CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

LEVEL 6 - UNIT 9 – LAND 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 pass rate is lower than in previous sessions and while this is likely at least in part due to the particular circumstances in light of the global pandemic, two key points should be made:

- Some basic understanding of principles related to real property (for example working in a conveyancing role) is not sufficient grounding to attempt an academic exam assessed at Level 6 (i.e. the final year of a law degree). Too many candidates have insufficient depth or breadth of knowledge to attempt the exam with a large proportion scoring exceptionally low marks.

- Candidates are again reminded that four "average" answers could add up to a pass, while three "good" answers must all be close to distinction level to achieve the same. Time management is a crucial exam skill and candidates must strive to properly answer four questions as required. A sizeable minority clearly had the knowledge and ability to achieve at least a pass mark, but failed because the three questions answered did not total enough to make up for 25% of the marks being missed.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

Knowledge of the areas examined in this question was varied – most candidates were able to enunciate the basic legal principles (that courts may strike down unconscionable terms in (a); that statute allows for delay on enforcement if chance of repayment in (b)) and gradation tended to depend on the depth of knowledge. Across both sections of the question there was something of a dearth of relevant cases and candidates are reminded that to move beyond a basic pass level this depth of knowledge is crucial at Level 6.

Question 2

This was a very popular question but also seemed to attract a large proportion of weaker candidates. At Level 6 it is not enough to simply be able to repeat a textbook summary of a single case, which is what a worrying proportion of answers provided. Secondly, candidates are once again reminded that irrelevant material will simply not gain credit – some answers provided considerable detail on different methods of creating easements which simply had no application to the question. Finally, the question itself is crucial – good answers did not merely describe the criteria of an easement but actually considered how and why they limited the types of easement that can be created.

Question 3

As always adverse possession was extremely popular as a topic. Knowledge of the statutory regime was generally very good across the cohort, although stronger answers were also able to discuss the common law principles required for a claim. Again, only the best answers provided analysis – candidates need to try and answer the specific question asked, not simply repeat soundbites from previous suggested answers.

Question 4

This question was answered very well by some, again stronger answers being notable for a real attempt to answer the actual question asked. Again, irrelevant material was an issue (in that some spent much of their answer discussing constructive trusts) and again superficial answers were unfortunately common. While quality is of course more important than quantity, writing two or three paragraphs is simply not enough material to attract meaningful credit at this level.

Section B

Question 1

This was a relatively unpopular question and as has been noted in previous questions it is almost twenty years since the modern regime of registered land was established. As such, it is concerning that so many answers entirely

ignored the law on registered land to apply the old law instead, with a considerable number seeming even unaware of the Land Charges legislation in 1972.

Question 2

This was a very popular question and generally answered quite well. Much of what has been said in previous reports relating to co-ownership problem questions applies once again – good answers provided detail on the initial situation, each event in chronological order, and on the prospects of a successful application under s14 TOLATA. Weaker answers confused legal and equitable title, and/or joint tenancy and tenancy in common, and failed to keep track of each "share" after each event.

Question 3

Restrictive covenants is a complex area that always tends to exceed expectations in terms of candidate performance and this examination was no different – ignoring the minority who chose this question with no actual knowledge of the area, the general standard was high. In general candidates seemed more comfortable with the equitable principles than with the common law, and there was some confusion with s78 and s79 LPA.

Question 4

This question was generally quite well answered and the "basic" principles – exclusive possession and certainty of term – were identified in the vast majority of answers. Again, depth of knowledge was an issue as was a lack of case law in all but the strongest answers.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 9 – LAND LAW

SECTION A

Question 1(a)

It is clear from cases such as Knightsbridge Estates Trust v Byrne (1939) that the courts have an inherent discretion to strike down anything "oppressive or unconscionable" found within a mortgage transaction. While this power could be used regarding any term of a mortgage contract, it has most often and most clearly been exercised in relation to the rate of interest to be paid by the mortgagor.

A good example of the interest rate being considered oppressive and/or unconscionable can be found in the case of Cityland & Property v Dabrah (1968). Here, a tenant was seeking to purchase the freehold of his house from his landlord, with the landlord providing a mortgage to the tenant to finance the purchase. The interest rate was calculated to, in practice, equate to up to 57% per annum. The court held that this was an oppressive and unconscionable term and reduced the rate to a "fair and reasonable" amount.

However, in Multiservice Bookbinding v Marden (1979) a mortgage linked to the value of the pound against the Swiss franc meant that repayment was required of almost four times the amount borrowed. Despite this, the court refused to exercise its discretion as it had in Dabrah and upheld the term of the agreement.

These cases can be reconciled when one considers the specific context more carefully. In Dabrah, the court were faced with a mortgage over residential property, taken out by a mortgagor with little option (the lease was expiring and the mortgagor had no other property), no legal advice and where the only explanation for the rate of interest was exploitation on the part of the mortgagee. In comparison, both parties in Multiservice Bookbinding were experienced businesspeople with access to independent legal advice – it was entirely the mortgagor's decision to accept the loan on those terms. As such, the crucial element is the relative bargaining power of the parties. This can be seen in later cases such as Davies v Direct Loans (1986), where it was held that a higher interest rate may be fair if it reflects higher level of risk being taken on by the lender. It could therefore be argued that this discretion (only exercised when the term goes beyond merely 'unfair' to being actually 'unconscionable') is of value to the mortgagor only in the most extreme cases and is unlikely to limit the terms of the vast majority of mortgage agreements. It should also be noted that the courts may use the Consumer Credit Act 2006 in such situations rather than their inherent discretion.

Question 1(b)

Where the mortgagee is, upon default, seeking possession of a "dwelling-house" then s36 of the Administration of Justice Act 1970 (as amended by s8 of the Administration of Justice Act 1973) may provide the mortgagor with some protection. Section 36 operates to allow the court to adjourn proceedings, or stay or suspend the execution of judgment, if the mortgagor is "likely to be able within a reasonable period to pay any sums due under the mortgage". As such, where a mortgagor (of a dwelling-house) is in arrears but believes he or she will be able to make good the default within a "reasonable period", the court may suspend possession (as a prelude to sale) to allow the mortgagor the chance to do so.

This then begs the question of what a "reasonable period" will consist of. This is not set by the legislation and at first was considered to be a relatively short time (perhaps influenced by the harsh decision in Birmingham Citizens Permanent BS v Caunt (1962) which strictly limited the common law discretion to adjourn possession proceedings to 28 days maximum). However, the period was slowly extended through case law, culminating in the decision in Cheltenham & Gloucester BS v Norgan (1996) where it was held that the period is the remaining length of time on the mortgage – in that case, being 18 years. It is even possible for the period to exceed the length of the mortgage, as for example, allowed in LBI HF v Stanford (2015).

However, there are still limits to the exercise of the s36 discretion. If there is simply no reasonable prospect that the arrears can be repaid (as in Cheltenham & Gloucester BS v Grant (1994)) or that repayment can occur within a reasonable time (such as the prospect of a 98 year wait for repayment in Bristol and West BS v Ellis (1996)) then the discretion will not be exercised. The court is also reluctant to postpone possession to allow for sale by the mortgagor not the mortgagee, stating that this will only be allowed in exceptional circumstances (Cheltenham & Gloucester BS v Booker (1997)).

The 1970 Act was introduced to purposefully provide an additional layer of protection for residential mortgagors, in the context of a rise in home ownership funded by mortgages. It certainly does provide some protection for residential mortgagors, especially now that the "reasonable period" has been defined so widely. Where there is a chance that the arrears can be paid off, even over many years, s36 may well apply – as such it is of particular benefit to those defaulting early in a long-term mortgage. However, there must be of necessity be limitations, as otherwise possession (and sale) would become very difficult if not impossible, leaving the mortgagee without a remedy. Mortgagees may also avoid s36 by seeking sale without vacant possession, although this is usually not to be recommended.

Question 2

An easement can be defined as a right over the land of another, falling short of exclusive possession. In order to qualify as an easement, a right must meet the four criteria established in the seminal case of Re Ellenborough Park (1955):

1) There must be a dominant and servient tenement;

2) The easement accommodates the dominant tenement;

3) The dominant and servient tenements are owned by different people;

4) The easement is capable of forming the subject-matter of a grant.

Looking first at the requirement that there must be a dominant and servient tenement, this means that a right will fail to exist as an easement if it is unclear either what land the right is over, or what land benefits from the right. As such, easements cannot exist 'in gross' or for the benefit of a group or section of the public (see e.g. London & Blenheim Estates v Ladbroke Retail Parks (1994)).

Secondly, the right must benefit the dominant tenement – not merely the owner of that tenement at the time the easement is created. This raises a number of issues, such as the granting of easements for business purposes. Such purported easements are usually not recognised (see e.g. Hill v Tupper (1863) and Re Webb's Lease (1951)) although have been allowed where the right is one which all owners may find useful (such as the right to advertise outside commercial premises, Moody v Steggles (1879)). Platt v Crouch (2003) suggests the courts will take a relatively generous approach today. Another issue is rights for 'purely recreational purposes', although here the strict approach in cases such as International Tea Stores v Hobbs (1903) appears to have been consigned to history by decisions such as Ellenborough itself and Regency Villas v Diamond Resorts (2018). This second factor may also prevent an easement being found where there is a lack of propinquity or increased use of the right beyond what was originally granted (see e.g. Greatorex v Newman (2008)).

The third requirement appears straightforward – one cannot have an easement as against oneself (see Metropolitan Railway v Fowler (1893)). However, the need for diversity of ownership has led to complications in the creation of easements (especially the concept of 'quasi-easements' when using methods such as the rule in Wheeldon v Burrows (1879) and/or s62 Law

of Property Act 1925). It is worth noting that the Law Commission has criticised this rule specifically in its most recent report on the area, as preventing owners from dealing freely with their own land.

Finally, an easement must be capable of forming the subject-matter of a grant. This is usually sub-divided into three categories – that there must be a capable grantor and grantee; that the easement must be sufficiently definite; and that (at least by analogy) the easement should fit into the existing categories already established. All three of these principles limit what can be granted as an easement and to whom. To further confuse matters, the second and third points often overlap – thus in Hunter v Canary Wharf (1997) a right to receive television signal failed both on the ground it was insufficiently definite (i.e. what constituted an adequate signal) and that it was not analogous with existing rights.

Considering the four characteristics as a whole, it is clear that the law is determined to limit what will be recognised as an easement. One obvious rationale for this is that easements must remain as a separate mechanism from other rights over land which fall short of outright freehold ownership – whether that is the greater rights provided by a leasehold estate, or the lesser rights provided by a licence. While the law still distinguishes between easements and covenants (something the Law Commission has recommended should change) the Ellenborough characteristics also cement this distinction.

It could also be argued that allowing a wider range of rights to constitute easements would lead to land becoming intolerably burdened, especially as it is far from straightforward to discharge or extinguish an easement. Notably, many of the rules discussed above prevent in particular easements exercisable by a group.

However, there are arguments against the relatively strict current approach. It can certainly be said that the limited development by analogy of new easements runs the risk of the law falling behind the needs of landowners and wider society, especially as the uses of land change. In particular, it is noticeable how many existing cases relate to agricultural use of land, when this is increasingly something affecting only a proportionately small minority of land owners in England and Wales. It also could be argued that there are actually good reasons to allow enforcement of easements by a wider group than individual land-owners; and that sufficient protection of potential servient tenements can be found elsewhere, such as in the limited methods for creating an easement. Perhaps most persuasively, it is difficult to say that the current law does not impose limits on what two consenting land-owners may agree with one another – surely the owner of land should be entitled to create rights over it as he or she wishes?

Question 3(a)

Adverse possession is the name given to the rather unusual doctrine which allows for a trespasser to acquire rights over the land on which he or she is trespassing, if used (i.e. possessed) for a sufficiently long period of time. At common law there are three requirements to establish adverse possession: factual possession, the intention to possess and the adverse nature of the possession.

Factual possession requires evidence that the claimant has an appropriate degree of physical control of the land and has been using it as an occupying

owner would (Powell v MacFarlane). The "degree" required will depend on the nature and quality of the land in question (West Bank Estates Ltd v Arthur (1967)). The strongest evidence of factual possession, albeit not essential, is likely to be enclosure by a fence or wall (Seddon v Smith (1887)).

Such evidence will also go to the second element, the intention to possess (*animus possidendi)*. This does not necessarily mean an intention to own, merely to possess the land for the time being (Pye v Graham (2001)). Thus evidence such as changing the locks on a property (Lambeth LBC v Blackburn (2001)) would suggest this intention, whereas enclosing property to keep animals in rather than others out would lack the requisite intention (Inglewood v Baker (2002)).

Finally, the possession must be adverse – this means that it is without the express permission of the paper title holder, or at least that the trespasser is exceeding any permission given (Allen v Matthews (2007)). Note that 'adverse' for this purpose does not mean that the possession has to be contentious or contrary to the intended use of the land by the paper title owner. Note that it is clear from the Limitation Act 1980 that there is no doctrine of "implied licence" despite earlier cases such as Wallis's Cayton Holiday Camp v Shell-Mex and BP (1975).

In all cases prior to 2002, and still to this day in relation to unregistered land, once these requirements have been met for a period totalling 12 years (except in certain cases such as Crown land or foreshore) the Limitation Act 1980 s15 operates to prevent recovery of the land by the paper title holder – so under s17 their title is extinguished and the squatter may apply to be registered as the new owner.

However, in registered land the Land Registration Act 2002 (LRA 2002) has created a very different regime. Under Schedule 6 of this Act, a squatter who satisfies the basic requirement of adverse possession (i.e. possession of land with the necessary intention and without consent) can apply to be registered as proprietor after a mere ten years.

Once the application is made, the current registered proprietor (RP) is given notice of the application under Sch 6 (as are any other interested parties: mortgagees, for instance). The RP has 65 days within which he or she can object (perhaps on the basis that adverse possession is not made out e.g. the squatter lacks the necessary intention); consent to the squatter's registration; or respond by counter-notice requiring the Registrar to deal with the application in accordance with Sch 6.

If such a counter-notice is received, the squatter can only be registered as proprietor of the land if the Registrar is satisfied that he or she should be registered on one of three bases: first, entitlement by some estoppel; secondly, some other reason (perhaps a non-completed contract for purchase where the money was paid over: if it was a long time ago, the Limitation Act 1980 may prevent the occupier enforcing the contract itself); or, thirdly, where the matter amounts to a claim over the boundary between two estates (the Schedule provides that the claimant must reasonably have believed the land belonged to him; and that the boundaries have not been determined by the Land Registry).

If the RP (or other interested party) makes no response, the squatter will be registered as proprietor.

The RP has a further two years to take action to repossess if the application is rejected because of service of a counter-notice in response to the original application. If the squatter is still in possession after two years, he or she is entitled to be registered as proprietor – this second application will be made without a Sch 6 notice (albeit the RP will be given general notification of the application) and so is much harder to resist.

The LRA 2002 was enacted to bring in an significantly revised regime of land registration and it has had a similarly major effect on the doctrine of adverse possession. The previous law applicable to registered land was seen as outdated, too far in favour of the trespasser and essentially unfair in the way it allowed land ownership to be lost without a clear opportunity to object. Schedule 6 makes a claim for adverse possession much less likely to succeed as the RP is almost certain to serve counter-notice when the first application is made, and then has two years to evict the squatter. However, the LRA 2002 has not changed the position in unregistered land (intentionally, as the greater protection now applicable to registered land is in itself a reason for voluntary registration).

Question 3(b)

The enactment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and in particular s144 of that Act raised a query over the continued application of adverse possession as it related to residential property. The effect of s144 is to make squatting in a residential building a crime, which would mean any would-be adverse possessor in such a building would, by gaining title through adverse possession, be gaining from their illegal activity (although holding over after the end of a lease or licence is excluded from the offence).

The position was therefore tested in Best v Chief Land Registrar (2015). The Court of Appeal held that s144 did not directly affect adverse possession, because, interpreting the statute in the usual way, it was clear Parliament had not intended the section to prevent adverse possession. The point of s144 is twofold: to make it easier for owners of residential property to remove squatters (as they may now involve the police) and to deter such squatters by the threat of their actions being perceived as criminal. As such, adverse possession was not directly impacted – but s144 is a powerful weapon in the paper title-holder's armoury if the trespass is to a residential property and they take action before a ten-year period of adverse possession has accrued.

Question 4

Proprietary estoppel is an equitable device by which a person with a legal estate in land is estopped from denying the interest of another.

The basic requirements for such a claim derived from the probanda in Wilmott v Barber (1880), which required that:

(i) the claimant made a mistake as to their legal rights;
(ii) the claimant expended money or did some act on the faith of that mistaken belief;
(iii) the defendant was aware of the true position;
(iv) the defendant was aware of the claimant's mistake; and

(v) the defendant encouraged the claimant in making the expenditure of money or acts of reliance.

Modern cases have tended to be less strict about the Wilmott probanda, preferring to instead use a three-part test: that there was some representation or assurance; reliance by the promisee; and detriment suffered by the promisee (Thorner v Major (2009)). There also appears to be an overarching requirement of unconscionability (see e.g. Sledmore v Dalby (1996)).

The doctrine has certainly been applied in a sufficiently flexible way that there is plenty of evidence to support an argument that it is uncertain. One example is in the very first requirement, that there must be an assurance as to rights in land. While cases such as Layton v Martin (1986) have required a relatively clear assurance, in other cases (notably Thorner) a vague or even implied assurance has been enough. This had led to differing outcomes on similar sets of facts. The second and third principles of reliance and detriment have also caused confusion – first and foremost as to exactly how separate the two concepts actually are. Cases such as Lalani v Crump (2007) seems to suggest there must be some form of financial detriment, but this is not present in all successful claims. Furthermore there is an issue where the claimant would have acted in the same way without the assurance – this has generally not been a bar to a claim (see e.g. Re Basham (1986), Campbell v Griffin (2001)) but again it is unclear where the line should be drawn (c.f. Coombes v Smith (1986)).

Perhaps the most uncertain element in a claim for proprietary estoppel is the overall basis in 'unconscionability' – compare for example the differing outcomes in Lloyds Bank v Carrick (1996) and E R Ives Investment v High (1967), both being cases where the claimant failed to protect their rights when they had the opportunity to do. The oft-repeated distinction between "farm and family" and "commercial" transactions is another example of potential uncertainty – what exactly is the dividing line between the businessperson given no assistance from equity (as in e.g. Yeoman's Row v Cobbe (2008)) and the award of estoppel on the grounds of unconscionability in Ghazaani v Rowshan (2015) which involved a similar joint venture?

Finally, the remedy for estoppel can be argued to be extremely uncertain. Courts have awarded everything from the freehold title (see e.g. Pascoe v Turner (1979)) or a lifetime interest (e.g. Inwards v Baker (1965)) through to a charge (e.g. Campbell v Griffin (2001)) and increasingly often monetary compensation (e.g. Gillet v Holt (2001)). As cases such as Davies v Davies (2016) demonstrate, even when the remedy is agreed, the extent or quantum may well be disputed and what is far may be decided differently by different courts. Even more uncertain is basis on which these remedies are awarded – it is clear that the courts have moved away from merely fulfilling the promise (see discussion in e.g. Jennings v Rice (2001)) but it is unclear whether the guiding principle today is proportionality (see e.g. Moore v Moore (2016)), the minimum to do justice (e.g. McGuane v Welch (2008)), or even returning the position to the expectation of the claimant (as used in e.g. Suggitt v Suggitt (2012)).

However, it could be said in response that much of the criticism given above applies to equity in general, rather than merely the doctrine of proprietary estoppel. Equity by its very nature lacks the certainty and rule-based technicality of the common law and would be of little effect were this not the

case. Indeed, estoppel can actually be said to have a firm set of principles, as embodied in the modern three-part test set out in Liverpool Victoria. What constitutes a sufficient assurance (as well as reliance and detriment) will inevitably depend on the facts of any given case but it is clear that the law has set a minimum requirement here, that there must be some form of encouragement to the claimant. Similarly, reliance uses clear principles of causation and detriment which, while again not the same in every case, must clearly be demonstrated. Where certainty is most required, s2 Law of Property (Miscellaneous Provisions) Act 1989 provides it – Yeoman's Row has made it clear that in the vast majority of commercial transactions there is no place for an estoppel to arise.

While a wide range of remedies has been awarded, it could be argued that this simply reflects a wide range of promises that have given rise to claims. Furthermore, modern approaches have (with admittedly some exceptions) focused on the concepts of proportionality and compensating for the detriment suffered, and the basis of the decision in cases such as Moore and Davies is clear.

As noted equity's greatest strength is in many ways the flexibility it provides, especially in an area such as estoppel where equity is acting in its role as a last resort for those who would otherwise suffer injustice as a result of the strict operation of law. Looking particularly at the "farm and family" cases, it is clear that there must be scope for discretion to be applied and that a rigid rule-based doctrine of estoppel would be unlikely to perform as well in doing equity in these somewhat unusual situations.

SECTION B

Question 1(a)

As one of the two estates in land set out in s1(1) of the Law of Property Act 1925 (LPA 1925) a lease may be either legal or equitable. In order to have legal status, a lease must first and foremost be made by deed (unless it does not exceed three years and meets the other requirements of the 'parol lease' exception found in s54 LPA 1925).

Under the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989) a deed must be titled as such, signed by the grantor with the signature being witnessed, and be 'delivered' (i.e. dated). As the lease being claimed by Clare exceeds three years in length, in order to be legal it must be created by deed under s1 LP(MP)A 1989. On the facts it is clear it is headed as a deed and signed by Antonio. If that signature has been witnessed and the document is dated, a legal lease has been validly created.

For longer leases (of more than seven years) registration is also required to confer legal status (see s27 Land Registration Act 2002 (LRA 2002)). However, as this lease is for six years, as a legal lease it can take effect as an overriding interest under Sch 3 para 1 LRA 2002. Thus as long as the lease is created by deed Clare's lease will bind Binita.

If the deed does not comply with s1 LP(MP)A 1989, then the creation of a legal lease will fail. However, it may be capable of enforcement at equity under the principle in Walsh v Lonsdale (1882) – i.e. a specifically enforceable contract to create a lease. If so, it will need to comply with s2 LP(MP)A 1989

as a contract for the disposition of an interest in land. As such it would need to be in writing (it is), contain all terms (it does as far as we know) and be signed by both parties (it is). As such, if the lease is not legal there may well be an equitable lease. While LRA 2002 Sch 3 para 1 only covers legal leases, an equitable lease (as an equitable interest) coupled with actual occupation could constitute an overriding interest under LRA 2002 Sch 3 para 2.

The problem here is that inquiry was made of Clare before the disposition in favour of Binita and she failed to disclose the right when she could reasonably have been expected to do so. It also seems unlikely that she is personally in actual occupation of The Stables in any event.

Question 1(b)

All interests in land which are capable of being legal are set out in s1(2) LPA 1925. As restrictive covenants do not appear in this list they are inherently equitable under s1(3). This means that a restrictive covenant must be created by signed writing as per s53(1)(a) of the same Act. This formality appears to be met here as Davor has a written letter signed by Antonio, who is the covenantor. However, in order to be protected for land registration purposes, the interest must be protected by entry on the register (see LRA 2002 ss27-30). In this case the appropriate entry would be a notice under s32. We are told that no notice has been entered, so the covenant will have no effect on Binita and can safely be ignored. A restrictive covenant cannot take effect as an overriding interest.

Question 2

Co-ownership of land refers to the position where two or more owners concurrently hold an interest in the land. This is a 'trust of land' and thus governed by the Trusts of Land and Appointment of Trustees Act 1996 (TLATA 1996). When analysing co-ownership both the legal title and the equitable (or beneficial) title must be considered. The legal title can only be held as a joint tenancy (s1(6) Law of Property Act 1925 (LPA 1925)). Legal title will be held by the first four persons named on the conveyance or transfer who are sui juris (s34 Trustee Act 1925). In this situation, this will be Ferdinand, Gloria, Hana and Jack. Isla cannot be a legal co-owner as she is under 18 and therefore a minor.

The equitable title may be owned by any number of people and held either as joint tenants or as tenants in common (the main difference being that joint tenants benefit from the principle of survivorship as explained below). The usual presumption where there is the purchase of land in unequal shares and the absence of a family relationship is that the parties intended to hold as tenants in common (see e.g. Bull v Bull (1955)); however this will be over-ridden by express provision in the conveyance (Pink v Lawrence (1977)). As such, all six parties here hold in equity as joint tenants due to the express wording. It should be noted that a joint tenancy in equity may be converted into a tenancy in common by means of the process of severance.
Lottie dies in September 2018 without any events that could constitute severance occurring before her death. As such, the doctrine of survivorship applies – her 'share' as a joint tenant is simply subsumed into the shares of those who outlive her. This takes precedence over her Will, which comes too late to effect severance (see e.g. Gould v Kemp (1834)). As such, there are now five joint tenants in equity and Nita has no interest in Melody Heights.

In November 2018 Gloria sells her share to Nathaniel. By selling her share, Gloria destroys the 'four unities' present in a joint tenancy and so has severed by acting upon her own share (Williams v Hensman (1861)). Nathaniel thus takes a 20% share in equity as a beneficial tenant in common (the 100% share being divided by the number of joint tenants at the point of severance, i.e. five). The remaining 80% is held by Ferdinand, Hana, Isla and Jack as beneficial joint tenants (because each joint tenant does not hold an individual share).

The next relevant event is when Ferdinand and Hana elope. Under s36 LPA 1925 it is possible to sever a joint tenancy in equity by written notice. Section 36 requires the notice to be in writing and to evince the immediate desire to sever. Both of these requirements appear to be met for both Ferdinand and Hana. Under s196 LPA 1925 service must be to the last known place of abode or business of the addressee(s) – this is satisfied by being sent to the house and Nathaniel's office (as Nathaniel does not live at Melody Heights). Both Ferdinand and Hana have severed their respective joint tenancies and each will hold a 20% share as a beneficial tenant in common.

Finally, the death of Jack means that survivorship operates once again, as he died while still a beneficial joint tenant with Isla. Isla thus absorbs Jack's share, although then becomes a tenant in common as there cannot be a single remaining 'joint' tenant. Her share is now 40% of the property.

Assuming Ferdinand, Hana and Isla do not agree to a sale, Nathaniel will need to apply to the court for an order to do so under s14 TLATA 1996. The court will have regard to the factors set out in s15 of that Act: the intentions of the settlor; the purpose of the trust; the interests of any minors; and the interests of any creditors. Here, by far the far most important factor is the purposes for which the property is held. These appear to be to provide a home and a place to record for the members of Magical Music. It could be argued (by analogy with e.g. Re Buchanan-Wollaston's Conveyance (1939)) that either or both purposes still exist for at least some of the beneficiaries – and it is clear (from Bedson v Bedson (1965)) that where there are multiple purposes only one needs to continue. However, Nathaniel will point out that the three remaining co-owners are not the six original members of Magical Music and he could also argue that the secondary purpose was to record the "first album", not any subsequent music. However, it seems unlikely that a sale will be ordered and a more practical outcome may be to negotiate the sale of Nathaniel's 20% share to the remaining co-owners – this could be relatively easily funded by a mortgage if necessary given that the co-owners have no existing loans over the property.

Question 3(a)

Freehold covenants are a method of controlling how a freehold owner can use their land. Under the doctrine of privity, such covenants will be easily enforceable between the original coventator and covenantee, but there are considerable issues with passing on the benefit and/or burden of such covenants to successors in title.

Where both the original covenantor and covenantee have passed their respective titles to successors, both the benefit and the burden of the covenant must run in either equity or common law in relation to those successors.

The first covenant is clearly positive – this can be established applying the "hand in pocket test" which asks whether the covenantor has to expend money to comply with the covenant (see Haywood v Brunswick (1881)). As such the burden will not pass at equity, so we must consider common law.

One of the main reasons common law is rarely used to enforce a freehold covenant is that the general rule is that the burden of the covenant will not pass, due to the rule of privity. This was established in Austerberry v Oldham Corporation (1885) and upheld in Rhone v Stephens (1994). Due to that self-same rule the original covenantor does remain liable, so it is possible here to claim damages from Qadim - unfortunately it appears on the facts given that no indemnity covenant was included in the transfer of number 3 to Sally so these losses cannot be reclaimed from her by Qadim.

However, one method of enforcing the burden of a covenant at law directly against a successor in title is where the rule in Halsall v Brizell (1957) applies. This principle states that where a (linked, see Thamesmead Town v Allotey (2000)) benefit is gained then the purchaser must also be liable for the associated burden. Subsequent case law (e.g. Davies v Jones (2009)) has clarified that there are three requirements for the doctrine to apply: that the benefit and burden are both conferred in the same transaction; that there is a reciprocal relationship between them; and that the person taking the burden had the choice of rejecting the associated benefit (and thus the burden).

Assuming Sally has chosen to take the benefit of the right to use the driveway, it would appear the principle applies here and she is liable for the burden. In order for Richard to enforce the covenant, he must also show the benefit has passed. This requires: (1) the covenant to touch and concern the land (i.e. affect the nature, quality, mode of use or value of the land as per P&A Swift Investments v Combined English Stores); (2) the original covenantee to have had a legal estate; (3) the transferee to have a legal estate; and (4) an intention for the burden to pass. Here, the benefit clearly touches and concerns number 1 as it is useful to have a driveway for parking; Precious and Richard had legal estates at the relevant time, and intention can be implied under s78 Law of Property Act 1925 (LPA 1925). Therefore covenant 1 is likely to be enforceable in law, although the only remedy available will be damages.

Question 3(b)

We must now consider whether the burden of covenant 2 passed in equity. This requires the five requirements from Tulk v Moxhay (1848) to be met: that (1) the covenant is restrictive in nature; (2) there is a dominant and servient tenement; (3) the covenant was intended to run with the land; (4) the covenant "touches and concerns" the land; and (5) the successor has notice of the covenant.

Here, it is clear covenant 2 is negative – it can be complied with by doing nothing. There is a dominant (number 3) and servient (number 1) tenement, intention can again be implied by s79 LPA 1925 and again the covenant clearly touches and concerns the land – a tall extension would overlook the dominant tenement and potentially restrict light too, both of which affect both the quality of the land and its value. As such, the burden of covenant 2 will pass as long as it has been protected by entry of a notice in the register. It is unclear whether notice has been entered on the register here. Assuming it is,

we should again look to see if the corresponding benefit has passed to the successor in title of the dominant land.

When passing the benefit in equity, this can take place through three methods: assignment, annexation and through a scheme of development. The most relevant here (and the most usual) is through annexation. Since the decision in Federated Homes v Mill Lodge (1980) it is clear that s.78 LPA 1925 implies an intention that the benefit will pass, in the absence of any wording to the contrary and as long as the land is clearly identified (Crest Nicholson Residential (South) v McAllister (2004)). The wording of the covenant is unlikely to meet the requirements for an express annexation, so it will be best to rely on s78 statutory annexation in this case.

As a remedy Sally will wish to claim an injunction to prevent any further building work and to remove the existing works. If this is not granted, she may be compensated by damages in lieu.

Question 4

One of the two recognised estates in land under Law of Property Act 1925 (LPA 1925), a leasehold estate confers on the tenant absolute ownership for a set period of time, at which point the land reverts to the freeholder. Thus a lease, which can be a legal or equitable interest in land, provides real protection as against the freehold owner. Conversely, a mere licence provides few rights against the holder of the freehold estate. As such, whether Walter can evict Ulrika and/or Vivek will depend on whether they hold a lease or a mere licence over their respective flats.

As explained in Street v Mountford (1985) there are three traditional requirements for a lease: a certain term, exclusive possession and rent (although this final requirement is not actually needed, see Ashburn Anstalt v Arnold (1989)).

Looking first at the requirement for exclusive possession, this means that the tenant may exclude all others from the land – including the landlord. Exclusive possession is a question of fact and the court will look to the substance of the agreement, not the labels that the parties have given it. This is because to do otherwise would allow for "sham" transactions, where unscrupulous landlords call what would otherwise be a lease a 'licence' to avoid giving the occupier the rights of a tenant (Street v Mountford). However, the principle works both ways – use of the word 'lease' is also not determinative (Watts v Stewart (2016)).

For the same reason the courts will be wary of sham clauses – terms of the agreement inserted only to make it appear not to confer exclusive possession. A genuine right to introduce other people into a property would prevent exclusive possession (see for example A-G Securities v Vaughan (1988) where four strangers sharing a house did not have exclusive possession as new licensees were added when previous occupiers moved out). However, a 'sham' clause which reserved the right to introduce others was not upheld in Antoniades v Villiers (1988) because the property was not suitable for sharing with any others, nor did the landlord ever introduce such others.

It should also be noted at this point that there are a number of factors which could prevent a lease being found despite exclusive possession. The factor which could be relevant here is the concept of service occupancy, as in Norris

v Checksfield. It is clear from that case that where an employee is provided with living accommodation by his or her employer for the better performance of his or her job, then no lease will be created.

Finally, there is also the requirement that a lease must be made for a certain term. This means that there must a determinate period for which the lease will exist, whatever the length of that period. Thus a lease expressed to last "for the duration of the war" will fail for uncertainty (Lace v Chantler (1944)). The crucial requirement is that the maximum duration of the lease must be clear at the outset, Prudential Assurance v London Residuary (1992). While the rather unusual case of Berrisford v Mexfield (2011) seemed to challenge the general rule by stating an uncertain term could be interpreted as a lease for life (which turn becomes a lease for 90 years under s149(6) LPA 1925), albeit in very specific circumstances, it has since been limited in e.g. Southward Housing v Walker (2015).

Applying the law to the two agreements, we shall first examine the contract between Tasha and Ulrika. The agreement refers to a 'licence' rather than a lease but as noted it is the substance which will determine its true status. There is certainty of term and rent, so the determining factor is whether there is in fact exclusive possession. While Clause 15 appears to suggest not, it seems more than likely that this is a sham clause. The property is a one bedroom flat, so it seems highly impractical for it to be shared by a stranger to Ulrika. Furthermore, at no point has Tasha attempted to exercise her 'right' under this clause. It seems likely the agreement is a lease.
Normally to have legal effect a lease must be created by deed, but under s54 LPA 1925 a lease made for a term not exceeding three years, at market rent and taking effect in possession is an exception to this rule and can be created orally. As such it is irrelevant whether the contract complies with the provisions of s1 Law of Property (Miscellaneous Provisions) Act 1989. As a legal lease for less than 7 years, Ulrika's lease will take effect as an overriding interest under Land Registration Act 2002 Sch 3 para 1. It will therefore bind Walter.

Regarding Flat 2B the same point can be made regarding labelling. Here the agreement is described as a lease, but this in itself cannot make it so – there must still be exclusive possession and certainty of term. There appears to be exclusive possession, however as noted above service occupancy can prevent a lease taking effect. Here, this will not be an issue as Vivek's agreement to live in 2B is separate to his employment. While he works downstairs, he does not need to live in 2B – it does not "materially assist" him in actually carrying out his job.

However, the attempt to create a lease may still fail due to the lack of a certain term. The problem is that Vivek could be accepted onto an undergraduate degree course at any point – or indeed, he may never be accepted onto a course at all! As such the maximum duration cannot be ascertained. It seems highly unlikely the lease could be saved by a similar analysis to that in Berrisford, as it would appear the parties need to intend a lease for life (Southward Housing), which is not the case here.

Potentially there is an argument that a periodic tenancy exists, if Vivek is paying rent at regular periods. For example, if he pays a monthly rent (as Ulrika does) the court could imply a periodic tenancy, which exists for a certain term (one month). This would give Vivek the rights of a tenant under a valid lease, but Walter would be able to bring the tenancy to an end, albeit after a

period of notice. Short of a periodic tenancy, Vivek will only have a tenancy at will or a licence to occupy the flat – both of which can be brought to an end easily by Walter.