CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

LEVEL 6 - UNIT 10 – LANDLORD AND TENANT LAW

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 better performing candidates exhibited similar characteristics, in that they possessed both good knowledge and understanding of case law and statute, which they were then able to deploy in providing relevant legal analysis, argument or advice. Weaker candidates were found wanting in one or more of these respects.

A number of 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). In many (but not all) cases, they would then conclude with a single sentence along the lines of 'this shows/proves/demonstrates that….', or 'I therefore agree/disagree with the statement in the question', or 'It follows that X has a claim for/should (not) do …'. In relation to most questions, this was not sufficient to achieve a pass mark – mere learning/recall must be accompanied by reasoned discussion and/or application.

Weaker scripts tended to exhibit significant amounts of repetition – either by way of two juxtaposed sentences which were but different ways of making the same point, or by way of separated sentences/paragraphs (in which the latter

simply went over the ground previously covered in the former, occasionally at some length). Not only does this gain no credit, but it inevitably reduces the time available to the candidate to answer other questions.

Candidates are expected to be precise in their citation of case law. No credit is given for statements such as 'In a decided case…', or 'In the case about…' or 'In [blank] v [blank]….'. Equally, excessive or unnecessary recitation of the facts of particular cases also receives no credit.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1

This question required candidates to discuss the statutory and common law rules relating to repair.

Better candidates not only set out the relevant common law principles and statutory provisions, but also went on to discuss whether they unduly favoured residential tenants. Weaker candidates tended to discuss either the relevant common law principles or the relevant statutory provisions and made little or no attempt to engage with the question.

Question 2

This question required candidates to consider the impact of (i) the Landlord and Tenant 1927, ss 19(1) and 19(1A) (the latter as inserted by the Landlord and Tenant (Covenants) Act 1995, and (ii) the Landlord and Tenant Act 1988 on the common law rules relating to covenants against dealings.

Most candidates who answered this question were able to discuss the common law principles in relation to reasonableness and the effect of LTA 1927, s 19(1). Considerably fewer, however, were able to demonstrate a sufficiently detailed understanding of the relevant provisions of the 1988 Act and/or the case law which has emerged out of them. Only a handful of candidates even mentioned LTA 1927, s 19(1A), and of that small number perhaps only one or two gave anything like a full explanation of its effect.

Question 3

This question required candidates to consider the remedies which are available to a landlord of commercial premises for non-payment of rent.

Some of the discussion in relation to forfeiture was wayward: a significant number of candidates who answered this question discussed service of a section 146 notice. Some candidates did not discuss CRAR at all, and others did so in a decidedly cursory manner. A small number of candidates opted to discuss LTA 1954, s 30(1)(b), for which no credit was given.

Question 4

This question required candidates to compare and contrast the procedures for acquiring the freehold of a long leasehold house and a long leasehold flat (the latter being, of course, a collective exercise).

This might be described as something of a 'self-selecting' question, in as much as it is only likely to be attempted by candidates who have specifically revised the topic. It is perhaps not surprising, therefore, that most of the candidates who answered this question were able to describe the qualifying criteria and the subsequent procedure (in varying degrees of detail). However, hardly any made any real attempt to compare the two regimes.

SECTION B

Question 1

This question required candidates to discuss three of the grounds on which a landlord may oppose the grant of a renewal tenancy under section 30(1) of the Landlord and Tenant Act 1954.

Better candidates identified and discussed each of the three grounds – in this case grounds (b), (c) and (f) – and offered realistic advice. The majority discussed ground (f) in far more detail than grounds (b) and (c) – suggesting, perhaps, that the latter grounds had not featured as heavily in their learning and/or revision. Weaker candidates discussed only ground (f), with varying degrees of detail/accuracy.

A small number of candidates attempted to answer this question as if it were a question about forfeiture, even though the question clearly asked for advice about recovering possession once the term had expired.

Question 2

This question required candidates to consider two aspects of Rent Act protected tenancies, namely (i) the right of succession and (ii) the right to a fair rent, both under the Rent Act 1977.

Most candidates who answered this question correctly identified the status of both Olive and Pauline. Answers in relation to Renate covered a very wide spectrum, at one end of which she enjoyed no statutory protection of any kind whatsoever and at the other end of which she was fully protected under the Rent Act 1977.

The discussion of the right to a fair rent varied considerably in detail and accuracy.

Question 3

This question required candidates to consider various provisions of the Housing Act 1988.

Most candidates identified that Vea was protected under the 1988 Act, but many were then unclear as to whether she held an assured tenancy or an assured shorthold tenancy (which inevitably led to divergence as to how the

tenancy might be brought to an end). Generally, the grounds for possession arising out of the service of a section 8 notice were poorly discussed.

Question 4

This question required candidates to discuss (i) the lease/licence distinction, (ii) termination measures, and (iii) provisions of the Protection from Eviction Act 1977 and the Housing Act 1988.

A great many answers attempted to 'hedge their bets' as to whether Siobhan was a tenant or a licensee. This led to an ambivalent discussion and an absence of any meaningful advice. Discussion of the PEA 1977 was, in general, relatively poor (in something of a contrast to previous exam sessions).

SUGGESTED ANSWERS

LEVEL 6 - UNIT 10 – LANDLORD AND TENANT LAW

SECTION A

Question 1

The common law definition of repair, and the common law principles relating to repair, will be examined first. Then the extent to which statute has extended or altered the common law obligations will be considered. Finally, the question whether residential tenants are unduly favoured in comparison to commercial tenants will be addressed.

The nature of the common law obligation of repair was defined by Buckley LJ in Lurcott v Wakeley & Wheeler (1911), in which he stated that repair consists of "making good damage" by replacement of "subsisting parts".

However, not everything which might ordinarily be thought of as constituting damage falls within the obligation to repair. At common law, 'damage' to property requires a transition from a state of repair to a state of disrepair (ie an adverse change in the physical condition of the premises). Consequently, if the property has always been 'damaged' (eg due to an inherent defect in the materials used or the method of construction), that of itself does not constitute disrepair and hence there is no obligation to repair the defect: illustrations of this principle can be found in Post Office v Aquarius Properties Ltd (1987) and Quick v Taff Ely Borough Council (1986). It is only if the inherent defect causes physical damage to premises which a party has covenanted to repair that the obligation to act will be engaged: and if the only viable method of repair is by curing the defect, then so be it.

But the touchstone as to the true extent of the tenant's obligation still remains the concept of 'repair'. This is because the common law draws a distinction between 'repair' and 'renewal'. Renewal is considered to be more extensive than repair, and so an obligation to repair will not usually require renewal - so, in the context of an inherent defect which causes damage (discussed above), the tenant will not be obliged to deal with the defect if the work required to remedy it is renewal rather than repair. The niceties of this distinction are sometimes very difficult to apply in practice.

Where the work which is required affects the whole of what is being repaired, or will result in a change in the character of what is being repaired, then it is likely to constitute renewal rather than repair: McDougall v Easington District Council (1989). A similar conclusion is likely to be reached if the cost of the works exceeds the value of the premises or represents a substantial proportion of that value. The courts are free to adopt one or all of these tests "as the circumstances of the case demand" on what is very much a fact and degree basis.

The extent of an express covenant to repair is determined by the terms in which that obligation is expressed. A traditional (and still very common) formulation of such an obligation will see the landlord covenanting to keep those parts of the property which remain under its control (which will invariably be the structure and exterior of the building, along with any internal and external common parts) in "good and substantial repair". However, adjectives such as "good", "substantial", "habitable" and the like do not add anything to the substance of the obligation: Proudfoot v Hart (1890).

Even where an obligation to repair is not express, it may be implied: in Liverpool City Council v Irwin (1977) it was accepted that where the council had rented out flats in a council-owned block, the leases should be read as containing an implied term that the landlord would ensure that the common parts (eg stair lighting, lifts and rubbish chutes) would be kept in repair. To the same effect is Barrett v Lounova (1982), in which it was held that where the tenant was under an obligation to keep the interior of the demised premises in good repair, a covenant on the part of landlord to repair the exterior had to be implied on the basis that, without it, the tenant would over time find it physically impossible to comply with its own covenant. These, of course, were both cases involving residential tenancies.

The common law definition of repair underpins the interpretation of not only express and implied covenants to repair, but also the statutory obligations under the Landlord and Tenant Act 1985 (LTA 1985). LTA 1985, ss 11-15 apply to a lease of a dwelling-house granted on or after 24 October 1961 for a term of less than seven years (LTA 1985, s 13). In particular, LTA 1985, s 11 imposes an obligation on a landlord to keep in repair not only the "exterior structure" of the dwelling but also the installations which provide the essential services which make the property habitable (such as water, gas and space heating). This extends the landlord's repairing obligation to items such as basins, baths and taps.

In addition, LTA 1985, s 9A imposes a covenant on the part of the landlord in relation to a lease of residential premises in England granted or renewed on or after 20 March 2019 that the premises are fit for human habitation on the date of grant and will be kept in that state throughout the term. Broadly speaking, this covenant applies to any lease to which LTA 1985, s 11 would apply.

LTA 1985 only applies to residential tenancies. There has been no equivalent intervention by statute in relation to commercial tenancies: the parties are therefore free to negotiate whatever arrangements they choose in relation to repair. The assumption appears to be that commercial tenants are more able to 'look after themselves'. But the inequality of bargaining power which exists in many commercial negotiations means that all too often the tenant has little room for manoeuvre (other than perhaps securing a qualified repairing

obligation - by reference to a schedule of condition - where the premises are clearly in a poor state of repair).

LTA 1985, with its requirement for the landlord to assume responsibility for repairing the installations within the premises and to ensure that the premises are fit for human habitation, clearly favours the (residential) tenant. The same might also be thought to be true of the requirement for the landlord to assume responsibility for repairing the 'exterior structure' (however imprecise the two elements within that term may be). To an extent this is correct, because the Act negates any inequality of bargaining power by prohibiting any contracting-out from that responsibility. However, it is submitted that a major flaw with LTA 1985 lies in the fact that it does not provide a different definition of repair; instead it relies on the common law definition which has been discussed earlier. This has the potentially serious shortcoming that where a property suffers from an inherent defect, the landlord is not obliged to repair it even though the consequence of the defect may mean that the property is not fit to live in. The decision in Quick (above) is an illustration of just such a scenario (defective window frames caused a build-up of condensation within the premises leading to serious damp and mould infestation, and yet the court was unable to hold that this fell within the landlord's repairing obligation, thereby leaving the tenant with no effective redress).

Question 2

There are two significant statutory controls over a landlord's ability to refuse consent to an assignment or underletting (a 'dealing'), or to impose conditions when granting consent, both of which are contained in Landlord and Tenant Act 1988 (LTA 1988), s 1. A third, more modest control, is contained in Law of Property Act 1925 (LPA 1925), s 144.

Firstly, the landlord has a statutory duty to give the reason(s) for a refusal, or a conditional consent, within a reasonable time after the tenant's application for consent: see LTA 1988, s 1(3). This is clearly designed to prevent the former practice of landlords effectively 'timing out' an application for consent by taking so long to generate a decision that the prospective assignee or undertenant lost patience and decided to look elsewhere. Once reasons have been given, they cannot be supplemented or amended: see, for example, Norwich Union v Shopmoor (1998), Footwear Corporation v Amplight Properties (1998) and Ashworth v Frazer v Gloucester City Council (2002).

A reasonable time cannot be quantified when an application is first made, because it may be extended or shortened as events unfold during the course of the application: see NCR v Riverland Portfolio No.1 Ltd (2005). However, case law has established that (so long as the tenant makes its application in writing and supplies the landlord with all the information that the landlord reasonably requires to make a proper assessment of that application) the landlord must generally make its decision in days rather than weeks, and even in complex cases the time allowed will be measured in weeks rather than months: see, for example, Go West v Spigarolo (2003), Dong Bang Minerva v Davina (1996) and Blockbuster Entertainment v Barnsdale Properties (2003).

Secondly, where the landlord's consent to a dealing is not to be unreasonably withheld, it is for the landlord to prove that any refusal of consent was reasonable, or that any condition attached to a grant of consent was

reasonable: LTA 1988, s 1(6). It seems that this obligation applies not only where the lease contains a fully-qualified covenant against dealings, but also where the relevant qualification is implied under Landlord and Tenant Act 1927 (LTA 1927), s 19(1) in relation to so-called 'partially-qualified' covenants.

LTA 1988, s 1(6) does not of itself say that the landlord must not advance an unjustifiable reason for refusing consent or imposing a condition: it did not need to because this was already well-established by case law before the enactment of LTA 1988: see, for example, International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd (1986), which sets out a series of factors for the court to consider when assessing the reasonableness of the landlord's response. The significance of LTA 1988, s 1(6) is that it reverses the common law burden of proof: it is for the landlord to prove reasonableness. However, the test of reasonableness does not require the landlord to prove that its conclusions are justified, so long as they are conclusions that might be reached by a reasonable person in the circumstances: see, for example, Pimms v Tallow Chandlers Company (1964) and Riverland (above). Consequently, the landlord can lawfully invoke a reason which only a minority of all reasonable landlords would have relied on. Given that in the vast majority of cases the landlord is entitled to take its own interests into account in preference to those of the tenant, this affords the landlord a considerable degree of latitude.

Although LTA 1988, s 1(6) does not apply to an absolute covenant against dealings, the detrimental effect of this on tenants is limited because, in practice, it is relatively uncommon for a lease to contain such a prohibition. This is because prospective tenants will view it as an unduly onerous obligation which will limit the attractiveness of the premises in the open market and will also have a detrimental effect on the rent on grant, on review and on statutory renewal.

Both the statutory controls contained in LTA 1988 have clear benefits for the tenant. Failure to comply with them may entitle the tenant to proceed with the dealing in any event (which was the position at common law prior to LTA 1988) or to bring proceedings against the landlord for damages (either at common law or for breach of statutory duty under LTA 1988, s 4).

However, the landlord can effectively sidestep the controls created by LTA 1988, ss 1(3) and 1(6) by invoking LTA 1927, s 19(1A), as inserted by LT(C)A 1995, s 22. LTA 1927, s 19(1A) (which is available in relation to any 'new' tenancy - ie a tenancy granted on or after 1 January 1996) allows the landlord and tenant to agree circumstances when consent can be refused and conditions which can be attached to any consent which is given. Where a specified circumstance exists, or a specified condition is imposed, the tenant cannot assert that the refusal or condition (as the case may be) is unreasonable. This ability to dispense with the requirement of reasonableness deprives LTA 1988, ss 1(3) and 1(6) of any effect, because those provisions only apply where the landlord has something to be reasonable about.

Unsurprisingly, virtually every 'new' tenancy of commercial premises (which is where qualified covenants against assignment are most commonly encountered) now lists circumstances and conditions which oust the landlord's obligation to be reasonable. Although landlords do not list every conceivable circumstance or condition that might be applicable (because doing so would create an undesirable absolute covenant by other means), nevertheless

significant onerous obligations (such as the automatic requirement for an authorised guarantee agreement) can be imposed on the tenant without any statutory constraint. The upshot, therefore, is that reasonableness is a legal requirement only insofar as the landlord is prepared to allow it to be.
Finally, LPA 1925, s 144 prevents the landlord from asking for payment of a fine (ie a premium) or similar sum for granting consent (unless the lease says otherwise). This section is sufficiently broad in its terms to prevent the landlord from trying to use the application for consent as leverage to secure new terms which benefit the landlord. Nevertheless, it does not prevent a landlord from recovering reasonable legal or other expenses: for a recent example (in the residential context) of what a landlord can and cannot recover, see No 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd (2016).

Question 3

There are three principal remedies which are available to a landlord whose tenant is in arrears with the payment of rent: forfeiture, commercial rent arrears recovery (CRAR) and a money claim for the rent.

Forfeiture

Forfeiture entitles the landlord to eject the tenant from the premises and recover possession of them either by court proceedings or by peaceable re-entry.

A landlord will only be able to forfeit for non-payment of rent if the right to do so is expressly reserved in the lease: the right to forfeit is never implied (see, for example, statements in Duppa v Mayo (1669) and Doe. d Abdy v Stevens (1832)).

At common law, the right to forfeit for non-payment of rent only arises if the landlord has made a formal demand for the rent. However, such a demand will not be required if:

(a) more than six months' rent is in arrear (Common Law Procedure Act 1852, s 210); or

(b) the parties have agreed that the right to forfeit may be exercised whether or not the rent has been formally demanded (virtually all leases contain such an agreement).

The right to forfeit may be frustrated by:

- the common law doctrine of waiver, under which the landlord may lose the right to forfeit if, with knowledge of the non-payment, the landlord engages in conduct which amounts to an affirmation that the lease continues to exist (see Metropolitan Properties v Cordery (1979) and Central Estates (Belgravia) Ltd v Woolgar (No.2) (1972)); or

- the tenant's right to seek relief from the courts: relief under County Courts Act 1985, s 138(2) is automatic but is only available in relatively limited circumstances (it only applies where the tenant pays the amount due into court up to five days before the hearing), but Law of Property Act 1925, s 146(2) confers wide powers to the court to grant relief on

such terms "as the court … thinks fit" (which, if relief is granted, will usually involve a requirement to pay the arrears of rent).

Although the threat of forfeiture, or the terms of any order by which relief is granted, may result in the tenant paying the arrears, the actual re-taking of possession does not achieve this objective. Indeed, taking possession may simply add to the landlord's problems: not only will the landlord still be out of pocket in relation to the arrears but the landlord will become fully responsible for the premises once again.

CRAR

Part II of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007), which came into force in April 2014, replaces the ancient common law remedy of distress (TCEA 2007, s 71). The new regime, which is amplified by the provisions of the Taking Control of Goods Regulations 2013 (TCGR 2013), regulates the circumstances and manner in which a landlord may seize the tenant's goods and subsequently sell them in order to recover arrears of rent.

CRAR is available in relation to all leases of commercial premises (including tenancies at will), whether legal or equitable, provided that the lease is in writing: TCEA 2007, ss 74(1) and 74(2).

CRAR, like distress before it, has the potential to be a highly effective weapon: the actual or threatened seizure of the tenant's goods may well provoke payment by the tenant. However, some of the constraints imposed by TCEA run the risk of substantially reducing the effectiveness of CRAR as a remedy. First and foremost amongst these is the requirement that the landlord must give at least seven clear days' notice of the intended seizure (TCEA 2007, s 72 and Sch 12, para 7 and TCGR 2013, para 6(1)): this appears to give the defaulting tenant ample opportunity to remove any valuable goods from the premises before the landlord can seize them (but the landlord can ask the court to shorten the notice period in appropriate circumstances (TCGR 2013, para 6(3) and 6(4)).

There is also the practical problem for the landlord that not all the goods on the premises may belong to the tenant (the tenant may, for example, lease its office and/or computer equipment) and so the landlord may find it difficult to identify which goods may lawfully be taken and which must be left behind.

Where the premises (or part of them) are occupied by an undertenant, TCEA 2007, s 81 enables the landlord to serve a notice on the undertenant requiring the undertenant to pay its rent directly to the landlord (see also TCGR 2013, paras 53 to 55).

Action for the rent

The landlord can also bring a money claim against the tenant for the amount of the rent. Such a claim may be brought in its own right or in conjunction with a claim for possession. Obtaining a judgment against the tenant is no guarantee that the tenant will pay the amount due: the landlord may still have to take steps to enforce the judgment if the tenant fails to pay.

Question 4

Qualifying long leaseholders of both houses and flats have a statutory right (under the Leasehold Reform Act 1967 (LRA 1967) and the Leasehold Reform, Housing and Urban Development Act 1993 (LRHUDA 1993) respectively) to acquire (for value) the freehold of the building in which they live - however, it is important to note the significance of the word 'building' in that statement. A long leaseholder of a house can buy the freehold of that building (ie the property which is their home), but the long leaseholder of a flat cannot buy just the freehold of their flat; instead they must, in the circumstances described below, acquire the freehold of the entire block.

When acquiring the freehold, the leaseholder is also entitled to acquire any intermediate leasehold interests. Where the right to acquire the freehold is established, the fact that the freeholder (and any intermediate leaseholder) may not wish to sell is irrelevant; consequently enfranchisement is, in certain senses, a form of compulsory purchase.

Enfranchisement of houses

Where the premises consist of a house, the right to enfranchise is given by the LRA 1967. The premises must satisfy the statutory definition of 'a house': under LRA 1967, s 2 this includes 'any building designed or adapted for living in and reasonably so called'. This definition is somewhat imprecise and has required interpretation by the Supreme Court, most notably in Day v Hosebay Limited (2012).

In addition to the qualifying criteria which apply to the premises, both the leaseholder and the lease must also satisfy a number of qualifying requirements (which have been amended, and only to some extent simplified, over the years).

The leaseholder initiates the process of enfranchisement by serving notice of their desire to have the freehold (LRA 1967, s 8). This is a standard-form notice. Once the notice has been served, a statutory contract for sale comes into existence for the sale of the property at a price and on such other appropriate terms as may be agreed between the parties or (in default of agreement) determined in accordance with the provisions of the Act (LRA 1967, ss 9-12).

The freeholder can argue that the claim is invalid because the leaseholder does not fulfil all the relevant statutory criteria or because the tenant has not followed the statutory procedure correctly. The freeholder does this by serving notice of opposition within two months of service of the leaseholder's notice. Again, this is a standard-form notice. The Act provides a mechanism for deciding whether a ground of opposition is valid. If the freeholder's opposition is successful, the leaseholder's notice will be rejected and the statutory contract for sale will fall away.

If all the statutory criteria are fulfilled and the correct procedure is followed, LRA 1967, s 8 gives the leaseholder the right to be granted the house and the premises for an estate in fee simple absolute. There is then only one ground on which the freeholder can refuse to enfranchise, namely that the premises are reasonably required for occupation as the only or main residence of the freeholder or a member of their family (LRA 1967, s 18).

Enfranchisement of flats

Where the premises consist of a flat, the right to enfranchise is given by LRHUDA 1993. It is in the very nature of a flat that it will form part of a block of flats (even if the block consists only of two flats). As a consequence, a long leaseholder of a flat cannot simply buy that part of the freehold which relates solely to the part of the block which they occupy because freeholds cannot sensibly be parcelled up in this way - and it would also beg the question as to what should happen to the freehold of any internal or external common parts.

So the right to enfranchise is only exercisable in relation to the entire block, which is defined as any "self-contained building" which includes two or more flats (LRHUDA 1993, ss 3 and 101). This is a definition which causes significant difficulties in practice.

In reality, of course, many blocks do not sit in self-contained, self-serviced isolation (unlike many houses); instead, they sit on estates which share common services and amenities which are essential to the proper use and enjoyment of each individual flat. Adequate provision also needs to be made for this.

In addition, the right to enfranchise is a collective rather than an individual right (this, again, is in part the product of the fact that the right relates to flats in a block, where all the tenants have a prima facie equality of interest).

Tenants who wish to enfranchise must join together and appoint a "nominee purchaser" to acquire the freehold on their behalf. Although it is feasible for one of the participating tenants to be nominated, the scale of the potential liability which the purchaser is likely to incur means that the nominated purchaser will typically be a registered company limited by guarantee. The procedure for nomination, and possible subsequent termination of that nomination, is set out in LRHUDA 1993, s 15.

The nominee purchaser should ensure that all the participating tenants agree to indemnify it/him/her against all and any liability that the nominee may incur on their behalf.

Once appointed, the nominee purchaser must serve a "notice of claim" to acquire the freehold on the reversioner (LRHUDA 1993, s 13). Again, any intermediate leasehold interests may also be acquired. The notice of claim must set out the details required by s 13 of the Act, including the names of the parties, a plan of the premises and the proposed purchase price (which will usually be based on a valuation provided by a qualified surveyor).

Once the notice of claim is served, the nominee purchaser becomes liable for the reversioner's costs (in addition to any costs which have already been incurred, eg solicitors' and surveyors' fees). The reversioner is required by LRHUDA 1993, s 21 to serve a counter-notice, in which the reversioner can admit the claim, deny it or set out an intention to apply for an order that the claim should not be allowed because the reversioner intends to redevelop the whole or a substantial part of the specified premises (and even then the application of this ground is severely curtailed by the requirements of LRHUDA 1993, s 23(1).

The operation of LRHUDA 1993 is undeniably much more complicated than LRA 1967 in relation to enfranchisement. This is not entirely surprising; by its

very nature the process of buying a block of flats is inevitably more intricate than buying a single house - there are more issues to consider and the price is likely to be substantially larger. When account is also taken of the fact that a collective acquisition is bound to be more difficult to orchestrate and implement than one where only the owner(s) of a single dwelling is/are involved, it is clear that it is easier for a long leaseholder of a house to enfranchise than it is for a long leaseholder of a flat.

SECTION B

Question 1

Part II of the Landlord and Tenant Act 1954 (LTA 1954) confers security of tenure on qualifying tenants who occupy premises for the purposes of a business. Where a tenancy enjoys security of tenure, the tenancy can only be terminated by the landlord by service of a notice under LTA 1954, s 25 which gives the tenant not more than twelve nor less than six months' notice of the termination dated specified in the notice. The specified date cannot be earlier than the expiry date of the contractual term. In the present case, there is sufficient time for Alain (in his current capacity as 'competent landlord') to serve a section 25 notice which specifies that date as the termination date.

Where a section 25 notice is served, the tenant is entitled to claim a new tenancy (LTA 1954, s 24) and can remain in the property on the terms of the current tenancy until that claim is resolved (either by agreement or by the court).

However, LTA 1954 does not give qualifying tenants an unrestricted right to be granted a new tenancy. There are seven grounds (set out in LTA 1954, s 30(1)(a) to (g)) on which the landlord is entitled to oppose such a grant.

LTA 1954, s 30(1)(b)

Ground (b) entitles the landlord to argue that the tenant ought not to be granted a new tenancy in view of their persistent delay in paying rent that has become due. Ground (b) is discretionary. 'Persistent' delay indicates a history of non-payment or late payment over a period of time, which covers both: (i) a long history of paying numerous instalments late, or (ii) allowing a few instalments to remain unpaid over a long period of time: Horowitz v Ferrand (1956). However, rent is not 'delayed' for the purposes of ground (b) if the landlord has acquiesced in the late payment of it: Hazel v Akhtar (2002) (where acquiescence as to late payment took place for 14 years). Given that Alain appears to have acquiesced in Brigitte's late payment of the rent, it seems unlikely to be able to resist the grant of a renewal tenancy to Brigitte on this ground.

Although Alain may not be able to oppose the grant of a renewal tenancy, he could try to negotiate with Brigitte for her to leave her shop voluntarily (by way of a surrender of her tenancy - this being one of the permitted methods of terminating a protected tenancy: LTA 1954, s 24(2)).

LTA 1954, s 30(1)(c)

Ground (c) entitles the landlord to argue that the tenant ought not be to be granted a new tenancy in view of other substantial breaches of obligation

under the current tenancy (ie other than those to repair or pay rent), or for any other reason connected with the tenant's use or management of the holding. Ground (c) is discretionary.

This ground is relevant to both Brigitte and Clive. Brigitte has habitually failed to pay the rent on each quarter day. However, Alain's acquiescence means that it is likely that the court would find that he has either waived any breach or is estopped from asserting it: in either case, he is unlikely to be able to invoke ground (c) against Brigitte.

As regards Clive, Alain should be advised to rely on the second limb of ground (c), with particular reference to Clive's behaviour. The facts bear some similarity to those in Youssefi v Mussellwhite (2014), where the Court of Appeal held that the correct question under ground (c) is 'whether it would be unfair to the landlord if the tenant were to be foisted on the landlord for another term'. On balance, Alain is likely to be able to oppose the grant of a renewal tenancy to Clive on this ground.

LTA 1954, s 30(1)(f)

In relation to both Brigitte and Clive, Alain should be advised that he may be entitled to rely on ground (f) - the landlord intends to carry out works of demolition, reconstruction or substantial construction and cannot do so without regaining possession of the holding. This is a mandatory ground for refusing a renewal tenancy. The proposed conversion works by the developer would appear to qualify.

One potential problem here is that it is not the current landlord (ie Alain) who wants to carry out the redevelopment; instead it is a third party (the developer). However, the necessary intention only needs to be demonstrated at trial and not before (Betty's Cafés v Phillips Furniture Stores (1958)). Consequently, it will not matter if the works are actually carried out by the developer provided that it is the competent landlord by the date of the hearing (Marks v British Waterways Board (1963)). Alain could therefore sell the property to the developer subject to the leases, and any proceedings instituted by Alain before that sale could be transferred into the name of the developer. Alternatively, the property can be sold to the developer and it can then serve the section 25 notices (although this would potentially put back the termination date which could be specified in those notices).

Question 2(a)

In the absence of any documentation which would contradict Pauline's assertion that she and Olive first moved into the property in 1979, it seems reasonable to conclude (on the basis of the contents of the rent book) that Olive was the periodic (weekly) tenant of a dwelling house which was first let to her prior to 15 January 1989. Consequently, Olive would appear to have been a protected tenant under the Rent Act 1977 (RA 1977), s 1. None of the exceptions contained in RA 1977, ss 4 to 16 seems to apply.

Although Olive has died, RA 1977 allows qualifying members of a protected tenant's family to succeed to a protected tenancy (and therefore to enjoy the statutory protections afforded by the Act). The year of Olive's death is significant, because it means that Pauline's right of succession is governed by RA 1977, s 1 and Sch1 as originally enacted and not by changes which were introduced by the Housing Act 1988 (HA 1988). The upshot of this is that

Pauline, who was the child of a protected tenant and was living with that tenant in the six months immediately before their death, became the statutory tenant of the property on Olive's death.

As a statutory tenant, Pauline enjoys all the protections afforded by RA 1977. One aspect of this is that she can only be required to pay a 'fair rent' for the property: see RA 1977, s 45. Either the landlord or the tenant can apply for the amount of the fair rent to be registered, ie determined by a rent assessment committee (now the Rent Service): see RA 1977, s 67.

As regards the supposed new rent of £950 per month, it would appear that Quentin's agreement with Pauline will be unenforceable. Renate's statement that the amount of the rent has been "fixed by the court" would appear to indicate that a 'fair rent' has already been registered in relation to the property (although the reference to a "court" may not be entirely accurate, nothing will turn on this). If that is the case, Quentin would only be entitled to increase the amount of the rent payable by Pauline by following the required statutory procedure, namely serving a notice of increase in accordance with RA 1977, s 49 and then applying for the determination of a new rent by the Rent Service. Quentin would appear to fall at the first hurdle, because a notice of increase must be in the prescribed statutory form and it seems unlikely that the document written out by Quentin fulfils that requirement. In any event, the amount of the new fair rent has not been determined by the Rent Service, and so Quentin cannot recover the revised amount.

Even if a fair rent has not been registered, RA 1977, s 51 requires that in that circumstance any agreement as to the amount of a new rent must contain prescribed information in relation to:

- the tenant's continuing right to security of tenure if they refuse to sign the agreement; and

- the tenant's right to apply for the registration of a fair rent notwithstanding the agreement that has been made.

It does not appear that the document written out by Quentin contained this information. Consequently, he cannot rely on it as setting an enforceable new rent.

However, Quentin may able to apply for the registration of a new fair rent if either the current rent was fixed more than two years ago or if there has been a change of circumstance within two years of such a rent being registered which means that the amount of the registered rent is no longer fair: see RA 1977, s 67(3).

Question 2(b)

RA 1977, in both its original and amended form, contemplates the possibility of a second succession. Given that Pauline died after 15 January 1989, Renate's position is governed by the more stringent amendments which were introduced into RA 1977, s 2(1)(b) and Sch 1, para 6 by HA 1988, s 39. These provide that where:

(a) the current occupier (ie Renate) was a member of the family of the original tenant (ie Olive) immediately before that tenant's death and was

also a member of the family of the first successor to the tenancy (ie Pauline) immediately before the first successor's death,

(b) the death of the original tenant was before 15 January 1989, and

(c) the current occupier was residing in the dwelling-house with the first successor at the time of, and for the period of 2 years immediately before, the first successor's death,

then that person is entitled to an assured tenancy of the dwelling-house by succession.

Renate's period of residence does not appear to be in doubt. Unfortunately, RA 1977 does not define 'member of the family'. However, case law establishes that a 'common sense' approach should be adopted: see, for example, Fitzpatrick v Sterling Housing Association Ltd (2001). It is submitted that Renate, as the granddaughter of the original protected tenant and the daughter of the first successor statutory tenant is clearly a 'member of the family' in relation to each of them. It follows that Renate is entitled to claim an assured tenancy of the property.

One consequence of this is Quentin can propose a new rent under HA 1988, s 13 so as to bring it up to open market level.

Question 3

Nature of Rowena's occupation

Rowena was granted a residential tenancy of the barn after 15 January 1989. Consequently the tenancy granted to her will be regulated by the Housing Act 1988 (HA 1988) so long as the requirements in HA 1988, s 1 are met. This appears to be the case because the outbuilding was let to Rowena as a separate dwelling under a tenancy by virtue of which she occupies the barn as her only or principal home, as discussed in cases such as Curl v Angelo (1948), Horford Investments v Lambert (1976) and Trustees of Henry Smith's Charity Kensington Estate v Wagle (1990).

The fact that Rowena does not live in the barn all year round does not affect the application of HA 1988 to her situation. The issue of whether premises are occupied as a home is always a matter of fact and degree, but ordinary periods of absence (even if they are quite lengthy) will be ignored. The fact that Rowena spends two months each year away from the outbuilding does not mean that it is not still her home - and on the facts it clearly is.

As Rowena's tenancy is regulated by HA 1988, Patsy will only be able to gain possession if she can establish one of the recognised grounds for possession set out in the Act. The grounds available will depend upon whether Rowena occupies the barn by virtue of an assured or an assured shorthold tenancy. Although it would benefit Patsy if Rowena's occupation were under an assured shorthold tenancy (because Patsy could then use the 'accelerated' possession procedure which is available under HA 1988, s 21), Patsy would need to have served notice to that effect on Rowena at the start of the tenancy. It does not appear from the facts that this happened, and so the conclusion would seem to be that Rowena is an assured tenant.

Obtaining possession

Patsy would have to serve notice under HA 1988, s 8 as a preliminary step to commencing possession proceedings. The notice would have to set out the grounds on which Patsy intends to rely, the particulars of each ground and the date on which proceedings could begin (HA 1988, s 8(2) and Mountain v Hastings (1993)), albeit that it would seem that some minor errors or variations may be allowed: Masih v Yousaf (2014).

HA 1988, Sch 2 sets out a number of grounds on which a landlord is entitled to recover possession of premises which have been let on an assured tenancy. Some of the grounds are mandatory, whereas others are discretionary. In the case of the latter, the court may only make a possession order if the court 'considers it reasonable to do so'.

Ground 1

This is a mandatory ground for possession. It allows a landlord to recover possession of the premises if the landlord requires them for use as their only or principal home and if the tenant was given notice before the start of the tenancy that the landlord might seek to recover possession on this ground. There does not appear to be any reason to doubt that Patsy has a bona fide need for the premises for use as her only or principal home. However, on the facts it does not appear that Patsy gave the required notice to Rowena. Nonetheless, the court can dispense with the requirement for a notice to have been served on the tenant if the court considers that it is 'just or equitable' to do so. In Boyle v Verrall (1996) the court exercised their discretion in favour of the landlord but in that case it was accepted that the landlord had unintentionally created an assured tenancy and that the landlord had always made it clear that possession might be required under Ground 1. These extenuating features are not present in this case (although Patsy's circumstances are doubtless deserving of some sympathy), so it may be more difficult for Patsy to persuade the court that she should be entitled to recover possession under this ground.

Ground 9

This is a discretionary ground for possession. It allows a landlord to recover possession of the premises on the ground that suitable alternative accommodation is available for the tenant or will be available when the order for possession takes effect. The accommodation which is offered in lieu of the demised premises will be 'suitable' if it is not only of similar security of tenure but it is also 'reasonably suitable to the means and needs of the tenant and [their] family'. Relevant considerations include the 'extent and character' of the premises (Hill v Rochard (1983)) and 'proximity to place of work' (Yewbright Properties Ltd v Stone & Others (1980)).

Here, the cottage is smaller than the outbuilding. By itself, that is not sufficient to deprive Patsy of the right to recover possession of the barn, because the relevant question is whether, on an objective assessment, the cottage represents accommodation which is suitable for Rowena's reasonable needs. Much may depend on the extent to which Rowena would have to downsize if she were to move into the cottage. Although proximity to work is not a consideration in this case, proximity to local amenities is a factor that the court will take into account. Patsy might well suggest that Rowena could just as easily take a taxi rather than a bus, but this might perhaps involve

significantly greater expense for Rowena, which again would be a factor for the court to consider.

In addition, possession will not be granted if greater hardship would be caused by granting the order than by refusing it. The burden is on Patsy to establish that greater hardship will not be caused, one aspect of which is why Patsy could not herself move into the cottage rather than forcing Rowena to leave the outbuilding - in this regard the proximity of the outbuilding to the farmhouse is a potentially relevant factor in Patsy's favour. This issue will be resolved by reference to the factors in Harte v Frampton (1948).

Timescale

As stated above, any notice served by Patsy would also have to set out the date on which proceedings could begin. In the case of both Grounds 1 and 9 this would be no earlier than two months from the date of service of the s 8 notice).

Question 4(a)

The issue here is whether Siobhan currently occupies the house under a lease or a licence. A lease confers proprietary rights on an occupier, whereas an occupier under a licence enjoys only contractual rights. Both statute and, to a lesser degree, the common law afford greater protection to tenants than to licensees.

At common law, there are three elements which must be satisfied if an occupational arrangement is to constitute a lease: exclusive possession, fixed and ascertainable duration and a term which is at least one day shorter than the duration of the grantor's estate. Of these, by far the most important is exclusive possession, which has been described as the 'touchstone' of a tenancy: Street v Mountford (1985). Exclusive possession entitles the tenant to exclude the entire world, including the landlord, from the property for the duration of the term.

Although it is often said that a lease must be reserved 'at a rent', there is in fact no requirement in law for a rent to be payable.

Applying these principles to the facts, it is certainly arguable that, at its outset, the agreement between the parties was, or is to be objectively construed as, a lease. There appears to be a fixed or ascertainable period of occupation (namely the duration of the apprenticeship for Tom and Siobhan, and there also appears to be exclusive possession. Although the provisions inserted by Richard for his protection might ordinarily be effective to defeat an argument that exclusive possession was granted, it seems clear that none of the parties believed that these provisions served any genuine purpose. Siobhan could be expected to argue that: (i) those provisions were, therefore, simply a device designed to give the appearance of a licence; and (ii) given that in this arena the court looks at substance rather than form (Street v Mountford), the only proper conclusion is that the arrangement should be treated as a lease. As stated above, the absence of rent does not affect this conclusion.

However, it is submitted that the agreement between the parties is, in fact, more correctly to be characterised as a gratuitous licence. The common law has long recognised that even if the three elements for categorising an

arrangement as a lease are present, they may be disregarded in exceptional circumstances. One of those circumstances is where there is no intention to create legal relations: see Facchini v Bryson (1952). A licence confers a contractual right of occupation, ie it grants permission to a licensee to use the licensor's land for a purpose which, without the permission, would be an act of trespass. However, it does not confer 'possession'.

The argument that Siobhan has a 'mere' gratuitous licence is based on the following factors. First, she has not been paying rent and does not appear to have been providing any other consideration for her right of occupation. Secondly, Richard has known Siobhan (no doubt as a result of her friendship with Tom) for many years, and the original arrangement under which she and Tom were to be provided with the house appears to have been intended as a 'favour' to both of them on Richard's part – this suggests a personal rather than a proprietary arrangement. Thirdly, there does not seem to have been any intention that Siobhan should have a right of occupation which was independent of Tom's occupation, which again emphasises the personal rather than proprietary nature of the arrangement. Fourthly, a written agreement only came into existence in the first place because of the need to satisfy the conditions of obtaining the grant; in that sense the element of 'sham' in this case is not to be found in the provisions which try to say that the arrangement is a licence rather than a lease, but rather in the existence of any formal agreement at all in relation to that arrangement. Insofar as the existence of the written agreement represents an attempt to defraud the local authority and/or to obtain the grant by deception, this is not something on which Siobhan could rely to argue that the arrangement is not, as between herself and Richard, to be treated as a licence.

Question 4(b)

If Siobhan went into occupation as a tenant, then she did so under an assured shorthold tenancy (see the Housing Act 1988 (HA 1998), as amended). The fixed term of the tenancy (as discussed above) would appear to have expired, and so the tenancy has been converted into a periodic tenancy under HA 1988, s 5.

Such a tenancy can only be terminated by service of a notice under HA 1988. Although Richard could invoke one of the grounds for possession set out in Sch 2 to HA 1988 (ground 14 would appear to be available), he would be better advised to invoke the 'summary procedure' provided by HA 1988, s 21 (under which the court must make a possession order if the landlord has given two months' written notice that he requires possession of the property). Richard should serve such a notice as soon as possible.

If Siobhan is simply a licencee, Richard can terminate that licence simply by serving notice of termination on her. Since no notice period appears to have been specified, the requirement at common law is that any notice must give Siobhan a 'reasonable time' to leave. It is suggested that one month would be adequate. In any event, Protection from Eviction Act 1977 (PEA 1977), s 5 requires a minimum notice period of 4 weeks.

Question 4(c)

Richard should be advised not to proceed with his proposed eviction of Siobhan.

PEA 1977, ss 1(2), 1(3) and 1(3A) afford protection to 'residential occupiers' of premises, which Siobhan clearly is. A residential occupier is not to be harassed whilst in occupation of the premises with a view to causing them to leave, nor are they to be evicted from the premises unless the landlord is justified in believing that the occupier has abandoned the premises or unless the court has made an order for possession (see PEA 1977, s 3). Breach of any of the provisions of PEA 1977, s 1 is a criminal offence.

Any unlawful eviction would also render Richard potentially liable to pay damages to Siobhan under HA 1988, ss 27 and 28.