

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

**LEVEL 3 - UNIT 19 – RESIDENTIAL AND COMMERCIAL LEASEHOLD
CONVEYANCING**

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the September 2020 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 candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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

The biggest concern was the poor performance on leasehold specific areas as opposed to general conveyancing questions. The questions in the examination paper covering the pros and cons of leasing and the operation of leasehold covenants dealing with permitting alterations frequently revealed that some candidates had a more limited knowledge of the leasehold specific areas of the syllabus and were attempting the examination reliant upon their general conveyancing knowledge. There was also weakness in certain discreet areas of the syllabus, for example, the Environmental Protection Act's implications.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

This was a question where candidates failed to maximise their marks. The treatment of the pros and cons of leasing was often superficial and many candidates were awarded few of the available marks. Greater evaluation of this key area would benefit any future performance in the exam.

(b)

Candidates were generally comfortable dealing with this general conveyancing question.

(c)

This was a standard new build conveyancing question concerning the NHBC scheme and candidates performed well.

(d)

This was a question on pre-completion searches. The main issue with the answers on this question was the lack of depth. This lack of detail limited the marks on an area where most candidates should have had a greater appreciation from their general conveyancing background. Accuracy in relation to time limits is crucial. The identification of the name of the correct search is also expected at this level.

Question 2(a)

This was a remedies question. Performance was generally strong. The distinction between a damages and a debt action was often, however, not clear. The answers need to show clear evaluation to be awarded top marks.

(b)

Candidates did show a good knowledge base when it came to this question on the security of tenure.

(c)

The understanding of reviewing rental payments by reference to an index was a discreet area of commercial leasing which was not universally understood. This again indicates a disappointing lack of knowledge of areas of commercial leasehold conveyancing practice.

(d)

This was one of the weaker answers on the paper. This was about contaminated land and the local authority's responsibilities and landowners liability.

Question 3(a)

This question on the UK Finance Mortgage Lenders' Handbook was handled very successfully by candidates and as a result most candidates achieved with high marks.

(b) and (c)

Candidates were able to achieve high marks in these questions on rent apportionment and co-ownership.

(d)

This question required lease clause analysis and many candidates struggled to understand the operation of the clauses.

(e)

Candidates had no major problems with this question on Formula C exchange of contracts, which again emphasised their strong conveyancing backgrounds.

(f)

A weak answer on registration applications. The weakness in precision when dealing with time limits remained apparent in this answer.

SUGGESTED ANSWERS

LEVEL 3 - UNIT 19 – RESIDENTIAL AND COMMERCIAL LEASEHOLD CONVEYANCING

Question 1(a)

Nabeela has asked for general advice in this instance, rather than specific advice about Flat 3.

I would explain that one advantage, from the tenant's perspective, of leasing a property is the flexibility that a lease can provide in terms of the duration of the leasehold interest. The lease term may provide for a relatively short duration, which may suit those tenants who do not want to commit themselves to a longer property interest. Alternatively, the lease duration may provide for a lengthier period when the tenant is seeking the stability of a long term.

A further potential advantage for a tenant is that it can avoid major capital outlay in acquiring a leasehold interest, if the main form of payment for the lease is a 'rack' or market rent.

A disadvantage of leasing may be the fact that the tenant is not the outright owner of the property and is subject to the landlord's interest in the land. The landlord may impose obligations or restrictions on the tenant, for example, requiring the tenant to repair the property or limiting the tenant's use of the property.

Another disadvantage is that the lease is a 'wasting asset'. The value of the interest declines as the term gets closer to the end of the grant. This feature of a lease can create problems when a party is trying to secure a mortgage on a lease.

The risk of the lease being forfeited if the tenant breaches a lease obligation makes the tenant's occupation precarious and so is another potential disadvantage of leasing.

1(b)

I would explain that entry number 3 in the proprietorship register reveals a restriction on the registered proprietor's ability to dispose of his estate without firstly obtaining the consent of his mortgagee.

Delamere Property Developments plc will have to secure the consent of Destiny Finance Group plc prior to the new lease to Nabeela being granted, and I would have to ensure that this consent had been supplied to me.

Entry number 1 in the charges register reveals a notice of a restrictive covenant. This restrictive covenant will bind Nabeela's leasehold title and so she should ensure that she complies with the covenant.

I should ensure, on behalf of my client, that evidence is provided of the consent from Harvey Winston Duffield or his successors in title to build this property. Alternatively, I could consider a restrictive covenant indemnity policy.

(c)

I would explain that the NHBC Buildmark scheme provides a 10-year guarantee to the buyer that the property has been built in a proper and workmanlike manner, using appropriate materials.

This guarantee is backed by an insurance policy, which protects the buyer in situations where the builder goes out of business.

I would explain that the NHBC Buildmark scheme protects the buyer, between exchange and completion, against the builder's failure to complete the property, through insolvency or fraud, up to a specified financial limit. The cover protects the buyer from losing his deposit.

After completion, for the first two years, the builder is responsible for correcting defects. If the builder fails to comply, the NHBC may take responsibility for the repairs.

For the remaining years of the guarantee, the NHBC insures the property against certain types of major defects resulting from the builder's failure to adhere to NHBC standards.

(d)

I would explain that I would carry out a Land Registry OS2 search as this is used for carrying out a search when buying a part of a registered title.

The result of the OS2 search will ascertain if there are any further entries entered on the register since the date when the official copy entries, supplied as part of the pre-contract package, were issued.

The result also creates a priority period for the buyer. The period is a 30-working day period for the date of the search result. Provided the buyers' registration application is made within that 30-working day period, the buyer will not be bound by entries made after the date of the search.

As Nabeela is buying with aid of a mortgage from Floyds Bank plc, and I am also acting for the bank in this transaction, I would carry out a bankruptcy search against Nabeela's full name using form K16.

The result of the search could reveal whether Nabeela has been made bankrupt. The result also creates a priority period (the 'protection ends' date will be shown on the search result) for completion of the purchase and mortgage.

As the seller is a company, I would also carry out a company search to check whether the company has gone into liquidation pre-completion.

Question 2(a)

There are a number of potential remedies available to Dylan.

He could pursue a debt action against Jenni. This would, however, have limited utility, if Jenni has little money to satisfy a court order.

As an alternative, Dylan could consider the commercial rent arrears recovery procedure (CRAR). This allows a landlord to take control of a tenant's items and sell them to settle the debt. The suitability of this remedy would be dependent upon the value of the tenant's items at the property that could be converted into money upon a sale.

Finally, Dylan could consider forfeiture. This could end the lease because of Jenni's breach. This remedy may be appropriate, given Dylan's wish to replace Jenni with a new tenant.

(b)

In order for **Part II Landlord and Tenant Act 1954 (LTA 1954)** to apply to a business occupying premises, a number of conditions require to be satisfied.

Firstly, the occupier must occupy the premises under the terms of a lease. Protection under LTA 1954 is not afforded to an occupier who only has a licence.

Secondly, the premises must be occupied by the tenant. Occupation is a question of fact.

Thirdly, the premises must be occupied by the tenant for business purposes. The nature of business occupation is widely defined for the purpose of this condition.

The final requirement is that the business tenancy is not excluded from protection under **LTA 1954**. Various tenancies are excluded, even if they satisfy the prior three conditions, the most significant example of which is the tenancy arrangement that has been formally contracted out of **LTA 1954**.

(c)

An index-linked rent review means that rent will be reviewed periodically by linking the rent figure to an index. An example of such a clause would be to link the rent review to the Retail Prices Index.

(d)

I would explain that Dylan should be concerned about the local authority inspecting the site under their powers in the Environmental Protection Act 1990, as he could (as owner) be required to clean-up contaminated land.

This would be a concern to Dylan, as although principal liability for clean-up lies with the party responsible for polluting the site, if the original polluter cannot be identified, it is possible that liability could fall to the owner or occupier of the site.

As the land has been used as a petrol station, there is a potential that the site could be contaminated.

Question 3(a)

(i)

I would explain that the UK Finance Mortgage Lenders' Handbook sets out the requirements that apply to most conveyancers engaged in mortgage-related work, and that these requirements must be complied with.

I would explain that Part 1 of the Handbook sets out general instructions and requirements which apply to all lenders and Part 2 sets out the specific requirements of Secure Bank.

(ii)

I would provide examples of matters governed by the Handbook (e.g. how the mortgage advance will be paid to the firm and how the mortgage is to be discharged following completion).

(b)

I need to consider arrangements for financing this transaction. The calculation will have to include an estimated amount for annual rent paid by the seller in advance to the landlord. The lease is likely to have required payment of this sum in advance. Unless the completion day for this purchase falls on a rent payment day, the buyer would therefore have to account to the seller for an apportioned sum of the rent the seller has already paid.

(c)

I would explain that there are two types of co-ownership in land, a joint tenancy and a tenancy in common.

A tenancy in common may be the appropriate co-ownership option for Gwen and Dylan.

One reason for this is because they are not a married couple, although they have been in an apparently stable relationship for at least two years. In addition, Gwen has a five-year-old son from a previous relationship. She may not wish her share of the property to pass automatically to Dylan in the event of her death, but may wish to provide for her son by leaving a share of the property to him in her will.

In order for Gwen's share in the property not to pass automatically to Dylan, according to the right of survivorship, Gwen would have to hold her interest as a tenant in common. As tenants in common, each party would own distinct shares in the property, which can be left by will on death.

Gwen and Dylan are also contributing differing amounts towards the purchase. A tenancy in common can recognise the distinct contributions, while in the case of a joint tenancy the co-owners own the whole of the property together, rather than having distinct shares.

(d)

The lease may restrict some or all of the proposed alterations.

Clause 7.1 is an absolute covenant that prevents any alterations other than those permitted by 7.2.

The proposed extension would breach clause 7.1 as it is not permitted under 7.2, not being an internal alteration.

Clause 7.2 is a fully qualified covenant, preventing internal non-structural alterations without the consent of the Landlord, such consent not to be unreasonably withheld.

The proposed under floor heating system would be permitted by clause 7.2, if the landlord consents, as it amounts to an internal, non-structural alteration. The landlord could only refuse to consent if they had a reasonable reason for doing so.

(e)

I would explain that Formula C is the formula that I would use, as the transactions will have to be synchronised and, in the case of the purchase, there is an onward chain.

(f)

The deadline for submitting my clients' registration application to the Land Registry is the priority period of the Land Registry OS1 pre-completion search (30 working days from the date of the OS1 search). The consequence for the buyers in failing to comply with this deadline is that they would risk losing priority to a third party application.