**PCLL Conversion Examination June 2023**

**Examiner's Comments**

**Hong Kong Land Law**

This examination paper covered a wide range of examination topics and required candidates to answer two out of a total of three questions.

To help candidates reflect upon their own examination performance, the Examiner's Comments are set out below:

**Common Mistakes**

1. Insufficient "Hong Kong elements" or none at all in the answers: The examination was on "Hong Kong Land Law" and hence there were "Hong Kong elements" in each question. Some candidates mentioned either insufficient relevant Hong Kong law and/or decided cases or none at all in their answers. In particular, students performed poorly in question 2(a) for failing to observe that the contracting parties had entered into a contract already.
2. Bad time management: Some candidates wrote numerous pages to answer their first question but could only manage half a page to answer the last one as they ran out of time towards the end.
3. Writing too much irrelevancies: Quite a few candidates wrote a lot about what they knew, regardless of its relevance to the question, instead of writing precisely and concisely about the specific legal issues arising from each question.

**Legal Issues relating to each question**

**Question 1(a)**

This question required candidates to appreciate issues arising from Offensive Trade Clauses. While the restaurant may be in breach of OTC (Victualler) as per *IO of Yue Sun v. Lake Side Elderly Care* (also s.4(25) of Summary Offence Ordinance), such clauses was held to be obsolete in *Green Park v. Dorku*.

There is a potential defence of 'not offensive' (i.e. *Uni-Creation* 'offensive being a fluid concept'). However, it may be distinguish as the OTC clause in this case specifically refers to "Victucaller" .

As per the clause, the Lessee cannot use the premises for the trade of "victualler" without the previous licence of His Majesty signified in writing by Governor.

Some other relevant authorities (not absolutely necessary if the student's analysis of the student is sensible):

- *Sunny Star Ltd v Au Mui* (1995) MP No 897- roast meat restaurant- breach of the "victualler" provision by relying on the case of *R v Hodgkinson* (criminal case). A victualler is a person who provides food.

- *Green Park Properties Ltd v Dorku Ltd* [2000] 2 HKLRD 400(CFI judgment, judgment overruled by CA on other issue) - Sitting tenant ran pizza restaurant and then a sushi shop. Cheung J while noting the *Sunny Star* case, held vendor had showed a good title as it is unthinkable Govt would enforce clause and victualler is not a word of modern usage.
- *Joint London Holdings Ltd v Mount Cook Land Ltd* [2005] All ER (D) 77- clause in TA in 1950, Pret a Manger outlet prohibited under a victualler clause which means provision of food and drink.

For a higher mark, it was necessary for candidates to point out a more practical solution- apply for licence or modification of the offensive trade clause. Depending on Lands Department consideration, licence for removal of five trades possible with a premium – as provided in Lands Administration Office Practice Note- 6/2007

**Question 1(b)**

This question required candidates to consider priority between outstanding mortgages and charging orders. Many candidates did not appreciate that Bob Bank's mortgage has not been approved yet, and hence, unlike *Financial Investment Services for Asia Ltd v Baik Wha International Trading Co Ltd* [1985] HKLR 103, there is no equitable assignment/subrogation yet. Without approval, the monies for the proposed 2nd mortgage has yet to be transferred to A-level Bank (or its lawyers as stakeholders). It is only after Bob Bank approves of ht mortgage then Bob Bank would step into the shoes of A-Level Bank (insofar as monies paid and up to HK$8m remaining in Mortgage A).

1st would be the remaining HK$8 million Mortgage A, as per early date of registration. 2nd would be SF CO 3 million: S.3(1) LRO. The Creditor's Charging Order would take priority before Bob Bank (should the mortgage application be approved) but after Mortgage A and SF CO. HK$16 million - $8m - $3m. There should be more than enough to recoup the $5m loan. Should act quicky to obtain charging order nisi, as the ex parte application still needs Court approval.

Very few candidates spotted that the lis pendens should not be a concern as it involves an in personam claim. It should not be registered onto the Land Registry: see *Wide Power Corp Ltd v IO of Manhattan Court* [2015] 5 HKC 269.

**Question 1(c)**

The starting point must be whether the part of the external wall in question area common parts or exclusively owned. In the absence of the actual DMC or other instructions indicating otherwise, as per Section 2 and Sch 1 BMO, the external walls v likely to be common parts.

As per ss. 16 & 18 BMO, IO would very likely have exclusive jurisdiction to enforce DMC for this dispute in respect to common parts.

Apart from interfering with common parts (whether express DMC provision or s.34I BMO), there is also likely breach of clause 13 (structuaal alterataions) as removal of external wall goes into fabric of Building (see *Pearlman*, *Pickering* or *Shan Kwong Towers Phase II*)

IO cannot acquiesce to breaches of DMC (s.16/s.18 BMO – duty bound to uphold DMC: see Ohashi). However, when considering whether grant an injunction, Court would consider whether it is equitable to do so or not. Candidates may raise relevant authorities such as IO of *Tuen Mun Hun Cheung v United HK Ltd* (unreported) HCMP 299/1998 22/11/1999. Further, even if the IO cannot get an injunction, it can still get a declaration in its favour and adverse costs order (*Hon Hing Enterprises Ltd v Honolulu Land Investment Co Ltd* (unreported) HCA 3557/1991, 31/07/1992)

**Question 2(a)**

Most candidates failed to appreciate there was already a binding agreement. Rather, they focused on the terms of the provisional agreement and whether it included all the essential terms to a binding sale and purchase agreement of land. Students were accorded marks where the discussion was sensible. Nonetheless, the main issues should be as follows:

- Even there is no term in the provisional agreement stipulating that time is of the essence, the midnight rule would apply in that the parties would have until midnight of the completion date to perform the contract- *Camberra Investment Ltd v Chan Wai-Tak* [1989] 1 HKLR 568 and Law Society Circular No 15 of 1989(Item 4 of DM 7)

- *Sun Lee Kyoung Sil v Jia Weili* [2010] 2 HKLRD 30- Even there is no express provision in a provisional sale and purchase agreement making time is the essence, the Court regarded that in HK, the parties would usually proceed on the basis that time was of the essence due to nature of transaction (ie sale of a completed flat in a secondary market). Delay by the purchaser for one day in paying the further deposit is regarded as breach

As a matter of contract law, assuming there is a binding agreement, candidates would be awarded marks on any sensible discussion on relief/remedies. While it was not necessary to include all of the below, the main issues in respect of relief/remedies should be as follows:

- Even if there is no express provision in the provisional agreement providing for the forfeiture of the deposit upon default, Victor as the innocent party can still forfeit the deposit upon Paul's breach of the agreement. See *Best Linkage Ltd v Marbella Garden Ltd* citing the judgment of *Polyset Ltd v Panhandat Ltd* "even in the absence of express contractual provision, the deposit is an earnest for the performance of the contract:……; in the event of the purchaser's failure to complete in accordance with the terms of the

contract, the deposit is forfeit(sic), equity having no power to relieve against such forfeiture and the deposit's forfeiture follows, whether or not the vendor has suffered any loss in consequence”

- Hence Victor is entitled to forfeit the deposit due to the one day late payment by Paul of the further deposit.

- Specific performance is an equitable remedy and the claimant must come with clean hands. Hence Paul having breached and failed on his part to complete the purchase of the property would bar him to claim for specific performance- *Gladflow Ltd v Grandland Development Ltd* [1993] 2 HKLR 494(delay of the purchaser in paying the deposit)- *Union Eagle Ltd v Golden Achievement Ltd* [1997] 1 HKC 173-late in tendering the completion cheques with time is of the essence clause would be a bar to applying for specific performance. Also the agreement has been terminated by Victor by his letter of 3 May and no longer executory so specific performance is no longer possible

**Question 2(b)**

Under common law the manager can be dismissed if it is in fundamental breach of its duties as manager: *IO of South Seas Centre, Mody Road v South Seas Centre Management Co Ltd* [1985] HKLR 457, *Pearl Island Hotels Ltd v IO of Pearl Island Villas* (1988) HCA 1628/1987. This is difficult to prove and the acts complained of may not constitute such fundamental breach of the manager’s duty. Similarly, obtaining 2/3 of undivided shares support (as per the DMC) would be too difficult.

The better path would be for Kenneth to persuade other co-owners to incorporate and utilize the implied terms in Schedule 7 to the BMO. Para 7 of Schedule 7 BMO is implied into all DMCs but it is only applicable when there is incorporation. After incorporation, the manager may be dismissed with the approval of the owners of 50% of the shares.

**Question 2(c)**

The Conditions of Exchange constitute a contract which is specifically enforceable thereby passing the equitable interest to the grantee: *Walsh v Lonsdale* (1882) 21 Ch D 9. Thus, Developer B received only an equitable interest under the Conditions of Exchange.

**Question 2(d)**

Candidates were expected to identify that athe equitable interest will be converted into a legal estate when all the positive conditions in the Conditions of Exchange have been fulfilled but also providing that none of the negative conditions have been breached: CPO, s.14(1)(a). The

grantee has to prove that they have complied with the conditions and must apply to the Lands Department for a certificate of compliance which must be registered.

Upon registration of the certificate of compliance, the grantee will be deemed to have complied with the conditions in the Conditions of Exchange (and a Government lease will be deemed issued containing the terms conventionally found in Government leases): CPO, s.14(3); see *Tai Wai Kin v Cheung Wan Wah Christina* [2004] 3 HKC 198.

**Question 3(a)**(i)

As per the DMC clearly the external wall is a common part. Candidates were expected a grasp of the following issues:

- Breach of express provisions of the DMC – external walls are common parts (cl.1) and there are items affixed on the external walls (hence breach of cl. 4 & 6).
- The IO should seek an injunction – as per *Doherty v Allman*, although generally mandatory injunctions may be difficult to obtain, for breach of negative covenants, that should not be the case. See *Hong Yip Service Co Ltd v Ng Wai-man* (1989) CACV 159/1988 as example of removal of outside aerial in breach of DMC.
- Damages also – while there no consequential loss (as IO or co-owners could not have licensed out wall as per DMC), there may be mesne profits like in *IO of Percival House v Fusion Advertising Solution Ltd* [2012] 5 HKC 95. Loss of bargain.
- Assuming there is breach, there should be no difficulty in obtaining a declaration that Mr. Chan is in breach of the DMC. Would likely obtain an adverse costs order against Mr. Chan. Students may refer to *Hon Hing Enterprises Ltd v Honolulu Land Investment Co Ltd* (unreported) HCA 3557/1991, 31/07/1992.

**Question 3(a)(ii)**

Candidates were expected to appreciate how House Rules may help and its limits.

- There may be no breach of any covenant in the DMC for keeping pets, as no covenant bans pets. However, candidates may suggest the possibility of breach under nuisance/annoyance (cl.5). The court will also look at rights of parties under a DMC subject to an element of reasonableness (and not absolute – see *Silver Triumph Holdings v Guardian Property*).
- A ban on keeping pets can be added to the House Rules. However, the House Rules must not conflict with the DMC and should deal with subsidiary/operational matters. As held in *Tsang Chi Ming*, a ban on animals may be inconsistent with an owner's right of exclusive use, occupation and enjoyment.
- Candidates may suggest, as regards to the wording of the ban, such as dogs in common areas must be muzzled and on a leash

**Question 3(a)(iii)**

No: A 'LEASE' was issued instead of conditions of sale. The interest is already legal and not equitable pending compliance of positive covenants for fulfilling 'right to Government Lease'.

In any event, the Government lease was entered into before 1.1.1970. s.14(3)(a) is deemed to have been complied with, and s.14(1)(a) provides that such right shall become legal estate.

**Question 3(b)**

Candidates need to identify and discuss two issues – the requirement for the signature for Bosco, and the lack of completion dates:

- Agreement between Bosco and Kelly should be unenforceable under s.3(1) CPO, as the document is not signed by Bosco, the person to be charged and also no part performance of the agreement in any manner.
- The next point is to see whether the memorandum or note contains all the required terms which are (A) parties, (B) property; (C) purchase price; (D) completion date and (E) any other agreed terms: *Kwan Siu Man v Yaacov Ozer* [1999] 1 HKLRD 216, CFA. Moreover, as per the CFA judgment in *World Food Fair*, completion date is an essential term so there would be no certainty of terms (hence no contract to begin with).

**Final Comment**

The legal issues mentioned above are non-exhaustive. Marks were still awarded to issues raised by candidates not mentioned above, so long as they made legal sense to the markers in light of the facts supplied.