UNIT 4 - LAND LAW

SUGGESTED ANSWERS – JANUARY 2010

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 2010 examinations. 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.

ILEX is currently working with the Level 3 Chief Examiners to standardise the format and content of suggested answers and welcomes feedback from students and tutors with regard to the ‘helpfulness’ of the January 2010 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

1. ‘Term of years absolute’ is the technical term for a leasehold estate under s.1 Law of Property Act 1925. The full definition is in s.205 which makes it clear that ‘term of years’ includes any period of letting whether fixed or periodic. A term of years can still be a legal estate even if it starts in the future, provided the start date does not exceed 21 years. A leasehold must have a fixed maximum duration (a periodic lease can be ended by a notice to quit) but is still absolute even though it can be ended earlier e.g. by surrender.

2. The definition includes the land surface, mines and minerals underneath, buildings on land and things attached to buildings, airspace above land and intangible rights attached to land such as easements.

3. (a) This occurs when trust land is sold. The purchase money should be paid to two trustees or a trust corporation for overreaching to occur.

   (b) As a result of overreaching, the buyer takes free of any beneficial interest in the land. The beneficiaries’ interests are now in the purchase money which is held by the trustees on their behalf in proportion to their interests.

4. The four unities are present in a joint tenancy and are:
   • Unity of possession: the co-owners are all entitled to full possession of
the land;
• Unity of interest: the interest of each co-owner is the same;
• Unity of time: the interest of all co-owners must arise at the same
time;
• Unity of title: each co-owner must derive title from the same
document.

contract must be in writing, signed by both parties and incorporate all
agreed terms. (Where contracts are exchanged all express terms must be
incorporated in each).

6. A ‘registrable interest’ is an estate or interest which has substantive
registration under its own title number. Examples of estates which are
registrable interests are the (freehold) fee simple absolute in possession
and leaseholds (term of years absolute) with over 7 years to run. Interests
which are registrable include rent charges, franchises, and profits in gross
(i.e. not held with land).

7. (a) Prescription Act 1832.
   (b) The usual minimum period is 20 years.

8. A ‘grant’ occurs when an easement is granted in favour of the land sold
over the land retained. A “reservation” occurs when an easement is
reserved over the land sold for the benefit of the land retained.

9. (a) The benefit of a covenant is the right to enforce it.
   (b) At common law the benefit of a covenant can pass with the benefited
land where:
   • The covenant touches and concerns the covenantee’s land
   • The covenantee owned the legal estate in that land at the time
the covenant was made
   • The original parties intended the benefit to pass (intention is
implied under s.78 Law of Property Act 1925).

10. Candidates to provide any two of the below:
A restrictive covenant can be terminated by ‘release’, where the dominant
owner (with the benefit of the covenant) gives up his right to enforce
the covenant and so ends it. This may be an express release by deed between
the parties with benefit and burden. It may also be an implied release
where the dominant owner is aware of breaches of the covenant, but does
nothing to enforce it. It is also released there the same person owns the
benefited and the burdened land.

11. The equity of redemption is the right of the borrower to redeem his
mortgage and have his property back free of the mortgage and free of any
other onerous conditions. (Any such conditions, such as buying supplies
from the lender, should not last beyond the redemption of the mortgage).

12. The curtain principle means that while legal estates and interests are shown
on the register equitable interests behind a trust are not shown. They are
“hidden behind the curtain”, and the purchaser will not see details of them.
**Section B**

**Scenario 1**

1. As the definition of 'land' includes the subsoil and minerals, the landowner normally owns items buried underneath his land, unless the true owner is known. There are some exceptions. The Crown owns valuable items such as gold and treasure. These gold coins are within the definition of 'treasure' so Ali is not entitled to keep them.

2. (a) If Ali wishes to claim an easement, he must show that his claim has the four characteristics listed in *Re Ellenborough Park*.

   (1) There must be two pieces of land, dominant (with the benefit) and servient (with the burden). There are two pieces of land here, Ali's and Fred's.
   (2) The two pieces must be in separate ownership (which they are here).
   (3) The easement must accommodate (i.e. benefit) the dominant land. The easement must add to the enjoyment of Ali's land, rather than just being a personal benefit for Ali.
   (4) The right claimed must be capable of forming the subject matter of a grant i.e. capable of being described in definite terms in a deed. So it must not be too vague.

   (b) The problem for Ali is that as a view cannot be definitely described, it is too vague. So he cannot claim an easement of the view (*Aldred’s Case*).

3. This question raises the issue of fixtures and fittings. Fixtures are items which have become attached to land, so becoming part of it. As such, they must pass with the land on a sale, unless their removal has been specifically agreed beforehand. Fittings belong to the seller and can be taken without needing to be mentioned.

   In deciding whether items are fixtures or fittings the courts have developed two tests: the degree of attachment and the purpose of the attachment. The purpose of attachment test tends to be more important in modern times.

   If the item is attached to land other than by its own weight, it is assumed to be a fixture. This is illustrated by the case of *Holland v Hodgson*. Here looms were a fixture because they were attached other than by their own weight. In *Leigh v Taylor* a tapestry attached to the wall by nails was seen to be a fitting as the fixing was for the purpose of display, rather than to benefit the house as a whole. The permanence of an attachment can also be relevant as shown in *Botham v TSB Bank plc*.

   In the question, the shrubs in the garden were clearly part of the land, so being fixtures, and should not have been removed.

   The pots of rose bushes were movable items, not fixed to the land, so were fittings which the sellers could take.

   Curtains are normally regarded as fittings (due to lack of permanence) – see *Botham v TSB Bank plc* - so can be taken unless there is prior agreement for them to stay.
4. (a) The landowner owns the airspace above his land up to the height required for enjoyment e.g. (*Bernstein v Skyviews*). Therefore any intrusion into that airspace is a trespass to land. The infringement of the gutters is as much a trespass to land as is walking over it. In e.g. *Kelsen v Imperial Tobacco*, there was trespass when a sign overhung a neighbour’s property. So in this case, the overhanging gutters would be a trespass.

(b) Ali could apply to the courts for an injunction to stop the proposed trespass or damages for loss.

5. (a) Sale of unregistered land is a trigger for first registration of that land (Land Registration Act 2002). As a consequence, Ali’s lawyer had to apply for first registration of title after completion.

(b) The application must be made within 2 months of completion of the sale, otherwise the legal title will not pass.
Scenario 2

1. Gino could obtain income from the cottage by granting a lease of it to a tenant in return for a rent. This would create a leasehold estate in favour of the tenant but Gino would retain the freehold ownership.

2. This question raises the issue of co-ownership and whether Gino and Cara bought Greenways as joint tenants or tenants-in-common in equity. Where there is a joint tenancy, there are no separate shares. The joint tenants are both entitled to the whole estate. There is a right of survivorship. The survivor of joint tenants automatically takes the interest of any joint tenant who has died, regardless of any provision in the will of the deceased joint tenant. While a joint tenancy can be ‘severed’, so turning it into a tenancy-in-common, this cannot be done by will.

Tenants-in-common hold separate shares in the equitable interest in the property. A tenant-in-common can sell his share, or leave it by will.

So if Gino and Cara bought as joint tenants, Gino would be the sole owner in equity when Cara died under the doctrine of survivorship. Sarah would not be able to claim any interest.

If Gino and Cara bought as tenants-in-common, Cara would be able to leave her share in the property by will to Sarah.

3. (a) Pam may be able to claim an interest in Greenways if she can prove that a constructive trust exists in her favour. If so, Gino would hold Greenways as a trustee on behalf of himself and Pam as co-owners in equity.

The main elements that must be shown are:
• an express common intention between Gino and Pam for the trust or reliance by Pam on a statement by Gino that she would have rights in the house;

and

• a substantial contribution by Pam (the beneficiary).

In Grant v Edwards a common intention was found. Here the man gave to his cohabitee that the reason for putting the house in his sole name was to avoid prejudicing her divorce proceedings. She relied on that statement and made a substantial contribution. There was a constructive trust.

Generally case law (such as Gissing v Gissing) shows that a contribution must be directly related to the acquisition of the property. A contribution to household expenses is not enough. This was also shown in Lloyds Bank v Rosset; the House of Lords said that direct contributions to the purchase price (initially or to mortgage instalments) were needed. In that case a contribution towards renovation and decoration of the property was insufficient.

In this question, firstly a statement has been made to Pam on which she relied. Secondly, she has also made a substantial contribution in financial terms. While paying for ordinary household expenses is not sufficient, she has paid some mortgage instalments. The two factors
should be sufficient to give her an interest in Greenways under a constructive trust.

(b) A lender taking a security on registered land takes the land subject to any entries on the register and any interests which override at the time of the loan (Land Registration Act 2002).

Even if Pam has an interest in the land and is in possession, which would normally give her an overriding interest under Sch.3 para.2 Land Registration Act 2002, this would have arisen after Gino mortgaged the property, so her interest is not binding on the Bank.

(c) The situation would be different. Pam would have an overriding interest under Land Registration Act 2002 as a person in possession with an interest in the land. This is binding on future buyers or lenders unless the occupation was not obvious at the time of the disposition, or the interest was not disclosed on reasonable enquiry.

The mortgagee (the lender) takes the land subject to preceding overriding interests (Williams v Glyn’s Bank v Boland), so that Pam’s interest would be binding on the Bank.

4. The Bank has several remedies:
   • to take possession; this is usually done as a preliminary to sale;
   • to exercise the power of sale either under an express power in the mortgage deed, or under the power in the Law of Property Act 1925;
   • to appoint a receiver. This is appropriate if any income is arising from the property, so could apply here if the cottage is rented;
   • to take an action in debt i.e. sue Gino for the arrears. This is unlikely as he cannot pay the mortgage instalments;
   • to foreclose, to transfer the whole property from Gino to the Bank. This remedy is very rare.
Scenario 3

1. Harriet should seek to obtain Absolute Freehold title which is equivalent to fee simple absolute in possession. This is the best class of title. It would have been thoroughly checked on first registration and the Land Registrar would have been completely satisfied with the title. The registered proprietor is then only bound by entries on the register and interests which override.

2. Jo might have some profits a prendre. A profit is an intangible right. It is a right to enter on to another’s land and take part of its produce or soil. Profits include shooting rights, and rights to collect wood or dig for peat. To check whether any such right is binding on her, Harriet should check the charges register of the land registry entries for her title. If the profit is shown there, it will be binding.

3. This question raises the issue of enforcement of covenants. When Kevin agreed to Harriet’s conditions, he covenanted with her. For Harriet to enforce Kevin’s agreement directly against Leo, she must show that the burden of the covenant has passed to Leo from Kevin.

The rule in Tulk v Moxhay recognises that a restrictive covenant is an equitable property right the burden of which can pass with the land. The rule states the principles for a purchaser to be bound by a covenant.
- The covenant must be negative in nature (i.e. restrictive);
- It must be intended that the burden of the covenant will pass with the land (if not actually stated in the covenant, s.79 Law of Property Act 1925 will imply this);
- There must be two pieces of land one which is dominant and the other servient. The covenant must benefit the dominant land.
- The purchaser must have notice of the covenant. This is done through registration against the burdened land. In registered land it must be protected by a notice on the register at the Land Registry.

Applying these rules to Harriet’s situation:
- There are two covenants: to build houses only and not more than ten, and to use any buildings for residential purposes. The covenants are negative as they restrain what can be done on the land sold;
- If the transfer to Kevin did not expressly state the intention for the burden to pass, this would be implied by s.79 LPA 1925;
- The wording of the agreement in the transfer showed an intention to benefit Harriet’s land (the dominant land);
- The transfer to Kevin would have been registered at the time of Kevin’s purchase and the covenant contained in it noted against his land

So the burden has passed to Leo and the covenant can be enforced directly against him if he breaches it.
4. Under s.1 Law of Property (Miscellaneous Provisions) Act 1989 to be a deed the document must:
   • be in writing
   • make clear on the face of it that it is intended to be a deed, and
   • be validly executed.

   Valid execution requires that the deed is signed by the party making it, in the presence of a witness (i.e. attested) and is delivered to the other party in a way which shows the intention to be bound.

5. (a) An endowment mortgage is where monthly instalments pay off interest only. An additional security such as an insurance policy is also taken out (for which premiums are paid). At the end of the mortgage period the additional security should mature to pay off the capital sum borrowed. A repayment mortgage involved regular payments of both capital and interest. At the end of the mortgage period the whole capital should have been paid off. There is also the possibility of a pension mortgage, where the funds in a pension being saved for retirement are linked to the mortgage.

   (b) A mortgage taken out over Harriet’s property would be shown in the charges register in her Land Registry entries.