

August 2023 e-Quiz

Notes to candidates:

- 1. Most of the contents of this e-Quiz are adopted from the August 2021 e-Quiz.*
- 2. Please read the case and annexes (if any) before attempting the questions. The subject matter and names of parties are fictitious.*
- 3. Clause 5.3 of the CPD Guidelines provides that, for the purpose of the award of the Certificate of Attainment, the following limitation applies in calculating CPD points: To encourage practitioners to diversify their modes of learning, certain modes may be capped. For example, the cap for EAA e-Quiz is four CPD points per a 12-month CPD period. Therefore, even if a participant completes more than four e-Quizzes (one CPD point each) during a 12-month CPD period, only four CPD points can be earned.*

Pass Mark: You will have 12 questions in this e-Quiz. You will earn one CPD point if you score not less than 6 correct answers.

Remarks: In the following questions, the following words have the following corresponding meanings:
“the Authority” means the Estate Agents Authority;
“the Practice Regulation” means the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation;
“the Code of Ethics” means the Code of Ethics issued by the Estate Agents Authority;
“the Practice Circular” means the practice circulars issued by the Estate Agents Authority;
Corporation, owners’ corporation and incorporated owners are used interchangeably; and
the singular includes the plural and the male sex includes the female, and vice versa.

Case

Alfred House

1. Alfred House was a residential-*cum*-commercial property in Aplichau. Annex A is the excerpts from the Deed of Mutual Covenant (“DMC”) of Alfred House.
2. Sam Ho Restaurant Limited (“Sam Ho”) ran a Chinese restaurant on the first and second floor of Alfred House, leased from Land Invest Limited (“Land Invest”). In 2013, the common canopy on the first floor of Alfred House collapsed, killing several pedestrians. Investigation revealed that the canopy collapsed was due to overloading by the fish tank of Sam Ho, and lack of maintenance.

Lawsuit

3. Families of the deceased sued the three relevant parties. In July 2020, the court held that the defendants were *jointly and severally* liable to the plaintiffs for damages totalling \$20 million. As between the defendants liability was apportioned by the court as follows:

<u>Defendant</u>	<u>Liability</u>	<u>Amount</u>
Sam Ho Restaurant Limited	70%	\$14 million
Land Invest Limited	20%	\$4 million
The Incorporated Owners of Alfred House	10%	\$2 million
		<hr/> \$20 million

4. The court stressed that this apportionment only affected the defendants as between themselves, and did not affect the plaintiffs in any way.

Instruction to sell

5. On 5 August 2022, Chan Tai Man Victor (“Victor”), owner of Flat 5A of Alfred House (“Flat 5A”), appointed ABC Estate Agency (“ABC”) to list his flat for sale at \$8 million. The salesperson of ABC, Sales, served Victor. The sitting tenant had given notice to quit when the tenancy agreement would expire on 30 August 2022 and as agreed, he would move out. Victor had problems with liquidity, and had not paid the management fees for Flat 5A for six months already. He hoped to clear his debt when the flat was sold. Sales conducted a land search (Annex B) to complete Form 3.
6. Peter was interested in buying a flat in Aberdeen in the \$7.5 million to \$8 million range. Sales introduced Victor’s flat to him and both parties agreed to ABC representing both of them in the transaction.

Flat 5A

7. From the street level, Flat 5A was visibly unique in that it was the only Flat A of Alfred House with its open-air balcony enclosed by a half-brick/half-window enclosure. The study thus formed had effectively enlarged the indoor floor area of Flat 5A from 800 sq. ft to 1,000 sq. ft.
8. There was a small recess of 4’ x 2’ between the lift door and the front door of Flat 5A. Victor fitted a shoe rack in this area and fenced it off with an iron grille. Sales noticed the strong odour emanating from its content as soon as he stepped out of the lift.

Negotiation

9. Peter needed the extra space that came with Flat 5A and, after some negotiation, agreed to buy it for \$7.75 million. Sales proceeded to complete the provisional agreement for sale and purchase (“PASP”). The initial deposit was agreed at \$250,000 and Victor needed the money urgently to soothe his liquidity problems. Sales was a little concerned about the court case but Victor assured him that all his liabilities relating to the court case had been settled. As proof, Victor produced a letter from Messrs. Dai Dai Wai & Co. (Annex C), his solicitors, to show that Victor had paid his known share of contribution for the judgment. Victor assured Sales that he would pay the outstanding management fees, which was no more than a few thousand dollars, as soon as he received the initial deposit.
10. Victor also assured Sales that even if there was any outstanding amount, the new purchaser would not be liable, as all demand notes of the owners’ corporation had been issued in the name of Victor.

Provisional agreement for sale and purchase

11. This was the first time that Peter bought a flat and he relied on Sales to protect his interests. As Victor had paid his due contribution to the court judgment, Sales believed that there was no need to advise them to seek legal advice, and arranged both parties to sign the PASP (see Annex D).
12. On 7 August 2022, the directors of Sam Ho petitioned for winding-up before discharging any of its \$14 million liability.

List of annexes:

- A. Deed of mutual covenant of Alfred House (excerpts)
- B. Land search of Flat 5A
- C. (1) Letter of Messrs. Dai Dai Wai & Co., dated 10 September 2021
(2) Letter of the building manager, dated 1 September 2021
- D. Provisional agreement for sale and purchase, dated 5 August 2022
- E. Relevant extracts from the Building Management Ordinance and other sources

Deed of Mutual Covenant - Alfred House

Note to candidates – excerpts (without modification) from a randomly selected DMC; some clauses may not meet the latest Lands Department DMC guidelines.

THIS DEED is made the 5th day of August 1973

BETWEEN JKL DEVELOPMENT COMPANY LIMITED whose registered office is situate at 6th Floor, Chung Chung Building, No. 1 Chung Wing Lane, Hong Kong (hereinafter called “the Registered Owner” which expression shall where the context so admits include their respectively successors and assigns) of the first part, and of Mak Sun of Flat A on 9th Floor of Alfred House, No.2 Alfred Road, Hong Kong (hereinafter called “the First Purchaser” which expression shall where the context so admits include his/ her executors administrators and assigns) of the second part, and XYZ Management Company Limited whose registered office is situate at 6th Floor , Chung Chung Building, No. 1 Chung Wing Lane, Hong Kong (hereinafter called “the Manager”) of the third part.

SECTION I

Definitions: -

In this Deed the following expressions shall have the following meaning whenever the context so permits: -

“the Lot”	The Remaining Portion of Aberdeen Inland Lot No. 500
“Estate”	The whole of the development erected or to be erected on the Lot in accordance with the Crown Lease know as “Alfred House” including all Commercial and domestic portions therein.
“The Manager”	The said XYZ Management Company Limited or any other manager of the Estate appointed pursuant to this Deed.
“management units”	The number of units allocated to the Domestic Development, the Commercial Development and the Car Port and sub-allocated to a Flat, a Restaurant or a Car Parking Space respectively thereof for the purpose of reckoning the proportion of Management Expenses to be contributed by the Owners of such Domestic and Commercial developments and Car Port respectively. (The first schedule)
“Undivided Shares”	All those equal undivided parts or shares of and in the Lot and the Estate allocated as hereinafter referred to (The second schedule)

NOW THIS DEED WITNESSETH as follows:-

SECTION II

The Registered Owner to have exclusive use etc. of the Estate except only

1. The Registered Owner shall at all times hereafter subject to and with the benefit of the provisions contained in this Deed and the Crown Lease insofar as they relate hereto have the full and exclusive right and privilege to hold use occupy and enjoy to the exclusion of the First Purchaser All That the Estate (save and except only the said Flat A on the 9th Floor thereof) together with the appurtenances thereto and the entire rents and profits thereof.

Owners bound by covenants etc

2. The Owners shall at all times hereafter be bound by and shall observe and perform the covenants, provisions and restrictions herein contained and the benefit and burden thereof shall be annexed to every part of the Lot and the Estate and the Undivided Shares therewith.

SECTION III

COVENANTS, PROVISIONS AND RESTRICTIONS TO BE OBSERVED AND PERFORMED BY THE OWNERS

No structural alteration which affects other parts of the Estate

3. No Owner shall make any structural alterations to any part of the Estate owned by him which may damage or affect or interfere with the use and enjoyment of any other part or parts of the Estate whether in separate or common occupation nor will any owner use, cut, injure, damage, alter or interfere with any part or parts of the Estate's, Block's, Podium's and Car Port's Common Areas or any of such Common Facilities or any equipment or apparatus on in or upon the Lot or the Estate not being equipment or apparatus for the exclusive use and benefit of any such owner.

Not to obstruct Common Areas

4. No part of the Estate's, Block's, Podium's and Car Port's Common Areas shall be obstructed or incumbered nor shall any refuse or other matter or things be placed or left thereon nor shall any part of such Common Areas be used for any business (including hawkers) or private purposes and no Owner will do or suffer or permit to be done anything in such Common Areas as may be or become a nuisance or cause annoyance to any other Owners or occupiers of the Estate.

Not to use the
Estate for illegal or
immoral purposes
or cause nuisance

5. No Owner will use or permit or suffer any part of the Estate owned by him to be used for any illegal or immoral purposes nor will he do cause or permit or suffer to be done any act or thing which may be or become a nuisance or annoyance or cause damage to the other Owners and occupiers for the time being.

SECTION IV

MANAGEMENT OF THE ESTATE

Powers and Duties of Manager

registered charge

6. In the event of any owner failing to pay any sum due and payable by him in accordance with the provisions of this Deed or failing to pay any damages awarded by any court for breach of any of the terms and conditions of this Deed within 30 days of the date on which the same become payable, the amount thereof together with interest as costs and expenses which may be incurred in recovering or attempting to recover the same including the legal expenses, shall stand charged on the Undivided Share or Shares of the defaulting owner and the Manager shall be entitled without prejudice to any other remedy hereunder to register a Memorandum of such charge in the Land Registry, against the Undivided Share or Shares of the defaulting Owner. Such charge shall remain valid and enforceable as hereinafter mentioned notwithstanding that judgment has been obtained for the amount thereof unless and until such judgment has been satisfied.

non payment of
management fees

7. In default of payment of any fees payable under this Deed by the owner of Unit, the Manager may disconnect water or electricity supplies or suspend services to the Unit in respect of which default is made.

[Note : other parts omitted for the e-Quiz]

Deed of Mutual Covenant of Alfred House
The First Schedule Above Referred To

	<u>First Column</u>	<u>Second Column</u>	<u>Third Column</u>
	<u>Total Number of Management Units</u>	<u>Management Units Each unit</u>	<u>Number of Units</u>
A <u>Domestic Development</u>			
Flat A on 1 st to 10 th Floors (inclusive)	4,000	400	10
Flat B on 1 st to 10 th Floors (inclusive)	3,000	300	10
Flat C on 1 st to 10 th Floors (inclusive)	4,000	400	10
Flats D on 1 st to 10 th Floors (inclusive)	3,000	300	10
Flats E on 1 st to 10 th Floors (inclusive)	4,000	400	10
B <u>Commercial Development</u>			
(including all the shops, the Restaurant and the Cinemas)	8,625		
C <u>Car Parks</u>			
Car Parks in the Podium	5,821		

[Note : the figures are made up for the e-Quiz]

Deed of Mutual Covenant of Alfred House
The Second Schedule Above Referred To

<u>Premises</u>	<u>Total No. of Units</u>	<u>Undivided Shares per unit</u>	<u>Total No. of Undivided Shares</u>
1 <u>Domestic Development</u>			
Flats A on 1 st to 10 th Floors (inclusive)	10	450	4,500
Flats B on 1 st to 10 th Floors (inclusive)	10	300	3,000
Flats C on 1 st to 10 th Floors (inclusive)	10	450	4,500
Flat D on 1 st to 10 th Floors (inclusive)	10	300	3,000
Flat E on 1 st to 10 th Floors (inclusive)	10	450	4,500
2 <u>Car parks</u>			
Car parks in the Podium			3,480
3 <u>Commercial Development</u>			
(including all the Shops and the Restaurant)			23,400
		Total No. of Undivided Shares	<u>46,380</u>

[Note : the figures are made up for the e-Quiz]

**土地註冊處 THE LAND REGISTRY
土地登記冊 LAND REGISTER**

印製於 PRINTED AT: INTERNET SEARCH (DOWNLOAD)
查冊日期及時間 SEARCH DATE AND TIME: 05/08/2022 15:59
查冊者姓名 NAME OF SEARCHER: ABC ESTATE AGENCY
查冊種類 SEARCH TYPE: HISTORICAL AND CURRENT

本登記冊列明有關物業截至 05/08/2022 07:30 之資料
THE INFORMATION SET OUT BELOW CONTAINS PARTICULARS OF THE PROPERTY UP TO 07:30 ON 05/08/2022.

備存土地紀錄以供市民查閱旨在防止秘密及有欺詐成分的物業轉易，以及提供容易追溯和確定土地財產及不動產業權的方法。土地紀錄內載的資料不得用於與土地紀錄的宗旨無關之目的，使用所提供的資料須符合《個人資料（私隱）條例》的規定。
The land records are kept and made available to members of the public to prevent secret and fraudulent conveyances, and to provide means whereby the titles to real and immovable property may be easily traced and ascertained. The information contained in the land records shall not be used for purposes that are not related to the purposes of the land records. The use of information provided is subject to the provisions in the Personal Data (Privacy) Ordinance.

**物業資料
PROPERTY PARTICULARS**

物業參考編號
PROPERTY REFERENCE NUMBER (PRN): A0325250

地段編號

LOT NO.: THE REMAINING PORTION OF ABERDEEN
INLAND LOT NO. 500

批約

HELD UNDER: GOVERNMENT LEASE

年期

LEASE TERM: 75 YEARS RENEWABLE FOR 75 YEARS

開始日期

COMMENCEMENT OF LEASE TERM: 29/07/1918

每年地稅

RENT PER ANNUM: -

所佔地段份數

SHARE OF THE LOT: 450/ 46380

ADDRESS: FLAT A ON 5TH FLOOR
ALFRED HOUSE
NO.2 ALFRED ROAD HONG KONG

地址: 香港天喜路 2 號天喜大廈 5 樓 A 室

備註

REMARKS: OMITTED

業主資料

OWNER PARTICULARS

業主姓名 NAME OF OWNER	身分 (如非唯一擁有人) CAPACITY (IF NOT SOLE OWNER)	註冊摘要編號 MEMORIAL NO.	文書日期 DATE OF INSTRUMENT	註冊日期 DATE OF REGISTRATION	代價 CONSIDERATION
JKL DEVELOPMENT COMPANY LIMITED-		UB768950	12/06/1970	21/08/1970	\$1,350,000.00
--		備註 REMARKS:	ASSIGNMENT OF AIL 500-		-
--		UB1032637	-	-	-
--		備註 REMARKS:	ASSIGNMENT WITH PLAN-		-
LEE KWAN		UB2904443	20/02/1985	29/03/1985	\$250,000.00
--		備註 REMARKS:	ASSIGNMENT		-
CHAN TAI MAN VICTOR 陳大文		UB8398757	28/01/2003	14/02/2003	\$2,800,000.00

物業涉及的轉讓

INCUMBRANCES

註冊摘要編號 MEMORIAL NO.	文書日期 DATE OF INSTRUMENT	註冊日期 DATE OF REGISTRATION	文書性質 NATURE	受惠各方 IN FAVOUR OF	代價 CONSIDERATION
UB769900	15/06/1970	23/08/1970	MORTGAGE	THE BANK OF SOUTH ASIA LTD.	\$900,000.00 (PT.)
				-	
UB989179	23/03/1973	25/04/1973	REASSIGNMENT	-	-
				-	
UB1018000	03/09/1973	18/09/1973	AGREEMENT FOR SALE AND PURCHASE WITH PLAN	LEE SIU WAI -	\$100,000.00
				備註 REMARKS: SEE ASSIGNMENT MEM.NO.UB1032637	

UB1026482	23/09/1973	22/10/1973	OCCUPATION PERMIT NO.H299/73	--	-
			備註 REMARKS: RE THE R.P.		
UB1026814	25/09/1973	22/09/1973	DEED OF COVENANT WITH PLANS RE THE R.P.	- -	-
UB1026825	05/08/1973	25/09/1973	DEED OF MUTUAL COVENANT		
UB1035538	-	-	MORTGAGE	- -	-
UB1425596	-	-	REASSIGNMENT	- -	-
UB7942266	10/01/2003	30/01/2003	AGREEMENT FOR SALE AND PURCHASE	CHAN TAI MAN VICTOR -	\$2,800,000.00
	-	-	REMARKS: SEE ASSIGNMENT M/N UB8398757	- -	-
18082509957589	29/7/2018	25/08/2018	A SEALED COPY JUDGMENT	MAY TSE SIU SIU, MA LAN, KWOK KAM AND CHAN CHU CHU "PLAINTIFFS" - SAM HO RESTAURANT LIMITED" 1 ST DEFENDANT" LAND INVEST LIMITED "2 ND DEFENDANT" THE INCORPORATED OWNERS OF ALFRED HOUSE (ALSO KNOWN AS THE OWNER INCORPORATION OF ALFRED HOUSE) "3 RD DEFENDANT"	-

備註 REMARKS: IN H.C.A NO. 999 OF 2015

等待註冊的契約
(DEEDS PENDING REGISTRATION)

***** 登記冊末端 END OF REGISTER *****

Dai Dai Wai & Co.
Solicitors & Notaries

40/F, Chung Nam Building, 259 Des Voeux Road, Central, Hong Kong
Tel.: 5555 5555 Fax: 6666 6666

10th September 2021

Messrs. MNO,
Solicitors,
Room 1408, 14/F,
Hang Lung Building,
7 Des Voeux Road, Central,
Hong Kong.

Dear Sirs,

Re: Sale of Flat A on 5th Floor, Alfred House, No.2 Alfred Road, Hong Kong.

Thank you for your letter of 15th August 2021.

We act for the Vendor Mr. Victor in the sale of the captioned property. On the question you raised, we are instructed that our client has fully paid his share of contribution towards satisfying the \$2,000,000 judgment sum that the Incorporated Owners of Alfred House has become liable pursuant to HCA No. 999 of 2020 (for proof, please see the letter of 1st September 2021 from the building manager of Alfred House attached).

Your allegation that our client has any residual liabilities is denied.

Yours faithfully,

Dai Dai Wai

Dai Dai Wai & Co.

The Incorporated Owners of Alfred House

G/F, Alfred House, 2 Alfred Road, Aberdeen, Hong Kong

Tel. 2222 3333

1st September 2021

Messrs. Dai Dai Wai & Co., Solicitors,
40/F, Chung Nam Building,
259 Des Voeux Road, Central
Hong Kong

Dear Sirs,

Re: HCA No. 999 of 2020

Thank you for your letter of 15th August 2021 addressed to the Incorporated Owners of Alfred House. We are instructed to reply on their behalf.

We confirm that the owner of Flat 5A has fully paid his due contribution towards satisfying the judgment sum of \$2 million arising from the captioned litigation. In fact all owners have paid up.

Please let us know if you have any further questions.

Yours faithfully,

Chan Siu Man

For and on behalf of
Guardforge Management Ltd.
Building Manager

Note: The 3-party provisional agreement for sale and purchase below predates the Practice Regulation. Though widely used, it may not necessarily be compatible with the spirit of the prescribed estate agency agreement – Professional Development Section.

ABC Estate Agency 紅運物業代理行
臨時買賣合約
PROVISIONAL AGREEMENT FOR SALE AND PURCHASE

賣方 Vendor 本合約訂於 This AGREEMENT is made on 05/08/2022 AMONG
合約第一方為 CHAN TAI MAN, VICTOR 持有香港身份證 /
the first party (holder of Hong Kong Identity Card No. /
商業登記証號碼 K888888(8) 地址在 FLAT 3A BEAUTY COURT,
Business Registration No. 8 BEAUTY ROAD, HONG KONG) of
買方 Purchaser 合約第二方為 CHEUNG TAK, PETER 以下稱“賣方”
the second party (hereinafter called “the Vendor”) and ;
商業登記証號碼 E999999(9) 地址在 FLAT 9B, BETTY HOUSE,
Business Registration No. 4 BETTY ROAD, HONG KONG) of
代理 Agent 合約第三方為 ABC ESTATE AGENCY (LICENCE NO. C-999999) 以下稱“買方”
the third party (hereinafter called “the Purchaser”) and ;
持有商業登記証號碼 08811111 地址在 6/F, SHOPC, 7
(holder of Business Registration No. ABERDEEN LANE, ABERDEEN, HONG KONG) of
以下稱“代理”
(hereinafter called “the Agent”)
合約三方茲同意買賣條款如下:-
NOW IT IS HEREBY AGREED as follows:-

物業 Premises 1. 買賣雙方通過代理，同意以下列條款出售及購入
The Vendor agrees to sell and the Purchaser agrees to purchase, through the Agent subject to the terms and conditions herein contained,
all that FLAT 3A, ALFRED HOUSE, 2 ALFRED ROAD, ABERDEEN,
HONG KONG 以下稱“該物業”
(hereinafter called “the said Premises”)

成交價及付款方式 Consideration and payment 2. 該物業之成交價為港幣
The purchase price of the said Premises shall be HK\$ 7750,000/- which shall be paid by
買方須按下述方式付款予賣方
the Purchaser to the Vendor in the manner as follows:-
(a) 於簽訂本合約之同時即付臨時訂金港幣
Initial deposit shall be paid upon signing of this agreement in the sum of HK\$ 250,000/-
(b) 於簽署正式買賣合約之時或以前，即
Upon signing of the formal agreement for sale and purchase on or before 19/08/2022
加付訂金港幣
Further deposit shall be paid in the sum of HK\$ 125,000/-
再付訂金餘款於
Further deposit shall be paid on or before _____ in the sum of
即港幣
in the sum of
HK\$
(d) 於完成交易之時或以前，即
Balance of purchase price shall be paid upon completion on or before 19/09/2022
並在賣方之代表律師行付清樓價餘款港幣
at the Vendor's solicitors in the sum of HK\$ 6,975,000/-

成交日期 Completion date

中間人託管 Stakeholder 3. 所有買方交付的訂金須予賣方其代表律師作為中間人託管，直至賣方能證明
All deposits payable by the Purchaser shall be paid to the Vendor's solicitors as stakeholder who shall not release the said
予賣方代表律師，滿意樓價尾數足夠還該物業之按揭貸款。
Deposits to the Vendor unless it is proved to the satisfaction of the Purchaser's Solicitors that the balance of the purchase price is
sufficient to discharge the existing charge in respect of the said premises.

交吉 Vacant possession 4. 買賣完成時，賣方須將該物業交吉予買方/
Upon completion, the Vendor shall deliver vacant possession of the said Premises to the Purchaser /
賣方同意連同該物業現有之租約一起購入該物業
The Purchaser agrees to purchase the said Premises subject to the existing tenancy.

確認人 Selling as confirmor 5. 賣方是以確認人身份售出該物業。
The Vendor is selling as confirmor.

代表律師及厘印費 Solicitors and stamp duty 6. 買賣雙方同意分別委託其代表律師。
The Vendor and the Purchaser agree that they shall separately appoint their own solicitors.
賣方代表律師為
The Vendor shall be represented by Messrs. DAI DAI WAI & CO.
而買方之代表律師為
Whereas the Purchaser shall be represented by Messrs. TO BE CONFIRMED
雙方各自負責其律師費，除第 8 條所規定外，厘印費則由買方單獨負責。
Each party shall pay its own legal costs. Subject to clause 8 hereof, all stamp duty shall be borne by the Purchaser solely.

賣方悔約 Vendor fails to perform 7. 如賣方在收取訂金後，不依本合約之條款完成買賣。
Should the Vendor after receiving the initial deposit paid hereunder fail to complete the sale in the manner herein contained, the
則賣方除須即時退還買方所付之訂金全數外，並須以同等數目之金額賠償予買方。
Vendor shall immediately compensate the Purchaser with a refund of the initial deposit together with a sum equivalent to the amount.
另負責繳付本合約之厘印費。
of the initial deposit as liquidated damages and the payment of stamp duty of this agreement.
惟買方不得再向賣方追究任何責任及 / 或要求其他賠償或申請強制執行令。
and the Purchaser shall not take any further action to claim for damages or to enforce specific performance.

買方悔約
Purchaser fails to perform

8. 如買方未能履行本合約之條款完成買賣，賣方除將買方已付訂金沒收外，並有權將該物業再行出售予他人；買方須負責繳付本合約之厘印費。
Should the Purchaser fail to complete the purchase in the manner herein contained, the deposit shall be forfeited to the Vendor and the Vendor shall then be entitled at his absolute discretion to sell the said Premises to anyone he thinks fit. The Purchaser shall be liable to pay the stamp duty of this agreement and the Vendor shall not sue the Purchaser for any liabilities and/or damages or to enforce specific performance.

代理佣金
Agent's commission

9. 基於代理在促成該物業買賣中所提供之服務，代理有權向賣方收取港幣 77,500 並向買方收取港幣 77,500 作為佣金，該等佣金須於簽署正式買賣合約之時或以前繳付。
In consideration of the services rendered by the Agent, the Agent shall be entitled to receive HK\$ 77,500 from the Vendor and HK\$ 77,500 from the Purchaser as commission. Such commission shall be paid on or before the date of signing the formal agreement for sale and purchase.

佣金賠償
Compensation to the Agent

10. (a) 無論在任情況下，若賣方或買方未能履行本合約之條款賣出或買入該物業，則悔約的一方須即時付予代理港幣 155,000 作為賠償代理之損失。
If in any case, either the Vendor or the Purchaser fails to complete the sale or purchase in the manner herein contained, the defaulting party/parties shall compensate at once the Agent HK\$ 155,000 as liquidated damages.
(b) 簽署本合約後如買賣雙方協議取消本合約，則買賣雙方將同時及分別成為本合約之悔約者，並仍須各自負責付予代理應得之上述佣金。
Should the Vendor and Purchaser after signing this agreement, both agree to cancel this agreement, they will jointly and severally become the defaulting parties of this agreement and will still be liable for the payment of their own commission mentioned herein before.
(c) 如賣方或買方是有限公司而不依本合約之條款完成買賣，代表該有限公司簽署人須承擔及支付代理應收之所有佣金。
Should the Vendor or the Purchaser be a limited company which fails to complete the sale or purchase in the manner herein contained, the person(s) who signed this agreement on behalf of the limited company shall be personally liable for all commission due to the Agent.

以現狀出售
As is basis

11. 該物業是以現狀售予買方。
The said Premises is sold to the Purchaser on an "as is" basis.

過往談判
Prior negotiations

12. 本合約取代三方過往所有談判、聲稱、理解及協議。
This agreement supersedes all prior negotiations, representation, understanding and agreements of the parties hereto.

動產
Chattels

- * 13. 本買賣包括附表內所列之動產、傢俬及裝設。
It is hereby declared that the sale and purchase hereof shall include the chattels, furniture and fittings as set out in the schedule attached hereto.

住宅 / 非住宅
Residential/Non-Residential

- * 14. 茲證明此項買賣之物業根據厘印法案第 117 章 29A(1)段之定義乃住宅 ~~非住宅物業~~。
It is hereby certified that the transaction hereby affected relates to residential ~~non-residential~~ premises within the meaning of Section 29A(1) of the Stamp Duty Ordinance Cap. 117.

委任代理
Appointment of Agent

- * 15. 茲聲明本合約之代理為買賣雙方代理 ~~只是賣方代理 / 只是買方代理~~。
It is hereby declared that the Agent is the Agent for both the Vendor and the Purchaser ~~for the Vendor only / for the Purchaser only~~.

責任
Liabilities

16. 如本合約由賣方或買方的代理人或授權人簽署，則代理人或授權人須承擔本合約之所有責任。
Should the signatory be donee(s) or attorney(s) of the Vendor / Purchaser, the donee(s) or attorney(s) shall be personally liable for all the liabilities arising from this agreement.

解釋
Interpretation

17. 本合約以英文為準。
In case of conflict between the English & Chinese Version of this agreement, the English Version shall prevail.

備註
Remarks

18. THE PURCHASE PRICE INCLUDES: 3 AIR-CONDITIONERS, ONE WASHING MACHINE AND ONE WATER HEATER.

For and on behalf of
ABC Estate Agency

Chan Tai Man
賣方簽署接受
Signed by the Vendor

Sales
代理簽署接受
Signed by the Agents

CKW
買方簽署接受
Signed by the Purchaser

Name: CHAN TAI MAN, VICTOR
I.D. No.: K888 888 (8)

Name: SALLES LEE
I.D. No.: J 777 777 (7)

Name: CHEUNG TAK, PETER
I.D. No.: E999 999 (9)

茲收到買方臨時訂金港幣
Received from the Purchaser the initial deposit in the sum of HK\$ 250,000

賣方簽收
Signed by the Vendor Chan Tai Man

支票號碼 9999 9999 銀行 HONG KEE BANK

Name: CHAN TAI MAN, VICTOR
I.D. No.: K888 888 (8)

* 刪去不適用者

Relevant extracts from the Building Management Ordinance, Cap. 344
(unless otherwise specified)

*Note to candidates: only those parts of a statute or legal term considered relevant to the e-quiz or estate agency work are summarized here. For easy reading the text of some clauses has been **abridged or reworded** in simple English. When in doubt, candidates should consult the original text of Chapter 344 at the Department of Justice free website (Bilingual Laws Information System page) : <http://www.blis.gov.hk/eng.m/home.htm>. The terms “corporation”, “ owners’ corporation” and “ incorporated owners” are here used interchangeably.*

The **preamble** to the *Building Management Ordinance* Cap. 344 (“BMO”) states its objects/reasons are :

“to facilitate the incorporation of owners of flats in buildings or groups of buildings, to provide for the management of buildings or groups of buildings and for matters incidental thereto ...”

Interpretation (according to BMO s. 2 unless otherwise specified):

Common parts means the whole of a building, except such parts as have been specified or designated in an instrument registered in the Land Registry as being for the exclusive use, occupation or enjoyment of an owner and those parts specified in Schedule 1.

Corporation means a corporation registered under s. 8.

Deed of mutual covenant (“DMC”) means a document which-

- (a) defines the rights, interests and obligations of owners among themselves; and
- (b) is registered in the Land Registry.

Good title - The title (of a property) should not be affected by any major defects which make it un-saleable in the market.¹

Joint and several obligation means an obligation entered into by two or more persons, jointly and severally, so that each is liable severally, and all liable jointly, and a creditor or obligee may sue one or more severally, or all jointly, at his option.

(Osborn's Concise Law Dictionary 6th Ed)

DMC Manager, in relation to a building, means the person who is specified in the deed of mutual covenant to manage the building. (s. 34D)

Manager, in relation to a building, means the DMC manager or any other person who for the time being is, for the purposes of the deed of mutual covenant, managing that building. (s. 34D)

Nuisance means : 1. a condition or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property; 2. loosely, an act or failure to act resulting in an interference with the use or enjoyment of property; 3. the class of torts arising from such conditions, acts or failures to act when they occur unreasonably ... (**Black's Law Dictionary**)

Owner means :

- (a) a person who for the time being appears from the records at the Land Registry to be the owner of an undivided share in land on which there is a building; and
- (b) a registered mortgagee in possession of such share.

Owners' Committee, in relation to a building, means the committee of owners (howsoever named) formed under or in accordance with the deed of mutual covenant in respect of the building. (s. 34D)

Share means the share of an owner in a building determined in accordance with section 39.

Undivided shares means a proportion of shares in the whole building allocated in the conveyance to a flat owner; a peculiar Hong Kong device to ensure that everyone gets a proportion of the whole block plus the flat actually allocated to him. (**Bramwell's Conveyancing in Hong Kong**)

The court has commented on the relationship between *undivided shares* and *DMC* as follows : “*without a DMC, each co-owner of the property, that is those who hold undivided shares, would be entitled to the full use and enjoyment of the whole property. The DMC governs the rights of the co-owners amongst themselves and regulates, amongst other things, the portions of the property in respect of which each owner would have the exclusive right of enjoyment. That exclusive right of*

¹ Chapter 3, Paragraph 8 of Monograph on *Hong Kong Conveyancing*

enjoyment cannot be assigned on its own, but it has to be assigned together with a part interest in the legal estate”².

Section 8 - Incorporation

(1) (on the application by a management committee under section 7) the Land Registrar shall, if satisfied that the (relevant) provisions ... have been complied with, issue a certificate of registration ...

(2) With effect from the date of issue of the certificate of registration ...

(a) the owners for the time being shall be a body corporate with perpetual succession and ... be capable of suing and being sued and ... of doing and suffering all such other acts and things as bodies corporate may lawfully do and suffer ...

(aa) the corporation shall have ... the power to hold an undivided share in the building, together with the right to the exclusive possession of any part of the building other than the common parts thereof.

Section 14 – Powers of corporation generally

(1) ... at a meeting of a corporation any resolution may be passed with respect to the control, management and administration of the common parts or the renovation, improvement or decoration of those parts and any such resolution shall be binding on the management committee and all the owners.

Section 16 – Rights of owners to be exercised by corporation

The rights, powers, privileges and duties of the owners in relation to the common parts of the building shall be exercised and performed by, and the liabilities of the owners in relation to the common parts of the building shall ... be enforceable against, the corporation to the exclusion of the owners, and accordingly ... any proceedings in the (Lands Tribunal) in respect of any of the common parts of the building may be brought and pursued by or against the corporation.

Section 17 - Enforcement of judgments against a corporation

(1) If a judgment is given or an order is made against a corporation, execution to enforce the judgment or order may issue-

(a) against any property of the corporation; or

(b) with leave of the (Lands Tribunal), against any owner.

Section 18 – Duties and powers of corporation

² *Jumbo King Ltd v Faithful Properties Ltd* CACV 180/1998, per Rogers JA;
http://www.hklii.hk/hk/jud/en/hkca/1999/CACV000180_1998.html

(1) The corporation shall-

- (a) maintain the common parts and the property of the corporation in a state of good and serviceable repair and clean condition;
- (b) carry out such work as may be ... required in respect of the common parts by any public officer or public body under any statutory powers

- (c) do all things reasonably necessary for the enforcement of the obligations contained in the deed of mutual covenant ... for the control, management and administration of the building.

Section 19 - Corporation may sell or register charges against flat in certain circumstances

(1) If a deed of mutual covenant provides that a person may ... register a charge in the Land Registry against an owner's interest if that owner fails to pay any sum ... payable under the deed of mutual covenant, then ... the corporation may ... register such charge as if it were that person.

Section 20 – Establishment of funds

- (1) A corporation shall maintain a general fund :
 - (a) To defray the costs of the exercise of its powers and the performance of its duties under the deed of mutual covenant and (the BMO), and
 - (b) to pay Government rent, premiums, taxes or other outgoings (including any outgoings in relation to any maintenance or repair work) which are payable in respect of the building as a whole.

- (2) A corporation may establish and maintain a contingency fund:
 - (a) to provide for any expenditure of an unexpected or urgent nature; and
 - (b) to meet any payments (of the kind specified for the general fund) if the general fund is insufficient to meet them.

Section 21 - Contributions to funds

(1) ... a management committee shall determine the amount to be contributed by the owners to the (general fund and contingency fund) ...

Section 22 - Recovery of contributions from owners

(1)(a) The amount to be contributed by an owner towards the amount determined under section 21 shall be fixed by the management committee in accordance with the deed of mutual covenant ...;

(3) the amount payable by an owner under this section shall be a debt due from him to the corporation at the time when it is payable.

Section 23 - Liability of occupier to pay contributions to funds

(1) If any amount payable under section 22 by an owner ... remains unpaid for a period of one month after it has become due to the corporation, the corporation may ... by notice in writing addressed to the occupier of the flat [Note: e.g. the tenant] ... demand such amount from the occupier, who shall ... thereupon be liable to pay the same to the corporation.

(2) The amount payable is limited to the amount of rent due at the time of demand

(3) (omitted)

(4) If an occupier ... has paid the amount (so demanded)... that amount may ... be deducted by him from the rent ...;

Section 33 - Winding up of corporations

(1) A corporation may be wound up under the provisions of Part X of the Companies Ordinance (Cap 32) ... and the provisions of that Ordinance relating to the winding up of an unregistered company shall ... apply to the winding up of a corporation.

Section 34 – Liabilities of owners on winding up

In the winding up of a corporation ... the owners shall be liable, both jointly and severally, to contribute, according to their respective shares, to the assets of the corporation to an amount sufficient to discharge its debts and liabilities.

Section 34I - Common parts

(1) No person may-

(a) convert any part of the common parts of a building to his own use unless such conversion is approved by a resolution of the owners' committee;

(b) use or permit to be used the common parts of a building in such a manner as ... (ii) to cause a nuisance or hazard to any person lawfully in the building.

(2) Any person who contravenes subsection (1) shall be deemed to be in breach of an obligation imposed on him by the deed of mutual covenant in respect of the building.

Section 39 - Determination of owner's shares

An owner's share shall be determined-

- (a) in the manner provided in ... a deed of mutual covenant ... which is registered in the Land Registry; or
- (b) if there is no (deed of mutual covenant), or (it) contains no such provision, then in the proportion which his undivided share in the building bears to the total number of shares into which the building is divided.

Schedule 3, Clause 3(5)(a) - Voting power

At any meeting of the corporation an owner shall...have one vote in respect of each share which he owns.

COMMON PARTS

1. External walls and load bearing walls, foundations, columns, beams and other structural supports.
2. Walls enclosing passageways, corridors and staircases.
3. The roofs, chimneys, gables, gutters, lightning conductors, satellite dishes and ancillary equipment, aerials and aerial cables.
4. Parapet walls, fences and boundary walls.
5. Vents serving 2 or more flats
6. Water tanks, reservoirs, pumps, wells, sewers, sewage treatment plants, drains, soil pipes, waste pipes, channels, water-courses, gutters, ducts, downpipes, cables, conduits, refuse chutes, hoppers and refuse container chambers.
7. Cellars, toilets, water closets, wash houses, bathhouses, kitchens and caretakers' flats.
8. Passageways, corridors, staircases, landings, light wells, staircase window frames and glazing, hatchways, roofways and outlets to the roofs and doors and gates giving access thereto.
9. Lifts, escalators, lift shafts and machinery and apparatus used in connexion therewith and the housing thereof.
10. Lighting apparatus, air conditioning apparatus, central heating apparatus, fire fighting equipment and installations intended for the use and benefit of all of the owners generally and any room or chamber in which such apparatus, equipment or installation is fitted or installed.
11. Fixtures situated in a flat which are used in connexion with the enjoyment of any other flat or other portion of the building.
12. Lawns, gardens and playgrounds and any other recreational areas.
13. Swimming pools, tennis courts, basketball courts, squash courts and premises containing or housing any other sporting or recreational facilities.
14. Clubhouses, gymnasiums, sauna rooms and premises containing health or leisure facilities.
15. Slopes, gradients and retaining walls including sea walls (if any) comprising or forming part of any land which is in common ownership with the building.

Answer Guide for e-Quiz – August 2023

Note:

1. This answer guide is prepared by the Estate Agents Authority and provides the correct answers to the questions of the August 2023 e-Quiz.
2. In this answer guide, the following words have the following corresponding meanings:

“the Authority” means the Estate Agents Authority;

“the Practice Regulation” means the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation;

“the Code of Ethics” means the Code of Ethics issued by the Estate Agents Authority;

“the Practice Circular” means the practice circulars issued by the Estate Agents Authority;

Corporation, owners’ corporation and incorporated owners are used interchangeably; and

the singular includes the plural and the male sex includes the female, and vice versa.

3. The copyright of the e-Quiz, this answer guide and all supporting materials (collectively “the materials”) belongs to the Authority, and the materials may be reproduced by candidates for the purpose of attempting the questions only. No reproduction of the materials for any other purpose is allowed without the prior written consent of the Authority.

Question 1

The objects and reasons for the Building Management Ordinance Cap. 344 are to:

- (i) introduce a licensing regime for the building management trade
- (ii) facilitate the formation of an owners' corporation
- (iii) provide for the management of buildings

[Suggestion - read the preamble to the Building Management Ordinance at Annex E]

- A. (i) only
- B. (i) and (ii) only
- C. (i) and (iii) only
- D. (ii) and (iii) only**
- E. (i), (ii) and (iii)

Answer to Q. 1 :

Option (i), Building Management Ordinance ("BMO") is not concerned with any licences. Building management work is unregulated at the moment, though in some overseas jurisdictions it comes within the scope of work of estate agents. Watchmen in Hong Kong are required to hold a permit under the Security and Guarding Services Ordinance (Cap. 460) because of the security, not building management, nature of their work.

Options (ii) and (iii), the objects and reasons of the BMO are set out in its preamble at Annex E. It is to facilitate the formation of the owners corporation and the management of buildings.

Only options (ii) and (iii) are correct. D is the answer.

Question 2

Once an owners' corporation is formed:

- (i) it can sue and be sued
- (ii) the owners will have limited liability
- (iii) it shall have perpetual succession

[Suggestion - read ss. 8, 33 and 34 of the Building Management Ordinance at Annex E]

- A. (i) only
- B. (i) and (ii) only
- C. (i) and (iii) only**
- D. (ii) and (iii) only
- E. (i), (ii) and (iii)

Answer to Q. 2:

Options (i) and (iii), a corporation shall have perpetual succession and can sue and be sued – Building Management Ordinance (“BMO”) s. 8(2)(a).

Option (ii), though the procedure under the Companies Ordinance (Cap. 32) is adopted for its winding up (BMO s. 33), an owners' corporation differs from a limited company in that on winding up the liabilities of an owners corporation have to be borne by all the owners jointly and severally (BMO s. 34). A limited company is liable only up to the value of its share capital.

Only options (i) and (iii) are correct. C is the answer.

Question 3

Under the Building Management Ordinance, against which of the following parties/objects can a judgment against the owners' corporation be enforced?

Such judgments can be enforced against:

- (i) the building manager
- (ii) an owner, if the Lands Tribunal approves
- (iii) any property of the owners' corporation

[Suggestion - read ss. 8 and 17 of the Building Management Ordinance at Annex E]

- A. (i) only
- B. (ii) only
- C. (iii) only
- D. (i) and (ii) only
- E. (ii) and (iii) only**

Answer to Q. 3 :

Building Management Ordinance ("BMO") s. 17(1) says the judgment can be executed against any property of the owners' corporation and, if Lands Tribunal approves, against any owner. It does not say that such judgment can be enforced against the building manager.

Only options (ii) and (iii) are correct. E is the answer.

Comment :

The potential liability of an individual owner of a property to contribute towards the costs of satisfying a judgment against the owners incorporation was held in the case of *Chi Kit Co Ltd v Lucky Health International Enterprise* [2000] CPR 554 to be an encumbrance as the owners incorporation would ultimately seek to recover such costs from the owners of the building.¹ As "*there might be circumstances where (the Lands Tribunal) would be proper to give leave for ... the entire judgment to be executed against one owner, leaving it to that owner to seek contribution from his co-owners*", therefore "*where... the liability to contribute is extraordinary in view of its magnitude so that it exceeds what any reasonable purchaser might be expected to have in contemplation, there is a powerful case for saying that there is a defect in title ...*".²

¹ Monograph on *Encumbrances*, P. 24

² *Chi Kit Co. Ltd. v Lucky Health International Enterprise Ltd.* FACV No. 18 of 1999

Question 4

The owners' corporation had never agreed to Victor installing the iron grille and shoe rack in the common area, but no action had been taken despite the repeated complaints from the owner of Flat 5B. What can the owner of Flat 5B do?

He can:

- (i) sue Victor for using the common parts
- (ii) register a charge under s.19 of the Building Management Ordinance against Flat 5A at the Land Registry
- (iii) sue the building manager for neglect of duty

[Suggestion - read clause 3 of the Deed of Mutual Covenant at Annex A and ss. 8, 16, 18(1)(c), 19, 34I and First Schedule of the Building Management Ordinance at Annex E]

- A. (i) only
- B. (ii) only
- C. (iii) only
- D. (i) and (ii) only
- E. None of the above (i), (ii) and (iii)**

Answer to Q. 4**On the shoe rack and iron grille****Option (i) to sue Victor**

The 5th floor corridor is a common part of the building under Building Management Ordinance ("BMO") First Schedule, and BMO s. 34I says anyone who converts a common part to his own use (i.e. fitting the iron grille and shoe rack) is deemed to have breached the DMC. Clause 4 of DMC at Annex A also prohibits an owner from using the common parts for private purposes.

BMO s. 8(2)(a) says an owners' corporation is capable of suing from the day of incorporation. Further BMO s. 16 says the rights and privileges of the owners in relation to the common parts of the building shall be exercised by the corporation *to the exclusion* of the owners. Therefore only the owners' corporation, not Flat 5B

owner or indeed any other owner of Alfred House, can sue Victor for committing a breach in respect of the common parts.

Option (ii) to register a s. 19 charge against Flat 5A

A charge under BMO s. 19(1) (called *memorandum of charge*) can only be registered for failing to pay any sum which is payable under the DMC, such as management fees, and not for other breaches of the DMC like encroaching on common parts.

Option (iii) to sue the building manager

The parties to a management agreement under which a manager is hired to manage a building are usually the owner's corporation and the building manager. If he fails to do his job he may have breached the management agreement, but under contract law only the owners' corporation can sue. Under very special circumstances an owner may sue the building manager under tort but that will be beyond the scope of this discussion.

None of the above options (i), (ii) or (iii) is correct. E is the answer.

Comment :

On the smell emanating from the shoe rack

As a side issue, note that Clause 5 of DMC at Annex A prohibits an owner from causing a *nuisance*, which term means :

1. a condition or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property;
2. loosely, an act or failure to act resulting in an interference with the use or enjoyment of property;
3. the class of torts (i.e. civil wrong) arising from such conditions, acts or failures to act when they occur unreasonably³.

If the odour is serious enough to constitute a nuisance, Victor may have committed a wrong against the owner of Flat 5B whether under tort or under the terms of the DMC. The latter may then sue Victor. Practitioners however are not expected to know the details of tort liabilities.

³ *Black's Law Dictionary*

Question 5

Apart from demanding payment from Victor, what might be the legal avenues for the owners' corporation to recover Flat 5A's six month management fee arrears?

- (i) register a charge under s.19 of the Building Management Ordinance (s.19 charge") against Flat 5A
- (ii) chase the new owner (Peter) after completion, if a s. 19 charge has been registered
- (iii) ask the tenant to pay

[Suggestion - read ss. 16, 19, 22(3) and 23 of the Building Management Ordinance at Annex E]

- A. (i) only
- B. (i) and (ii) only
- C. (i) and (iii) only
- D. (ii) and (iii) only
- E. (i), (ii) and (iii)**

Answer to Q. 5 :

The Legal Advisory and Conveyancing Office ("LACO") of Lands Department has by way of Circular Memorandum No.64 ("LACO No.64") issued guidelines setting out what can or cannot be specified on a DMC (see their website: <http://www.landsd.gov.hk/en/images/doc/64.pdf>)

Option (i) to register a s. 19 charge

Building Management Ordinance ("BMO") s. 19 says if a DMC specifies that a charge may be registered at the Land Registry for non-payment of a sum payable under the DMC, then the owners' corporation can register such a charge (referred to below as a *memorandum of charge*). A *memorandum of charge* clause is permitted pursuant to LACO No. 64, and so the clause appears in virtually all new DMCs.

Management fees are sums payable under the DMC. Clause 6 of the DMC of Alfred House (Annex A) empowers the registration of a *memorandum of charge*. Therefore such a charge can be registered against Flat 5A at the Land Registry for arrears of management fees. Land Search Sample 9 of Monograph *Interpretation of a land*

search shows what a *memorandum of charge* looks like (see p. 89 *Memorial No. TW1768453*).

Option (ii) to chase Peter

BMO s. 22(3) says the management fee contribution payable by an owner shall be a debt due from him to the owners' corporation, and if a BMO s. 19 charge is registered at the Land Registry then Peter buys Flat 5A subject to the charge. The owners' corporation can then chase Peter for the arrears.⁴

Option (iii) to ask the tenant to pay

BMO s. 23 empowers the owners' corporation to ask the tenant to pay the arrears of management fees and then deduct that amount from the rent payable to the owner. This is reflected in LACO No. 64 which allows DMCs to include a clause to withhold supply of management services (e.g. rubbish collection) to a flat whose management fees are in arrears (see for example Clause 7 at Annex A). In such a situation the tenant is often willing to pay the owners' corporation then set-off the sum paid from the rent payable to the owner, rather than to run the risk of having management services cut off. The owners' corporation can therefore demand the tenant to pay, but only up to the amount of rent due.

All options (i), (ii) and (iii) are correct. E is the answer.

Comment:

(a) To avoid unnecessary litigation arising from unpaid management fees, it is prudent for the purchaser's agent to enquire from the building manager if there are any such arrears before any agreement is signed. If the land search shows any *memorandum of charge* (see Monograph *Interpretation of a land search* p.89), it may be necessary to have the arrears deducted from the balance of the purchase price and held by one party's solicitors as stakeholder for payment to the owners' corporation, or dealt with in any other way the parties mutually agree. Advise the clients to seek independent legal advice if in doubt.

In this case Victor agrees to pay all management fee arrears with the initial deposit, so a term effecting the agreement should be included in the PASP.

(b) Note that LACO No. 64 does not allow a DMC to contain a term permitting the

⁴ Kent *Building Management in Hong Kong* p. 320

disconnection of utilities for non-payment of management fees. It is doubtful if a term like Clause 7 of Annex A can be enforced nowadays.⁵

(c) Note further that a *memorandum of charge* can be registered by the owners' corporation without going through any court process, unlike a *charging order* which can only be registered pursuant to a court order arising from, say, a judgment debt. For the meaning of *charging order*, see Monograph *Encumbrances* p. 25, and for its land search samples, see Monograph *Interpretation of a land search* p. 63 (Memorial nos.ST913845 and ST915877).

⁵ Kent *ibid* p. 141

Question 6

As among the owners of Alfred House themselves, how should the \$2 million liability be apportioned?

It should be apportioned according to:

- (i) management units
- (ii) number of units, in equal shares
- (iii) undivided shares

[Suggestion - read ss. 34 and 39 of the Building Management Ordinance at Annex E]

- A. (i) only
- B. (ii) only
- C. (iii) only**
- D. (i) and (iii) only
- E. (i), (ii) and (iii)

Answer to Q. 6 :

Option (i), where *management units* are specified in a DMC (see Section I and First Schedule of Annex A), it is there for the apportionment of management related expenses. Not all DMCs, in particular for older residential buildings, specify management units.

Option (ii), as not all units in a building have equal undivided shares, not in particular for Alfred House, equal division by the number of units cannot be the basis of apportionment.

Option (iii), Building Management Ordinance (“BMO”) s. 34 says when an owners’ corporation is wound up, the owners shall contribute, *jointly and severally*, according to their respective shares to an amount sufficient to discharge its debts and liabilities. Under s. 39 a *share* shall be determined according to the manner provided in a DMC, or else according to the undivided shares. Logically the liability should be apportioned according to the undivided shares. For the meaning of *joint and several liability*, please see Annex E.

Only option (iii) is correct. C is the answer.

Comment:

The owners' corporation has to bear responsibilities for the incident due to its negligence in maintaining the balcony. Negligence is described as:

... the tort of failing in particular circumstances to exercise the care which should have been shown in these circumstances, the care of the reasonable man, and of thereby causing harm to another in person or property. It implies the existence of a legal duty to take care, owed to the complainer, which duty exists, in general, where there is such proximity between two persons that a want of care on the part of the one is likely to affect the other injuriously, a failure to exercise the standard to care deemed right in the circumstances, ... causal connection between the failure to take care and injury suffered, not interrupted by the intervention of some other causal factor, and not too remotely connected with the ultimate harm, and actual loss, injury or damage to the complainer. Negligence takes innumerable forms, but the commonest forms are negligence causing personal injuries or death⁶...

Further, occupiers are liable for injury or damage to persons or goods lawfully on their land resulting from danger due to the state of the property or to things done or omitted to be done there. In this case the incident took place in the street. Had it taken place on the premises of Alfred House, the owners' corporation may also be liable under the Occupiers Liability Ordinance (Cap. 314). Readers may recall that a few years ago the Incorporated Owners of Sun Hing Building in Mongkok had to pay \$23 million damages to a plumber for injuries sustained while carrying out plumbing work there.

⁶ David Walker *The Oxford Companion to Law*

Question 7

Which of the following will be the worst case scenario if, as it had no valuable assets, Sam Ho was wound up?

- (i) the owners' corporation and Land Invest have to shoulder Sam Ho's \$14 million liability
- (ii) the owners' corporation may be wound up
- (iii) Victor can no longer sell Flat 5A

[Suggestion - read ss. 34 and 39 of the Building Management Ordinance at Annex E]

- A. (i) only
- B. (ii) only
- C. (i) and (ii) only**
- D. (i) and (iii) only
- E. (ii) and (iii) only

Answer to Q. 7 :

Option (i), the court held that all three defendants are *jointly and severally* liable for payment of damages to the plaintiffs, and the 7:3:1 ratio is only the internal apportionment as between the defendants. The plaintiffs can choose to chase any number of them for the full \$20 million damages - see the meaning of *joint and several liability* at Annex E. It will then be up to the defendant who has paid up to chase the other defendants for contribution according to their internal 7:3:1 apportionment. The owners' corporation and Land Invest may therefore be each liable to the plaintiffs for the \$14 million that Sam Ho is unable to pay.

Option (ii), the owners' corporation may have limited assets to meet its liabilities, in which case its creditors (including the deceased's estate) can petition for its winding up under Building Management Ordinance ("BMO") s. 33 in order to gain access to the owner's properties under BMO s. 34.

Option (iii), a vendor normally has a duty both to show and give good title, meaning a title as will enable the purchaser to hold the property against any challenger⁷. The court has commented that: "*A good title is one which can at all times and in all*

⁷ Sihombing *A Student's Guide to Hong Kong Conveyancing*, p. 261, and *Hong Kong Conveyancing Law and Practice* at V[2]

circumstances be forced upon and unwilling purchaser in an action for specific performance, but the court will not force a doubtful title on a purchaser. A doubtful title includes not only a title on which the court entertains doubts, but also one in respect of which the court entertains a favourable opinion but may yet be reasonably and fairly questioned by other competent persons. In this connection the court bears in mind that its decision binds the parties but not other adverse claimants who are not parties to the proceedings. A purchaser will not therefore be forced to take a title which will expose him to risk or hazard...’’⁸

Legally the position of Victor has not changed before and after Sam Ho is wound up as his potential liabilities remain the same, i.e. *joint and several* with others all the time. Such liabilities may result in Victor being unable to give *good title* for Flat 5A. However parties to a property transaction can agree to a title other than a good title provided they can make an *informed consent*. Under such circumstances what has been agreed should be clearly stated in the PASP. The issue is complicated and practitioners should always advise their clients to seek independent legal advice before committing to the transaction.

Only options (i) and (ii) are correct. C is the answer.

⁸ *Liu Kin Leung v. Tsang Mi Ling* [2000] HKCFI 763

Question 8

True or False:

The letter of 10 September 2021 of Messrs. Dai Dai Wai & Co. shows that Victor's solicitors have represented to a third party that Flat 5A is clear of all liabilities relating to the lawsuit, and so may be liable if the third party suffers loss as a result of relying on the representation.

[Suggestion - read the letter carefully]

- A. True
- B. False**

Answer to Q. 8 :

Victor's solicitors only stated the fact that as at 1 September 2021 Victor has paid his share of the \$2 million liability then demanded by the owners' corporation. They have never represented that Flat 5A is clear of ALL liabilities relating to the law suit. Solicitors mainly serve the interests of their clients, in this case Victor the vendor, which may often be in conflict with those of the purchaser. In Hong Kong dual agency is the norm and in such a situation an estate agent serving the interests of both parties should treat such a letter with caution.

B is the answer.

Comment:

On the question whether Messrs. Dai Dai Wai's letter has made any false representation, note that *misrepresentation* can be described as :

*An incorrect statement of fact, or of mixed fact and law, made by one party to another with the object, and having the result, of inducing the other to enter into a contract or similar relationship with the representor. It may be made by statement or other actings, or by concealment but not by mere omission, silence or inaction save where such would distort the natural inference from other facts or where, exceptionally, there is a positive duty to disclose all relevant facts...*⁹

⁹ *The Oxford Companion to Law*

Where a person (i.e. the victim) has entered into a contract after a misrepresentation has been made to him by another party and as a result he suffers loss, then, depending on whether the misrepresentation was made fraudulently or not, he may be entitled to rescind the contract and/or damages.¹⁰

Where the circumstances justify it the victim may also make a claim for *deceit*, described as “*a tort arising from a false statement of fact made knowingly or recklessly with the intent that another person should act on it, with the result that the person who acts on it suffers damage.*”¹¹ Deceit could also amount to fraud related crimes if the necessary intent is present.

The solicitors’ letter does not appear to contain the representation as alleged, and it is beyond this discussion to go deep into civil claim issues. Beware that when solicitors deny an allegation, they may not necessarily express an opinion on the truthfulness of the allegation, but simply that liability is not admitted and that it will be up to the other party to prove the allegation. The very fact that Victor’s solicitors need to address the issue of “residual liabilities”, however, should have put practitioners on notice that due to the lawsuit the transaction may have to be handled with particular care.

¹⁰ s. 3 *Misrepresentation Ordinance* Cap. 284

¹¹ *Garner A Dictionary of Modern Legal Usage*

Question 9

What will be the effect of Clause 11 of the provisional agreement for sale and purchase on the sale of Flat 5A?

- (i) whatever title problems that may come with the enclosed balcony, the purchaser accepts them
- (ii) the purchaser agrees to buy Flat 5A unless a building order to rectify the balcony is registered at the Land Registry prior to completion
- (iii) there is no binding agreement until the parties' solicitors reach an agreement on how to resolve the balcony problem, if any

- A. (i) only
- B. (ii) only
- C. (iii) only
- D. (i) and (iii) only
- E. None of the above (i), (ii) and (iii)**

Answer to Q. 9 :

When a property is sold on an “as is” basis, the purchaser has inspected the property and has accepted its physical condition (see Chapter 3, para. 19, Monograph on *Hong Kong Conveyancing*). It does not mean that the purchaser is aware of the existence of illegal structures or alterations or agrees to purchase the property subject to those conditions.

A PASP is normally a binding agreement, even when “as is” is specified, unless the parties have expressed any contrary intention.

None of the above options (i), (ii) or (iii) is correct. E is the answer.

Comment:

If a purchaser accepts the illegal structure and whatever consequences, then the vendor's agent should record his acceptance expressly in the PASP. A general term merely saying that the purchaser buys on an “as is” basis may not truly reflect what the parties have agreed or offer them the protection needed.¹²

¹² Sihombing *A Student's Guide to Hong Kong Conveyancing*, p. 272

Sometimes the vendor would try to keep the deal by agreeing to pay for the necessary restoration. Case law suggests that where the effect of such restoration will affect the value of the property substantially (like say reducing the floor area from 1,000 sq. ft. to 800 sq. ft. as in this case), the purchaser may still be able to rescind the deal by claiming that he is not getting what he has originally bargained for. (see p.27 of Monograph *Encumbrances*). These issues are complicated, and so should be left to solicitors to handle.

Question 10

Sales arranged both parties to conclude the transaction on an “as is” basis. On the “as is” point only, has he breached the Code of Ethics?

Sales has neglected his duties, if any, in relation to:

- (i) Victor
- (ii) Peter
- (iii) the owners’ corporation

[Suggestion - read Code of Ethics]

- A. (i) and (ii) only
- B. (i) and (iii) only
- C. (ii) and (iii) only
- D. (i), (ii) and (iii)
- E. None of the above (i), (ii) and (iii)

Answer to Q. 10 :

Option (i), the enclosed balcony, in particular of that size, may be an illegal structure subject to possible enforcement action by Government authorities, if not also action from the owners’ corporation for breaching Clause 3 of the DMC. If Peter accepts the risks, then such acceptance should be spelt out in the PASP to protect the interests of Victor. Conversely, Sales should have told Peter of the risks so that he can make an informed decision before arranging him to buy on an “as is” basis. Better still he should suggest them to seek independent legal advice before signing the PASP. Both parties may now have to resort to legal action to sort out the exact meaning of “as is”.

Option (ii), the standard expected of estate agents in other common law jurisdictions may offer valuable reference. It is said in one Queensland estate agency law book¹³ that:

"The careless completion of documents can later lead to problems for the principal in the enforcement of obligations against the other party. Whilst it may not seem difficult to complete the particulars of a contract of sale, and it will be reasonably presumed by all vendors that real estate agents could do this, it is also important for such agents to

realise their limitations in drafting any special or other unusual conditions and not attempt to do so without professional legal advice...If, for any reason, the omission to do so permits a purchaser to avoid a contract, in circumstances where the purchaser would not have been able otherwise to do so, had the proper statements been given, the real estate agent will be liable, not only for non-compliance with the legislation, but also to the vendor, in breach of the implied term that all duties will be performed with reasonable care and skill"

The same argument may apply to the purchaser. Therefore, Sales may have breached Code of Ethics 3.4.1 for failing to promote and protect the interests of both clients and also Code of Ethics 3.5.1 for failing to exercise due care and due diligence in fulfilling his duties towards them.

Option (iii), Sales owes no duty to the owners' corporation.

Only options (i) and (ii) are correct. A is the answer.

Comment:

While Sales may owe no duty to a non-client, he still should not in his practice behave in such an unprofessional way as may bring disrepute to the profession.

¹³ Duncan *Real Estate Agency Law in Queensland*, p. 157

Question 11

By not suggesting Peter to seek independent legal advice or to arrange the initial deposit to be stakeheld before the PASP is signed, has Sales breached the Code of Ethics?

Sales has breached his duty (if any) in relation to:

- (i) Victor
- (ii) Peter
- (iii) the owners' corporation

[Suggestion - read Code of Ethics]

- A. (i) only
- B. (ii) only**
- C. (i) and (ii) only
- D. (ii) and (iii) only
- E. None of the above (i), (ii) and (iii)

Answer to Q. 11 :

Option (i), buying a property with such an alteration to the balcony may be risky. If soon after signing the PASP a building order is registered against Flat 5A requiring rectification work, Peter may wish to rescind the deal. If Victor refuses to return the initial deposit Peter may have to sue him to get the money back. There would be greater protection to Peter had the initial deposit been stakeheld, and so Sales has breached his duty towards him.

Option (ii), Victor pockets the initial deposit and his position is not adversely affected (in fact it relieves his liquidity problem), so no issue of breach of duty will arise.

Option (iii), Sales owes no duty to the owners' corporation.

Only option (ii) is correct. B is the answer.

Question 12

On hearing of Sam Ho's winding up Peter became worried, but as he had not been able to instruct a solicitor he could not get any legal advice. Seeing that Peter was really worried, Sales phoned Pao Ching ("Pao"), a legal executive of the conveyancing department of Messrs. Dai Dai Wai & Co. whom he knew well, to ask if the deal should go ahead. Pao reassured Sales that the deal should go ahead.

Seeing that Peter was still worried Sales gave him the phone to talk direct to Pao, who reiterated that there was nothing to worry about. Peter breathed a sigh of relief.

According to the Code of Ethics, Sales may have breached his duty (if any) towards which of the following parties:

- (i) Victor
- (ii) Peter
- (iii) Pao

[Suggestion - read Code of Ethics]

- A. (ii) only
- B. (i) and (ii) only
- C. (ii) and (iii) only
- D. (i), (ii) and (iii)
- E. None of the above (i), (ii) and (iii)

Answer to Q. 12 :

Option (i), Sales should suggest Peter to get independent legal advice instead of getting advice from Victor's solicitors who only serve Victor's interest. Peter may get some false assurance. Note further that for a property valued above \$1 million no solicitors can act for both parties.

Option (ii), this suggests that Sales may not have kept himself informed of the laws and developments in the real estate market in order to be in a position to advise his clients in a responsible manner, in breach of Code of Ethics 3.2.2. However, since the PASP is already signed and the initial deposit paid, Peter is unlikely to get significantly worse off as a result of talking to Pao. This together with the fact that Sales has acted out of good intentions may be mitigating factors.

Pao, acting for Victor, should be aware of the need to protect his interests and not say any thing to Peter that may be harmful. Therefore, Sales has not neglected his duty towards Victor.

Option (iii), Sales owes no duty to Pao.

Only option (ii) is correct. A is the answer.
