

**2023 OVERSEAS LAWYERS
QUALIFICATION EXAMINATION**

**HEAD III: COMMERCIAL
AND COMPANY LAW**

Friday, 17 November 2023



2023 Overseas Lawyers Qualification Examination

Head III: Commercial and Company Law

Question 1 (25 marks)

Prime Coffee Limited (“Company”) is a coffee wholesaler based in Hong Kong. It is a Hong Kong private company limited by shares. The Company has four shareholders and directors, Titus Chiu (“Titus”) (holding 40% of the shares), Peter Chiu (“Peter”) (holding 20% of the shares), Rob Chiu (“Rob”) (holding 20% of the shares) and Maggie Chiu (“Maggie”) (holding 20% of the shares). The Company began business on 13 March 2020. Titus provided a personal loan of HK\$3,000,000 to the Company on 18 June 2020. About one month afterwards, Peter provided a personal loan of HK\$2,000,000 to the Company. On 18 August 2020, Rob and Maggie provided personal loans to the Company in the amount of HK\$1,000,000 and HK\$500,000 respectively.

The Company faced financial difficulties when Big Bucks and Atlantic Coffee (two of the leading coffee retailers in Hong Kong) stopped buying from the Company. On 6 May 2021, Titus provided a further personal loan (HK\$2,000,000) to the Company. Titus hoped that by providing further funds, the Company could reach out to small and medium coffee retailers in Hong Kong. The plan did not work out. The Company’s rival, Challenger Coffee Limited, had monopolized the market for small and medium coffee retailers. The Company was late in paying the rent for its office in Tsuen Wan, Hong Kong in October 2021.

On 8 November 2021, Bulldozer Bank advanced HK\$20,000,000 (a five-year term loan facility) to the Company secured by a fixed charge over the Company’s warehouse in Fanling, Hong Kong (“First Bulldozer Bank Fixed Charge”).

(See over the page for a continuation of Question 1)

On 3 December 2021, a further five-year term loan (HK\$15,000,000) was provided by Bulldozer Bank to the Company secured by a charge over the book debts of the Company. At the top of the charge instrument, it is stated that the charge is a “Fixed Charge over Book Debts” (“Second Bulldozer Bank Fixed Charge”). Under the terms of the charge instrument, the proceeds of collected book debts must be paid into a designated account maintained with Bulldozer Bank. Bulldozer Bank explained that this is a “blocked account”. However, the Company is at liberty to withdraw and use the proceeds of the collected book debts without Bulldozer Bank’s consent. The Second Bulldozer Bank Fixed Charge was duly registered under the Companies Ordinance, Cap. 622.

On 21 February 2022, the Company entered into a two-year term loan facility (HK\$4,000,000) with Titanic Bank secured by a floating charge over all assets, book debts and undertakings of the Company (“Titanic Bank Debenture”). The Titanic Bank Debenture was duly registered under the Companies Ordinance, Cap. 622.

In April 2022, the Company suffered financially as one of its major suppliers ended the contract with the Company. On 23 April 2022, Titanic Bank appointed a receiver in accordance with its debenture (an event that crystallized the floating charge pursuant to the terms of the Titanic Bank Debenture).

On 17 June 2022, a trade creditor filed for the compulsory winding-up of the Company.

(See the next page for a continuation of Question 1)

The liquidator, Jonathan Kwan, has learned the following information:

- (i) The Company has the following assets: account receivables (worth HK\$3,000,000), machinery used for packaging (worth HK\$2,000,000), the warehouse in Fanling (worth HK\$25,000,000), and cash at bank (worth HK\$500,000).
- (ii) The Company owes 8 of its employees a total of HK\$1,600,000 for wages in arrears.
- (iii) The Company has 7 unsecured trade creditors, who are owed HK\$2,000,000 in total.
- (iv) On 28 January 2022, the Company transferred HK\$3,000,000 to Titus' personal bank account.
- (v) On 8 June 2020, Techno Coffee Limited (a wholly-owned subsidiary of the Company) ("TCL") provided a term loan of HK\$500,000 to the Company repayable in full on 10 July 2023 ("TCL Loan"). The Company made an early repayment of the TCL Loan (with interest) in full to TCL on 3 May 2021.
- (vi) A competitor of the Company, Bad Coffee Limited ("BCL"), initiated proceedings against the Company for breach of contract, claiming HK\$8,000,000 in damages. The Court of First Instance gave judgment in favour of BCL to the full extent of the claim. No enforcement actions were taken by BCL until 20 June 2022.

(See over the page for a continuation of Question 1)

(vii) First Bulldozer Bank Fixed Charge was not duly registered under the Companies Ordinance.

(viii) Evidence shows that the Company was insolvent during January 2022.

The Company made no early payment to Bulldozer Bank and Titanic Bank in connection with the term loan facilities.

For the purpose of this question, please assume there is no negative pledge clause in any of the debentures or charges.

Question:

Prepare a letter of advice to the Company's liquidator, Jonathan Kwan, addressing the rights and priorities of all the creditors of the Company.

(25 marks)

[25 marks in total]

Question 2 (25 marks)

Part A

Big Profit Ltd. (the “Company”) is a private company founded in Hong Kong in 2013 by Mr. Wong (“Wong”) and Mr. Chan (“Chan”). The Company is engaged in trading business. It has 10,000 issued shares which were held by Wong and Chan in equal numbers and the two founders were also the only directors of the Company.

In September 2018, Wong decided to emigrate to the U.S. with his family. Before Wong’s departure, Wong and Chan reached an agreement whereby Wong would continue to hold 50% interest in the Company but Wong would no longer be involved in the management of the Company. To enable Chan to run the Company smoothly in the absence of Wong, Wong transferred his 5,000 shares in the Company (the “Shares”) to Chan on 18 September 2018 and cancelled the original share certificate in respect of the Shares issued in his name. On the same day, Wong also resigned as a director of the Company. In return, Chan executed a declaration of trust in favour of Wong on 19 September 2018 (the “Declaration of Trust”) which contains the following terms:

- Chan was holding the Shares as a trustee only;
- Wong was the beneficial owner of the Shares;
- Chan would, whenever called upon to do so by Wong, transfer the Shares to Wong or such other person as Wong directs.

(See over the page for a continuation of Question 2)

As a result of the above arrangements, Chan became, on record, the sole shareholder and sole director of the Company since 19 September 2018 although in reality, the Company is still 50:50 beneficially owned by Wong and Chan.

Over the past three years, the Company has suffered huge losses due to the Covid-19 pandemic. The relationship between Wong and Chan turned sour. Shortly after his return to Hong Kong from the U.S. in September 2023, Wong contacted Chan and demanded the latter to return the Shares. When this demand was not answered, Wong instructed his solicitor to issue a letter to Chan on 16 October 2023 demanding Chan to execute the instrument of transfer (enclosed in the same letter) to transfer the Shares back to Wong. On 20 October 2023, Wong's solicitor also wrote to the Company and demanded the Company to register Wong's name in its register of members. Neither Chan nor the Company respond to these letters.

Question:

- (a) **Advise Wong if there is any course of action that he can take against Chan and the Company to recover the Shares and to ensure that his title to the Shares is properly recorded.**

(12 marks)

Part B

Springfield Properties Ltd. (the "Company") is a private company incorporated in Hong Kong in 2020 with an issued share capital of HK\$1 million (comprising 100 shares). It has two shareholders, namely Red Sun Ltd. ("Red Sun") and Blue Sky Ltd. ("Blue Sky"). Red Sun is holding 51 shares and Blue Sky is holding the remaining 49 shares.

(See the next page for a continuation of Question 2)

The Company was set up as a joint venture to develop certain properties in Guangzhou, China. It has two directors, namely Mr. Red (appointed by Red Sun) and Mr. Blue (appointed by Blue Sky).

Since mid-2023, the relationship between Red Sun and Blue Sky has broken down due to disagreement on the business strategies of the Company. To avoid further disputes, Red Sun offered to buy out Blue Sky's interest in the Company. However, after several rounds of negotiation, the parties are still unable to agree on the main terms of the sale and purchase agreement. To exert some pressure on Blue Sky, Red Sun unilaterally filed a ND2A form (the Notice of Change of Company Secretary and Director (Appointment/Cessation)) on 4 September 2023 which indicated that Mr. Blue ceased to be a director of the Company as at 1 September 2023 and Mr. Red became the sole director of the Company. The ND2A form was purported to be signed by Mr. Red as a director of the Company. After Mr. Blue found out the filing of the form, he immediately wrote to Mr. Red and the Company in protest and insisted that he had never filed such a form to the Companies Registry and that he was still a director of the Company.

Questions:

Answer the following questions:

- (b) Mr. Blue is considering taking legal proceedings against the Registrar of the Companies for the registration of the unauthorised ND2A form. Will he succeed?**

(3 marks)

(See over the page for a continuation of Question 2)

- (c) In light of the registration of the unauthorised ND2A form, is there any mechanism under the Companies Ordinance, Cap. 622 that will possibly enable Mr. Blue to remove this document from the register of the Companies Registry?**

(10 marks)

[25 marks in total]

Question 3 (25 marks)

Perseus Limited (“Perseus”) is a company incorporated in the Cayman Islands whose shares are listed and traded on the Main Board of The Stock Exchange of Hong Kong Limited, principally engaged in wastewater treatment. Perseus is contemplating the acquisition of certain fixed assets, namely equipment and machinery for its own use in its ordinary and usual course of business, from Angelos Limited (“Angelos”) (the “Acquisition”). Mr. A holds 65% of the issued shares of Perseus. Additionally, he serves as a director of Perseus. Furthermore, Mr. A is one of the five directors comprising the board of Angelos.

Perseus and Angelos have agreed upon a price of HK\$5,000,000,000 for the equipment and machinery. Perseus will make the payment in cash. Angelos is satisfied with this price, considering that the equipment and machinery were valued at HK\$4,000,000,000 in the most recent audited accounts. Perseus is also content with the price, as they have engaged a specialized valuer who has determined the fair market value of the equipment and machinery to be HK\$6,000,000,000.

The following figures are extracted from Perseus’ most recent audited financial statements:

	HK\$ Million
Revenue	3,000
Profit before tax	500
Taxation	(50)

(See over the page for a continuation of Question 3)

	HK\$ Million
Non-current assets	10,000
Current assets	10,000
Current liabilities	(5,000)
Net current assets	5,000
Total assets less current liabilities	15,000

Perseus currently has a market capitalization of HK\$20,000,000,000.

Questions:

Based on the given information above, advise Perseus on the following:

- (a) **Perform a size tests calculation for the Acquisition. No adjustment or modification is required for the purpose of assets ratio.**
(10 marks)
- (b) **Determine the classification of the Acquisition under Chapter 14 and Chapter 14A of the Listing Rules.**
(3 marks)
- (c) **Explain the applicable compliance requirements and manner of approval for the Acquisition under the Listing Rules.**
(5 marks)

(See the next page for a continuation of Question 3)

Mr. B, who is the son of Mr. A, holds 20% of the issued shares of Heleus Limited (“Heleus”). Ms. C, who is Mr. B’s wife, holds 60% of the issued shares of Heleus. Two months after the completion of the Acquisition, Heleus acquired 15% of the issued shares of Angelos from an independent third party (the “Heleus Share Purchase”).

Question:

(d) Explain whether Heleus is a connected person of Perseus.

(3 marks)

At the Annual General Meeting of Perseus, held two months after the completion of the Heleus Share Purchase, Mr. A retired as a director of Perseus, and Mr. B was elected as a director of Perseus. Currently, Perseus is contemplating the purchase of 5% of the issued shares of Angelos from an independent third party (the “Angelos Share Purchase”).

Question:

(e) Explain whether the Angelos Share Purchase constitutes a connected transaction for Perseus.

(2 marks)

The Angelos Share Purchase has been successfully completed. Perseus is now deliberating the possibility of granting a loan to Angelos.

Question:

(f) Explain whether the granting of the loan will constitute a connected transaction for Perseus.

(2 marks)

[25 marks in total]

Question 4 (25 marks)

Part A

Horace is the company secretary of CC Financial Holding Ltd. (the “Company”), a company listed on the Main Board of The Stock Exchange of Hong Kong Limited.

The controlling shareholders of the Company are in the course of negotiating with a potential purchaser about the proposal to sell their controlling stake, representing 60% of the issued shares in the Company. If the potential purchaser enters into an agreement to acquire all the shares held by the controlling shareholders of the Company, the potential purchaser is required to extend a general offer to acquire the shares of all other shareholders pursuant to The Code on Takeovers and Mergers and Share Buy-backs.

The Chairman of the board of directors of the Company instructed Horace to prepare an application to suspend trading of shares in the Company in relation to a possible general offer.

Having possessed this material information, Horace informed his brother, Charles, of such information who then purchased a total of 100,000 shares in the Company through his own securities account before the trading suspension took place. Charles subsequently sold some of the shares after resumption of trading and made a profit of approximately HK\$20,000. The notional profit of the remaining unsold shares was approximately HK\$40,000.

(See the next page for a continuation of Question 4)

Question:

- (a) Are Horace and Charles liable under Part XIII of the Securities and Futures Ordinance, Cap. 571?**

(13 marks)

Part B

Alicia works in an asset management company. One day, she met her university classmate, Ruby, who works in a securities trading company. They are interested in establishing their own asset management company (the “Company”) in Hong Kong to carry out the business of asset management and securities trading regulated activities mainly for professional investors in and outside Hong Kong. Both of them will own 50% of the issued shares in the Company. The day-to-day management and operations of the Company will be jointly managed by both of them.

Alicia and Ruby need you to advise them on the legislation, procedure and licensing requirements involved in setting up the Company and applying for the licence to become a licensed corporation.

Question:

- (b) Prepare a memorandum of advice for Alicia and Ruby to advise on the legislation requirement, procedures and licensing requirements involved.**

(12 marks)

[25 marks in total]

Question 5 (25 marks)

Part A

Mud Studio Limited (“MSL”) is a Hong Kong private limited company which operates a very popular ceramic studio in Hong Kong called “Mud Studio”. Mud Studio conducts ceramic workshops and regular classes for both adults and children in its ceramic studios located in Mongkok and Wanchai, Hong Kong. Toby is the sole director of MSL, and MSL is currently 90% owned by Toby and 10% owned by Toby’s friend, Justin. Toby will emigrate to Canada and has agreed to sell his shareholding in MSL to Janet. Janet is trying to persuade Justin to sell his 10% shareholding in MSL as well, but Justin seems reluctant as he would like to keep his investment in MSL, seeing its growth in the past few years. Toby would like to sign the share purchase agreement with Janet in 4 weeks’ time. You act for Janet.

Question:

- (a) **Advise Janet if there is anything that she should check, be aware of or concerned about at this stage if she is only going to buy the 90% shareholding in MSL from Toby. If there is anything she should check further, state what it is and how it would affect your advice.**

(7 marks)

(See the next page for a continuation of Question 5)

Part B

After your advice given in part (a) above, Janet continued to negotiate with Toby and Justin. Assume for Part B that it was finally decided by the parties that Justin would sell his 10% shareholding in MSL to Toby first, and then Toby will sell the 100% shareholding in MSL to Janet for a consideration of HK\$5,000,000.

During the negotiation between the parties and due diligence, the following matters and instructions were brought to your attention.

- Toby has lent a shareholder's loan to MSL in the amount of HK\$1,000,000 last year to finance the general working capital of MSL. Janet would like to acquire the shareholder's loan on a dollar-for-dollar basis from Toby (at the same time when she purchases the 100% share capital in MSL from Toby); and
- "Mud Studio" has an in-house ceramic artist, Priscilla Chin, who is a primary school friend of Toby and has been working in MSL for over five years. Priscilla is the most popular ceramic teacher at "Mud Studio" and she would also help to organize ceramic exhibitions at the studio from time to time. Priscilla has not signed any formal contract with MSL, all her remuneration over the years has been based on oral agreements with Toby. Janet finds Priscilla a key person of MSL and would like to make sure that Priscilla will continue to work at "Mud Studio". Toby said Priscilla had agreed to stay with MSL after Janet takes over the company.

(See over the page for a continuation of Question 5)

Questions:

- (b) Advise Janet on the stamp duty implications (under the Stamp Duty Ordinance (Cap. 117)) of the share purchase transaction based on the above information. Briefly explain your advice, but you do NOT need to calculate the exact amount of stamp duty payable by the parties.
- (5 marks)
- (c) Advise Janet what should be done in order to carry out her instructions above and to protect her interest, including provisions that can be included in the share purchase agreement and documents and/or mechanisms that should be put in place.
- (8 marks)
- (d) Which internal registers of MSL will need to be updated upon/after completion of the share purchase transaction? Briefly explain your answer.

(5 marks)

[25 marks in total]

END OF TEST PAPER