

## **PCLL CONVERSION EXAMINATION JANUARY 2022**

Title of Paper : Commercial Law – Part B  
Date : 10 January 2022  
Time : 2:30 p.m. – 2:40 p.m. (Reading Time)  
2:40 p.m. – 3:40 p.m.

### **Instructions**

1. Write your **candidate number** on the cover of each answer book. Do **NOT** write your name in the answer book.
2. Start the answer to each question or sub-question on a separate page of the answer book.
3. Write your answers only in the answer books provided.
4. This is a one-hour examination.
5. This is an open book examination.
6. Reading time for this paper is 10 minutes. Do **NOT** begin writing in your answer books during this period until you are instructed to do so.
7. This paper consists of 5 pages, including two questions. Candidates are only required to answer **ONE** question out of two. A total of 100 marks may be awarded. Candidates will score zero marks if they answer more than one question.
8. The passing mark for this paper is 50 marks.

**DO NOT OPEN THIS QUESTION BOOK  
UNTIL YOU ARE TOLD TO DO SO**

PCLL Conversion Examination January 2022

Commercial Law

**Part B: Personal Property**

**Question 1 (100 Marks)**

Exceptional Paintings Limited (the “**Company**”) runs a high-end art gallery specializing in the purchase and sale of very expensive paintings. It has two shareholders and directors, James and Kelly. They each contributed HK\$26 million to the Company in the form of shareholder loans when it was set up in January 2019. Soon after the Company’s establishment, the majority of the funds raised through the loans were used to buy 5 paintings, each costing HK\$10 million (collectively the “**Paintings**”).

As security for his shareholder loan, the Company granted James a fixed charge over the inventory of the Company. The loan and the charge were documented in a debenture dated 10<sup>th</sup> January 2019, with only a simple charging clause dealing with the fixed charge (“**James’ Debenture**”). James’ Debenture was registered with the Companies Registry on 18<sup>th</sup> January 2019. Kelly was very confident in the prospects of the Company and did not require any security for her shareholder loan.

Due to COVID 19 complications, the Company was not able to sell any of the Paintings and needed additional working capital to continue. In November 2019, the Company borrowed HK\$5 million from Smart Bank Limited (“**Smart Bank**”) under a Loan and Security Agreement (the “**Agreement**”) executed on 5<sup>th</sup> November 2019. The Agreement was registered with the Companies Registry on 18<sup>th</sup> November 2019 and contained, inter alia, the following provisions:

*4.01: The Company, as beneficial owner, hereby charges to Smart Bank as continuing security for the payment of all moneys and the discharge of all obligations and liabilities hereby covenanted to be paid or otherwise hereby secured by way of a first fixed charge over the Paintings.*

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*7.01: The Company covenants with Smart Bank that the Company shall not (without prior written consent of Smart Bank):*

- a) create any mortgage, pledge, charge, debenture, lien or other encumbrance upon the assets hereby charged ranking in priority to or pari passu with this Agreement;*
- b) sell, dispose or transfer any of the assets hereby charged (in whole or in part) and where such sale, disposal or transfer is so consented by Smart Bank in writing that any proceeds derived must be deposited into a specific account with, and held on trust for, Smart Bank and such proceeds left untouched by the Company except with consent of Smart Bank; and*

- c) *remove any of the warning labels which Smart Bank has required the Company to place prominently on the frames of the Paintings stating such painting is subject to the charge created under this Agreement nor restrict or revoke any of the access rights to the Paintings which the Company has granted to Smart Bank pursuant to this Agreement.*

Unfortunately for the Company, the artist who painted the Paintings (the “Artist”) became controversial and as a result the Company could not sell the Paintings. By December 2020, the funds borrowed from Smart Bank had been largely used up and the Company was in financial difficulties. The Company managed to convince another bank, Silly Bank Limited (“**Silly Bank**”), to lend it HK\$2 million and signed a debenture granting Silly Bank a fixed charge over the Paintings on 1<sup>st</sup> December 2020 to secure this HK\$2 million loan (“**Silly Bank Debenture**”). The Silly Bank Debenture was identical in form and substance to the Agreement (in particular, containing provisions identical to Clauses 4.01 and 7.01 of the Agreement) and filed with the Companies Registry on 10<sup>th</sup> December 2020.

The Company’s business suffered another significant blow in the third quarter of 2021 when the Artist publicly announced that he would paint a lot more paintings to make more money for himself. The Company is now behind in its payments and a petition to wind up the Company was filed on 17<sup>th</sup> December 2021 with the court subsequently granting a winding up order.

**Advise the liquidator as to the order in which the assets of the Company should be distributed. You can assume that the only material assets of the Company (other than working capital in bank accounts) held throughout January 2019 to December 2021 were the Paintings. (100 marks)**

**Question 2 (100 Marks) (Answer both parts)**

- a) Bacchus Limited (“**Bacchus**”) is a Hong Kong private company that owns multiple vineyards in China from which it produces a white wine and a red wine (collectively, the “**Wines**”). The Wines are sold in standard bottle form exclusively to Fantastic Bars Limited (“**Fantastic**”) for onward sale and use in various bars in Hong Kong which are owned and operated by Fantastic.

Fantastic purchases the Wines as and when needed under a supply agreement with Bacchus (the “**Supply Agreement**”), the terms of which will apply to each and every order Fantastic makes. Clause 1 of the Supply Agreement contains, inter alia, the following provisions:

*1. Sale and Title*

*1.1. Notwithstanding any other provision in this Supply Agreement, Fantastic agrees and acknowledges that Bacchus will retain ownership and title in the Wines supplied by Bacchus under this Supply Agreement until*

*Fantastic has made full and final payment of all amounts due under this Supply Agreement and any other sums it owes Bacchus.*

*1.2. Bacchus consents and agrees that Fantastic may, in its ordinary course of business, process, use or sell the Wines. Any moneys received from a third party in respect of such processing, usage or sale of the Wines by Fantastic must be held on trust for Bacchus and Fantastic must strictly account to Bacchus for such moneys unless and until full and final payment as set out in Clause 1.1 is made.*

*1.3. Where the Wines are processed or used by Fantastic to make, or incorporate into, any new product or beverage, ownership and title of such Wines continue to remain with Bacchus and all of Bacchus' rights to such Wines under this Supply Agreement will extend to such new products or beverages of Fantastic.*

Fantastic uses the Wines in its bars in the following fashion:

- a) sale in individual glasses for consumption by bar patrons;
- b) sale in original bottles for bar patrons to bring back home for consumption; **and / or**
- c) as a mixer in cocktails and other bar drinks (such as sangria) for consumption by bar patrons.

Unfortunately, due to the COVID situation in Hong Kong, Fantastic has become insolvent. Bacchus is owed HK\$2 million for unpaid Wines. Bacchus was permitted by the liquidator to carry out an inspection of Fantastic's bars. This inspection revealed that Bacchus had on Fantastic's premises HK\$800,000 worth of Wines in their original bottles. Fantastic had paid Bacchus for half of such Wines. There was also in the bars, bottles of cocktails and other bar drinks worth HK\$600,000 which had labels indicating that some Wines had been used to make such cocktails and bar drinks. In addition, Bacchus discovered from bar records that Fantastic is in possession of HK\$500,000 which was generated by sale of Wines in Fantastic's bars (either in glasses or original bottles).

**Advise Bacchus as to its legal position given Fantastic's insolvency.**

**(70 Marks)**

- b) Following on from the facts of Part A, due to the insolvency of Fantastic, the Chief Executive Officer ("CEO") of Bacchus decides that it needs to improve its cash flow situation quickly and so agrees to sell a HK\$1 million trade receivable (the "**Receivable**") which it is owed by another customer, Excellent Restaurants Limited ("**Excellent**") to a debt factoring agent, Factoring Express Limited ("**Express**") for HK\$800,000. The sale is documented in a detailed written

assignment agreement dated 1<sup>st</sup> December 2021 between Bacchus and Express under which the Receivable is assigned in full to Express. On 6<sup>th</sup> December 2021, Express notified Excellent (via registered mail) of the assignment of the Receivable from Bacchus to Express, enclosing a copy of the assignment agreement.

The Chief Financial Officer (“CFO”) of Bacchus had similar thoughts to the CEO about Bacchus’ cash flow situation and agreed with another debt factoring agent, Newcomer Factoring Limited (“Newcomer”), to sell half of the Receivable (HK\$500,000) to Newcomer for HK\$300,000. The sale of the Receivable to Newcomer was agreed over a telephone call between the CFO and Newcomer on 29<sup>th</sup> November 2021. On 10<sup>th</sup> December 2021, Newcomer emailed Excellent to inform them of the partial assignment of the Receivable.

**Which assignment has priority? Please fully explain your answer. You can assume that (a) the CEO and the CFO did not discuss with each other the sale of the Receivable but nevertheless, each of them has sufficient authority to bind Bacchus to the respective sale of the Receivable to Express and Newcomer, and (b) that neither Express nor Newcomer knew about the assignment of the Receivable by Bacchus to the other.**

**(30 Marks)**

**~ End of Examination Paper ~**

## **PCLL CONVERSION EXAMINATION JANUARY 2022**

Title of Paper : Commercial Law – Part C  
Date : 10 January 2022  
Time : 4:00 p.m. – 4:10 p.m. (Reading Time)  
4:10 p.m. – 5:10 p.m.

### **Instructions**

1. Write your **candidate number** on the cover of each answer book. Do **NOT** write your name in the answer book.
2. Start the answer to each question or sub-question on a separate page of the answer book.
3. Write your answers only in the answer books provided.
4. This is a one-hour examination.
5. This is an open book examination.
6. Reading time for this paper is 10 minutes. Do **NOT** begin writing in your answer books during this period until you are instructed to do so.
7. This paper consists of 3 pages, including two questions. Candidates are only required to answer **ONE** question out of two. A total of 100 marks may be awarded. Candidates will score zero marks if they answer more than one question.
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PCLL Conversion Examination January 2022

Commercial Law

**Part C: Consumer Credit and Protection**

**Question 1 (100 Marks) (Answer all parts)**

Alan and Bert are brothers. Alan is the eldest. Bert is very close to him and works for Alan's company, Cedar Ltd. One day over a family dinner, Alan told Bert "*I am expanding the business. I can get a bank loan for Cedar Ltd from Mega Bank for HK\$5 million but they want both of us to sign guarantee agreements. Here is the guarantee agreement, can you please sign it. You have always supported me during the ups and downs of my life. I know you will not let me down now. I love you little brother.*" Bert was overcome with emotion by what his brother had just said and replied "*Of course I will.*" Bert then immediately signed the agreement without reading it. The guarantee agreement stated "*Whenever Cedar Ltd does not pay any amount when due under any loan agreement, the Guarantor must immediately on demand pay that amount as if he were the principal obligor in respect of that amount.*". Under the terms of the agreement, Bert charged his home to Mega Bank as security for payments due under the guarantee.

Advise Bert in relation to each of the following different situations:

- i. Bert and his brother have had an argument and are no longer on speaking terms. Bert feels he was pressurised by his brother into signing the agreement and wants to know whether it is possible for him rescind the guarantee agreement with Mega Bank. **(40 Marks)**
- ii. Bert has discovered that Alan has actually used the loan to Cedar Ltd from Mega Bank to pay off existing debts of the company and not to expand the company's business. **(10 Marks)**
- iii. Bert has discovered that his brother has agreed with Mega Bank, without telling Bert, to increase the loan to Cedar Ltd to HK\$10 million. To what extent, if any, is he still bound by the guarantee agreement? **(25 Marks)**
- iv. Bert paid off all of Cedar Ltd.'s Mega Bank loan. Can he recover all or any of this sum from Cedar Ltd. or his brother? **(15 Marks)**
- v. What is the legal effect of the following clause in the guarantee agreement "*Mega Bank may place any monies received by the Guarantor in a suspense account*" **(10 Marks)**

**Question 2 (100 Marks) (Answer all parts)**

- i) Jill enters into a contract with Dream Ltd ('Dream') for a three day 'Ocean Cruise to Nowhere'. The contract Jill signs states it is subject to Dream's standard terms and conditions which are available on Dream's website. Jill signs the contract without bothering to check what these terms and conditions are. During the cruise Jill suffers severe food poisoning. She now wants to bring a claim for compensation against Dream in Hong Kong for breach of contract on the basis that some of the food she ate was not of merchantable quality and on the basis that there was negligence in the preparation of the food.

However, Dream refer her to the following clauses in the contract:

7. *The courts of Singapore have exclusive jurisdiction to deal with any disputes arising out of this contract .*
8. *Dream Ltd are not liable for any loss or damage or personal injury sustained by guests during the voyage*

Advise Jill as to the legal effect of these clauses. **(60 Marks)**

- ii) In what way, if any, would your advice differ in the case of Jack who was employed as a singer on the cruise ship? Jack also suffered food poisoning and his contract of employment contained similar terms to those stated above. **(15 Marks)**
- iii) Jill owns a diamond brooch. She allows her friend Diana to borrow it in order to attend a party. However, Diana takes the brooch to Fung, a licensed pawnbroker. Diana told Fung she was the owner and, after checking her identity, Fung entered into a pawn broking contract with Diana under which she pawned the brooch with Fung in return for a HK\$90,000 loan. When Diana did not return the brooch to Jill she contacted the police and they have traced the brooch to Fung.

Advise Jill and Fung as to their rights in relation to the brooch. **(25 Marks)**

**~ End of Examination Paper ~**