UNIT 9 – Land Law
SUGGESTED ANSWERS – JANUARY 2012

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 2012 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 6 Chief Examiners to standardise the format and content of suggested answers and welcomes feedback from students and tutors with regard to the ‘helpfulness’ of these 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

Ordinarily, a covenant can only be enforced against an assignee of the original covenantor where the instant owner of the dominant tenement has the benefit and the assignee has taken the burden. The benefit and burden must have passed both in law or in equity.

The benefit of a covenant will pass at law where the covenant "touches and concerns" (that is, it is not personal, but affects the mode of user or occupation of the servient tenement); where the covenantee had the legal estate of the dominant tenement and the assignee derives title therefrom; and where there was an intention that the covenant bind the land (although now see s78 LPA 1925 which deems the relevant intention unless the instrument expresses a contrary intention).

The burden of covenants does not, subject to some exceptions, run with the servient tenement’s ownership at law (Austerberry, affirmed in Rhone v Stevens).

The exceptions to this rule include circumstances where there is a commonhold development, an estate rentcharge, or where the rule of mutual benefit and burden applies. This last rule, deriving from the case of Halsall v Brizell, provides that a covenant to pay the cost of maintaining a facility on the dominant tenement binds the owner of the servient tenement where the servient tenement benefits from rights to use that facility. It is clear from Thamesmead v Allotley that the cost must relate directly to the facility. In Thamesmead, a covenant to pay for the maintenance of landscaping had insufficient nexus with the right to use estate roads for the rule to apply.
The benefit will run in equity where the covenant touches and concerns the estate and is annexed or assigned. A covenant will be deemed annexed in the absence of words to the contrary, by s78 LPA 1925. For covenants created before 1926, the covenant must be expressly annexed (by wording in the deed creating it) or assigned (by wording in the transfer from the original covenantee to the next owner of the dominant tenement).

The burden will run in equity pursuant to the rule in Tulk v Moxhay: the covenant must be restrictive in nature (the "hand in pocket" test - a test of substance not form); the covenant must "accommodate the dominant tenement", in effect "touch and concern"; the covenantee must have owned the dominant tenement at the date of the covenant's creation; and, the covenant must have been intended to run with the land, although this will be deemed to be so by s79 LPA 1925 in the absence of words to the contrary. Finally, the covenant must have been adequately protected (notice for pre-1926 covenants affecting an unregistered estate or registration as a Land Charge for later covenants; or noted on the register of a registered estate).

It may also be possible to enforce covenants indirectly where there is a chain of indemnity covenants by successive assignees of the servient tenement. The dominant tenement owner can take enforcement action against the original covenantor, who, in turn, will seek an indemnity from his or her successor and so on. There are two weaknesses inherent in chains of indemnities: first, that the chain "breaks", in that one or more assignees in the chain are dead, insolvent or undiscoverable; and secondly that the dominant tenement owner’s only remedy is damages, where it is compliance with the covenant which is sought.

It seems clear that, generally, only restrictive covenants run with the land, and, therefore, that Lindley J’s statement is true. There are exceptions, but these are limited to particular circumstances (Halsall v Brizell), precarious (chains of indemnities), or rarely used (estate rentcharges, and commonhold).

**Question 2**

(a)

There has been considerable judicial intervention so far as concerns the terms of a mortgage.

First, there must be no “oppressive or unconscionable” terms. The court made it clear in Multiservice Bookbinding Ltd v Marden that the test is not one of reasonableness. The courts look for some degree of moral reprehensibility or sharp practice. Thus in Cityland & Property (Holdings) Ltd v Dabrah, the court held that an annual interest rate equivalent to 19% to be unconscionable in circumstances where the borrower had been a tenant of the property and his landlord threatened not to renew his lease unless he bought the reversion with a loan of funds from the same landlord.

As well as its inherent jurisdiction, the courts can also “reopen an extortionate credit bargain” under powers contained in the Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006).
Secondly, there must be no clogs or fetters on the right to redeem: the mortgagor cannot be prevented, by terms in the mortgage, from satisfying the obligation and discharging the mortgage (*Santley v Wilde*). Typically an option in the mortgage for the mortgagee to acquire the estate was consider a clog (*Samuel v Jarrah Timber & Wood Paving Corporation Ltd*), although the courts now consider each case on its own facts in determining whether an option is indeed a clog (see, for instance, *Wanborough Ltd v Garmite Ltd*), and appear increasingly inclined to find that the option does not amount to a clog or fetter.

Thirdly, there must be no collateral advantages. This means that once the mortgagor’s obligations are satisfied, the estate must be as if it was never charged (*Noakes & Co Ltd v Rice*). Thus where the mortgage contains a solus type agreement which continues after the underlying loan is repaid, the solus will amount to an unenforceable collateral advantage. Even where a solus expires on redemption, it is subject to a test of reasonableness as it amounts to a restraint of trade (see, for instance, *Esso Petroleum v Harper’s Garage (Stourport) Ltd*).

The protection from “unfair” or “unconscionable” terms seems limited to extreme cases, and modern courts are increasingly reticent to view matters in complex contracts as clogs or collateral advantages.

(b)

A mortgagee has a number of options available to it to enforce its charge. The principal ones are: to sue on the covenant to repay; to repossess; to exercise a power of sale; to appoint a receiver; or to foreclose.

It is settled law that a secured lender cannot be in a worse position than an unsecured lender, and can therefore raise a simple debt action (*C&G v Johnson & Sunshine*).

The right to repossess arises as soon as the mortgage is executed (s95(4)Law of Property Act 1925). Common law intervenes, however, to provide that possession can only be claimed “bona fide” by the lender and only then for the purposes of enforcing the charge (*Quennell v Maltby*). Furthermore, where the property is residential, s36 Administration of Justice Act 1970 gives the court a wide discretion to vary or suspend any order for possession of that property (see *C&G v Norgan* which lists factors to be taken into account, principally concerning the likelihood of the mortgagor satisfying the mortgage in the future). Such an order is likely to be necessary for the repossession of residential property, given the provisions of the Protection from Eviction Act 1977.

The power of sale arises, per s101 LPA 25, where the mortgage is by deed, contains no contrary provision, and where the date for redemption has passed. The date for redemption is the earliest date on which the lender can demand repayment of the whole outstanding sum. In most institutional mortgages for the purchase of residential property, this is the date the mortgage is executed, or a few months later.

The power of sale can only be exercised if s103 is satisfied. This requires default of repayments for three months after notice has been served; or two months arrears of interest; or breach of any other covenant.

If the power is exercised, the mortgagee has a duty to take reasonable care to secure the market value of the property (*Cuckmere v Mutual Finance*) and the
proceeds are held on trust by the mortgage to be distributed in accordance with s105 LPA25.

The appointment of a receiver to manage a property can be made if, again, ss101 & 103 are satisfied.

Foreclosure means that any outstanding loan is extinguished, but that the mortgagee becomes the legal and beneficial owner of the property. As this could permit the lender to make a “windfall” if the borrower has positive equity, s91 LPA25 permits the court a discretion to order a sale in lieu of foreclosure, which it is highly likely to do if there is any “equity” in the property.

The only other bars to enforcement action are the expiry of the limitation period under the Limitation Act 1980 (generally 12 years for recovery of monies owed and secured by mortgage) and a successful plea of undue influence. In respect of undue influence, institutional lenders are increasingly aware of the steps that they must take to “avoid the taint”.

Whilst it might seem that statutory provision has enhanced the protection of mortgagors from the oppressive exercise of the mortgagee’s remedies, the reality is that the mortgagor is not protected from the mortgagee’s remedies where the mortgage is breached by the mortgagor, as the remedy will usually be granted.

**Question 3**

An express trust of land will be recognised so long as the relevant formality requirements (s53 Law of Property Act 1925): it is made in writing and signed by the settlor orsettlor. It is often the case that such trusts appear on the face of the transfer of the property to the trustees.

Where such an express trust is not found, a resulting or a constructive trust may be implied.

A presumption is raised that the people who advance the purchase money at the time of acquisition of property are entitled to a proportion of the value of that property equivalent to the proportion they paid to the purchase price (*Dyer v Dyer*). The presumption can be rebutted by evidence that the money was a gift or loan, or by express wording to the contrary (*Re Sharpe, Cowcher v Cowcher*, although see also *Bull v Bull*).

Where there has been contribution to the purchase price by both parties, the use of the resulting trust provides some remedy to both parties. The resulting trust, however, may not provide a fair division of value where the purchase price was paid wholly or mostly by one party, or where the other party has made a significant contribution to the running of the household after purchase.

The use of the constructive trust goes some way to providing a degree of fairness in such instances.

A constructive trust is imposed when it is unconscionable for the legal owner to deny the beneficial interest. According to *Lloyds Bank plc v Rosset*, the person claiming to be the beneficiary of a constructive trust must show either: an express common intention at the time of purchase that the property be owned jointly together with detriment; or a common intention implied from the circumstances, together with a contribution to “bricks & mortar”.

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Thus in *Grant v Edwards*, the express intention was manifested by the defendant’s assurance that the legal estate would be in joint names but for that it would complicate his divorce, and detriment was shown by bringing money in to the household and paying some of the bills (note that there was not direct contribution to “bricks and mortar”).

It seems that the detriment need not be great. In *Hammond v Mitchell* it amounted to demurring in the legal owner granting a charge over the property, although in the absence of her having a demonstrable interest in the property before that point, it is difficult to see how she might have prevented it.

Where there is no express common intention, the courts will look at all of the circumstances to see if such an intention can be implied. Here the claimant will have to show a direct contribution to “bricks and mortar”. In *Passee v Passee*, making payments towards the mortgage was sufficient, but, tellingly, in *Burns v Burns*, giving up work to keep the house and raise children was not.

Traditionally, the courts would imply a resulting trust where there was a contribution to the purchase price, and, where appropriate, a constructive trust where there was no such contribution at time of purchase by a beneficiary who was not a legal owner.

More recent decisions (*Oxley v Hiscock, Drake v Whipp, Midland Bank v Cooke*) have demonstrated a greater willingness by the courts to impose a constructive trust where a resulting trust could be made out, and in the landmark decision in *Stack v Dowden*, even where the claimant was a legal owner of the estate and had contributed to the purchase price.

In those cases the courts seemed to recognise that the imposition of a resulting trust was a “blunt instrument” in determining the distribution of the asset. But this can only be done where the common intention and reliance or contribution can be demonstrated. If the parties have never discussed the matter, the claimant faces the high hurdle of showing contribution: this creates problems in the cases which seem most to require justice, where one party has given up work and career to raise a family.

**Note:** This Suggested Answer was drafted before the decision of the Supreme Court in *Jones v Kernott* (2011).

**Question 4**

Proprietary estoppel is an equitable device by which a person with a legal estate in land is estopped from denying the interest of another.

The basic requirements for such claim derive from *Wilmott v Barber*, and required that:

(i) the claimant made a mistake as to their legal rights;
(ii) the claimant expended money or did some act on the faith of that mistaken belief;
(iii) the defendant was aware of the true position;
(iv) the defendant was aware of the claimant’s mistake; and
(v) the defendant encouraged the claimant in making the expenditure of money or acts of reliance.

The mistake on the part of the claimant is inevitably the claimants ignorance of
the need to comply with statutory formality requirements for the creation or transfer of the claimed interest.

Modern cases have tended to be less strict about the *Wilmott* probanda, preferring to address issues of representation or assurance; reliance; and detriment (*Thorner v Major*).

In *Greasely v Cooke*, detriment was made out by the claimant nursing the defendant’s daughter, and in *Pascoe v Turner* acting as unpaid housekeeper and mistress.

The encouragement can be active (in *Inwards v Baker* a father encouraged his son to build a house on the father’s land) or passive (in *Steed v Whitaker* the defendant mortgage stood by whilst the claimant built on land he did not own).

Reliance is presumed once the claimant has made out detriment (*Grant v Edwards*).

In the past, the remedy awarded to a successful claimant was based on the claimant’s expectation, which in turn derived from the promisor’s promise or representation. Thus in *Pascoe*, the claimant received the fee simple having been promised, "the house and everything in it". More recently, following the decision in *Jennings v Rice* the courts have recognised that the remedy should be "the minimum required to satisfy the equity". In that case, the award to the claimant reflected his detrimental acts, and not what he was promised by the promisor.

Difficulties have arisen where the facts of a proprietary estoppel claim are based on a commercial agreement between the parties which does not comply with the statutory requirements for the creation or transfer of interests in land (s2 Law of Property (Miscellaneous Provisions) Act 1989).

Such difficulties did not arise prior to the 1989 Act, as s40 of the Law or Property Act 1925 recognised such contracts without writing if evidenced by part performance (and such part performance was recognised by equity as a detrimental act).

The courts began to engage in a debate about the relationship between estoppel and constructive trusts (s2 of LP(MP)A 1989, providing an exception to formality requirements for interests arising under a constructive trust). In *Godden v Mythr Tydfil*, the court suggested that a proprietary estoppel claim would prevail, as it was “independent” of the formality requirements. However, in *Yaxley v Gotts* the court held that an estoppel would have to give way to statutory formality requirement unless a constructive trust arose (which, in that case, it did). This approach was stretched to the extreme in *Kinane v Mackie-Conteh*, where it was held that the estate was subject to a mortgage by way of constructive trust.

The House of Lords in *Cobbe v Yeomans Row*, albeit obiter, suggested that, in future, courts should be reticent to permit the use of equitable concepts such as estoppel and unconscionable conduct to evade formality requirements: such is required to provide certainty in commercial relations. It is fair to say, however, that inferior judges have been quick to distinguish *Cobbe* (see, for instance, *Herbert v Doyle*) and to permit the claim of estoppel to succeed notwithstanding the informality of the agreement.

The courts appear to be back-pedalling from the liberal approach taken in *Godden*, and, following *Cobbe*, it would appear that *Yaxley* and *Kinane* should be
decided differently. The decision in *Herbert*, though, casts some doubt on whether the courts will follow the dictum in *Cobbe*.

The status of claims of proprietary estoppel in commercial situations is still somewhat unsettled. It appears that such a claim will only succeed if allied to a claim for a constructive trust. Whether the courts are as flexible as they have been in finding such trusts in the future remains to be seen.

In non-commercial situations, the estoppel claim tends not to be dependent on facts suggesting the sort of agreement requiring formality, so these types of cases are unlikely to be affected by the decision in *Cobbe*, as was the case in the “farm and family” case of *Thorner*.

It seems clear that, especially in the non-commercial cases, proprietary estoppel remains relevant.

**SECTION B**

**Question 1**

(a)

In a 1995 lease the running of covenants is governed by the common law and the Law of Property Act 1925.

The original landlord and tenant are liable, as privy to the original contract, for breaches of their respective covenants for the full term of the lease (unless it is varied) as, even in the absence of express wording, they are deemed by s79 of the Law of Property Act 1925 to have covenanted on behalf of their successors in title. It follows that incumbent successors of either can sue the original landlord or tenant (as the case may be) for breaches by their respective successors. The disadvantage of such an action is that, having parted with their interests, the original parties are liable only in damages.

The position of an original party was ostensibly protected by indemnity covenants or the rule in *Moule v Garrett*. Indemnity covenants would permit the original party to seek and indemnity from his or her successor, whilst the rule in *Moule v Garrett* permitted an original party to raise an indemnity action against the incumbent successor. In either case, however, the action would only be successful to the extent that an assignee was not a “tenant (or landlord) of straw”.

The benefit and burden of leasehold covenants would run to assignees of the lease according to the rule in *Spencer’s Case*, where there is privity of estate between the parties, and where the relevant covenant “touches and concerns” the estate.

According to *P & A Swift Investments –v- Combined English Stores Group plc*, a covenant will touch and concern where a) it benefits the estate owner for the time being and would cease to benefit if separated from the ownership of the estate; b) it affects mode, use or value of the benefited estate, and: c) it is not a personal covenant. Thus personal covenants and terms by way of option for the tenant to purchase the reversion would not run (See and *Woodall v Clifton*).
On an assignment of the reversion, those covenants which "have reference to the subject matter of the lease" will pass to the purchaser of the reversion (ss141 and 142 Law of Property Act 1925). According to Re King, the effect of s141 is such that the assigning landlord loses the right to sue the original or the incumbent tenant, that right passing to the purchaser of the reversion.

The first two covenants “touch and concern” and “have reference to the subject matter”, as they affect the “nature mode and quality of user” Thus Patricia has the benefit, and the burden has passed to Quentin. She can also enforce the covenants (for a claim in damages only) against Oliver (who, in turn, can seek indemnity from Quentin).

The third covenant is personal in nature, and the benefit does not pass to Patricia. It cannot be enforced.

The benefit of the option will not have run to Quentin, and therefore cannot be enforced against Patricia.

The benefit of the covenant to pay rent “touch and concerns” and “has reference to the subject matter”. Thus Patricia has the benefit, and the burden has passed to Quentin. As original tenant, Oliver is also liable for any breaches of the covenant to pay rent (although should there be a breach and Patricia seeks to enforce against him, he would be entitled, per s19 Landlord and Tenant (Covenants) Act 1995 to an over-riding lease, and, in any case, s17 LT(C)A95 prevents recovery of arrears of rent from a former tenant if that tenant has not been notified of the arrears within six months of them arising).

(b)

The Landlord and Tenant (Covenants) Act 1995 governs the running of covenants in leases created after 1st January 1996, and therefore applies in this situation.

The Act provides that the benefit and burden of all covenants contained in the lease run on assignment of the lease or the reversion unless they are expressly stated to be personal (s3). s30 provides that s79 LPA25 shall not apply to “new” leases, and also repeals those parts of the LPA implying indemnities.

The original tenant (and any subsequent tenant assigning his or her estate) is automatically released from the burden of the tenant's covenants unless the lease provides for an Authorised Guarantee Agreement (s5).

An AGA provides an indemnity from an assigning tenant to the landlord, but only for breaches committed by the tenant to whom the lease was immediately assigned. The AGA ceases to have effect on a subsequent assignment (although the outgoing tenant may him- or herself be required to provide one)(s16).

Thus the original tenant is liable at most for his or her own breaches and for those of the tenant to whom her or she assigned, unless such assignment is in breach of covenant (for instance without the landlord’s consent if that is required by the lease) or by operation of law (for instance on the death or bankruptcy of the tenant)(s11).The first two covenants run per s3. Patricia has the benefit and Quentin the burden. She can, however, only bring an enforcement action against Oliver if he executed an AGA on his assignment of the lease to Quentin.
The third covenant might be considered to be personal to Nkwame. On that analysis the benefit will not run to Patricia, and the covenant cannot be enforced.

The option, however, will be enforceable, as, per s3, Patricia has the burden and Quentin the benefit.

Again, per s3, the covenant to pay rent is enforceable by Patricia against Quentin, and, if he executed an AGA on assignment, Oliver (although any action against him would be subject to ss17 and 19 as above).

Question 2

(a)

A trust of land arises on any occasion where land is owned or purchased by more than one person (Trusts of Land and Appointment of Trustees Act 1996). There are two ways in which estates can be held where a trust of land arises: joint tenancy and tenancy in common.

The legal estate cannot be held other than by joint tenants (s1(6) Law of Property Act 1925). A joint tenancy in law cannot practically be severed (resulting in a tenancy in common): the land itself could be partitioned, or one or more trustees can retire and be replaced.

On the purchase of an estate, law and equity raise certain rebuttable presumptions about the ownership. As to the legal estate, this will be held by the first four named purchasers capable of owning the legal estate, unless the deed specifies otherwise (s34 Trustee Act 1925). Where there are unequal contributions to purchase price, equity will presume a tenancy in common, again, unless there are words to the contrary (Bull v Bull; Barton v Morris).

A joint tenancy requires four unities (time, title, possession and interest). Each joint tenant "owns the whole yet owns nothing". On the death of a joint tenant, the rule of survivorship applies and the estate is held by the remaining joint tenants: this applies irrespective of the will of the deceased or of the intestacy rules.

A tenancy in common requires only the unity of possession. A tenant in common has an alienable and discrete share in the estate.

A joint tenancy in equity can be severed by various means. The severance will results in the joint tenant effecting the severance acquiring a share as tenant in common equal to 1/n, where n is the number of joint tenants.

The various means of severance include: Notice – s36 LPA 1925; mutual agreement – Burgess v Rawnley; course of dealing – Re Draper’s Conveyance; alienation (including bankruptcy) – Brown v Randle, First National Securities v Hegarty; homicide – Re Crippen (subject to relief under the Forfeiture Act 1982 see Re K).

At purchase, the legal estate will be held by R, S, T & V as joint tenants. Although presumably named on the transfer before V, U is only 17 and cannot hold the legal estate in land as she is a minor (s1(6) LPA 1925).
The beneficial estate is held on the express trust. Thus R, S, T, U and V hold the beneficial estate as joint tenants.

The sale by R to W, assuming that it complies with relevant formality requirements, severs R’s share and transfers it to W. R remains a trustee of the legal estate, as the joint tenancy of the legal estate cannot be severed or unilaterally assigned. The beneficial estate is held as to 1/5th by W as a Tenant in Common and as to 4/5th by S,T, U and V as joint tenants between themselves.

Trevor’s bankruptcy severs his beneficial joint tenancy, as it amounts to an alienation to the trustee in bankruptcy, in whom Trevor’s property vests. The legal estate is unaffected as, again, it cannot be severed or unilaterally assigned, whether expressly or by operation of law. The beneficial estate is now held 1/5th each by W and T’s trustee in bankruptcy as tenants in common and as to 3/5th by S, U and V as joint tenants between themselves.

On T’s and S’s deaths, the rule of survivorship operates on Soniya’s legal and beneficial interest (notwithstanding provision in her will to the contrary) and Trevor’s legal interest. The legal estate is now held by R and V as joint tenants. The beneficial estate is now held 1/5th each by W and T’s trustee in bankruptcy as tenants in common and as to 3/5th by U and V as joint tenants between themselves.

The homicide of U by V may sever the joint tenancy between them, subject to relief under the Forfeiture Act 1982 (which is possible as this was not, in the sense that he intended to kill another joint tenant, a "voluntary" homicide by V). The legal estate is unaffected.

If relief from forfeiture is granted, then the beneficial estate is held 1/5th each by W and T’s trustee in bankruptcy and as to 3/5th by V, all as tenants in common.

If no relief is granted, then V has 3/10th and U’s estate 3/10th as tenants in common.

In either case, the legal estate is held by R and V as joint tenants.

(b)

The relevant provision of the Trusts of Land and Appointment of Trustees Act 1996 include the prima facie right for a beneficiary to occupy (subject to the intentions of the settlor) (ss12 & 13) and the right of any party with an interest in the property to apply to the court for an order for, inter alia, sale (s14). The Act lists various factors the court will take into account (s15). There is also a requirement that the trustees consult the beneficiaries (s11).

V has, then a prima facie right to occupy (it seems likely under the circumstances that there is room). If W applies to the Court to order sale, the Court may take the view that the purpose of the trust has all but failed (in that most original parties have died) and that the interests of the majority of the beneficiaries are no longer served by the retention of the property.

**Question 3**

The rules for determining the priority of interests affecting a registered estate (ss27-29 LRA02) are that interests rank in order of creation unless the instant
transaction is a registered disposition for value completed by registration, which is subject only to those matters on the register or which over-ride (per Schedule 3 LRA02). A registrable disposition is one of the transactions listed in s4 of the Act. A failure to register such a transaction means that it takes effect in equity only (s7).

Interests which override a registered disposition are listed in Schedule 3 of the Act.

They include certain short legal leases (subject to exceptions including "reversionary leases" - leases which give the tenant a right to possession three months or more after the date of the lease)(para 1)

Legal easements override per para 3. This applies only to implied and prescriptive easements, as express legal easements are registrable dispositions, so, if not registered, exist only in equity. Such easements override only to the extent that the easement is "obvious on a reasonably careful inspection"; is known by the purchaser; or has been exercised within the last year

The interests of persons in occupation are protected by the actual occupation of the person with the benefit of that right (para 2).

Actual occupation is determined as a matter of fact, and the occupation must have commenced prior to the transaction (the date of the transaction; not the date it was registered). The occupation must be "obvious on a reasonable careful inspection" or known of by the purchaser. It is important to note that the occupation is not itself protected per se. It is the fact of occupation which provides protection to any interest the occupier has.

Assuming that Xavier provided valuable consideration for the estate, the transaction amounted to a registrable disposition and was completed by registration, he will be bound by the various claimed rights only to the extent that they override, as none appear on the register.

Zebun’s lease itself is a registrable disposition. As it is not registered, it takes effect in equity only. It will not override in its own right (as it exceeds seven years in term), so depends on Zebun being in actual occupation in order to bind Xavier. The question of whether Zebun is deemed to be in actual occupation by having her possessions at the property is one to be decided on the facts. It may be that in some situations that may be the only use to which relevant land can be put. In Strand Securities Ltd v Caswell, however, the defendant was held not to be in actual occupation of a residential flat in which his belongings were stored. It seems unlikely that Zebun will be held to be in actual occupation on that basis, and, therefore, Xavier takes free of her lease.

If Alicia’s lease is a “standard” assured shorthold it will have become a periodic tenancy on the expiry of the original term. As she is paying monthly, it would appear to be a monthly periodic tenancy. It will be legal per s54 Law of Property Act 1925 and will therefore override in its own right per para 1 Sch 3 Land Registration Act 2002. Xavier is bound, but can bring the lease to an end by giving notice.

As to the third cottage, the lease takes effect in possession more than three months from grant. Therefore, although a short lease, it required substantive registration and is excepted from Schedule 3. It is not clear from the facts when Xavier’s purchase completed. If Barnaby’s lease took effect in possession before
that date, his actual occupation will protect the lease. If the lease had not taken
effect in possession at that date, his occupation is of no effect (Sch 3, para 2(d).
Chris’s estate does not benefit from an express right of way. However, the
operation of s62 of the Law of Property Act 1925 would imply the right of way
from his lease into the transfer to him of the reversion.

As an implied legal easement it will override if obvious on a reasonably careful
inspection or in any case if he has exercised it within the last year. It seems
likely that Xavier will be bound by the easement, and cannot prevent Chris from
using the estate roads.

Xavier will be bound by the interests of Alicia and Chris, but he takes free of
those of Zebun and Barnaby, who can both be required to vacate (although they
may have remedy against Xavier’s predecessor for breach of contract).

**Question 4**

In order to advise, it is necessary to determine first whether the user could
amount to an easement and, second, to determine if they have arisen by
implication into the transfer of the estate.

An easement is a right to do something on someone else’s land falling short of a
right to possession. In order to be an easement a right must fall within the
criteria laid down in *Re Ellenborough Park*. The right must: relate to a dominant
and servient tenement; which are owned or occupied by different persons;
accommodate the dominant tenement; and "be capable of forming the subject
matter of a grant". The final point takes in both the capacity of the grantor and
grantee and that the right claimed falls within the range of rights recognised by
the courts as being capable of amounting to easements.

There is clearly a dominant and servient tenement in diverse ownership. There is
nothing to suggest that either party (or their predecessors) lack capacity. A
purported right “accommodates” if it benefits the land itself, as opposed to
benefiting the incumbent estate owner personally. In the round, any owner of
the cottage (and thus the estate itself) would benefit from a right to park, and to
use the track and the pipes.

It is long settled that rights of way and of utility media are capable of being
easements.

Rights to park have troubled the courts. It was held in *Newman v Jones* that a
right to park cannot amount to an easement if the right refers to a specific
parking space. Rights to park in a larger area are more problematic. *London &
Blenheim Retail Parks v Ladbrokes* and *Batchelor v Marlow* seemed to suggest
that the key is whether the user is exclusive and whether it deprives the servient
tenement owner of the reasonable use of his land. If the Lords’ decision in the
Scottish case of *Moncrieff v Jamieson* is followed by English courts, a right to
park may qualify as an easement provided the servient tenement owner retains
possession and control of the land (even if he cannot do much with it, it seems).

If so, it would appear that the right to park on the hard-standing is capable of
being an easement.

In the absence of an express grant (and providing that there are no express
words to the contrary in the transfer) the courts may imply a grant of easement
under one or more of four heads.
First, necessity. An easement will only be implied by necessity where the estate cannot be used at all without it (Union Lighterage, Nickerson v Barraclough, Wong v Beaumont).

Secondly, by common intention (eg Liverpool City Council v Irwin). Where it is objectively the common intention of the parties that the estate be used in a particular way, the courts will be willing to imply easements necessary to that use (thus in Irwin the right to use the stairs and lift to access a ninth floor flat).

Thirdly, the rule in Wheeldon v Burrows. This requires evidence of a "quasi-easement". A quasi-easement is the use by the owner of a single estate of parts of that estate in a manner such that an easement would be required if the use of those parts in that manner was to continue if one part was sold. Where a part of that estate is sold, the continued user (assuming the user "crosses" both estates) will be implied as an easement where the quasi-easement was "continuous and apparent" and where its continuation as a "full" easement is "reasonably necessary for the enjoyment" of the dominant tenement (the part of the estate sold).

Finally, s62 Law of Property Act will imply easements into the transfer of an estate where there is already diversity of occupation between the dominant and servient tenements (for instance on the purchase of a reversion by the tenant).

Here the use of the track may well be implied by necessity, as the estate is to all practical purposes land-locked. It would seem likely that the common intention of the parties would be that the track be used, and, in any case, the rule in Wheeldon is made out – there can be little doubt that the right of way is “reasonably necessary”.

Similarly, one might advance an argument that the common intention of the parties was that the cottage benefit from rights of water and drainage. Implication of such rights by the rule in Wheeldon turns on whether the user is apparent. This might be made out if, for instance, there were man-holes in the track. It is unlikely that the right can be made out on the basis of necessity: the property can still be used without services, albeit not for the purposes intended (this can be contrasted with the use of flues in Wong, as the lease in Wong limited the tenant’s user such that the property could not be used without the relevant easement).

The right to park is potentially a little harder to make out in common intention. For the purposes of Wheeldon, one assumes that Edna’s user was continuous, and the presence of the hard-standing would make the user apparent. Is it “reasonably necessary”? This will be a matter of fact. Is the cottage only a short distance from the public highway? If more distant from the highway, it seems that a right to park ancillary to a right of way, as here, may arguably be reasonably necessary following Moncrieff.

It seems likely that the right of way and for water and drainage will be made out; the right to park will be dependant on the nature of the estate, and its distance from the public highway.