CILEx CHARTERED INSTITUTE OF LEGAL EXECUTIVES

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 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 January 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 showed similar characteristics in that they used case law appropriately to underpin their analysis and had good knowledge and understanding of the law. Candidates who did less well, did not have a sufficient legal foundation on which to base any sort of reasoned argument or (in terms of the Section B questions) advice. Citation of relevant statute or case law was scant.

In this session, candidates generally preferred to answer Section A questions rather than Section B questions - 21 of the 48 candidates chose to answer 3 Section A questions and a further 19 chose to answer two Section A questions. However, 57 of those 101 Section A answers were awarded 10 marks or less. Those answers tended to demonstrate insufficient legal knowledge and also failed to fulfil the command instruction in the question (i.e. they did not discuss, analyse or evaluate the proposition within the question with the required degree of critical appraisal. In some cases, answers were very discursive and generalised.

Most of the better performing candidates answered all four questions to a reasonably comparable standard. A small number of candidates, however,

only offered three (or even two) such answers: the remaining answer(s) proved to be significantly worse than the others. In some instances, this was sufficient for the candidate not to achieve enough total marks for a pass. Given that the poorer answer(s) did not appear to bear any of the hallmarks of time pressure, it would seem that those candidates had not revised a sufficient number of topics to cover the elements of the unit specification which appeared in the question paper.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1

This question required candidates to discuss (a) the formalities for creating both a valid lease and an agreement for lease, and (b) equitable leases and the rule in Wheeldon v Burrows. This was easily the most popular question – 46 of the 48 candidates answered it. However, an average mark of just over 9 indicates that candidates did not deal with this topic particularly well – in fact only 12 candidates achieved 13+ marks (i.e. the equivalent of a pass). Weaker candidates did not cite, or were confused as to the identity of, the relevant statutory provisions which set out the formalities in relation to leases and agreement for leases. Weaker candidates also thought parol leases were equitable leases. The discussion as to when an equitable lease might come into existence was also generally poor.

Question 2

This question required candidates to discuss 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. Twenty-one candidates answered this question, but only 9 achieved 13+ marks (ie the equivalent of a pass). Better candidates identified and discussed each of the seven grounds (it being understood that the discussion of some of the grounds (d) and (e) in particular) would not be as detailed as others given the relatively little case law which exists in relation to them). They also attempted to assess whether a particular ground favoured the landlord or the tenant. Weaker candidates only dealt with grounds (f) and (g) and did not attempt any sort of evaluation as to the balance struck by either of those grounds.

Question 3

This question required candidates to discuss whether the assured shorthold tenancy (AST) and the summary method, by which it may be terminated, unduly favoured the interests of landlords over the interests of tenants. Nineteen candidates answered this question, but only five achieved 13+ marks (ie the equivalent of a pass). Better candidates correctly focussed on the combined elements of the summary termination procedure and the accelerated possession procedure. Weaker candidates tended to engage in a discursive description of the Housing Act 1988 generally and/or the criteria for establishing the existence of an AST (pre-and-post the statutory reversal of the default position).

Question 4

This question required candidates to discuss the statutory and common law rules relating to a landlord's right to forfeit. Twenty-two candidates answered this question and 17 achieved 13+ marks (ie the equivalent of a pass). The few candidates who did not achieve that level fell well short of it, suggesting perhaps that this was not a topic which they had sufficiently revised. Better candidates not only set out the relevant rules, but also went on to discuss whether they unduly favoured the landlord or the tenant and/or possible aspects which might be ripe for reform.

SECTION B

Question 1

This question required candidates to discuss: (a) the Housing Act 1988 and (b) the Protection from Eviction Act 1977 (with also an element re termination of a tenancy by one of two joint tenants). Thirty candidates answered this question but only five achieved 13+ marks (i.e. the equivalent of a pass). Weaker candidates seemed to struggle particularly with part (a), where poor appreciation of the stated facts too frequently resulted in a discursive and generalised answer. Better candidates tailored their answers/advice to the facts. They were also more accurate in their citation of the relevant statutory provisions of the 1977 Act.

Question 2

This question required candidates to discuss covenants against assignment and the consequences of the Landlord and Tenant (Covenants) Act 1995 in relation to excluded assignments. Thirty candidates answered this question but only eight achieved 13+ marks (ie the equivalent of a pass). Weaker candidates seemed to take no account of the 1995 Act at all and did not adequately address the reasonableness of the condition imposed by the landlord. Better candidates considered the principles enunciated in relevant case law and took specific account of section 11 of the 1995 Act.

Question 3

This question required candidates to discuss derogation from grant and the covenant for quiet enjoyment, along with the proper construction of a landlord's reserved right to enter the premises. Fourteen candidates answered this question, of whom six achieved 13+ marks (ie the equivalent of a pass). The weaker answers were very poor (no candidate in this category achieved more than 8 marks) and took no account of the reservation within the lease. Better candidates not only took account of this, but also engaged in separate and considered discussions of the distinct concepts that are non-derogation and quiet enjoyment.

Question 4

This question required candidates to discuss the safeguards which are enjoyed by long leaseholders in relation to the recovery of variable service charges. Only seven candidates answered this question, of whom only one achieved 13+ marks (ie the equivalent of a pass). Better answers cited the relevant statutory provisions and applied those to the facts within the question. Weaker

answers did not consider the statutory provisions in relation to reasonableness but resorted to reliance on substantiated requirements of 'fairness'.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 10 - LANDLORD AND TENANT LAW

SECTION A

Question 1(a)

Formalities for the grant of a lease

Where a lease takes "effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine", it can lawfully be created 'by parol': Law of Property Act 1925 (LPA 1925), s 54(2). This means that such a lease can be made either in writing (without the need for a formal deed) or orally. The result is that any weekly, monthly or annual periodic tenancy will confer a legal estate on the tenant, even if the tenancy subsequently endures for more than three years - this because the initial 'term' was only for a week, month or year (as the case may be).

This absence of formality presents a significant trap for unwary property owners, who may find what they thought was an informal arrangement for occupation is elevated to the status of a lease (invariably with adverse consequences in relation to security of tenure and other statutory protections which will benefit the occupier). Conversely, a supposedly 'parol' lease which is not granted at the best rent, or which takes effect at a future date, will not confer a legal tenancy on the tenant: see, for example, Fitzkriston LLP v Panayi (2008), where the Court of Appeal held that the failure to reserve the best rent in respect of an intended periodic tenancy meant that only a tenancy at will had been granted.

As indicated above, a tenancy at will can be created without the formality of a deed, because it is inherent in the nature of such a tenancy that it does not have a term at all (and so cannot satisfy LPA 1925, s 54(2)).

Where a lease is to be granted for a term of more than three years, it must be made by way of a deed: this is the combined effect of LPA 1925, ss 52(1) and 205(1)(ii). The specific requirements for valid execution of an instrument as a deed are set out in Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989), s 1(1) - in particular subsections (2) and (3). Broadly put, they are as follows:

- the instrument must make clear that it is a deed and must be executed as a deed
- an executing party must sign in the presence of an attesting witness
- the instrument must be delivered after execution.

Formalities for an agreement for lease

Under LP(MP)A 1989, s 2(1) a contract for the sale or other disposition of an interest in land only comes into existence if the agreement:

- is in writing
- incorporates all the terms which the parties have expressly agreed (either in one document or, where contracts are to be exchanged, in each part of the contract)
- is signed by or on behalf of each party to the contract

The grant of a lease (ie a term of years absolute) is a "disposition of an interest in land" for these purposes (it is one of the two legal estates in land permitted by the LPA 1925: see LPA 1925, s 1(1)(b)). Consequently, LP(MP)A 1989, s 2(1) applies to an agreement for lease.

However, the requirement for a contract which complies with s 2(1) does not apply to a lease which can lawfully be granted 'by parol': see LP(MP)A 1989, s 2(5)(a). It therefore does not apply to any of the leases referred to in the first paragraph of this answer.

1(b)

Where the grant of a lease does not take effect in law because of the failure to comply with the requirements of LPA 1925, s 52(1), the court may nevertheless regard the lease as being binding on the parties and enforce its terms against one of them at the instigation of the other. The justification for this is the principle that, in equity, "an agreement for a lease is as good as a lease". In Walsh v Lonsdale (1882), for example, a tenant went into possession following an agreement for a lease but before a deed granting the lease was executed. When a dispute later arose as to the terms on which the tenant was occupying the premises, the court rejected the tenant's assertion that he occupied on the basis of a common law periodic tenancy; instead it found that the tenant occupied by virtue of the agreement "under the same terms in equity as if a lease had been granted". Further, on the basis of the maxim that "equity looks as done that which ought to be done", equity regards the lease as being granted, whether or not the tenant seeks relief from a court.

It is important to realise that the doctrine in Walsh v Lonsdale is dependent on the theoretical availability of specific performance. The equitable lease is therefore vulnerable if specific performance is not actually available, or ultimately not granted, because the most likely outcome is that the court will conclude that the parties have created an implied periodic tenancy (with all the adverse consequences for the property owner which are discussed above).

The rule in Walsh v Lonsdale cannot be invoked:

- to perfect a lease which is not signed by the tenant (because the lease does not require the tenant's signature in order to be effective to grant a legal (leasehold) estate)
- to perfect an agreement for lease which does not satisfy the requirements of LP(MP)A 1989, s 2(1) - this is because such a failure

means that no contract ever comes into existence, and therefore there is no contract to which the rule can apply

Question 2

Part II of the Landlord and Tenant Act 1954 (LTA 1954) confers security of tenure on tenants who occupy premises for the purposes of a business. Where a tenancy enjoys security of tenure, it can only be terminated in accordance with the procedures laid down by LTA 1954. Once the current tenancy has been terminated, the landlord or the tenant can apply for the grant of a renewal tenancy.

However, LTA 1954 does not give tenants an unrestricted right to be granted a new tenancy. LTA 1954, s 30(1) sets out seven grounds (in paragraphs (a) to (g)) on which the landlord can oppose such a grant. They are:

(a) breach of the tenant's repairing obligations

(b) persistent delay by the tenant in paying the rent

(c) substantial breaches of the tenant's other obligations or any other reason connected with the tenant's use or management of the holding

(d) the provision of suitable alternative accommodation for the tenant

(e) where the current tenancy is a subletting of part only of the property comprised in a headlease and the reversioner of that headlease can demonstrate that the property could, more economically, be let as a whole

(f) that the landlord intends to demolish, reconstruct or carry out substantial works of construction

(g) that the landlord intends to occupy the premises for the purposes of a business carried on by himself (or a company which he controls) or as his residence (although this ground is not available to a landlord who has purchased his interest in the property within the preceding five years)

As can be seen from this list, the first three grounds are so-called ‘fault’ grounds - the landlord can invoke them if the tenant has committed a breach of its obligations under the lease. The second limb of ground (c) entitles the landlord to oppose the grant of a renewal tenancy for “any other reason connected with the tenant's use or management of the holding”. In Youssefi v Mussellwhite (2014) the Court of Appeal held that the correct question in relation to this limb is whether the tenant’s behaviour (falling short of a breach of covenant or other obligation under the lease) throughout the term of the current tenancy has been such that ‘it would be unfair to the landlord if the tenant were to be foisted on the landlord for another term’.

The remaining four grounds of opposition are ‘no-fault’ grounds, in that they are unconnected with the tenant’s conduct during the term of the current tenancy. Grounds (d) and (e) are infrequently encountered in practice. Grounds (f) and (g) require the landlord to prove that at the end of the current tenancy (which may be some time after the contractual expiry date if the tenant contests the landlord’s opposition) the landlord has the requisite intention to carry out works or to occupy (as the case may be). In the case of

ground (f), this requires proof that the landlord has any necessary planning permission, funding, etc along with proof that the landlord requires possession of the holding in order to carry out the works. The requisite intention needs to be demonstrated at the date of the hearing (Betty's Cafés Limited v Phillips Furniture Stores Limited (1959)) and must be an intention which, in the words of Asquith LJ in Cunliffe v Goodman (1950), is "a firm and settled intention not likely to be changed, or in other words that the proposal for doing the work has moved out of the zone of contemplation … into the valley of decision".

Grounds (a), (b), (c) and (e) are discretionary grounds. As such, the court can grant a renewal tenancy even though the landlord has made out its ground(s) of opposition. In relation to grounds (a), (b) and (c), the court is likely to want proof that any existing breaches or misconduct have been remedied and cogent re-assurance that they will not be repeated under the renewal tenancy. There is no case law as to how the discretion under ground (e) will be exercised (no doubt reflecting how rarely ground (e) is invoked in practice). Grounds (d), (f) and (g) are mandatory grounds - the court must refuse to grant a renewal tenancy if the landlord establishes the relevant ground. That being said, the requirement that any alternative accommodation offered under ground (d) must be suitable for the tenant's needs and must be available on terms which are reasonable introduces an element of flexibility in the court's approach.

If the landlord successfully opposes a renewal tenancy on grounds (e) to (g), he must pay compensation - however the amount is relatively modest (being linked to the rateable value of the premises and never being more than twice that value).

Given that grounds (a) to (c) are based on the tenant's own default, it is perhaps difficult to argue that they do not strike a fair balance between the landlord and tenant: the 'remedy' lies in the tenant's own hands. Ground (d) requires the tenant to be put in no worse position in relation to the alternative premises than it was in relation to the original premises, so again there is a balance between the interests of the landlord and the tenant. As stated above, ground (e) rarely arises in practice.

It is in relation to grounds (f) and (g) where the landlord holds most of the cards, in that:

- the landlord controls all or most of the relevant evidence

- the landlord does not have to establish that his proposals are economically viable (provided that they are genuinely held and implementable), nor is the landlord's motive relevant (provided that his intention exists independently of the tenant's statutory claim to a new tenancy: see, for example, S Franses Limited v The Cavendish Hotel (London) Ltd (2018))

- the amount of any compensation payable is small

- the relevant date for assessing whether or not the landlord holds the requisite intention is the date of the hearing of the application for a new tenancy, which means that the tenant often embarks on litigation without any real certainty as to the strength or otherwise of the

landlord's case, and with the landlord being able firm up his intentions (and the evidential basis for his case) right up until the trial

All of the above means that, in many cases, the tenant's scope for challenging the landlord's opposition under ground (f) or (g) is relatively restricted and, therefore, can be said not to strike a truly fair balance between the parties.

Question 3

Prior to the enactment of the Housing Act 1988 (HA 1988), a landlord who wished to recover possession of a property which had been let in the private rented sector invariably had to establish a statutory basis for terminating the tenancy. This was because the vast majority of tenancies in that sector enjoyed security of tenure under the Rent Act 1977 (RA 1977)). Under RA 1977, a tenant can only be deprived of that security if the landlord is able to establish one or more of the statutory 'cases' for doing so (RA 1977, s 98 and Sch 15, Part I). This state of affairs was replicated in broadly similar terms in relation to assured tenancies under HA 1988 (albeit that that Act refers to 'grounds' for possession): see HA 1988, s 7 and Sch 2, Part II).

If the tenant who has the protection of RA 1977 or an assured tenancy under HA 1988 is unwilling to give up possession, a court hearing will be required before a possession order can be made. Under both statutes, the 'fault-based' cases or grounds for possession on which landlords most typically seek to rely as the basis for recovering possession (eg non-payment of rent, persistent delay in payment of rent, or breach of the tenancy agreement) do not lead inevitably to the making of a possession order; instead, these grounds give the court a discretionary power to make a possession order if the court 'considers it reasonable' to do so (see HA 1988, s 7 and RA 1977, s 98). The court also has full power to stay or suspend the operation of any possession order which it makes. In some instances, the period over which a possession order is stayed or suspended can last for months or even years.

Although much about the new assured tenancy was familiar to practitioners, HA 1998, s 20 (as originally enacted) contained something new. It established the assured shorthold tenancy (AST) in an attempt to make letting in the private rented sector more popular. RA 1977 was considered to be unduly tenant-friendly in view of the measures which it contained in relation to security of tenure, rent protection and succession rights. Although adoption of the AST was initially limited, changes introduced by the Housing Act 1996 mean that since 1997 the AST has become the 'default' tenancy of choice in the private rented sector.

The particular attractiveness of the AST to landlords lies in HA 1988, s 21. This provision entitles a landlord to regain possession of a property which has been let on an AST without the need to establish a case or ground for possession and also without a court hearing, where the relevant criteria apply.

HA 1988, s 21 applies to both fixed-term and periodic tenancies. In either case, a landlord can terminate the AST (and hence trigger an incontestable right to possession) if he gives the tenant at least two months' written notice that the landlord requires possession of the property (HA 1988, s 21(1) and s 21(4)). This no-fault ground has proven to be very popular with landlords, so much so that it has been suggested that landlords are effectively distorting the market in privately-rented property by granting only ASTs.

However, the landlord does need to take a certain amount of care in relation to the termination date which he specifies in the section 21 notice because:

- in the case of a fixed-term tenancy the termination date cannot be earlier than date on which the fixed term expires, and

- in the case of a periodic tenancy the termination date cannot be earlier than date on which the periodic tenancy could otherwise have been terminated by a notice to quit.

Upon proof that the relevant statutory criteria have been satisfied, the court will make a possession order by way of an administrative act rather than holding any sort of hearing. In most cases the tenant will be ordered to give up possession of the property within 14 days of the date of the order; even if the tenant is able to prove that a possession order will cause exceptional hardship to him, the maximum period which can elapse between the date of the order and the date for possession is 42 days.

It should be noted that a landlord's right to invoke HA 1998, s 21 is not completely unrestricted. First, regardless of when a section 21 notice is served, a possession order cannot be made for a date which is less than six months from the date when the tenancy began (HA 1988, s 21(5)): this means that a tenant will have at least six months' use of the property before he can be required to leave. Secondly, a landlord may be debarred from serving a section 21 notice if he (or his letting agent) has failed to protect any deposit provided by the tenant with an approved deposit protection scheme and/or he has failed to provide the tenant with prescribed information about the arrangements relating to the protection of the deposit (see HA 1998, ss 212 - 214) and also prescribed documents (eg a gas safety certificate, an EPC or a Government booklet on lettings).

The absence of any requirement to prove fault on the part of the tenant, nor indeed to prove any specific reason at all for requiring possession of the property, coupled with the relatively straightforward and inexpensive procedure for obtaining a possession order, means that there is very little judicial oversight as to why a landlord is seeking to recover possession. In addition, service of a s 21 notice may give the tenant only a few weeks in which to try to find alternative accommodation, which has been cited as one of the principal reasons for a significant increase in homelessness in recent years

The AST and the s 21 procedure were deliberately designed to protect the interests of landlords, so it is hardly surprising that the interests of tenants appear to have been subordinated. However, it is a legitimate criticism of the current system that the period of notice is too short where no fault on the tenant's part is being alleged. An extension of the notice period might well serve to redress the balance.

Question 4

The right of forfeiture is a landlord's right to terminate a lease early on account of a tenant's breach of the lease. The law 'leans against forfeiture': Duppa v Mayo (1669). At common law, a landlord's right to forfeit will never be implied; it must either be reserved expressly in the lease or it must arise as a result of a breach of a condition of the lease. The latter is rarely encountered, so in practice the landlord must first establish that the lease contains an

express right to forfeit and must then prove that the event entitling the landlord to forfeit has occurred. Where there is any ambiguity as to the meaning of the words that have been used in the lease, these will be construed contra proferentem (ie in favour of the tenant): see Doe d Abdy v Stevens (1832).

It is then necessary to distinguish between a breach of covenant in relation to the payment of 'rent' and a breach of any other covenant.

As regards non-payment of rent, the common law requires that the landlord must have served a formal demand at the premises before sunset on the day on which the rent is due before initiating possession proceedings. There is an exception to this requirement if half a year's rent is in arrears and either (a) the right of commercial rent arrears recovery under Tribunals, Courts and Enforcement Act 2007, s 72(1) is not exercisable to recover the arrears, or (b) there are insufficient chattels on the premises to enable the landlord to recover the arrears by that power, in which case formal demand is unnecessary and a 'writ of ejectment' may be served immediately): see Common Law Procedure Act 1852 (CLPA 1852), ss 210 and 210A. Relief from forfeiture is available to the tenant if all rent, arrears and costs are paid before the possession proceedings come to trial (see CLPA 1852, s 212). If a possession order is made, the landlord is entitled to mesne profits for the period from the date for which rent was last paid up to the date when possession is recovered (see CLPA 1852, s 214).

However, there is nothing to prevent the parties from waiving the need for a formal demand, and virtually all modern leases do in fact dispense with this requirement. In addition, there is nothing (other than the tenant's bargaining power) which prevents the landlord from defining a wide range of monetary payments which are or may be due from the tenant under the lease as 'rent', non-payment of which will therefore engage the right to forfeit. So, for example, contributions towards service charge and insurance, as well as sums owed by way of interest or as reimbursement of expenditure incurred by the landlord, are commonly defined as 'rent' along with the passing rent.

As regards the breach of any other covenant, statute has intervened so as to require the landlord to follow the procedure set out in the Law of Property Act 1925 (LPA 1925), s 146. The landlord must serve a written notice on the tenant specifying the breach of covenant which is said to have occurred. Not only must the landlord identify the relevant breach, but the landlord must then correctly characterise the breach as either 'remediable' or 'non-remediable'. LPA 1925 does not provide definitions or examples of either of these terms, but case law has established the proper characterisation of various common types of breach: see, for example, Saava and Another v Hussain (1996) (breach of covenant against alterations is remediable) and Scala House and District Property Company v Forbes (1974) (breach of covenant against assignment is non-remediable, although this was later questioned in Akici v Butlin Ltd (2005)). Where the breach is remediable, the landlord must then specify in the notice a reasonable period of time within which the tenant can remedy the breach in order to avoid the right to forfeit being exercised. Again, LPA 1925 does not define what is a 'reasonable time' and case law establishes that this is a fact-sensitive question (and so may vary from case to case). If the landlord (in the opinion of the court) either wrongly characterises a breach or specifies an insufficient period of time within which that breach can be remedied, then the landlord's s 146 notice will be invalid.

Even if the landlord follows the correct procedure, events subsequent to the breach may still defeat a right to forfeit.

First, there is the common law doctrine of waiver. This doctrine establishes that the right to forfeit will be lost where the landlord, with knowledge of the breach and his right to forfeit, nonetheless takes any step which, viewed objectively, appears to affirm the continued existence of the lease. This objective assessment means that the actual motive or intention of the particular landlord is irrelevant: see Central Estates (Belgravia) Ltd v Woolgar (No.2) (1972) (landlord fully intending not to accept rent and to assert right to forfeit, but nonetheless the right to forfeit was lost when payment of rent was accepted in error). In practice (as illustrated by Woolgar itself), landlords commonly fall foul of the waiver doctrine by accepting rent from the tenant after they have become aware of a breach of covenant; however a range of other positive steps will have the same effect (eg finalising a rent review or dealing with an application by the tenant for a consent which is required under the lease). The position is made even more difficult for landlords because the knowledge of their managing agents will be imputed to them: see Metropolitan Properties v Cordery (1979).

Secondly, tenants have a statutory right to apply for relief from forfeiture in relation to both remediable and non-remediable breaches. There is an automatic right to relief if the tenant pays the amount of any unpaid rent and the costs of the action at least 5 days before the hearing of the landlord's claim for possession: County Courts Act 1984, s 138. This is rarely used. Of far greater assistance to tenants (and also those with derivative interests, such as mortgagees and sub tenants) is the discretionary right to relief which exists under LPA 1925, s 146(2) and s 146(4) in relation to any breach of covenant other than non-payment of rent. The court's discretion is very wide: generally, the court will grant relief if the tenant remedies the breach, or pays compensation (if compensation is an adequate remedy) in respect of an irremediable breach and the court is convinced that the tenant will perform its obligations under the lease for the remainder of the term.

SECTION B

Question 1(a)

Barry and Craig were, until the service of the notice to quit by Craig, joint tenants under a periodic assured shorthold tenancy which came into existence once the original fixed term tenancy expired: Housing Act 1988 (HA 1988), s 5. The periodic tenancy was on the same terms, and subject to the same protection, as the original tenancy.

As such, Barry and Craig were entitled to security of tenure and Adam as landlord could not have brought the tenancy to an end otherwise than by way of obtaining a court order for possession or exercising any break right which was available to him under the tenancy. Non-payment of at least two months' rent provides a landlord with a mandatory ground for obtaining a possession order under HA 1988, s 21.

However, in the present case Craig has determined the tenancy by serving notice to quit in accordance with the contractual right of termination which is contained in the tenancy agreement. Because Craig and Barry are joint tenants, it is open to either one of them to invoke any contractual right to terminate the tenancy which is available to them without the participation or agreement of the other: Sims v Dacorum Borough Council (2014). Service of the notice to quit is therefore effective to terminate the tenancy: HA 1988, s 5(2)(b).

The tenancy will determine one month after the date of service of the notice to quit. After that date, Barry will have no legal right to remain in occupation of the property. If Barry refuses to vacate the property voluntarily on or before that date, Adam will be entitled to evict him. The steps which he can take are considered under part (b) below.

Adam is owed several months' rent. Until the tenancy comes to an end in accordance with the notice to quit, both Barry and Craig remain liable to pay rent to Adam. Craig's agreement with Barry is not binding on Adam because he was not a party to it and so he has not agreed to exonerate Craig from his obligation to pay rent. Barry and Craig are therefore jointly and severally liable to Adam for the rent which is owed up to and including the date on which the tenancy comes to an end in accordance with the notice to quit.

Adam can bring debt proceedings against both Barry and Craig for the unpaid rent. However, Craig may be entitled to an indemnity from Barry for any rent which he pays to Adam given that Barry appears to have agreed to accept sole responsibility for the payment of rent from the date when Craig left the flat.

If Barry remains in the property after the termination date, his occupation will be unlawful. Adam will be entitled to recover damages/mesne profits from Barry for his use and occupation of the property from that date until the date on which Barry vacates the property.

1(b)

Adam should not proceed with the proposed eviction. Although Barry would appear to be a trespasser as a result of the termination of the periodic tenancy under which he was formerly entitled to occupy the property, he nonetheless continues to enjoy the protection of the Protection from Eviction Act 1977 (PEA 1977). This is because, prior to the termination of the tenancy, Barry was occupying the flat as his residence within the meaning of that Act. The fact that Craig has moved has no effect on Barry's continuing rights.

Adam should be advised that under PEA 1977, s 3 it is unlawful for him to obtain possession of the premises other than by court order. Any attempt by Adam to remove Barry without obtaining such an order exposes Adam to the risk of criminal liability under the Act, for which the punishment on conviction is a fine or imprisonment (for a period of up to two years) or both.

If Adam were actually successful in evicting Barry without a court order, he would risk incurring liability under PEA 1977, s 1(2) which establishes the offence of unlawful deprivation of occupation. The offence may be committed "by any person" and the acts must have "the character of an eviction": R v Yuthiwattan (1984). The absence of a court order authorising the eviction inevitably means that the deprivation of occupation would be unlawful.

If Adam tried but failed to evict Barry, he might still be guilty of "harassment" contrary to PEA 1977, s 1(3A). Harassment is defined by that section as "acts likely to interfere with the peace or comfort of the residential occupier". An attempted eviction of an occupier who is unwilling to give up occupation voluntarily would seem clearly to constitute such an act. In order for Adam to be guilty, the prosecution would also have to prove that Adam had "reasonable cause to believe" his acts might cause Barry to leave. Again, this seems clear on the facts.

If Barry were forced to give up occupation as a result of harassment he would be entitled to claim damages under the statutory tort of unlawful eviction set out in HA 1988, ss 27 and 28. Damages are awarded on the basis of the difference in value between the landlord's interest if the tenant remained in occupation and the value of the landlord's interest without the tenant in occupation. Damages under these sections can prove substantial and may be punitive in nature.

Question 2

In order to advise James, it is necessary to consider: (a) the law relating to qualified covenants against assignment, and (b) the effect of the Landlord and Tenant (Covenants) Act 1995 (LT(C)A 1995).

The covenant in the lease prohibiting assignment of the premises is a qualified covenant. Consequently, in accordance with Landlord and Tenant Act 1927 (LTA 1927), s 19(1) the covenant is to be read as if it contained a proviso that the landlord's consent "is not to be unreasonably withheld".

It is a question of fact for the court as to whether consent has been unreasonably withheld. The reasonableness of the landlord's response to a request for consent to assign falls to be determined in accordance with the six guidelines expounded in International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd (1986), as expanded upon in Ashworth Frazer v Gloucester City Council (2002). At the heart of these guidelines are the following principles which are relevant to James' situation:

- the purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the landlord from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee

- the landlord's reason(s) for refusing consent or imposing a condition subject to which his consent is granted must be directly related to the relationship of landlord and tenant in regard to the subject matter of the lease

Typically, the burden of proof is on the tenant to demonstrate that consent has been unreasonably withheld, but this will be reversed if the landlord refuses to give any reasons for a refusal. It is not necessary for the landlord to prove that his reason is justified, so long as it is a reason that is genuine and might be invoked by a reasonable person in the circumstances: see, for example, NCR v Riverland Portfolio (2005) and Pimms v Tallow Chandlers Company (1964).

In the present case, Pete was being asked to consent to an assignment of the lease to a person who has no previous business experience and, presumably

therefore, no previous track record as a tenant of commercial premises. In many leases, it is an express pre-condition of the landlord granting consent to assign that the outgoing assignor should guarantee the incoming assignee (in the form of an authorised guarantee agreement, as permitted by LT(C)A 1995, s 16). However, it does not appear that such a pre-condition is present in James' lease, so the condition imposed by Pete must be considered in accordance with general principles of reasonableness. As to this, it is submitted that Pete's apparent concern as to the risk that Chrissie might not be able to fulfil the burden of the tenant covenants in the lease was understandable in the light of her particular circumstances. Chrissie was a potentially 'undesirable' assignee (to use the terminology of the International Drilling case). Against that background, Pete's request for James to act as a guarantor appears to have been both genuine and one which a reasonable person would have been entitled to put forward. Consequently, the imposition of a condition that the assignment would only be permitted if James agreed to stand as a guarantor for Chrissie is likely to be upheld by the court as a reasonable one.

If Pete's condition had been unreasonable, James would have been entitled lawfully to assign the lease to Chrissie without complying with that condition. However, given that it is considered likely that the court would uphold the condition imposed by Pete, it follows that James has assigned the lease in breach of covenant.

James' lease is a 'new tenancy' for the purposes of LT(C)A 1995, s 1. Ordinarily, a tenant who assigns such a tenancy is automatically released from the burden of the tenant covenants in the lease from the moment of the assignment (LT(C)A 1995, s 5). However, an exception exists in relation to what LT(C)A 1995, s 11 refers to as an 'excluded assignment'. An excluded assignment includes an assignment by the tenant in breach of covenant, and so applies to the present scenario.

Where an excluded assignment occurs, the outgoing assignor does not achieve an automatic release under LT(C)A 1995, s 5. Instead, the assignor remains jointly liable with the incoming assignee on the tenant covenants in the lease until the next lawful assignment of the lease, at which point both of them secure their automatic release. This means that, even though James has had nothing to do with the business for several months, he is still liable to Pete in relation to the rent (and indeed all the other tenant covenants in the lease). On the assumption that the unpaid quarter's rent is now due and payable in accordance with the terms of the lease, James would appear to have no defence to Pete's claim. For what it is worth, he would have a right of indemnity against Chrissie in relation to the amount which he pays.

Question 3

In order to advise Leroy, it is necessary to consider the express terms of the lease, and also the obligations which are imposed on Marwan as landlord in terms of the covenant for quiet enjoyment and also the principle of non-derogation from grant.

The grant of a lease confers exclusive possession on the tenant: Street v Mountford (1985). This entitles the tenant to exclude everyone (including the landlord) from the demised premises - but only to the extent that the landlord has not reserved a right of entry in favour of himself (which he may exercise in person or through anyone authorised by him, according to the precise terms

of the reservation). Where a landlord reserves such a right, it is necessary to construe it strictly in accordance with its terms - too wide a reservation will effectively negate the grant of a lease altogether because the element of exclusive possession will be lacking. It should also be construed as restrictively as is required in order to avoid a derogation from grant or a conflict with the covenant for quiet enjoyment: see, for example, Windsor-Clive, Earl of Plymouth v Rees (2019).

The first point to consider, therefore, is whether the terms of the lease entitle Marwan to carry out any sort of intrusive excavations in the yard. It is submitted that they do not, for two principal reasons. Firstly, the lease entitles Marwan to 'enter'. The normal dictionary meaning of 'enter' does not include 'drill' or 'dig' or anything else which would amount to excavation (ie breaking the surface of the demised premises). Secondly, the right of entry is limited to "reasonable times and reasonable purposes". If the works are to be carried out when Leroy's business is open for trade, then it is arguable that this is not at a "reasonable time". Equally, it is doubtful whether it is a "reasonable purpose" for a landlord to excavate parts of the demised premises. In the context of a lease, the notion of reasonableness does not take account solely of the landlord's interests, but has regard to the relationship of landlord and tenant. The "reasonable purposes" are reasonable purposes concerned with the parties' rights and obligations under the lease. Viewed against that background, excavating part of the demised premises to the substantial detriment of the tenant is not a reasonable purpose of the lease.

In addition, a lease may contain an express covenant by the landlord for quiet enjoyment. Even if it does not, such a covenant is implied (Markham v Paget (1908)). The covenant means that the landlord must ensure that there is no interference with the tenant's occupation and enjoyment of the property. Not every interference gives rise to liability: the disturbance suffered by a tenant must be "so substantial or intolerable as to justify the tenant in leaving the demised premises": Browne v Flower (1911). Older cases suggest that there has to be a substantial physical interference with the enjoyment of the premises, even if the interference does not take place on the premises themselves. However, more recent cases have held that noise and odours can give rise to a breach of the covenant. The modern test is whether there has been some interference "with the tenant's freedom of action in exercising his rights as a tenant" (Lord Denning in McCall v Abelesz (1976)).

Applying those principles to the present case, it seems clear that Marwan's proposed excavation of the yard (or at least parts of it) will substantially interfere with Leroy's ability to trade. Even if Leroy might not have to close his business completely, it is clearly arguable that the impact of the yard being out of commission for eight weeks would severely curtail his freedom of action in exercising his rights as a tenant.

A landlord is also subject to an implied obligation not to derogate from his grant. This means that the landlord must not do anything that prevents the tenant from being able to enjoy the demised premises for the purpose for which they were let: see, for example, Aldin v Latimer Clark, Muirhead & Co (1894)). The obligation not to derogate from grant is not excluded by an express quiet enjoyment covenant.

If Leroy will be unable to use the yard as a consequence of the excavations which Marwan is proposing, then it is submitted that the position is analogous to the situation in Stewart v Scottish Widows & Life Assurance Society Plc

(2005), where a roadway was rendered unusable by the tenant following the installation of speed bumps. In that case the tenant successfully sued for breach of the landlord's obligations of quiet enjoyment and non-derogation from grant.

In light of the above, Leroy should be advised to apply for an interim prohibitory injunction preventing Marwan from entering onto the site for the purpose of carrying out any excavation of the yard.

Question 4

Sections 18-30 of the Landlord and Tenant Act 1985, as amended (LTA 1985), provide holders of long residential leases with two principal forms of protection in relation to a variable service charge, ie a service charge the amount of which can vary according to the level of expenditure incurred by the landlord in respect of services, repairs, maintenance, improvements, insurance or the landlord's costs of management (LTA 1985, s 18). Those protections are: (a) the right for the tenant to challenge a service charge which is based on expenditure by the landlord which has been unreasonably incurred or which is unreasonable in amount, and (b) the right to be consulted before major works are carried out.

Contracting out is unlawful: see LTA 1985, s 27A(6). This therefore invalidates the provision in Paula's lease to the effect that the service charge demand is conclusive as to any of the matters relating to the amount or reasonableness of the landlord's expenditure. Paula is entitled to challenge the amount demanded of her.

<u>Service charges</u>

Service charges must be reasonably incurred and reasonable in amount: see LTA 1985, ss 18(2) and 18(3). This applies to expenditure already incurred as well as to anticipated future expenditure in relation to which the tenant is making payments on account: see LTA 1985, s 19. In this context 'reasonable' must be given a broad common-sense meaning (see, for example, <u>Veena SA v Cheong</u> (2003)): so, for example, the landlord need not always choose the cheapest option.

The demand for payment must also be accompanied by a summary of the tenant's rights and obligations in relation to service charges: see LTA 1985, s 21B). The tenant is not obliged to pay until such a summary is served. If asked by the tenant, the landlord must also provide a summary of the costs incurred by him so that the tenant can understand the amount that has been demanded: see LTA 1985, s 21. Again, the tenant is not obliged to pay until such a summary is served after being requested.

In the present case, Paula does not appear to have been served with the necessary summary of her rights and obligations as required by the LTA 1985 s 20B. Until this happens, she is not obliged to pay Quentin anything. She could also request a summary of Quentin's expenditure: not only would this give Paula more time within which to pay, but it would also 'fix' Quentin with a further formal assertion that the actual cost of the painting works was £25,000. This would be material if it were subsequently to transpire that Quentin is in fact trying to reclaim a supposed cost which is higher than the amount that was actually charged to him by his brother's company.

If Quentin continues to claim that the total amount sent by him was £25,000, Paula can challenge that amount under LTA 1985, s 18 on the ground that it is not reasonable in amount. Paula can start proceedings before the First-tier Tribunal (Property Chamber) for its determination as to the amount which it is reasonable for her to be expected to pay. Roger's evidence will clearly be highly material in any such proceedings.

Consultation

LTA 1985, ss 20 and 20ZA provide that a landlord must consult where a tenant will be required to contribute by way of service charge more than £250 in relation to qualifying works (which would include the repainting works carried out in the present case). The specific requirements which the landlord must follow vary according to the nature of the works.

Failure to consult means that the landlord cannot recover more than the amount set out above in relation to the relevant expenditure.

The requirement for consultation can be dispensed with, but only (in the first instance) by the First-tier Tribunal (Property Chamber) and only if it is reasonable to do so: see LTA 1985, s 20ZA(1). Following the Supreme Court decision in Daejan Investments Ltd v Benson (2013), dispensation will be granted if the failure to consult has caused no real prejudice to the tenants.

In the present case, the amount now being demanded from Paula means that Quentin ought to have consulted all the tenants before arranging for the repainting to be carried out (notwithstanding that he has a contractual obligation to carry out those works). On the face of it, therefore, Paula is only obliged to pay £250. However, Quentin would be entitled to ask for the requirement for consultation to be dispensed with.