PCLL Conversion Examination
June 2017
Examiner's Comments
Commercial Law

GENERAL COMMENT

There were a considerable number of weak answers indicating that many students had not prepared sufficiently for the examination.

PART A
QUESTION 1

a) The answers to this question on ownership and risk were on the whole very erratic mainly because of a lack of a proper structure. Assuming the goods were destroyed accidentally (credit was given for identifying the possibility that if the seller's negligence had caused the fire he would be liable as a bailee even if ownership had passed to the buyer S22 SOGO) then the rules in S18-22SOGO would apply as to who bears the risk. A good answer would first have set the scene - subject to any contrary agreement the risk is with the party who has property in in the goods S22.

So who had property? As property can never pass in unascertained goods the distinction between specific ascertained and unascertained goods should have been explained and then applied to the facts. Many answers did not do this well referring to the fact that the goods were ascertained with no explanation as to how this conclusion was reached or referring to the application of S20 R1 which only applies to specific goods. Many candidates forgot one very important matter–the classification as to the type of goods is made at the time the contract is made.

Applied to the facts the goods were actually unascertained –at the time the contract was made G does not know which 10 from the 11 in stock he is going to get. At the time the contract was made G cannot point to any one machine and say this one is definitely mine. Therefore S20 R5 needed to be applied– had there been unconditional appropriation before the fire by the act of sticking 10 labels on 10 machines? Any sensible discussion of this got full credit. Most answers correctly highlighted S20 is the default provision and gives way to S19–property passes when the parties intend it to pass–but many concluded that there was an intent property was only to pass on delivery based on English law which applies to a contract with a consumer buyer but the buyer here was a commercial buyer. Most answers correctly identified that under an exception to S22 that as the buyer failed to pick up the goods on the day agreed then the goods were at the risk of the party at fault in delivery being delayed.

b) Most answers correctly identified the point that goods to be manufactured are future goods and therefore unascertained at the time the contract was made. Property would only pass when the requirements of S20 R5 were satisfied

c) Surprisingly poorly done. The point was a simple one, the goods were clearly specific and S20 R2 operated (unless there was a contrary intention under S19)

QUESTION 2

a) The main issue to be addressed was in relation to the buyer's remedies. Normally if a buyer has the right to reject the goods he can either do this or accept the goods and claim damages– there is no in-between situation of partial acceptance S13(3) SOGO.

Most answers correctly identified that the quantity issues in parts i to iii were covered by S32 which gives the buyer a full range of options =keep all, reject all, keep the conforming goods and reject the rest. The only weakness was in relation to part iii where 61 suits were delivered. The issue of de minimis should have been considered and rejected –getting one suit less than you contracted for is not a microscopic trivial deviation from the contract.

Part iv could have been better dealt with –the point to make here was that in this case S32 did not apply S32 (3) only applies when goods of a different description not quality are delivered so the buyer's choice was more limited accept all and sue for damages or reject all –not possible to keep the 30 good suits and reject the unmerchantable ones.

Part v on instalment contracts was generally well done – this again is an exception to the rule that there can no partial acceptance and any defective instalment can be rejected but any good one can be accepted. The better answers also discussed repudiation S33 (2) and when a breach is sufficiently serious to allow the buyer to end the contract and refuse to accept delivery of future instalments.

b) This was generally poorly done, most answers merely gave the basic rule concerning damages for non –delivery that damages are normally the contract price –market price on date fixed for deliver S53(3). However few answers considered the other possibilities. Thus if the buyer had accepted the seller's anticipatory breach on 1st May the buyer would then have to mitigate its loss– on the facts if the market price is rising the reasonable thing to do would be buy at once so the market price on the date the buyer accepted the repudiation would be the one to take into account. Loss of profit on the resale–the general rule not normally recovered– should have been explained and the conditions that need to be filled as specified in Re Hall & Pim, as to when a sub-sale may be taken into account, should have been considered. The most likely conclusion on the facts was that the exception was unlikely to apply as there appears to be an available market. Finally reference should have been made to the fact that, on the grounds of certainty, the market price after the date of delivery is ignored. If the buyer wants to wait that is his gamble not the seller's as confirmed by the English Supreme Court decision Bunge v Nidera.

PART B
QUESTION 1

Part a) was generally answered well. Candidates displayed a good understanding of the differences between a legal and equitable assignment and correctly concluded on the facts that the both assignments were equitable. However on the issue of priority of assignments answers were mixed. Many candidates failed to appreciate that this was governed by the rule in Dearle v Hall and that priority is determined by the order of

notice to the debtor, which on the facts was Ken, provided the later assignee had no knowledge of the earlier assignment.

Part b) was uniformly poorly done. A high percentage of the answers were way off the mark discussing rules such as only benefits can be assigned and not obligations. To the examiner's surprise many of the candidates seemed ignorant of one of the most fundamental rules of assignment –the assignee takes subject to the equities and the assignee cannot be placed in a better position vis a vis the debtor than the assignor was. Thus the general rule is that the debtor can raise against the assignee defences that could be raised against the assignor. Thus the issue in the question was whether the debtor could set-off against the assignee the liquidated damages claim the debtor had against the assignor.

Most answers that referred to set off only referred to common law set-off and not equitable set- off. This was important as the normal rule is that the debtor can only set off defences that come into existence before the notice of assignment is given to the debtor and on the facts of the question the right to set -off the HK $ 100,000 liquidated damages only came into existence after the notice of assignment took place. However under the principle of equitable set=off if the cross claim is so closely connected with the claim it would be inequitable to allow judgment for the claim without taking into account the cross claim, the cross claim can be raised as a defence even if, as on the facts of the question, it accrued due after the notice of the assignment. The liquidated damages claim arose out of the same transaction and was so closely connected with the claim that is could therefore be set-off against the debt.

QUESTION 2

Part a) was poorly attempted by a high percentage of candidates. To begin with many candidates failed to address the question asked and simply wrote long descriptive answers on what is a bailment or even more bizarrely wrote an essay on the differences between bailment, liens and pledges! The question was quite specific– the focus was on the advantages to the bailor on relying on bailment as a separate distinct remedy. A good answer, after defining in general terms what a bailment was, should have first put things in context, a bailor may often have a remedy in contract, tort, restitution, or under statute, for example, Innkeepers Ordinance so why does a bailor need to rely on bailment at all? Incredibly a high percentage of answers did not address the most obvious reason why bailment is still a useful remedy– the reversal of the burden of proof. If a claim is brought in contract for breach of the implied term of care and skill or in tort for negligence, the bailor will have to prove fault on the part of the bailee but in the case of bailment the bailee must prove he was not negligent – very useful for the bailor if it is not clear how the goods were damaged or destroyed. Other advantages could have listed e.g. situations when the obligations of the bailee become strict, the advantages of the bailor being able to sue the sub-bailee directly, the flexible measure of damages such as the ability to recover the contractual measure of damages even though no contract exists and no damages could be recovered in tort etc.

Bizarrely a number of candidates who referred correctly to the rules of sub-bailment in their answer to part a) made no reference to the concept in parts b) or c) where it

was highly relevant!

Part b) Again answers were generally of a poor standard. Many students seem to have no knowledge of the rules of sub-bailment as established in the Pioneer Container. Many students focused their answer on the rights the bailor had against the bailee for damage to the goods but the bailee was insolvent! What is the point of advising the bailor to sue the bailee and the bailee to sue the sub-bailee when the bailee was insolvent! A good answer had to explain and apply the principles led down in the Pioneer Container which can allow the bailor to sue the sub-bailee directly as an exception to the privity of contract rule.

Again part c) raised the same issue could the sub-bailee use the benefit of an exclusion clause in the bailee –sub-bailee contract against the bailor despite there being no contract between them. The conditions under which this defence could be raised, as specified in the Pioneer Container, should have been stated and applied.

PART C
QUESTION 1

a) A good answer should have begun by explaining why the Unconscionable Contracts Ordinance (UCO) applied, why Matt was a consumer and what the powers of the court were under UCO. Many answers lost easy marks by not doing this.

The application of UCO to the facts as to whether the clauses were unconscionable was generally well done though there was some confusion re the exclusive jurisdiction clause. Many answers read this as a choice of law clause and erroneously applied S7 UCO! Answers that merely identified the criteria the court must take into account in deciding if the clause is unconscionable without making any effort to apply these to the facts lost a significant number of marks

A significant number of answers after correctly referring to S5 Supply of Services (Implied Terms) Ordinance (SOS(IT)O) re the term of care and skill implied into a service contract failed to mention that as Matt was a consumer the clause excluding this term was void S8 SOS (IT) Ord and not subject to the S7 CECO reasonableness test.

b) Answers were surprisingly poor, the point to make was that as Matt was no longer a consumer UCO and S8 SOS (IT) O did not apply and the clause excluding liability for negligence was now subject to the reasonableness test under S7CECO.

QUESTION 2

a (i) The better answers correctly identified the fact that the statutory presumption in S25 (3) Money Lenders Ordinance (MLO) that the interest rate is extortionate only applies if the interest rate is <u>above</u> 48%. Most answers were sound in describing the formalities required under the MLO but some candidates lost marks by not applying the rules to the facts and concluding that as the infringements were minor the court would be likely to exercise its discretion in favour of enforcing the agreement S18(3)

a) (ii) Quite a few answers failed to identify that a bank is not subject to the MLO.

b) The answer is the Pawnbrokers Ordinance (PO) did not apply as the amount being lent was HK$300,000 and the PO only applies to loans up to HK$100,000. Any reference to s17 and s23 PO is wrong.

c) (i) The better answers identified that in the absence of Jane's consent (knowledge of the change is not the same as consent) the increase in the loan to her husband was a material variation of the original guarantee agreement and under the rule in Holme v Brunskill discharged her from the guarantee. Many answers missed this point. Credit was also given for referring to undue influence and the principles laid down in RBS v Etridge (No 2). The better answers identified that this was a case of third party undue influence as if there was influence it was by Jane's husband (who was not party to the guarantee agreement) not the bank and that the bank would be able to avoid liability by showing they taken reasonable steps to make sure Jane understand the nature of the agreement she was making.

c) (ii) The point of this question was to identify that it is possible to exclude the material variation rule by clear drafting. The better answers stated that the wording was clear enough to do this but that if the changes were considered sufficiently great by the court to amount to a new agreement and not merely a variation, it was doubtful if the words were wide enough to cover this Triodos Bank v Dobbs.