

PCLL Conversion Examination
January 2019
Examiner's Comments
Hong Kong Land Law

This paper followed the usual format for Hong Kong Land Law examinations with candidates required to answer two questions from three. The paper was designed to offer students a wide range of topics from within the syllabus to illustrate their knowledge and understanding of Hong Kong land Law. It was noticeable that Question 1 was answered by fewer candidates than the other two questions- when it was attempted generally candidates did well. The other two questions were equally popular with candidates. There were some excellent answers. Those not performing so well suffered from the same issues that have been noted in previous years- failure to answer the question, time wasted providing irrelevant law e.g. providing law from other jurisdictions which does not apply in Hong Kong. Question 1 was a question concerning priorities on interests in land and how equitable interests may arise. Question 2 was a question concerning covenants Question 3 was a question which considered the Small House Policy, fixtures and fittings and legal and equitable interests.

Question 1 (50 marks)

This was a question concerning priorities on interests in land and how equitable interests may arise. The question had four parts.

- (a) This part considered the effect of registration of interests on priorities. Most candidates noted the backdating effect of registration of the sale and purchase agreement within one month of its date of signature and thus its priority over the charging order. However, some candidates missed the obligation on the purchaser to discharge the charging order from the residue of the purchase monies if he has notice of the order. The purchaser has constructive notice of the order because of its registration.
- (b) In this part the later registration of the sale and purchase agreement would not affect the advice, as Peter only has beneficial interest and is still subject to the same obligation to discharge the charging order from the balance of the purchase monies.
- (c) Candidates acknowledged the priority of the mortgage and charging order but some failed to note that the subsequent lender may rely on the equitable doctrine of subrogation to step into the shoes of the Bank mortgagee and so obtain priority over the charging order to the extent of the discharge of the original mortgage.
- (d) This part of the question dealt with beneficial interests and their effect on subsequent interests. Melissa may have an interest by way of the presumption of resulting trust or common intention constructive trust because of her contributions.

If she has an interest the Bank will be bound by her interest unless they are the bona fide purchaser for value without notice of the prior equitable interest.

Question 2 (50 marks)

This was a question concerning covenants.

- (a) (i) This part required candidates to consider the running of the burden of covenants upon successive purchasers and tenants. Candidates needed to explain the principles regarding the running of covenants in s.41(2), (3) CPO. Two questions have to be satisfied- is it a land covenant? And is it expressed and intended to benefit the land of the covenantee? For the latter question s.40(1)CPO provides a rebuttable presumption that a covenant is made on behalf of the covenantor on behalf of himself and his successors in title.
- (ii) The same principles will apply to the covenant to pay management fees and candidates should have identified that it would be binding on Mr Lam as a successor in title. However, this is a positive covenant and s.41(5) CPO provides that these are not binding on tenants, therefore Trudi would not be liable.
- (b) This question required candidates to describe the process for dividing the property into smaller units. First the allocated shares should be subdivided by deed poll so that some shares are allocated to each newly created unit. Then a new floor plan should be drawn up. Finally a sub-deed of mutual covenant should be drawn up, consistent with the terms of the head DMC, to cover the right to use the newly created common parts and allocating between the new co-owners liability for management fees and Government rent.
- (c) This question considered the liability of successors in title for breaches of restrictive covenants committed by their predecessors. Generally the successor is not liable for the breach unless it is continuing and he has adopted it: *IO Fortune Mansion Tsuen wan v Chiu Ng Ling* [2010] 2 HKC 67, CA.
- (d) This question has conflicting authorities. Candidates were first meant to identify the requirements for adverse possession and whether it might be applicable here and then address the conflicting authorities. In *IO Man Hong Apartments v Kwong Yuk Ching* [2001] 3 HKC 116, CA, the Court held that, as all tenants are tenants in common with regard to the whole building a tenant's possession of property within the whole property cannot be adverse. However in *Wong Kong Lim v IO of Peony House* [2013] 4 HKC 295. CA, the Court commented obiter that the tenant's possession could still be adverse.

Question 3 (50 marks)

This was a question concerning the Small House Policy, fixtures and fittings, and equitable and legal interests.

(a) This part considered how an indigenous villager could obtain land and build a small house. Candidates had to explain how the indigenous villager, Danny, could apply for a Private Treaty Grant of land from the Government at a concessionary premium. This grant would specify the dimensions for the house and the house would have to be built within the height and area prescribed in the Building Ordinance (Application to the New Territories) Ordinance. Generally anyone building a property in Hong Kong must obtain approval of their building plans from the Building Authority and then obtain permission to commence building. However, Danny could apply for a certificate of exemption for the construction of a small house from the District Land Officer to exempt him from obtaining the approval of his building plans and approval to commence building. If Danny wished to sell the property after it was built he must produce his certificate of exemption to the purchaser, a certificate of compliance from the Director of Lands to show that the conditions in the Private Treaty Grant have been complied with, and a letter of no-objection from the District Land Officer to show that there is no objection to the small house being occupied.

(b) This part of the question dealt with the concepts of fixtures and fittings. Candidates needed to explain the purpose of annexation test and the degree of annexation test and apply them to the examples in the question of the different types of air conditioners. If the air conditioners are considered fittings, they are chattels and do not pass with the sale of the land unless specified. If they are fixtures then they are part of the land and pass on the sale without the need for express mention of them in the sale and purchase agreement.

(c) This part considered the passing of interests subject to the sale and purchase agreement. As Paul has an interest derived from the Conditions of Sale which are specifically enforceable, the equitable interest passes: *Walsh v Lonsdale* (1882) 21 ChD 9.

The equitable interest will be converted into a legal interest when the Conditions of Sale have been complied with. This means the positive conditions precedent in the Conditions of Sale have been complied with as a matter of fact. There must also be no breach of any restrictive covenant. To prove that conditions have been complied with the developer must obtain a certificate of compliance and register it. Section 14(30) of the CPO provides that, where under an agreement for a Government lease (which includes Conditions of Sale) entered into after 1 January 1970 a person has a right to a Government Lease upon compliance with any conditions precedent, he shall be deemed to have complied with those conditions upon the issue of a certificate of compliance and registration of the certificate in the Land registry.