**PCLL Conversion Examination**
**January 2023**
**Examiner's Comments**
**Hong Kong Land Law**

This examination paper covered a wide range of examination topics and required candidates to answer two out of a total of three questions.

To help candidates reflect upon their own examination performance, the Examiner's Comments are set out below:

## Common Mistakes

1. Insufficient "Hong Kong elements" or none at all in the answers: The examination was on "Hong Kong Land Law" and hence there were "Hong Kong elements" in each question. Some candidates mentioned either insufficient relevant Hong Kong law and/or decided cases or none at all in their answers. This was particularly so for questions relating to Deeds of Mutual Covenants and Priority.
2. Bad time management: Some candidates wrote numerous pages to answer their first question but could only manage half a page to answer the last one as they ran out of time towards the end.
3. Writing too much irrelevancies: Quite a few candidates wrote a lot about what they knew, regardless of its relevance to the question, instead of writing precisely and concisely about the specific legal issues arising from each question.

## Legal Issues relating to each question

### Question 1(a)

This question required candidates to appreciate issues for land held by a Chinese customary trust. A Chinese customary trust for ancestral worship and is intended to be inalienable and perpetual. Under s.15 New Territories Ordinance, managers have full power to dispose of or deal with the land as if he were the sole owner subject to consent of the Secretary for Home Affairs. Every instrument signed in the presence of Secretary for home affairs shall be effectual for all purpose as if it had been executed or signed by all members.

Under Chinese Customary law unanimous consent from all members would be required for sale of the land. There need to be compelling circumstances for sale unless local customs or NTO require otherwise:

For a very high mark, candidates should identify that as a matter of practice, consent of District Land Office may be given if all members were notified of the proposed sale, and approved in a family meeting. Unanimous consent may somehow be 'inferred' from the consent of the 'head' of the Fongs or absence of objection from members after notification. Sometimes 50-80% consent may also be allowed for effecting the proposed sale.

Relevant decided cases include: *Kan Fat Tat* (1986), *Tang Che Tai* (2007 CFI, 2008 CA), and/or *Lau Wai Chau* (2000 CFA) *Lam Yui Ming* (2020 CFI).

**Question 1(b)**

This question required candidates to consider the meaning of 'industrial': manufacturing or altering articles, use of materials, machinery and labour. Manufacturing processes include R&D, production, testing, packaging and export. Processes which not ancillary would be disregarded. There are arguments for or against, and candidates who make cogent observation on both sides would obtain a very high mark. Relevant decided cases would include *Mexx Consolidated v. AG* [1987] HKLR 1210*, Raider v. SforJ* (2000) 3 HKCFAR 309, and *J&F Garments v. 虛境世界有限公司* [2019] 2 HKLRD 1274.

For industrial arguments:

- The building was not built yet when the lease was entered into in 1980. The time in 1980 was fairly modern already. The building was to be newly erected by the developer. There is scope to apply 'fluid' interpretative approach under *Uni-Creation* to make room and flexibly cater for technological advances in industrial processes and methods in the future 20 years or so.

- In respect whether it is more agricultural use than industrial. It is a kind of 'manufacturing' process where plants and vegetation are 'made' indoor. Save that the goods are 'organic' and 'living' in nature, there is virtually no difference with traditional industrial methods. 2 of the 5 floors is used for arranging and packaging flowers, which is more akin to manufacturing processes than agriculture. The plan is also to sign supply contracts to bring in flowers from outside, which is also consistent with an industrial process rather than agriculture. On balance, it would appear the primary purpose should be industrial. Office/R&D/Reception are all ancillary purposes to the 'manufacturing process' and cannot be viewed in isolation.

Not industrial arguments:

- The lease was executed in 1980. Meaning of 'industrial' must be interpreted in such context (originalist interpretation approach in *River Terminal*/*Fully Profit*) where horticulture was NOT developed yet. 'Industrial' must have referred to traditional manufacturing industries only (e.g. textile, garments, toys, watches, electronics etc.).

- While 'processing' of vegetables can be regarded as part of manufacturing process, the cultivation hub mainly involves growing activities and is simply the farming of vegetation which deviates from the understanding of 'industrial' despite without the use of soil. The operation should be more properly characterized as 'AGRICULTURAL' whose meaning is separate and distinct from industrial in many leases or in the town planning context.

- There could be planning considerations or other regulatory concerns if one is dealing with 'living things' (e.g. foul smell/ decompose if improperly handled, spread of diseases, mould/spores, water supply, drainage etc.) that grows within the premises instead of goods.

**Question 1(c)**

The question requires analysis on who owns the parapet wall. While there may not be a definitive answer (without the DMC) candidates would be given credit for considering both possibilities (common part or Humphrey's). The starting point (without the DMC) may be to refer to s. 2 and 1st Schedule BMO. It is likely the parapet wall should be a common part. Each case is decided on its own facts (and DMC), but an example would be in *Kau Ching Wing v Main Shine Development* [2011] 2 HKC 1, CA, even the inside of a parapet wall was found to be a common part.

If it is common part then surely the IO would be liable. Humphrey may also be, as he has interfered with the use of common areas under s34I BMO (or express provisions in the DMC, if any), and made structural alterations, by erecting illegal structures which increased the load of the parapet walls. Some liability may still be apportioned against Humphrey. The court would consider taking into account IO's duty to maintain of the common parts (i.e. s. 34I BMO and/or express provisions in DMC). The IO ought to have known of the illegal modifications to the parapet wall and had a duty to inspect and neutralize such a nuisance hazard. Breach is a question of fact and it appears the IO had been sitting on their hands for numerous years on this. See *Leung Tsang Hung v Incorporated Owners of Kwok Wing House* [2007] 5 HKC 227, [2007] 4 HKLRD 654, CFA

Even if the debris is from parts exclusively owned by Humphrey, the IO may still have liability for failing to enforce the DMC. By failing to take action against structural modifications the IO may still be liable: see *Aberdeen Winner Investments Ltd v IO of Albert House* [2004] 3 HKLRD 910.

Causes of action against the IO (and Humphrey) would likely be occupier's liability, negligence and public nuisance. For public nuisance, the court would likely consider, inter alia: a state of affairs of which endangered the public, the IO was under a legal duty to neutralize the hazard, ought/reasonably ought to have known real risk, whether injury was forseeable and whether reasonable steps were taken. See *Leung Tsang Hung v IO of Kwok Wing House* [2007] 4 HKLRD 654. It is likely both the IO and Humphrey would be found liable (as well as the manager and even contractors involved in the structural modifications), and liability apportioned accordingly. The IO should expect there to be joint and several liability.

**Question 2(a)**

Most candidates appeared to be unaware of "House Rules" and considered the question purely on the basis of enforceability of restrictive (or positive) covenants in the DMC.

Candidates were given credit for distinguishing between *Tsang Chi Ming and IO Of Hang Tsui Court v Ho Fu* [2011] 5 HKC 40. In *Tsang*, the DMC did not restrict rights of owners enjoying exclusive possession of their own flats, accordingly any house rules should not (i.e. ultra vires). However, in this case the said "house rule" on banning pets and cl 2(a) are in one document, they should be read together. It is more likely the Court would be able to reconcile the conflicting general right for enjoyment of one's flat, with the restriction on the 'house rule', and, like in *Hang Tsui Court*, find that the DMC bans pets.

As the owners of the Building have incorporated, the IO has a statutory duty to enforce the DMC, and hence cannot acquiesce to a breach in DMC: *Incorporated Owners of Hoi Luen Industrial Centre v Ohashi Chemical Industries (Hong Kong) Ltd* [1995] 2 HKC 11. Nonetheless, should the IO take Jane to Court, a likely remedy sought would be an injunction (to remove the pets from her flat). Jane would have a defence that the Court should exercise its discretion against this equitable remedy. Relevant authorities on the exercise of the discretion would include: *IO of Dragon View v Nalpak Ltd* [1989] 1 HKC 549, or *Freder Centre (IO) v Gringo Ltd* [2016] 2 HKLRD 190 *Hon Hing Enterprises Ltd v Honolulu Land Investment Co Ltd* (unreported) HCA 3557/1991, 31/7/92. *Incorporated Owners of Tuen Mun Hun Cheung Industrial Centre v United Hong Kong Ltd* (unreported) HCMP 2991/1998, 22/11/1999

In respect of the 3 dogs scaring elderly residents and urinating in the hallways, candidates should get credit for obvious points such as passageways and lift lobbies likely to be common areas pursuant to s.2 and Sch. 1 of the BMO, and referring to the "nuisance, annoyance or inconvenience" covenants. Candidates may receive further credit for discussion of s.34I BMO on interference of common parts and rights/obligations of owners subject to element of reasonableness (see *Silver Triumph Holdings Ltd v Guardian Property Management Ltd [2012] 3 HKC 391)*

**Question 2(b)**

For the Partition wall that was demolished, Candidates should advise the manager to seek an authorised person's (building surveyor) opinion on whether it was load bearing. Relevant authorities on partition walls would include *Chi Fu Fa Yuen*, *IO of Westlands* and *Tam Sze Man*. If it was load bearing then under s.2 and sch 1 BMO it would very likely be common area (unless otherwise suggested in title deeds) and hence should not have been demolished.

As for corridor, under s2 and sch. 1 BMO it is likely common area. Under s.34I BMO, Mr. Fong may have converted common areas for his own enjoyment. It is highly unlikely the retired security guard had the requisite approval and authority to represent the Manager or all the other owners (i.e. owner's committee) to allow Mr. Fong to convert/use the 13/F corridor in such a manner. In any event, such conversion would only be possible with the approval of the owner's committee (under s.34I(1))

Most candidates overlooked that Mr. Fong may have dispossessed co-owners (adverse possession). For AP against co-owners, need to consider ouster – *Tang Tak Sum v Tang Kai Fong [2015] 1 HKLRD 286, CA*, and *Foremost Hill Ltd v Bank of China (HK) Ltd* HCA 2555/2013 (5.4.2017). Ouster can be presumed/actual but slightest act from fellow co-owners may suggest there no ouster (*Tang Tak Sum*). Whether Mr. Fong would succeed in the present case would depend on whether owners (or IO or Manager) disturbed Mr. Fong's factual possession of the said area in 2003-2015. Candidates who have a different view can still get credit for discussion suggesting it would be very difficult for co-owners to establish AP in common areas, as they are bound by the DMC.

**Question 2(c)**

The focus on this question is on the student's understanding of the implications of *Tse Fook Choy* [1999] 3 HKC 126 (and subsequent cases such as *Fortis Bank v Yu Kam Hoi* [2004] 2 HKC 314. Percy should ensure the balance of the purchase price is properly paid out. Candidates should get some credit for pointing out the registration dates and the effect of s.5 and s.5A LRO, but little is resolved by this, only some credit. The HK Bank Mortgage and the Vincent Charge clearly has highest priority and the balance should be first paid out to them.

As for the Goodman CO, as per *Tse Fook Choy* [1999] 3 HKC 126, although the vendor had yet to assign the Flat to Percy, she would have priority over the charging order. The assignment would relate back to the contract. However, as Percy has actual and/or constructive notice of the charging order, she should pay HK$1.5 million with the balance of the purchase price: see *Ho Ying Kim* [1980] HKLR 42 and *Fortis Bank v Yu Kam Hoi* [2994[ 2 HKC 314

In respect of the lis pendens, it appears to be an 'in personam' action against Billy which claims no interest in the land so is not registrable to begin with: see *Wide Power v IO of Manhattan Court* [2015] 5 HKC 269. Percy should be advised that the IO may take action against her in the future for the adopting the breach or 'continuing breach' of her predecessor (*IO of Marina Cove v Chu Kam Tai* [2012] 2 HKLRD.

**Question 2(d)**

Considering that Mrs. Chang's financial difficulties, a charge against the flat and/or redirection of rent from the occupier under s.23 BMO would be most practical.

Under s.19(1) BMO, where a DMC empowers the manager to impose a charge on the property for the payment of management fees, an owners' corporation may instead impose the charge. It is very likely the DMC would contain express covenants on the charge. After the charge, the IO would become a secured creditor, and may also give pressure to the owners to pay their management fees in arrears. Should that not be the case, in any event, the IO can eventually obtain an order for sale from the Court.

For high marks, candidates should discuss the difficulties of compliance with s. 5 and s.44 CPO for such charges. In particular, how Mrs. Chang's signature would not be required, and the nature of the charge being equitable (and equity treats what ought to be done as done, see *Beacon Heights (Management) Ltd v Leung Ping Hung, Antonio* [1995] 1 HKLR 181, and *Wise Wave Investments v TKF Services Ltd* [2007] 4 HKLRD 762).

In respect of s 23 BMO, if an owner fails to pay his contribution to the funds within 1 month, the IO may, without prejudice to any rights it may have against the owner, by notice demand the sum from the occupier, who will become liable to pay the sum. This sum paid by the occupier (or mortgagee, s 25) may be deducted from the rent payable to the owner - s 23(4).

**Question 3(a)**

As per s.2 and Sch 1 BMO, it is very likely lift lobby/corridors are common areas. Regardless of express terms, section 34I BMO prohibits unreasonable use of common areas. In *Gallium Development Ltd v Len Tong Holdings Ltd* (unreported) CACV186/2003, 17/9/2004, placing large vending machine in common parts was held to be a breach.

The Manager is bound to enforce the terms of the DMC, so should take enforcement action. If it does not, then a co-owner may do so. If the owners (or the Manager) do take legal action against the Developer, they should seek not only an injunction but *mesne* profits should be considered. In respect of the injunction sought, it would be a mandatory injunction, but it would not be not draconian / onerous as parties agreed to be bound by a negative covenant (see *Doherty v Allman*). Section 34I BMO (or express covenants) forbid unreasonable use of the common areas, so owners could not have set up vending machines. While the co-owners do not actually suffer actual loss, but they may obtain compensation on basis of benefit to wrongdoer if they sue for mesne profits: see *IO of Percival House v Fusion Advertising Solution Ltd* [2012] 5 HKC 95.

**Question 3(b)**

This question required candidates to recognise that once the developer had sold all its units (and undivided shares) in the building, there are conflicting views as to what will happen its appurtenant rights to use the external wall. As per *Incorporated Owners of Cheong Wang and Cheong Wai Mansion v HKSAR* [2001] 1 HKC 57 and *South China Amusement Co Ltd v Incorporated Owners of Sun Hing Building* (2000) LDBM No 106/2000, the right to use the external wall to erect signs devolve upon co-owners. Later authories such as *King Prosper Trading Ltd v URA* [2010] HKCFI 1025; HCAL 56/2009 (17 December 2010) or *Incorporated owners of No.27A Chatham Road, Kowloon v Mr Lee and Others* (unreported) CACV 2238/2001, 02/08/2022, [2001-2003] HKCLRT 273 also followed this approach..

Another view can be found *Silver Carnival Ltd v Longbase Investments Ltd* [2005] 2 HKC 681 (a case concerning summary judgment), where the CA accepted that it was arguable that such rights might pass to the assignee of the last shares sold by the developer by operation of s 16 CPO (which creates a rebuttable presumption that an assignment includes all rights and interests)

**Question 3(c)**

This candidate required candidates to consider s.17 LRO and its implications. Despite late re-registration, the 1$^{st}$ IO Charge still valid under s.17 LRO: see *IO of Century Centre v Bank of China (HK) Ltd and Hongkong and Shanghai Banking Corpn Ltd* [2011] 4 HKC 439

Further, candidates should appreciate that the part of the Kowtow Mortgage was used to pay off the earlier HK Bank Mortgage so insofar as for those sums, there would be 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 50).

**Question 3(d)**

Candidates should understand the Watford Covenant under the Block Government Lease, no building and structure can be erected without consent. Also, that the Melhado Clause is descriptive only. Many candidates incorrectly approached the question as if the Old House built in 1980 was a "Small House". The preferred analysis is for the Old House it is necessary to check whether it is registered under the 'squatters control team' policy and tolerated. Even if it was registered with the squatters control team (as a Surveyed Squatter Structure), it cannot be assigned. Since the Old House existed since 1980 there could be waiver for breach, however the Old House has now been demolished.

The more pertinent question is whether the new 'container home' should be classified as a 'building' or 'structure'. This may depend on details as set out in authorities such as *Splendid Resources Inc. v Secretary for Justice* [2017] 2 HKLRD 421or *HKSAR v. Poon Lok To Otto* TMS 15101/2018. A structure is "*anything which is constructed; and it involves the notion of something which is put together, consisting of a number of different things which are so put together or built together, constructed so as to make one whole, which then is called a structure*". While ease of transport is one factor, its degree of permanence and need for assembly should render it to be at least a 'structure'.

If there is breach of Watford Covenant, the Lands Department may exercise right of re-entry under Cap. 126 and evict under Cap. 28, subject to relief. Lands Department may also enter to demolish unlawful structures and seek costs under s.12 of LMPO (Cap. 28).

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**Final Comment**

The legal issues mentioned above are non-exhaustive. Marks were still awarded to issues raised by candidates not mentioned above, so long as they made legal sense to the markers in light of the facts supplied.