PCLL Conversion Examination
June 2018
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 questions were equally popular and there was a fairly even distribution of very good answers for the three questions. Question 1 was a question concerning the formalities required for transactions involving land. Question 2 was a question concerning restrictions on the use of land in conditions of sale and leases. Question 3 was a question which considered how interests in land might be acquired by adverse possession.

Question 1 (50 marks)

This was a question concerning formalities. The question had three main parts.

(a) This part of the question had the majority of marks available and considered the requirements for reducing contracts for the sale of land to writing if parties are to found actions on the contract (CPO s.3(1)). Candidates needed to identify this requirement and the possibility of identifying the written negotiations between the parties as fulfilling the requirements of s.3 as a sufficient note or memorandum evidencing the oral agreement. Candidates received marks for identifying the need for the correspondence to be based on a concluded agreement (*World Food Fai Ltd v Hong Kong Island Development Ltd* [2007] 1 HKLRD 498, CFA), that it must contain all the required terms (parties, property, purchase price, completion date, and any other agreed terms: *Kwan Siu Man v Yaacov Ozer* [1999] 1 HKLRD 216, CFA) and must be signed by the parties or someone authorized to sign on their behalf. Candidates should have noted two or more documents may be joined if they refer to one another (*Timmins v Moreland Street Property Co Ltd* [1958} 1 Ch 110]. The final point to note is that, even if the joined letters contain all the terms of the agreement this will only be binding on the parties if the solicitors have been authorised to sign a memorandum or note on behalf of their respective clients, and that solicitors do not have implied authority to sign such a memorandum or note (*Well Lock Ltd v Reserve Investments Ltd* (2013) DCCJ 2111/2011).

(b) This part of the question considered "subject to contract" correspondence which is a form used during negotiations to prevent a concluded contact before the parties intend. Thus correspondence so headed is usually considered to be only part of the negotiation (*Tiverton Estates Ltd v Wearwell Ltd* [1974] 1 All ER 209). It may not matter that negotiations are continued without always using the expression 'subject to contract' because the English Court of Appeal, in *Cohen v Nessdale Ltd* [1982] 2 All ER 97, CA, held that where negotiations have begun under the "subject to contract" umbrella, they continue to be subject to contract unless there is an express agreement that it is no longer to apply or it can be implied that the negotiations are no longer subject to contract.

(c) This part of the question required a brief explanation of the doctrine of part performance. Section 3(2) of the Conveyancing and Property Ordinance provides that section 3(1) does not affect the law relating to part performance. The doctrine of part performance was developed in equity in the context of sale and purchase of property as a means of protecting parties who had been induced to act in some way on this agreement to their detriment in the belief that the agreement would protect them. Thus where a party to an oral or defective agreement for the sale and purchase of property has partly performed that contract, the contract may be enforced by the courts. There must be a concluded agreement (*World Food Fair Ltd v Hong Kong Island Development Ltd* [2007] 1 HKLRD 498, CFA) and the act which is identified must be an act as part of the performance of that agreement. Examples of acts which have been accepted as constituting part performance include: payment of part or the whole of the purchase price by the purchaser: see *Steadman v Steadman* [1976] AC 536, HL; entry into possession by the purchaser: *Wu Koon Tai v Wu Yau Loi* [1995] 2 HKC 732, [1996] 2 HKLR 477, CA; decoration/renovation of the premises: *Rawlinson v Ames* [1925] Ch. 96.

Question 2 (50 marks)

This was a question concerning restrictions on the use of land in conditions of sale and leases.

(a) Part (a) required candidates to explain what Conditions of Exchange and Conditions of Sale are and how they operate. Conditions of Exchange constitute a contract which is specifically enforceable thereby passing the equitable interest to the grantee: *Walsh v Lonsdale* (1882) 21 Ch D 9. This equitable interest will be converted into a legal estate when all the positive conditions in the Conditions of Exchange have been fulfilled but also provided that none of the negative conditions have been breached: CPO, s.14(1)(a). The grantee has to prove that they have complied with the conditions and must apply to the Lands Department for a certificate of compliance which must be registered. Upon registration of the certificate of compliance, the grantee will be deemed to have complied with the conditions in the Conditions of Exchange: CPO, s.14(3); see *Tai Wai Kin v Cheung Wan Wah Christina* [2004] 3 HKC 198. To prove such conversion therefore Chen must produce a certified copy of the certificate of compliance and show that it has been registered. However, CPO, s.14(2), provides that Conditions of Exchange dated before 1st January 1970 are deemed to have been complied with. Therefore, the equitable interest is deemed converted into a legal estate. There is no need therefore (and it would be improper) to requisition a certificate of compliance: *Minchest Ltd v Lau Tsui Kwai* [2008] 2 HKC 283, CFA.

(b) This part of the question required candidates to consider whether conditions in the Conditions of Sale may bind subsequent purchasers of land. There are two issues to consider – whether the term may bind successors to the original parties to the sale of the land and whether the term is still binding. Although generally only parties to a contract are bound by its terms, land contracts may contain terms which are

intended to bind successors to the original parties and which may do so if they meet certain requirements. To be binding on successors the term must be a land covenant (relate to the land) and have been expressed as or intended to run with the land (s.41, CPO). A term relating to permitted height affects the mode of use of the land and will be a land covenant. There is also the statutory presumption that covenants affecting land shall be deemed to be made by the covenantor on behalf of himself and successors in title unless expressed otherwise CPO, s,40(1). Therefore, although Ritz is not a party to the Conditions of Sale it will be bound by the term. On the further issue of whether the term will still bind- terms may sometimes become "spent", that is they are no longer valid because of a first compliance: *Gold Shine Investment Ltd v SJ* [2010] 1 HKC 212. Looking objectively at the intention of the government when the land was granted in 1985, as this term is of continuing importance in maintaining the urban environment and restricting development and has never been complied with the term will still be current and Ritz will be bound. However, Ritz may be able to raise defences based on estoppel (unlikely: *Hang Wah Chong Investment Co Ltd v AG* [1981] 1 WLR 1141; HKLR 336, PC) or waiver (*Fairfax Ltd v AG* [1997] 1 HKC 17; [1997] 1 WLR 149, PC).

(c) This part considered the difference between restrictive covenants and descriptions of the land use in the Schedule to the Block lease. Block Crown leases contain standard covenants one of which restricts the use of land described as agricultural land for use for building purposes. As we are told this Crown Block lease contains the 'usual' covenants this covenant will be in this lease. As 'dry cultivation' is agricultural use, then constructing a hotel on the land will be prohibited: see *Watford Construction Co. v Secretary for the New Territories* [1978] HKLR 410, CA. The description of the land in the Schedule to the Block Government lease is not in itself a covenant but a mere description of the use of the land at the time of the grant of the lease (*AG v Melhado Investments Ltd* [1983]. The land may, therefore, be used as a dump for old cars since such use does not offend the 'Watford' restrictive covenant against building on the land.

Question 3 (50 marks)

This was a question concerning how interests in land might be acquired by adverse possession

(a) This part carried the majority of the marks and required candidates to explain the requirements for a successful claim by way of adverse possession and application of this law to the facts in the problem. To claim an interest by way of adverse possession Gerald had to establish that: he and his predecessors in title have been in exclusive possession of the plot for the required period of 60 years or more: Limitation Ordinance, s.7(1); he had the intention to possess the plot ('animus possidendi') ; and, his possession was adverse to that of the rightful owner of the plot (i.e. the government). Gerald and his immediate predecessor seem to have been in exclusive and continuous possession for 60 years or more; an intention to possess can be established by inference from the facts (*Powell v McFarlane* [1989]

3 WLR 152) - relevant facts are cultivating the plot, erecting a fence and putting up a notice saying 'Trespassers Keep Out'; the possession was adverse to the Government as the facts do not tell us that the Government has permitted Mr Leung and/or his son to use the land.

(b) This part considered the effect on the claim to an interest in the land by adverse possession of the New Territories Leases (Extension) Ordinance (Cap 150). The Court of Final Appeal *in Chan Tin Shi v Li Ting Sung* [2006] 1 HKLRD 185, CFA, 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 part considered the further issue of whether the return of the New Territories to Mainland China in 1997 provides a break in any possession period. Although this argument had been upheld in *Chau Ka Chik Tso v SJ* (2009) HCA 10670/2000 it was subsequently rejected in *Li Kwok Ching v SJ* (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.

(d) This part considered the effect of any admission by the squatter that, if asked, he would have been willing to pay rent to the Government for the plot. Although the House of Lords, in *J.A. Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, indicated that willingness to pay rent if asked would not be incompatible with an intention to possess, the CFA 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.