it was not clear which tortoise Jack was to get. Property cannot pass in unascertained goods S18 SOGO.S20 R5 SOGO property (and risk) will only pass if there has been unconditional appropriation before the accident happened. Credit was given for any sensible discussion of this – applying the dicta in Carlos Federspeil v Charles Twigg this will normally be the last act the seller must do under the contract which on the facts here would be the actual delivery of the tortoise to Jack – at WP's premises or at Jack's home? - which had not yet occurred. However there was also a good argument that it occurred when Jack was informed by email as to the tortoise he was to receive. S34 SOGO delivery to a carrier did not apply as the question clearly stated the goods were being transported by the seller "our van".

b)(ii) The goods were now specific – at the time the contract is made the buyer knew exactly which tortoise he was to get. Ownership and risk passed at once under S20 R1 SOGO but under S19 SOGO property only passes when the parties intended it to pass. In consumer contracts this is not likely to be intended to occur until the payment is made and there is delivery Ward v Bignall. The latter had not yet occurred.

PART B

Question 1a(i),(ii), (iii)., 1b. and 1c.

The answers to each part of the question required an understanding of the rules and legislation that are applicable and the application to the facts given. 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, students need to recognize that it was a question relating to a bailment relationship. Many of the students were able to recognize the nature of a bailment relationship but some of them did not fully explain the make-up of a bailment with relevant case law.

Question 1a(i)

Students needed to explain and show knowledge of the difference between a common carrier and a private carrier. Many students failed to spot the difference and discuss the issue. Further, students need to understand that even a common carrier bailee is typically strictly liable, such liability could be amended via contractual terms, it woud release the "strict liability" of the common carrier.

Question 1a(ii)

The explanation that Jon was not a common carrier and how this would affect the level of standard of care was needed. Top discussions would discuss not only the level of standard of care but also appreciate that different types of bailments that are available. The discussion would further discuss that the traditional view is when there was a gratuitous bailments and the bailor is benefiting, only liable for gross negligence and a reasonable care for bailment for reward but noting that this approach was questioned in the case of Houghland v RR Low, but courts still follow the traditional approach e.g. Port Swettenham v TW Wu.

Question 1a(iii)

Students should explain that even though Jon was a private carrier, a deviation to the terms of the bailment would make the liability strict and show with relevant case law

Question 1b.

This question required the explanation, definition and differentiation of the nature of a pledge and a lien and come to the conclusion that as the physical and document of title

are still with XYZ, the security cannot be a pledge and/or a lien and may only be a charge.

Question 1c.

Student should explain the attitude of courts in determining the nature of security, that even the documents was titled a "pledge", the court will look at the substance and not the form. Since the fact said that all security documents were presumed to be registered, it seems that the security with True Bank were duly executed and therefore at the very least, True Bank will have priority. Students should also be aware of and discuss the nature and effect of a negative pledge clause in True Bank's security. In relation to the MoneyLender – students should discuss the assignment of ABC's debt is a partial assignment and using the *Law Amendment Reform Consolidation Ordinance* discuss that it cannot be a legal assignment but only an equitable one and that the priority will be lower against legal assignments that were executed after the equitable assignment of MoneyLender.

Question 2a. and 2b.

The answers to each part of the question required an understanding of the rules and legislation 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.

For this part of the question, student need to recognize that it was a question relating to retention of title clauses ("ROT"). There were some students that did not recognize the nature of a ROT and therefore were unable to answer the question or did not attend the full possible marks. The question also required an explanation of the relationship between the ROT and the *Sale of Goods Ordinance*.

Students needed to go into particular clauses and explain how each of the clauses work in accordance with the particular item that it affects. Clause 2.2/2.3 – as the Artwork uses the canvas of Supplier Ltd. but had been combined/changed into another good – it was a mixed goods ROT. To determine whether the mixed goods ROT still work would depend on whether the essential character of the original goods had changed or not (illustrate/apply with relevant case law e.g. *Hendy Lennox (Industrial Engines) Ltd* v *Grahame Puttick Ltd* and *Re Peachdart Ltd.* Apply the case law and come to the conclusion that the 'canvas' no longer exists, the Artwork belongs to Alex/Emily as the purchaser and Supplier Ltd. had no right to take the Artwork but does have a

charge/contractual right to be paid the original goods in accordance with the original contract.

Another issue for discussion was the bank and customer relationship between BankCorp. with Alex and with AS Ltd. – students needed to explain what a bank and customer relationship is (one where the parties are in a contractual creditor and debtor relationship, where the customer is the creditor, and the bank is the debtor), of which some students did not explain. Further, most students did not explain and discuss how the relationship entitles the bank and its customers' with certain rights and obligations, for the purpose of this question, banks need to adhere to the instruction of the customer, and therefore entitling the bank to charge a reasonable fee (the *Supply of Services Ordinance* can be mentioned here for a bonus mark of which very little student discussed). The right to set off without notification was another possible right of which no notice would be required were also mostly missed out by students. However, as the loan was made by AS Ltd, the bank had no right to set off the loan with Alex's personal account. Even though the bank has a right to receive a reasonable fee, such a fee should be 1. reasonable and 2. from AS Ltd.'s account. Therefore, as the set off was Alex's personal account, there is a breach of the creditor and debtor relationship.

Question 2b.

There were two main discussions in this part. The first was the discussion of the affect of the ROT clauses and the second was the possible unfair preference to Emily.

Clauses:

- Whether Clauses 2.2 and 2.3 would work to protect priority in the liquidation of AS Ltd. If the explanation of a ROT was not given in Qu.2(a) but was given here, the marks allocated in Qu. 2(a) would still be allocated, but no extra marks for restating/explanation of ROT in this part if marks already given.
- Clause 2.1 – general ROT clause which only allow the passing of title of the goods upon payment of purchased price owed by AS Ltd, as Supplier Ltd would have title/'priority' to the unused oil paints and they were the property of Supplier Ltd. and the liquidators has no right on them (relevant case to illustrate e.g. *Aluminium* or *Compaq Computers Ltd* v *Group Ltd Abercorn*).
- Clause 2.3 – an extended ROT clause – a ROT which, the seller attempts to trace its ownership interest to, or claim security over, the sale proceeds of the goods should the goods be on-sold by the buyer to a third party. The seller is essentially claiming beneficial ownership over the sale proceeds from an on-sale. There are two possible characteristics of an extended ROT clause: Trust: potentially, the

buyer holds the sale proceeds as the seller's fiduciary; or Security: potentially, an extended ROT clause is a charge over the buyer's book debt (explain with relevant case law, e.g. *Compaq Computers Ltd* v *Group Ltd Abercorn).* In our current case, as the funds were mixed with other funds and not separately held, it would be unlikely there to be a trust and unlikely for the ROT would work for Supplier Ltd. Further as there was no registration of the charge, it is unlikely that Supplier Ltd would rank priority to other unsecured creditors.

Unfair preference:

The HK$100,000 payment to Emily was a discussion of unfair preference. As Emily was not an associate, but the repayment was made within 6 months (s.266B of *Companies (Winding Up and Miscellaneous Provisions) Ordinance* and more likely during the time that AS Ltd. was insolvent (as it was having difficulties before) and resulted in Emily, who was also an unsecured creditor receiving more than she would have in AS Ltd's winding up (*Re Sweetmart Garment Works Ltd (in liquidation).* However, further discussion in the difficulties in claiming unfair preference over non-associates in relation to arm's-length transaction by explaining the difficulties that liquidators face in proving to the court's satisfaction that the transaction was motivated by the debtor's desire to prefer a creditor was considered a valid discussion and bonus were considered.

PART C

Q1)

(a) Most candidates did quite well in discussing whether this clause is unconscionable under the Unconscionable Contracts Ordinance (UCO). Candidates are expected to first discuss whether this contract falls under the scope of the UCO by applying to the facts (s.5 UCO), and then discuss the list of matters which the Court may take into consideration to decide if this clause is unconscionable (s.6 of UCO) and the remedies which the Court may grant if it finds the clause to have been unconscionable. Some candidates considered this clause as an exemption of liability clause which is not correct. Not many candidates discussed the relevance of s.8 of the Control of Exemption Clauses Ordinance (CECO) which applies to business liability (s.2(2) CECO) where one of the parties deals as a consumer or on the other's written standard terms of business. Sam is clearly a consumer in this case as he does not make the contract in course of a business. Under s.8 of the CECO, AP cannot by reference to any contract term claim to be entitled to render a contractual performance substantially different from that which was reasonably expected of it, except if the term satisfies the reasonableness test (s.8(2)(b)(i) CECO) – this is arguably the case here, by reference to this clause in AP's terms and conditions, AP has changed the tour substantially. Candidates are expected to discuss whether the term is likely to satisfy the reasonableness test under s.3 CECO by citing some matters in the guidelines under Schedule 2 of CECO and applying to the facts. Whether the clause was incorporated at common law should also be discussed briefly.

(b) This clause is a non-reliance clause seeking to exclude misrepresentation liability by taking away reliance on the part of the customer which is quite common in contracts. Candidates are expected to first discuss whether Sam may have an actionable misrepresentation claim against AP given the statements/assurance made by AP's salesperson in the live chat on AP's website by applying the facts to each element of an actionable misrepresentation. Candidates should also discuss briefly the likely type of misrepresentation in this case and the remedies available under common law and the Misrepresentation Ordinance (s.3(1) and (2) MO). Candidates should be able to apply s.4 MO in this case (i.e. exclusion of misrepresentation liability will be of no effect unless it satisfies the reasonableness test under s.3(1) of CECO) – since this non-reliance clause has expressly carved out fraudulent misrepresentation, it may satisfy the reasonableness test and be enforceable. Credit will also be given to candidates for a good analysis on whether this clause may be unconscionable under the UCO by applying to the facts.

Q2)

(a) This part of the question concerns with the application of the Pawnbrokers Ordinance (PBO). Candidates are expected to identify that while the interest rate of 3.5% per month is within the maximum monthly rate prescribed under Schedule 2 of the PBO, the redemption fee of HK$10,000 is not allowed under s.11(3) PBO as any agreement for a loan shall not be enforceable if the pawnbroker demands any payment other than principle and interest. Hence Sue can redeem the vase without payment of interest or any charges for the loan, and the Pawnshop is entitled to recover the principal amount of the loan but the Pawnshop commits an offence and is liable for a fine and imprisonment (s.11(5) PBO). Under s.17(2) PBO, the Pawnshop shall extend the loan if borrower wishes to continue the loan before expiration of 4 months from the date of advancing the loan (which is the case here) on the borrower paying the interest then due, but a new pawn ticket should be delivered to Sue (but Mr Kwan asked Sue to keep the original pawn ticket which is a breach of s.17(2), the Pawnshop commits an offence and is liable to a fine (s.17(3) PBO). Finally, not many candidates noted that the Pawnshop in this case only extended the loan for 3 months and said the vase must be redeemed within 3 months, but as per s.15(1) PBO, Sue should have another 4 months to repay the loan and redeem the vase, hence a breach (s.15(2) PBO).

(b) This part of the question concerns with the application of the Money Lenders Ordinance (MLO). Candidates should first discuss whether Mr Kwan is a money lender under the MLO by applying to the facts (s.2 MLO and *Premor v Shaw Bros*). If Mr Kwan is a money lender and if he does not have a money lender license (s.7), the money lent and interest charged cannot be recovered (s.23 MLO). Candidates should also discuss whether the s.18 MLO formalities were complied with, if not, the loan cannot be enforced. However, these are subject to the Court's power to permit recovery of the loan to the extent it considers equitable (ss.18(3) and 23 proviso MLO). Regardless of whether Mr Kwan is a money lender, on interest rate, 46% pa was not excessive (excessive if above 48% pa under s.24), but it was presumed extortionate under s.25 (above 36% pa), and if found extortionate, the Court may reopen the transaction to do justice between the parties having regard to all the circumstances and make such orders as the Court thinks fit (s.25(1)) – the fact that Sue was under a lot of financial pressure at the time of entering into the loan transaction would be relevant (s.25(5) MLO). Candidates generally did quite well for this part of the question.