

PCLL Conversion Examination
June 2017
Examiner's Comments
Hong Kong Land Law

Question 1 (50 marks)

- (a) This was a question on adverse possession. Candidates were expected to analyse whether Amy and Peter had acquired a title to the plot by way of adverse possession and in particular whether (i) they and their predecessors in title had been in exclusive possession of the plot for the required period of 60 years or more: s 7(1), *Limitation Ordinance*; (ii) they had the intention to possess the plot ('animus possidendi'); and (iii) their possession was adverse to that of the rightful owner ie the Government. Candidates should have considered whether the squatters had taken exclusive possession: see *Kam To Pui v IO Lux Theatre Building* (2000) HCA 646/1996 and *Seddon v Smith* (1877) 38 P & CR 168, CA and should have explained that periods of adverse possession may be aggregated provided the periods are continuous: see *Sze To Keung v Kung Kwok Wai David* [1997] 2 HKC 231, PC. The fact of the leasing of the plot to Joshua in 1970 did not interfere with the children's exclusive possession: 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. An intention to possess can be established by inference from the facts: see *Powell v McFarlane* [1989] 3 WLR 152.
- (b) This argument was rejected by the Court of Final Appeal in *Chan Tin Shi v Li Ting Sung* [2006] 1 HKLRD 185, CFA, where the Court held that the New Territories Leases (Extension) Ordinance had not created a new lease, but had merely extended the existing lease leaving the accrued or accruing rights of a squatter unaffected.
- (c) This argument had been upheld in *Chau Ka Chik Tso v S-J* (2009) HCA 10670/2000 but was subsequently rejected in *Li Kwok Ching v S-J* (2015) HCA 1303/2010 where G Lam J ruled that the HKSAR Government was to be regarded as having stepped into the shoes of the HK Colonial Government and the rights of squatters, whether final or inchoate, had been preserved. See also *Lam Man Lau v S-J* (2016) DCCJ 1682/2012.
- (d) The CFA has ruled in *Wong Tak Yue v Kung Kwok Wai (No 2)* (1997) 1 HKCFAR 55 that willingness on the part of a squatter to pay rent to the paper title owner if such were demanded will prevent the squatter from securing title by adverse possession (disagreeing with *Ocean Estates v Pinder* [1969] 2 AC 19, PC, and *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, HL).

Question 2 (50 marks)

- (a) This was a question on section 3(1) of the Conveyancing and Property Ordinance which provides that no action shall be brought upon any contract for the sale of land unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged or by some other person lawfully authorized by him for that purpose. In this case the sale and purchase agreement between Vivacious and Pacific is not in writing and will be unenforceable unless the exchange of correspondence constitutes a sufficient note or memorandum evidencing the oral agreement.

The first point to note is that the correspondence cannot constitute a sufficient memorandum or note unless the parties have reached a concluded agreement and are not still in the process of negotiating the agreement: see *World Food Fair Ltd v Hong Kong Island Development Ltd* [2007] 1 HKLRD 498, CFA. On the facts given above, it would appear that there was a concluded agreement.

Correspondence between the parties can constitute a sufficient memorandum or note. The next point is to see whether the memorandum or note contains all the required terms which are (A) parties, (B) property; (C) purchase price; (D) completion date and (E) any other agreed terms: see *Kwan Siu Man v Yaacov Ozer* [1999] 1 HKLRD 216, CFA. Since Vivacious is seeking to enforce against Pacific we must see whether the letter signed on behalf of Pacific contains the required terms. It identifies only the property (in the heading) and the parties and makes no mention of the purchase price or completion date. However, two or more documents may be joined if they refer to one another: see *Timmins v Moreland Street Property Co Ltd* [1958] 1 Ch 110. Here the letter from Pacific's solicitors refers back to the first letter from Vivacious' solicitors. Joinder of the two letters may, therefore, be allowed. The first letter on behalf of Vivacious contains reference to the purchase price and completion date. We have, therefore, by joining the letters identification of the parties, property, purchase price and completion date. There is, however, no mention of the vendor's agreed duty to give vacant possession and to include all the fixtures in the building. The duty to give vacant possession will be implied by law: see *Grandwide Ltd v Bonaventure Textiles Ltd* [1990] 2 HKC 154. Further, fixtures do not need to be expressly identified since they form part of the land and will automatically pass with the land. The failure to include these matters in the correspondence is, therefore, of no consequence.

The only outstanding issue is whether the solicitors have been authorized to sign a memorandum or note on behalf of their respective clients. In *Well Lock Ltd v Reserve Investments Ltd* (2013) DCCJ 2111/2011 the District Court ruled that solicitors did not have implied authority to sign such a memorandum or note. Whether the solicitors had express authority must, therefore, be ascertained. Provided they did, the agreement would appear to be enforceable and we can advise out client Vivacious that it will be able to enforce the oral agreement against Pacific.

- (b) The expression 'subject to contract' means that the parties are still in the process of negotiating the contract and there will be no binding contract until the negotiations

are concluded and a final agreement is reached: see *Tiverton Estates Ltd v Wearwell Ltd* [1974] 1 All ER 209.

- (c) The doctrine of part performance in the context of sale and purchase of property means that, where a party to an oral or defective agreement for the sale and purchase of property has partly performed that contract, the contract will be enforced by the courts. The act of part performance must, however, be unequivocally referable to the existence of the contract.

Examples include:

- (i) Payment of part or the whole of the purchase price by the purchaser: see *Steadman v Steadman* [1976] AC 536.
- (ii) Entry into possession by the purchaser: *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169; *Wu Koon Tai v Wu Yau Loi* [1995] 2 HKC 732, CA.
- (iii) Decoration/renovation of the premises.

Question 3 (50 marks)

Parts (a)-(d) concerned deeds of mutual covenant.

- (a) (i) Philip owns undivided shares in the building and land on which the building stands; (ii) he holds those shares as a tenant in common with the other co-owners; and (iii) he has the exclusive right to use, occupy and enjoy his flat.
- (b) A land covenant is a covenant that affects the nature, quality, mode of user or value of the land: see *P & A Swift Investments v Combined English Stores* [1989] 1 AC 633, HL, at p 642. Common examples of land covenants found in deeds of mutual covenant are: (i) Covenant to pay rent: *Rolling Development v Ease King Ltd* (1997) CACV 128/1997; (ii) Covenant to pay management expenses: *Hang Yick Properties Management Ltd v IO Tuen Mun Kar Wah Building* [2005] 2 HKLRD 499, CA; (iii) Covenant not to make structural alterations: *IO Marina Cove v Chu Kam Tai* [2012] 2 HKLRD 107, CA; (iv) Covenant not to keep dogs: *Lee Yin Hong v IO Serenade Cove* (2010) DCCJ 4861/2008; (v) Covenant to use land for agricultural (or residential, commercial etc) use: *Marten v Flight Refuelling* [1962] Ch 115.
- (c)(i) A sub-deed of mutual covenant may be useful, for example, where a floor (or floors) in a multi-storey building to which shares have been allocated is sub-divided into several units. For example, where a floor in a commercial or industrial building is sub-divided into several residential units, a sub-dmc is required to show the division of the units (the division is carried out by deed poll) and to identify the rights and duties of the co-owners under the sub-dmc inter se. This will include the ratio of sharing the management fees, Government rent etc. It will also identify any newly created common parts and provide for their use.
- (c)(ii) The co-owners under the sub-dmc will be bound by the LAND covenants in the head dmc (but not the personal covenants) which are expressed or intended to run with the land: see s 41(2), (3), CPO and *IO San Po Kong Mansion v Island Management Services Ltd* [2007] 1 HKC 206.

- (d) According to sections 41(2) and (3), CPO, the benefit of a covenant, express or implied, whether positive or restrictive, can be enforced by the covenantee and his successors in title and those claiming under or through the covenantee and his successors in title provided the covenant relates to the land of the covenantor and the covenant is expressed and intended to benefit the land of the covenantee and his successors in title or persons deriving title to that land under or through him. Further, the person seeking to enforce the covenant (the covenantee) must retain land to be benefitted: *Sky Heart Ltd v Lee Hysan Estate Co Ltd* [1999] 1 HKLRD 100, CFA.
- (e) Parts (i) and (ii) dealt with Block Government leases and required knowledge of two important judgments: *Watford Construction Co v Secretary for the New Territories* [1978] HKLR 410, CA (prohibition on building on land delineated as agricultural) and *Attorney General v Melhado Investments Ltd* [1983] HKLR 327 (the description of the land in the Schedule to Block Government leases ('dry cultivation') was a mere description of the use of the land at the time of the granting of the lease and was not a restrictive covenant).