Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2016 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners’ reports which provide feedback on student performance in the examination.

SECTION A

Question 1

(a)

The essential difference between a lease and a licence is that a lease, in addition to being a contract, confers proprietary rights on the person entitled to occupy the land under that contract (an interest under a lease is one of only two permissible estates in land (Law of Property Act 1925, s 1)).

At common law, there are three elements which must be satisfied for an agreement to constitute a lease: exclusive possession, fixed and ascertainable duration and a term which is at least one day shorter than the duration of the grantor’s estate.

The most important, but also the most troublesome, of these is exclusive possession: indeed, it has been described as the “touchstone” of a tenancy (Street v Mountford (1985)). Exclusive possession entitles the tenant to exclude the entire world, including the landlord, from the property for the duration of the term. As explained in Street v Mountford, the central issue in determining whether exclusive possession has been conferred is the degree of control which the owner is entitled to exercise over the land notwithstanding that it is occupied by another for the term of their agreement. Inevitably, such an enquiry will take in all the circumstances, which will necessarily vary according to the facts of a given case and a given tenancy (eg Marchant v Charters (1977) - exclusive possession not granted where a resident housekeeper had daily access to the room in question).
Prudential Assurance v London Residuary Body (1992) illustrates the need for the other two common law requirements also to be satisfied: an agreement granting possession until land “was needed” did not create a lease because there was no fixed and ascertainable duration for the agreement and hence no ‘term’; the question whether the tenants has exclusive possession was never raised.

A licence, by contrast, confers a contractual right of occupation, ie it grants permission to a licensee to use the licensor’s land for a purpose which, without the permission, would be a trespass. It does not confer ‘possession’ in the sense described above. The personal nature of a licensee’s rights means that they will not, for example, bind the owner’s successor in title nor will a licensee enjoy any of the benefits which are associated with the existence of an estate in land.

(b)

The conclusion that an agreement gives rise to a licence rather than a lease deprives both commercial and residential tenants of significant statutory protections. All the significant statutes which provide security of tenure (eg the Landlord and Tenant Act 1954, the Housing Act 1988 and the Rent Act 1977) only apply to leases. Some residential tenants may also enjoy rent protection or have the opportunity (either individually or collectively) to exercise enfranchisement rights in relation to their homes under the Leasehold Reform Act 1967 or the Leasehold Reform, Housing and Urban Development Act 1993. Only the Protection from Eviction Act 1977 provides licensees with some protection from unlawful eviction, and even then it does not apply to commercial occupiers of premises.

(c)

Even if the three elements for categorising an agreement as a lease are present, they may be disregarded if the agreement falls within the recognised exceptions set out in the case of Facchini v Bryson (1952). These exceptions extend to agreements where there is a lack of intention to create legal relations, or an existing relationship which is inconsistent with the claimed relationship of landlord and tenant, or where the supposed ‘landlord’ has no power to grant a tenancy. If one of the exceptions applies, a presumption is raised that no tenancy was granted. In Cobb v Lane (1952), for example, a sister granted her brother the right to live rent free in accommodation she owned. While the court accepted her brother had been granted exclusive possession, no tenancy arose as the parties lacked the intention to create legal relations. As with all presumptions, the presumption that a tenancy was not granted may be rebutted by tendering evidence to the contrary.

There are also a number of grey areas where the authorities do not appear to be consistent. For example, in the case of charities, in Family Housing Association v Jones (1990), the Court of Appeal refused to take into account the fact that the underlying purpose of the grant was charitable but in Westminster City Council v Clark (1992), the underlying charitable nature of the grant prevented the tenant from acquiring exclusive possession. The methods of interpretation used by the courts when faced with multiple agreements are another case in point. In Stibling v Wickham (1989), for example, the Court of Appeal advocated the adoption of a common sense approach to determine the “substance and reality”
of multiple transactions but other authorities have adopted a more legalistic approach.

It should also be noted that when examining the rights and obligations of the parties the courts draw a distinction between residential and business occupiers. In the case of business agreements, the courts are more likely to regard landlords’ attempts to retain control of the premises as genuine. For example in Dresden Estates v Collinson (1987), the court accepted that exclusive possession had been retained by the landlord, despite the fact that the licensees were paying rent for a term and were the exclusive occupiers of the land. The argument that such reasoning was counter to Lord Templeman’s speech in Street v Mountford was rejected on the basis that “the attributes of residential premises and business premises are often quite different”.

Some, however, would argue that these are not examples of a failure to apply established principles, but instead reflect the reality that the facts of any given case, rather than the law, can be complex or give rise to nuances of interpretation which cannot always be easily assigned to one or other side of the lease/licence distinction.

Question 2

Possession procedures

Under Rent Act 1977 (RA 1977), a landlord can only recover possession after the end of the contractual term by serving the appropriate notice and then obtaining an order for possession based on one of the statutory grounds (or ‘cases’).

Schedule 15, Part I of RA 1977 sets out ten discretionary cases for possession. Of these, perhaps the most significant are: Case 1 (breach of the tenancy agreement), Case 2 (conduct which is a nuisance) and Case 6 (unlawful assignment and subletting).

If a landlord makes out a discretionary case, the court “may” make a possession order (s.98(1) RA 1977) but only if: (i) “it considers it reasonable” to do so, and (ii) suitable alternative accommodation is or will be available for the tenant. In considering reasonableness, the court should take “a broad, common-sense view”, per Lord Greene MR in Cumming v Danson (1942). An illustration of this approach is Battlespring Ltd v Gates (1983), where evidence as to the personal attachment of the tenant to the flat of which she had been a tenant for 35 years was considered relevant.

The court can (s.100 RA 1977) stay or suspend possession or postpone the date for possession “as the court thinks fit”. This is particularly common in relation to claims for possession based on arrears of rent, where tenants are frequently allowed to pay off the arrears by instalments.

Schedule 15 Part II sets out 10 mandatory cases for possession, none of which is based on tenant default. Under s.98(2) RA 1977, the court must make a possession order if: (i) a mandatory ground is established, and (ii) the tenant was informed in writing no later than the relevant date (which is typically the day on which the tenancy commenced) that he or she might be evicted on the
basis of that specific ground. In relation to four of the cases (11, 12, 19 and 20), the court can waive the notice requirement but only if “it would be otherwise just and equitable to make a possession order.”

The court can postpone possession, but typically only for 14 days (although in cases where possession may cause exceptional hardship the postponement can be for up to 6 weeks).

Succession

On the death of the tenant, the tenancy can be transferred to a surviving spouse (including a same-sex spouse) or civil partner by way of a statutory tenancy by succession, under Schedule 1, Part 1, paragraphs 1 and 2 to the Rent Act 1977. Other family members can succeed to the tenancy but only as assured tenants paying a market rent, and only if they have lived in the property for at least two years before the death of the original tenant (under paragraphs 1 and 3). In all cases, any successor has to demonstrate that they lived with the original tenant.

Fair rent

RA 1977 also provides the rules for setting fair rents for regulated tenancies. Under s.67 RA 1977 either party (or both) can apply to the Rent Service for a “fair rent” to be set in accordance with s.70 RA 1977 (which contains a number of statutory assumptions and disregards). Notwithstanding those statutory rules, it is still open to the adjudicator to “adopt any method or methods of ascertaining a fair rent” provided those methods are not “unlawful or unreasonable”, per Lord Reid in Mason v Skilling (1974). A number of methods have been used over the years, but in all cases scarcity value is ignored. As a result, Rent Act properties are typically let at levels below open market rent.

Once the fair rent is set and registered, this is the maximum rent that the landlord can charge during the contractual and statutory periods of the tenancy (unless the rent is either reviewed or cancelled): ss.44 and 45 RA 1977. The amount set will then increase from year to year in line with the retail prices index. If a fair rent is registered after the tenancy was granted, the fair rent is the maximum payable even if the tenancy provided for a higher rent.

Rents can be re-registered every two years and an application for re-registration by the landlord will be accepted one year and nine months after the effective date of the previous registration. Applications can also be made at any time where there has been a significant change in circumstances or where a joint application is made by the landlord and the tenant: see s.67(3) RA 1977.

Question 3

(a)

Under s.2(1) Law of Property (Miscellaneous Provisions) Act 1989 (LPMPA 1989) “a contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each”. This includes a contract or agreement for the grant of a lease. However, the
requirement for “signed writing” does not apply to a tenancy which can lawfully be created “by parol” (ie a tenancy to which s.54(2) Law of Property Act 1925 (LPA 1925) applies (s.2(5)(a) LPA 1925). This means that the requirement does not apply to those short leases which can be created orally.

Where a lease is to be granted for a term of more than three years, it must be made by way of a deed (s.52(1) LPA 1925). The deed must be executed by the landlord or by his lawfully authorised agent.

Where a lease is for a term “not exceeding three years”, it may be lawfully created orally (s.54 LPA 1925). This includes any weekly, monthly or annual periodic tenancy (even if the tenancy subsequently endures for more than three years, because the initial “term” was only for a week, month or year (as the case may be)). This absence of formality presents a significant trap for unwary property owners, who may find what they thought was an informal arrangement for occupation is elevated to the status of a lease (invariably with adverse consequences in relation to the right to security of tenure and other statutory protections which will benefit the occupier).

A tenancy at will may also be created orally, because it is inherent in the nature of such a tenancy that it does not have a “term” at all. A tenancy at will may also be implied as arising in a number of other circumstances, eg where a tenant holds over during the course of negotiations of the grant of a new lease which is to replace a previous lease: Javad v Mohammed Aquil (1991). However, the adverse consequences for the landlord are much reduced, because such a tenancy (being determinable “at the will” of either party) attracts very little statutory protection.

(b)

Where the grant of a lease does not take effect in law because of the failure to comply with the requirements of s.52(1) LPA 1925, the court may nevertheless regard the lease as being binding on the parties and enforce its terms against one of them at the instigation of the other. The justification for this is the principle that, in equity, “an agreement for a lease is as good as a lease”. In Walsh v Lonsdale (1882), for example, a tenant went into possession following an agreement for a lease but before a deed granting the lease was executed. When a dispute later arose as to the terms on which the tenant was occupying the premises, the court rejected the tenant’s assertion that he occupied on the basis of a common law periodic tenancy; instead it found that the tenant occupied by virtue of the agreement “under the same terms in equity as if a lease had been granted”. Further, on the basis of the maxim that “equity looks as done that which ought to be done”, equity regards the lease as being granted, whether or not the tenant seeks relief from a court.

It is important to realise that the doctrine in Walsh v Lonsdale is dependent on the theoretical availability of specific performance. The equitable lease is therefore vulnerable if specific performance is not actually available, or ultimately not granted, because the most likely outcome is that the court will conclude that the parties have created an implied periodic tenancy (with all the adverse consequences for the property owner which are discussed above).
The rule in *Walsh v Lonsdale* cannot be invoked:

- to perfect a lease which is not signed by the tenant (because the lease does not require the tenant’s signature in order to be effective to grant a legal (leasehold) estate);

- to perfect a contract or agreement for lease which does not satisfy the requirements of s.2(1) LPMPA 1989 (because such a failure means that there is no contract at all to which the rule can apply).

**Question 4**

Sections 18-30 of the Landlord and Tenant Act 1985 (as amended) (LTA 1985) provide holders of long residential leases with two principal forms of protection in relation to variable service charges, i.e., a service charge whose amount can vary according to the amount of any qualifying expenditure incurred by the landlord (s.18 LTA 1985). They are: (a) protection from service charges which are unreasonably incurred or are unreasonable in amount, and (b) the right to be consulted before major contracts are awarded or major works are carried out.

In addition:

- service charge demands must comply with prescribed requirements and are subject to statutory time limits;

- the landlord’s right to forfeit for non-payment of service charge is restricted;

- the landlord’s right to recover the cost of legal proceedings by way of a service charge is also restricted

- statutory trusts are imposed over service charge funds.

Contracting out is unlawful (s.27A(6) LTA 1985), which therefore invalidates any provision in the lease to the effect that a certificate supplied by the landlord, or the landlord’s surveyor, or any other third party, is conclusive as to any of the matters relating to the amount or reasonableness of the landlord’s expenditure.

**Service charges**

Service charges must be reasonably incurred and reasonable in amount (s.18(2) and s.18(3) LTA 1985). This applies to expenditure already incurred as it does to anticipated future expenditure in relation to which the tenant is making payments on account (s.19 LTA 1985). In this context ‘reasonable’ must be given a broad common-sense meaning (*Veena SA v Cheong* (2003)), which means that a landlord can act later rather than sooner (even if the costs payable increase as the result of delay) and need not always choose the cheapest option.

Service charges must be demanded within 18 months of the date on which the relevant cost was incurred, unless the tenant was warned in advance that older costs might be included: s.20B LTA 1985. If this time limit is breached, the
tenant does not have to pay the amount demanded. The demand for payment must also be accompanied by a summary of the tenant’s rights and obligations in relation to service charges (s.21B LTA 1985). The tenant is not obliged to pay until such a summary is served.

If asked by the tenant, the landlord must provide a summary of the costs incurred by him so that the tenant can understand the amount that has been demanded from him (s.21 LTA 1985). Again, the tenant is not obliged to pay until such a summary is served after being requested.

Where the tenant fails to pay service charge due from him, the landlord cannot simply invoke s.146 Law of Property Act 1925 and forfeit the lease, even if the service charge is reserved as ‘rent’ under the lease. Instead, the landlord must first establish that the amount in question is incontestably due, either by agreement with the tenant or following determination by a tribunal (s.168 Commonhold and Leasehold Reform Act 2002 (CLRA 2002)). In addition, the amount due must exceed £350 or must have been owed for more than three years (s.167 CLRA 2002).

In any proceedings to recover arrears of service charge, the tribunal can only make an order in respect of costs against the losing party if they acted unreasonably in bringing, defending or conducting the proceedings.

Service charge payments made by a tenant are held on statutory trust (s.42 Landlord and Tenant Act 1987) and can only be used to meet service charge expenditure incurred by the landlord in the relevant year.

Consultation

Under ss.20 and 20ZA LTA 1985, a landlord must consult where a tenant will be required to contribute by way of service charge:

- more than £250 in relation to qualifying works, ie building works; or
- more than £100 in relation to qualifying long-term agreements (eg a management contract or a lift maintenance agreement).

Failure to consult means that the landlord cannot recover more than the amounts set out above in relation to the relevant expenditure.

The specific requirements which the landlord must follow vary according to the nature of the works or agreement in question.

The requirement for consultation can be dispensed with, but only by the appropriate tribunal and only if it is reasonable to do so (s.20ZA(1) LTA 1985). Following the Supreme Court decision in Daejan Investments Ltd v Benson (2013), dispensation will be granted if the failure to consult has caused no real prejudice to the tenants.
Evaluation

Sections 18-30 LTA 1985 clearly provide substantial benefits to long leaseholders. The regime requires both reasonableness and transparency on the part of landlords, who are consequently unable to use service charges either as a means of improving their properties at the expense of their tenants or as a way of generating an additional source of income.

SECTION B

Question 1

Part II of the Landlord and Tenant Act 1954 (LTA 1954) confers security of tenure on qualifying tenants who occupy premises for the purposes of a business. Where a tenancy enjoys security of tenure, the tenancy can only be terminated by the landlord by service of a notice under s.25 LTA 1954 in accordance with the statutory timescales and procedure. Where a s.25 notice is served, the tenant is entitled to claim a new tenancy and can remain in the property on the terms of the current tenancy until that claim is resolved (either by agreement or by the court).

However, LTA 1954 does not give qualifying tenants an unrestricted right to be granted a new tenancy. There are seven grounds (set out in s. 30(1) LTA 1954, paragraphs (a) to (g)) on which the landlord is entitled to oppose such a grant.

In the case of Burt, Adam should be advised that he may be entitled to rely on Ground (b) - that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent that has become due. Ground (b) is discretionary. ‘Persistent’ delay indicates a history of non or late payment over a period of time, which covers both a long history of paying numerous instalments late or allowing a few instalments to remain unpaid over a long period of time: Horowitz v Ferrand (1956). However, rent is not ‘delayed’ for the purposes of ground (b) if the landlord has acquiesced in the late payment of it: Hazel v Akhtar (2002) (where acquiescence as to late payment took place for 14 years). On balance, Adam is likely to be able to resist the grant of a renewal tenancy to Burt on this ground.

In the case of Cassandra, Adam should be advised that he may be entitled to rely on Ground (c) - that the tenant ought not to be granted a new tenancy in view of other substantial breaches of obligation under the current tenancy (ie other than those to repair or pay rent), or for any other reason connected with the tenant’s use or management of the holding. Ground (c) is discretionary. In this case, Adam should be advised to rely on the second limb of the ground, with particular reference to Cassandra’s behaviour. The facts bear some similarity to those in Youssefi v Mussellwhite (2014), where the Court of Appeal held that the correct question under ground (c) is ‘whether it would be unfair to the landlord if the tenant were to be foisted on the landlord for another term’. On balance, Adam is likely to be able to oppose the grant of a renewal tenancy to Cassandra on this ground.
In the case of Derek, Adam should be advised that he may be entitled to rely on Ground (d) - ie that Derek has been offered reasonable alternative accommodation. This is a mandatory ground, although the requirement of reasonableness does introduce an element of discretion for the court. On the facts, the court must weigh whether the offer by Foodmart can be made sufficiently secure, and the terms on which the concession will be granted are sufficiently reasonable, to deprive Derek of his statutory rights.

In relation to all three tenants, Adam should be advised that he may be entitled to rely on Ground (f) - the landlord intends to carry out works of demolition, reconstruction or substantial construction and cannot do so without regaining possession of the holding. This is a mandatory ground for refusing a renewal tenancy. The proposed conversion works by Foodmart would appear to qualify.

One potential problem here is that it is not the current landlord (ie Adam) who wants to carry out the redevelopment; instead it is a third party (Foodmart). If Adam wanted to redevelop the site, he would not have to carry out the works personally, provided that they were carried out under his supervision and control (Gilmore Caterers v St Bartholomew’s Hospital (1956)).

However, the necessary intention only need to be demonstrated at trial and not before (Betty's Cafés v Phillips Furniture Stores (1958)). Consequently, it will not matter if the works are actually carried out by Foodmart provided that it is the competent landlord by the date of the hearing (Marks v British Waterways Board (1963)). Adam could therefore sell the property to Foodmart subject to the leases, and any proceedings instituted by Adam before that sale could be transferred into the name of Foodmart. Otherwise, if time permits, the property can be sold to Foodmart and it can then serve the s.25 notices.

**Question 2**

A lease may contain an express covenant by the landlord for quiet enjoyment. Even if it does not, such a covenant is implied (Markham v Paget (1908)). The covenant means that the landlord must ensure that there is no interference with the tenant's occupation and enjoyment of the property.

Not every interference gives rise to liability: the disturbance suffered by a tenant must be “so substantial or intolerable as to justify the tenant in leaving the demised premises”: Browne v Flower (1911). Older cases suggest that there has to be a substantial physical interference with the enjoyment of the premises, even if the interference does not take place on the premises themselves. However, more recent cases have held that noise and odours can give rise to a breach of the covenant. The modern test is whether there has been some interference “with the tenant’s freedom of action in exercising his rights as a tenant” (Lord Denning in McCall v Abelesz (1976)).

A landlord is also subject to an implied obligation not to derogate from his grant. This means that the landlord must not do anything that prevents the tenant from being able to enjoy the demised premises for the purpose for which they were let. The obligation not to derogate from grant is not excluded by an express quiet enjoyment covenant.
All the tenants should be advised that the scaffolding and sheeting probably do not breach the obligations of quiet enjoyment and non-derogation from grant. Although the apartments were let as residences, and although the tenants may have had an expectation that their apartments would be naturally lit during daylight hours, in law the tenants have no right to light via, nor any right to a view from, their windows of their apartments. Any loss of light can be compensated for by switching on the lights in the apartments.

As regards the driveway, each tenant has the use of a parking space as part of the demise to him. Even if the lease does not contain the express grant of a right of way with or without vehicles over the driveway from the public highway to the stable block, such a right will be implied. The implied covenant of non-derogation from grant prevents a landlord from doing anything inconsistent with the purpose of the letting (eg Aldin v Latimer Clark, Muirhead & Co (1894)). The inability to use the driveway is analogous to the situation in Stewart v Scottish Widows & Life Assurance Society Plc (2005), where a roadway was rendered unusable by the tenant following the installation of speed bumps and the tenant successfully sued for breach of the landlord’s obligations of quiet enjoyment and non-derogation from grant. The tenants will be entitled to an injunction requiring Ludwig to restore the right of access and may also claim damages for the unlawful interruption/derogation. Again, they may also be entitled to a prohibitory injunction preventing further work until the access is restored.

Johann should be advised that he cannot complain about the disturbance of his sleep. 7.30am is not an unreasonable time for workmen to begin work, and even if the workmen arrived later in the morning that does not mean that other external factors completely outside Ludwig’s control would not disturb Johann to the same degree. In Southwark LBC v Mills (2001) it was accepted that tenants simply have to put up with noise that is associated with the ordinary, everyday living activities of their neighbours, and the position is no different where that ‘neighbour’ happens to be the landlord (or his workmen) when he or they are carrying out normal activities on the common parts of a communal building such as a mansion block.

Felix should be advised that more information may be needed before definitive advice can be given. If his apartment was marketed as being suitable for home working, or if the cable was installed after the grant at his request or for his benefit, or if Ludwig knew that Felix was operating a home business which depended on continuity of internet service, then Felix might have a claim against Ludwig. Otherwise, it would seem that he has no cause of action.

**Question 3**

(a)

The covenant prohibiting assignment of the premises is a qualified covenant, so s.19(1) Landlord and Tenant Act 1927 (LTA 1927) implies the statutory proviso that “such licence or consent is not to be unreasonably withheld.” It is a question of fact for the court as to whether consent has been unreasonably withheld, as to which the guidelines set out in International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd (1985) apply. Typically, the burden of proof is on
the tenant to demonstrate that consent was unreasonably withheld, but this will be reversed if a landlord refuses to give reasons for a refusal.

The timescale for dealing with an application for consent to assign is governed by s.1(3) Landlord and Tenant Act 1988 (LTA 1988): an application must be dealt with by the landlord within a “reasonable period”. What constitutes a reasonable period is a question of fact for the court. In Dong Bang Minerva (UK) v Davina Ltd (1996) it was stated that a period of 28 days was a reasonable benchmark. Where a landlord fails to comply with the statutory duty, the tenant may assign the lease without obtaining the landlord’s consent.

Nadeem’s initial request for consent to assign is oral. If the lease states that such a request must be made in writing, then no valid application has been made. However, Marwan could waive that requirement and deal with an oral request if he wished. Marwan’s statement that he would not oppose a sale and would refer the matter to his solicitors is arguably an acceptance of the oral request.

It is a separate question whether Marwan’s statement amounts to consent to assign. If the lease states that consent can only be given in writing, then prima facie an oral consent is ineffective. Again, however, Marwan could waive this requirement. An oral consent ‘in principle’ would potentially be a valid consent for the purposes of both the lease and LTA 1988, and reference to completion of ‘formalities’ or ‘subject to contract’ would not affect the position. Marwan’s conduct could mean that a lawful assignment has occurred.

If the court decides that no consent was given at that time, there was clearly no refusal either. The question then arises as to whether Marwan has failed to deal with Nadeem’s application within a reasonable period. An oral request by a tenant for consent to assign does not engage the statutory duty imposed by LTA 1988.

In any event, it would seem that a reasonable time has not elapsed - Marwan was on holiday after the request was made. In addition, he has not received any information as to Sunesh’s ability to meet the financial and other obligations imposed by the tenant covenants in the lease. He would be entitled to ask for this information before making his decision, and would be acting reasonably (both under the lease and under LTA 1988) in refusing consent until it was provided. He would also be entitled to a reasonable time within which to consider the ramifications of the alterations and change of use.

(b)

A tenant who assigns his lease without a required consent from his landlord is not released from the tenant covenants in the lease. Such an assignment is an ‘excluded assignment’ for the purposes of s.11 Landlord and Tenant (Covenants) Act 1995 (LT(C)A 1995).

If Marwan has not consented to the assignment, Nadeem remains the tenant and is currently in breach of covenant by reason of his non-payment of the last quarter’s rent. The lease is therefore liable to forfeiture, either by peaceable re-entry or by possession proceedings. Forfeiture for non-payment of rent does not
need to be preceded by the service of notice under s.146 Law of Property Act 1925. Nadeem is also in breach of covenant in having caused or allowed unauthorised alterations and a change of use. He would also appear to have unlawfully assigned the lease. Those breaches would require service of a s.146 notice before he could forfeit.

A breach of covenant may be waived by a landlord. If waiver occurs, any right to forfeit arising out of the breach is lost. Acceptance of rent by a landlord with knowledge of a breach by the tenant is the commonest form of waiver. Although Marwan has received a cheque from Sunesh, he has not presented it for payment. It is unlikely that waiver has occurred. Marwan should be advised not to present the cheque until matters are resolved.

Sunesh is liable to pay Marwan for his use of the premises even if he has no right to occupy them. Marwan could, therefore, decide to present the cheque as a payment on account of the amount due from Sunesh for such use. If he opts for this course, he should ensure that his lawyers write a letter to Sunesh explaining that this is the only basis on which payment is being accepted, and that the payment is accepted without prejudice to Marwan’s argument that Sunesh has no right to occupy the premises.

**Question 4**

All three tenants have the benefit of security of tenure under the HA 1988 (HA 1988), which applies to qualifying residential tenancies created on or after 15 January 1989 (HA 1988, s.141(3)). A landlord can only obtain possession by following the statutory procedure (relating principally to the service of notices) and making out one or more of the statutory grounds for possession. Some of these grounds are mandatory, whilst others are discretionary.

Philip should be advised that he has been unlawfully evicted from his home. No statutory notice was served and no order for possession was obtained. Whilst HA does not affect the ability of a tenant voluntarily to surrender his tenancy at any time, this did not happen - Philip paid sufficient rent for a full year before his departure and told Charles why he was going away. These facts also tend to negate any argument that Charles can rely on the defence provided by s.27(8) HA 1988, because he could not reasonably have believed that Philip had ceased to reside at the property. Charles was not entitled to treat the property as having been abandoned nor the tenancy as having been surrendered.

The Protection from Eviction Act 1977 (PEA 1977) applies to Philip as a (former) occupier of residential premises. By virtue of s.3 PEA 1977 a landlord must seek a court order for possession of residential property and s.5 requires any notice to quit to be in writing. Charles did not comply with either of these requirements; consequently he would appear to be guilty of the criminal offences of harassment under s.1 PEA 1977.

Although PEA 1977 does not itself provide Philip with any civil remedy against Charles, so as to allow him to recover compensation for any loss which he has suffered, the breach of s.1 PEA 1977 does engage ss.27 and 28 HA 1988 (which create the statutory tort of unlawful eviction). As the victim of such an unlawful eviction, Philip is entitled to an award of damages calculated on the basis of the
difference in value between the landlord’s interest if the tenant remained in occupation and the value of the landlord's interest without the tenant in occupation. Given the very generous offer made to Charles for all three cottages, Philip may be entitled to a substantial sum following his eviction from his cottage, assessed by reference to the difference between its tenanted and vacant possession values.

Arthur should be advised that Charles cannot evict him from his cottage on the basis of the s.21 notice which he has served. This is because Charles has failed to comply with ss.213-215 Housing Act 2004 (HA 2004). Those sections impose three requirements on the landlord:

- register a tenancy deposit received from an AST tenant with an approved tenancy deposit scheme (TDS) within 30 days of receipt;
- serve on the tenant certain prescribed information confirming the registration details for the deposit, within the same 30 day period after receipt of the deposit;
- comply with the initial requirements of the particular TDS used.

Charles has failed to comply with any of these requirements. This means that he cannot serve a s.21 notice on Arthur claiming a mandatory possession order (s.215(1) HA 2004). In addition, Arthur would be entitled to bring a claim requiring Charles to register the deposit or repay it to him. In those proceedings he could also claim compensation of up to three times the amount of the deposit as compensation for Charles’s failure to comply with the registration rules.

Although the s.21 notice served by Charles is therefore invalid, Arthur should also be advised that if Charles were to serve a further notice, this time under s.8 HA 1988, he might be entitled to recover possession on the mandatory ground (HA 1988, Sch 2, para 6) that the cottage is required for redevelopment. However, it is arguable that the ground does not apply because it is the developer, and not Charles, who is proposing to carry out the development works.

George should be advised that his tenancy cannot be brought to an end before the initial fixed term. So the current s.21 notice is, again, invalid. However (as in the case of Arthur), a s.8 notice which relies on the mandatory ground (HA 1988, Sch 2, para 6) that the cottage is required for redevelopment might succeed. Again, the same caveat would apply as regards the fact that it is the developer, and not Charles, who is proposing to carry out the development works.