

PCLL Conversion Examination
January 2011
Examiner's Comments
Hong Kong Land Law

Question 1

- (a) This question required students to consider whether there is an agreement for lease which Tom can enforce against Loretta. There is no written agreement and the issue is therefore whether there is a concluded oral agreement which is evidenced in writing and signed by Loretta or by her agent: s 3 *Conveyancing and Property Ordinance*. Candidates should therefore consider whether the letter signed by Loretta's solicitor is sufficient evidence of the oral agreement. As the letter does not contain details of the agreed rent, it is also necessary to consider whether the draft lease can be read with the letter. The law on this issue is stated in *Timmins v Moreland Street Property Company Ltd* [1958] Ch 1101 WLR 678. In addition the air conditioners are not referred to in the letter and it is necessary to consider whether they are fixtures which form part of the flat. Candidates should apply the degree and purposes of annexation tests. Alternatively, since the inclusion of the air conditioners benefits Tom, he might waive the term.

For there to be a concluded oral agreement, the parties must have agreed on the identity of the property, the identity of the parties, the rent payable and the duration of the term and the commencement date. See *World Food Fair v Hong Kong Island Development Ltd* [2007] 1 HKLRD 498. A number of candidates referred to the completion date which has been held to be an essential term of an agreement for the **sale** of land.

- (b) (i) The lease and mortgage are both registrable. Priority is therefore determined under the *Land Registration Ordinance*. Section 3(2) applies. Candidates should consider whether Goodwill Bank Ltd is a bona fide mortgagee for value. Notice is irrelevant under s 4 *LRO*.

A number of candidates correctly stated that under s 5 *LRO* the mortgage in favour of Goodwill Bank Ltd enjoys priority from its date because Goodwill registers within one month **after** the date. A number also correctly stated that if Tom registers his lease within one month after its date, the lease will enjoy priority from 23 December 2010 and under s 3(1) the lease will have priority over the mortgage.

This question states that Goodwill Bank Ltd has a legal mortgage. A legal mortgage is created by way of charge. By contrast, a charging order is a method of enforcing a judgment debt. A charging order enjoys priority from the day following the date of its registration.

- (b)(ii) The oral lease is for a term of two years and comes within s 6(2) *CPO* provided it takes effect in possession (Sara has moved in) and the rent is a market rent without payment of a premium. The lease is legal.

Question 2

(a) The owners own undivided shares in the land and the building. They are tenants in common enjoying unity of possession over the whole building. However, they enjoy exclusive use rights over their individual flats. The undivided shares in the land give them a proprietary interest without which the exclusive use right is merely a licence.

(b) Candidates should consider whether the burden has passed to M Bank Ltd which derives title from a successor in title to one of the parties to the Deed of Mutual Covenant.

Section 41(3) CPO provides that the burden passes to M Bank Ltd provided under s 41(2)(a) the covenant relates to land of the covenantor and under s 41(2)(b) the covenant is expressed or intended to run with the land. The test under s 41(2)(a) is stated in *P & A Swift Investments Ltd v Combined English Stores Group PLC* [1989] 1 AC 632. Candidates must apply the test to the covenant to pay management charges and the covenant not to create a nuisance or annoyance. Regarding s 41(2)(b), s 40 CPO provides the necessary intention.

Candidates were required to focus on the passing of the burden of covenants. Mortgagees are liable for positive as well as restrictive covenants.

(c) The burden of covenants also passes to Tom under s 41(3) CPO. However, the burden of positive covenants does not pass to Tom under s 41(5). See s 41(6) CPO regarding the nature of a positive covenant. Candidates must apply section 41(6) CPO to the covenant to pay management charges and the covenant not to create a nuisance or annoyance.

(d) This question concerns the reallocation of undivided shares which is permitted unless prohibited by the Deed of Mutual Covenant. Candidates should mention the importance of assigning undivided shares in the land (without which there is no proprietary interest), the need for a deed poll (to separate the shares) and a Sub Deed of Mutual Covenant regulating the rights and obligation of the reallocated undivided shares.

Question 3

(a) Candidates must mention both renewal under the *New Territories (Renewable Government Leases) Ordinance* and extension under the *New Territories Leases (Extension) Ordinance*.

(b) The Conditions of Sale are an agreement for lease which gives Beatrice an equitable interest in the land. Under s 14 (1) CPO the equitable interest is converted to a legal interest upon compliance with conditions precedent and the *Government lease is deemed issued*. There is case law which suggests that the letter of compliance must be registered in the Land Registry.

(c) The given facts indicate only that there is a breach of covenant which entitles the Government to re-enter, that the passage of time may indicate that the Government has waived the right to enforce the covenant. However, Great Buildings must be able to show that the Government knew about the breach and

failed to take action. Knowledge might be inferred from the circumstances: *Fairfax Ltd v A-G of Hong Kong* [1997] 1 HKC 17, PC.

- (d) Wilma has an unwritten equitable interest in the flat which is unregistrable. Priority between Wilma and ABC Bank Ltd is therefore determined by the common law rules: *Wong Chim Ying v Cheng Kam Wing* [1991] 2 HKLR 253. The issue is whether ABC Bank Ltd is a bona fide purchaser for value of the legal estate without notice of Wilma's equitable interest. ABC Bank must inspect the property and make enquiries of occupiers. Wilma is in occupation (even though she was not present when the Bank inspected). Her occupation amounts to constructive notice unless ABC made enquiries of Wilma who failed to disclose her interest.

The common law rule is that equitable interests bind the whole world except the bona fide purchaser for value of the legal estate without notice of the equitable interest. Contrast this with s 3(2) *LRO* which provides that a registrable but unregistered instrument is void against a subsequent bona fide purchaser or mortgagee for value of the same piece of land.