

PCLL CONVERSION EXAMINATION, JANUARY 2016

Title of Paper : Commercial Law – Part A
Date : 7 January 2016
Time : 9:00 a.m. – 9:10 a.m. (Reading Time)
9:10 a.m. – 10:10 a.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 each answer 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 for that part if they answer more than one question from one part.
8. The passing mark for this paper is 50 marks.

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PCLL Conversion Examination January 2016

Commercial Law

Part A: Sale of Goods

Question 1 (100 marks)

John operates a luxury canned fish products store in Central, known as Luxury Fish HK Limited (“LF”). On 1st June, LF ordered 1,000 boxes of canned abalone labeled “Top Quality Luxury Abalone” from Sam at a price of \$500,000, cash on delivery, with delivery to be made at 10 a.m. on 15th June. At 11 a.m. on 15th June, Sam loaded 6,000 boxes of canned abalone onto the van of a transport company, with instructions to Billy, the driver of the lorry, to deliver all the boxes to all his customers on that day. However, Billy made no deliveries in the morning and only reached the shop, LF, at 2 p.m. after a long lunch. Billy began unloading some of the boxes from the lorry and placing them at the entrance of LF’s store. John, the owner of LF was inside his shop arguing with a customer as Billy was unloading the boxes.

John shouted at Billy:

“You are 4 hours late. Put them all back on your lorry at once and come back at 6.00 p.m. tonight when I shall have time to check the delivery for myself. Do not be late tonight as time is running out for me to serve my customers. I told you time is of the essence.”

Billy reloaded the boxes of canned abalone back onto the van and drove off to an early tea with his friends. Billy spent so long at tea that he was almost late for the 6 p.m. delivery to LF. He did not, however, have time to deliver any other orders that afternoon.

Driving back to LF’s shop most of the 6,000 cans of abalone fell out of Billy’s lorry into a pool of dirty water and were dented. Some of the cans also lost their “Top Quality Luxury Abalone” labels.

At 6:15 p.m., after Billy had unloaded all 1,000 cans in front of the LF shop, John noticed that about half of the cans had no labels and that all were badly dented. John refused to accept delivery saying to Billy,

*“My customers need to see the Top Quality Abalone label on the can before they will buy this luxury product. I refuse to pay for this delivery or to sign the Seller’s delivery note. I cannot sell these dented cans to my customers who only want top quality luxury products.
This damaged consignment is useless so please take it all away and I shall find another supplier.”*

Sam, the seller, seeks your legal advice on whether he can bring a claim against Luxury Fish HK Limited for breach of contract under Hong Kong law. Advise Sam on his legal position.

Question 2 (100 marks)

Nemo dat quod non habet is said to be an important principle in commercial law. How significant does this principle continue to be in the context of 21st century Hong Kong commercial law? Illustrate your answer with examples to support your argument.

~ End of Examination Paper ~

PCLL CONVERSION EXAMINATION, JANUARY 2016

Title of Paper : Commercial Law – Part B
Date : 7 January 2016
Time : 10:25 a.m. – 10:35 a.m. (Reading Time)
10:35 a.m. – 11:35 a.m.

Instructions

1. Write your **candidate number** on the cover of each answer book. Do **NOT** write your name in the answer book.
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PCLL Conversion Examination January 2016

Commercial Law

Part B: Personal Property

Question 1 (100 marks)

You are consulted by Smart Bank's in-house counsel ("SM") to advise whether Hong Kong law continues to permit the creation of a fixed charge over book debt as set out in Clause 1 of SM's Debenture below.

Advise SM on

- a) the current law in relation to the creation of a fixed charge over book debts;
- b) how, if at all, SM can protect itself under Clauses 2.2 and 2.3; and
- c) the advantages and disadvantages of fixed and floating charges from SM's perspective as secured creditor.

You are *not* asked to comment on any other Clauses in the Debenture or banking law. You are only provided with Clause 1 and Clause 2 for the purposes of the advice to SM's in-house counsel.

EXTRACT FROM SMARTBANK DEBENTURE (CLAUSES 1 AND 2 ONLY) UNDERTAKINGS AS TO CHARGE OVER BOOK AND OTHER DEBTS

1. SECURITY

1.1 Creation of Fixed Security

The Company charges to the Bank by way of fixed charge as beneficial owner and as a continuing security for the payment and discharge of the Secured Liabilities all of the Company's rights to and title and interest from time to time in any and each of the following:

- 1.1.1 All plant, machinery, vehicles, computers, office and other equipment and chattels (excluding stock-in-trade or work in progress); and
- 1.1.2 All book debts of the Company (the "Debts").

2. FLOATING CHARGE

2.1 Creation of Floating Charge

The Company charges to the Bank by way of first floating charge as beneficial owner and as a continuing security for the payment and discharge of the Secured Liabilities all of the Company's rights to and title and interest from time to time in the whole of its property, assets, rights and revenues, whatsoever and wheresoever's, present and future, other than any property, assets, rights and

revenues validly and effectively charged or assigned (whether at law or in equity) pursuant to Clause 2.1.

2.2 Realisation of Debts

For as long as any of the Secured Liabilities remains outstanding, the Company undertakes with reference to the Debts:

2.2.1 To collect the Debts in the ordinary course of its business and to hold the proceeds of those Debts on trust for the Bank;

2.2.2 Not, without the prior consent in writing of the Bank, to sell, factor, discount, charge, assign, declare a trust over or otherwise dispose of or release, exchange, compound, set off or grant time or indulgence or otherwise deal with all or any of the Debts in favour of any other person or purport to do so;

2.2.3 To pay into an account of the Company with the Bank or otherwise as the Bank may direct all monies which the Company may receive in respect of the Debts;

2.2.4 Save to the extent that the Bank otherwise agrees in writing not to withdraw any amounts (whether in the nature of principal or interest) standing to the credit of the account referred to in Clause 4.2.3.

2.3 Proceeds of realisation of the Debts

For as long as any of the Secured Liabilities remains outstanding, the Company shall not be entitled to be paid, withdraw or otherwise transfer any amount relating to the proceeds of realisation of the Debts standing to the credit of any account except with the prior written consent of the Bank.

Question 2 (100 marks)

Traditionally the pledge has been an important security interest known in commercial law. However, as a security device, the pledge may have serious limitations in 21st century Hong Kong.

Explain this statement and illustrate your answer with examples to support your reasoning.

~ End of Examination Paper ~

PCLL CONVERSION EXAMINATION, JANUARY 2016

Title of Paper : Commercial Law – Part C
Date : 7 January 2016
Time : 11:50 a.m. – 12:00 p.m. (Reading Time)
12:00 p.m. – 1:00 p.m.

Instructions

1. Write your **candidate number** on the cover of each answer book. Do **NOT** write your name in the answer book.
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PCLL Conversion Examination January 2016

Commercial Law

Part C: Consumer Credit and Protection

Question 1 (100 marks)

Unsecured creditors of an insolvent company have minimal protection in Hong Kong insolvency law. How, if at all, does the doctrine of “relation back” and the law relating to “unfair preference” protect unsecured creditors and assist the liquidator to pay off their debts?

Question 2 (100 marks)

Hang Seng Credit Card Ltd & Ors v Tsang Nga Lee [2000] 3 HKC 269 is an important Hong Kong case providing guidance on how judges may apply the *Unconscionable Contracts Ordinance* (cap 458).

The Hang Seng Credit Card case concerned the unfair imposition of a term by the Credit Card company in its standard form contract with customers. The unfair term provided that in the event of the customer’s default the customer would pay ALL legal costs of the credit card company, making the interest rate exceptionally high.

Since this case involved a bank, the credit card company was exempt from the *Money Lenders Ordinance* but the court was able to apply the *Unconscionable Contracts Ordinance* (cap 458).

After examination of the clause, the court severed the provision as “unconscionable”.

Section 6 of the *Ordinance* (reproduced below) sets out the factors to be considered by the court. These have been described as factors which a court of equity would consider in deciding whether or not the defendant had acted “unconscionably”.

What particular factors would you argue to protect the customer in a similar situation, and how, if at all, could a bank redraft its standard form contract to avoid similar allegations of “unconscionability” in the future?

You are NOT required to draft any clauses when advising the bank. But you are asked to advise on the relevant factors in cap 458 that the bank should concern itself with and the appropriate steps the bank should take to avoid any similar allegations from customers in the future.

Chapter:	458		Title:	UNCONSCIONABLE CONTRACTS ORDINANCE
Section:	6		Heading:	Matters to be considered by the court

(1) In determining whether a contract or part of a contract was unconscionable in the circumstances relating to the contract at the time it was made, the court may have regard to (among other things)-

- (a) the relative strengths of the bargaining positions of the consumer and the other party;
- (b) whether, as a result of conduct engaged in by the other party, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the other party;
- (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the other party or a person acting on behalf of the other party in relation to the supply or possible supply of the goods or services; and
- (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the other party.

(2) In determining whether a contract or part of a contract was unconscionable in the circumstances relating to the contract at the time it was made-

- (a) the court shall not have regard to any unconscionability arising from circumstances that were not reasonably foreseeable at the time the contract was made; and
- (b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this Ordinance.

(3) In considering the exercise of its powers under section 5 to grant relief in respect of a contract or part of a contract found to be unconscionable, the court may have regard to the conduct of the parties to the proceedings in relation to the performance of the contract since it was made.

~ End of Examination Paper ~