LEVEL 6 - UNIT 9 – LAND LAW

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

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

After improved performance in the previous examination, there was unfortunately a return to what have been two common trends in recent years: candidates sitting the paper with a selective knowledge; and candidates sitting the paper without any real knowledge whatsoever.

As has been highlighted in numerous previous reports, a sizeable minority of candidates seem capable of answering three questions but not four. It is, unfortunately, quite common to find scripts where three questions are answered to at least pass standard and often better, but the fourth answer (or lack of it) is unable to attract even a handful of basic marks. Candidates and tutors are again reminded that it is always tactically preferable in an examination at this level to obtain "easy" marks across four questions than to rely on obtaining the marks for a merit or distinction in individual answers at the expense of substantially answering four questions.

Looking at the content of answers, the common errors made are very similar to previous examinations. Overall candidates clearly find repeating learned knowledge easier than applying this knowledge or thinking critically about the

subject - this is to an extent inevitable but it is concerning how many answers are purely descriptive without even the most trite or obvious analysis, especially in Section A.

One noticeable trend in this cohort, was a confusion between easements and covenants, not something that has been remarked on before. It is speculated that this may be due to the fact that reform of these areas has been looked at as a single issue by the Law Commission, but it is worth noting for tutors who teach this area that weaker learners do seem to be conflating the two mechanisms.

To finish the general review on a more positive note, the standard of application in Section B was anecdotally better than in previous examinations. Some more "obscure" areas such as interests in land (A3) attracted a pleasingly high proportion of really good answers.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1

Overall there was a preference for the problem questions in Section B, which meant that despite attracting barely more than a quarter of the cohort this was the second most popular essay question. Performance was very much in line with the average for the paper as a whole.

This was reflected in the answers given. Most candidates were able to identify the essential characteristics of a lease and discuss the general concept of exclusive possession. Weaker answers tended to be extremely descriptive, at worst simply reporting relevant cases for their facts without any understanding of the ratio - however, most candidates were able to provide relatively informed discussion of the "sham clauses" cases at least. Better answers also considered situations where exclusive possession was not in itself sufficient to create a lease, looking at exceptions (E.g. service occupancy, family charity etc.) and/or other requirements such as certainty of term.

Question 2

This was by far the most popular question in Section A and only B4 was (very narrowly) more popular across the paper as a whole. As such, it was a little surprising how many candidates selecting this question seemed to have limited knowledge of the area. This may partly be explained by poor exam technique - performance on part (a) of the question was stronger than on part (b), suggesting a sizeable minority chose the question based on just half of the marks actually available.

The vast majority of answers did distinguish joint tenancy from tenancy in common and were able to, to some degree at least, describe differences such as the four unities, survivorship etc. Only stronger answers provided analysis or context, such as considering when each mechanism would be more appropriate.

As noted, performance on part (b) was considerably less strong. Many candidates struggled to distinguish the concept of severance by statutory procedure from severance at common law. There was also a lack of detail as to either method and weaker answers often failed to provide much in the way of relevant case law.

Question 3

The topic of interests in land has proved historically both unpopular and poorly answered when set in previous papers. While its popularity does not appear to have increased (only 1 in 5 candidates attempted this question) the quality of the answers given was high, with the best average mark across the paper. Some answers were truly excellent, with marks above 80% given more regularly than usual, thanks to detailed and thoughtful answers which not only explained the law but also provided real analysis.

Perhaps unusually the overall performance on section (a) was stronger - considering how prevalent registered land has become, it is perhaps odd that the "old" system appears better known. It should therefore be reiterated for centres and tutors that it is important not to disregard the "easy" law due to a focus on the more "difficult" concepts. In particular, knowledge of interests which override under LRA 2002 seemed a weak spot.

Question 4

This question was also attempted by around 20% of the cohort but attracted the lowest average mark across Section A of the paper. The marking guidance for this question was extremely wide, allowing for a range of approaches, but unfortunately the majority of answers were unimaginative and focused almost exclusively on the passing of the benefit and burden of covenants (other issues such as remedies for breach and modification/discharge were only touched on in a handful of answers).

The main issue was not this focus, but the fact that it led on the whole to very descriptive answers, with many reading almost like a problem question answer simply lacking the subsequent application. It also should be noted that simply mentioning a Law Commission report is not in itself "analysis" - candidates need to be able to discuss the recommendations from the report and relate these to the question asked.

SECTON B

Question 1

Almost half of the cohort chose to answer this question, but performance was notably the weakest across all eight questions. This was mainly due to two common errors which suggest a lack of exam technique as much as a lack of knowledge.

Firstly, far too many answers simply concluded that both easements met the requirements of Re Ellenborough Park without any real attempt to apply the law. As will be clear from the suggested answer, there was plenty to discuss on this point, especially regarding the "right" to use the showers.

Secondly, a sizeable minority seemed to have a very confused understanding of the different methods of creation of an easement. The most common error

was to discuss methods based on quasi-easements despite the question making it clear that there was not the previous use to support this. Candidates are again reminded to read questions carefully and in particular not to assume that just because an issue was examined previously, the next question will require the exact same application!

Question 2

This question was answered by more than 60% of candidates and the average mark was above the overall average for the paper. Overall knowledge of implied trusts appeared to be relatively good. Most candidates dealt well with the difference between resulting and constructive trusts and applied the two mechanisms appropriately.

Indeed, the main differentiation between answers was simply the level of knowledge and application (note that a minority still appear to consider the 1970s early constructive trusts cases as more important than Rossett and subsequent decisions).

However, one very common error is the continued over-estimation of the *obiter* comments made in cases such as Stack v Dowden. While it is certainly possible that a constructive trust could be found in the absence of a contribution to bricks and mortar, it is also certainly not "very likely" that a contribution to household expenses will suffice, something a worrying number of answers took for granted.

Question 3

More than half of the cohort answered this question regarding proprietary estoppel. Almost all answers were able to explain the general concept and as opposed to previous years, a greater proportion recognised the modern test has moved on from the "five probanda" of the Victorian era. As with B2, generally the distinction between higher and lower marks was simply knowledge and application.

That said, two common errors worth noting were a) problems advising on potential remedies - while this is notoriously difficult in estoppel candidates should at the least explore the different options rather than simply saying remedies will be at the court's discretion; and b) treating the commercial contract with Irene as a straightforward estoppel claim, i.e. ignoring the importance of Cobbe v Yeoman's Row.

Question 4

As is almost invariably the case, the question on adverse possession proved extremely popular. However, performance was not particularly impressive and anecdotally the level of application was weaker than in previous years.

Candidates should bear in mind that simply reciting cases on the common law requirements will not in itself lead to a lot of credit - application in a question such as this one is crucial.

LEVEL 6 - UNIT 9 – LAND LAW

SUGGESTED ANSWERS

SECTION A

Question 1

Under the Law of Property Act 1925 (LPA 1925) two estates may exist at law: the fee simple absolute in possession (otherwise known as freehold) and the term of years absolute (otherwise known as leasehold). A leasehold estate offers much more in the way of rights and protections to a tenant, compared to the very limited rights of a licensee occupying under a mere licence. In the seminal case of Street v Mountford (1985) Lord Templeman suggested that a lease required three elements: exclusive possession; for a term; and at a rent.

Looking first at the need for certainty of term, it is clear from authority such as Lace v Chantler (1944) that the lease must run for a defined period (although not necessarily until a specific date, due to mechanisms such as the periodic tenancy). In Lace itself, this meant that a lease expressed to last "for the duration of the war" failed for uncertainty of term. This strict approach has been upheld in more recent authority such as Prudential Assurance Co v London Residuary Body (1992). However, the courts have been able to save seemingly uncertain leases where the 'tenant' is a natural person. In Berrisford v Mexfield Housing Co-operative (2011) the purported tenancy could be determined on various conditions being met – but when these conditions would be fulfilled was uncertain. However, the court 'saved' the agreement as a lease by first interpreting it as a lease for life, then using s149(6) of the LPA 1925 to convert this into a 90-year term. While this case does demonstrate that certainty of term is not therefore always required, lower courts have been reluctant to follow the reasoning in Berrisford (see for example Southward Housing Co-operative v Walker (2015)).

What is clear is that rent is not a mandatory requirement – this is stated by LPA 1925 s205(1)(xxvii) and was confirmed in Ashburn Anstalt v Arnold (1989).

Exclusive possession is thus usually stated to be the other requirement for an agreement to constitute a lease. It can be defined as the right of the tenant to exclude all others from the land, including the landlord (until the end of the term). Traditional approaches to exclusive possession prioritised the intentions of the parties, which often meant in practice relying upon the wording of the agreement in question (see e.g. Somma v Hazelhurst (1978)). This approach changed in Street v Mountford where the House of Lords made it clear that it was the substance, not the form, of the agreement which would be determinative. As such, labelling by the parties is far from conclusive. Two examples demonstrating this are Watts v Stewart (2016) where an agreement called a 'lease' was found to be a licence; and Gilpin v Legg (2017) where a "licence" over a beach hut was held to actually constitute a lease. As such, some have argued that the fact of exclusive possession is now the most important factor in deciding whether an agreement is a lease. Perhaps the high watermark of this approach came in Bruton v London and Quadrant Housing Trust (1999) where, despite not having any proprietary interest in the land itself, the Trust was held to have created a form of 'lease' for the claimant. While a complex judgment that has attracted much debate, it is

clear that a crucial factor in the decision of the court was that Bruton was in exclusive possession.

However, it is by no means true to say that exclusive possession will guarantee that a lease will be found. There are a number of established categories where despite such possession, only a licence exists between the parties. These include: where the licensee is provided with 'board and lodging' (such as breakfast each morning in Otter v Norman (1989) or with 'services' (such as cleaning rooms daily and changing bed linen in Marchants v Charters (1977)); where an employee is provided with accommodation for the better performance of his job (see e.g. Norris v Checksfield (1992)); where lodging is provided out of familial or charitable motives (e.g. Cobb v Lane (1952), Heslop v Burns (1974) etc.) and where the licensee only has a right to *a* room, not a particular room (e.g. Westminster City Council v Clarke (1992)).

One area which has caused the courts some difficulty is the situation where more than one person is sharing the property. In the conjoined cases of A-G Securities v Vaughan and Antoniades v Villiers (1988) the House of Lords held that exclusive possession was crucial. In the former case, as an individual sharing a property with strangers, the occupier was merely a licensee; however, in the latter case the appellants were a couple sharing the property and were found to have exclusive possession of their room despite having signed separate agreements. They were thus held to be tenants. It could be argued that these cases demonstrate the importance of exclusive possession, but it could equally be argued that the courts are more concerned with whether a joint tenancy exists (as a tenant in common will also have exclusivity of possession).

In conclusion, it is difficult to argue against the proposition that a leasehold interest cannot be created without exclusive possession. However, this is not the same as stating that exclusive possession will always result in a lease being established. An occupier may have exclusive possession but still not be considered a tenant, either because the agreement is for an uncertain term or because it falls into one of the exceptions outlined above. A further point which could be made is that there are various formalities required for a valid lease (in law or in equity) and again these may prevent a leasehold interest being created irrespective of exclusive possession.

Question 2(a)

Where land is owned by more than one person, these co-owners will hold beneficially as either joint tenants or tenants in common. It is clearly established by s1(6) Law of Property Act 1925 (LPA 1925) that the legal title may only be held as a joint tenancy. Thus, the distinction is only relevant when looking at the equitable title to real property.

In a joint tenancy, the co-owners own the whole interest jointly, rather than in defined 'shares'. By comparison, tenants in common will hold a specified share in the property (e.g. 25%), although it should be noted that this does not mean they own a specific physical portion of the land. The difference in the way the share is held leads to the crucial distinction between the two mechanisms – the doctrine of survivorship. When a joint tenant dies, they are 'survived' by the remaining co-owners. As the joint tenants all own the single interest, the deceased's interest is subsumed into the joint tenancy. This means that a joint tenant cannot leave a 'share' under their Will. Where a share is held as a tenant in common, the doctrine does not apply – the share

does not increase or disappear on the death of any other co-owner and can be bequeathed on death.

The courts have a number of methods to decide whether a given beneficial interest is held as joint tenants or tenants in common. First and foremost, a joint tenancy may only exist when the 'four unities' are present: the unities of possession, interest, time and title (sometimes referred to as the 'PITT test'). Tenants in common also share the unity of possession (the right to possess every part of the land); but joint tenants must also show that they have the same interest (e.g. in extent, nature and duration), acquired their title under the same document and acquired their interest at the same time.

Assuming the four unities are present, the general presumption is that equity follows the law and so the equitable title will be held, just like the legal title, as a joint tenancy. However, this presumption can be rebutted, most obviously by the parties expressly stating a contrary intention. This may be formally within the deed of conveyance (or transfer), but can also be implied from using words of severance such as referring to "my share" or "equal shares". Without such evidence, the court may also look at contributions to the purchase price (unequal contributions leading to a presumption of a tenancy in common in resulting trusts) and the purpose for which the property is bought: thus partners buying a family home will be presumed to be joint tenants as per Stack v Dowden (2007), while those purchasing property for commercial purposes are more likely to be seen as tenants in common (see e.g. Malaysian Credit Ltd v Jack Chia-MPH Ltd (1986)).

Joint tenancy is seen as particularly appropriate where property is held by family members and those in romantic relationships. It allows for a simple and automatic 'inheritance' of the deceased's interest without the need for probate or a formally constituted Will. However, it does reduce the control a person has over their interest in land – while remaining a joint tenant, they cannot bequeath their interest and this is of course particularly important when for the vast majority of people an interest in property is often their most valuable asset. Conversely, a tenancy in common allows a co-owner to leave their share on their death but does prevent them 'benefiting' from the death of other co-owners – and may risk the 'loss' of the share if the co-owner dies intestate.

2(b)

There are a number of mechanisms which will sever a joint tenancy, with the effect of converting a co-owner's beneficial share into a tenancy in common. One method is that provided for by statute under s36 LPA 1925, sometimes known as 'severance by notice'. Under s36, a joint tenant will sever his or her beneficial share by providing written notice of their immediate desire to sever. The word 'severance' is not required (see e.g. Re Draper's Conveyance (1969)), but there must be evidence of an immediate intention to sever – thus in Harris v Goddard (1983) a prayer to the court to make whatever order it thought just was at most a request for severance, not an intention. The provisions in s196 of the LPA 1925 make clear how notice can be delivered. The notice may need to be delivered if sent by ordinary post, but as shown in Kinch v Bullard (1998) there is no need to demonstrate the other co-owner(s) actually read or even knew of the notice.

At common law there are three different methods by which a joint tenancy may be severed, as per Williams v Hensman (1861). The first is by a co-owner

acting upon his share, thereby destroying the four unities. This may, for example, occur on a sale, mortgage or bankruptcy in respect of a share (see e.g. Re Pavlou (1993)). The second method is by mutual agreement. This requires both mutuality (e.g. all co-owners must agree, see Nielson-Jones v Fedden (1975)) and evidence of an actual agreement. This agreement does not need to comply with any particular formalities, see e.g. Gore and Snell v Carpenter (1990). Finally, severance may take place through a 'mutual course of dealing'. This is a rather vague concept which has only been successful in handful of cases, most notably Burgess v Rawnsley (1975).

Severance using notice under the LPA 1925 is a relatively straightforward procedure. While there is some uncertainty in borderline cases regarding an 'immediate intention' to sever, for the determined co-owner the requirements are easily met. There is clear legal provision as to what is needed and crucially this form of severance can be carried out entirely unilaterally.

At common law, severance by acting upon one's share is similarly clear, although it requires something relatively drastic to take effect. It is a pragmatic doctrine which allows for the necessary severance to take place when the four unities are destroyed but is of little assistance to the co-owner who simply wants to convert their share from joint tenancy to a tenancy in common. Mutual agreement is effective but requires the co-operation of all joint tenants and evidence of the agreement made – this may be useful where more than one joint tenant wishes to sever their share, but seems unnecessarily complex for use by a single co-owner. Finally, mutual conduct is a very vague doctrine and is unlikely to be relied on, except where no other method can be argued. It would appear that the vast majority of joint tenants are best advised to use the statutory procedure to ensure severance of their interest.

Question 3(a)

There is an inevitable conflict between the desire of the purchaser to take the land free from encumbrances, and the desire of those with interests in the land to retain those interests as against the purchaser as a successor in title. The law must balance these competing desires and has used various mechanisms to achieve this over the past centuries. Prior to the Land Registration Act 2002 (LRA 2002), the most important distinction was that drawn between legal and equitable interests.

Under s1(1) of the Law of Property Act 1925 (LPA 1925) there are two legal estates in land: freehold and leasehold. Under s1(2) of the LPA 1925 there are five interests which may have legal status: easements, rentcharges, mortgages, similar charges and rights of entry. In the case of unregistered land, legal estates and interests "bind the world" and thus will bind the purchaser, regardless of whether the purchaser did have, or even could have, knowledge of the estate or interest. All other interests will take effect in equity only, as per s1(3). In the case of unregistered land, such interests only bind a purchaser if they have notice of the interest (as otherwise they will be protected as 'equity's darling'.) Notice can be actual, constructive or imputed. Usually constructive notice would only attach where the purchaser failed to make reasonable inspections and/or enquiries prior to purchase (see, for example, Kingsnorth v Tizard (1986)).

However, for many equitable interests the doctrine of notice is displaced by the need to register the interest as a land charge, the applicable law being

the Land Charges Act 1972. This Act provides six classes of land charge where a failure to correctly register will mean the charge is unenforceable against the purchaser of the property. The classes include important interests such as estate contracts (Class C(iv)) and freehold covenants (Class D(ii)). Failure to register will mean the charge has no effect against the purchaser, even if the purchaser is not acting in "good faith" (see e.g. Midland Bank v Green (1981)).

Interests under a trust of land do not require registration as a land charge, but the purchaser is still protected – this is by the doctrine of overreaching. Under ss 2 and 27 LPA 1925, where purchase money is paid to two or more trustees any equitable interests in the land are overreached, which means they are converted into merely personal interests in the proceeds of sale. This leaves the purchaser to take free of these interests (for an example of overreaching in practice, see City of London BS v Flegg (1988)).

It is clear that in relation to legal interests, the protection is very much weighted in favour of the holder of the interest, with the purchaser simply unable to take free. Equitable interests show more of a balance, especially under the doctrine of notice, but in the case of 'deemed' notice the Land Charges Act provides the purchaser with a good measure of protection – as long as searches are carried out properly. Where equitable interests are concerned, the purchaser is strongly advised to ensure payment to two or more legal owners if at all possible to avoid being bound by interests under a trust.

3(b)

The Land Registration Act 2002 provides a very different system for registered land, making the law relating to unregistered land of very limited relevance to registered titles. The principles governing priority are contained in ss27-30 LRA 2002 and these make the vast majority of interests only effective as against a purchaser if they are protected by registration. Interests are 'protected' for this purpose through the entry of notices in the register (s32), although the entry of restrictions (s40) is also relevant because the terms of a restriction will need to be complied with before the transfer to the purchaser can itself be registered. To a considerable degree, the distinction between legal and equitable interests is of less importance in terms of protection under the registered land regime – registration is the crucial step.

However, there remain interests which may bind a purchaser even though they are not recorded in the register. These are interests which override registered dispositions such as a transfer, and are governed by Schedules 1 (in relation to first registration) and 3 (in relation to registered dispositions) of the LRA 2002. While a number of other, rarer, interests are protected, the three main interests which override are legal leases of less than seven years, equitable interests where the holder is in actual occupation of the land, and legal easements. Each has its own criteria which must be met in order for the interest to bind the successor in title. For legal leases, future leases are notably excluded. For actual occupation under Schedule 3 (not Schedule 1), not only must both the equitable interest and the occupation itself be proven, the interest will not override if it was not disclosed when inquiry was made or it would not have been obvious on a reasonably careful inspection of the land at the time of disposition. Legal easements under Schedule 3 (not Schedule 1) will only override if the easement is obvious on inspection, the purchaser has actual knowledge of the easement, the easement has been exercised in

the past year or has been registered under the Commons Registration Act 1965.

Clearly the move to a system of registered land, including at its heart the so-called 'mirror principle' has provided greater protection and certainty for purchasers. The majority of interests will be ineffective unless entered in the register and thus made easily discoverable. Even interests which can override will only enjoy overriding status in certain circumstances, meaning that the purchaser is unlikely to be caught out if they take reasonable steps to inspect the land prior to purchase. It could also be noted that if a mistake in the register itself is the cause of loss for the purchaser, they will usually be compensated under the indemnity principle.

Question 4

(Note: this was a relatively wide question, so candidates may have chosen to focus on some of the below areas in more detail – credit was allowed accordingly)

Freehold covenants are a long-established mechanism for controlling a freehold owner's use of their own land. Covenants may in nature be either negative, preventing the owner from doing something on the land; or positive, requiring the owner to perform a specified act or activity. This area of law requires a delicate balance to be struck between the rights of freeholders to enjoy their land and the need to control use of land, such as preserving the character of a neighbourhood. The Law Commission has published a number of reports regarding the reform of covenants, most recently in 2011. However, the system has to date remained unchanged by Parliament.

One crucial area which has attracted considerable debate is who may enforce a freehold covenant. As between the original parties, the covenant remains enforceable because of privity of contract – even if these parties subsequently dispose of their interest in the property. However, the rules as to enforcement by successors in title are considerably more complex.

In equity, the benefit of the covenant may pass through annexation, assignment or under a building scheme. These rules can be complex and difficult to apply but after the decision in Federated Homes v Mill Lodge Properties (1980) as interpreted in Crest Nicholson Residential v McAllister (2004), s78 of the Law of Property Act 1925 (LPA 1925) can automatically annex the covenant unless expressly excluded.

The burden will pass if the requirements of Tulk v Moxhay (1848) are met. These are that the covenant is negative in nature, that there is identifiable benefitted and burdened land, the covenants touches and concerns the benefited land (as per P & A Swift Investments v Combined English Stores Group (1989)) and there was the intention that the burden will run with the land, which can be presumed under s79 LPA 1925. There must also be notice of the covenant (usually provided by registration).

At common law, the benefit will pass if four conditions are met: the covenant touches and concern the land, the covenantee owned the legal estate at the time the covenant was made, the successor also has a legal estate and the original parties intended that the covenant should run with the land (which can be presumed under s78 LPA 1925). The burden will not usually pass at common law (Austerberry v Oldham Corporation (1885) as confirmed in

Rhone v Stephens (1994)). There are exceptions to this rule, such as the rule of 'mutual benefit and burden' from Halsall v Brizell (1957). This allows the burden to pass only if it is directly related to the benefit being enjoyed (Thamesmead Town v Allotey (1998)) and the successor has the option to reject the benefit (Davies v Jones (2009)). Other options include the grant of a long leasehold, the imposition of estate rentcharges and the use of a 'chain' of indemnity covenants. These are of limited application and a chain of covenants is only as strong as its weakest link.

It is thus clear that the passing of either (or often both) the benefit and the burden is a complicated and difficult process. The rules are well beyond the comprehension of the layperson and represent an arcane and arguably out-dated category of land law. Critics point to the fact that while a party who has long since departed from the land may remain bound as the original covenator, whereas the current owners of the land may have no ability to enforce the covenant (or have no liability to have it enforced against them). The rule against the burden of positive covenants passing at equity means such covenants are particularly difficult to enforce against successors in title.

Arguments in favour of reform can also be made when one considers that which of the mechanisms outlined above is used will determine the claimant's remedy. A successor to the benefit may be unable to claim the injunction needed to prevent breach and instead only receive damages, if the covenant can only be enforced at law – or if the court will not exercise its equitable discretion to grant such a remedy. This can lead to those burdened by covenants "buying their way out" by simply committing a breach and paying what may be a low sum of damages as a result. Damages are something of a blunt instrument and may not reflect the non-pecuniary impact of breach.

Finally, some criticism has been made of the process for modification and/or discharge of freehold covenants. This takes place under s84 of the LPA 1925 which provides the Lands Tribunal with the discretion to modify or discharge restrictive covenants. In fact, the correct tribunal is now the Lands Chamber of the Upper Tribunal, as a result of the Tribunals, Courts and Enforcement Act 2007. There are various grounds upon which an applicant can challenge a covenant: that it is obsolete, that it would impede the reasonable user without providing a practical benefit to others, that there is agreement from the person(s) entitled to the benefit; or that the proposed modification or discharge will cause no injury to those benefited. Further tests are then provided from case law such as Re Bass Ltd's Application (1973). It can be argued that the rules are complicated and rely too heavily on being able to identify who has the benefit of a covenant (which may be very difficult). The Law Commission has also noted the cost and time of the procedure, and that it can be used to try and force a negotiated settlement to allow a party to escape from the burden.

The above arguments demonstrate that there is a clear case for reform. The Law Commission has repeatedly recommended a new form of "land obligation" which would address most of the issues identified above. However, there are also reasons to be cautious of reform. The current rules have developed over a long period of time and reflect pragmatic responses to how covenants work in practice. Cases such as Federated Homes show that the law can adapt to circumstances and issues such as the original parties remaining bound are simply basic principles of common law. It could be argued that any new system would make it too easy to restrict the use of land, leading the

'innocent' successor in title bound by obligations (which may be positive and involve considerable expenditure) that are difficult to discharge.

SECTION B

Question 1

An easement is the right to do something upon the land belonging to another. In order to be a valid easement, a right must comply with the four criteria set out in the case of Re Ellenborough Park (1956). There must be a dominant and servient tenement, the easement must accommodate the dominant tenement, the dominant and servient tenements must have diversity of ownership or occupation and the right must be capable of forming the subject matter of a grant.

The right to use the showers

There is a clearly identifiable dominant (Dryroot Cottage) and servient (Blue Farm) tenement. The second characteristic, that the easement must benefit the dominant tenement is less clear in this scenario. Cases such as Hill v Tupper (1863) have made clear that a right which only benefits the particular business of the current dominant owner will not suffice (in that case, the right to use pleasure boats on a canal). However, even if a right is commercial in nature it will benefit the dominant tenement if all occupiers might find it useful (see e.g. Moody v Steggles (1879)). In Platt v Crouch (2003) it was held that a right exercised by guests of the hotel which owned the dominant land was capable of being an easement. In any event, it is likely that any owner of Dryroot Cottage (which has limited washing facilities) would appreciate the right to use luxury facilities nearby. As Clara herself uses the showers, this would suggest that this is indeed the case.

Turning to the third requirement, there is obviously diversity of ownership. Thus all that remains is to establish whether the easement is capable of forming the subject matter of grant. This category is somewhat residual and comprises a number of requirements, including that there is a capable grantor and grantee (which does not appear to be a problem here), that the right is sufficiently definite (again not in issue) and that the right is within the nature of rights accepted as being easements. Even if the shower facilities are considered recreational, the case of Regency Villas Title v Diamond Resorts (2017) (which was the subject of an appeal to the Supreme Court in 2018) demonstrates a progressive approach to such easements. It further seems unlikely there is a problem with exclusive possession as the showers will hardly be in use twenty-four hours a day.

However, there is one final issue with the right – that an easement should not require the servient owner to spend their own money. Following Regency Villas there would clearly be no obligation on the owner of Blue Farm for the time being to maintain the showers, thus this would not be a cost imposed on them. However, the showers require water to operate and the owner of Blue Farm will have to pay for the water used. However, by the logic of the Court of Appeal judgment in Regency Villas (which was not disapproved in the Supreme Court on this point) the water could be brought onto the land by the

users. As such, it seems likely the right to use the showers can exist as a valid easement.

It is clear from the scenario that the easement has been created using a valid deed and is registered – as such, it will be a legal easement which is binding upon Felicia.

The right of way

The second right which may constitute an easement is the vehicular right of way to access Gamekeeper's Lodge. Again, there is clearly a dominant (the Lodge) and servient (the Farm) tenement. The right clearly benefits Gamekeeper's Lodge as it is the only means of vehicular access. There was diversity of ownership at the time of grant (i.e. the sale to Ellis) and the right is capable of forming the subject matter of grant.

The issue is therefore whether the easement has been validly created. There is no evidence of an express grant complying with the necessary formalities. While Wheeldon v Burrows (1879) and s62 of the Law of Property Act 1925 are often relevant when looking at easements created on the sale of part of the land, they will not apply here as the right of way was not used by Aubrey prior to the sale (i.e. there had not been "continuous and apparent" usage). The right has not been used for a long enough period for prescription to apply, as the sale only took place in 2016.

Two methods of creating an easement remain, being necessity and common intention. The former requires that there is no reasonable use of the land without the easement and is most relevant where land is "landlocked", with no other method of access. It could be argued that there is an alternative route onto the land, albeit on foot, and this could defeat implication by necessity (see e.g. Titchmarsh v Royston Water Co (1899)).

However, the closely related doctrine of common intention may be of more assistance. This will imply an easement if it can be shown that the right is reasonably necessary to give effect to the common intention of the parties (see e.g. Wong v Beaumont Property Trust (1965)). It is clear from the scenario that Aubrey knew of Ellis' intentions in renovating the Lodge and that this would require use of the track – the situation is analogous to Davies v Bramwell (2007) where the parties were aware the purchaser of land needed a right of way over land retained by the vendor in order to use the land as he intended.

As such, a valid easement is likely to exist. As the easement will be implied as a legal easement, it is binding upon successors in title as an over-riding interest (Sch 3 para 3 LRA 2002). Felicia should be advised that Ellis may successfully claim against her regarding the fence. Following Coventry v Lawrence (2014) it is clear injunctive relief is at the discretion of the court, but there seems no reason to withhold the discretion in this case.

Question 2(a)

Whenever two or more people concurrently beneficially own land, this ownership will be behind a trust of land (s1 Trusts of Land and Appointment of Trustees Act 1996). Trusts may be either express or implied, and the latter category includes both resulting and constructive trusts. As there is no suggestion of a formal deed of trust in the scenario, the focus will be on implied trusts.

As The Elms is a residential property which was purchased as Mandy and Norman's family home, the court will prefer to look for a constructive as opposed to a resulting trust (Stack v Dowden (2007)). In order for a constructive trust to arise in favour of a party who is not named on the legal title, there must be a common intention that the claimant was to hold an equitable interest in the land, and detriment caused to that claimant. Decades of case law have established that the former requirement is considerably more difficult to satisfy.

Common intention may be express, but in situations such as the present where no express words can be proven, the claimant must demonstrate a common intention, which can be implied from the behaviour of the parties. The leading case on implying such an intention remains, despite sustained criticism, Lloyds Bank v Rosset (1990). As Lord Bridge made clear in his judgment, anything less than a direct contribution to 'bricks and mortar' is highly unlikely to suffice. This means that a claimant will need to demonstrate a contribution to the purchase price of the property, mortgage instalments or possibly extensive enough renovations which increase the price of the property. Unfortunately for Norman, on the facts of the scenario he will not be able to provide any of this evidence. More recent authority, notably Stack v Dowden and Jones v Kernott (2011) has suggested *obiter* that "the law has moved on" but this discussion, in cases relating to joint names, cannot be considered by the lower courts in preference to the binding decision in Rosset. Thus, it remains the case at the time of writing that no "sole names" case has allowed anything less to imply a common intention (see for example the Court of Appeal making clear that it was making its decision in Wodzicki v Wodzicki (2017) on a set of facts distinguishable from family home constructive trust cases).

If Norman was able to demonstrate entitlement to a share, the quantification of that share would be at the discretion of the court. At this second stage the court could take full account of other expenditure such as the household bills and the school fees, giving Norman a share, which is likely to be more than negligible. However, without qualification he will have no beneficial interest in The Elms and would therefore be entitled to nothing on any sale of the property.

2(b)

While the flat is a residential property, it is being bought as an investment rather than a family home. As such, the court will likely look to use the mechanism of a resulting trust rather than a constructive trust. A resulting trust will arise when a party provides money toward the purchase price of a property but is not included on the title.

As was originally made clear in Tinsley v Milligan (1993) just because the reason a party is not included on the title is some form of illegal or fraudulent activity, this in itself will not prevent the trust from being implied (see also O'Kelly v Davies (2014)). While the main test for illegality provided in Tinsley was overturned in Patel v Mirza (2016), this particular point remains good law and is likely to be followed in order to avoid unjust enrichment.

Thus, even though Mandy and Norman have fraudulently taken advantage of a scheme for which they were not eligible, this will not impact the position as it relates to a resulting trust. Because Mandy has contributed directly to the purchase price, Norman will hold the property on resulting trust for himself and Mandy. Quantification is straightforward in resulting trust cases – shares are determined by the size of the initial contribution. As a result, on the face of it, Norman will have a 75% share and Mandy a 25% share. However, Norman may wish to argue that the £20,000 discount should also be 'credited' as part of his share. By analogy with cases such as Day v Day (2005) where a right to buy discount was considered a "contribution", this argument might succeed – however, as Norman is not actually legally entitled to the discount this could prove a distinguishing factor.

N.B. Credit was given for answers which considered the possibility of an express common intention to create a constructive trust on the basis an "excuse" was given for Mandy not to be named as a legal owner (e.g. Eves v Eves (1975) etc.)

Question 3

Under the equitable doctrine of proprietary estoppel, the promise of the owner of land as to rights in the property may be upheld in equity even in the absence of the usual formalities required to create an interest in land. While traditionally the court used the so-called 'five probanda' established in Willmott v Barber (1880), the modern test is one of assurance, reliance and detriment (Taylor Fashions Ltd v Liverpool Victoria Trustees (1982)). To these factors can be added a general requirement of unconscionability (Sledmore v Dalby (1996)). As an equitable doctrine, both the existence of an estoppel and any remedies awarded are at the discretion of the court.

The farm
Looking first at Manor Farm, Hatice will seek to establish a claim for proprietary estoppel. Because she has not directly financially contributed to the property there is no claim in resulting trust and there is nothing to suggest a common intention to create a constructive trust during her father's lifetime. It should be noted that as a (literal) 'farm and family' case s2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A) is unlikely to prevent a claim (see e.g. Thorner v Major (2009)).

The first element Hatice needs to establish is a clear assurance relating to rights in the land. The original statement of Geraint is found in his letter, "you can expect to be well rewarded". While the law has moved on from the idea that a promise could not be made as to the contents of a Will (see e.g. Gillett v Holt (2001) c.f. Taylor v Dickens (1998), the assurance must be unambiguous. Vague promises of reward will not be sufficient (Layton v Martin (1986)) and must relate to the land itself (Macdonald v Frost (2009)). This first statement seems far too vague and makes no reference to an interest in Manor Farm as the reward.

However, in 2015 Geraint tells Hatice that "if you carry on running the Farm I will leave everything to you". While this may appear to suffer from the same issues as the first statement, it could conversely be argued that "everything" includes the Farm along with any other assets Geraint may own. However, "everything" is interpreted, crucially Geraint also gave Hatice the combination to access the title deeds for the farm. This is similar to the case of Thorner v Major where a naturally taciturn farmer was held to have made a sufficient

assurance by, among other things, giving the promisee insurance documents. Thorner v Major also suggests that an assurance may be cumulative over time, which allows the claimant to rely on earlier actions for detriment and reliance even if the full assurance was yet to be made. In the words of Lord Hoffman, "The owl of Minerva spreads its wings only with the falling of the dusk."

If there is a sufficient assurance, Hatice must also show reliance and detriment. While the courts have repeatedly stated these to be two separate elements, much of the evidence for one is also likely to demonstrate the other. Hatice can demonstrate reliance first and foremost by her coming to work on the farm – it is clear she changed her position as a result of the letter as she gave up her university studies. If we look at her behaviour as a result of the 2015 assurance, there is also reliance then, as Hatice continued to work for her father despite losing her £25,000 annual salary. As noted, this evidence can also be put to proving detriment, but in addition it could be argued that through working on the farm (and caring for her father) Hatice has lost out on various opportunities such as developing a social life, romantic relationships and the possibility of having children etc. These were considered relevant considerations going to detriment in Davies v Davies (2016). While it could be argued (as in, for example, Lalani v Crump Holdings (2007)) that at least up until 2015 Hatice did earn a wage and throughout her time at Manor Farm lived rent-free, this is unlikely to outweigh the above, as well as the fact that she could potentially have had a career as a professional in a relatively well-paid profession (see for similar facts Moore v Moore (2016)). Overall it seems, on the facts given, unconscionable for Hatice to gain nothing for her years of commitment to Manor Farm in reliance on Geraint's assurance.

As noted above, any remedy granted to Hatice is at the court's discretion. In recent decades the law has moved away from trying to satisfy the original assurance and instead remedies are usually based on the detriment suffered. The remedy should be proportionate in all the circumstances of the case, as held in Jennings v Rice (2003). This is arguably the same as awarding the minimum equity to do justice (McGuane v Welch (2008)). Considering that there are three other children, and that the farm is likely to be worth a large sum of money (especially if one field alone can be sold for development for £500,000 or more), it is perhaps unlikely that the court will award Hatice the entire freehold of the property. It would seem likely that instead she may be awarded a larger share of the estate than her siblings, with the court looking at the particular facts to decide what size that share should be.

The field

There may also be an estoppel claim against Geraint's estate by Irena. However, crucially Irena had a commercial relationship with Geraint and was looking to make a profit through developing the property. As the House of Lords made clear in Yeomans Row Management v Cobbe (2008), proprietary estoppel is not to be used as a method of evading the usual formalities required for dealing in land. Section 2 LP(MP)A makes it clear that a contract for the sale of land should be in writing, contain all of the terms of the agreement and be signed by both parties. As a developer and a businesswoman, Irena should be aware of these formalities and/or capable of seeking legal advice – equity is unlikely to assist her merely because she has failed to comply. It is possible, however, that she may be able to claim a sum of money from the estate on a *quantum meruit* basis, in relation to the costs she incurred in obtaining planning permission etc, as in Cobbe itself.

Question 4(a)

Adverse possession is the unique doctrine which allows a trespasser to gain title to land from the current freehold owner. The area is largely governed by the competing policy considerations of (on the one hand) protecting proprietor's rights in land; but (on the other) ensuring that land is not left to go to waste.

Any claim for adverse possession must first meet three common law requirements. The claimant must demonstrate factual possession of the land ("a degree of physical control" *per* Slade J in Powell v McFarlane (1977)); the intention to possess (not necessarily the intention to own the land but merely to possess for the time being, see e.g. Lodge v Wakefield City Council (1995)); and that possession is adverse (i.e. without permission of the legal owner, compare e.g. Smart v Lambeth LBC (2013)).

Looking at Travis' actions, the first question is when he can be said to be in factual possession of the property. Fencing or otherwise securing the property is seen as strong evidence of such, as in Seddon v Smith (1877). When Travis secures the property in December 2007 he also installs a lock to which he has the only key, which again suggests the physical control needed for factual possession (see e.g. Buckinghamshire County Council v Moran (1990)). However, the court will look at why the property was secured in this way (as confirmed in Chambers v London Borough of Havering (2011)), thus fencing to keep animals in would not suffice, as in Basildon District Council v Charge (1996). By analogy, it could be argued that the purpose of the lock was not to exclude all others from the land, including the paper title holder – it was simply to protect young children from injury on the premises. As such, factual possession may not be found until Travis moves in his possessions and makes the house weatherproof in 2008, or even until May 2010 when he begins to live at the property.

The same evidence will be of assistance in establishing the intention to possess. It will not prevent a claim that Travis is aware that he has no legal right to be on the land (see e.g. J A Pye v Graham (2002)). It could be argued that acts such as boarding up the windows and storing possessions are merely temporary usage, as in Powell v McFarlane (1977) but similar acts sufficed in Purbrick v Hackney LBC (2003) on the basis that it would have been clear enough to the paper title holder on inspection that someone was making use of the land.

As such, it looks likely that time has begun to run for Travis at the earliest in December 2007 and at the latest in May 2010. It is perhaps more likely than not that Travis was in adverse possession by at least August 2008 when he made the property weatherproof and began to use it for storage. It is settled law that the possessory interest may be passed on to another (see e.g. Willis v Earl Howe (1893) as confirmed more recently in Ellis v Lambeth LBC (2000)) and so Ursula may use Travis's period of adverse possession in addition to her own. Finally, the possession appears to be without Vikram's consent – the letter asking Ursula to leave will have no effect (see e.g. Mount Carmel Investments v Peter Thurlow (1988). Travis appears to have assigned his interest to Ursula, rather than her dispossessing him, but in any event, time will have accrued against Vikram throughout.

If the land is unregistered, the 'old law' under the Limitation Act 1980 will apply. As per s.15 once 12 years of adverse possession has passed, the paper

title owner's right to recover the land will be statute barred. His title will be extinguished by section 17. As such, Ursula need do nothing until this time limit expires, at which point she can apply for registration as the freehold owner. Unless Travis' possession began in December 2007 the 12-year period is yet to expire and so Vikram can remove Ursula from the land as long as he acts before (most likely) August 2020. As this is residential property, Vikram may rely on s144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to use the police to remove Ursula from the property. However, s144 will not prevent a period of adverse possession from continuing to accrue whilst Ursula remains in possession (Best v Secretary of State for Justice (2015)).

4(b)

A claim based upon adverse possession in relation to registered land requires the same common law elements to be made out as discussed above. However, the procedure to claim is different. Under the Land Registration Act 2002 Schedule 6, the trespasser may claim the registered title after a minimum of ten years in adverse possession. This means that as long as Travis went into adverse possession before January 2010, Ursula may now bring the claim (that she can use the period of Travis's previous adverse possession is confirmed by Sch 6 para 11) and apply to HM Land Registry to be registered as the new proprietor of the registered title.

However, upon Ursula's application the Registrar will notify the paper title holder (i.e. the current registered proprietor), who has 65 working days to serve a counter-notice. It can be assumed that Vikram will serve such a counter-notice – but only if he is aware of Ursula's application. As he has inherited the land it is possible that the previous owner remains registered at the Land Registry, which may mean Vikram is not notified or (if he is) that he will not be able to serve a counter-notice, although he can still object to the application – for example, on the basis that he disputes that Travis and/or Ursula have actually been in adverse possession for the required period or at all. If Vikram does serve a counter-notice, the application will fail as none of the exceptions set out in para 5 of Sch 6 appear to apply. However, if Vikram then fails to remove Ursula from the land in the next two years, she may make a further, unopposable application. As this is residential property, Vikram may rely on s144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to use the police to remove Ursula from the property. However, s144 will not prevent a period of adverse possession from continuing to accrue whilst Ursula remains in possession (Best v Secretary of State for Justice (2015))