

PCLL Conversion Examination
August 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) Whether the goods in question had an issue in accordance with section 15, section 16 and section 2(5) of the Sale of Goods Ordinance (Cap. 26). In relation to the colour of the goods, it should be stated or identified that the wrong colour was not a merchantable quality issues, but one of description and explain with case law, e.g. . *Varley v Whipp* (as example). In particular to section 15 of the Sale of Goods Ordinance, it should be explained a breach of description is a breach of the condition of the contract and the consequences thereof.

The discussion of merchantable quality was also essential for the answering of this part of the question. The discussion should focus on section 16(3) of the Sale of Goods Ordinance, whether the goods should be fit for common purpose or specific purpose and whether the yoga pants in question, were indeed unfit for common purpose/specific purpose if used for scuba diving.

Another discussion that needs to be discussed in the answer is the one employee having issue with the yoga pants. The discussion should surround the idea and concept of "reasonable" usage and whether the employee was peculiarly sensitive (e.g. *Griffith v Peter Conway*), and if so, will not make the pants unmerchantable.

- (b) This part of the question focuses on frustration. An answer should explain the concept of frustration and explain how the concept of frustration are incorporated into sections 8 and 9 of the Sale of Goods Ordinance. But come to the conclusion that these two sections do not apply in the given case and therefore need to rely on section 62(2) of Sale of Goods Ordinance and the use of the common principle of frustration. However, the contract had not become impossible to perform,

therefore, there was no frustration.

- (c) The discussion on this part should be focused on the passing of risk and how it usually passes with property under section 22 of the Sale of Goods Ordinance. Further, in ascertaining when the property passed, the answer needs to distinguish the type of the goods in question and be able to explain and apply section 20 rule 5 of the Sale of Goods Ordinance.

Question 2

2a) This question requires the answer to explain the *nemo dat* rule and section 23 of Sale of Goods Ordinance. Further, it requires the answer to discuss the exceptions to the *nemo dat* rule, in particular section. 24 of Sale of Goods Ordinance, explain that an exception is given if the purchaser purchased the item in a shop or market and that as the purchase of the phones was in a shop (seemly a normal shop, *Au Muk Shu v Choi Chuen Yau*) Alan will be able to get good title as against the true owner.

2b) This question focuses on the concept of anticipatory breach and whether the same had been committed. An explanation of anticipatory breach would be necessary and the option the innocent party may have in such situation. The discussion of the refusal to accept the anticipatory breach need to be discussed with the remedies that would be available in accordance with section 53 of the Sale of Goods Ordinance. The calculation of the damages between the contract price⁴ and the market price should be the actual date of non-performance.

2c) The answer needs to focus on the remedies that would be available and also the discussion of real remedies as well as personal remedies. The innocent can claim under section 51 of the Sale of Goods Ordinance provided that the property and risk had already passed to Candy and Candy refused to pay.

- i) The answer will be different. The goods are still in transit and Candy being insolvent, Alan may be able invoke section 46 of Sale of Goods Ordinance to stop the goods in transit and request DHL to be redelivered to Alan. Alan would be able to either hold the goods as a lien (not much use) or excise the power or re-sale under section 50 of Sale of Goods Ordinance. Explanation of how each of the remedies work would be required.
- ii) As Candy had refused to take delivery, Alan would only have a course of remedy in section 52 of Sale of Goods Ordinance. Explain the main difference between

action for price (section 51) and action for non-acceptance (section 52).

Explain in detail the measure of damages which is the estimated loss directly and naturally resulting from the ordinary breach as laid down in *Hadley v Baxendale* (1854) 9 Ex 341. Explain the innocent party (Alan) need to take reasonable steps to mitigate damages and how s. 52(3) of SOGO apply with the concept of available market.

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:

Explaining the nature of a cheque using s.73 of the Bill of Exchange Ordinance (Cap. 19) (“BOEO”) and explain that a cheque is a bill of exchange according to s.3 of the BOEO. The answer should also define using s.3 of BOEO and explain what a bill of exchange with explanation of the key elements.

The effect of alteration on a bill of exchange would be required and in particular what determined to be a material alteration (*Wallet v Stanley* [1928] 138 LT 620 and *Auto Finance Corporation of Australia v Law* [1933] 49 CLR 1) in accordance with s. 64 of the BOEO. The answer need to also discuss the bank and customer relationship and to determine if a breach had occurred. By the failure to pay the money to the correct person in relation to the materially altered cheque. Another question is whether reasonable care had been exercised in drawing the cheques and where the loss lay. For the breach of bank and customer relationship by the bank, the discussion of whether a failure to follow mandate on the countermand of the 1st November cheque need to be discussed followed by whether the countermand was an effective one. It should be noted that under s.75 of BOEO a customer may terminate the mandate with a countermand. Explain what is an effective countermand with case law examples (*Curtice v London City and Midland Bank* [1908] 1 KB 293 and *Westminster Bank Ltd v Hilton* (1926) 43 TLR 124).

The customer’s duty relating to the bank and customer relationship need to also be discussed. It should be noted that there is no general duty of customers to check bank statements. However, discussion of how the banks may be able to protect itself further can be discussed in the landmark case of *Tai Hing Cotton Mill v Liu Chong Hing Bank* [1986] AC 80,

Question 2

- a. Explain how a bailment is established and in particular the elements that are required to create a bailment relationship, noting at the same time that the creation of a bailment does not necessarily need a contractual relationship. The explanation of the duties of a bailee in a bailment relationship would also be

required and how the bailee need to adhere to the bailor as well as the obligations under the bailment relationship.

The answer should apply the facts and discuss the gift that was damaged and whether the bailee could be liable as whether the bailee failed the standard of care placed on a bailee but must discuss the standard of care in the context of the type of bailment. The different type as well as legal application of gratuitous bailment from a bailment for reward need to be discussed. The standard of care could also be different based on the traditional and modern approach as give example with case law (e.g. *Hougland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694)

- i. The answer would be different as Bill deviated with the terms of the bailment and would make him strict liable unless the loss would have happened in any event (which was not in this case).
- b. The answer needs to explain and define the nature of a pledge as a security and explain that even though shares are choses in action in nature, if the chose in action can be evidenced by a document, the document may be pledged (*Silver Stone Development Ltd & Anor v Lau Kwong Ching & Ors* [2007] 4 HKC 77.) As such, the shares which are represented by the share certificates can be pledged and creating an enforceable security.
- c. Using s.9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23), explain the requirements for an assignment of the debt being a chose in action and should discussion the consequences if the element of notice was not given to the debtor. The discussion of possible issues with assigning in equity only needed with case law (e.g. *Holt v Heartherfield Trust Ltd* [1942] 2 KB 1).

Part C

Question 1

Part (a) of Question 1 focused on the powers and functions of the Consumer Council and Part (b) of the same question related to the doctrine of unfair preferences. The main points of each part were:

1a)

Explain the function and powers of the Consumer Council:- as laid down by s.4 of the Consumer Council Ordinance (Cap. 216), the power and the function of the Council is to collect information regarding goods and services, and to provide a platform for conciliation. It does not have adjudication nor investigatory powers.

As the Council is not an adjudication body, there is no “remedies” as such, but to provide support to conciliate between the parties in the refunding of the money and may help in provide other remedial measures, such as product exchange, free repair and other discounts etc. The answer should lay out the necessary information that the Consumer Council would need to enforce its powers.

- i. The answer would be different as the Consumer Council only investigate complaints on goods and services purchased from traders by individual consumers for private use or consumption and therefore as the purchase was for his business, it will not be under the purview of the Consumer Council.

1b)

Students need to explain the doctrine of unfair preferences - Section 266B of the Companies Ordinance (Cap 32)(“CO”) provides for the avoidance of unfair preferences in corporate insolvencies and, in doing so, incorporates Section 50 of the Bankruptcy Ordinance (Cap 6)(“BO”).

- i. Powers of the liquidators - Liquidators are empowered to review transactions which took place in the six months before the commencement of the winding up to see whether any of them constitute unfair preferences. However, if it appears that the unfair preference has taken place in favour of an associate of the company, the liquidator can go back up to two years to overturn transactions of this nature. In such cases there is a statutory presumption that the debtor was influenced by a desire to improve the creditor’s position.

Explain and define an “associate” under s. 51B of the BO and s.266B(1)(b) of the CO and they are:- someone who is in partnership with the company; or an employee of the company including directors; or a trustee and beneficiaries of

the trust of the company.

Apply the law to the facts using relevant case law (e.g. *Trustees of the Property of Hau Po Man Stanley (in bankruptcy) v Hau Po Fun Ivy* [2005] 2 HKC 227; *Re Fairway Magazines Ltd, Fairbairn v Hartigan* [1993] BCLC 643, *Joint and Several Trustees of Property of Hau Po Man v Hau Po Fun & Anor* [2005] 2 HKLRD 262).

- ii. The students should come to a conclusion that the answer will not be different as even though under s.51B of BO means the director of an insolvent company is not a 'debtor' and therefore the spouse of a directors do not come within the meaning of 'associates' of the insolvent company. The only difference is the length of time that the liquidator can refer back to i.e. from 6 months to 2 years. Since the repayment happened just 2 months before the insolvency proceedings, the issues are still whether the test for unfair preference is satisfied.

Part C

Question 2

This question focuses on consumer protection and the discussion in the Control of Exemption Clauses Ordinance (Cap. 71) ("CECO") of Clause 7.1 being an exclusion clause under s.5(1)(a) of the CECO and the Supply of Services (Implied Terms) Ordinance (Cap. 457) ("SSO") for the second part of the question.

1. Identify whether VC Ltd. was a consumer for the purposes of the 5 carpet cleaning vacuums and that there is a presumption under s.4(3) of CECO that it might. Discuss the conditions that must be satisfied 1. the goods supplied must be of a type ordinarily supplied for private use or consumption as laid out in s4(1)(c) of CECO AND 2. The contract was not made in the ordinary course of a business nor hold itself out to be s.4(1)(b) of CECO. Apply the facts to the law and come to a conclusion of the likelihood of whether VC Ltd. is a consumer or not.

The second test for VC Ltd to argue it is a consumer would also be difficult even if the expression of 'ordinary course of business' has been given a narrow meaning. Discuss the case of *R&B Customers Brokers v UDT* [1988] 1 WLR 321 and explain what had been held as to whether the goods is part of the ordinary course of business or not. The answer should come to a conclusion that VC Ltd. is not a consumer and the answer should further discuss what and whether the reasonable test had been passed.

2. For the second part of the question, the answer should discuss whether the handheld

vacuum was made the contract in the ordinary course of its business. Come to a conclusion with justification.

b. In relation to the defective service and is a breach of the implied term of care and skill, the answer should discuss in accordance with s.5 of the Supply of Services (Implied Terms) Ordinance (Cap. 457)(“SSO”) and how under s.8 of the SSO, Clause 4.1 is void against.