

**PCLL Conversion Examination**  
**June 2016**  
**Examiner's Comments**  
**Hong Kong Land Law**

**Question 1**

(a)

- (i) This question involves adverse possession; in particular whether Stanley had acquired possessory title to the land and shop by adverse possession. Since the right of action accrued before 1 July 1991, the relevant period is 20 years: s 7, Limitation Ordinance ('LO').
- (ii) Candidates were then required to discuss whether the necessary three elements were present: (a) continuous exclusive factual possession for 20 years; (b) intention to possess; and (c) possession adverse to the paper title owner (ie no permission granted).
- (iii) For factual possession See *Kam To Pui v IO Lux Theatre Building* (2000) HCA 646/1996 and *Wong Kim Lim v IO Peony House* [2013] 4 HKC 295, CA.  
It was also necessary to show that the period of possession had been continuous notwithstanding the lease to Fred: see *Tang Kwan Tai v Tang Koon Lam* [2002] 4 HKC 482, [2002] 3 HKLRD 762, CA and *Cheung Yat Fuk v Tang Tak Hong* [2004] 2 HKLRD 86, CFA. Further, periods of adverse possession by different persons can properly be aggregated: see *Sze To Keung v Kung Kwok Wai David* [1997] 2 HKC 231, PC.
- (iv) Intention to possess can be established by inference: see *Powell v McFarlane* [1989] 3 WLR 152.
- (v) The possession was also adverse in the sense of not being permitted by way of a lease or licence granted by the paper title owner.
- (vi) The inchoate rights of squatters which were in the course of being acquired as at the date of the Handover on 30 June 1997 were preserved (and not destroyed) by the New Territories Leases (Extension) Ordinance: see *Chan Tin Shi v Li Tin Sung* [2006] 1 HKLRD 185, CFA

(b)

- (i) There is likely to be a clause on the deed of mutual covenant providing that no co-owner may interfere with the common parts or convert them to his own use. Bill has breached this provision.  
Converting the common parts to one's own use would also breach section 34I of the Building Management Ordinance.
- (ii) Bill has enjoyed exclusive factual possession of the enclosed area for 16 years. Since the period began in 2000 - ie after 1 July 1991 - the period required for acquiring title

by adverse possession is only 12 years: s 7(1) LO. The fact that he wrongly believed that he had a right to exclusive use of the area does not change the position: see *Wong Luen Chun v Secretary for Justice* [1998] 4 HKC 122. Yet see *IO Man Hong Apartments v Kwong Yuk Ching* [2001] 3 HKC 116, CA (a co-owner of shares in a multi-storey building cannot obtain title by adverse possession over the common parts of the building against the other co-owners; this is because co-owners are tenants in common with a joint right of possession of the whole building including the common parts).

## Question 2

(a)

- (i) This question involves the application of section 3(1) of the Conveyancing and Property Ordinance.
- (ii) The first question is whether there is a concluded agreement on all essential terms and on all the terms that the parties intend to include in their agreement: ie property, parties, rent, duration of term and starting date. The parties have also agreed that split level air conditioners be included. It appears that there is a concluded agreement for lease between the parties: see *World Food Fair v Hong Kong Island Development Ltd* [2007] 1 HKLRD 498.
- (iii) Is there written evidence ('a memorandum') of the oral agreement. The letters may be joined: see *Timmins v Moreland Street Property Company Ltd* [1958] Ch 1101.
- (iv) However, the term regarding the split-level air conditioners is not included in either letter. As the term benefits Tina, Larry might submit to it and enforce the oral agreement with this term: *North v Loomes* [1919] 1 Ch 378.
- (v) Alternatively if the air conditioners are fixtures, they are part of the Flat and are automatically included. Candidates were expected to identify and apply the relevant case law.

(b)

- (i) The lease being for a period exceeding 3 years is registrable but unregistered and is void against a subsequent bona fide purchaser or mortgagee for value under section 3(2) of the Land Registration Ordinance ('LRO'). Knowledge does not constitute mala fides: see *Keep Point Development Ltd v Chan Chi Yim* [2000] 2 HKLRD 145.
- (ii) A lease (including a sub-lease) for a term not exceeding three years at a market rent without a premium and taking effect in possession does not need to be in writing under s 6(2) CPO. The lease is enforceable.

## Question 3

- (a) The sale and purchase agreement was registered within one month of its date of signature and, in accordance with the backdating provision in s 5, LRO, takes priority from the date of its execution. The charging order takes priority from the day

following the registration of the charging order nisi: s 5A, LRO. The sale and purchase agreement accordingly has priority over the charging order. According to *Ho Kim Yim v Lau King Mo* [1980] HKLR 42, because the equitable (beneficial) interest passed to Prosperous under the sale and purchase agreement and Vagabond only retained the bare legal estate, the charging order will not bind the unit, but Prosperous would be obliged to pay off the charging order from the 90% residue of the purchase price so that the charging order will be discharged: see also *Megalink Holdings Ltd v Whole Fortune Co Ltd* (1998) HCMP 4482/1997 and *Fortis Bank Asia HK v Yu Kam Hoi* [2004] 2 HKC 314.

- (b) No difference since what is important is that the beneficial ownership passed under the sale and purchase agreement. The fact that the sale and purchase agreement was not registered within one month of its signature (thereby excluding the operation of the backdating provision in s 5, LRO) does not affect the principle in *Ho Kim Yim v Lau King Mo*.
- (c) The mortgage to A Bank takes priority from 2000 whereas the charging order in favour of Lucky takes priority from 2015. The mortgage has priority over the charging order. If B Bank lends \$800,000 to Ben, provided the loan is used to pay off A Bank's mortgage, B Bank will take the same priority as A Bank by virtue of the doctrine of subrogation: see *Financial and Investment Services for Asia Ltd v Baik Wha International Trading Co Ltd* [1985] HKLR 103; *Hong Kong Chinese Bank Ltd v Sky Phone Ltd* [2001] 1 HKC 509 - but only to the extent of the discharge of Ben's liability to A Bank.
- (d) The charging order will have expired since it ceases to have effect after 5 years unless re-registered: s 17 LRO.
- (e)
  - (i) Industrial purposes must involve the process of manufacturing: see *Mexx Consolidated (Far East) Ltd v Attorney General* [1987] HKLR 1210. Manufacturing plastic flowers is clearly industrial use. But one floor is used for commercial use. There is a partial offending user. Whether this will constitute a breach of the restrictive covenant will depend upon the relative extent of the offending use: see *Donald Shields (No 2) v Mary Chan* [1972] HKLR 121. Is it significant or is the commercial use merely ancillary to the manufacturing process? This is a matter of evidence but, on the facts given, the offending use appears more than ancillary: see *Raider Ltd v Secretary for Justice* [2000] 3 HKLRD 300, CFA.
  - (ii) A breach would give rise to the Government's right of re-entry but more realistically Government would apply for injunctive relief (and possibly damages).