

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

LEVEL 6 - UNIT 17 – CONVEYANCING

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the September 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

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

CHIEF EXAMINER COMMENTS

The better performing candidates exhibited similar characteristics, in that they possessed both good knowledge and understanding of the relevant law, coupled with the ability to offer practical and pragmatic advice in relation to the issues with which they were presented. Weaker candidates were found wanting in one or more of these respects. They had clearly made good use of the opportunity to consider the case study materials in advance of the exam.

Weaker candidates tended to produce answers which were generalised and discursive, with occasional suggestions of sheer guesswork.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a) – Information to be confirmed in initial correspondence with buyer’s lawyers.

Relatively few candidates correctly identified the requirements of the Protocol. A significant number discussed client verification and/or money laundering.

Question 1(b) – Explain why good leasehold title is a defective title.

Most candidates answered this question reasonably well.

Question 1(c) – Documents to be included in the contract bundle.

The vast majority of candidates correctly identified the documents that needed to be included, though some neglected to include the contract itself. Others seemed to have learned a list by rote, including the documents which would be relevant to a leasehold title but neglected to take account of the fact that the lease was missing, the freehold title was unregistered, the landlord was seemingly absent, and no ground rent had been demanded or paid for several years.

Credit was given to those candidates who stated that they would not include certain documents and would explain why to the buyer’s lawyers, or who stated that they would include the documents but explain why some of the usual information would be missing.

Question 2(a) – Significance of Rose Hill Grove not being adopted.

Most candidates identified the maintenance/repair issue which would arise. A significant proportion were nevertheless far from convincing in describing how they would address that particular problem. However, surprisingly few recognised the problem which the search result presented in terms of establishing any right to access the property. Of those that did, there was then a pretty wide range of detail/accuracy as to what steps might be taken in relation to it.

Question 2(b) – Requisitions.

Candidate performance on this was patchy. Most candidates identified the need to ask for the two conveyances, based on their contents. Not all were able to say that production was a requirement of the Protocol. Very few candidates noted the location of the property, and consequently did not raise any requisition in relation to flooding.

Question 3(a) – Advice re beneficial joint tenancy or tenancy in common.

Most candidates dealt with this adequately, but a handful appeared to believe that a joint tenancy meant that the beneficial interest was held 50/50, whereas tenancy in common was reserved for any other proportions.

Question 3(b) – Identify correct formula for exchange and discuss matters arising.

Quite a few candidates wrongly opted for Formula C, failing to identify that the relevant property was at the top of a chain – this is a failing which has been noted in previous CE reports. Quite a large number of the answers in relation to the matters which would be agreed/confirmed on exchange, when using the chosen formula, were very generalised and discursive.

Several candidates discussed both exchanges (and the logistics in relation to the sequence of events which that would involve) even though the question clearly only related to one of the properties. Again, this is a failing which has been noted in previous CE reports. No credit is given for irrelevant discussion/advice.

Question 3(c) – Draft key provisions of sale contract.

A few elements of this question caused problems, namely: (i) inserting the completion date in the draft transfer (when it should be left blank), (ii) failing to apportion the total amount payable between the property and the contents (a surprisingly large number of candidates failed to do this), and (iii) failing to include an indemnity covenant in its full and proper form.

Question 4(a) – Consequences of buyer’s default and recommended next step(s).

Virtually all candidates identified the need for a K16 search and an OS1 search, but there was then a very wide range of detail in the subsequent discussion as to why those searches were required and what benefits they would yield, and for whom. Some candidates did not appear to be aware of the differing lengths of the respective priority periods or expressed their answers in terms of ‘days’ rather than ‘working days’.

Question 4(b) – SDLT.

Most candidates dealt with this question adequately. Equal credit was given regardless of whether the candidate answered the question on the basis that the current SDLT ‘holiday’ was or was not in force.

Question 4(c) – Registration of dealings.

For the most part, candidates dealt adequately with identifying the dealings which needed to be notified to/registered at HM Land Registry.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 17 – CONVEYANCING

Question 1(a)

Under the Law Society Conveyancing Protocol 2019 (the Protocol) paragraph 12 we will need to confirm the following information in our initial correspondence with the buyer’s lawyers:

- That we are instructed to act for Mrs Isha Jennifer Guirguis and Mr Hamed Guirguis in their sale of Irwin Road;
- That we are adopting the Protocol;

- That the sale price of Irwin Road is £105,500;
- That our clients have a related purchase of Rose Hill, the purchase of which will need to be synchronised with the sale of Irwin Road;
- The length of the chain in relation to Irwin Road and Rose Hill;
- That our clients will be using mortgage finance from Birmingham Midshires to part fund their purchase.

1(b)

Irwin Road has a good leasehold class of title. This is a defective title because the superior title was not submitted to the Land Registry on first registration. This means that HM Land Registry cannot confirm whether the lease was validly granted by the freeholder. The risk for the tenant is that if the lease was not validly granted then the good leasehold title could be extinguished. Further, the lease is subject to the restrictions affecting the freehold title (if any) and so the leasehold title will be bound by these, even though the tenant does not know what they are. Additionally, the leasehold title will also be subject to the defects that affect the superior title (if any) and again the tenant will not know what these are.

The buyer is funding part of her purchase with mortgage finance from HSBC plc. Under paragraph 5.6.2 of the UK Finance Mortgage Lenders' Handbook (the Handbook) good leasehold title is only acceptable to lender if:

- a marked abstract of the freehold and any intermediate leasehold title for the statutory period of 15 years before the grant of the lease is provided; or,
- the buyer's lawyers are prepared to certify that the title is good and marketable when they send in their certificate of title to the lender, which most lawyers would not be willing to do; or,
- good leasehold title indemnity insurance is arranged, usually at the sellers' own cost.

Another option is to make an application to HM Land Registry to upgrade the title from good leasehold to absolute leasehold title. However, this is unlikely to be successful as the process will involve identifying a superior title and also obtaining a copy of the lease.

A further difficulty is that the lease for Irwin Road was not produced to HM Land Registry on first registration and the clients have stated that a copy is not available.

This means the tenant does not know what the tenant's or landlord's obligations are under the lease. The lease may contain onerous provisions and/or provisions which are not acceptable to lenders (such as a provision for forfeiture on the insolvency of the tenant). Further, paragraph 5.14.16 of the Handbook states that the buyer's lawyer must check a certified or official copy of the original lease and where the original lease is lost the lender will only be prepared to proceed where an official copy of the lease has been obtained from the Land Registry, which clearly cannot be done here. Thus some lenders may be unwilling to lend where the lease has been lost.

We might also ask our clients:

- if they have an indemnity policy from the time of their purchase

- to make enquiries of their neighbours (ours being a lease of part) to see if they have any information, etc about the landlord

We would therefore at our clients' own cost, offer to provide the buyer with a good leasehold title indemnity insurance policy and also a missing lease indemnity insurance policy. The buyer's lawyer can then make enquiries with their client's lender to see whether these will be acceptable.

1(c)

I will prepare a contract bundle (package) in accordance with paragraph 13 of the Protocol which includes:

- The draft contract for the sale of Irwin Road;
- An official copy of the Register and a coloured title plan (both must be less than six months old)
- The Property Information Form (TA6); and
- The Fittings and Contents Form (TA10).
- EPC

The property is a leasehold property, however as the lease was not provided to the Land Registry on first registration and the clients state it is not available, we will not be able to provide the buyer's lawyers with a copy of the lease, nor will our clients be able to complete the Protocol forms relating to leasehold land (e.g. the Leasehold Information Form (TA7) unless they complete TA7 as far as they can, which will be very limited LPE1, etc). We should perform an index map search to determine whether a superior title has been registered and if so, we will include the superior title in the contract bundle.

We will also include copies of the good leasehold title indemnity insurance and also missing lease indemnity insurance policies if (or assuming) that the clients have them.

Question 2(a)

The results of the local search show that the road 'Rose Hill Grove' (the Road) has not been adopted by the local authority. This means that it is a private road.

Unless the Road is a public right of way, access over the Road will only be possible if there is an easement in favour of the owner of the property.

Ideally there should be a legal easement, which may be set out in the title deeds, but not necessarily as old easements are still overriding interests provided they are apparent or have been used in the last year. Even if there is such an easement, we need to investigate the extent of the easement to ensure that it extends to vehicular access as our clients will need access by car along the Road.

Entry 2 of the Property Register states that Rose Hill has the benefits of the rights granted by but is subject to the rights reserved by, the Conveyance of the land in this title dated 11 September 1963. We therefore require a copy of this conveyance from the sellers' lawyer to investigate whether it does grant access over the Road.

We also need to ask the sellers' lawyers to see if there is a formal easement over the Road and if so to provide us with a copy.

Alternatively, the sellers (and their predecessors) could have obtained prescriptive rights over the Road through usage over at least 20 years. It seems that this applies, as the property was built in in the early-1960s (see entry 2 of the Property Register) i.e. more than 20 years ago. We would need to raise a requisition on this with the seller's lawyers. We would require a statutory declaration from the sellers detailing the existence of the easement.

If the replies to enquires/requisitions show there is no formal easement we would need to report this to the client. There is also the possibility that the Local Authority could in the future adopt the road resulting in all the frontages having to pay to the Local Authority the costs of adoption.

If a road serving the property is unadopted, the properties served by that road will have to pay the costs of any repairs themselves. We will need to raise enquiries of the sellers' lawyers to see if there is a formal arrangement or informal arrangement for this and the amount of payments (if any). We should check the replies to question 8 of the Property Information Form (TA6). We should also advise our clients that if no one carries out any repairs there is a danger that the Road can fall into a poor condition and become unusable and/or in danger of causing damage to vehicles.

We would also advise the clients to check the condition of the road at present. If it is in very poor condition the clients may be involved in further expense in on-going maintenance before the road is adopted.

We will need to inform the lender that the road to the rear of the property is un-adopted and any of any rights of access/maintenance. Note that if the buyer clients refuse to let us contact the lender (which is also our client) we must cease acting for the lender, as there would otherwise be a conflict of interest.

2(b)

We would raise the following requisitions on title with the sellers' lawyers.

"Please provide us with an abstract of the conveyance dated 17 July 1961 made between (1) Mary Ethel Houghton and others and (2) A. Robinson & Sons (Morecambe) Limited as it contains restrictive covenants and with a copy of the conveyance dated 11 September 1963 made between (1) A. Robinson & Sons (Morecambe) Limited and (2) Christopher Mason as it contains restrictive covenants, details of rights granted and reserved and a provisions as to light or air."

Both of these conveyances contain restrictive covenants which will be binding on our clients and they need to know what they are.

The Register contains notes under entries 1 and 2 of the Charges Register stating that copies have been filed. Under paragraph 13 of the Code the sellers' lawyer must provide official copies of all filed documents, and these are also required under the Standard Conditions of Sale (Fifth Edition - 2018 Revision) ('SCS').

Further, the 1963 conveyance contains information about the rights granted to Rose Hill and also those granted over Rose Hill to neighbouring properties. The conveyance also contains provisions as to light and air. We therefore need to investigate the rights granted and reserved over Rose Hill.

"Please confirm whether the property or vicinity has suffered from any coastal or tidal flooding, or any other type of flooding".

The title register shows that the property is adjacent to Morecambe Bay and as such it is essential to investigate whether the property has suffered from any flooding.

Question 3(a)

The clients are purchasing Rose hill jointly. They will therefore automatically hold the legal estate in a joint tenancy.

There are two ways in which the beneficial interest in land can be held where there is a joint ownership, these being a joint tenancy and a tenancy in common.

A beneficial joint tenancy is where the co-owners hold the beneficial interest in the property as a whole (with no distinct shares) and immediately on the death of the other joint tenant the deceased person's share automatically passes to the surviving joint tenant by survivorship.

A beneficial tenancy in common is where each co-owner has a distinct share in the beneficial interest in the property (e.g. 50% each) and where a co-owner dies their share passes through their estate by either will or intestacy, this means they can leave their share in the property to who they want to.

We would recommend that Mr and Mrs Guirguis hold their beneficial interest in Rose Hill in a joint tenancy for the following reasons:

1. They are married to each other and have 2 children together and so a joint tenancy is suitable; and
2. They both owned Irwin Road in a joint tenancy (as indicated by the fact there is no co-ownership restriction in the Register), are purchasing Rose Hill jointly and both are entering into a mortgage to part fund the purchase of Rose Hill.

3(b)

Rose Hill is at the top of the chain and so we will use Law Society formula B to exchange contracts.

When exchanging contracts on Rose Hill over the telephone:

- Both parties will confirm that we are holding our respective client's part signed contract;
- Confirm, agree and insert the completion date of 17 July 2020 into the contract; and
- Date the contract to confirm that contracts have been exchanged and have now become binding.

Following exchange of contracts, we will send our clients signed and dated part contract and the deposit of £8850 to the sellers' lawyers today by either

first class post or DX. Note that a 10% deposit is £19,400. However we would have asked the buyer's lawyers to forward the 10% deposit payable on the exchange of contracts of Irwin Road of £10,550 directly to the sellers' lawyers.

3(c)

- i. Title Number - CU3535352
- ii. Property - 15 Rose Hill Grove, Storth, Milnthorpe, LA7 7HR
- iii. Date - leave blank
- iv. Transferor - Angela Jane Stuart and Thomas Stuart
- v. Transferee - Isha Jennifer Guirguis and Hamed Guirguis
- vi. Consideration - One hundred and ninety-four thousand pounds (£194,000)
- vii. Declaration of trust - they are to hold the property on trust for themselves as joint tenants
- viii. Additional Provisions - The Transferees jointly and severally covenant to observe and perform the covenants referred to in Entries number 1 and 2 of the Charges Register of the above title and to indemnify the Transferors against any future liability for their breach or non-observance.

Question 4(a)

The buyer's default means that our clients will not be able to complete the sale of Irwin Road, or their purchase of Rose Hill because they will not have sufficient funds to complete the purchase.

The buyer will be in breach of contract if she fails to complete the purchase of Irwin Road today. Once completion is delayed the buyer will be liable to pay our clients compensation (SCS 7.2.1 and 7.2.2) and is also liable to our clients for contractual damages for any losses they incur as a consequence of the breach (SCS 7.2.3), however any claim for damages is reduced by any compensation paid under the contract (7.2.3).

Our clients will be in breach of contract in relation to their purchase of Rose Hill and will have to pay compensation and/or damages for any losses suffered by the sellers as a consequence of failing to complete the purchase today. However, our clients will be able to claim these losses from the buyer of Irwin Road as these losses have been caused by the buyer's breach of contract.

Time is not of the essence (SCS 6.1.1) so neither we, nor the lawyers acting for the sellers, can rescind the clients' respective contracts today. We should serve a notice to complete on the buyer's lawyers which will give the buyer 10 working days in which to complete the purchase, failing which our clients can forfeit the deposit, rescind the contract and sue the buyer for any contractual losses suffered.

The matter is likely only going to be delayed until Monday and so any losses suffered by the parties throughout the chain should be relatively limited.

We should also check the lender's requirements re returning the advance and/or take their instructions.

We will not register an agreed/unilateral notice at HM Land Registry to protect our clients' purchase contract, as the delay is only expected to last until Monday and the OS1 priority search should still be valid.

4(b)

The relevant tax will be Stamp Duty Land Tax (SDLT). The purchase price of the Rose Hill is £194,000 and so the amount of SDLT payable is £1,380 which must be paid within 14 days of completion to HMRC. A failure to pay the amount due within the 14-day deadline will result in the automatic imposition of a £100 fine and interest.

[As an alternative in relation to the amount of SDLT payable, given that the assumed completion date is within the effective stamp duty 'holiday' arising from the temporary uplift in SDLT thresholds introduced in response to COVID-19, candidates may correctly state that no SDLT is payable because of the 'holiday' (or words to that effect).]

We will submit form SDLT1 to HMRC and will receive form SDLT5 in return to confirm that SDLT has been paid. HM Land Registry will require a copy of SDLT5 to accompany any application to register the transfer of title.

(c)

The transactions that we will register using form AP1 on Rose Hill are:

- discharge of Barclays Bank's charge on Rose Hill;
- transfer of the property to Mr and Mrs Guirguis; and
- the charge to Birmingham Midshires.

These transactions must be registered within the 30-working day priority period provided by the official search of whole (OS1), otherwise there is a risk that our clients and lender could be subject to third party interests.

Credit for reference to fact that Barclays discharge electronically so no steps required re their mortgage.

The documentation that we will send to HM Land Registry in support of our application are:

- The TR1 executed by all parties;
- Birmingham Midshires' charge; and
- SDLT5 certificate.