PCLL Conversion Examination
January 2019
Examiner's Comments
Commercial Law

Part A

Question 1a)

Many answers started with a discussion of acceptance. This was clearly the wrong order any law student should know that rights come before remedies!

Answer should have begun by discussing that given the fact that the contract required a considerable amount of skill the first issue too consider was whether the contract one for the sale of goods and therefore subject to SOGO or a contract for work and materials in which case it is most likely that analogous implied conditions exist at common law.

The relevant implied conditions should then have been considered. Surprisingly many answers omitted discussion of S15 implied condition of description. The contract required the use of original 1930 parts and engine did not meet this requirement. This would therefore seem a breach of S15 unless there was evidence that in the classic car trade the car could still be described as a 1930 Rolls Royce despite the fact that the engine was not 1930 one as then the engine's age would not be an important ingredient of the Rolls Royce's identity.

Regarding S16 (2) SOGO a good answer should have focused on the S2 (5) definition of merchantable quality. Clearly the scratch would fall within (b) appearance while the problems with the wipers and gears would fall within (a) fitness for common purpose and (d) safety. However at the end of the day the court would take into all the faults together and ask the question would a reasonable buyer if he had known about these faults at the time of delivery have refused to take the goods or only after a significant reduction in the price? A good answer would also have taken into account the fact that the price difference because of the faults in HK $500,000. Such a substantial price difference could mean the goods are unmerchantable. BROWN v CRAIKS [1970] 1 All ER 823. HK CASE GRACE GARMENTS v TAJAMAHAL'S LTD [1974] HKLR 239 The defence that because of the complicated nature of the project there can be no expectation of perfection should also be considered as the definition states that all relevant circumstances must be considered. If the goods are unmerchantable at the time of delivery there is a breach even though the defect can be remedied later by a simple process JACKSON v ROTAX MOTORS[1910] 2 KB 937. Credit was also given for reference to s16(3) however as there no indication that the goods were wanted for any special purpose e.g. display only as opposed to also driving on the road this provision does not significantly improve the buyer's rights on the facts.

Remedies if there was a breach of any of the implied conditions should then have been considered Tim could end the contract if no acceptance and obtain a refund as well as damages for non-delivery for any loss that is not to remote e.g. extra need to purchase an equivalent vehicle elsewhere, disappointment damages, any repair costs

incurred etc.

Acceptance S37 SOGO should then have been explained and applied. Tim allowing KVC to attempt a repair –is that an intimation of acceptance –does reasonable time run against Tim while repairs are being attempted? Candidates should been expected to know that unlike England there is nothing in the HK legislation that makes it clear whether time spent attempting repair is an act of acceptance "intimation of acceptance/act inconsistent with the seller's ownership" and whether time spent repairing counts towards lapse of reasonable time.

(If there is acceptance Tim's only remedy is damages –had he failed to mitigate his loss by not accepting KVC's offer to cure the continuing problem with the wipers and gears or is it reasonable to reject this as confidence had been lost in KVC? The prima facie measure of damages under S55 (3) would be the difference between the value of the Rolls- Royce on the date of delivery HK$5 4.5 million and the value it should have had (normally taken as the contract price) HK$5 million and any other loss that it is not too remote such as disappointment damages. However this is only the prima facie rule and the court might consider that a better measure of assessment is the amount spent by Tim on repairs with another repairer. Thus if the car can be made perfect by spending Hk$100,000 on a new gear system this, plus other repair costs, could be the measure of damages. The fact that the price has fallen to HK $3 million is unlikely to be taken into account as this was not caused by the breach of contract and would have been suffered even if the car had been in perfect quality.

Question 1 b)

Most answers correctly identified that issue was concerning ownership and risk but the application to the facts was generally quite weak.

It was crucial to correctly categorize the goods as unascertained goods and not as many answers did as specific goods. This is judged at the time the contract was made and at that that time the car did not exist, therefore it would be classified as future goods which are always regarded as unascertained. Therefore s9 SOGO had no application. Answers should have focused on S22 risk of accidental loss is with the owner and S20 R5.

Under s20 R5 title only passes when the goods which are in a deliverable state are unconditionally appropriated to the contract with the assent of either seller or buyer. The car was not in a deliverable state at the time of fire (as work still needed to be done on the Rolls Royce) so property did not pass. However S20 is subject to a contrary intention in the case of ascertained goods S19. Was there an intention for property to pass earlier? This seems unlikely.

Question 2

(a) In general this was not well answered, candidates struggled in particular to identify the relevant nemo dat exceptions to apply.

Re whether Amanda had lost title to the diamond many answers erroneously applied S3 Factors Ordinance. However this was wrong as even if Bert was

actually a mercantile agent (not clear from the facts) the diamond was given to him in his capacity as a buyer and not a mercantile agent. When Bert sold the diamond to Celia the market overt exceptions24 SOGO could not apply, a Kowloon hotel could be regarded as "a shop or market".

S25 SOGO should have been considered as Bert has obtained possession of the diamond by fraudulent means as he may have misled Amanda about its value and for certain he was guilty of fraudulent misrepresentation when he presented to her a forged cashier's order. This gave Bert a voidable title and if he sold the diamond before Amanda rescinded, a good faith third party would get good title. Unfortunately for Celia this would not work in her favour, the facts said that 3 days after the sale Amanda rescinded by telling the police and it was one week later when Celia bought the diamond so at that time the contract between Amanda and Bert had already been rescinded Car & Universal v Caldwell.

S27(2) SOGO resell by a buyer in possession should then have been considered. Clearly on the facts Bert was a buyer in possession but the issue for Celia was that even if she bought in good faith under S27(2) the buyer must sell in the same way a mercantile agent would sell. This might be difficult for Celia as the sale did not take place from business premises but at a hotel. On the other hand if evidence can be produced that diamond brokers did actually meet clients in hotels then this might satisfy S27(2) in the same as the buyers selling a car for cash in Warren Street was acting like a car dealer in Newtons of Wembley v Williams .

Celia's contract with Diane

Clearly, if no title passed to Celia she was in in breach of S14 (1) SOGO and also there has been a total failure of consideration under Rowland V Divall which would allow Diane to get a refund of her money from Celia. Very few answers mentioned this.

(b) Very few answers were aware of S14 (2) SOGO. In a contract for the sale of goods, in the case of which there appears from the contract there is an intention that the seller should transfer only such title as he may have there is only an implied warranty that the seller will not disturb the buyer's quiet possession of the goods. So in effect it is possible for a seller to contract out of S14 (1) and avoid the total failure of consideration rule by a clearly worded clause in the contract limiting the nature of the seller's promise regarding title. Therefore if Celia did not pass title to Diane she would be protected from a S14 (1) SOGO or total failure of consideration claim by the fact that the clause results in S14 (2) applying.

(c) Answers should have discussed whether title had passed to Victor. If the answer was yes answers should have discussed S27 (1) resale by a seller in possession as crucially Tony had remained in physical possession of the car. Case law states that as long as the seller remains in physical possession it does not matter that here Tony's status has changed from seller to bailee/ repairer. PACIFIC MOTOR AUCTIONS v MOTOR CREDITS. S27 (1) then provides that if the seller in possession, Tony, sells and delivers the goods to a good faith B2 then B2 gets good title and B1 loses out. So whether or not Walter gets good title depended on

whether there has been a delivery to him. Clearly there has been no physical delivery but has there been a constructive delivery? Is the act of Tony stating the car is ready and in effect saying I am holding the car for you a constructive delivery as in MICHAEL GERSON (LEASING) LTD v WILKINSON STATE SECURITIES-any sensible discussion of this received full credit. Some students raised market overt but on the facts this provision does not seem likely to apply as the goods must be "openly sold in a shop". This means that the sale must involve goods on public display and not as here a car which is out of public view in the repair shop.

(d) If Tony allowed Victor to have possession then S27 (1) will not apply as Tony was not "a person [who] having sold goods continues ..in possession of the goods" and when he got the goods back it was not as a seller in possession but only as a bailee/repairer. So any break in physical possession prevented S27 (2) applying MITCHELL V JONES.

Overall there was a lack of consistency in the quality of the answers, it was common for candidates to do exceptionally well on one or two parts of the question but then do very badly on the other parts.

Part B

Question 1

This question requires an analysis of Clause 6. This title retention clause consists of three parts – the basic title retention provision (Clause 6(A)), an extension to cover the sale proceeds of the wood boards delivered (Clause 6(B)) and an extension to cover new products arising from the wood boards delivered (Clause 6(C))**.**

Clause 6(A):
This clause is effective to retain title and is not a charge, *Romalpa*. The problem here is the original wood boards delivered cannot be found. Only the wood boards fully assembled into furniture can be found. Because the furniture are easily assembled and therefore disassembled, discussion should be had about whether the assembled furniture are still the original materials delivered and therefore should still be recovered under Clause 6(A). The language "any other sums" denote an all monies clause which will cover the $150,000 judgment against the buyer.

Clause 6(B):
The question here is whether the sub-sales are authorised so that the seller can be said to be holding the sale proceeds for the seller as an agent or a trustee. If it does not, then the clause amounts to a registrable charge, *E. Pfeiffer* and *Compaq Computers*. The charge needs to be registered under Part 8 of the Companies Ordinance, Cap 622 ('the CO"), otherwise it is void against the liquidator and other creditors. Almost all candidates who discussed the registration of charges did so under s80 of the repealed Companies Ordinance. The operative provisions are in Part 8 of the CO and this was mentioned on the recommended reading list on p34 of the Information Package issued in October 2018. The CO came into effect on 4 March 2014, two months short of five years ago!

Clause 6(C):

There should be a discussion here as to whether the intention is that the new products belong to the seller or that a registrable charge be imposed on the new products. The courts' inclination is to treat a clause like this as imposing a charge, *Re Peachdart Ltd* and *Clough Mill.* The charge needs to be registered under Part 8 of the CO, otherwise it would be void against the liquidator and other creditors.

The candidates generally did well on Clause 6(A) but not so well on the other subclauses.

Question 2

Conservative Credit Bank's fixed charge over book debts

Most candidates are able to set out the requirements for an effective fixed charge over book debts under *Re Spectrum Plus*. However, they did not do well in determining from the facts whether an effective fixed charge was created over book debts in this case. Even when they correctly determined that the charge here falls short of the requirements, they were unable to correctly state that a floating charge was instead created.

invalidation of CCB's floating charge

Almost all of the students discussing this issue did so under the old s267 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance Cap 32 ("CWUMPO"). The amendments to this provision came into effect on 15 February 2017, almost two years ago. The operative provisions are ss267 and 267A and this was mentioned on the recommended reading list on p34 of the Information Package issued in October 2018.

Even when the students were discussing invalidation under the old s267, the analysis was simplistic without discussing the different treatment for the "old" monies (the previous unsecured loan of HK$500,000) and the "new" monies (the HK$2.5m loan).

outstanding salary owed to the employees

Most candidates failed to discuss this issue. Because CCB's charge only took effect as a floating charge, CCB must pay the outstanding wages (for the 4 months immediately prior to winding-up and subject to a cap of HK$8,000 per employee) prior to themselves on an enforcement of the floating charge, s265 CWUMPO.

Part C

Question 1

This is a question about unfair preferences under the Bankruptcy Ordinance, Cap 6.

share mortgage to NQA Credit Bank

Most candidates failed to spot this issue. Those who did, did not do well. The discussion regarding the elements of an unfair preference as applied to the facts was inadequate:

- existing creditor-debtor relationship
- preference – here, Donald's share mortgage to NQA
- Donald influenced by a desire to prefer NQA – NQA is not an associate and so no presumption
- the relevant time period – 6 months because NQA is not an associate
- Donald's insolvency.

repayment to Priscilla Lee

Most candidates spotted this issue but the discussion in relation to the abovementioned elements as applied to the facts was generally inadequate:

- existing creditor-debtor relationship
- preference – here, Donald's repayment of the loan to Priscilla
- Donald influenced by a desire to prefer Priscilla – Priscilla is an associate only by reason of being an employee and so no presumption
- the relevant time period – 6 months because NQA is an associate only by reason of being an employee
- Donald's insolvency.

Question 2

a) Many answers failed to appreciate that Clause 6 was not an exemption clause but a clause defining the terms of the fitness centre's contract. Thus meant that the main focus of the answer should have been on the Unconscionable Contracts Ordinance (UCO) (though credit was also given for discussion of S8 CECO the one section of CECO that covers clauses defining the scope of the contract). Thus a good answer should have explained why the contract comes within the UCO, the burden of proof and the powers of the court under the Ordinance and then gone through the S6 list of factors that the court must take into account plus any other factors as the S6 list is not exhaustive and then crucially applied this to the facts. Many answers lost marks by making little attempt to apply the factors to the facts.

b) The better answers appreciated that the clause was an attempt to exclude s5 Supply of Services (Implied Terms) Ordinance and that as Adam was clearly a consumer this clause was void under S8 Supply of Services (Implied Terms) Ordinance. Too many answers just focused on S7CECO and while some credit was given this was not the best answer as from Adam's point of view it is better for the clause to be void than subject to the reasonableness test.

c) The quality of answers here were surprisingly poor. The clause was clearly an attempt to exclude the remedy available for breach of S16 SOGO and thus was void if Tina was a consumer, if not it would be subject to the reasonableness test S11 CECO. Clearly it should have been the main focus of the answer to discuss

whether Tina passed the S3 (3) consumer test. However only a minority of answers did this and even less did it well!

Clearly the seller was selling in the course of a business but to make Tina consumer the first question that had to be answered was, is a helicopter the type of goods ordinarily supplied for private use? Arguments both ways could have been made on this in particular in CHANG PIU YIN v BANK OF SINGAPORE the point was made that this requirement could be satisfied even though only wealthy consumers could afford the goods or services. Secondly applying the narrow test of acting in the course of a business in R and B Customs Brokers v UDT Tina would only be acting in the course of a business if she bought helicopters regularly or it was integral to her business, which did not appear to be the case on the facts.

d) This was very badly done by most candidates. Very few answers appreciated that a consumer has no legal right to exchange or replacement in Hong Kong, unlike England, even if the goods are faulty. Therefore the clause is not caught by CECO –not excluding any right or remedy the consumer is entitled to and it is hard to see why such a clause could be regarded as unconscionable, business have a legitimate interest limiting their customers rights to those specified by law and clearly it is unfair to expect clothes shops to take back clothes that have been worn!