PCLL Conversion Examination
January 2021
Examiner's Comments
Commercial Law

Part A
Question 1

Overall, candidates who answered this question answered well. For part (a), most candidates were able to identify the difference between the design contract (which is not a contract for the sale of goods) and the t-shirt contract (which is a contract for the sale of goods). As for part (b), most candidates were able to discuss the obligations of the seller under sections 15 to 17 of SOGO. These include the requirement that genuine Swarovski crystals be used under section 15 (sale by description) and the requirement under section 17 that the bulk of the goods should correspond with the sample (there should be some discussion here about the 1,000 t-shirts whose colour faded and the 1,00 t-shirts with rips and tears and whether these would be considered "a bulk"). As for section 16, candidates should discuss whether the rips and tears and the colour fade in the t-shirts would render them unmerchantable. As for fitness for purpose, there should be some discussion as to the specific purpose of the t-shirts (to celebrate the 50th anniversary of Lucky Star) and whether the defects would render them unfit for this specific purpose, together with some discussion of the common purpose of the t-shirts – whether the defects would render them unfit to be worn.

Question 2

For part (a)(i), there should be some discussion of when the property in the diamond passed under sections 19 and 20 of SOGO and the recourse of the seller under section 51(1) of SOGO. For part (a)(ii), if Rose still retained the Diamond and the price is unpaid, has the property in the diamond passed to Frank? Sections 40 to 43 of SOGO should be discussed. As for part (b) the *nemo dat* principle and its exceptions (whether they apply) should be discussed. The conclusion should be that those exceptions did not apply. Whether the online auction website constituted market overt under section 24(1) of SOGO should also be discussed but many candidates missed this point. If market overt applies then Mrs Pennybag would have good title and Rose would then have to sue for the price of the diamond from Frank under section 51(1) of SOGO and if market overt doesn't apply, then Rose can demand for the diamond or sue for its price from Mrs. Pennybag. It would then be up to Mrs. Pennybag to claim against Frank for the price paid for the diamond as there would be total failure of consideration.

Part B (personal property)
Question 1

Question 1(a)

The assignment to Donna does not comply with s9 of LARCO – it is in writing signed by the assignor, but it assigns 10 lease payments to Donna only. Therefore, the assignment to Donna is an equitable assignment and not a legal one. The assignment to Steve is also only an equitable assignment as it is an oral assignment and not one in

writing signed by the assignor. The facts did not say whether it is an assignment of the entire debt. (Since the facts did not state expressly that the assignment to Donna was of specified due date payments, students are given credit if they treat the assignment to Donna as a legal assignment and conclude that it has priority over the assignment to Steve.)

Priority of equitable assignments is normally determined by their time of creation. Notice to obligor is not required to establish an equitable assignment. However, notice is an important element here because for an assignment of a chose in action, the rule in Dearle v Hall applies: the first assignee to give notice to the obligor will have priority, provided that the assignee does not have knowledge of a prior assignment.

We have no information on whether Steve knew about the assignment to Donna. Assuming that Steve has no such knowledge, he is the first to give notice to Rosa (students should compare dates in facts) and will have priority over Donna's assignment.

Question 1(b)

Students should identify Karen as a bailor and Sophie as a bailee, and discuss the elements of bailment: transfer of possession but not ownership, by mutual agreement, etc. This is a bailment for reward.

Students should also analyze whether DIA is a sub-bailee. DIA certainly took posssesion of the diamond. There was no privity of contract, but Karen gave consent to have diamond sent to DIA, which was specifically named and identified, so there is express consent to the sub-bailment. It is not certain whether DIA knows that the diamond belongs to someone other than Sophie. If DIA knows that Sophie is a jewellery store owner, the answer is likely yes. If DIA is a sub-bailee, it owes a duty of care to Karen directly.

The duty of care applicable to Sophie as a bailee is negligence. Sophie has the burden of proving that she was not negligent and has exercised reasonable care. This is significant as it was not clear how and when the diamond was damaged. Students should discuss and apply this standard to the facts given.

Strict liability applies if terms of a bailment have been varied. Students should discuss whether terms of the bailment have been varied by Sophie's sending the diamond to another branch.

Sophie has a common law lien on the diamond for payment of her services in setting the ring and for sum advanced by paying DIA. A bailment turns into a lien upon default of the bailor.

Question 2

Question 2(a)

Students should point out that in determining the nature of a charge, the label is not conclusive. The terms of the charge and the characteristics of the relationship are also

relevant factors (Re Brightlife).

The KB charge purports to be a fixed charge but is in fact a floating charge. Even though the receivables are required to be deposited into a designated account, it is not a "blocked" account: chargor is still free to withdraw funds from the account and use them in its ordinary course of business. It retains control over these receivables. By contrast, the NTB charge is a fixed charge since the funds cannot be used by the chargor without NTB's consent (Re Spectrum Plus). (Bonus marks are given to students who point out that it is highly unrealistic to grant a fixed charge over a company's receivables.)

Generally, a fixed charge prevails over a floating charge despite it being created later. However, there is a negative pledge clause in the KB debenture (covenant not to create further encumbrances on the receivables) and NTB may be deemed to have notice of the charge (students should discuss the requirement to file the entire debenture under the Companies Ordinance (Cap. 622) and how subsequent chargees may be deemed to have notice as a result). To conclude, KB may have preserved priority over subsequent fixed charges by virtue of NTB having constructive notice of the negative pledge clause in the KB debenture.

Question 2(b)

The provision is a retention of title (Romalpa) clause. It retains title of the goods sold until the filfilment of certain conditions by the buyer and is not a charge. This is permissible under s19 and s21 of SOGO (property passes when intended to pass).

ROT clause is useful because it does not require registration or yield to preferential creditors in priority like a charge. Unpaid seller can rely on the ROT clause and not have to queue up with other creditors in the event of buyer's insolvency.

The ROT clause can be improved by (a) adding a new monies clause, (b) providing that on-sale or sub-sale of the materials will be as agent / trustee of seller, and (c) providing that new products made using the materials will remain seller's property and sale of those products will be as agent / trustee of seller.

Likely treatment by court: (a) new monies clause will likely be honoured, (b) sub-sale clauses - apart from the special facts of Romalpa, Associated Alloys in Australia and the much criticised decision in Wilson v Holt, the trend in the common law world is not to honour them (c) clause re new products made from materials is not likely to be honoured. Courts have consistently held that at some point title will transfer if the supplied item has been incorporated and mixed with other things to be made into a new product and the supplied item can no longer be separated. The language will instead create a charge, which is void against liquidator and other creditors as it is unlikely that the charge is registered under Part 8 (s335) of the Companies Ordinance. Seller will be an unsecured creditor.

Students should include discussion of relevant cases (Amour, Pheiffer, Re Andrabell, Re Peachdart Ltd., Compaq Computers, Clough Mill, Modelboard) in their answer as appropriate.

Part C
Question 1

This was not a popular question for candidates to attempt. However, the general standard of answers was much better than for Question 2.

Question 1(a)

The issue to be considered was whether an unfair preference had been given. The requirements as to what constitutes an unfair preference under S50 & S51 Bankruptcy Ordinance should have been gone through and applied to the facts. In particular, whether there was a desire to prefer, which was presumed, as Uncle Sam was clearly an associate. Most answers did this to a satisfactory standard.

Question 1(b)

The major issue to be addressed in this part was the possible effect of the Money Lenders Ordinance ('MLO').

A significant number of answers lost marks by inadequately addressing the issue whether John was a moneylender. Sensible application to the facts was required. Against the view: he did not lend money "to all and sundry" (only to family members and later to friends of family members) but if there was evidence he lent money on a frequent basis this could make him a moneylender-all a question of degree. It would depend on the number of people he lent to and how often.

If John was not a moneylender then there were no legal restrictions on the loan as S24 MLO (interest rate above 60 % pa) did not apply.

If John was a moneylender then S 25(3) MO applied: interest rate above 48% pa and not above 60%, presumed extortionate up to John to prove not. Court would take into account factors listed in S25 MLO (4) to (6). If found extortionate court could reopen the transaction so as to do justice between the parties 25(1) MLO.

If John was a moneylender then if he had no license money lent was not recoverable S23 MLO but the court has the discretion to enforce the agreement to the extent it considers equitable.

If John was a moneylender he must comply with the S18 MLO formalities, otherwise the agreement is not enforceable except to the extent court thinks equitable. Here there was clear non- compliance with the S18 formalities. The formality requirements should have been explained and applied to the facts.

Question 2

Question 2(a)

As the clause was not an exclusion clause but simply a clause defining Superfit's contractual obligations, answers that wrote solely on the Control of Exemption Clauses Ordinance ('CECO') were wide of the mark. The only provision in CECO

that would be capable of applying was S8 CECO. While some credit was given for discussion of this provision, in order to pass, the Unconscionable Contracts Ordinance ('UCO") needed to be considered. This only applied if Brenda was a consumer. The definition of a consumer in S3 UCO should have been considered. Clearly Superfit was providing a service in the course of its business which is ordinarily supplied for private use but was Brenda acting in the course of a business as interpreted in R&B Customs Brokers v UDT? This was a crucial aspect of the question and the weaker answers failed to consider it or merely assumed without much discussion that Brenda was a consumer. Any sensible discussion of this received full credit. For the view that that Brenda was acting in the course of a business, was the fact that the contract clearly is important for Brenda if she wants to be successful in her business (profession), against would be that she clearly must get personal enjoyment out of the contract, as she is a keep-fit enthusiast. The better answers highlighted there is presumption in favour of Brenda being a consumer S3(3) UCO. If Brenda was a consumer, there should then have been a discussion as to whether the clause limiting opening hours was unconscionable taking into account *inter alia* the criteria listed in s6 UCO. Many answers lost marks by making an insufficient attempt to apply the law to the facts e.g. merely giving a descriptive statement of the wide powers available in general to the court if a clause is found unconscionable and failed to specifically advise Brenda whether she would be able to cancel her membership or obtain a price reduction.

Question 2(b)

Candidates were expected to identify that that the problem was concerned with defective services. Superfit was in breach of s5 Supply of Services (Implied Terms) Ordinance ('SS(IT)O') –implied term of case and skill and if Brenda was a consumer then it was not possible to exclude this term S8 SS(IT)O. If Brenda was not a consumer then the attempt to exclude liability for negligence was subject to the reasonableness test S7 CECO.

Question 2(c)

It should have been identified that the clause was an attempt to exclude one of the remedies for breach of S16 Sale of Goods Ordinance SOGO -the right to a refund if no acceptance - and if Brenda was a consumer then the clause would be void s11(3) CECO. If not a consumer, the clause would be subject to the reasonableness test.

In all three parts credit was given for consideration as to whether the relevant clauses had been incorporated into the contract.