PCLL Conversion Examination
June 2024 Examiner's Comments
Commercial Law

PART A

General Comment.
The overall standard was poor. Too many candidates were insufficiently prepared for the assessment

QUESTION 1(a)(i)
Identification that none of the nemo dat exceptions applied and thus AA was the legal owner of the machine as BB had only the machine on hire (not hire purchase as many answers said!). Re CC - DD could rely on the principle of total failure of consideration –when the contract ended on 30 May 24 DD had never acquired title. Rowland v Divall; Butterworth v Kingsway Motors; a buyer makes a sale of goods contract in order to obtain title and not just for the use. Thus DD would be entitled to a refund and no allowance/ deduction for fact DD had 6 months use of the machine

Alternatively there would be a breach of S14 (1) SOGO implied condition that the seller has the right to sell. This would mean again for breach of the implied condition the remedy would be to end the contract and obtain a refund of the price. It is a moot point whether the rules on acceptance apply in relation to S14 (1) SOGO where no title has passed.

(a)(ii) Advice would differ as by the settlement the title has now been feed. Thus there is longer total failure of consideration as DD get title albeit late. However, there is still a breach of S14 (1) SOGO as at the time of the sale CC had no right to sell but since DD has had the goods for 6 months there may be acceptance S 37(4) .The buyer is deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

Question 1(b)(i) This was a nemo dat question. Two exceptions were relevant
Estoppel by words or conduct, owner, Simon gave impression to third parties that Jane is the owner or has the authority to sell by signing the letter. S23 (1) SOGO. Merely giving a buyer possession of the goods is not enough CENTRAL NEWBURY CAR AUCTIONS v UNITY FINANCE compare EASTERN DISTRIBUTORS v GOLDRING– where O signing a document that said B was the owner amounted to estoppel-similar to the facts here.
S3 Factors Ordinance Sale by a mercantile agent

1. Must be a mercantile agent, 2.In possession of the goods in that capacity. 3.O must have consented originally to MA having possession –does not matter consent was obtained by means of a trick, PEARSON v ROSE & YOUNG[1950] 2 All ER 1027 4.When MA sells must be acting in the ordinary course of business of MA –a hotel? 5. B buys in good faith. All the requirements seem complied with except possibly the fact the sale is in a hotel.

Question 1(b)(ii)
Potentially two other nemo dat exceptions would have relevance S25 SOGO voidable title re misrepresentation concerning the value of the watch and S27 (2) SOGO resell by a buyer in possession but S25 SOGO would not assist Simon as there has been no attempt to rescind the Simon-Jane contract before the sale to Tony and there were doubts about S27 (2) SOGO applying –as the sale took place in a hotel –is the sale in the ordinary course of business of a mercantile agent?

Question 1(c)
The facts were very loosely based on the recent case Liang Ying v Wong Sze Man [2023] 4 HKLRD 749. You should always check for recent developments in the law. The question concerned whether Beryl had acquired the cat by way of a gift. The burden was on the donee Beryl to prove that Anne made a gift of Fluffy to her. This meant establishing the three elements of a gift: (i) an intention on the part of the donor to make a gift: (ii) an intention on the donee's part to accept the gift; and (iii) delivery of the gift. The objective test is applied in deciding the parties' intention

Applying this to the facts (ii) and (iii) would be easily established but what about (i) by saying "You can keep her" is there a clear and unequivocal intention by Anne to make a gift of the cat to Beryl? Credit was given for any sensible application to the facts

QUESTION 2(a)(i)
S53(3) SOGO prima facie rule damages for non-delivery is the difference between the contract price and market price on the date when goods ought to have been delivered. On the facts this is $200 per tonne . No obligation on part of Star to mitigate its loss and buy elsewhere on a rising market, can take advantage of WHITE &CARTER v McGREGOR and refuse to accept the anticipatory breach on 1 February. In which case there is no breach and thus no obligation to mitigate until the delivery date. KONWALL CONSTRUCTION & ENGINEERING V STRONG PROGRESS. If Star had accepted the anticipatory breach on 1 February as the market was rising it would have to mitigate its loss and buy at $1100, thus the damages would then have been $100 per tonne. As there was an available market the market price after the date fixed for delivery is ignored as is loss of profit on the sub-sale HK$500 per tonne WILLIAMS V AGIUS as B can fulfill his sub-sale obligations by buying at the market price on 1 March.

Question 2(a)(ii)
General rule S13 (3) SOGO where there is a breach of a condition the buyer can either accept all the goods or reject all. Has no right to accept part of the goods and reject the rest. KUDOS KNITTING v ZAMIRA FASHION. Exception S33 (2) where you have a severable contract – delivery is by instalments and each instalment is separately paid for then .If S's breach is sufficiently serious to amount to repudiation of the contract Star can end the contract and therefore refuse to take any further instalments. Repudiation is a question of fact, court will consider the % of goods delivered which are defective compared to total contract quantity MUNRO v MEYER compare MAPLE FLOCK V UNIVERSAL FURNTURE. Answers should have applied this law to the facts but most failed to do so.

Question 2(a)(iii) S32(3) SOGO buyer gets some of the goods he contracted to buy 'mixed with goods of a different description' can reject all or keep those in accordance with the contract. This provision does not apply to a difference in quality .Thus Star's options were: Keep all; Reject all; Keep the 75 % in accordance with the contract and reject the rest

Question 2(b)(i)
Identification that (in the absence of any agreement to the contrary) risk of accidental loss lies with the owner S22 SOGO .However if the fire was due to the fault of Dragon then they will be liable for this loss even if ownership had passed to Bright "Provided, also, that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party." S22 SOGO

It should have been stated that ownership cannot pass in unascertained goods S18 SOGO. Where the goods specific or unascertained? Clearly unascertained as at the time the contract was made Bright did not know exactly which 50,000 circuit breakers it was getting.

If unascertained, property can only pass when the goods became ascertained after the contract was made. S20 R5 SOGO must be applied. Property can only pass when there is unconditional appropriation. Discussion of unconditional appropriation was required and applied to the facts. Any sensible application received full credit. If ownership did pass before the fire then Bright must pay for the goods. S 51(1) SOGO. If ownership and risk did not pass Bright was still entitled to the goods and can sue for damages for non-delivery

Question 2(b)(ii)
The goods here were specific. This is judged at the time the contract is made. On the facts it was clear the parties were agreeing that the contract was for these specific goods currently in Dragon's warehouse. Bright was subject to the default rule S20 R1 property (and therefore risk S22 SOGO) passes when the contract was made. If this is the case Bright must pay the price S51 (1) SOGO. Credit was also given for reference to S19 (1) SOGO property passes when the parties intend it to pass – (however as it was a commercial contract it would be unlikely the court would find a contrary intent.)

Part B

Question 1a and 1b

The answers to each part of the question required an understanding of the rules and legislations that are applicable and the application to the given facts. Just merely citing the case name and/or the legislation with no or little application will not score many marks in the answer.

Question 1a

For this part of the question, student need to recognize that it was a question relating to retention of title clauses ("ROT"). There were some students that did not recognize the nature of a ROT and therefore was unable to answer the question. The question also required the definition of a ROT and how it is not a charge with appropriate case law as explanation (e.g. *Aluminium Industrie Vasseen* v *Romalpa Aluminium).*

Students needed to go into particular clauses and explain how each of the clause work in accordance with the particular item that it affects. Clause 4.1 is an all-monies ROT, Clause 4.2 is a proceeds of sale ROT and Clause 4.3 is a mixed goods ROT. Clause 4.1 for the 70 LED-TVs and the unused wire. Clause 4.3 for the used wire. For the application of Clause 4.3, students should recognition that it is a ROT dealing with goods mixed with or made into new items that whether the retention of title would still be applicable would depend on the new object, that whether the essential character have changed. Using appropriate case law (e.g. *Hendy Lennox (Industrial Engines) Ltd* v *Grahame Puttick Ltd)* to show in what situation the retention of title clause would still work and using *Re Peachdart* and the analysis thereof, to show why the fancy "TechZone" gadgets no longer have the essential character and therefore, no longer just "wire", the retention of title clause would fail. For Clause 4.2, students need to discuss the effect of this clause and recognized that how to distinguish a charge to a ROT and must use appropriate case law, e.g. *Armour v Thyssen* and *Compaq Computers Ltd v Abercom Group Ltd*. Explain that if Clause 4.2 does not place a debt on the buyer to pay the purchase price and just merely retaining the title over the goods, the ROT would still work. Because of Clause 4.2, students should also discuss and explain what is a floating charge and the priority of the Banks' security.

Question 1b.

This question required the explanation of how a charge is to be perfected and what are the needs to satisfy the requirement of registration in Hong Kong and according to the Companies Ordinance, the charge must be registered within 4 weeks of creation and

what would happen if there is a failure to register within the appropriate time. A discussion of other consequences (i.e. committing an offence) or the discussion of the possibility of the company obtaining extension under s.346 of CO would also be taken into consideration.

Question 2i and 2ii

The answers to each part of the question required an understanding of the rules and legislations that are applicable and the application to the given facts. Just merely citing the case name and/or the legislation with no or little application will not score many marks in the answer.

Question 2i - The safe deposit box

The issues and points that should be raised:

Sarah - the safety deposit box

- Recognize that there are two possible relationships – a bailment and a license.
- Explain and define what is a bailment and what is a license and the differences. – explain in particular the separation of ownership and possession in a bailment relationship and there is no duty to take care in a license. Use some case law (e.g. *Ho Sui Kam* v *On Park Parking*) to illustrate the concept of bailment.
- Using the case facts to come to a conclusion that the relationship is one of license, meaning that the Bank has no additional duty to take care of the items in the safety deposit box, but merely to provide for a "box" to be used.
- However, due to the special nature of the relationship of customer and Bank in a safety deposit box situation, even though it is a license as opposed to a bailment relationship. The bank still has the duty to provide proper security surveillance on the premises, otherwise it would be liable – *Susa*n *Cheah Pik Yee & Ors* v *Mayban Finance Bhd.*

Question 2ii

The main discussion should be:

Mike

- Explain the bank and customer relationship and in particular the duty of confidentiality, the right to set-off and to adhere to the instructions of the customer. – The bank and customer relationship are one of contractual creditor and debtor relationship. The bank is the debtor, and the customer is the creditor, but the bank will have right to set-off and even notification would be good for business, the Bank had a right to set-off the debt.
- Discussion of the duties that arises due to the bank and customer relationship –

secrecy, that the Bank should not disclose information that it received in the capacity as a Bank and the giving of info regarding financial difficulties to the sports car company was a breach. Using case law (e.g. *Tournier* v *National Provincial and Union Bank of England Ltd.*), explain how the duty applies, e.g. it is continuing and that it involves all matters and information that the bank gain due to or from and in connection with the bank accounts.

Material alteration from Property Ltd. to Properties Ltd.

- Explain what will happen if a material alteration accords on a bill of exchange – section 64 of the Bills of Exchange Ordinance, that a materially altered bill (without the consent of all parties to the bill) will be avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent endorsers.
- Explain and define what is material alteration – s.64(2) of BOEO

There is a duty of the bank, as the debtor of the customer to adhere to the instruction of the customer in relationship to the use of the customer's money/funds. A failure to follow the instructions (provided the instructions are proper and fulfill all requirements (not an issue here)) by the bank would be a breach of the bank and customer relationship/contract and the material alteration means that Mike did not instruct the payment to be given to Properties Ltd.

Part C

QUESTION 1

a) Most candidates discussed whether the clause is unconscionable under the Unconscionable Contracts Ordinance (UCO) by applying to the facts reasonably well. Candidates should also discuss the court's discretion under the UCO if it finds the clause unconscionable in the circumstances. However, not many candidates discussed whether the clause was incorporated at common law, in this case, Olivia was asked to read the agreement carefully before signing it, but if the clause was argued as particularly onerous, DF should have drawn the clause to Olivia's attention before she signed it. Candidates should also discuss if s.8 of the Control of Exemption Clauses Ordinance (CECO) applies in this case – against a party dealing as consumer (which Olivia should be one in this case) DF cannot, by reference to a contract term, claim to be entitled to render a contractual performance substantially different from that which was reasonably expected of it, except if the term satisfies the reasonableness test – candidates should apply to the facts and analyze whether the reasonableness test can be satisfied in this case. Not many candidates identified this as a relevant issue to discuss.

b) Candidates generally did quite well in this part of the question. However, not many candidates discussed if the small prints at the back of the ticket and notice displayed at the corner (which is an exclusion of liability clause) was incorporated in the contract at common law.

The clause in the notice is to exclude any liability of the garden for both personal injuries and property damage suffered within the garden. The Supply of Services (Implied Terms) Ordinance (SSO) applies in this case, with an implied term under s.5 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 there is likely a breach of this implied term and be able to identify that 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.

There are two possible claims here: one for personal injury resulting from negligence (if proved) – CECO s.7(1) is relevant, any clause excluding or restricting liability for death or personal injury resulting from negligence would be void; and another claim for property damage (mobile phone) resulting from negligence - CECO s.7(2) is relevant, any exemption clause for any other loss or damage resulting from negligence would be void unless it satisfies the reasonableness test under s.3 CECO. Candidates should discuss briefly whether the reasonableness test is satisfied by applying to the facts.
Candidates should also discuss whether the clause may also be unconscionable under the UCO.

QUESTION 2

a) Most candidates identified the key issue in this case – whether the guarantee was procured by undue influence from Jon inducing Maria to enter into the guarantee with BLB, a third party. The possibility of presumed undue influence should be discussed – automatic presumption of trust and confidence does not apply in this case as it is a child over parent relationship not parent over child. But most candidates managed to apply to the facts and argued that there is a relationship of trust and confidence between Mary and her son Jon. The next issue was whether BLB was "put on inquiry" as to the possibility that the guarantee made was affected by undue influence (*RBS v Etridge (No 2*), and applied in *Li Sau Ying v Bank of China*), candidates should apply to the facts to analyze if the transaction calls for an explanation and whether the relationship is non-commercial. The steps which BLB should have taken to discharge its duty to reduce the risk of Maria entering into the guarantee as a result of undue influence should also be briefly discussed.

The second issue in this case is in relation to the rule in *Holme v Burnskill* – a guarantor is not bound by the contract where there has been a material variation or alteration in the obligations of the borrower except with the guarantor's consent of such variation or alteration. Most candidates answered this part of the question reasonably well. Candidates should identify that the clause in the guarantee is intended to contract out of this rule and discuss the effect of this clause (the guarantor already agreed that any alteration of the term with the lender will not affect the liability of the guarantor, hence Maria's liability will not be affected by this clause). However it could be argued that the variation is so extreme (doubling the amount of the loan) that it no longer amounts to a material variation but instead there is a new agreement between Jon and BLB (*Triodos Bank v Dobbs* - purview of the agreement principle) and candidates should discuss whether the wording of this clause is clear enough to cover such change.

b) Candidates generally did well in this part of the question. Candidates should discuss whether Judith is a money lender (under the MLO and *Premor v Shaw Bros*) and apply to the facts. If Judith is a money lender, since she did not obtain a licence from the facts (s.7), the money lent and interest charged cannot be recovered (s.23). Candidates should also briefly discuss whether the s.18 formalities were complied with and, if not, the loan cannot be enforced, but these are subject to the Court's power to permit recovery of the loan to the extent it considers equitable (ss.18 and 23 proviso). On interest rate, candidates should identify that 30% p.a. was neither excessive nor extortionate (s.24).