

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 - UNIT 10 – LANDLORD AND TENANT

JUNE 2022

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 2022 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.

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...’.

Excessive or unnecessary recitation of the facts of particular cases receives no credit.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

Most candidates simply didn’t engage with the question, and just recited what they knew about forfeiture (which in most instances resulted only in a bare pass).

Question 2(a)

Those candidates who attempted the question generally performed well. This was a straightforward question asking when the LTA 1954 Act applies, (but references to specific instances and/or case law were relatively few and far between).

(b)

Those candidates who attempted the question generally performed well. However, references to specific instances and/or case law were relatively few and far between.

Question 3

Of those candidates who attempted the question, overall performance was disappointing. For the most part, candidates simply recited what they had learned about the lease/licence distinction and, separately, ASTs and made no attempt to identify any relationship between the two (and hence made no attempt to address the issue raised by the question). This led to only a bare pass.

Question 4(a)

Most candidates answered the question as if it were a question on the general topic of repair rather than the discrete issue of fitness for human habitation, and so performed poorly.

(b)

Most candidates seemed unaware of the reforms/revisions introduced by the new Act (notwithstanding that it is clearly referred to in the Unit Specification).

Section B

Question 1

Relatively few candidates attempted this question, which was a little surprising given the subject matter (which is generally popular with students)..

Question 2(a)

Of the candidates who attempted this question, only a quarter achieved a 'pass' mark, ie 5 or above. This was surprising given the subject matter (landlord's implied covenants and landlord's liability for nuisance are familiar topics). Given the considerably better performance by candidates in relation to part (b) – which carried substantially more marks – it seems probable that a number of candidates answered part (a) more out of a sense of 'obligation' than with any enthusiasm.

(b)

The RA 1977 is a niche topic, which candidates invariably perform well on if they have revised it thoroughly. This cohort was no exception.

Question 3

The law relating to the rights of long residential leaseholders is a niche topic, which candidates invariably perform well on if they have revised it thoroughly. This cohort was no exception.

Question 4

This question involved a topic which is popular with candidates and is one where they can achieve a creditable mark by identifying the applicable legal principles (statutory and common law). As ever, the differentiator between candidates was the degree to which they were able to engage in the application of those principles to the facts of the scenario.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 - UNIT 10 – LANDLORD AND TENANT

Question Number	Suggested Points for Responses	Marks (Max)
1	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of right to forfeit in outline, with reference to need for reservation of express right of re-entry and <u>Duppa v Mayo</u> (1669). • Discussion of current law, and complications and uncertainty which arise from: <ul style="list-style-type: none"> - need for lease to contain an express right to forfeit and to dispense with need for formal demand - ‘unhelpful’ distinctions: eg breach of covenant/condition, remediable/irremediable breach - existence of 2 regimes (ie non-payment of rent and other breaches, and consequences in terms of s 146 notices and requirements) - distinction between re-entry and recovery of possession - possible waiver through acceptance of rent or other acknowledgement of continued existence of the lease - tenant’s ability to secure automatic relief through statutory mechanisms - equitable discretion to grant relief in other situations (and the uncertainty of outcome that it creates) - fact that relief may be granted many months after forfeiture has occurred - no obligation on landlord to notify other affected parties (eg undertenants and mortgagees, and yet they have a right to apply for relief) - anachronism of denial of landlord’s title • Candidates will discuss whether there have been any interim developments which alter the position as it was in 2006 	25
Question 1 Total: 25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of security of tenure re: (a) occupation, (b) for the purpose of a business, (c) carried on by the tenant, citing LTA 1954, s 23. • Explanation of ‘occupation’, with reference to authorities such as <u>Morrison Holdings Ltd v Manders Property Ltd</u> (1976), <u>Teasdale v</u> 	16



	<p><u>Walker (1958)</u> and <u>Groveside Properties Ltd v Westminster Medical School (1983)</u>.</p> <ul style="list-style-type: none"> • Explanation of ‘for the purposes of a business’, with reference to authorities such as <u>Hillil Property and Investment Co Ltd v Naraine Pharmacy Ltd (1979)</u>, <u>Groveside, Abernethie v A M Kleiman (1970)</u> and <u>Cheryl Investments Ltd v Saldanha (1978)</u>. • Explanation of ‘carried on by [the tenant]’, with reference to third party involvement, partnerships and companies (and relevant statutory provisions). 	
Question Number	Suggested Points for Responses	Marks (Max)
2(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of the key elements of the separate grounds of opposition • Discussion of the elements that create difficulties for landlords in practical terms (eg proof of intention, funding, planning permission, need to have vacant possession in order to carry out works, etc) • Reference to relevant case law, eg <u>Fisher v Taylors Furnishing Stores Ltd (1956)</u>, <u>Cunliffe v Goodman (1950)</u>, <u>Betty's Cafe Ltd v Phillips Furnishing Stores Ltd (1958)</u> and <u>S Franses Limited v The Cavendish Hotel (London) Ltd (2018)</u> 	9
Question 2 Total:25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
3	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of the lease/licence distinction, with reference to the proprietary nature of the former and the contractual nature of the latter • Discussion of the statutory protections that are afforded to residential leases • Discussion of limited statutory protection for licensees, eg PEA 1977 • Discussion of ASTs in the context of the distinction (eg limited nature of security in terms of grounds on which possession can be recovered, absence of judicial discretion, accelerated possession procedure, etc) 	25

	<p>Responses could include:</p> <p>Reference to occupation contracts in Wales, which dispense with distinction between leases and licences - appropriate credit should be given.</p>	
Question 3 Total: 25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
4(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of position at common law – implied term that premises fit for human habitation at date of grant only • Discussion of case law re different types of ‘unfitness’, eg: <ul style="list-style-type: none"> - (infestation) <u>Smith v Marable</u> (1843) - (lack of ventilation) <u>Summers v Salford Corporation</u> (1941), <u>Morgan v Liverpool Corporation</u> (1927) - (infectious disease) <u>Bird v Lord Greville</u> (1884), <u>Collins v Hopkins</u> (1923) - (inadequate security) <u>Bold v Huntsbuild</u> (2009) • Discussion of limited nature of statutory intervention prior to H(FHH)A 2018 – LTA 1985, s 8 provided for an implied obligation on landlords to ensure that a dwelling which was let for a term of less than 7 years was fit for human habitation and remained so throughout the tenancy, but was rendered inoperable by virtue of being linked to outdated rent limits which had not changed since the 1950s. 	15
Question Number	Suggested Points for Responses	Marks (Max)
(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • H(FHH)A 2018 inserts new sections 9A - 9C into LTA 1985 re dwellings in England which are let for a term of less than 7 years • the duty applies at the outset, and throughout the term of, the lease • although part of the definition of unfit for human habitation is linked to existing legislation, part of it is in effect new by linking it to the list of prescribed hazards defined in HA 2004 • while there is a long list of prescribed hazards, the key issue in deciding whether a property is unfit for human habitation is whether there is a risk or hazard of harm to the health and safety of the occupier • the new implied term overlaps with a landlord’s existing repair obligations but it is also wider in scope and covers any defect which gives rise to health and safety issues (including damp, lack of heating and fire safety risks) 	10

	the landlord’s duty encompasses all parts of the building, so if the dwelling is a flat it covers health and safety risks in the common areas retained by the landlord (such as corridors and communal rooms or courtyards)	
Question 4 Total:25 marks		

SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of Nigella’s break notice – it was invalid because it was served ‘short’ (ie not within the time frame required by the lease) and therefore Nigella remains the tenant of the shop • Discussion of the executed lease of Unit 5 – no reason to think its invalid for want of formalities or anything similar • Discussion of whether Nigella being allowed into early occupation supplanted the future lease and gave rise to a different legal relationship between Morten and Nigella • Preferable alternatives for Nigella are a periodic tenancy or a tenancy at will, either of which would allow her to terminate that tenancy in short order • Candidates will engage in a reasoned discussion of whether either can be established on the facts (with the likely conclusion that they cannot) • On the facts, therefore, it would seem that Nigella’s only realistic option is to try to negotiate a surrender with Morten – albeit there is no material which would currently indicate that he has any reason to agree to this <p>Responses could include:</p> <ul style="list-style-type: none"> • Candidates may mention: <ul style="list-style-type: none"> - the lease between Morten and Nigella is an example of a reversionary lease - as such it should have been protected by registration at the Land Registry - Nigella could try to negotiate a surrender with the landlord of the shop (although not directly covered by her request for advice) a competent legal adviser would mention this as one way of avoiding having two leases, even if it’s not Nigella’s preferred alternative. 	25
Question 1 Total:25 marks		



Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of the law of nuisance as between landlord and tenant, and the interaction with the covenant for quiet enjoyment, with reference to (for example) <u>Coventry v Lawrence (No 2)</u> (2014), <u>Southwark London Borough Council v Mills</u> (1999) and <u>Kenny v Preen</u> (1962) • Candidates will apply this to the facts and discuss: <ul style="list-style-type: none"> - is there actually a nuisance, or are the activities complained of simply the ordinary incidents of communal living, coupled with a property which was not originally designed for sub-division into separate dwellings - even if the activities go beyond the acceptable norm, has Benedict done anything to condone or facilitate the creation and continuation of the nuisance. 	9
Question Number	Suggested Points for Responses	Marks (Max)
2(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • In order to discuss possible grounds for recovering possession, candidates must first identify which Act applies to Carmen's tenancy • When originally granted, the tenancy was protected under RA 1977 - the death of Carmen's father did not affect that position, because they were originally joint tenants and so the tenancy passed by survivorship to Carmen's mother • Carmen's succession is as a child of a protected tenant, and so gives rise to an assured tenancy under HA 1988 • Discussion of possible grounds for possession under HA 1988, Sch 2: <ul style="list-style-type: none"> - suitable alternative accommodation (Ground 9) - nuisance or annoyance caused by tenant to the landlord or to a person residing in the locality (Ground 14) • Reasoned application of the above to the facts, noting that both possible grounds are discretionary 	16
Question 2 Total: 25 marks		

Question Number	Suggested Points for Responses	Marks (Max)
3	<p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of CLRA 2002, Part 2 as conferring a right for qualifying long leaseholders to take over the management of the property in which their flats are located • Discussion of <ul style="list-style-type: none"> • qualifying premises • appurtenant property • qualifying tenants • number of tenants required to participate • qualifying leases • need for existence of RTM company • Discussion of procedure: invitation to participate, notice of claim, counter-notice (if any, and grounds for serving), resolution of dispute (by FTT) • Discussion of transfer of functions, effect on existing management contracts • Higher marks to be awarded for degree of detail (eg re statutory provisions) and/or discussion of relevant case law which highlights issues re any of the foregoing <p>Responses could include:</p> <ul style="list-style-type: none"> • Candidates may discuss exercising the collective right of enfranchisement under LRUHA 1993, s 1 to buy the freehold (and any intermediate leasehold interests) of the building containing the flats together with any common areas – this indirectly achieves the same result by putting the tenants in the shoes of the freeholder (and so in a position to make decisions re management) • However, this would not really be appropriate in terms of the goal that is to be achieved (more expensive, time consuming, etc) • Appropriate credit should be given (max 4 marks, according to the amount of detail provided) but full marks should not be awarded if there is no recognition that this is a less appropriate option 	25

	<ul style="list-style-type: none"> • Candidates may discuss right to appoint a manager under Part 1 of LTA 1987, even though it's not expressly mentioned in the Unit Specification: appropriate credit should be given (max 2 marks, according to the amount of detail provided) 	
Question 3 Total:25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
4	<p>Responses should include:</p> <ul style="list-style-type: none"> • Candidates will identify the three elements of the question: <ul style="list-style-type: none"> - can consent be refused - has consent already been given - has the time for refusing consent passed, with the result that consent is not required • Discussion of qualified covenants against alienation and the effect of LTA 1927, s 19(1) • Discussion of principles enunciated in cases such as <u>International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd (1986)</u>, <u>Straudley Investments Limited v Mount Eden Land Limited (1996)</u> and <u>Ashworth Frazer Ltd v Gloucester City Council (2001)</u> – candidates will apply these to the facts • Discussion of potential risk of giving premature consent – use of ‘in principle’ (<u>Next plc v NFU Mutual Insurance Company Limited (1997)</u>) – but candidates will note that an operative consent must be in writing and must be given by someone who has authority to give it • Discussion of LTA 1988, s 1 in relation to the ‘reasonable time’ for dealing with an application, with reference to relevant authority such as <u>Go West v Spigarolo (2003)</u>, <u>Dong Bang Minerva v Davina (1996)</u> and <u>Blockbuster Entertainment v Barnsdale Properties (2003)</u> – candidates will discuss whether a delay of six weeks can be justified • Discussion of possible consequences of being out of time • Discussion of LTA 1927(3) re change of use – noting that concepts of ‘reasonableness’ equivalent to LTA 1927(1) and LTA 1988, s 1 do not apply, and so the covenant is akin to an absolute prohibition on changing use, meaning that a refusal under this ground might well be enough to end Gambletons’ interest in the assignment <p>Responses could include:</p> <ul style="list-style-type: none"> • Candidates may discuss whether Thora has authority (actual or ostensible) to accept service of the application, and conclude (if 	25

	she does not) that no valid application for consent has been made. Appropriate credit should be given (max 2 marks).	
	Question 4 Total:25 marks	

