

PCLL Conversion Examination
January 2018
Examiner's Comments
Commercial Law

Part A (Sale and Acquisition of Goods)

Part A consisted of two problem type questions. Question one's facts were based loosely on *Godley v Perry* [1960] 1 WLR 9 and required a detailed examination of the implied terms protecting a consumer under the Sale of Goods Ordinance (SOGO) in particular under sections 16 and 2(5). Students would also be required to discuss on the duty of delivery and the ascertaining of remedies. While Question two required students to identify the type of goods, the principles in relation to passing of property and risk with an application of the *nemo dat* rule.

Question 1

This question required students to have a detailed discussion of the implied terms as implied into a sale of goods contract under the Sale of Goods Ordinance (SOGO) and the principles surrounding installment contracts, partial acceptances of goods and the remedies available. It is noted that many of the answers contained the principles and/or sections to the relevant legislation, but lack case authorities and the application of the authorities to factual situation.

- The type of sale?
Students would be required to discuss and come to a conclusion the kind of sale that occurred – a sample sale or a description sale to further discuss the rules as apply in ascertaining whether the goggles were of merchantable quality.
- Merchantable quality and fitness for purpose
Students were required to explain the definition of merchantable quality in section 2(5) of the SOGO, but some students failed to do so. Students should also have discussed the exception to the implied conditions on merchantable quality under section 16(2) of the SOGO. If the exception applied, the implied term of merchantable quality had not been breached.

Students should also discuss section 16(3) of the SOGO as the buyer had made known the particular purpose of the goods being purchased.

- Delivery and acceptance
Some students failed to discuss the importance of sections 12 and 13 of the SOGO. Was delivery a condition specified in the contract? If yes, then the Buyer could have repudiated the contract. As the Buyer also took two goggles out of the ten purchased, the discussion of whether the contract was a severable one and partial acceptance were required.
- Remedies and damages
Most students mentioned that damages would be claimable but failed to explain in detail how the court would ascertain the amount/type of damages, in particular,

under section 53(2) of the SOGO in the meaning of “damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller’s breach of contract.”

Question 2

The question required students to analyse the application of the Latin *nemo dat quod non habet* and its exceptions in the SOGO and the Factors Ordinance and a clear understanding of the passing of property and risk under the SOGO with some issues on sections 14 and 15 of the SOGO. It is noted that many of the answers contained the principles and/or sections to the relevant legislation, but lack case authorities and the application of the authorities to factual situation.

- Type of goods and the rules of passing of property and risk
Students are required to determine the type of goods to determine the rule to apply in relation to passing of property under section 20 of SOGO and the passing of risk under section 22 of SOGO.
- *Nemo dat quod non habet*
Students are first required to explain the rule under section 23 of the SOGO and the exceptions as applicable to the question.

Exception of sale under a voidable title section 27(1) of SOGO – “Where a person having sold goods continues to be in possession of the goods or document of title” This section seeks to protect an innocent purchaser who is deceived by the seller’s apparent ownership because of seller’s physical possession or possession of documents of title. The buyer must act in good faith with no notice.

Exception of sale by a mercantile agent under section 3 of the Factors Ordinance - Students were also required to explain the meaning of a mercantile agent definition in Factors Ordinance section 2 (authority in customary course of business to sell goods or consign them) and whether it applied in this particular situation.

- Implied undertaking as to title – section 14 of the SOGO
Under section 14(b) of the SOGO – “an implied warranty that the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made....” Therefore, unless the seller had made known to the buyer of the previous security made on the goods, the seller would be in breach of an implied warranty.
- Sale by description – section 15 of the SOGO
Under section 15 of the SOGO – “Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description....” As three of the fish were not Platinum Arowana as described, they did not fit the description.

Whether the remaining sterile Platinum Arowana fits the description, students should discuss the application of the case of *Cotter v Luckie* [1918] NZLR 811.

Part B (Personal Property)

Question 1 of Part B focused on the issues revolving around the bank and customer relationship and Negotiable instruments. Question 2 of Part B tested students on principles of bailment, securities and the retention of title clause. It is noted that many of the answers contained the principles and/or sections to the relevant legislation, but lack case authorities and the application of the authorities to factual situation.

Question 1

This question required students to go into in-depth discussions on the issue relating to the bank and customer relationship and negotiable instructions.

- **Bank and customer relationship**
The relationship between the bank and its customer is normally one of contractual creditor and debtor and give rise to specific duties, including the adhering to the mandate of the customer, the keeping of the customer's information secret and the right to set off. As the bank was aware of the trust bank account, the bank would be put on notice that the funds in the trust account should be used of the beneficiary. Whether the set off made to the trust account was for the benefit of the beneficiary? If not, the bank should not have set off the amount from the trust account. If the bank set off funds not for the benefit of the beneficiary, the relationship become one of constructive trustee as the bank was put on notice regarding the trust account.
- **The mandate**
As the bank is under a duty to adhere to the mandate of the customer, this includes countermanding negotiable instruments which the customer had made. What is an effective countermand? Was the communication authenticated? Was the communication clear in stating out the payment to be countermand? If the countermand was a proper one, the bank breached its duty.
- **Secrecy**
The bank has a duty to keep its customer's information secret. Unless the revealing of the information falls into an exception (e.g. consent, compulsion by law, public policy etc.) the bank breached its duty to keep the information secret.
- **Action of restitution**
Was the mistake one that was fundamental or instrumental? If so, restitution may be possible disregardless of whether the mistake was one of law, one of fact or a mixture. If the mistake was not fundamental or instrumental, restitution is not possible.

Question 2

- **Bailment**
Whether there was proper transfer of possession and a voluntary duty to take care of the goods by the bailee? If a bailment relationship was satisfied, the failure to return of the goods would be a breach of the bailee's duty unless the

bailee could prove that he had acted up to the standard of a reasonable bailee.

- **Mortgage**
A mortgage is a non-possessory security that transfers the title to the mortgagee. A breach of the mortgage may entitle the mortgagee certain actions, namely the termination of the mortgage and claim the repayment of the loan amount; the power of sale in the event of non-payment and to foreclose (after the application to the court for the relevant court order).
- **Retention of title clause (ROT)**
A ROT is a clause that merely retains title of the property to the seller until the fulfillment of certain conditions by the buyer. It is not a security. However, if a ROT does more than retain title, it may become a charge and would require the procedure of registration and other security procedure to make a security effective.

Clause 1 – whether the ROT merely retains title, if yes, it is a proper ROT.

Clause 2 – whether the ROT merely retains title, if yes, it is a proper ROT.

However, in this case, the ROT goes beyond merely retaining title and may become a charge.

Clause 3 – Whether the ROT retain effective if the raw materials have been incorporated and made into new items. This would depend on whether the original goods (raw materials) remained its essential characteristics (e.g. Re. Peachdart).

Part C (Consumer Credit and Protection)

Part C consisted of two problem type questions. Question 1 required students to discuss the range of protections given to consumer amongst the three protective legislation, namely, the Unconscionable Contract Ordinance (UCO), the Control of Exemption Clauses Ordinance (CECO) and the Supply of Services (Implied Terms) Ordinance (SSO). Question 2 focuses on the topic of securities and the factors that may vitiate them.

Question 1

The question required the student to discuss how the UCO, SSO and CECO apply to protect the relevant consumer in question. As a general requirement, the definition of consumer should be discussed.

- **Amy at the Susan's salon**
The CECO applies to both consumer and businesses, therefore it should apply to Amy's situation. In relation to the stolen property, the discussion of whether the exemption clause was incorporated into the contract, if yes, a discussion of whether the exemption clause satisfies the reasonable test in section 4 and Schedule 2 of the CECO.

The students were required to discuss and apply section 7 of the CECO that no exemption can exclude or restrict his liability for death or personal injury resulting from negligence.

SSO – If Susan is a consumer, sections 5 and 8 would apply that the exclusion of liability for the breach of the implied terms of reasonable care and skill is not allowed unless it is considered reasonable under the CECO.

UCO – The UCO is also applicable in this situation and a legitimate route; however is not the best remedy as unconscionable is generally for rare and egregious examples of immoral sales tactics in Hong Kong.

- Simon and Jeremy’s renovation contract
Whether the SSO applies in this situation and if so how would sections 6 and 7 apply. Section 6(1) of the SSO stipulates that “... the time for the service to be carried out is not fixed by the contract... there is an implied term that the supplier will carry out the service within a reasonable time.” Students should discuss whether 2 months delay was within a reasonable time. If not, there would be a breach of an implied term of the SSO.

Section 7(1) of the SSO stipulates that “Where... the consideration for the service is not determined by the contract... there is an implied term that the party contracting with the supplier will pay a reasonable charge.” Therefore, Simon would be required to pay a reasonable fee to Jeremy for the work done.

- Simon and David’s money lending issue
Whether David was a licensed moneylender? Whether David was in the business of money lending and whether he held a moneylender license. If David does not hold a valid moneylender license, David would be acting in contrary to the Moneylenders Ordinance (MLO) section 23 and the loan become unenforceable. Presuming that David or David’s company holds a moneylender license, under section 24 of the MLO, the interest rate should not exceed 60% per annum.

Question 2

The question required the students to discuss whether Ada can succeed in avoiding the guarantee and the security on the grounds of undue influence, misrepresentation or duress or whether Mr. Lam had failed in the duty of care to advise Allen and Ada to seek independent legal advice. Therefore, the explanation of what is undue influence, misrepresentation and duress would be required.

- The security
The nature of a guarantee and the meaning of a joint and several guarantee could be explained.
- Misrepresentation
Whether the statement made by Mr. Lam was a statement of fact or just a comment to determine the likelihood of misrepresentation.
- Duress

Whether there was duress in the factual situation, by explaining what duress is, it would be unlikely that duress had occurred.

- Undue influence (UI)
Whether the UI is a two party UI or a three party UI? If the undue influence is via Mr. Lam, was there trust and confidence relation on the bank? If no, there may be no UI by the Bank. Was it a three party UI relationships, because Mr. Lam was a friend? Student should discuss the concept of constructive notice, but if the transaction is one of commercial, constructive notice does not apply, however, but is the Bank put on inquiry because of the relationship between Allen and Ada is one of husband and wife (a non-commercial relationship as well). The principles in *Royal Bank of Scotland plc v Etridge (No. 2)* are required to be applied. Whether the Bank was put on enquiry by applying the suspicious transaction test? If the overall situation/relationship as known to the Bank is a non-commercial one, the Bank may be put on enquiry, but as the wife is also the director and shareholder of the company, does this make the transaction one of commercial? If so, the transaction may not be one that is suspicious.
- Duty of the bank
Did the bank satisfy its duty to take “reasonable steps” to bring home to the wife the implication of the transaction? Asking the wife to seek independent legal advice may already satisfy this requirement.