

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

### LEVEL 6 UNIT 10 – LANDLORD & TENANT LAW

JUNE 2023

#### Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2023 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

### CHIEF EXAMINER COMMENTS

Better performing candidates exhibited similar characteristics, in that they demonstrated good knowledge and understanding of the relevant law and used references to statutory provisions and case law appropriately to underpin their analysis/explanation. Candidates who did less well: (a) did not have a sufficient legal foundation on which to base any sort of reasoned argument or (in terms of the Section B questions) to provide any sort of reasoned advice, and (b) cited little or no relevant statute or case law.

Weaker candidates tended simply to recite everything that they were able to recall about a particular topic (whether or not it was germane to the question posed). However, learning/recall must be accompanied by reasoned discussion and/or application if higher grades are to be achieved. This is particularly pertinent in relation to the Section A questions, where candidates are expected to be able (as the case may be) to analyse, evaluate or discuss both sides of a particular proposition and to set out a reasoned conclusion for their particular point of view.

In relation to the Section B questions, a failing which is common to a large number of candidates is a reluctance to commit to a conclusion and/or offer a pragmatic explanation or advice – the phrase “it all depends on what the court decides” (or its equivalent) is an all-too-common feature of many scripts.

As stated above, candidates are expected to cite statutory provisions and/or case law in relation to legal principles which they refer to. They are also expected to be accurate. No credit is given for statements such as ‘In a decided case...’, or ‘In the case about...’ or ‘In [ ] v [ ] ...’ or ‘The Landlord

and Tenant Act 1927 deals with this...'. Too many candidates also appear to 'invent' statutes (eg the Law of Property Act 1954)

Several candidates gave quite short answers, particularly in relation to the Section A questions. Although volume certainly does not go hand in hand with quality, it is somewhat optimistic to hope that a 300–400-word answer will garner a significant proportion of the marks which are available in relation to a 25-mark question.

Excessive or unnecessary recitation of the facts of particular cases receives no credit. It also takes up time which might (hopefully) be more usefully employed elsewhere.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Section A

#### Question 1

This question concerned the familiar topic of exclusive possession as the hallmark of a tenancy, but not in the more general context of the lease/licence distinction. This topic is typically popular with candidates and 12 of the 17 candidates attempted it in this session. The answers ranged widely in quality – better answers were able to explain the circumstances in which exclusive possession does not warrant the conclusion that a tenancy has been created.

#### Question 2(a)

This question required candidates to consider the impact of the Landlord and Tenant (Covenants) Act 1995 in relation to the enforceability of the tenant covenants in a lease following assignment or underletting. 9 candidates answered this question, but the better performance of 5 of them is marred by the decidedly poor performance of the remaining 4 (none of whom managed to achieve even a third of the available marks). This was a relatively straightforward question at Level 6.

#### (b)

Candidate's performance in relation to this part was broadly on a par with their performance in relation to part (a). Again, the question was not particularly difficult.

#### Question 3

This question concerned security of tenure under the Landlord and Tenant Act 1954. This is usually a popular topic with candidates, but as a general rule they tend to perform less well when it appears in Section A rather than Section B. On this occasion, the overall performance was again marred by the very poor performance of some candidates: this was particularly disappointing/surprising given that a decent number of marks were available for candidates who could identify how Part II benefits tenants, which at Level 6 should be straightforward.

#### **Question 4**

Questions on the Rent Act 1977 have (historically at least) been ones on which candidates have tended to perform well, and 50% of those who answered this question achieved at least a pass. There was a broad range of marks; lower marks reflect the fact that those candidates were not able meaningfully to carry out the 'compare and contrast' exercise required by the question (principally because those candidates were for some reason unable to articulate the key elements of HA 1988).

#### **Section B**

#### **Question 1**

This question combined the familiar topics of (i) the lease/licence distinction, (ii) forfeiture, and (iii) protection from eviction. Given the familiarity of these topics, the overall performance by candidates is disappointing (although there were two good scripts). The statistics are marred by two very poor scripts.

#### **Question 2**

This question concerned the common law and statutory rules in relation to repair as they apply to dwellings (with an element of occupiers' liability). Many candidates did not articulate the common law rules correctly or apply them convincingly to the facts.

#### **Question 3**

This question concerned the familiar topics of legal/equitable leases and periodic tenancies. Overall performance was poor – candidates who achieved a pass did so with only 14 ex 25 marks. This topic is typically popular with candidates and is one where they have tended to perform well. In the main, the answers simply did not engage in a systematic exposition of the legal principles nor a convincing application of those principles to the facts.

#### **Question 4(a)**

Part (a) was a question about a landlord's liability for nuisance caused by their tenant. This is not usually a popular topic and candidates have typically not performed well in relation to it. This cohort were no exception.

#### **(b)**

Part (b) concerned the tenant's right of first refusal under Part 1 of the Landlord and Tenant Act 1987. This tends to be something of a niche topic, ie answered only by those candidates who have specifically revised it; other candidates will simply avoid it. The performance of the two candidates who answered the question suggests that they had not revised it.

**SUGGESTED POINTS FOR RESPONSE****LEVEL 6 UNIT 10 – LANDLORD & TENANT LAW**

Question Number	Suggested Points for Responses	Marks (Max)
1	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of the hallmarks of a lease, with particular reference to the persuasive effect of granting exclusive possession (with reference to, eg, <u>Bruton v London &amp; Quadrant Housing Trust</u> (1999))</li> <li>• Discussion of scenarios where exclusive possession does not involve creation of a tenancy, ie a freehold owner, a trespasser, a mortgagee in possession, a person housed by a charity or a service occupier (with reference to, eg, <u>Facchini v Bryson</u> (1952) and <u>Norris v Checksfield</u> (1991))</li> <li>• Discussion of other exceptions, eg no intention to create legal relations (with reference to cases such as <u>Booker v Palmer</u> (1942) and <u>Cobb v Lane</u> (1952))</li> <li>• Reasoned discussion in relation to the question posed</li> </ul>	25
<b>Question 1 Total: 25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of position prior to 01.01.96 in relation to enforcement of covenants, with discussion of rules re privity of contract/estate, running of covenants which touch and concern, need for direct covenants in appropriate circumstances, original tenant liability, etc</li> <li>• Noting that these continue to apply in relation to 'old' tenancies</li> <li>• Discussion of impact of the 1995 Act for 'new' tenancies in relation to: (i) transmission of benefit and burden of covenants (ss 3 and 4), (ii) automatic tenant release on assignment (ss 5 and 25), (iii) exceptions for excluded assignments, (iv) mechanisms for landlords to achieve release (s 8 and contractual (Avonridge)), (v) impact re underlettings.</li> </ul>	16
2(b)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion that tenant's automatic release is subject to s 16</li> <li>• Explanation of what an authorised guarantee is, and the extent of the liability which it imposes</li> <li>• Contrast with contractual liability habitually imposed on original tenants and assignees throughout the (remainder of the) term</li> <li>• Reasoned discussion in relation to the question posed</li> </ul>	9
<b>Question 2 Total: 25 marks</b>		



Question Number	Suggested Points for Responses	Marks (Max)
3	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• General overview of security of tenure under Part II of LTA 1954 and the protections which it affords to the tenant</li> <li>• Discussion of criteria that tenant must satisfy and the difficulties that these may create in practice</li> <li>• Discussion of steps that tenant must take to claim a renewal tenancy and the difficulties these may create in practice</li> <li>• Discussion of steps landlord needs to take to 'defeat' security of tenure (ie ensuring that the tenancy is terminated correctly, establishing a ground of opposition, etc)</li> <li>• Identifying that in certain instances tenant can 'walk away' without complying with s 27 procedure</li> </ul> <p>Reasoned discussion in relation to the question posed</p>	25

**Question 3 Total:25 marks**

Question Number	Suggested Points for Responses	Marks (Max)
4	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of rights afforded to tenants by RA 1977: (i) security of tenure, (ii) succession, (iii) rent review</li> <li>• Discussion of criticisms associated with those rights</li> <li>• Discussion of HA 1988, with particular reference to the AST becoming the default tenancy under the Act</li> <li>• Discussion of HA 1988, s 21 and the identified abuses of it</li> <li>• Discussion of the nature of a periodic tenancy and termination by notice to quit</li> <li>• Reasoned discussion in relation to the question posed</li> <li>• Discussion of white paper proposals, specifically: (i) abolition of s 21 notices, (ii) only tenant can serve a notice to quit (giving 2 months' notice), (iii) reformed grounds for possession</li> </ul>	25

**Question 4 Total:25 marks**

**SECTION B**

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• General discussion of right to forfeit and nature of a fully-qualified covenant</li> <li>• Discussion re Celine's occupation in specific context of whether it constitutes a breach of covenant, ie: (i) a covenant against assignment or underletting does not prohibit sharing or parting with occupation, (ii) does Celine have a lease or merely a licence to occupy (including a discussion re lack of intention to create legal relations of any kind), (iii) a lease constitutes a breach but a licence does not</li> <li>• Recognition that any breach is only actionable if Brendan first serves a s 146 notice (with discussion re requirements for that notice re remediable/irremediable breach, 'reasonable time' and compensation)</li> </ul>	17



	<ul style="list-style-type: none"> <li>• Recognition that non-payment of rent is a breach of covenant which prima facie entitles Brendan to forfeit, without need for service of a s 146 notice</li> <li>• Availability of relief, with particular discussion re (i) discretionary nature under LPA 1925, s 146 re breach of covenant against underletting (if a breach is said to have occurred), (ii) Alain’s automatic right to relief on payment in accordance with statutory safeguards under CLPA 1852 or CCA 1984, (iii) discretionary nature re non-payment of rent if Alain has not paid prior to trial</li> </ul>	
1(b)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Brief recap re status of Celine’s occupation</li> <li>• Discussion of PEA 1977 (with reference to each of the relevant separate elements within the Act)</li> <li>• Reasoned application of the above to the facts of the scenario</li> </ul>	8
<b>Question 1 Total: 25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
2	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Recognition that: (i) the express covenant does not apply to the interior of any of the flats, nor any of the facilities within them, (ii) in the case of Flats 1 and 2, tenants can only succeed if they can invoke relevant provisions of LTA 1985, ss 9 - 11</li> <li>• Re Flat 1, discussion re: (i) whether LTA 1985 ss 9 - 11 are engaged, (ii) the nature and extent of D’s implied repairing obligation if they are, (iii) E’s obligation to use the flat in a tenant-like manner (including discussion re carrying out ‘little jobs’ (and whether this encompasses keeping drains clear/odour-free by relatively simple measure of pouring bleach down them)</li> <li>• Re Flat 2, (i) whether LTA 1985 ss 9 - 11 are engaged, (ii) inter-relationship with principles re inherent defects</li> <li>• Re Flat 3, recognition that express covenant prima facie applies, but with subsequent discussion re: (i) concept of repair/disrepair re a feature which did not exist at date of grant, (ii) discussion of law relating to landlord’s duty of care under Defective Premises Act 1974, s 4 (with references to illustrative case law, eg <u>Alker v Collingwood Housing Association</u> (2007) and <u>Sternbaum v Dhesi</u> (2016))</li> <li>• Reasoned application of the law to the facts of each scenario</li> </ul> <p><b>Responses could include:</b></p> <ul style="list-style-type: none"> <li>• Candidates may discuss the Occupiers Liability Acts and/or Defective Premises Act.</li> </ul>	25
<b>Question 2 Total: 25 marks</b>		

Question Number	Suggested Points for Responses	Marks (Max)
3	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion re: (i) formalities for creation of a lease (including reference to LPA 1925, ss 52 (and possibly also 54(2)), (ii) whether the lease executed by J complies</li> <li>• Discussion re: (i) formalities for creation of an agreement for lease (including reference to LP(MP)A 1989, s 2(1) and <u>Walsh v Lonsdale</u> (1882)), (ii) whether the agreement for lease complies (better candidates will note that Ivanhoe can create a binding agreement if authorised to sign on behalf of Hotspur (LP(MP)A 1989, s 2(3))</li> <li>• Discussion re: (i) nature of a monthly periodic tenancy, (ii) whether such a tenancy came into existence on J going into possession and paying rent</li> <li>• Recognition of potentially competing legal and equitable leases and that 'equity will prevail' (if specific performance is available re the agreement for lease)</li> <li>• Discussion of alternatives available to J if notice to quit cannot be served (including reference to break right (if any), assignment or surrender)</li> </ul>	25
<b>Question 3 Total:25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
4(a)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of covenant for quiet enjoyment (including reference to <u>Markham v Paget</u> (1908) and <u>Sanderson v Berwick-upon-Tweed Corporation</u> (1984))</li> <li>• Discussion of actionable interference (including reference to <u>Browne v Flower</u> (1911), <u>McCall v Abelesz</u> (1976) and <u>Southwark LBC v Mills</u> (2001))</li> <li>• Discussion of possible adoption of nuisance by Lupine (including reference to <u>Coventry v Lawrence</u> (2014))</li> <li>• Application to Magda's situation</li> </ul>	12
4(b)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Outline discussion of nature of right of pre-emption (including reference to LTA 1987, ss 1 and 4)</li> <li>• Detailed discussion re qualifying criteria, etc (eg number of qualifying leaseholders, collective right, invitation to participate (including reference to LTA 1987, s 2(c))</li> <li>• Discussion of (i) need for LTA 1987, s 5 notice to be served re proposed disposal and consequences of failure to serve (including references to LTA 1987, ss 5, 10A, 12A and 12B)</li> </ul>	13
<b>Question 4 Total:25 marks</b>		