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 2015 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

The requirements that must be met for a lease to be legal will be set out first. The circumstances in which equity will be prepared to enforce an agreement for a lease will then be examined. It will then be possible to compare the differences between legal and equitable leases and determine whether an agreement for a lease is as good as a legal lease.

S.1(1) of the Law of Property Act 1925 (‘LPA 1925’) recognises a ‘term of years’ as one of the two estates capable of existing at law. To be legal a lease must fall within the statutory definition of a term of years as set out in s.205 (xxvii) LPA 1925. While a lease must be of a ‘fixed and ascertainable maximum duration’, unlike a fee simple, a term of years does not need to take effect in possession. It should be noted, however, that reversionary leases that commence more than 21 years in the future will be void on account of s.149 LPA 1925 and that leases that are determinable with life or lives or on the determination of life interests are also specifically excluded by s.205 (xxvii).

In addition a legal lease must be created in accordance with formalities. On account of s.52 (1) LPA 1925 a lease must be created by deed if it is to take effect as a legal estate. The requirements of a deed are set out in S.1 of the Law of Property (Miscellaneous Provisions) Act 1989 (‘LP(MP)A 1989’). By virtue of s.1(2) LP(MP)A 1989 any instrument must make it clear on its face that it is a deed and the instrument must also be validly executed in accordance with the provisions of s.1(3) LP(MP)A 1989, that is it will have to be signed in the presence of witnesses and delivered.
Some leases are excluded from the operation of s.52(1) LPA 1925. The combined effect of s.52(2)(d) & 54(2) LPA 1925 is that a legal lease of less than three years may be created by parol but only if the lease takes effect in possession and is ‘at the best rent which can reasonably be obtained’. In Fitzkriston LLP v Panayi (2008) the court equated best rent with a market rent. In Fitzkriston it was found that a payment of £4000 was not the best rent obtainable for a property with an estimated annual letting value of £12,000.

While a failure to observe the required formalities will result in the lease being unenforceable at law, in certain circumstances a contract to create a lease may be enforceable in equity. In Walsh v Lonsdale (1882), for example, a tenant went into possession following an agreement but before a deed granting the lease was executed. When a dispute later arose as to terms, the court rejected the tenant’s assertion that he occupied on the basis of a common law periodic tenancy and found instead 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 will regard the lease as being granted, whether or not the tenant seeks relief from a court. Since the coming into force of the LP(MP)A 1989 any agreement must satisfy s.2 of the LP(MP)A 1989 which requires contracts for the sale of land to be in writing.

Between the parties, there will be very little difference whether a tenant occupies by virtue of a legal or an equitable lease. Any obligations will be enforceable against the other by virtue of privity of contract. Further, the statutory regimes that regulate business and residential tenancies apply to equitable as well as to legal leases. It should be noted, however, that a claimant seeking to enforce an agreement in equity will first have to satisfy the equitable maxims.

Against a third party there are significant differences between a legal and an equitable lease. A legal lease, is a right in rem and as such will be good against the world. Legal leases of more than seven years need to be registered to be protected but leases of seven years or less constitute an overriding interest for the purposes of the Land Registration Act 2002. By contrast, an equitable lease should be registered by notice to be protected and will not constitute an overriding interest in its own right. Further an equitable lease does not fall within the definition of ‘conveyance’ for the purposes of s. 62 LPA 1925.

In summary, for the reasons given, an agreement for a legal lease will not always be as good as a legal lease.
Question 2

The different types of tenancy recognised by the Rent Act 1977 (‘RA’) and the Housing Act 1988 (‘HA’) will be set out first. The qualifying requirements of each Act will then be compared before the different ways in which the two Acts regulate possession and the payment of rent are assessed. It should then be possible to determine the extent to which the Housing Act 1988 (‘HA’) marks a departure from the Rent Act 1977.

The RA applies to tenancies granted before the 15 January 1989 while the HA applies to tenancies granted on or after the 15 January 1989. Both acts apply to short term residential leases so long as the tenancies in question meet the specific qualifying requirements set out in the relevant Act.

Although the HA is largely modelled on the RA, the two acts recognise different types of tenancy. Under the RA a tenant will hold a protected tenancy for the duration of the initial contractual period. On termination of the contractual period, a tenant will acquire a statutory tenancy so long as certain conditions are met. A consequence of the RA approach is that the qualifying requirements in s.1 RA need to be met at the start of the tenancy while the requirements of s.2 need to be met on termination of the contractual term. Under the HA all tenancies are classified as assured. In contrast to the RA, the qualifying conditions for assured tenancies, set out in s.1, must be met from the start of the tenancy and must be satisfied throughout the term. Further, in the case of periodic leases, termination of the contractual lease does not give rise to a statutory tenancy at all but rather, the original lease continues with the addition of the terms set out in the Act. It should also be noted that the HA makes provision for assured shorthold tenancies, a sub-species of the assured tenancy which can be terminated by two months notice in writing. The qualifying requirements of assured and assured shorthold tenancies are the same. Whether a tenant holds as a fully assured or a assured shorthold tenant depend upon whether certain notice requirements are met. These notice requirements differ according the whether the tenancy was passed before or after the coming into force of the Housing Act 1996.

While the two acts recognise different species of tenancy, taken together the qualifying conditions are very similar. For example, both Acts will only apply if there is a ‘tenancy’, if that tenancy is a tenancy of a ‘dwelling house’ and if the premises were ‘let as separate dwelling’. The interpretation of these terms is left for the courts but has proved identical in relation to both Acts. Nevertheless, there are some important differences in relation to the qualifying requirements of the two Acts. For example, while both Acts impose a residency requirement, it is expressed differently. Under the RA premises must be occupied ‘as a residence’ while under the HA occupation must be as the tenants ‘only or principal home.’ The HA formulation was intended to be and has proved to be more restrictive. Under the RA a tenant may occupy more than one home as a residence and, in circumstances where a tenant is not in immediate occupation, it is possible for occupation to be preserved so long as a tenant can establish an intention to return. By contrast, under the HA, only one home may be occupied as a principal home and a tenancy will only qualify for protection ‘as long as’ the premises are occupied.

Both the RA and the HA limit the grounds on which a landlord may seek possession. The RA 77 defines them as ‘cases’ while the HA calls them ‘grounds’, but this difference is simply one of terminology. Further, both Acts differentiate between grounds that are mandatory and grounds that are discretionary and
grant the courts identical powers in relation to each category. For example, s.98(3) RA and s.7(3) HA 88 both require a court to grant an order for possession in the event that a landlord proves a mandatory ground. Similarly, s.98(1) RA and s.7(4) HA both leave it to a court to determine whether possession should be granted if a discretionary ground has been established. Although the wording of s.98(1) RA and s.7(4) HA is slightly different, under both acts the granting of an order for possession is conditional on whether the court considers it ‘reasonable’ to grant such an order. Authority as to the definition of reasonableness is the same for the HA as for the RA.

While the substantive grounds set out in Schedule 15 of the RA and Schedule 2 of the HA reflect a different style of drafting, many of the grounds are similar in scope and effect. For example and without attempting to provide an exhaustive list, both Acts allow a landlord to recover possession on the basis that the landlord is a returning owner / occupier, or the property is required by a mortgagee or that the tenant is in breach of some obligation under the tenancy. Further, while Ground 9 of HA 88, which allows a landlord to recover possession in the event that suitable alternative accommodation is available for the tenant, is not listed in the schedules to the RA, s.99 RA achieves a similar effect. Nevertheless, there are some significant differences as to the grounds available under the two Acts. In relation to the payment of rent, for example, there is one ground available to a landlord under the RA 77 while under the HA there are three. Ground 10 of the HA mirrors the rental provisions of Case 1 of the RA. Like its counterpart Ground 10 remains to be discretionary and authority in relation to Case 1 will apply to Ground 10. Grounds 8 and 11 of the HA 88, however, have no equivalents in the RA 88. Ground 11 allows a landlord to recover possession where a tenant has ‘persistently delayed paying rent’ while ground 8 of the HA allows a landlord to recover possession where, typically, two months rent remains unpaid. Significantly ground 8 is a mandatory ground for possession which means that the HA has removed some of the Court’s discretion in relation to matter of rent.

In relation to the regulation of rent, the RA provides for the registration of a “fair rent” against a given dwelling. By virtue of ss.44 & 45 RA the registered rent will be the “maximum rent that a landlord can recover against the property”. While the RA does not define a fair rent and the matter is left to the courts, s.70 of the Act sets out the factors that should be taken into and left out of account. By contrast the does not make provision for a fair rent and its provisions in relation to rent are far narrower. In relation to fixed term tenancies, rent review is governed by the provisions of the lease. In relation to periodic tenancies, a landlord can increase rent using the notice procedure set out in s.13 HA 88, subject to any covenant in the lease to the contrary. As with the RA, determination of rent under s.13(4) will have to take into account the statutory regards and disregards but the HA provides for a ‘market rent’ as opposed to a ‘fair rent’.

Thus, as has been seen, the HA is modelled on the RA and many of the provisions are similar. Nevertheless the HA is narrower in its application, has widened the grounds of possession in relation to the non-payment of rent and has abandoned the principle of a ‘fair rent’. Further, by the introduction of the assured shorthold tenancy, the HA has significant reduced the security of tenure of many residential tenants. In these ways the HA marks a significant departure for the principles encapsulated in the RA.
Question 3

(a)

English contract law has long subscribed to the principle of freedom of contract and to impose obligations in relation to repair would be to interfere with the nature of the bargain struck between landlord and tenant. As such the common law is reluctant to impose obligations to repair.

Sleather v. Lambeth BC (1960) is authority for the proposition that the common law will not impose a general obligation on a landlord to ‘keep the premises in repair’. Nevertheless this statement requires qualification. Firstly, the common law will imply a condition that a landlord will maintain common parts of a block as seen in Liverpool City Council v Irwin (1977). This exception is very much an expedient as the relationships created in such cases, to adopt the words of Lord Wilberforce ‘demand, of their nature, some contractual obligations on the landlord’. Secondly, in the case of furnished dwellings, the common law will imply an undertaking on the part of the landlord that the premises are fit for human habitation on the basis of the rule in Smith v Marrable (1843). Nevertheless the obligation is limited in scope. It will only apply where the premises are unfit from the outset and will not extend to circumstances where the property subsequently becomes unfit, as demonstrated by Robbins v Jones (1863).

While Warren v Keen (1954) is authority for the proposition that ‘a tenant owes no duty to the landlord to keep the premises in repair’ a tenant will be required to occupy a property in a tenant-like manner. As such a tenant ‘must do the little jobs about the place that a reasonable tenant would do’. He must not ‘wilfully or negligently’ damage the property and if the property is so damaged the tenant will need to repair it. Nevertheless, this does not amount to a positive obligation to repair. If a house falls into disrepair for any a reason ‘not caused’ by the tenant, including fair wear and tear or lapse of time, the tenant will not be obliged to repair. As was explained in Regis Property Co. Ltd. v Dudley (1959) the obligation is related to the ‘user of the premises’ and if such user is appropriate, the question of repair should never arise.

While the common law may be reluctant to impose obligations to repair it does seek to provide a framework when those obligations are freely undertaken. Many express covenants turn on the common law’s definition of repair and in the absence of any contrary provision it will be the common law that dictates the standard of any repair. It should also be noted that the common law definition of repair is central to the statutory obligation imposed on a landlord by the Landlord and Tenant Act 1985.

The common law regards repair as ‘making good damage’ and draws a distinction between repairs and renewals. A party who has undertaken to repair will not be required to renew. The courts adopt the three practical tests set out in McDougall v Easington District Council (1989) to determine whether work is a repair or a renewal in a given case. While the law around the three tests is reasonably well settled, there remain areas of controversy, not least the fact that when disrepair stems from an inherent defect a party may not be obliged to repair as seen in Quick v Taff Ely Borough Council (1986) and Post Office v Aquarius Properties Ltd. (1987).
There are two main statutory obligations to repair, both of which are set out in the Landlord and Tenant Act 1985. The provisions only apply to residential tenancies and there are no equivalent provisions for commercial property.

S.8 of the Landlord and Tenant Act 1985 imposes an obligation of a landlord to maintain a dwelling as fit for human habitation for the duration of the tenancy. While, to use the words of the Law Commission, the provision has ‘much to recommend it’ the rental limits have not kept in line with inflation and the provision only applies to houses let at very low rents.

S.11 of the Landlord and Tenant Act 1985 imposes a series of related obligations on a landlord. s.11(1)(a) requires a landlord to ‘keep in repair’ the ‘structure and exterior of the dwelling house’, while the combined effect of s.11(1)(b) & s.11(1)(c) is that a landlord must ‘keep in repair and proper working order’ the ‘installations’ in the dwelling house that supply services, sanitation and heating.

The obligations are generally self explanatory. For example, the obligation to ‘keep in repair’ is a well recognised formulation and ensures that the obligation will rest on the landlord for the duration of the term. Further, ‘installations’ are defined in the Act. The question as to whether a given repair relates to the ‘structure and exterior’ has led to some seemingly contradictory outcomes, for example Irvine v. Moran (1992) and Staves v. Leeds City Council (1992) but these cases serve as a reminder that the issue will always be a matter of fact and will always take into account the particular circumstances of an individual case.

By virtue of s.13 the provisions in s.11 will apply to dwelling houses let for a term of less than seven years. S.12 forbids contracting out of the obligations although under s.12(2) a court may allow a provision excluding or modifying the obligation contained in s.11 but only if the court considers it ‘reasonable to do so, having regard to all the circumstances of the case’.
Question 4

The scope of the Protection from Eviction Act 1977 must first be set out. It will then be possible to consider the provisions in the Act in order to determine its effectiveness.

The Protection from Eviction Act 1977 (‘PEA 77’) extends its protection to ‘residential occupiers’. By virtue of s.1 PEA 77, a residential occupier is a person who occupies the premises ‘as a residence’. The definition of residence is the same as that for the Rent Act 1977. As the PEA 77 applies whenever occupation is ‘under a contract or by virtue of any enactment or rule of law’ it will apply to tenants and licensees alike. On account of s.3(1) it will also apply to tenants holding on after their term. Nevertheless, some agreements are automatically excluded by s.3A, which was inserted by the Housing Act 1988. By way of example, the Act will not apply where accommodation is shared with the landlord or a member of the landlord’s family or where no rent was payable or where the landlord is one the excluded landlords set out in the s.3A(8).

S.1 of the PEA 77 seeks to protect the right of residential occupiers by offering a deterrent in the form of three criminal offences. These will be examined in turn.

S.1(2) sets out the offence of unlawful deprivation of occupation. It can be committed by ‘any person’ and will occur where a person ‘unlawfully deprives’ or attempts to unlawfully deprive a residential occupier of his occupation. Any deprivation of occupation will be unlawful unless it is by court order by virtue of s.3 PEA 1977. The circumstances must have what was termed in R v Yuthiwattana ‘the character of an eviction’ and an immediate failure to replace a lost key, for example, will not suffice. It is a defence for an accused to show that he believed that the occupier had ‘ceased to reside’ in the premises but the accused will be required to prove that he had ‘reasonable cause’ to hold such a belief.

The PEA 1977 takes harassment to mean ‘acts calculated to interfere with the peace or comfort’ of the occupier or members of his family. Acts specifically include the withholding or withdrawal of services. The PEA 1977 set outs two offences of harassment. S.1(3) can be committed by ‘any person’ and the acts complained of must be committed with the specific intent to cause the occupier to give up occupation or ‘refrain from exercising any right’ or remedy in relation to the premises. S.1(3A), which was inserted by the Housing Act 1988, applies in the more limited circumstances that it is the landlord or his agent who is undertaking the prohibited acts. Specific intent to evict in not required for s.1(3A) and an offence with be committed if there was ‘reasonable cause to believe’ that the acts may cause the occupier to leave.

Under s.1(4) the penalties for all three offences include a term if up to two years in prison, a fine or both. In R v Brennan and Brennan (1979) while it was said that ‘there can be few crimes which are more serious than depriving a man of a roof over his head’ a sentence of 12 months imprisonment was reduced to three as it did not involve actual violence. Where violence was involved, a term of 16 months was upheld in R v Khan (Jahinger) (2001).

If a tenant is forced to give up occupation due to harassment they may have an action under the statutory tort of unlawful eviction set out in in ss.27 and 28 of the Housing Act 1988. Damages are 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.

The criminal provisions of the PEA 77 serve as a deterrent. Unfortunately a tenant is unable to initiate proceedings in its own name and is therefore reliant on other authorities to either prosecute or enforce the provisions of the Act. In answers given to Parliament in 2012 it emerged that only 38 prosecutions were brought in 2011. Further, it was accepted by the Communities and Local Government Select Committee in June 2013 that “many local authorities” are “under-using their powers of prosecution under the PEA”. Further, on the basis of the decision in Cowan v Chief Constable of Avon and Somerset [2001], a tenant is unable to compel the Police to act in the case of an unlawful eviction if it is the policy of the local force to not become involved in disputes between landlord and tenant.

The remaining provisions of the PEA 77 seek to protect the right of residential occupiers by restricting and regulating the use of some of the common law remedies and the introduction of baseline notice requirements. For example, S.2 PEA 77 prevents a landlord from using the self help remedy of peaceable re-entry if ‘any person is lawfully residing in the premises’. The term ‘any person’ extends beyond the immediate tenant and can include, for example, licensees of the tenant or lawful sub tenants. Further, S.3 PEA 77 makes it unlawful to obtain possession of residential premises other than by court order. As has been seen, this is also important for the purposes of establishing an offence under s.1. S.5 regulates notices to quit. S.5(1)(a) requires that all notices to quit should be in writing and s.5(1)(b) requires that as a minimum, four weeks notice must be given.

In summary, while the PEA is broad in scope and it provides a deterrent to law abiding landlords, there remains some question as to the extent to which its provisions are actually enforced in practice.
SECTION B

Question 1

To advise Alison it is necessary to examine the statutory framework that regulates qualified covenants in relation to assignment to determine whether Alison will be able to refuse her consent.

As the covenant in the lease regulating assignment is expressed to be subject to the landlord’s consent, s.19(1) of the Landlord and Tenant Act 1927 will imply the proviso that Alison will not ‘unreasonably’ withhold such consent. Alison will be required to demonstrate that he has reasonable grounds for any refusal. The Act itself does not seek to define reasonableness, and the issue will be a matter for the court. The starting point will be the six principles of general application set out by Balcombe, LJ in International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd (1986). In view of these principles, Alison should note that she will only be required to show that ‘a reasonable man would have refused consent’ and that, on the current facts, she will be entitled to consider her own interests above those of Terry. Nevertheless, Alison will not be able to rely on grounds ‘which have nothing to do with the relationship of landlord and tenant’. In Bromley Park Garden Estates v Moss (1982) it was explained that consent will only be seen to be reasonably withheld when an assignment is judged to be detrimental to the landlord’s interests ‘under the lease’. For this reason, loss of standing with the local residents and Alison’s moral reservations in relation to Presto’s financial backers are unlikely to be regarded as reasonable grounds for refusal.

In relation to the financial standing of Presto, lack of financial strength can amount to a reasonable ground for refusal. Although a ‘generally accepted test’ that turned on the pre-tax profits of the assignee was proposed in British Bakeries v Micheal Tesler (1986) it was disapproved in Footware Corporation v Amplight Properties (2001) and each case will turn on its individual facts. Admittedly Presto is newly formed, but the facts that it is a public limited company and has ‘considerable financial muscle’ are relevant considerations for current purposes. Before deciding whether to refuse consent on this ground, Alison should attempt to gain as much information from Terry as is necessary to assist him in making any assessment. A failure by Terry to furnish Alison with satisfactory information will strengthen the case for refusal. Alison should be warned, however, not to acquiesce in this matter as failure by him to ask the appropriate questions at the relevant time will prejudice his position in relation to s.1(3) of the Landlord and Tenant Act 1988 (‘LTA 1988’) for the reasons given by Sir Richard Scott, VC, in Norwich Union Life Insurance Society v Shopmore Ltd (1999). The 1988 Act applies to written requests for consent and will be discussed shortly.

It should also be noted that, as the lease was signed after the coming into force of the Landlord and Tenant (Covenants) Act 1996 (‘LT(C)A’) and as the tenancy will amount to a new tenancy for the purposes of the Act, Alison will be able to require Terry to enter an authorised guarantee agreement as a condition to the granting of consent if such an agreement is reasonable by virtue of s.16(2) LT(C)A. This will give Alison a right to recover rent from Terry for the remainder in the event that Presto should fail as a commercial enterprise.

S.1(3) of the Landlord and Tenant Act 1988 (‘LTA 88’) requires a landlord to respond to any written request to assign within a reasonable time. Alison will be
obliged to set out reasons for her refusal in writing. The issue as to what constitutes a reasonable time is a matter for the court and will take into account the factual nexus of a case. In relation to the stated grounds, it was accepted in Footware Corp. Ltd v Amplight Properties Ltd (1998), that a landlord will not later be able to rely on grounds that were not set out in the refusal.

On the basis of Treloar v Bigge (1874), failure by Alison to comply with s.1(3) LTA 88 will entitle Terry to proceed with the transaction without consent. In practice, however, Presto is unlikely to be willing to run the risk associated with such a strategy and Alison would be more likely to face a claim for damages for breach of statutory duty by virtue of s.4 LTA 88. The duty under s.1(3) will only arise if Terry first makes an application for consent to Alison. While Terry did send an email to Alison, this is unlikely to be regarded as a valid application. S.196 of the Law of Property Act 1925 requires the notice to be either physically delivered or sent by recorded delivery and in E.ON UK plc v Gilesports Limited (2012) it was accepted that, where a lease that does not expressly permit the use of email as a method of service, an email will not satisfy the requirements of s.196. No such express permission appears to have been given in the current case.

In summary, Alison does have the right to refuse Terry to assign the lease but only if she can demonstrate reasonable grounds for refusal. On the current facts, the only reasonable ground for refusal is likely to be Presto’s financial strength but more information needs to be gathered before a final determination can be made in this regard. Alison has yet to receive a written request but should be mindful of the need to act expeditiously should such a request be served.
Question 2

(a)

As the tenancy is residential and the lease was signed in 1994, the tenancy will be regulated by the Housing Act 1988 (‘HA 1988’) if the requirements in s.1 HA 1988 are met. On the facts, the requirements in s.1 appear to be satisfied. There is no dispute that Natasha and Anatoly occupy by virtue of a tenancy, the property amounts to a ‘dwelling cottage’ within the meaning of the Act and the cottage was let under a single lease so was, therefore, let ‘as a separate dwelling’. S.1 also requires the property to be occupied by the tenants and occupation must be as the tenants’ only or principal home. While Natasha and Anatoly only live in the cottage for nine months of the year, the issue of whether premises are occupied is always a question of degree and ordinary periods of absence will be ignored. The fact that the children remain in the cottage when they are away further supports the view that Natasha and Anatoly remain in occupation.

As the tenancy is regulated by the HA 1988, Leonid will only be able to gain possession if he is able to establish one of the recognised grounds for possession set out in the Act. The grounds available will depend upon whether Natasha and Anatoly occupy by virtue of an assured or an assured shorthold tenancy. It would be more favourable to Leonid to demonstrate that Natasha and Anatoly occupy as assured shorthold tenants. He will then be able to terminate the tenancy by giving two months in writing by virtue of s.20 HA 1988 and he may be able to use the accelerated possession procedure. As the lease was signed in 1994, however, Natasha and Anatoly will only hold as assured shorthold tenants if Leonid can demonstrate that notice was served on them in accordance with s.20 HA 1988 at the start of the tenancy. From the facts, it does not appear that a s.20 notice was served and it is therefore presumed that Natasha and Anatoly hold as assured tenants.

(b)

Before examining the potential grounds for possession available to Leonid, it should be noted that grounds for possession are categorised as being either mandatory or discretionary. In the case of a mandatory ground, s.7(3) HA 1988 requires a court to make an order for possession and a court can typically only delay such an order for two weeks under s.89 Housing Act 1980. By contrast, if a discretionary ground is established, s.7(4) HA 1988 only requires a court to grant a possession order if the court ‘considers it reasonable to do so’.

Ground 1 is a mandatory ground and allows a landlord to recover possession if he requires the premises for use as his only or principal home. Before Leonid can rely on this ground, he will have to demonstrate that written notice was served on Natasha and Anatoly ‘not later than the beginning of the tenancy’. The notice should have informed Natasha and Anatoly that Leonid might seek possession under Ground 1. A court may dispense with the notice requirement but will only do so if it is ‘just or equitable’ to do so. In Boyle v Verrall (1996) the court exercised their discretion in favour of a landlord but in Boyle it was accepted that the landlord had unintentionally created an assured tenancy and that the landlord had always made it clear that possession might be required under Ground 1. In relation to Leonid’s case it is not possible to give a decided opinion on the available facts. If Leonid can overcome the notice requirements Leonid will then only need to demonstrate that he intends to use the cottage as his
home and that his intention is bona fide. This appears consistent with the agreed facts.

Leonid will be able to acquire possession under discretionary Ground 9 if he is able to demonstrate that the flat amounts to suitable alternative accommodation. To be suitable, accommodation must be of a ‘similar security of tenure’ but it must also be ‘reasonably suitable to the means and needs of the tenant and his family’. Relevant considerations include the ‘extent and character’ of the premises and ‘proximity to place of work’. In relation to extent and character, the fact that the flat is larger and grander than the cottage suggests that the flat will amount to suitable alternative accommodation. While the flat does not have a private garden and has a restriction on pets, in Hill v Rochard (1983), property was found to be a suitable alternative even though it lacked paddocks and outbuildings for animals. In relation to proximity to work in Ywebright Properties Ltd v Stone & Others (1980) accommodation offered in south east London was not suitable for a tenant who lived and worked in south west London. Nevertheless, the fact that the flat is within five miles of the cottage suggests Ywebright could be distinguished on the facts.

To acquire possession Leonid will first have to serve notice in accordance with s.8 HA 1988. The notice will need to set out the grounds on which Leonid intends to rely and the particulars of each ground. The notice must also set out the date on which proceedings can begin. In relation to Grounds 1 and 9, proceedings can begin no earlier than two months from the date of service of the s.8 notice.

In summary, on the available facts Natasha and Anatoly occupy by virtue of an assured tenancy under the HA 1988 and Leonid will only be entitled to possession if he can establish one of the grounds for possession recognised by the Act. Leonid has a reasonable chance of establishing Grounds 1 and 9, although in both cases Leonid will be reliant on the court exercising its discretion in his favour. Before commencing proceedings Leonid should serve notice in accordance with s.8, the details of which have already been set out.
Question 3

To advise Azure Computer Systems plc (‘Azure’) the three occupiers will be examined in turn. In all three cases on first sight, occupation appears to be for business use so it will be necessary to determine whether the agreements fall within the scope of the Landlord and Tenant Act 1954 (‘LTA 1954’). It should be noted from the outset that for Act to apply the requirements set out in s.23 LTA 1954 must be met.

In relation to the ground floor and car park, the main issue appears to be whether Food Exchange (‘Exchange’) occupies under a tenancy or by licence. The LTA 1954 will only apply if there is a tenancy. On the facts, it appears that two separate agreements were signed. It has been presumed that one relates to the ground floor and the other relates to the car park and that both agreements were in the form of a deed as set out in s.1 of the Law of Property Act (Miscellaneous Provisions) Act 1989.

S.23 LTA 1954 does not define the term tenancy and imports the statutory definition set out in s.205 Law of Property Act 1925. To amount to a tenancy, any agreement must be of a fixed and ascertainable maximum duration, the duration of the term must be one day shorter than the grantor’s estate and exclusive possession must have been granted. In relation to the occupation of the ground floor, these requirements appear to have been met and it appears from the facts that Exchange occupies the ground floor by virtue of a lease. In relation to the car park, however, there is some question as to whether exclusive possession was granted. Exclusive possession is a legal issue and to adopt the wording of Lord Templeman in Street v Mountford (1985), will take into account the ‘detailed rights and obligations contained in the agreement’. For example in Dresden Estates v Collinson (1987) the right of a grantor to move the occupier to other premises was regarded as inconsistent with a grant of exclusive possession. To turn to the current facts, it was held in National Car Parks Ltd v Trinity Development Co (Banbury) Ltd (2001) that an occupier who agreed to keep 40 parking spaces free for the owner of land was a licensee rather than a tenant. Nevertheless in Trinity the occupier had also undertaken ‘not to impede’ the ‘exercise of rights of possession’ by the owner while Exchange does not appear to have given such an undertaking. On balance, it is more likely than not that Exchange occupy the car park on the basis of a lease but the reservations expressed should be noted and should be taken into account in pleadings.

On the presumption that both of the premises are occupied under a tenancy, both tenancies are likely to be regulated by the LTA 1954 as they meet the other requirements of s.23. Both the ground floor and the car park are capable of amounting to premises within the meaning of the Act as premises includes ‘buildings or parts of buildings’ and also land which has no buildings upon, such as a training ground in the case of Brace v Read (1963). The requirement that occupation must be for business purposes is also likely to be satisfied on the facts. While the exact use of the property has not been disclosed, the fact that Exchange is an incorporated body means that Exchange will only need to demonstrate that they are engaged in some ‘activity’ on the premises.

In relation to the first floor, the agreement with Dr Martin Butchell (‘Martin’) meets the requirements of a tenancy. Taking into account s.23 LTA 1925, Martin is an individual, so occupation will still be seen to be for business use so long as Martin is engaged in any activity related to his ‘trade, profession or employment’. The fact that Azure allowed Martin to live in part of the premises is unlikely to
remove the protection offered by the LTA 1954. As demonstrated by the case of Cheryl Investments Ltd v Saldanha (1978), the Act will continue to apply so long as business use remains a ‘significant purpose’ of Martin’s occupation. If business use has ceased, the LTA 1954 will no longer apply and it is possible that Martin could occupy as a residential tenant under the Housing Act 1988. Nevertheless for the Housing Act 1988 to apply, on the reasoning of Wolfe v Hogan (1949) Martin would be required to demonstrate not only that the permission Azure granted him amounted to a contractual variation but also that the permission was granted by deed. This does not appear to be the case on the facts.

In relation to the agreement with Jimmy Green, the fact that the grant was only until such time as Azure ‘might find a suitable long term tenant’ suggests that the lease may not have been granted for a fixed and ascertainable maximum duration. For example in Prudential v London Residual Body (1992) land granted until such time as the landlord wanted it back failed to qualify as a lease. While, in the current case, there may be grounds to suggest a court may imply a periodic tenancy, it is not entirely clear that Jimmy Green will be able to demonstrate that he occupies for business use. As he is an individual he will need to show that he carries out activities connected to his ‘trade, profession or employment’ on the premises and the fact that he is an ‘enthusiast’ suggests that this is not the case.

In summary, Exchange appear to occupy the ground floor and car park by virtue of two separate leases, although in relation to the car park there are grounds for Azure to allege Exchange was only granted a licence. Both the leases will be subject to the provisions of the LTA 1954. Martin is likely to be regarded as holding under a lease and the agreement is likely to be subject the LTA 1954. It appears questionable as to whether Jimmy Green was granted a lease and the agreement is unlikely to be subject to the LTA 1954.
Question 4

To advise Alistair it is necessary to explain the procedures that Negative Image ('NI') must adopt if it wishes to forfeit the lease in relation to each of the breaches. Alistair will also be advised as to the procedure he should follow to resist NI’s action and / or obtain relief.

It was said in Duppa v Mayo (1669) that the common law 'leans against' forfeiture and it will only allow a landlord to forfeit if a right is reserved in the lease. The fact that the lease with NI contains a ‘proviso for re-entry on breach of covenant’ is sufficient to meet this requirement but NI will only be able to forfeit on evidence of breach. As the warehouse is not being used for residential purposes, NI may choose whether to exercise its right of forfeiture by either peaceable re-entry or by an action for possession. Irrespective of the method NI elects, however, NI will first be required to follow certain procedural steps if forfeiture is to be considered lawful. In the event that forfeiture is lawful, the courts have powers to grant relief from forfeiture. In the event that forfeiture by re-entry is unlawful, Alistair will have a right to recover damages for trespass. The steps NI must follow will be dependent upon whether NI intends to forfeit for non-payment of rent or for breach of the alienation covenant.

In relation to non-payment of rent, NI will first be required to serve a formal demand for the rent due, unless the circumstances prescribed by s.210 of the Common Law Procedure Act 1852 apply. The circumstances in s.210 do not appear to have been met on the current facts as less than six months rent is outstanding. Unless Alistair has waived his right to a formal demand in the lease, NI will be required to serve a formal demand. It appears that NI is refusing to accept Alistair’s tender of the rent. It is likely that NI is refusing to accept the rent as it is mindful of waiver in relation to what it regards as breach of the alienation covenant. As demonstrated by Seegal v Thoseby (1963), any demand or acceptance of rent will constitute waiver of the right to forfeit in relation to all breaches that the landlord is aware of at the time. Alistair should be reassured that if he is able to pay the outstanding rent he is likely to be granted relief from forfeiture by s.212 of the Common Law Procedure Act 1852 or ss.138 & 139 of the County Courts Act 1984. Alistair may apply for this ‘automatic’ relief either before trial or within six months of any judgment granting NI possession. Alistair will be entitled to relief so long as he pays the rent and any expenses incurred by the landlord. This is on the assumption that there are no reasons to suggest that it would not be ‘just and equitable to grant relief’. By virtue of s.168(9A) of the County Courts Act 1984 if Alistair fails to apply within six months he will be 'barred from all relief'. An application for relief will typically be by counterclaim but Alistair does have the right to commence his own proceedings.

In relation to the alleged breach of the alienation covenant, it should first be noted that there is some question as to whether NI have a substantive claim for breach. NI appears to be alleging that Linda’s occupation of one of the rooms in the warehouse amounts to an unlawful sub-letting but Alistair will only be liable if Linda was granted a lease. On the facts, it is not entirely clear whether Linda has been granted exclusive possession. Even if exclusive possession was granted, it is likely that Alistair will be able to demonstrate that the agreement falls within the exceptional categories set out in Facchini v Bryson (1952) on the basis that there was no intention to create legal relations. The facts of the current case are not dissimilar from Cobb v Lane (1952) and the fact that Alistair would not accept ‘money from his little sister’ supports the assertion that the agreement was a family arrangement.
S.146 of the Law of Property Act 1925 ('LPA 1925') will prevent NI from being able to enforce its right of forfeiture against Alistair unless it first serves notice in accordance with the section. This will apply irrespective of whether NI chooses to enforce forfeiture 'by action or otherwise', that is by obtaining an order for possession or attempting to effect peaceable re-entry. NI will be required to set out the breach complained of in the notice and require the Alistair to make compensation for the breach. In circumstances where a breach is capable of remedy, a landlord will also be required to give the tenant a reasonable time to remedy the breach. It was established in Scala House v Forbes (1974), however, that unlawful subletting and assignment are not capable of remedy for the purposes of s.146. NI will not be required to give Alistair time to remedy the breach but it must still give Alistair a reasonable time to respond.

In the unlikely event that NI are able to establish breach of the alienation covenant, Alistair may still apply for relief under s.146(2) LPA 1925. S.146(2) empowers a court to grant relief and a court may take into account 'the proceedings and conduct of the parties' and 'all the other circumstances'. Even where a breach is not capable of remedy for the purposes of s.146, a tenant may still be entitled to relief. For example, in Bon Apettito v Michael Poon (2005) the court considered a tenant’s application in relation to an unlawful subletting of the whole of a premises, although on the facts it refused to grant relief on account of the conduct of the tenant who had attempted to deliberately conceal the letting.

In summary, NI will be required to follow the steps that have been set out if forfeiture is to be lawful. If Alistair is able to pay the outstanding rent into court before trial he will be entitled to automatic relief in respect of the non-payment of rent. In relation to alleged breach of the alienation covenant, there are strong grounds to refute the allegation of breach. In the unlikely event that a breach is established, Alistair will be able to seek discretionary relief.