PCLL Conversion Examination
January 2025 Examiner's Comments
Commercial Law

PART A

QUESTION 1

The main weakness of many answers to this question was the failure to apply the law adequately to the facts.

Apple and Mango Juice Contract

There was a clear breach of S15 SOGO- sale by description as the type of juice is "a substantial ingredient of the identity". The fact that the extra apple juice might sell quicker was irrelevant. The only possible defence would be if the de minimis rule applied. However the rule is seldom applied Shipton Anderson v Weil Bros; Arcos v Ronaasen – 'a ton does not mean about a ton' - and the difference here would be likely to be too great for this exception to apply

There is nothing in the question to suggest that FB had accepted any of the goods in which case as S15 SOGO is an implied condition FB could reject the goods and claim damages –the extra cost incurred in purchasing similar juice elsewhere which was HK$ 5 per litre.

FB would also have a remedy under S32 SOGO which would give it greater options than just relying on S15 SOGO, accept all, reject all or just accept the goods that were in accordance with the contract.

Orange Juice Contract

This was a quality issue

S16 SOGO should have been considered.

Regarding S16(2) SOGO merchantable quality if, as the facts suggest, the juice was fine on delivery and the only problem was it could not last 4 months then the issue would be whether the juice was 'durable'(part of the S2 (5) SOGO definition of merchantable quality –capable of lasting in a reasonable condition for a reasonable length of time.) The facts suggest there was no breach if it was correct that the industry standard was two months not four and the juice was fit for human consumption at the time of delivery. S16 (3) SOGO would seem the most obvious remedy. FB made known its particular purpose –juice to last four months - and there is a presumption that it relied on S's skill or judgment that it would be suitable. The onus would be on S to prove there was no reliance or it was unreasonable to rely on its skill or judgment. Would S remaining silent when FB specified it must last four months be enough to rebut the presumption? Very unlikely

If there was a breach of S16 (3) SOGO then the issue arises whether there was acceptance. The answer would seem to be 'yes'. Either under S37 (4) SOGO lapse of a reasonable time or S37 (1) SOGO selling some of the juice is an act "inconsistent with the ownership of the seller" It should have been emphasised there can be no acceptance until the buyer had a reasonable chance to examine the goods but clearly this should have been done before the first selling of the juice.

Finally the remedy for breach of S16(3) SOGO, if there was no acceptance FB could reject the goods and obtain a refund of the price as well as also damages for any other loss arising naturally S55(2)- extra amount required to buy similar juice elsewhere. If there was acceptance the remedy would be damages only but as the juice was worthless, under S55(3) SOGO FB would get the difference between the value received (worthless) and the value it should have had (contract price). Alternatively, under S55 (1) (a) SOGO, FB "can set up against the seller the breach of warranty in diminution/extinction of the price." So again this would in effect enable the buyer to recover the price by way of damages.

(b) The reference to each instalment being separately paid for made this a severable contract. The legal consequences of this should have been explained. The fact that the first instalment was accepted does not prevent the buyer's right to reject the defective instalment as S13 (3) SOGO –if the buyer has accepted some of the goods then cannot reject the rest- does not apply to severable contracts This means that if there was a breach of S15/16 in relation to the second instalment the buyer could reject this instalment despite accepting the first. In other words the buyer can accept or reject each instalment on its merits.

The buyer can only end the contract and refuse to take any more instalments if there has been repudiation of the contract S33 (2) SOGO. Case law Munro v Meyer ; Maple Flock v Universal Furniture; should have been referred to that this is a question of fact, the court will consider the % of goods delivered which are defective compared to total contract quantity and the chances that future instalments will be defective. It was then essential to apply this law to the facts. Re apple and mango contract –the fact that only one instalment was 'defective' and that it is a quantity issue which is unlikely to be repeated suggests repudiation is unlikely to be found- re orange juice contract -repudiation would be dependent on the likelihood future instalments would also be rotten.

QUESTION 2

(a) Whether Tom had good title to the painting depended on the application of the nemo dat rules.

S25 SOGO voidable title should have been considered. Under the Bill - Linda contract Linda obtained a voidable title as there was a misrepresentation made re the Yang painting.

Explanation of voidable title should have been given -valid until rescinded. Rescission can occur by notification to the police if Linda was impossible to trace as here Car &Universal Finance v Caldwell. Therefore the issue was did Bill rescind before the sale to Tom. The answer was clearly yes- the timing worked in favour of Bill as he told the police before sale to Tom. Conclusion, title could not pass under S25 SOGO.

S27 (2) SOGO resale by a buyer in possession should also have been considered as Linda had 'agreed to buy' the painting and had obtained 'with the consent of the seller [Bill] possession of the goods' BUT the case law states that the reference to mercantile agent in S27 (2) SOGO means that for title to pass the sale must be in the ordinary course of business of a mercantile agent Newtons of Wembley v Williams. This means the sale must be from business premises during normal business hours. As Linda was not an art dealer it would be hard for her to comply

with this as it seems the sale took place at her home. Likely conclusion, title did not pass under S27 (2) SOGO either. Credit was also given for explanations as to why the other exceptions could not apply -no estoppel by Bill-giving Linda possession of the painting is not an estoppel Central Newbury Car Auctions v Unity Finance, S3 Factors Ordinance – Linda is not a mercantile agent but a buyer, no resale by a seller in possession S27 (1) SOGO, Linda is a buyer in possession, market overt S23 SOGO –no sale from a shop.

It should be noted the question only asked if title had passed, therefore discussion as to any rights Tom had against Linda for breach of S14 SOGO and/ or total failure of consideration was not relevant.

(b) If Linda was an art dealer the only potential differences would be that if she sold from an art gallery, the title could then pass under market overt S24 SOGO as the sale would be from retail premises and if other conditions were complied with e.g. sale in the public and not private part of the gallery. Also S27 (2) SOGO would now be satisfied. Too many answers stated S3 Factors Ordinance applied but this was not the case as possession was not given to Linda in her capacity as a mercantile agent but as a buyer.

(c)It should have stated that under S22 SOGO if the fire had broken out accidentally the risk of accidental loss lay with the owner S22 SOGO. Credit was also given for making the point that if the fire was Chan's fault, then Chan would be liable as a bailee S22 SOGO.

The question emphasised there were two contracts and each should have been considered in turn.

The 2,500 components already in stock were clearly specific goods. Under S20R1 SOGO property passes in specific goods when the contract is made provided they are in a deliverable state, which seemed to be the case here. Therefore in the absence of anything in the agreement to the contrary, S19 SOGO, the property and the risk had passed to ABB at the time of the fire and ABB must pay the price.

The second 2,500 components were unascertained goods. Property cannot pass in unascertained goods S18 SOGO. SOGO S20 R5 should have been applied –property (and risk) would only pass if there had been unconditional appropriation of the goods before the fire broke out.

Credit was given for any sensible discussion of this and application to the facts. Cases such as Carlos Federspeil v Charles Twigg should have been be referred to.

If there has been unconditional appropriation, property would have passed and the price must be paid. If not ABB was still entitled to delivery and, unless frustration could be established, could sue Chan for damages for non–delivery.

(d) Few answers identified that as this was a sale or return arrangement, property passes under S20R4 SOGO when the buyer does any act adopting the transaction. This has been defined as "some act which would be right only if he were the absolute purchaser" Kirkham v Attenborough. Clearly the act of lending to a friend came into that category

Therefore if property had passed, Anne could sue for the price under S51 SOGO.

Part B

Question 1(a)

A floating charge over the Company's assets and undertaking is a specified charge (s334 of the CO) and is thus required to be registered within 1 month of its creation (a good number of students were wrong on the law and stated that all charges must be registered, and some stated the old law of 5 weeks instead of 1 month). Students must be able to apply the legal rule to the specific facts: the Panda Bank charge was created on 31 December 2018, and Adrian only realized on 1 February 2019 that he forgot to register the charge. Therefore, he missed the one-month period for registration.

Adrian can now apply to the court for an extension under s346 of the CO. Students should discuss the criteria set forth in s346 and the court's wide discretion. Courts will not grant extension if doing so will prejudice the rights of other creditors. In this case, allowing Adrian to register the Panda Bank charge means that the Panda Bank charge will have priority over the Eagle Bank charge (comparing the date of creation of the two charges), which is prejudicial to Eagle Bank. Therefore, the court is not likely to grant the application for extension.

Students should discuss the consequences of non-registration – at the option of Panda Bank, the loan may be accelerated (many students stated the old law of automatic acceleration); the Company and all responsible persons commit an offence and may be subject to fines; the charge will be void against the liquidator and other creditors, although it remains a valid contract between the chargor and chargee.

Students earned bonus points by offering alternate solutions. For example, Adrian could try to have his client re-execute the debenture and register the new charge within a month, but it will still rank behind Eagle Bank because the new debenture will have a later date of creation than the Eagle Bank debenture.

Question 1(b)

Panda Bank v. Eagle Bank – the assets granted overlapped, so we need to determine priority. Both charges were duly registered within one month of creation. Panda Bank should have priority because it was created earlier. The fact that the Eagle Bank charge was registered before the Panda Bank charge is irrelevant because date of registration with the Companies Registry does not determine priority. Unfortunately, some students were wrong on this basic rule on priority.

Gretel v. Hansel – Gretel's charge was created first, so she would enjoy priority over Hansel's (dates of registration not given and are irrelevant anyway).

Students should discuss whether the charge granted to Gretel will be invalidated under s267 of the CO. The elements of s267 should be discussed: a floating charge granted within 2 years (not 6 months, since Gretel is a connected person as a director) prior to the commencement of the winding up (which was 10 December 2021, the date of the petition and not 14 February 2022, the date of the winding up order) is invalid. Disappointingly, most students did not know that when the chargee is a connected person, whether the company was insolvent when the charge was created is irrelevant. "New money exception": a floating charge will not be invalidated under s267 to the extent of money lent to the Company at the time of the charge. Gretel lent $1 million to the Company when the charge was granted, so the new

money exception applies - Gretel's charge is not invalidated. She will rank after Panda and Eagle as a secured creditor.

Students should also discuss whether the charge granted to Hansel will be invalidated under s267 of the CO. His charge was also granted within 2 years, and was also a floating charge; however, the new money exception does not apply here because the charge was granted to secure a loan years ago, there was no "new money" accompanying the charge. Therefore, his charge will be invalidated under s267, and Hansel will be an unsecured creditor.

Question 2(a)

Diamond ring

A diamond ring is a chose in possession and can be pledged. The title of the diamond ring remains with Sonia while possession has been delivered to Amanda. The value of the diamond ring ($260,000) is less than the amount of the loan, so it is a drawback. However, the nature of it as a chose in possession is an advantage over the other items.

Personal cheque

A personal cheque is a bill of exchange, a negotiable instrument that can be pledged. A crossed cheque (//) means that its negotiability is restricted. The bank has an obligation to pay the payee on demand on or after 14 February 2025. This means that Amanda may deposit the cheque after 14 February 2025 upon Sonia's default to repay. A good answer would discuss the practical ramifications: Sonia may give a countermand order to the bank at any time. Also, Sonia may or may not have enough funds in her account on or after the date of the cheque, so the check may be dishonoured due to insufficient funds.

Assignment of debt

The assignment was in writing signed by Sonia, but it is not an absolute assignment since only $300,000 out of the $500,000 debt was assigned. Therefore, it does not comply with s9 of LARCO. It is thus only an equitable assignment and not a legal assignment. A good answer should discuss the possibility of the existence of other legal or equitable assignments, and the notice requirement (Dearle v. Hall).

Share certificates

Shares are choses in action and are not documentary intangibles like a bill of exchange. In a pledge, only possession passes to the lender, the title remains with the borrower. The signed instrument of transfer is therefore not consistent with a pledge (though having the blank instrument of transfer is certainly in Amanda's favour and is common commercial practice). A share "pledge" is then not actually a pledge but an equitable mortgage (Bank of China (Hong Kong) Ltd. v. Kanishi). A good answer would include the practical implication that taking shares as security is subject to market volatility. As of now, the value of the shares exceeds the amount of loan but that may change.

Comparison - Overall, the diamond ring seems to be the most sensible choice, followed by share certificates, personal cheque, and assignment of debt. Students are not required to rank these items. Sensible discussion comparing the items will be given credit.

Question 2(b)

All pledges are bailments – possession of the diamond ring was transferred as security for the repayment of the loan owed to Amanda, but ownership remains with Sonia. Amanda, as bailee, has a duty to exercise due care to protect the diamond ring and will be liable to Sonia if it is damaged/ lost during the time of the pledge. As bailee, Amanda has the burden of proof that Amanda has exercised due care and was not negligent.

Students should apply the above rules to discuss whether Amanda was negligent in leaving the diamond ring in a shoe box with no lock and can be easily accessible by others. The fact that Amanda treats her own jewelry the same way is a favorable fact for her. Sonia may opt for calculation of damages based on contract or tort theories (e.g., Yearworth v. North Bristol NHS Trust). Students should also discuss Amanda's sister as third-party wrongdoer and whether Amanda is liable for the losses caused by her sister (Always Win Limited). Amanda should have a good argument that her liability should not extend to consequential damages (cost of the wedding), that it was not foreseeable.

Part C

Question 1

(a) Candidates are expected to briefly explain the nature of guarantee. Most candidates discussed whether Mrs Kwok can set aside the guarantee on the grounds of undue influence - there was no presumption of trust and confidence in this case as it is a child over parent relationship but the facts suggest that there is a relationship of trust and confidence as Jenny is Mrs Kwok's everything and also actual undue influence with the threat of Jenny not wanting to live in this world. The transaction also calls for an explanation as the guarantee is disadvantageous to Mrs Kwok and this is also a non-commercial relationship. The next issue to discuss is whether ABC was put on inquiry that the guarantee was affected by undue influence (*RBS v Etridge (No.2), Li Sau Ying v Bank of China*). Most candidates discussed whether ABC had taken reasonable steps to discharge its duty to reduce the risk that the guarantee was entered into as a result of undue influence and applied to the facts satisfactorily. If reasonable steps were indeed taken by ABC, it can enforce the guarantee against Mrs Kwok if Jenny fails to perform her obligations under the ABC Loan. However, not many candidates addressed Mrs Kwok's concern as to whether her residential home might be affected by the guarantee - if Mrs Kwok fails to perform her obligations under the guarantee, ABC can sue Mrs Kwok for the debt and execute judgment debt against her assets which would include her residential home.

(b) This part of the questions is to discuss whether the trustee in bankruptcy can apply to the Court to set aside the 2 transactions. Regarding the pearl necklace which is a gift from Jenny to her mother, it constitutes a transaction at an undervalue under s.49(3)(a) of the Bankruptcy Ordinance (BO). Some candidates mistakenly focused their discussion on unfair preference for this transaction which is not correct because Mrs Kwok is not a creditor of Jenny. For a transaction at an undervalue, the relevant time is 5 years ending on the day when bankruptcy petition is filed (s.51(1)(a) BO), and also need to prove that Jenny was insolvent at the time or becomes insolvent as a consequence of the transaction (since the gift was given more than 2 years prior to bankruptcy petition) (s.51(2) BO). Mrs Kwok is an associate as she is a relative (s.51B(2) BO) so insolvency is presumed (s.51(2) BO).

Regarding the payment of overdue interest to ABC, candidates should discuss whether this transaction constitutes an unfair preference to ABC as a creditor (s.50 BO). The relevant time is 6 months ending on the day when bankruptcy petition is filed as ABC is not an associate, hence the payment of overdue interest is still within the relevant time, and also need to prove that Jenny was influenced by a desire to prefer ABC (s.50(4) BO). There is no presumption of a desire to prefer in this case as ABC is not an associate. Since Jenny did not want ABC to enforce the guarantee against her mother, there could be a desire to prefer ABC in this situation.

Question 2

(a) Candidates generally did well in this part of the question. Most candidates identified the relevant cause of action here is misrepresentation and discussed the key elements for an actionable misrepresentation. One key issue here is whether there was reliance by Claire on the statement made by Jacky which had induced Claire to buy the car given that she had engaged a third party (Gin's Motors) to inspect the car. If it is proved that Claire indeed relied on Gin's Motors' inspection report rather than the statement made by Jacky to enter into the purchase agreement, then Claire would not have an actionable misrepresentation claim (*Attwood v Small*). Candidates are also expected to discuss briefly whether this is more likely to be a case of fraudulent or negligent misrepresentation by applying to the facts, which some candidates did not do so. Candidates should also discuss the remedies of misrepresentation under common law and Misrepresentation Ordinance, but some candidates' discussion lacked details, for example, missing a brief discussion on the bars to rescission and the Court's discretion to award damages in lieu of rescission if equitable under s.3(2) of the Misrepresentation Ordinance. Some candidates discussed a possible breach of the implied condition as to merchantable quality of the car sold under s.16(2) of the Sale of Goods Ordinance, credit would be given if candidates identified in their discussion that such section would have no application in this case as Jacky is a private seller rather than selling the car in the course of business.

(b) Most candidates discussed the application of Supply of Services (Implied Terms) Ordinance (SSO) in this case (given the car inspection service is a contract for the supply of services under the SSO) and the implied term under s.5 of the SSO that supplier acting in the course of business will carry out services with reasonable care and skill. Candidates should apply to the facts to discuss whether such implied term as to care and skill is likely breached in this case. The next issue is whether the clause in the contract (which is to exclude any liability of the garage for any loss or property damage) was incorporated at common law (if the clause is argued as an onerous or unusual clause because it seeks to exclude all liability of the garage, then it should be drawn to customer's attention), but not many candidates discussed this issue. Since a supplier cannot restrict any liability arising under the contract by virtue of the SSO (s.8(1) SSO) as against a party dealing as a consumer (Claire is clearly a consumer in this case), this clause would be invalid in exempting the garage's liability for the breach of the implied term as to care and skill under the SSO. Candidates should also discuss whether the exemption clause may be found unconscionable under the Unconscionable Contracts Ordinance (UCO). Candidates are expected to discuss the key elements that need to be satisfied under the UCO by applying to the facts and the relief which the court may grant if the clause is found to be unconscionable under the UCO (s.5 UCO).