

PCLL Conversion Examination
7th January 2010
Examiner's Comments
Hong Kong Land Law

These notes are given as a guide to students preparing for the Hong Kong land law conversion examination. Candidates should support their answers with case authority. In general it is important to state the rules and then apply them to the given facts.

Question 1.1

This question concerns whether Siu Ling has acquired title by adverse possession to strip of Oswald's garden. This requires candidates to consider whether Siu Ling can show that she has been in possession of the strip for the requisite period of time without permission from Oswald.

Regarding the duration of Siu Ling's possession, it is necessary to consider ss 7, 8 and 13 of the Limitation Ordinance Cap. 347 and when Oswald's right of action arose. Periods of adverse possession may be aggregated provided they are continuous. Thus the periods of possession by Siu Ling and her husband, Man Fai can be aggregated.

Regarding possession, it is necessary to consider both factual possession and intention to possess. Candidates must state the tests and apply them to the facts.

Marks were also awarded for considering the superior title and in particular the effect of the New Territories Leases (Extension) Ordinance Cap.150 and that title starts to run against the Government only after expiry of the Government Lease.

A number of candidates were unable to identify the issues raised by the question. In order to score good marks, candidates had to identify all issues. In this connection although most candidates knew that the limitation period was 12 years, they failed to mention when the right of action first arose or to refer to the legislation. Many candidates did not consider what is meant by factual possession or intention to possess. The mistake regarding the positioning of the boundary fence does not affect intention. A number of candidates did not mention the superior title.

Question 1.2

This question was generally well done. The Conditions of Sale create an equitable interest dependent on Bonny's right to specific performance: *Walsh v Lonsdale* (1882) 21 CH D 9. Candidates must discuss the date of the Conditions, conversion of the equitable to a legal interest and deemed issue of the Government lease under s 14 (1) Conveyancing and Property Ordinance Cap. 219. In addition candidates should consider evidence of compliance and deemed compliance under s 14(3) provided the certificate of compliance is registered.

Most candidates failed to mention *Walsh v Lonsdale*. A number of candidates failed to mention that under s 14(1) CPO the Government lease is deemed issued.

Question 2.1

Victor and Percy have agreed orally for the sale of Victor's flat. This question is concerned with s 3 CPO - the formalities for an enforceable agreement for sale and purchase of land.. Candidates must consider whether the agreement is in writing or whether there is a written memorandum of the agreement signed by the party against whom the agreement is to be enforced or that party's lawful agent.

There is no written agreement. However, there is a cheque signed by Percy and a letter signed by Percy's solicitor. Candidates should consider whether either of these amounts to a sufficient memorandum. For this purpose they must consider the contents of the writing (property, parties, price, completion date and particular terms) and the signature. Percy's solicitor could be his agent. Although solicitors have no implied authority to sign contracts for their clients they do have implied authority to sign letters. The cheque alone is not a sufficient memorandum but the letter may be.

Regarding the omission of the furniture from the letter, a number of candidates considered whether the furniture is a fixture which is part of the property and therefore included in the sale. In addition candidates should consider whether this term benefits Percy in which case Victor might submit to it.

A number of candidates considered part performance for which some credit was given.

A number of candidates failed to identify the issue raised by this question. There was also some evidence of confusion between the need for a deed to transfer a legal estate and the need for writing or evidence in writing for an enforceable agreement for the sale of land .

In general it is important to state the requirements of s 3 CPO before applying them. When applying the rules it is necessary to consider against whom the contract is to be enforced and to look for writing signed by or on behalf of that person.

Question 2.2

An enforceable agreement for sale and purchase creates an equitable interest in land which can be disposed of by writing signed by Percy or his lawful agent who must be authorized in writing: s 5 (1) CPO.

A number of students did not identify the issues.

Question 2.3

Both mortgages are in writing and are registrable.

The registration questions were generally well done. Question (a) is concerned with the dates of registration under s 5 Land Registration Ordinance Cap. 128. An instrument registered within one month **after** the date of execution takes priority from the date of execution. The order of priority follows the dates of registration under s 3 LRO. Alpha Bank has priority.

Question (b) is concerned with priority between a registrable but unregistered instrument and a later registered instrument. Under s 3(2) LRO Alpha Bank's mortgage is void against a bona fide purchaser or mortgagee for value of the same land. Candidates should consider whether Beta Bank is a bona fide mortgagee for value. Notice of the earlier unregistered mortgage is irrelevant under s 4 LRO which seems to require that Beta must have registered.

It is not clear how priority would be determined in question (c). Candidates were given credit for recognizing this and also for considering whether s 3(1) would apply to the first to register, or whether Alpha Bank would lose priority to Beta Bank under s 3(2) which does not seem to require Beta Bank to register, or whether priority would be determined under common law principles. In this connection, the facts say that both mortgages are legal.

Question 3.1

The answers of a number of candidates overlapped between questions 3.1, 3.2 and 3.3 but credit was given for correct answers regardless of where they were written.

Subdivision or reallocation of undivided shares in the land and the building is permitted unless expressly restricted by the Deed of Mutual Covenant. There is ample case authority for this. The subdivision is effected by deed poll.

Question 3.2

It is necessary to reallocate undivided shares in the land and the building to each flat to be sold and to sell undivided shares with exclusive use rights. This is permitted unless restricted by the DMC (see above). After the first sale of the reallocated shares it is advisable to create a sub-deed of mutual covenant between Flowers and the first purchaser. The sub-DMC should be registered in the Land Registry. The DMC should contain a floor plan of the area and details of the common areas and of the share reallocation. All subsequent sales by Flowers of flats on the third floor should be made 'subject to and with the benefit of the DMC'.

Question 3.3

The right to the exclusive use of the roof cannot be assigned without undivided shares in the land and the building. Without undivided shares, the assignee has only a licence to use the roof which is not enforceable against all co-owners of the building. William must by deed poll reallocate his undivided shares to his flat and the roof (see 3.1) and sell undivided shares in the land and the building together with the right to the exclusive use of the roof.

Question 3.4

All co-owners of the tenth floor are bound by the covenants in the DMC provided the burden of the covenants passes. Candidates should apply s 41(3) and s 41(2) CPO under which the burden passes provided the covenants relates to land of the covenantor and the burden is expressed or intended to run with the land of the covenantor.

A covenant relating to land of the covenantor is one which affects the nature, quality, mode of user or value of the land. There is no case directly on the point but a covenant which restricts the keeping of dogs affects something done or not done on the land and is likely to be a land covenant. The burden of the covenant must also be intended to run with the land and in this respect s 40(1) CPO provides that a covenant relating to land will be presumed, unless a contract intention is expressed, to be made by the covenantor for himself and his successors in title.