

PCLL Conversion Examination
June 2022
Examiner's Comments
Commercial Law

Part A
Question 1

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. The main points that should be discussed were:

- (a) A discussion as to whether the antique clocks could be kept and why it was unlikely so. Students would need to discuss the role of Tom as a mercantile agent and why that is satisfied, which included the discussion of whether Tom was authorized to deal with the clocks, whether Tom was in possession, whether Tom was in possession in the capacity as a mercantile agent and with consent and whether Tom acted within “ordinary course of business”. The discussion should be backed by case law. The discussion should also discuss the good faith element requirement of the purchaser and whether Mr. Chan had been “put on notice”.
- (b) Another part of the question that is centered on the *Nemo dat* rule. The focus should be on the exception as given under s.24 of the Sale of Goods Ordinance. The answer should discuss what can be considered to be within the exception as “shop or market overt” but be clear that according to *R v Tai Shing Jewellery Co.* SCt, CC No. 278 of 1982, s. 24 do not protect shop owners.
- (c) The exception to the *Nemo dat* rule that this part refers to was s.27(1) of the SOGO. Answers should discuss the requirement and the need to keep continuous possession of the car for this exception to apply, noting that the capacity of possession does not matter. (*Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd* [1965] AC 867).
- (d) This part of the question required the answer to explain and define the nature of a gift and how gifts can be “perfectly” assigned and protected by equity if the conditions are met, i.e. (1) the donor intended to make the gift without payment and lose all the donor’s rights; (2) the donor gives title to the donee and (3) any other requirements that may be needed to transfer title as required by law.

Part A
Question 2

There were several parties involved in the question and the answers needed to be specific as to whom it was referring to and also which part of the facts. The answers tend to miss parts of the issues.

Alan and Barry – There were four main points that needed to be discussed with appropriate case law and application.

Regarding the 6th and 7th deliveries, section 32(2) of Sale of Goods Ordinance should be used and discussed. The discussion should be on whether Alan could have rejected the additional 10kg or the entire delivery, and as Alan accepted the additional 10kg, Alan should have paid for them at the contracted rate. For the 8th and 9th deliveries, the issues centered on s.32 of SOGO and the *de minimis* rule. In the discussion of the *de minimis* rule case law such as *Shipton Anderson & Co Ltd v Weil Bros & Co.*, *Wilensko v Fenwick* and *Arcos v Ronaasen* should be discussed. Another discussion should be based on the 10th delivery, and because it is a severable contract, s33(2) SOGO applies and should result in Alan being able to refuse to take delivery if there has been repudiation. However, discussion on the duty of refusal delivery by Alan would be necessary and should point towards s. 38 of SOGO.

Cathy and Alan – The issue mainly focused on the discussion on s.12 of the SOGO and the issue of time of essence as a term of the contract. The discussion should, using case law, center on whether Cathy can and did waive the deadline and gave a new one. It would also require the understanding of what would happen if the time of essence term is breached.

Daniel and Alan – This part of the question required understanding and application on the merchantable quality implied terms (s.16 of SOGO) and sale by description (s.15 of SOGO) and their application to installment/severable contracts (s/33(2) of SOGO). Case law would be important to illustrate the application of the law.

Part B
Question 1

The parts in the questions referred to different legal knowledge and application required within securities and the rule of priority. The main points were:

- (a) In this part, an explanation of what a floating charge is to show the knowledge would be needed – e.g. it is a “dormant” interest attached to the book debts which allow for the book debts to change from time to time until the occurrence of an event which will crystallize the floating charge, at which point the charge will affix itself to the book debts. It is an equitable security and allow for Fuji to deal with and run the business and will not affect the day-to-day running of the business. The question further focuses on a mortgage, that required the discussion of the nature of a mortgage. In particular the differences and advantages and disadvantages of both.
- (b) This part of the questions dealt with priority and required the understanding and explanation of the principle of *qui prior es tempore potior est jure* and application of the Companies Ordinance (Cap. 622).
- (c) This part of the question required the discussion of priority again with particular focus on the requirement of registration and the jurisdiction and discretion of the court to extend the time of registration. Case law will be required to illustrate and discuss.
- (d) The discussion of the nature of a fixed charge and in particular compared to a floating charge would be needed. Other points for this part were the discussion of how to prevent further charges by the discussion of the use of effective and enforceable covenants such a negative pledge clause and/or automatic crystallization clauses. A thorough discussion of what these clauses are and how they work would be necessary.

Part B
Question 2

The question surrounds one shop but deal with a range of issues ranging from hire-purchase agreements to retention of title clauses. The main points for each of the sections are:

- (a) The nature of a hire-purchase agreement should be explained with an explanation on the bailment relationship and how it is “not yet” a sale of goods agreement.
- (b) Concludes that it was a sale of goods agreement as there was no option and the explanation of what was and how does a retention of title clause work. Case law, in particular the case of *Aluminium Industrie Vasseen v Romalpa Aluminium* [1976] 1 Lloyd’s Rep 443 would be necessary.
- (c) Sections 19 and 21 of the SOGO should be pointed to, as well as relevant case law, such as *Clough Mills Ltd v Martin* [41985] 1 WLR 111, to illustrate and apply how the retention of title clause worked for the gold stickers.

In relation to the dried flowers, the main issue was whether title could be reserved due to the clear wording of clause 8.2. The conclusion should be drawn and relevant legal discussion that the flowers had lost their identity and therefore ceased to be the property of Beauty Ltd. The use of case law, such as *Re Peachdart* [1983] 3 All ER 204 or *Re Bond Worth* [1980] Ch 228, to illustrate the loss of ‘identity’ would be required.

Glass bottles – Application and the argument regarding whether the bottles have lost their identity would be a key to this part of the question. The distinguishment that can be made can

be illustrated in the cases of *Re Peachdart* and *Hendy Lennox Ltd v Grahame Puttick Ltd* [1984] 1 WLR 485.

Part C
Question 1

Part (a) of Question 1 focused mainly on the law and legal application of undue influence and guarantee. Part (b) of the same question related to undue influence with a minor part of how the misrepresentation of Alister affected the outcome of undue influence. The main points of each part were:

- (a) The discussion and explanation of the law relating to undue influence was essential. Many answers lacked the details that were required. The main points were the recognition of the class 2A relationship and the explanation and application with case law thereof. It must be noted that Benny who was responsible for the undue influence was not a party to the Bank, the Bank was not responsible for the undue influence of Benny unless there was constructive notice as established in *Royal Bank of Scotland v Etridge* due to vulnerable party contract. According to *Royal Bank of Scotland v Etridge (No.2)*, there was still an evidential requirement to show that the transaction was one that calls for explanation. The test is an objective one, ie, the question is whether, on the facts of the particular transaction and in light of the parties' relationship, the transaction can be explained by ordinary motives.

Negligence of the Bank to advise was also an issue, but that itself did not give rise to undue influence.

The second main point of the question was the explanation of a guarantee. The nature and how it works with the primary obligation was needed. The next requirement would be the discussion of what makes a material alteration illustrating with case law. Many answers jump right into the discussion of material alteration without explaining the nature of the guarantee, which would be the basis that explains why the material alteration of the loan agreement would affect the guarantee.

- (b) For the second part of the question, the answer should be focused on the class 2B undue influences and the requirement of the reposed trust and confidence on Danny. Applying the similar approach in *Royal Bank of Scotland v Etridge* because of the misrepresentation by Alistair of the use of the funds i.e. (a commercial nature), the Bank will not be likely to be put on notice.

Discussion of misrepresentation by Alistair to the Bank would also be given credit.

Part C
Question 2

The question regarding Elenore were separated mainly into consumer protection with the Supply of Service (Implied Terms) Ordinance, the Control of Exemption Clauses Ordinance and the Misrepresentation Ordinance for Part (a) and Part (b) and the Money Lenders' Ordinance for Part (c). For each part of (a) and (b), credits were given for the discussion of incorporation of terms into the contract at any given part when it was discussed.

- (a) The discussion of and defining of what a “consumer” is as referred to under s.4 of the Supply of Service (Implied Terms) Ordinance. The question further required the discussion of the need to supply service with reasonable care by Thai M Ltd. and a failure of it would be a breach of s.5 of the Supply of Service (Implied Terms) Ordinance.

The lower back problem and its exemption from the relevant clause should be placed under the discussion of s.7(1) of the Control of Exemption Clauses Ordinance and s.8 of the Supply of Service (Implied Terms) Ordinance, that personal injuries due to negligence cannot be exempted or restricted. Many answer were able to spot one of the ordinances, but not both.

Section 3 of Misrepresentation Ordinance should be applied to the situation of the licensing of the masseuses. Discussion of the kind of damages would be required to gain full marks for this part.

- (b) In discussing this part, answers all took into consideration of the clauses 4.1 and 4.2. In this part, the main point was that due to the lost being property and not personal damage, s.7(2) of the Control of Exemption Clauses Ordinance would allow the use of the exemption clause if it satisfied the reasonable test. What is, and the explanation of the reasonable test is required.
- (c) This part focused on the Money Lenders' Ordinance and the requirements the ordinance set for the enforcement of loans and its procedures. The first issue would be the discussion of whether Loans4ease Ltd, was indeed a money lender (s.7 of MLO) and if it was not, whether the loan is one that was enforceable. The enforceability of the loan meets the following challenges, namely, money lender license, the lack of following of procedures regarding the memorandum (s. 18 and s.19 of the MLO), the terms and the discussion of the interest rate (.24 of MLO).

The answers generally were able to discuss and pick out what were not complied with under the MLO by Loans4ease Ltd. but tend to fail to discuss and apply the legal discretion of the court in enforcing the loan dispute the procedures not being followed properly.