CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2021

LEVEL 6 – UNIT 10 – LANDLORD & TENANT

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 2021 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

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

CHIEF EXAMINER COMMENTS

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

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

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

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1

This question required candidates to discuss: (a) the criteria for achieving security of tenure under Part II of the Landlord and Tenant Act 1954, and (b) the procedure for excluding that security on the grant of a new lease.

This was a reasonably popular question. On the whole, part (a) was handled better than part (b), but many candidates did not sufficiently illustrate the relevant principles under part (a) with citation of relevant case law. As regards part (b), most candidates did not enter into any meaningful discussion of whether the new procedure has made it more difficult to exclude security of tenure.

Question 2

This question required candidates to consider the law relating to surrenders. This was one of the more challenging questions on the paper.

Relatively few candidates attempted this question, and generally it was not well-handled. Candidates did not articulate with sufficient clarity when/how a surrender can arise, and hence could not then go on to discuss the relevance of intention to the actual result.

Question 3

This question required candidates to discuss: (i) the doctrines of privity of contract and privity of estate, and (ii) the impact of the Landlord and Tenant (Covenants) Act 1995 on each of them.

Relatively few candidates attempted this question. Some of the discussion was rather wayward: there was confusion as to which doctrine was which. In general terms, the discussion of the 1995 Act was rather limited.

Question 4

This question required candidates to discuss the protection afforded to long leaseholders in relation to service charges.

This might be described as something of a 'self-selecting' question, in as much as it was only likely to be attempted by candidates who had specifically revised the topic. It is perhaps not surprising, therefore, that most of the candidates who answered this question were able to engage in a reasonable discussion.

SECTION B

Question 1

This question required candidates to discuss the obligations as to fitness for human habitation and repair contained in the LTA 1985, together with common law obligations as to repair.

This was a popular choice of question amongst candidates. However, in a large number of cases the statutory obligation in relation to fitness for human habitation was not adequately discussed. The discussion of implied obligations in relation to part (b) of the question was also decidedly patchy.

Question 2

This question required candidates to discuss the formalities for the creation of a lease and/or an agreement for lease, together with periodic tenancies and tenancies at will.

Again, this was a popular choice of question amongst candidates. Most candidates gave relatively little consideration to the possibility of either a periodic tenancy or a tenancy at will having arisen, and some had some little knowledge as to the nature of an equitable lease and when it arises. There was also some confusion as to whether a lease, to which LPA 1925 s.54(2) applies, can be a legal lease.

Question 3

This question required candidates to discuss the lease/licence distinction.

This was a popular question. Most candidates identified the relevant criteria. However, only a small handful of candidates made an attempt to apply the law to the facts of the scenario, and to consider the factors for or against a decision as to whether a lease or a licence had been created. The question quite clearly contained a number of relevant factors, and any reasoned/reasonable conclusion would have been credited.

Question 4

This question required candidates to discuss various aspects of the Housing Act 1988, with particular reference to assured and assured shorthold tenancies.

In the main this question was not handled particularly well, which was a little surprising as past sessions have suggested that this subject area is popular with, and familiar to, candidates. Some failed to identify the type of tenancy, some answered the question more from the perspective of the landlord than the tenant (Anna), and a handful answered the question as if it were about the lease/licence distinction.

SUGGESTED ANSWERS

LEVEL 6 – UNIT 10 – LANDLORD & TENANT

SECTION A

Question 1(a)

In order for a tenancy to qualify for security of tenure under Part II of the Landlord and Tenant Act 1954 (LTA 1954), the requirements of LTA 1954, s 23 must be satisfied.

The first requirement is that occupation must be by virtue of a tenancy. Consequently, licensees will not qualify for protection. The nature of the occupation will be resolved by reference to the principles set out in Street v Mountford (1985) albeit that the "indicia" of a tenancy which were identified in that case are not directly transferable to occupation by a business: Dresden Estates v Collinsdon (1987).

Secondly, the tenancy:

- must not be one of the excluded categories of tenancy specified in LTA 1954, s 43 (ie it must not be a tenancy at will, a farming tenancy, a tenancy of a mine or a tenancy of certain categories of licensed premises)

- must be for a term of more than six months (note that using successive short tenancies as a device to avoid protection under LTA 1954 is prohibited under the aggregation provision in LTA 1954, s 43(3)(b)).

Thirdly, the premises (or part of them) let under the tenancy must be occupied by the tenant for the purposes of a business carried on by him. This third requirement comprises two distinct elements, namely "occupation by the tenant" which is "for the purposes of a business" and which is "carried on by the tenant".

Occupation

Occupation need not be constant, but it must be "real and genuine". This allows the court to take into account the fact that on certain occasions the premises may inevitably be empty or unoccupied (eg where the tenant is on holiday or is seriously ill, or is carrying out major refurbishment works, or has been forced to vacate temporarily following a fire (Morrison Holdings Ltd v Manders Property Ltd (1976) or where the tenant's business is seasonal: Teasdale v Walker (1958)). In none of these situations would the protection of LTA 1954 be lost.

Occupation does not have to be personal, so the tenant can occupy through an agent or a licensee: Groveside Properties Ltd v Westminster Medical School (1983).

For the purposes of a business

Business includes a trade, profession or employment: LTA 1954, s 23(2). The business does not have to be run for profit, so for example a charity can

qualify for protection under LTA 1954, but the absence of any trading or profit element will disqualify an occupier from protection: Abernethie v A M Kleiman (1970) (tenant running a not-for-profit Sunday School). Nor does the business have to be run from the particular premises; so where a tenant rents storage space in a warehouse to store goods which the tenant then sells from a shop elsewhere, the warehouse is being occupied "for the purposes of a business": Hillil Property and Investment Co Ltd v Naraine Pharmacy Ltd (1979).

Use of premises (either wholly or partially) for residential purposes is not inconsistent with business use if the residential use furthers the tenant's business (in Groveside a medical school used premises as accommodation for its students, and this was held to be furthering the school's business and so qualified for protection under LTA 1954).

Business use in breach of a covenant prohibiting such use will not entitle the tenant to protection under LTA 1954: see LTA 1954, s 23(4) and Methodist Secondary Schools Trust Deed Trustees v O'Leary (1993).

Carried on by the tenant

If the tenant personally carries on the business, the tenancy clearly qualifies for protection. In some circumstances, the business can be carried on vicariously and the tenancy will still be protected. Common situations in which this will arise are those where:

- the business is carried on by a manager employed by the tenant
- the business is carried on by a company in which the tenant has a controlling interest (LTA 1954, s 23(1A)(a))
- the business is carried on by an individual who has a controlling interest in the tenant company (LTA 1954, s 23(1A)(b))
- the business is carried on by a member of a group of companies, and the tenant is also a member of that group (LTA 1954, s 42)
- the business is a partnership business and the tenancy is held by the partnership (LTA 1954, s 41A)

1(b)

Prior to the changes introduced by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (RRO 2003), any agreement to exclude the security of tenure afforded by LTA 1954, Part II had to be legitimised by the court.

However, the requirement for a court order introduced a degree of expense, delay and formality which many regarded as unnecessary given that the parties were agreed that the tenancy should be contracted-out. The Law Commission itself concluded that most courts were simply rubber-stamping applications precisely because of this agreement.

The purpose of the reforms introduced by RRO 2003 in relation to excluding security of tenure was to put the mechanics of the contracting-out procedure exclusively in the hands of the parties. That was undeniably a laudable aim.

The new procedure consists of the following steps:

(i) the landlord must serve a 'warning' notice on the tenant, advising the tenant that the tenancy will be contracted-out

(ii) the tenant must respond by serving a simple or statutory declaration (depending on when the warning notice is served relative to the date of the lease or any prior agreement for lease)

(iii) the document creating the tenancy must record not only completion of previous two stages but also the parties' agreement that the tenancy will be contracted-out

Stages (i) and (iii) are not particularly problematic. Stage (ii), however, gives rise to a number of issues. First, there is uncertainty as to whether using the wrong form of declaration invalidates the contracting-out procedure. Secondly, the technicalities surrounding the making of a statutory declaration are potentially troublesome, particularly the requirement that the declaration must be made before an independent solicitor. Thirdly, where a third party is making the declaration on behalf of the tenant, the landlord has to obtain proof of that person's authority to do so if it wants to avoid being drawn into arguments about implied, apparent or ostensible authority: see, for example, TFS Stores Limited v The Designer Retail Outlet Centres (Mansfield) General Partner Ltd (2019).

Unfortunately, the steps which now have to be undertaken involve a degree of technicality and rigour which can present a trap for the unwary landlord.

Question 2

A surrender of a lease arises when the landlord and the tenant agree that, notwithstanding the absence of any break clause in the lease between them, the term of that lease should end on a date which is earlier than the contractual expiry date that is provided for by the lease.

The consequence of a surrender is that the term merges with, and is extinguished in, the reversion: the result of this is that both parties are released from any future obligation to comply with the terms of the lease. However, in the absence of any provision to the contrary, the surrender will not release either party from any past breach of the lease: see, for example, Dalton v Pickard (1924).

A surrender may be express or it may arise by operation of law. It is generally considered that an express surrender must be by deed because it is a conveyance of the term to the landlord (see Law of Property Act 1925 (LPA 1925), s 52(1) and, for example, Crago v Julian (1992)). However, there is some uncertainty as to whether this is necessary where the lease itself is not required to be in writing (ie in relation to leases to which LPA 1925, s 54(2) applies).

An express agreement is necessarily a matter of subjective intention, and the parties will frequently choose to enter into an express agreement so that they can record the precise basis on which the surrender is being agreed (eg in relation to dilapidations, release (or otherwise) from past breaches, etc). Even then, however, the terms that are negotiated between the parties in relation to the surrender, or the effect of the surrender on obligations contained in

other documents, may sometimes have consequences which come as a surprise to one or other of them: see, for example, Baroque Investments Limited v Heis and Bewick (2012) (tenant's obligation to reinstate contained in a licence to alter negated by express release on surrender).

A surrender by operation of law arises where the unequivocal conduct of both the landlord and the tenant is inconsistent with the continuation of the current tenancy between them. Such a surrender may arise where:

- the landlord and tenant agree that the tenant should be granted a new lease of the same premises
- the landlord and tenant agree to vary the existing lease by increasing the length of the term or increasing the extent of the demise
- the tenant delivers possession of the premises to the landlord and the landlord's subsequent conduct demonstrates that the landlord has accepted possession of the premises as a recognition that the lease is at an end

In the first and second scenarios, the circumstances of the relevant agreement are such that the law considers there to be a new tenancy on new terms, which necessarily means that the original tenancy must have come to an end, and so therefore has been surrendered. This conclusion applies without regard to, and sometimes even in spite of, the parties' subjective intentions.

The third scenario is also based on an objective assessment of the parties' conduct. However, the outcome of that assessment is markedly different, in that no new tenancy arises (which could have serious financial consequences for the landlord). It is this circumstance which invariably underpins an argument by the landlord that it did not intend to enter into a surrender.

In the case of the third scenario, the tenant will often simply abandon the premises, with or without prior notice, and with or without returning the keys. However, this unilateral act by the tenant is not of itself sufficient to force a surrender upon the landlord: the tenant's conduct is best characterised as an implied offer to surrender by the tenant. There must then also be some unequivocal act on the part of the landlord which is objectively inconsistent with the continued existence of the lease and of such a nature that it can only be justified as being lawful on the basis that the landlord has accepted the tenant's implied offer to give back possession and to treat the lease as being at an end.

Examples of conduct which have not warranted such an adverse conclusion include changing the locks and other acts which are intended to secure the premises against trespassers and vandals, or carrying out necessary repairs, or advertising the premises as being available to let, or entering into negotiations with a guarantor who is bound by the terms of the lease to take a new lease as a result of the tenant's default (see, by way of example, RVB Investments v Bibby (2013) and Levett-Dunn v NHS Property Services (2016)).

Conversely, a sufficient acceptance of the tenant's offer to surrender has been held to exist where the landlord re-lets the premises to another tenant, or accepts rent from subtenants at the tenant's direction, or resumes possession

of the premises for the landlord's own benefit (see, by way of example, Artworld Financial Corp v Safarian (2009)).

In light of the above discussion, it is submitted that, if the question posed is considered in terms of the subjective intention of the landlord and/or the tenant, then it is incorrect; a surrender by operation of law can occur notwithstanding a contrary intention on the part of one or both of the parties. This inadvertent and unintended outcome can have serious consequences for both parties.

Question 3

The Landlord and Tenant (Covenants) Act 1995 (LT(C)A 1995) was enacted to address what were then perceived as two significant problems in relation to the enforcement of leasehold covenants, namely:

- the perceived injustice of original tenant or landlord liability (which is an aspect of the rules relating to privity of contract)

- inconsistent application of the concept of 'touch and concern' (which is an aspect of the rules relating to privity of estate)

Prior to LT(C)A 1995, privity of contract as between landlord and tenant meant that the original landlord and the original tenant would normally remain liable to perform their respective obligations under the lease for the whole of the term for which it had been granted, even though they had parted with all interest in the property. Although privity of contract meant that both original parties remained liable, it was clear prior to LT(C)A 1995 that the rule was far more disadvantageous to tenants than it was to landlords. Original tenants might find themselves held accountable, many years after they had parted with their interest in the property, for the default of an assignee about whom they knew nothing. Landlords had no incentive to minimise the extent of the original tenant's loss.

LT(C)A 1995, s 5 deals with the problem of original tenant liability by providing an assigning original tenant (and, indeed, every subsequent assigning tenant) with an automatic release from liability under the tenant covenants if they engage in a lawful assignment of the tenancy. However, there are two major qualifications to this release:

- it only applies to whose leases which LT(C)A 1995, s 1 characterises as 'new' tenancies, ie those tenancies created on or after 1 January 1996 – this means that a significant (albeit inevitably dwindling) number of leases remain subject to the old rule

- the landlord can require the assigning tenant to enter into an authorised guarantee agreement (in accordance with LT(C)A 1995, s 16) under which the assigning tenant guarantees the performance of the tenant covenants in the lease by the incoming tenant – this latter exception is a very significant restriction on the efficacy of the automatic release referred to above, because it allows a continuation (albeit limited to the period for which that assignee is the holder of the term) of the very problem which LT(C)A 1995, s 5 was designed to resolve

LT(C)A 1995 also affords original landlords under 'new' tenancies the same opportunity of a release, but only if they are granted it by the tenant or (if the

tenant unreasonably refuses to grant it) by the court (see LT(C)A 1995, s 8). In theory, this allows tenants to prevent their landlord from assigning the reversion to an entity with little or no covenant strength, thereby jeopardising performance of the significant landlord covenants on which many tenants rely. However, in practice, landlords simply sidestep the need to seek such a release at the time of assignment by providing in the lease for an automatic release to arise – such a provision being presented to the tenant on what is essentially a 'take it or leave' it basis. This practice was endorsed by the House of Lords in London Diocesan Fund and others v Avonridge Property Company Limited (2005).

Prior to LT(C)A 1995, privity of estate as between landlord and tenant meant that, where original landlord or original tenant liability did not apply, the landlord and the tenant for the time being (ie assignees of the original landlord or the original tenant) would assume responsibility for some, but crucially not necessarily all, of the covenants. In the case of an assignment of the reversion, LPA 1925, ss 141 and 142 ensured (albeit in slightly different terms) that the benefit of the tenant covenants and the burden of the landlord covenants (so far as each has reference to the subject matter of the lease) runs with the reversion. The statutory requirement of 'having reference to the term of the lease' is equivalent to a requirement that the covenant should 'touch and concern' the land: see, for example, Davis v Town Properties Investment Corpn Ltd (1903).

On an assignment of the term, the question of whether the burden of a tenant covenant or the benefit of a landlord covenant runs with the term again depended on whether that covenant could be said to 'touch and concern' the land: see Spencer's Case (1583).

Unfortunately, the concept of 'touch and concern' is an imprecise one, and was prone to inconsistent formulation and/or application. Romer LJ in Grant v Edmondson (1931) described the concept as being "purely arbitrary, and the distinctions [between those covenants which satisfied the concept and those which did not], for the most part, quite illogical".

LT(C)A 1995 deals with the problem presented by privity of estate and the inconsistent application of the concept of 'touch and concern' by the simple expedient of abolishing the distinction between covenants which 'touch and concern' the land and those which do not. LT(C)A 1995, ss 2(1) and 3 provide that the benefit and burden of all landlord and tenant covenants of a tenancy run with the reversion and the term respectively.

Again, however, this solution only applies to 'new' tenancies; consequently, a significant (albeit inevitably dwindling) number of leases remain subject to the old rule.

In light of the above discussion, it is submitted that LT(C)A 1995 has only been partially successful in resolving the problems presented by privity of contract and privity of estate.

Question 4

Sections 18-30 of the Landlord and Tenant Act 1985 (as amended) (LTA 1985) provide holders of long residential leases with two principal forms of protection in relation to variable service charges, ie a service charge whose amount can vary according to the amount of any qualifying expenditure incurred by the

landlord (LTA 1985, s.18). They are: (a) protection from service charges which are unreasonably incurred or are unreasonable in amount, and (b) the right to be consulted before major contracts are awarded or major works are carried out.

In addition:

- service charge demands must comply with prescribed requirements and are subject to statutory time limits
- the landlord's right to forfeit for non-payment of service charge is restricted
- the landlord's right to recover the cost of legal proceedings by way of a service charge is also restricted
- statutory trusts are imposed over service charge funds

Contracting out is unlawful (LTA 1985, s 27A(6)), which therefore invalidates any provision in the lease to the effect that a certificate supplied by the landlord, or the landlord's surveyor, or any other third party, is conclusive as to any of the matters relating to the amount or reasonableness of the landlord's expenditure.

Service charges

Service charges must be reasonably incurred and reasonable in amount (LTA 1985, s 18(2) and s 18(3)). This applies both to expenditure already incurred and also to anticipated future expenditure in relation to which the tenant is making payments on account (LTA 1985, s 19). In this context 'reasonable' must be given a broad, common-sense meaning (Veena SA v Cheong (2003)), which means that a landlord can act later rather than sooner (even if the costs payable increase as the result of delay) and need not always choose the cheapest option.

Service charges must be demanded within 18 months of the date on which the relevant cost was incurred, unless the tenant was warned in advance that older costs might be included (LTA 1985, s 20B). If this time limit is breached, the tenant does not have to pay the amount demanded. The demand for payment must also be accompanied by a summary of the tenant's rights and obligations in relation to service charges (LTA 1985, s 21B). The tenant is not obliged to pay until such a summary is served.

If asked by the tenant, the landlord must provide a summary of the service costs incurred so that the tenant can understand the amount that has been demanded (LTA 1985, s 21). Again, the tenant is not obliged to pay until such a summary is served after being requested.

Where the tenant fails to pay any service charge which is due, the landlord cannot simply invoke Law of Property Act 1925, s 146 and forfeit the lease, even if the service charge is reserved as 'rent' under the lease. Instead, the landlord must first establish that the amount in question is incontestably due, either by agreement with the tenant or following determination by a tribunal (Commonhold and Leasehold Reform Act 2002 (CLRA 2002), s 168). In addition, the amount due must exceed £350 or must have been owed for more than three years (CLRA 2002, s 167).

In any proceedings to recover arrears of service charge, the tribunal can only make an order in respect of costs against the losing party if they acted unreasonably in bringing, defending or conducting the proceedings.

Service charge payments made by a tenant are held on statutory trust (Landlord and Tenant Act 1987, s 42) and can only be used to meet service charge expenditure incurred by the landlord in the relevant year.

Consultation

Under LTA 1985, ss 20 and 20ZA a landlord must consult where a tenant will be required to contribute by way of service charge:

- more than £250 in relation to qualifying works, ie building works; or
- more than £100 in relation to qualifying long-term agreements (eg a management contract or a lift maintenance agreement).

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

The specific requirements which the landlord must follow vary according to the nature of the works or agreement in question.

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

Evaluation

Sections 18-30 of the LTA 1985 clearly provide substantial benefits to long leaseholders. The regime requires both reasonableness and transparency on the part of landlords, who are consequently unable to use service charges either as a means of improving their properties at the expense of their tenants or as a way of generating an additional source of income.

SECTION B

Question 1(a)

The extent of Gareth's obligations depends on a proper interpretation and application of both statutory and common law rules.

Section 9A of the Landlord and Tenant Act 1985 (LTA 1985), as inserted by the Homes (Fitness for Human Habitation) Act 2018, implies a covenant by the landlord of a dwelling in England that the property is fit for human habitation at the commencement of the lease and throughout the term. That covenant is implied into any lease which is granted on or after 20 March 2019 for a term of less than seven years. Fitness for human habitation is measured by reference to the matters specified in LTA 1985, s 10. So far as potentially relevant for present purposes, the matters to which the court must have regard in determining whether a dwelling is "not reasonably suitable for occupation" include freedom from damp, damp and mould growth, ventilation

and excess cold. Where a breach is made out, the court may order specific performance of the obligation (which presumably means an order requiring the landlord to carry out sufficient works to make the dwelling fit for human habitation): see LTA 1985, s 9A(5). However, a landlord is not obliged to carry out works where:

- the consent of a superior landlord is required and is not secured after reasonable endeavours to obtain it (LTA 1985, s 9A(2)(e))

- the works would need to be carried out to a part of the building in which the landlord has no estate or interest (LTA 1985, s 9A(6))

LTA 1985, s 11 implies a covenant by the landlord of a dwelling-house:

- to "keep in repair the structure and exterior of the dwelling-house" (see LTA 1985, s 11(1)(a)), and

- to "keep in repair and proper working order" the installations which provide the essential services within the property: this includes the installations for space heating and heating water (see LTA 1985, s 11(1)(c)).

Those covenants apply to any lease of a dwelling-house granted on or after 24th October 1961 for a term of less than seven years (LTA 1985, s 13).

The extent of an obligation to keep something 'in repair' is determined in accordance with common law principles. In particular, an obligation to repair will only arise when there is a physical transition from a state of repair to a state of disrepair. As a result, there is no obligation to repair an inherent defect (whether of design or construction) even though the defect results in conditions which mean that the property is not fit for purpose, as illustrated by Post Office v Aquarius Properties Ltd (1987).

Applying these principles to the facts, the following conclusions can be drawn:

- even if we accept for present purposes that the absence of a cavity wall relates to the structure or exterior of the flat for the purposes of LTA 1985, s 11(1)(a), the presence of damp and/or mould in the flat does not constitute physical disrepair: it is the consequence of an inherent defect – as such, Gareth is not required to deal with it under LTA 1985, s 11(1)(a)

- the obligation under LTA 1985, s 9A raises different issues: the flat's state of repair is irrelevant if Fatima can establish that the flat is affected by damp and/or mould to such an extent that it is "not reasonably suitable for occupation" – this could perhaps be supplemented by any evidence as to the absence of sufficient natural ventilation and/or the existence of excessive cold which arises in the winter months due to the misfiring boiler

- according to Gareth's surveyor, the defect which is causing the damp and/or the mould affects the entirety of the building, or at least the exterior wall(s) of the flat, and so is located within the common parts of the building and outside the demise to Gareth – in which case Gareth is not obliged (nor, indeed, is he in any practical position) to repair/remedy it

- Gareth would, however, be obliged to deal with the manifestations of damp/mould within the flat

- Gareth must repair the boiler – it is clearly an installation to which LTA 1985, s 11(1)(c) applies and it is clearly not in proper working order: in any event, the Gas Safety (Installation and Use) Regulations 1998 require him to ensure that the boiler and flue are maintained in a safe condition and are checked at 12 monthly intervals

1(b)

It is highly likely that the entrance system, the stairwells and the lift are all located within the common parts of the block of flats. If there is an express covenant by the superior landlord/freeholder to keep the common parts in repair (or to provide services which include repair of the common parts), then Gareth will be entitled to call on the superior landlord/freeholder to comply with that obligation.

If there is no such covenant, Gareth may be able to invoke the principle in Liverpool City Council v Irwin (1977). In Irwin it was accepted that where the landlord council had rented out flats in a council-owned block, the leases should be read as containing an implied term that the landlord would ensure that the common parts (eg stair lighting, lifts and rubbish chutes) would be kept in repair. To the same effect is Barrett v Lounova (1982), in which it was held that where the tenant was under an obligation to keep the interior of the demised premises in good repair, a covenant on the part of landlord to repair the exterior had to be implied on the basis that, without it, the tenant would over time find it physically impossible to comply with its own covenant.

Nevertheless, it is important not to overstate Gareth's chances of success. It was accepted by their Lordships in Irwin that the duty to repair is not absolute but rather, in Lord Denning's words, "the standard must surely not exceed what is necessary having regard to the circumstances". In Irwin itself, the House of Lords concluded that the council's obligation had not been breached where the state of disrepair was partly the result of vandalism, partly the result of the tenant's default and partly due to the council's lack of care.

Question 2

Kieran's tenancy, which has now expired, did not enjoy security of tenure under Part II of the Landlord and Tenant Act 1954 (LTA 1954). Consequently, when Kieran remained in occupation of the premises after the original lease expired by effluxion of time, he was not holding over on the terms of that tenancy as continued by operation of LTA 1954.

It is therefore necessary to determine whether there is any other basis on which Kieran might currently claim to be lawfully entitled to remain in occupation of the property.

It seems clear that Kieran has enjoyed exclusive possession of the premises and that he has been paying rent monthly since the old lease expired. The executors may say that the receipt of the rent should not be treated as indicative of any sort of contractual intent on Jolene's part if, at the time it was paid, she was incapable of managing her own affairs. Clearly, Jolene also had title to grant a new lease to Kieran. It is arguable that these facts are sufficient to allow Kieran to claim that he is now a tenant of the premises

under a common law monthly periodic tenancy. Moreover, because the relevant contracting-out procedure was not adopted prior to that tenancy coming into existence, Kieran might also claim that he now enjoys security of tenure under LTA 1954 in relation to his new tenancy. This would mean that his tenancy (and consequent right of occupation) could only be terminated in accordance with the procedures laid down by that Act. The executors certainly would not be entitled to force Kieran to leave on only seven days' notice.

However, the factual matrix reveals that Kieran remained in occupation against a background of preparations for the grant of a new lease. If that lease had been granted, it seems clear (assuming that the new lease was indeed to be granted on the same terms as the old lease) that the new lease would also have been contracted-out. In such circumstances, the court might well conclude (adopting the reasoning from cases such as Javad v Aqil (1991)) that there was never any intention that Kieran's continuing occupation should attract security of tenure; instead, the court might conclude that he occupied the premises under a less formal arrangement, such as a common law tenancy at will (which is a species of tenancy which is not protected by LTA 1954 - see LTA 1954, s 42).

If Kieran does indeed only have the benefit of a tenancy at will, then the executors are entitled to terminate that tenancy as and when they wish; service of the letter from their solicitors means that Kieran has no right to remain in occupation.

The uncertainty as to Kieran's position creates something of a paradox. On the one hand, if Kieran has the apparent benefit of a monthly periodic tenancy, it is in the executors' best interests to argue that in fact there was at all times a binding agreement for a lease under which Bob was legally bound to accept the grant of a new five-year lease which would be contracted-out of LTA 1954: as a matter of law, a periodic tenancy and an agreement for lease cannot co-exist. On the other hand, if Kieran has the apparent benefit of only a tenancy at will, it is in his best interests to argue that such an agreement existed. If such an agreement exists, equity will regard the lease as granted and the equitable lease will override the terms of any tenancy at will (see Walsh v Lonsdale (1882)).

Does such an agreement exist? Clearly there was an oral agreement between Jolene and Kieran for the grant of a new lease, but such an oral agreement is not a valid contract. By virtue of Law of Property (Miscellaneous Provisions) Act 1989 (LPMPA 1989), s 2(1) a contract for the creation or disposition of an interest in land (such as the grant of a lease) must be in writing, must contain all the agreed terms and must be incorporated either in a single document which is signed by all parties or in separate parts with each party signing their own part and then exchanging them. Failure to satisfy these requirements means that there is no contract at all.

Of course, Kieran did sign the Heads of Terms. On the face of it, that document recorded all the terms of the proposed new lease (it should be noted that incorporation by reference to another document (in this case the old lease) is expressly contemplated by LPMPA 1989 (s 2(2)). If the evidence establishes that Jolene or her solicitors signed their 'part' of the Heads of Terms and provided it to Kieran, then Kieran might be able to establish the existence of binding agreement for lease.

Question 3

The question for determination here is whether Nico has a lease or a licence of the accommodation which he occupies in the hotel. If he has a lease, he will have the benefit of an assured shorthold tenancy and will enjoy security of tenure under the Housing Act 1988; consequently, Monica will have to comply with the relevant procedures of that Act in order to remove him from the hotel. If he has only a licence, then he will enjoy only the relatively limited protection afforded to all residential occupiers by the Protection from Eviction Act 1977.

At common law, there are three elements which must be satisfied for an agreement to constitute a lease: exclusive possession, fixed and ascertainable duration and a term which is at least one day shorter than the duration of the grantor's estate: Street v Mountford (1985). Although it was stated in Street v Mountford that payment of rent was also an integral element, this is not the case: see Ashburn Anstalt v Arnold (1988).

The most important, but also the most difficult of these to apply in practice, is exclusive possession. Exclusive possession entitles the tenant to exclude the entire world, including the landlord, from the property for the duration of the term. As explained in Street v Mountford, the central issue in determining whether exclusive possession has been conferred is the degree of control which the owner is entitled to exercise over the land notwithstanding that it is occupied by another for the term of their agreement. Inevitably, such an enquiry will take in all the circumstances, which will necessarily vary according to the facts of a given case and a given tenancy (eg Marchant v Charters (1977) - exclusive possession not granted where a resident housekeeper had daily access to the room in question).

Prudential Assurance v London Residuary Body (1992) illustrates the need for the other two common law requirements also to be satisfied: an agreement granting possession until land "was needed" did not create a lease because there was no fixed and ascertainable duration for the agreement and hence no 'term'; the question whether the tenants has exclusive possession was never raised. It is clear from the facts that both these elements are satisfied in the present case.

A licence, by contrast, confers a contractual right of occupation, ie it grants permission to a licensee to use the licensor's land for a purpose which, without the permission, would be a trespass. It does not confer 'possession' in the sense described above. The personal nature of a licensee's rights means that they will not, for example, bind the owner's successor in title nor will a licensee enjoy any of the benefits which are associated with the existence of an estate in land.

The starting point in the present case is to consider the terms of the agreement between Monica and Nico both in their own right and also by reference to the subject-matter of the agreement and all other relevant circumstances. In terms of the agreement and its subject matter:

- it describes itself as a 'licence' and expressly states that no relationship of landlord and tenant is created by it – however, such expressions are not conclusive by themselves if all the essential agreements for the creation of a tenancy are held to exist (as in Street v Mountford itself)

- it describes Nico as a 'Property Guardian' rather than as a 'Tenant' and it specifically obliges him to provide services which are akin to those of a security guard, albeit that those services are being provided on a potentially 24/7/365 basis – this is perhaps more indicative of a commercial agreement (the better performance of which requires Nico to be on-site rather than a periodic visitor to the hotel) than a tenancy agreement

- Nico is not granted possession of a specific bedroom (he is allowed to use any one of them, at his choosing)

Other relevant circumstances include:

- the fact that, although Monica has a key (suggesting a right to enter the property when she wished) she has never actually used it – this could be indicative of a recognition that Nico's possession was not to be disturbed without his presence/consent

- the absence of any express reservation by Monica of a right to enter the property – this could be regarded as an indication that no right of exclusive possession (and hence a right to deny Monica entry) was being granted to Nico and so is indicative that a licence has been created: see, for example, Holland v Oxford City Council (2016)

- the overarching commercial purpose of the arrangement (namely the proposed re-development) would be significantly delayed, albeit probably not entirely frustrated, if a tenancy were held to have been created

- the fact that this does not appear to be an entirely gratuitous licence – although Nico does not pay rent he is nonetheless providing a service, elements of which Monica might otherwise have to pay a security firm to provide, and so Nico can be said to be providing valuable consideration in return for his accommodation

There are clearly aspects of the facts which can be cited for and against the proposition that the arrangement is a true licence. It should be noted that the rights of property guardians have been considered in two recent cases: Camelot Property Management Limited (1) Camelot Guardian Management Limited (2) v Greg Roynon (2017) and Camelot Guardian Management Ltd v Khoo (2018). In each, the lease/licence distinction was directly in issue. The fact that opposite conclusions were reached in the two cases perhaps illustrates how difficult the relevant legal principles can be to apply in practice, and how fact-sensitive the ultimate decision may be.

Question 4

To advise Anna it is first necessary to determine the type of tenancy under which she occupies the flat. It will then be possible to consider the grounds which might be available to the landlord as the basis for a possession claim.

Anna appears to have a periodic tenancy of a "dwelling house" which is let "as a separate dwelling" (in that it is self-contained and is not shared by her with the landlord) and which is her "only or principal home". The tenancy would therefore appear to qualify for protection under the Housing Act 1988 (HA 1988) given that it was granted after 15 January 1989. None of the

circumstances set out in HA 1988, s 43 would appear to exist so as to disqualify Anna's tenancy from that protection.

Whilst it seems relatively clear that Anna's tenancy is protected by HA 1988, it is far less certain whether she holds an assured tenancy or an assured shorthold tenancy. This is because there is uncertainty as to the date on which the tenancy started. If the tenancy started before 28 February 1997 it will be subject to the provisions of HA 1988 as originally enacted: the practical consequence of this for present purposes is that the absence of any paperwork suggests that Anna has an assured tenancy (because it would not appear that she was given written notice that the tenancy was to be an assured shorthold tenancy, as required by HA 1988, s 20). If the tenancy started on or after the 28 February 1997, the absence of any written notice means that the tenancy will be an assured shorthold tenancy in light of HA 1988, s 19A (as inserted by Housing Act 1996, s 96), which makes an assured shorthold tenancy the 'default' tenancy unless the landlord serves notice that the tenancy is to be an assured tenancy or the tenancy agreement specifically states that an assured tenancy is being granted.

If Anna's tenancy is an assured tenancy, the landlord can only recover possession by:

- serving a notice on her under HA 1988, s 8 (which must be in the prescribed form) notifying Anna of the landlord's intention to commence possession proceedings and specifying both the ground(s) on which the landlord intends to rely (although grounds can be altered or added to with the leave of the court) and the earliest date when those proceedings will be brought (which will depend on which ground(s) the landlord is relying on), and

- establishing the stated ground in subsequent possession proceedings

On the basis of the given facts, the grounds which would appear to be available to the landlord are grounds 8 and ground 10.

Ground 8 is a mandatory ground for possession, so the court "must grant an order" (HA 1988, s 7(3)) if the relevant facts are established. Ground 8 requires the landlord to prove that at least two months' rent was in arrears at the time of service of the section 8 notice and remains in arrears at the date of the hearing. If Anna is able to pay off just over half the current arrears immediately, the landlord will not be entitled to serve a section 8 notice at all. If Anna cannot afford to do this, but is able to keep to her plan to clear the arrears, the landlord will not be able to rely on Ground 8 by the time the case comes on for hearing (and Anna may well have cleared the arrears completely before the case can be heard).

Ground 10 is a discretionary ground for possession, so the court will only make an order for possession if it considers it "reasonable to do so" (HA 1988, s 7(4)). Ground 10 requires the landlord to prove that some rent was in arrears when the section 8 notice was served – it seems highly likely that this will be the case if a section 8 notice is served. In exercising its discretion whether to make a possession order, the court will take into account Anna's payment history to date, the circumstances in which the arrears arose, the amount which Anna has paid towards settling the arrears before the case comes on for hearing and her proposals for paying the balance of the arrears (if any)

after the hearing date. On the given facts, it is submitted that it is most unlikely that the court would grant a possession order.

Whichever ground is relied on, it seems highly unlikely that the landlord will be granted possession for non-payment of rent.

If Anna has an assured shorthold tenancy, the landlord may (in addition to or as an alternative to serving a section 8 notice) serve a section 21 notice on Anna. A notice served under HA 1998, s 21 entitles the landlord to terminate on giving not less than two months' notice – no ground for possession is required. Once the two-month notice period has expired, the landlord will be able to apply to the court for a possession order, which the court must make.