LEVEL 6 - UNIT 9 – Land Law
SUGGESTED ANSWERS - JANUARY 2014

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 2014 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

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

SECTION A

Question 1

(a) As between the original covenantee and covenantor, all covenants affecting a freehold estate are enforceable pursuant to privity of contract.

Ordinarily, a covenant can only be enforced against an assignee of the original covenantor where the subsequent owner of the dominant tenement has the benefit and the assignee has taken the burden. The benefit and burden must have passed to 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 Law of Property Act 1925 (LPA 1925), which deems such an intention).

The burden of covenants does not, however, subject to some exceptions, run with the servient tenement's ownership at law (Austerberry (1885), affirmed in Rhone v Stevens (1994)).

It follows that, prima facie, that the burden of the various obligations/covenants will not run to successors of the original covenantors at law.

The exceptions to this rule include circumstances where there is an estate rentcharge, or where the rule of mutual benefit and burden applies. This last rule, deriving from the case of Halsall v Brizell (1957), 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 Allotey (1998) 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.

That the benefit runs in law may, however, have some utility as it may 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 has died, become insolvent or undiscoverable; and secondly that the dominant tenement owner’s only remedy is damages, where it is actual compliance with the covenant which is sought.

Furthermore, it is possible to incorporate a further obligation by which the transferor of the burdened estate procures a direct covenant from the transferee in favour of the dominant tenement owner, thus maintaining privity of contract. This method is, however, unusual and unwieldy.

The benefit of a covenant, provided it touches and concerns, will run in equity where it is annexed or assigned. A covenant will be deemed annexed in the absence of words to the contrary, by s78 LPA 1925. Thus, per the ratio in Federated Homes Ltd v Mill Lodge Properties Ltd (1980), the benefit will run unless the conveyance states otherwise. Following the decision in Crest Nicholson Homes Ltd v McAllister (2004) the dominant tenement must be clearly identified for statutory annexation to operate. 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 (1848): the covenant must be restrictive in nature (determined by 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.

Covenants that do affect the estate (in that they touch and concern) will run in law and in equity to the successors of the original covenantee with comparative ease; the burden of the covenant, unless restrictive, is unlikely to run, and then only in equity.

Positive covenants, unless falling under the rule in Halsall, are highly unlikely to be directly enforceable; the dominant owner will be reliant on a damages claim against the original covenantor (assuming that he or she can be found and has funds), who in turn might “persuade” the extant servient over by way of threat of indemnity proceedings. Even there, a break in the chain of indemnities can be fatal.

Restrictive covenants will generally be directly enforceable, but only in equity. A claim for enforcement is, therefore, not guaranteed, as the equitable maxims apply and any coercive remedy is at the discretion of the court.
Commonhold is a way of holding a freehold estate where that estate forms a part of a matrix of interdependent properties (for example a block of flats, dependant on each other for support, and containing common parts used by all flat owners). It was introduced by the Commonhold & Leasehold Reform Act 2002, with a view to providing a means of enforcing positive covenants against successors of the original covenantor, whilst retaining freehold ownership (as opposed to the grant of a long lease; a wasting asset).

A commonhold can be designated by a developer or with the consent of all of the owners of “units” in interdependent properties. Such a designation means, _inter alia_, that purchasers of units automatically are bound by both positive and restrictive covenants. A commonhold unit cannot, however, be forfeited on breach by the unit owner, rendering the enforcement of such covenants potentially problematic.

The commonhold regime goes some way to providing for the enforceability of positive covenants in freehold land (albeit only where properties are interdependent), but the regime has not proved popular with mortgagees, who have been reticent to lend, and with purchasers, who face limits on their ability to let units, combined with the need to ensure that the Commonhold Association overseeing the development operates and remains solvent.

**Question 2**

A lease is an estate in land, whereas a licence is a mere permission to occupy. A tenant can “exclude the world” including the landlord; a licensee has no such luxury. Furthermore, a licensee cannot benefit from the various statutory protections (including the right to a further tenancy on effluxion of the current one) afforded to both commercial and residential tenants.

In order to be recognised as a lease, as opposed to a licence, three “certainties” are required: certainty of term; exclusive possession; and certainty of rent.

The term must be certain both as to commencement of possession and as to determination of the term from the date of grant. Hence in _Lace v Chantler_ (1944), a term stated to determine on the cessation of the Second World War was not certain as to determination, as at the date of the lease it was not possible to know when the War would end.

Certainty of rent requires that, if the “lease” requires periodic payments by way of rent, the amount falling due must be certain on the date it is payable. This is only the case if the lease requires payment of periodic rent. It is possible to create a lease without such periodic rent (_Prudential Assurance v London Residuary Body_ (1992)), although the law of contract will require some consideration for the grant (perhaps a premium paid at commencement) if the agreement is to be enforceable.

Exclusive possession requires that the tenant has the right to exclude the world, including the landlord, from the estate (_Street v Mountford_ (1985)). The identification of exclusive possession has troubled the Courts in the past.

The Courts have recognised for some time that landlords draft “sham” agreements to avoid any suggestion that a lease has been granted. Thus, for example, in _Aslan v Murphy_ (1990), where the agreement for the occupation of a very small room required the occupier to vacate for an hour a day, and to share the premises if required, was held to be a sham. In such cases, the Courts have closely scrutinised the label attached to the agreement: in _Addiscombe Gardens_
Ltd v Crabbe (1958) the Court confirmed that the existence of exclusive possession was a matter of construction of the agreement, not of nomenclature or label.

Originally, the intention of the parties was considered the key: Somma v Hazelhurst (1978). This meant that only a sham agreement would be closely scrutinised. However, the reality was that the landlord’s intention would often be to grant a licence, and the landlord often drafted the agreement – the reality would be that a potential occupier could “take it or leave it”.

Following the decision in Street, it was recognised that basing the matter on the intention of the parties (where the landlord’s intention would inevitably prevail) would allow “a coach and horses” to be driven through the various pieces of legislation which protected tenants, but not licensees. Street confirmed that the agreement and surrounding circumstances should be considered to determine whether there was exclusive possession.

This approach is clearly illustrated in the contrasting decisions in the joined appeals in Antoniades v Villiers and AG Securities v Vaughan (1988). In the first, a cohabiting couple signed so-called “licences” for the “shared” occupation of a bed-sit, which permitted the landlord to share the occupation: this was held a sham, and the claimants were tenants. In the second, occupiers of a four bedroomed flat each had a licence agreement. Each agreement had been signed on different dates, for different rents, and required the occupier to share with the others. This was held to be a licence as there was no genuine joint tenancy.

It should be noted, that, even where there is exclusive possession, the law may find that the occupier is a mere licensee (such as a service occupier; lodger; a purchaser taking occupation prior to completion; or pursuant to family arrangements or act of generosity).

It would appear, then, that the parties respective intentions are subject to being interpreted by the reality of the situation, and a fixed subjective intention by the landlord to grant a licence will be of little weight in determining whether a lease exists.

However, the more recent case of National Car Parks Ltd v Trinity Development Company (Banbury) Ltd (2001) suggests that the Courts may be a little more accepting of subjective intentions, at least where the agreement is made between commercial parties of broadly equal bargaining power who have taken legal advice before entering the agreement.

**Question 3**

In order to claim title to a registered estate by adverse possession, the claimant must first show that the basic requirements for such a claim have been met.

Powell v MacFarlane (1979) confirms that the claimant must demonstrate factual possession (effectively exclusive possession), together with the intention to possess (that is to exclude the world: not necessarily an intention to own (Pye v Graham (2002))) for the requisite period, without the consent of the true owner, to be entitled to the estate. The intention must be demonstrated by evidence of outward conduct (Prudential Assurance Co Ltd v Waterloo Real Estate Inc (1999)).
Factual possession requires evidence that the claimant has an appropriate degree of physical control of the land, and has been using it as an occupying owner would (Powell v MacFarlane). The “degree” required will depend on the nature and quality of the land in question (West Bank Estates Ltd v Arthur (1967)). The strongest evidence of factual possession is likely to be enclosure by a fence or wall (Seddon v Smith (1987)).

The possession must be adverse: this connotes only that possession is without the consent of the paper owner.

Schedule 6 of the Land Registration Act 2002 (Sch 6) now disapplies the Limitation Act 1980, and provides that a person can apply to be registered as proprietor after ten years provided he or she can show possession of land (with the necessary intention and without consent).

When the application is made, the Registered Proprietor (RP) is given notice of the application (as are any other interested parties: mortgagees, for instance). The RP has 65 days within which he or she can object (perhaps on the basis that adverse possession is not made out: the squatter lacks the necessary intention); consent to the squatter's registration; or respond requiring the Registrar to deal with the application in accordance with Sch 6.

If such a response is received the squatter can only be registered as proprietor of the land if the registrar is satisfied that he or she should be registered on one of three bases: first, entitlement by some estoppel; secondly, some other reason (perhaps an non-completed contract for purchase where the money was paid over - if it was a long time ago, the Limitation Act 1980 may prevent the occupier enforcing the contract in itself); or, thirdly, where the matter amounts to a claim over the boundary between two estates (the schedule provides that the claimant must reasonably have believed the land belonged to him; and that the boundaries have not be determined by the Land Registry).

If the RP (or other interested party) makes no response, the squatter will be registered as proprietor.

The RP has a further two years to take action to repossess if the application is rejected. If the squatter is still in possession after two years, he or she is entitled to be registered as proprietor (subject to limited exceptions, including ongoing possession actions).

Furthermore, since s144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force in late 2012, a squatter who enters a residential building as a squatter, living, or intending to live there, commits a criminal offence (note that this does not apply to tenants holding over following the end of a lease, or persons who enter with permission). It is not clear how this will affect claims for adverse possession of residential estates (historic claims may be affected as the offence is retrospective in effect), and it may be that the Courts will take the view that it is not in their purview to permit a squatter to benefit from a criminal act (the “ex turpi causa” rule).

Whilst it is not quite fair to say that a claim of adverse possession of registered land is “doomed to fail”, it will only succeed in the face of objection from a person interested in the land under narrow grounds. In the absence of an abandonment of the estate by the RP, or his or her failure to remove the squatter within two years of the first application, a claim is doomed to fail. This may be all the more so if the land is residential.
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".

An easement will accommodate the dominant tenement where there is sufficient proximity between dominant and servient tenements and where the rights benefit the estate (and any owner of it) rather than being a personal right. Thus in Hill v Tupper (1863), where the claimed right benefited the dominant tenement owner’s business rather than the land, the right was incapable of being an easement.

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. Such rights must not be vague or indefinite (see Webb v Bird (1863)), where a general right to the flow of air to a windmill was not sufficiently definite, although compare with Wong v Beamont (1965), where passage of gases through ducts was.

A claim to an easement by way of prescription is based on the claimant’s long user of another’s land in the manner of an easement. The doctrine is based on the fiction that there has been some grant in the past (and which would explain the servient tenement owner’s failure to take action to prevent the use).

A prescription claim has three basic requirements.

The user must be nec vi. That is without force; this connotes unlawful acts, rather than violence per se. In Brandwood and others v Bakewell Management Ltd (2004), a claim for a prescriptive right of way was resisted on the basis that the user, involving driving on commons land, was unlawful. The Court took the point that it was an offence to drive on commons land only in the absence of lawful authority. The fiction of prescription gave the user lawful authority.

The user must be nec clam (without secrecy; this connotes that the user is readily apparent to the servient tenement owner, rather than any intent to deceive – see, for instance, Diment v NH Foot Ltd (1974)), and, finally nec precario (without permission).

The user must also be continuous (infrequent user will not suffice: Hollins v Verney (1884)) and by the freehold owner of the dominant tenement against the freehold of the servient tenement.

Under the common law doctrine, if the claimant can show twenty years user, a presumption arises that there is a prescriptive easement. This is easily rebutted by evidence that the user cannot have existed since time immemorial (since 1189). Thus in Duke of Norfolk v Arbuthnot (1880), the presumption of a right of way to a church was rebutted by evidence that the church was built (only) in 1380.
The doctrine of lost modern grant relies on the fiction that a grant was once made, but that the deed has been lost. Provided the claimant can show twenty years user, and the defendant cannot show that such a grant was impossible (perhaps because at the relevant time there was no capable grantor) the claim is made out.

The requirements for a claim under the Prescription Act 1832 (PA 1832) depend on whether the claimant can show 20 or 40 years long user (unless the claim is for a right to light, where there is only one period of 20 years). Where a user has been enjoyed without interruption for 20 years “next before action”, it will not be defeated by proof that it commenced later than 1189, but it may be defeated in any other way possible at common law, for instance by establishing that the use had not been “as of right” (s2 PA 1832). Where an easement has been enjoyed without interruption for a period of 40 years “next before action”, it will not be defeated unless it appears that the user was enjoyed by some consent or agreement expressly given for that purpose by deed or in writing (s3 PA 1832).

Interruptions must be “hostile” (in that they interfere with and prevent the exercise of the claimed right) and of at least a year in duration.

The Act provides for deductions from the period (for example if the servient tenement owner lacked capacity during the relevant period).

A comparison of Lost Modern Grant and PA 1832 claims arguably turns on the next before action point (although there may be some mileage in Lost Modern Grant where there has been a recent “interruption” for the purposes of the Act, but twenty or more years user prior to that interruption): in Hanning v Top Deck (1993), the claimant was unable to evidence any period of user during which it was not unlawful. However in Hayling v Harper (2003), the claimant made her case in Lost Modern Grant. She could not evidence the period next before action, as the user was unlawful during that period; she could, however, evidence a period of twenty years user prior to the time the user was rendered unlawful by statute.

This point may, however, be moot following the decision of the House of Lords in Brandwood v Bakewell (2004), at least in cases where the servient tenement owner could give lawful authority for the user.

The Common Law doctrine is redundant, since it is most unlikely that any piece of land has been used in the same way for nearly 1000 years, a claim at common law will almost inevitably fail. The utility of a claim in Lost Modern Grant appears to have reduced following the decision in Brandwood. The Act is widely regarded as particularly poorly drafted. Reform, as recommended in a number of Law Commission reports, would bring clarity and certainty to the law, and would be welcomed by most legal commentators.
SECTION B

Question 1

(a) 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 (1997)). If Paul is in arrears of his repayments, it seems likely that he would not have the funds available to satisfy a judgment in such an action.

The right to repossess arises as soon as the mortgage is executed (s95(4)Law of Property Act 1925 (LPA 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 (1979)).

The power of sale arises, per s101 LPA 1925, 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 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.

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

In this case, there seems little point in appointing a receiver to manage a business which appears to have closed (and which, in any case, has no spare parts or equipment).

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 LPA 1925 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.

Any attempt to foreclose is likely to be resisted and an order for sale made in lieu.

Here, it seems likely that the power of sale has arisen (assuming that this is a “standard” commercial mortgage) and the want of several months of repayments suggests that the power is also exercisable.

It would seem legitimate to take possession of the premises in order to sell to realise the outstanding monies: as the property is not residential, Paul will be unlikely to be able to resist any application for possession (per s36 Administration of Justice Act 1970).

The bank is advised to gain possession and to exercise the power of sale.
Section 205 of the LPA 1925 defines "land" as including, *inter alia*, all corporeal and incorporeal hereditaments. This includes the land itself, buildings, and things forming a physical part of the land and buildings, as well as rights appurtenant to the estate.

Assuming that the mortgage is of only the estate (i.e. there is no provision in the charge relating to fittings), the purchaser will acquire, in terms of corporeal hereditaments, fixtures (but not fittings).

The original test to distinguish fixtures (land) and fittings (chattels) is the "degree of annexation test", although problems can arise with "temporary" or "lean to" buildings. Other things attached to land were seen as land so long as they were firmly attached. Thus if a one ton statue was bolted down, it was land, if not, a chattel (compare *Holland v Hodgson* (1872) and *Berkeley v Poulett* (1977)).

The more modern test is the "purpose of annexation" test. This test asks why the object has been attached: for its own purpose, or for the enhancement of the land.

The case of *TSB Bank plc v Botham* (1996) invites the Court to distinguish fixtures and fittings on the basis of permanence & lasting improvement and relevance or utility and ease of removal. In that case, kitchen and bathroom units were considered fixtures, whereas white-goods and gas fires, given their limited annexation and short working lives, were considered fittings. Similarly, unless recessed (that is “built in”) light fittings were to be considered fittings.

The case of *Elitestone v Morris* (1997) confirms that a common-sense approach should be taken to the application of the degree and purpose tests. In that case, a free-standing wooden bungalow was held to be a fixture, not least because it would be destroyed if any attempt was made to remove it.

Here, the spare parts are not annexed and cannot be argued to be of benefit to the land (and, given their purpose, have no permanence at all). They are clearly chattels, and do not form a part of the security.

The lift is securely attached (thus has a high degree of annexation) and is there for the better use of the premises. It seems likely that such a piece of equipment has a relatively high degree of permanence and amounts to a lasting improvement to the land. It is not clear how easy it would be to remove, but, in any case, the degree and purpose of its annexation suggest that the Court will consider it a fixture, and thus within the Bank’s security.

Following *Botham*, the toilets and sinks will be considered fixtures (it seems unlikely that a Court would seek to distinguish on the basis that this is commercial property). Thus they form a part of the security.

The signage is, presumably, securely attached, thus having a high degree of annexation. However, it is difficult to argue that modern signage is intended to be permanent, or that it cannot be easily removed. The first point seems to be reinforced by the fact that the business appears to have closed. It seems likely that the signs will be held to be fittings, and outside the Bank’s security.

**Question 2**

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 (1880), and require that:

(i) the claimant made a mistake as to his or her 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 claimant’s 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 requirements, preferring to address issues of representation or assurance; reliance; and detriment (Thorner v Major (2009)).

The representation or assurance can be active (in Inwards v Baker (1965) a father encouraged his son to build a house on the father’s land) or passive (in Steed v Whitaker (1740) the defendant mortgagee stood by whilst the claimant built on land he did not own).

There is a clear assurance here that the parties will receive Raj’s estate when he dies.

In Greasely v Cooke (1980), detriment was made out by the claimant nursing the defendant’s daughter, and in Pascoe v Turner (1970) acting as unpaid housekeeper and mistress.

Difficulties can arise where the claimant obtains some benefit from the arrangement; often free accommodation. Where that is the case, according to the Court of Appeal in Gillett v Holt (2000), a balancing act must be performed, to determine if the detriment outweighed the benefit.

Steve has clearly obtained some advantage in that he received free accommodation. He has suffered no detriment in respect of his shifts, as he retained his pay. It is difficult to assess whether his detriment in running the house would be sufficient to offset the advantage of free accommodation.

Trisha, although also gaining the advantage of free accommodation, has worked greater hours and for no pay. It is likely that she will be considered to have acted to her detriment.

Usma has not acted in reliance on the assurance, and clearly suffers no detriment.

Reliance is presumed once the claimant has made out detriment (Grant v Edwards (1986)).

It was, though, thought following Taylor v Dickens (1998) that the knowledge of the claimant that a will could be changed obviated any reliance on the defendant’s promise to leave property by will. This decision was criticised in Gillet v Holt (2001), where the Court pointed out that the claimant was relying on the promise (to leave property by will) not on the will itself.
That Raj’s will purportedly left the property to charity will be no bar to a claim. If Steve can persuade a Court that he has suffered a greater detriment than the advantage he gained, his claim may succeed. It seems likely, too, that Trisha’s claim will succeed. Usma’s will fail for the reason noted above.

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* (2002) 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. It appears, following *Henry v Henry* (2010), that any advantage the claimant received should be taken into account in determining the remedy.

In Steve’s case, it seems likely that, given his limited detriment, and the advantage he gained, that an award would be limited to, roughly, the value of his efforts in keeping house.

Trisha might gain more, as she worked without pay for many years.

Usma will receive nothing.

It should be noted that the House of Lords in *Cobbe v Yeomans Row* (2008), 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. However, the Court made it clear that such would not be an appropriate approach to what have become referred to as the “farm and family” cases. Here, then, the want of formality should be no bar to the parties’ claims.

**Question 3**

(a) The rules for determining the priority of interests affecting a registered estate (ss28 and 29 Land Registration Act 2002 (LRA 2002)) 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 LRA 2002).

A registrable disposition is one of the transactions listed in s4 of the LRA 2002 (including freehold transactions; the grant or transfer of a lease of more than seven years; the grant of a legal charge or of a legal easement). 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 LRA 2002.

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).

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 protected itself. It is the fact of occupation which provides protection to any interest the occupier has.

In determining whether a person is, as a matter of fact, in actual occupation, the Courts will consider the nature and purpose of the property in determining what form occupation would take (Abbey National v Cann (1990)), but will require the occupation to involve some permanence and physical presence (Mallory Enterprises v Cheshire Homes Ltd (2002)). "Normal" absences, for reasons such as a holiday or for a hospital visit will not result in the occupation being vitiating (Hoggett v Hoggett (1979); Chhokar v Chhokar (1984)). It is important to note, though, that the mere storage of possessions at residential premises occupied by a third party will not amount to actual occupation (Strand Securities v Caswell (1965)).

Prescriptive or implied easements will override provided they would be obvious on a reasonable inspection of the estate; or have been exercised in the year prior to the transaction in question (para 3).

Assuming that Victor provided valuable consideration for the estate (as it was bought at auction), the transaction amounted to a registrable disposition and was completed by registration, s29 will apply.

Victor will be bound by the enforceable rights noted on the register, and the interests of the various parties to the extent that they override.

The lease of the garden to Xanadu amounted to a registrable disposition. Thus Xanadu, having failed to register the transaction, holds only an equitable lease. Such a lease cannot override per para 1. He will be reliant on actual occupation to protect his interest. Given the nature of the land (as garden), his cultivating and fencing it should be sufficient to make out actual occupation as a matter of fact. The same facts suggest that his occupation would be obvious on a reasonably careful inspection of land. It is likely that Victor will be bound by Xanadu's interest.

Yasmin’s prescriptive right may bind per para 3. Her continued use after the transaction suggests that she is likely to have been using it in the year before, and, in any case, the track would have been obvious on a reasonably careful inspection of the estate. Victor will be bound.

Carefree’s mortgage is another registrable disposition, and, again, in the absence of registration, its interest will take effect in equity. As it is not on the register, and does not fall into any of the categories of overriding interest, Victor will take free.

(b) If Victor acquires the freehold estate by way of gift, the transaction remains a registrable disposition, but not one for which Victor provided valuable consideration. Thus s29 will not apply, and the default provisions of s28 will determine what he takes subject to: all prior interests. It does not matter whether such interests were on the register or capable of overriding.

Thus he will take subject to all three interests, including the charge which Carefree can enforce against the estate.
Question 4

Where parties purchasing jointly have considered the division of property on sale or the breakdown of relationships and have expressed the nature of the trust, there can be little problem. An express trust of land will be recognised so long as the relevant formality requirements are satisfied (s53 Law of Property Act 1925): it is made in writing and signed by the settlor or settlors. 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 towards the purchase price (Dyer v Dyer (1788)). The presumption can be rebutted by evidence that the money was a gift or loan; by express wording to the contrary (Re Sharpe (1980), Cowcher v Cowcher (1972)); or where the estate is purchased for the residential purposes of those purchasers (Jones v Kernott (2011); Gallarotti v Sebastianelli (2012)), in which case a constructive trust will be applied.

A constructive trust is, in theory, imposed when it is unconscionable for the legal owner to deny the beneficial interest. According to Lloyds Bank plc v Rosset (1990), 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”.

Thus in Grant v Edwards (1986), 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 no direct contribution to “bricks and mortar”).

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 (1988), making payments towards the mortgage was sufficient, but, in Burns v Burns (1984) giving up work to keep the house and raise children was not.

Earlier decisions concerned the “sole ownership” cases. More difficult have been the situations where the parties are joint legal owners, but where no express trust is in place. Historically, equity would follow the law, and the parties were deemed to be beneficial joint tenants. Following Stack, this approach could be rebutted by strong evidence of a contrary intention between the parties. Judged against the unusual facts of that case (that the parties had punctiliously separated their respective finances throughout their relationship), it seemed that few claimants would be in a position to rebut.

In Jones v Kernott (2011) the Supreme Court made it clear that a resulting trust should not be applied to disputes concerning the family home (whether solely or jointly owned). Instead, the starting point in joint ownership cases would be a joint tenancy, but the bar appears to be lowered in comparison with Stack, as if the objective common intention is otherwise, the presumption will be rebutted and a constructive trust applied. Moreover, and significantly, the Supreme Court held that the parties’ intentions could change through the course of the
relationship and the ownership of the property, and that the parties’ respective shares could change in consequence.

In the express common intention cases, the parties’ shares will be determined by that expressed common intention.

Where there is an implied common intention, once the Court is satisfied that a constructive trust should be imposed, the claimant’s remedy is a share “that is fair having regard to the whole course of dealing” between the parties.

Here, and notwithstanding the parties’ contributions at time of purchase, no resulting trust can be implied. *Prima facie*, equity will follow the law, and each entitled to an equal share of the proceeds of sale (this would certainly be the case where all were contributing equally to the mortgage repayments).

Bob may seek to argue that the assurance that he would receive his share amounts to an express common intention, although the want of discussion of the quantum of that share mitigates against such an argument. In any case, his want of payment of subsequent mortgage repayments may be sufficient for the Court to imply a contrary common intention.

Between Zane and Andrea, the pooling of resources would give rise to the suggestion that, at that time, there could be implied to them a common intention to hold equally (see Stack), notwithstanding unequal mortgage repayments. After their divorce, Andrea’s continued repayment of a half of each mortgage repayment might continue to imply an intention to hold in equal shares.

It seems likely that the Courts would imply a common intention to the parties, in which case each would receive a share that is fair in light of the whole course of the parties’ dealing. Bob would receive a reduced share of the net proceeds of sale (to take into account his want of payment of mortgage instalments for more than 20 years). The remainder would most likely be applied equally between Zane and Andrea.