PCLL Conversion Examination
January 2024 Examiner's Comments
Commercial Law

PART A

QUESTION 1

(a)Answers should first of all have considered and applied the relevant SOGO implied conditions. The better answers focused on S15 SOGO sale by description, the goods should correspond with their description KN 95, and given the fact there was the possibility there was a sale by sample the bulk of the goods had to correspond with the description, which was clearly not the case given that half the masks were not KN 95. In addition if there was a sale by sample then S17 SOGO was also applicable especially S17 SOGO -the implied condition that the bulk shall correspond with the sample in quality. Credit was also given for any sensible discussion as to whether there was a breach of S16 SOGO merchantable quality/ fitness for particular purpose.

On the assumption that there was a breach, remedies should then have been considered. It should first of all been clearly stated that the buyer had the right to reject the goods unless there had been acceptance. Few answers mentioned the fact that, as half of the goods only were not of the KN 95 standard, then potentially S32 (3) SOGO would give the buyer the extra option of keeping the goods in accordance with the contract and rejecting the rest. The rules on acceptance in S37 SOGO should have discussed in detail. Many answers did so but failed to apply the law sensibly to the facts. Given that the seller had received delivery of the masks before supplying the sub-buyer, the issue was whether seller had a reasonable opportunity to examine the goods before sending on the goods to the sub-buyer (an act inconsistent with the seller's ownership). Clearly Molling v Dean was distinguishable as in that case the goods were sent directly from the seller to the sub –buyer. Damages should then have been discussed. Again the better answers applied the law sensibly to the facts – in particular considering whether the loss of profit on the sub-contract would have been recoverable – was the sub-sale 'foreseeable' applying Hadley v Baxendale remoteness test and the fact that the normal measure of damages, if there was acceptance, would be the difference between the value the goods should have had on delivery (normally taken as the contract price) and their actual value S55 (3) SOGO.

(b) This part tested candidates' knowledge of the nemo dat exceptions. Answers here differed widely in standard the weaker ones failing to identify the relevant exception to be applied.

(i) The only exception that potentially applied here was market overt S24 SOGO given that Tony was a jeweller.

(ii) Apart from market overt the relevant exception that was most likely to apply was sale by a mercantile agent S3 Factors Ordinance as Tony was in possession of the jewellery in that capacity.

(iii) As Tony was now a buyer S27 (2) SOGO resale by a buyer on possession was the relevant exception to apply and not, as many answers said, seller in possession S27(1) SOGO.

QUESTION 2

This question was less popular than Question 1 but generally the standard of the answers to this question was better.

(i) The issue here was that if the fire was accidental, under S22 SOGO, the risk was with the owner. Answers should have considered who the owner was by applying S18-20 SOGO as to when property was to pass. As it was unclear which 50 chairs the buyer was getting under the contract, the goods were unascertained and thus S20 R5 SOGO applied. Unconditional appropriation should have been explained and applied to the facts with the most likely conclusion being that this had not occurred. Thus property and risk was still with seller and in the absence of frustration the seller would be liable to the buyer for non-delivery. As the question said it was unknown how the fire broke out and thus the better answers also referred to the S22 SOGO proviso that nothing in the section affected the seller's duties as a bailee and thus if the fire was due to the seller's fault, the seller would be liable as a bailee even if ownership had passed to the buyer.

(ii) The facts here made it more likely there had been unconditional appropriation. Thus if the goods had now become ascertained at the time the fire broke the property and risk had passed to the buyer who would have to pay the price S51(1) SOGO, unless there was a contrary intention under S19 SOGO.

(iii) The goods here were future goods S17 SOGO. Future goods are never specific and thus the answer would be the same as in (ii).

(iv) The goods here were specific. Under S20 R1 SOGO property (and risk) would pass to the buyer when the contract was made and the buyer would thus have to pay the price unless under S19 SOGO the parties only intended property to pass on delivery.

(v) Under S22 SOGO the risk would be with the seller if delivery had been delayed due to the seller's fault Demby Hamilton v Barden

PART B

QUESTION 1

Question 1(a)

The relationship between the bank and its customer is normally one of contractual debtor and creditor. When a customer has a deposit account, the customer is the creditor, and the bank is the debtor. When a customer has a credit facility with the bank, the customer is the debtor, and the bank is a creditor.

WBL has opened an account with Saybrook Bank, so it is the creditor and Saybrook Bank is the debtor. The account opened for Cindy's son, Justin, is a trust account, with Justin as the beneficiary. This trust account is opened in Cindy's name as trustee and is styled as "Re Justin, a minor" or "Cindy, in trust for Justin, a minor".

Saybrook Bank is under a duty to adhere to the mandate of its customers, including honouring the cheques of a customer in accordance with the mandate given. A cheque is a bill of exchange, a negotiable instrument. A crossed cheque means its negotiability is restricted; a cheque marked "account payee only" means it can only be deposited into the payee's account. Saybrook Bank has an obligation to pay the payee on the cheque Cindy wrote on behalf of WBL on demand of that payee on or after the date of the cheque. Post-dated cheques are acceptable in Hong Kong.

The bank has a duty to keep its customers' information confidential, unless the disclosure of the information falls into an exception (e.g., consent, compulsion by law, public policy etc.). No exception seems to apply based on the facts. Saybrook Bank has therefore breached its duty by disclosing WBL's financial condition to the Yau family.

Cindy's stop payment order on behalf of WBL - a bank customer is entitled to countermand negotiable instruments she made. To be an effective countermand, the communication must be capable of being authenticated by the bank. The facts did not indicate whether the communication stating the countermand was clear. If the countermand was a clear and proper one, Saybrook Bank has breached its duty.

Saybrook Bank has a right of set off – the right to combine accounts of the customer and amalgamate the amounts to reduce any debt owed to the bank. However, debiting Justin's account to pay for the cheque was wrong since the two accounts belong to different customers. Cindy is the signatory to the WBL account, but she is not the account owner. In addition, Justin's account is a trust account. Funds in that account ought to be used for the benefit of Justin only. Saybrook Bank is not even entitled to set off a credit balance in a trust account against a debit balance of Cindy's personal account. Here, the connection is even further removed as Cindy is merely a signatory and not the account holder of the WBL account.

Question 1(b)

Despite having remedies in contract and/or tort, a plaintiff who has suffered loss or damages in personal property should still consider bringing a claim in bailment because:

- Bailee must prove that the bailee is not negligent. This reversal of the burden of proof is most useful to plaintiff when circumstances are unclear as to how the personal property was lost / damaged / destroyed.

- Bailee's liability becomes strict (as opposed to being subject to a negligence / gross negligence standard) if the terms of the bailment are altered.

- Measure of damages is more flexible – plaintiff may opt for calculation of damages based on contract or tort theories (e,g, Yearworth v. North Bristol NHS Trust)

QUESTION 2

This question concerns the priority of three assignees of a debt.

The first determination is whether these assignments are legal / statutory or equitable in nature. This involves an evaluation of these assignments based on s9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) ("LARCO").

The assignment to Monica:
- the assignment of debt to Monica is in writing signed by the assignor, Rachel
- however, as Rachel only assigned half of the security deposit to Monica, the assignment was not absolute (not her entire interest in the chose)
- also, the notice to the debtor was not an "express notice in writing" – Rachel only made a telephone call to Ross
- therefore, the assignment to Monica was not legal / statutory as it does not meet the requirement of s9 of LARCO. It is an equitable assignment only

The assignment to Chandler:
- the notice to debtor was in writing, but Rachel merely gave Chandler a copy of the lease agreement, the assignment was not in writing
- therefore, the assignment to Chandler was also an equitable assignment only
- the fact that the assignment was for a consideration less than the security deposit is of no relevance

The assignment to Phoebe:
- notice was properly given in writing
- the assignment was absolute and was in writing; however, it was not signed by Rachel (so not "under the hand of the assignor")
- therefore, the assignment to Phoebe was also an equitable assignment only
- the fact that the assignment was for a consideration less than the security deposit is of no relevance

Priority of the three equitable assignments:
Generally, priority is given to the first created in time. Notice is not a requirement for perfection, but as these are assignments of a debt, the rule in Dearle v. Hall applies and gives priority to the assignee who is first to give notice to the debtor. However, Monica will lose out as the assignment to her was not given for value (no relief in equity unless the assignee gave consideration). As for the other two assignments, Chandler takes priority as he was the first to give notice to the debtor.

Ross' right of set-off
As Rachel did not pay the monthly rent pursuant to the lease agreement to Ross last month, and the broken shower stall costs $8000 to repair, Ross is entitled to deduct these sums from the security deposit. Therefore, only $42,000 ($100,000 - $50,000 - $8,000) of the security deposit should be returned.

Some credit was given to students who pointed out that Rachel's multiple assignments of the same debt amount to fraud.

PART C

QUESTION 1

a) Most candidates discussed if Paul may have a misrepresentation claim against Top Design. However, many candidates failed to discuss with details (and applying to the facts) the relevant elements which must be proved in order to give rise to an actionable misrepresentation claim (including the relevant false statements from the facts). Candidates should apply the facts and also the Misrepresentation Ordinance in discussing the relevant type of misrepresentation briefly in this case (which is more likely to be a negligent misrepresentation since Jason could have checked with the engineer of Top Design before making the statement about the layout and structure of Paul's unit) and also the relevant remedies, but not many candidates did so.

The clause in the service agreement is a non-reliance clause, seeking to exclude misrepresentation liability by taking away reliance on the part of the client (i.e. Paul). Some candidates had mistaken this clause to be excluding liability for negligence generally. Candidates should also discuss briefly whether the clause was incorporated at common law, in this case, a non-reliance clause is arguably not excessively onerous or unusual. As per s.4 of the Misrepresentation Ordinance, a clause seeking to exclude misrepresentation liability needs to satisfy the reasonableness test under the Control of Exemption Clauses Ordinance. Candidates should apply to the facts and discuss whether such clause is likely to satisfy the reasonableness test and that it will be of no effect if reasonableness test is not satisfied (one of the relevant issues is that this clause seeks to exclude all types of misrepresentation liability including fraudulent misrepresentation, which could be argued as unreasonable, but very few candidates identified this issue). The clause may also be unconscionable under the Unconscionable Contracts Ordinance, many candidates answered reasonably well by applying the facts to the 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. The increase in loan amount and extension of time for repayment are material alterations of the loan and hence Patsy is not bound by the guarantee as she was not aware of these changed terms. Some candidates discussed whether there was undue influence from Paul inducing Patsy to give the guarantee, but this is not an issue here on the face of the facts as the renovation project also benefits Patsy as their new home after marriage and there's no other form of undue influence from the facts.

QUESTION 2

a) Laundry service is a contract for the supply of services under the Supply of Services (Implied Terms) Ordinance. Having damaged two dresses from the dry cleaning process, Lucky Laundry has likely breached the implied term under s.5 SSO that supplier acting in the course of business will carry out services with reasonable care and skill, but need further information as to the reason of damage. The clause in the contract is to restrict the liability of Lucky Laundry for property damage, whether such clause was incorporated at common law should be discussed briefly. Supplier cannot restrict any liability arising under the contract by virtue of the SSO (s.8(1) SSO) as against a party dealing as a consumer. Candidates should discuss whether Monica is dealing as a consumer – since the dresses are from the model agency which Monica works for, it is likely that Monica was not dealing as consumer and if so, the restriction clause would work to exclude the implied term under SSO, subject to the Control of Exemption Clauses Ordinance. S.7(2) of CECO is relevant as this case involves property damage resulting from negligence (if proved); the restriction clause would be void unless it satisfies the reasonableness test under s.3 CECO. Candidates should apply the facts to discuss whether the clause is likely to satisfy the reasonableness test – in this case, the term seeks to limit all liability to only $20 per garment regardless of brand and condition can be argued as being unreasonable, although Monica was asked to read the contract before signing it. Credit was also given if candidates discuss the relevance of Unconscionable Contracts Ordinance with a reasonable discussion on whether Monica is dealing as a consumer.

b) This question is on the application of the Pawnbrokers Ordinance and candidates did generally well on this part of the question. The watch was pawned by Monica without being authorised by the owner (Monica's grandpa), hence Monica commits an offence and is liable to a fine and to imprisonment (s.19 PBO). The Pawnshop can extend the loan if requested by borrower before expiration of 4 months (which is the case here), but a new pawn ticket should be delivered and a new entry should be made in their books, but the Pawnshop failed to do so and hence it commits an offence and is liable to a fine (s.17(2), (3) PBO). The Pawnshop demanded an additional extension fee, it is in breach of s.11(3) PBO - any agreement for loan shall not be enforceable if the pawnbroker demands any payment other than principal and interest, in which case the borrower can redeem the watch without payment of interest or any charges for the loan; while the Pawnshop is entitled to recover the principal amount of the loan but it commits an offence and is liable to a fine and imprisonment (s.11(5) PBO).