CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2021

LEVEL 6 - UNIT 9 – LAND LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the 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

Candidate performance was very much in line with previous examinations prior to the considerable drop in pass rate in September 2020. This suggests that this drop was potentially the result of the wider circumstances in which the paper was sat (i.e. COVID-19) rather than cause for longer term concern. Overall performance was very similar to previous sessions. Candidates are better at recalling information than applying it and stronger scripts were noticeably better at answering the specific question asked, rather than providing a generic answer prepared in advance.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This question was attempted by just under half of the cohort and performance was below average overall. This was mainly due to a lack of stronger answers,

although a good proportion were able to provide a "pass" level answer. Such answers tended to be descriptive but to show a good knowledge of different methods of implication. Weaker answers failing to reach a pass mark usually did not consider all (or most) of the main methods in any depth and a notable minority focused mainly or entirely on irrelevant topics (e.g. prescription, criteria for a valid easement, car parking). Again, candidates are reminded that pre-preparing answers based on previous papers is not a substitute for proper learning and revision.

Question 2

This was the second most popular question across the paper, although it did not attract a notably stronger average mark. Stronger answers tended to be those which showed a good knowledge of case law across both areas examined, and which were able to provide analysis rather than simply description. Notable areas which candidates rarely referred to included treasure, the position of finders who are trespassing and in part (b) ownership of land below ground.

Question 3

This was the least popular question on the paper, answered by only one in five candidates, and also attracted the lowest average mark. While statistics such as this are of limited value given the small sample size, it is noticeable that only a few candidates were able to achieve a pass mark. This was due to three issues, all ones which are seen across examination sessions:

1. Candidates answering multi-part questions but only having knowledge of one of the parts
2. Candidates writing exceptionally brief answers
3. Confusion of leasehold and freehold covenants

Question 4

This question also attracted a relatively low average mark, although in this instance this was due more to considerable number of weaker answers rather than a lack of stronger answers. There was a clear distinction between candidates with a good working knowledge of the modern law of constructive trusts and those who seemed to have only learned a handful of very early cases from the 1970s. Qualification and quantification are commonly confused when constructive trusts are examined.

Section B

Question 1

As is usually the case, this question on adverse possession was the most popular across the paper. It also attracted the highest average mark, although it is noted that this was more due to a lower proportion of very poor answers than because it was answered particularly well. Candidates seem to have a much stronger grasp of the "procedural" elements of adverse possession than the common law requirements, the latter being the main area where most answers could have improved.

Question 2

This question attracted a wide range of responses and given that it tested three distinct areas of knowledge it is difficult to draw many general conclusions. With that proviso, it would appear anecdotally that knowledge of fixtures and fittings was strong, knowledge of the mortgagee's remedies was reasonable, and knowledge of collateral advantages was confined only to stronger candidates.

Question 3

Answers on this question were mixed and candidates are again reminded that application in section B is crucial – only a certain amount of marks can be awarded for an answer which shows excellent knowledge of the law but fails to apply it to the facts.

Question 4

This was a relatively popular question that generally attracted solid answers. The main issue here was the reverse of that in B3 – a considerable number of answers showed good application but only referred to a very limited range of case law.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 9 – LAND LAW

SECTION A

Question 1

An easement can be defined as a right over another's land, failing short of possession. In order for such a right to constitute a valid easement, the requirements set out in Re Ellenborough Park (1955) must be met:

1) There must be a dominant and servient tenement;

2) the right must accommodate the dominant tenement;

3) there must diversity of occupation of the two tenements;

4) the right must be capable of forming subject matter of grant.

There are also other limitations on when a right can be considered an easement, such as the requirement that the servient owner must not be obliged to go to any expense, or that the right must not have the effect of exclusive possession. However, these rules are not the focus of the current question.

Where a right is capable of existing as an easement, it must also be created as such. There are broadly three methods of creation – granting or reserving the easement expressly, impliedly, or through the doctrine of prescription. To

create an express easement, the correct formalities must be met, such as using a deed in order to create an express legal easement.

When looking at implied easements, there are actually a number of methods that have been used to imply an easement into a conveyance. Four methods are generally identified: creation by necessity; by common intention; by the rule in Wheeldon v Burrows (1879); and by operation of s62 of the Law of Property Act 1925.

To create an easement by necessity, it must be demonstrated that the land cannot be enjoyed without the benefit of the easement. This is a very strict test and the need must be absolute. Thus, if land would otherwise be completely inaccessible without a right of way, i.e. 'landlocked' then that easement may be granted. However, if there is an alternative means of access, this will prevent the easement being implied, even if the alternative is extremely inconvenient (see for example Titchmarsh v Royston Water Co (1899)).

Creation by common intention is a distinct, but overlapping mechanism. Here, the question is not whether the parties presumably had an intention that the land could be used (Nickerson v Barraclough (1981)), but whether they can prove they did have such a common intention – and that the easement is necessary for that intention to be met. While not quite as restrictive a test as that for implication by necessity, it is still difficult to satisfy. A clear common intention is needed, as shown in e.g. Wong v Beaumont (1965) where an easement for the flow of air was necessary to allow for the common intention of using the premises as a restaurant.

A third method of impliedly creating an easement comes from the case of Wheeldon v Burrows (1879). Where there is initially unity of seisin, i.e. land is owned and occupied by a single person, and the land is then split, any 'quasi-easements' exercised by one part of the land over the other may become full easements. For this to take place the right(s) must be continuous and apparent and reasonably necessary for the enjoyment of the property. he first requirement is usually met for rights such as rights of way (as a clear path can be discerned, as in Hansford v Jago (1921)), but can be more difficult for other rights. Thus in Ward v Kirkland (1967) a right to enter land to make repairs failed on this ground, although it is difficult to see how such a right could ever be "apparent" in this sense. The second requirement, of the right being reasonably necessary, is interpreted much more loosely than necessity as a ground in itself.

Finally, there is the creation of implied easements via section 62 of the Law of Property Act 1925. Intended as a time-saving measure, the effect of section 62 has actually been to not only include existing easements on a conveyance of land, but also to create new easements where a right falling short of an easement exists (such as a bare licence) and a conveyance then takes place. In recent years section 62 has become even more powerful, as the traditional need for diversity of occupation of the dominant and servient tenements has been removed (see Platt v Crouch (2003) as confirmed in Wood v Waddington (2015)). This has also commensurately decreased the importance of the Wheeldon v Burrows method. All that is needed for s62 to operate is some form of existing right that is continuous and apparent.

Overall it is clear that the courts will only look to imply an easement where there are grounds to do so. The starting point is that no easement exists. This

is particularly true when the alleged easement is a reservation (i.e. the original owner claims to have reserved the right over land they are parting with). This is as a matter of policy – the courts will be very wary of limiting a person's use of their land by a mere implication. As such, the rules under Wheeldon v Burrows and s62 do not apply to reservations. It is technically possible to create an easement by reservation in cases of necessity and common intention, but a very heavy burden lies on the reserver, see e.g. Walby v Walby (2012).

Even where the alleged easement is in the nature of a grant, it is wrong to say that implication will take place automatically. The easement must fall within one of the four methods of implication and the specific requirements of that method must be met. As already noted, this can be very difficult with necessity and with common intention – these are only likely to apply in very specific circumstances and need copious evidence of a positive intention, not merely an absence of contrary intention. Wheeldon v Burrows is also rather limited as it only applies where splitting land and some rights are not sufficiently "apparent" by their very nature. Section 62 is increasingly seen as the easiest and most common method of implying an easement and does provide the only support for the statement in the question. Where an existing right benefits land which is then the subject of a conveyance, the effect of s62 is likely to be that the right becomes an easement in the absence of contrary intention. However, that right must exist in the first place, and there is still the need for the right to be in existence, and for an actual conveyance for it to be implied into. Furthermore, s62 can be expressly excluded.

Question 2(a)

When an object is found on or in the land, the court may have to decide who of the available claimants to it has the best title. Of course, the true owner of the item will always have the best title (see for example Armory v Delamirie (1722)) and reasonable steps should be taken to locate this person (e.g. Moffat v Kazana (1969)). However, where the true owner cannot be located, the question is who will have the next best claim. At this point relativity of title is considered – i.e. who has the *next best title* to the true owner.

This will depend on whether the object is found in or on the land itself. Where an object is found on the surface of land, the traditional approach taken in cases such as Armory was that the finder had better title than the owner of the land on which the object was found – a rather pragmatical approach giving rise to the concept of "finder's keepers". However, in Parker v British Airways Board (1982) the Court of Appeal adopted an approach based on "control" over the land where the object was found. In Parker the lounge in which the item was found was not under sufficient "control" of the airline. There was control over who could enter (only certain ticket holders) but not custody or control over lost property. Donaldson LJ drew a distinction between heavily controlled areas such as the vault of a bank and entirely public areas such as a park. However, the Court of Appeal admitted that many areas could fall between these extreme examples and did not offer particular guidance on exactly what level of "control" will be required to place the landowner in a better position than the finder.

From earlier cases such as Bridges v Hawkesworth (1851)) it is clear that the more access the public has to the area where the item is found, the less likely "control" is exercised and thus the more likely the finder will be to retain the item. For the occupiers of land, the best policy would be to manifest control

by e.g. by placing notices making it clear that any lost property will belong to the occupier (something which BA had notably failed to do).

When an object is found *in* the land itself, the position is different. Firstly, the maxim of *quicquid plantatur solo, solo cedit* will apply (roughly translated, this means whatever is attached to the ground becomes part of it). This is reflected in the wide definition of 'land' under s205(1)(ix) of the Law of Property Act 1925. Secondly, any finder of an object within the soil of land belonging to another is likely to be either a trespasser (whose claim is very weak, see Waverley Borough Council v Fletcher (1995)) or an employee (who will find on behalf of the owner of land, see South Staffs Water Co v Sharman (1896)). Therefore, the "control" test will not apply and, short of the true owner being located, the best claim will almost inevitably be that of the owner of the land. This was amply demonstrated in Waverley.

There may be a potential issue when an object is found by someone with the right to dig on the land, such as a licensee or leaseholder. In such cases the court will first look to see if there has been an express reservation of rights by the freehold owner and if not, the decision will likely be based on whether the object was already part of the land at the time the lease or licence was granted (see Elwes v Brigg Gas Company (1886) where a pre-historic boat had clearly been on the land before the grant of the lease and thus was the property of the freeholder). It should also be noted that the Crown (and thus the state) will have a superior right against even the true owner if the items found constitute "treasure" under the Treasure Act 1996.

Thus in conclusion it can be said that for objects found *in* the land, there is a clear order of relative title which the court can adopt, while for objects found *on* the land, the "control" test established in Parker will be determinative.

2(b)

Traditionally it was said that the owner of land owned *ad coelum et ad inferos* – to the heavens and to the depths of the earth. However, both above and below the ground, changes in society and technology have long since rendered this maxim of limited value.

When looking at the airspace above the land, it is clear that the owner does have title to what is immediately above his or her land. Any intrusion will constitute a trespass. Thus in Kelsen v Imperial Tobacco (1957) an advertising sign projecting over the property was a trespass. As with all cases of trespass, this would be actionable *per se* and thus even the smallest intrusion will give rise to liability even without any evidence of damage.

However, after a certain point the "upper stratum" takes over from the "lower stratum" and this does not belong to the landowner (and thus no claim can be brought for trespass). This is clear from Bernstein v Skyviews (1978) where it was held that the lower stratum extends only to the height necessary for the ordinary use of the land. This is of course a subjective measure that will depend on the land in question – there is no set number of metres or feet at which point the upper stratum begins. The position is reinforced by statute, where s76 Civil Aviation Act 1982 prevents any claim against an aircraft flying at a "reasonable height" over property.

The position below the ground is in many respects similar. Cases such as Grigsby v Melville (1974) make it very clear that landowners do have rights

beneath their property and the relatively recent Supreme Court decision in Bocardo v Star Energy (2010) reaffirmed this principle, stating that trespass could occur down to the depth at which ownership becomes "illusory" – arguably a similar approach to the upper/lower stratum above the land.

However, as a practical economic matter the vast majority of valuable resources which can be found beneath the surface of land are dealt with through statutory law – the Petroleum Act 1998 and Infrastructure Act 2015 are two examples.

Question 3(a)

There is a long-standing legal principle that in order to be valid, a lease must be for a certain term. This means that it must be clear when a lease commences, and when it terminates. On commencement the law is relatively clear - a lease with no given start date will automatically fail (Say v Smith (1563)) although a lease with a beginning set by a particular condition will be allowed (thus a lease expressed to commence on the outbreak of hostilities with Germany was held to be sufficiently certain in Swift v MacBean (1942)). Certain "periods" are automatically converted into certain terms by the law, so a "lease for life" is actually a lease of 90 years under Law of Property Act (LPA) 1925 s149(6) and a perpetually renewable lease is actually a lease of 2000 years (see e.g. Caerphilly Concrete Products v Owen (1972)).

Much less clear is what exactly will constitute a valid termination date. Again, where no date at all is specified or an event outside the control of the parties is used, the lease will fail for lack of certainty (see e.g. Lace v Chantler (1944), Birell v Carey (1989) etc.) However, in Ashburn Anstalt v Arnold (1989) it was held that where a lease was expressed to determine on the giving of a set period of notice, this was sufficiently certain to meet the requirement.

The decision in Ashburn Anstalt was heavily criticised in the case of Prudential Assurance v London Residuary Body (1992) where the House of Lords refused to allow a "tenancy" determinable on the giving of notice by the council - Lord Templeman held that Ashburn Anstalt was wrongly decided and contradicted the authority of Lace v Chantler. It should be noted that while agreeing with the decision, Lord Browne-Wilkinson provided cogent criticism of the general rule of certainty of term, calling it an "ancient and technical rule" which could leave to a "bizarre outcome".

The issue was raised once again by the Supreme Court decision in Berrisford v Mexfield Housing Co-operative (2011). Here, the landlord co-operative had granted a "lease" to Mrs Berrisford determinable if certain conditions were met. *Prima facie*, the court followed the approach of Prudential Assurance and held that this made the term of the lease uncertain. What was more controversial was that the court still managed to salvage the agreement, by using law pre-dating the LPA 1925 to argue that a lease for an uncertain term should be treated as a lease for life - and then converting this lease for life to a lease for 90 years under LPA 1925 s149. There were policy reasons for doing this - a lot of "tenants" would be left without the rights of a leaseholder had the Supreme Court not salvaged the lease, but legally the argument was questionable at best.

The decision in Berrisford has attracted considerable criticism and while it remains good law, its effect has been somewhat mitigated by Southward Housing Co-Operative v Walker (2017) where the Supreme Court held that

Berrisford could be distinguished where there was no evidence of an intention for a lease for life. While a strict rule requiring certainty exists, it is difficult to justify the legal sleight-of-hand in Berrisford, but it could also be argued that the need for certainty of term is itself an artificial and unnecessary provision.

3(b)

Until 1996 leasehold covenants were governed by the Law of Property Act 1925 and the common law (and this law still applies to leases granted before 1996). However, this regime was criticised for allowing the original tenant to remain bound by the covenants in a lease even after they had assigned their interest (due to the rule of privity).

This position was seen as complex, confused and overly in favour of landlords. A landlord usually had the right to pursue subsequent assignees on their breach of covenant, yet retained the right to also sue the original tenant. This meant many former tenants were stuck in a precarious position for the duration of what may be a very long lease, where at any moment they may become liable for a breach committed by someone else even though they themselves had long since left the land. As such, the Landlord and Tenant (Covenants) Act (LTCA) 1995 was passed and applies to all leases granted on or after 1st January 1996.

The Act simplifies the rules relating to the running of covenants, meaning that on assignment the benefit and burden of all covenants will pass to the new tenant automatically under s3. Furthermore, s5 has the effect of automatically releasing the outgoing tenant from the burden of any covenants. This essentially reverses the previous position. While s5 does not apply where assignment is in itself in breach of covenant, it otherwise removes an important "plan B" for landlords - now, if an assignee is in breach of e.g. the payment of rent, there is no alternative claim against the original tenant.

In order to balance this, Parliament created the concept of Authorised Guarantee Agreements, commonly known as 'AGA's, as set out in s16 of the LTCA 1995. When consent is required for assignment of the lease, the landlord may make such consent dependent upon the original tenant entering into an AGA. Such an agreement makes the original tenant liable for breach by the new assignee.

In some ways it can be argued that AGAs have the same effect as the old law - a landlord can essentially guarantee that an outgoing tenant will remain liable, leaving a valuable alternative route open for enforcing any future breach by the incoming assignee. AGAs have certainly proved popular and there is essentially no reason for a landlord not to include such a provision, especially due to the general perception that landlords have the greater bargaining power in most instances. As such, it could be said that from the perspective of the freehold owner AGAs have been a success, but that they have rather undermined the reforms the LTCA 1995 promised.

It should be noted that while the practical effect may be that landlords retain the right to sue the "old" and "new" tenant, AGAs do not actually operate in the same way as the old law. Two key restrictions are, firstly, that the AGA is only binding as to breaches by the immediate assignee. If the lease is assigned again, the original tenant is clear of any liability (although the landlord is likely to now enter an AGA with the outgoing tenant). Of course, the original tenant does have the choice whether to assign the lease and who to assign it to, so

the law here gives an incentive to choose a reliable assignee. Secondly, other provision of the LTCA 1995 do somewhat limit what a landlord may claim from the guarantor - such as s17 which limits recovery of rent arrears to those of which notice is given to the original tenant within six months of the sum becoming due.

Question 4

English law uses the mechanism of trusts to deal with the position where more than one person concurrently holds title in land. It is perfectly permissible for an express declaration of trust to be made, which will establish who will hold the legal and/or beneficial interests and in what capacity - however, in many situations such as co-habiting romantic partners, no express deed of trust is made.

In such case a trust will be implied using either resulting or constructive trust, although constructive trusts are now used in almost all non-commercial cases (see judicial comments in Stack v Dowden (2007)). When looking at constructive trusts, two crucial issues need to be established - whether such a trust exists (or "qualification") and if it does, what "share" each party will have of the beneficial interest ("quantification").

Looking first at qualification, in order to create a constructive trust there must be evidence of a common intention that the parties would have an equitable interest in the land; and evidence of detriment. It should be noted that the former requirement is considered to be the more difficult hurdle to clear.

A common intention may be express, or implied. The clearest form of express intention is where the parties are jointly named as legal owners, which automatically qualifies them as having an equitable interest in the property. Therefore in 'joint names' the only dispute that may arise relates to quantification, which will be discussed below. However, even where a party claiming a beneficial interest is not named as a legal owner, it is possible to establish an express common intention from other sources, such as the comments of the parties. This may include an express agreement falling short of a formal express trust (as in Bank of Scotland v Forrester (2014)) or it may be the logical result of what a party says. The "excuse cases" such as Eves v Eves (1975) and Grant v Edwards (1986) involved the legal owner giving the person claiming a beneficial interest particular reasons as to why he had not placed the other person's name on the legal title. Logically, such an excuse would only need to be made if the person in question would otherwise be on the legal title, i.e. there was in fact a common intention that they would be a legal owner.

However, in many cases there is not sufficient evidence as to exactly what rights each person was intended to have in the property - as judges have alluded to in cases on the matter, in close domestic relationships it is not surprising that cohabitees do not sit down and negotiate their legal rights! Where there is no express intention, the only recourse for a person claiming an equitable interest is to ask the court to imply such a common intention. In the 1970s and 1980s, in the absence of clear authority as to what was required, a number of inconsistent decisions were made. To compare two such cases as an example, in Gissing v Gissing (1971) 25 years of contributions to household expenditure did not imply a common intention that a woman had

rights in the property, but in Cooke v Head (1972) such contributions were taken into account by the court.

This lack of clarity was at least partially remedied by the House of Lords decision in Lloyd's Bank v Rosset (1990). Lord Bridge made it clear that only "direct contributions to the purchase price" would "readily justify" the inference of a common intention. Such contributions, whether to the initial purchase or to mortgage repayments, have generally been seen as necessary by the courts post-Rosset. One recent example is Capehorn v Harris (2015) where contributions to a business gave no interest over the premises from which it was run.

However, Lord Bridge did provide the smallest of possible exceptions in only going so far as to say he was "extremely doubtful whether anything less will do" than direct contributions. In the years since Rosset many claims have attempted to show that less will indeed 'do', with some encouragement from *obiter* comments such as those of Baroness Hale in Stack v Dowden (see para 69 in particular).

Cases since Stack have certainly looked very widely at the circumstances when considering common intention (see e.g. Geary v Rankine (2012)) and while Wodzicki v Wodzicki (2017) again reiterated that common intention should be based on financial contributions, the court did not outright reject the concept that it could be imputed on other grounds in the right circumstances. It can certainly be argued that where a party relies heavily on assumed rights in a property (for example, in providing labour on maintaining or improving the property, or using their financial resources for other costs to allow their partner to pay mortgage repayments, or assuming much heavier childcare responsibilities etc.) that it would be unfair to simply ignore these contributions for the purposes of qualification. It can be argued that strict interpretations of Rosset do lead to unfair outcomes and a lack of protection - particularly notable as it only affects those who are not married or in civil partnerships, who are protected from exactly this problem by various elements of family law.

Turning to the second issue regarding constructive trusts, qualification, we see the court being asked to decide the "size of the share" for each party. Again, case law has generally distinguished between 'joint name' (where both parties are legal owners) and 'sole name' (where only one party is the legal owner) cases.

While prior to Stack v Dowden (2007) there was support for a 'fairness' based approach (most notably in Oxley v Hiscock (2004)), the decision in Stack made it clear that the court would not simply 'impute' an intention to the parties. Instead, the shares should be 'inferred' from all of the circumstances. Put more plainly, the court would look at the parties' behaviour to try and infer what the parties actually intended, rather than simply arbitrarily assigning shares based on some notion of 'fairness' or 'justice'.

Stack also made it clear that in 'joint name' cases the starting point should be a 50/50 split (on the basis that equity follows the law and the parties hold as joint tenants at law) and that the court should only depart from this in "exceptional circumstances". Thus as seen in e.g. Fowler v Barron (2008) merely having spent more money over the course of the relationship will not alone change the equal shares. Quite how exceptional these circumstances

must be to move away from 50/50 is unclear, but there are examples such as Jones v Kernott (2011).

It can be said that on the one hand, this element of discretion allows the court to provide greater protection for those who deserve it - where a party has contributed "more" in whatever format, the court can recognise this and come to a just division of the asset. However, critics have argued that there is a very artificial distinction between inferring what the parties intended and simply imputing an intention to them - and that judges do not always remain on the right side of this narrow division.

Overall, it is clear that for more than half a century the courts have tried to provide protection through the mechanism of constructive trust - without such a doctrine, many cohabitees would be left with no legal rights whatsoever and at best a nebulous claim in estoppel to some form of remedy. However, it is hard to deny that at times the protection offered appears piecemeal and unevenly distributed. In particular, it is difficult to fully support a system where anything short of a direct contribution to "bricks and mortar" must be ignored for the purpose of qualification, yet with a nominal sum paid (such as a single mortgage instalment) that exact same wider conduct can lead to a huge difference in quantification. It is certainly understandable why there are increasing calls for statutory reform of this area.

SECTION B

Question 1(a)

Adverse possession is a method of obtaining title to land without the consent of the original owner. In order for adverse possession to take place, three common law requirements must first be met:

1) Factual possession;

2) The intention to possess;

3) Possession must be adverse.

Looking first at factual possession, what is clear is that the land must be in the possession of the claimant - which also means making use of the land (sometimes expressed as using the land as the true owner would, see e.g. Powell v McFarlane (1977)). While some land is, by its nature, only usable in a certain, limited, way (Red House Farms v Catchpole (1977)) the general approach of the courts is to find merely temporary acts barely affecting the land itself to be insufficient. In particular, it should be noted that parking vehicles upon the land was held not to constitute factual possession in Central Midland Estates v Leicester Dyers (2003)). The best evidence of factual possession is taking physical control of the land, such as by fencing it off (Seddon v Smith (1877)) although the purpose of the fencing is important (Chambers v London Borough of Havering (2011)).

The intention to possess the land means an intention to be in current possession, not necessarily to own the land outright either now or in the future (see e.g. Lodge v Wakefield (1995)). It is clear from the important decision in Pye v Graham (2002) that it does not matter if the claimant originally had the right to be in possession of the land - as soon as that right expired, the clock can start to run on adverse possession. Even the acceptance that the land

must be vacated at the insistence of the paper title holder will not prevent the requisite intention being found (Alston & Sons v BOCM Pauls (2008)).

Finally, by requiring the possession to be adverse, the law is stating that time will not run on a claim where the claimant has permission to be on the land. This permission does need to be express - the controversial doctrine of "implied licence" has no application after the passage of the Limitation Act 1980. Therefore the paper title holder cannot argue he impliedly allowed adverse possession until he was ready to use the land for his own purposes. Similarly, merely asserting the right of possession or asking the claimant to leave is not in itself enough to stop time running on a claim (Mount Carmel Investments v Peter Thurlow (1988)).

In the scenario, it seems clear that AAA is in adverse possession from at least December 2010. At this point the fencing provides strong evidence of factual possession (especially as it is intended to keep others out, not e.g. keep livestock in) and the intention to possession. As noted, it is irrelevant that AAA knew the land did not belong toit, and that staff were told to remove vehicles if BB objected. AAA still intended to be in possession for the time being. Similarly, the 2015 letter would have no effect on the claim, as the doctrine of 'implied licence' is long consigned to history.

However, if the land is unregistered then under s15 Limitation Act 1980, AAA would need to show that it had been in adverse possession of the Field for 12 years. If adverse possession only began in December 2010, this would not be the case until December 2022. AAA could attempt to argue that time actually started running when the permission to use the Field expired at the beginning of 2009. If this argument was accepted by the court, then at the beginning of 2021 s17 Limitation Act 1980 would apply to statute-bar BB from making any claim to recover the land. AAA could apply to the Land Registry to be registered as the new owner. However, it is very arguable as to whether factual possession was established as early as 2009.

1(b)

If the land was registered, then the correct statute to apply is the Land Registration Act 2002. Schedule 6 of this Act governs a claim for adverse possession. In short, AAA would need to apply to the Registrar under para 2 Sch 6. The Registrar will then notify BB as the registered proprietor and BB will have 65 days to serve a counter-notice. Assuming BB do serve such a notice, it is likely AAA's claim will fail as none of the exceptions under para 5 Sch 6 appears to apply. BB would then have two years to evict AAA from the land, or AAA could apply again without notice.

Question 2(a)

A mortgage can be defined as arising where land is used as security for the payment of a debt. In order to take legal effect, a mortgage should be made by deed and be registered. In the current scenario this seems to be the case, so we will presume the mortgage is a legal mortgage.

The courts will be wary of anything which could be considered a clog or fetter on the equity of redemption - in other words, anything which makes it harder or impossible for the mortgagor to discharge the mortgage. This is why they will look very carefully at any collateral advantages given to the mortgagee

under the mortgage, including so-called *solus* agreements where there is a promise to be tied to a particular supplier.

First and foremost, the courts will look at the length of any such agreements. As is made clear by cases such as Noakes v Rice (1902) and Bradley v Carritt (1903), if the collateral agreement extends beyond the period of the mortgage it will be invalid, but if it is for the same time or less it can be allowed. The second question is whether the agreement is an unreasonable restraint of trade. This is a subjective question to be answered in each case, but some general principles can be discerned: the longer the agreement, the more likely it is to be unreasonable (Esso Petroleum v Harper's Garage (Stourport) (1968)); but in an arms length commercial transaction the term can be upheld (Kreglinger v New Patagonia Meat and Cold Storage Co (1914)).

Here, Dika has clearly had a chance to consider the term and there is no evidence of any undue pressure being placed upon him to accept it. In fact, he may even have been offered an incentive, as the interest rate is lower than that of alternative providers. The term also only lasts for 5 years of the 20-year mortgage. It seems likely that as a businessman Dika is entering into a fair commercial agreement and that the court would not invalidate the agreement.

2(b)

Broadly speaking there are three ultimate ways of recovering the money loaned by a mortgagee - repayment by the mortgagor; in commercial concerns possibly recovery of the sum through the ordinary profits of the business; or finally, sale of the property used as security. Looking at the first option, it seems unlikely that Dika is going to be in a position to repay the mortgage - he has missed four instalments already and the bulk of the sum is yet to be paid. A simple debt action against Dika is unlikely to be of any value unless he has substantial private finances.

The second option is a possibility here - Kempston Bank could appoint a receiver (under s109 Law of Property Act (LPA) 1925). The problems with the business may be merely temporary - the appointment of a better chef and an improvement in the local economy may lead to increased profits. However, considering the large amount of money owing, the Bank may well prefer to recover its losses in a more immediate fashion through possession and sale.

A mortgagee can technically exercise the right to possession "before the ink is dry" (Four Maids v Dudley Marshall (1957)) - i.e. as soon as the mortgage is agreed. However, in practice the right is usually only exercised as a prelude to a sale of the property. Whilst not required, it is good practice to seek a court order for possession so as to avoid any potential criminal offence. Because the Corn Exchange is a commercial premises, Dika will not be able to rely on s36 of the Administration of Justice Act 1970 to postpone possession.

The power of sale arises as long as the conditions imposed by s101 LPA 1925 are met - i.e. the mortgage was made by deed; there is no contrary provision in that deed; and the legal date for redemption has passed. These conditions appear to be met here, so the power of sale has arisen. However, for it to be actually exercisable at least one of the conditions in s103 LPA 1925 also needs to have been met. Here, interest is at least two months in arrears so the power of sale will be exercisable.

As such, it would appear that Kempston Bank can proceed with a sale of the property. If it does so, it must comply with its duty of care to obtain the best price reasonably obtainable (Raja v Lloyds TSB Bank (2001)) - although specifics such as how the property is advertised and the timing of the sale are usually at the mortgagee's discretion (see e.g. Michael v Miller (2004), China & South Sea Bank v Tan Soon Gin (1990) etc.). If the Corn Exchange is sold for a higher amount than remains owing on the mortgage, the remainder is held on trust for Dika by Kempston Bank under s105 LPA 1925.

2(c)

Items within a property can be classified as "fixtures" - that which is part of the property and should transfer on sale; and "fittings" - chattels which can be removed by the current owner prior to sale. In order to distinguish between the two, the courts traditionally have used two key tests: the degree of annexation and the purpose of annexation.

The degree of annexation test looks literally at how the object is (or is not) attached to the land - thus equipment bolted to the floor in Holland v Hodgson (1872) was held to be a fixture, while similarly heavy equipment was merely a fitting in Hulme v Brigham (1943) as it was resting on its own weight. As a result of the inconsistencies caused by the degree test, the courts also developed the purpose of annexation test, which asks why the object was attached to the land. If attachment was merely so that the chattel could be used or enjoyed, it is likely to remain a mere fitting (see e.g. Lyon & Co v London City & Midland Bank (1903), Leigh v Taylor (1902) etc.). However, if the item permanently improved the land on attachment, it was likely to be a fixture (see e.g. Vaudeville Electric Cinema v Muriset (1923)).

One area of particular difficulty was where decorative items, while lightly attached to the land and annexed for their own enjoyment, formed a wider "scheme of decoration" that benefited the land as a whole. Thus in Re Whaley (1908) tapestries intended to create an Elizabethan-style room in a historic dwelling were held to be fixtures, as were statues and vases in a garden in D'Eyncourt v Gregory (1866).

In more modern times, the court has advocated a "common sense" approach (most notably in Elitestone v Morris (1997)). A good summary of the law was provided in the judgment in Botham v TSB Bank (1996) which also emphasised that the court should look at the permanence of the item in question and the damage caused on removal.

Applying all of these tests, it is clear that the fridge-freezers in the kitchen are highly likely to be mere fittings. As "white goods" they are unlikely to have a very long useful life, they are likely free-standing or at most to be minimally attached, and little or no damage will be caused on their removal. The light fittings could be fittings on a similar argument, but if they are custom-made or recessed into the walls/ceiling this may change their status to fixtures. Finally, the tapestries are likely again to *prima facie* be fittings under both the degree and purpose tests - but due to the historic nature of the building could be argued to fall under the "scheme of decoration" exception.

Question 3

A freehold covenant is a method of restricting the freehold owner's use of land. Such covenants will always be binding between the original covenantor and covenantee as matter of privity of contract, but where property has changed hands this is of limited value. Thus it needs to be demonstrated that the benefit and/or burden of each covenant has passed to the successor(s) in title through either common law or equity.

Looking first at passing the burden of a covenant in equity, five requirements need to be met (as set out in the case of Tulk v Moxhay (1848). These are:

1) The covenant must negative in nature;

2) At the date of the covenant, the covenantee must have owned identifiable land benefited by the covenant;

3) The covenant must "touch and concern" the land;

4) The burden of the covenant must have been intended to run with the land;

5) The purchaser has notice of the covenant.

Covenant 1 in the scenario is clearly negative. Covenant 2 is more difficult to classify - it has a negative element (not to hold events after 6pm) and a positive element (to seek consent of the owner of the Farmhouse). The covenant cannot be split in two, so the approach in Shepherd Homes v Sandham (1971) cannot be applied. Applying the so-called "hand in pocket" test, the covenant can be satisfied by the covenator doing nothing, so overall it is negative, as per Powell v Hemsley (1909). Finally, covenant 3 is definitely positive and so will not run in equity.

At the date of the covenants being made, Mary owned identifiable land benefited by them. The next question is whether they touch and concern this land. Following the approach in P&A Swift Investments v Combined English Stores Group (1989) each covenant must affect the use of the land, its value or how it is used. Covenant 1 will affect the land as it prevents strangers being present overnight. Both covenants 1 and 2 restrict late night events which could otherwise disturb the enjoyment of the owner of the Farmhouse. Regarding the fourth requirement, the phrasing of these covenants suggests an intention that they run ("to heirs") and in any event such intention is presumed under s79 Law of Property Act (LPA) 1925 in the absence of express words to the contrary. Finally, notice is given as the covenants are correctly registered.

Turning to the benefit in equity, the most common route is annexation. As the conveyance refers to the people involved, not the land itself, there is unlikely to be express annexation (see e.g. Renals v Cowlishaw (1879)). However, since the seminal decision in Federated Homes v Mill Lodge Properties (1980) s78 LPA 1925 will be interpreted to cause statutory annexation as long as the land in question is defined somewhere in the conveyance (Crest Nicholson Residential v McAllister (2004)), which is extremely likely. Therefore the benefit of covenants 1 and 2 is also likely to pass in equity. This means that Riku can enforce these covenants against Percy and can seek the equitable remedy of an injunction to prevent the use of the property as overnight accommodation, and to also stop the fifth anniversary party occurring.

Covenant 3 did not pass at equity so it should be considered whether it can be enforced at law. As a general rule the burden of a covenant will not pass at law, due to the rule of privity. This can be seen in Austerberry v Oldham Corporation (1885) as upheld in Rhone v Stephens (1994). There is no mutual benefit attached to the burden so the exception from Halsall v Brizell (1957) has no application here. It is possible that there is an indemnity covenant which makes Percy liable to indemnify Nigella in the event she is sued for his breach - this will depend on the terms of the conveyance of the Old Barn. In either case, Nigella is the defendant who Riku should sue if he has the right to do so. Riku may enforce the covenant as long as the benefit passes in law - however as this appears to be a personal covenant that does not touch and concern the land, it is unlikely this right has passed to Riku in any event.

Question 4

Proprietary estoppel is an equitable doctrine which will, in certain circumstances, uphold a promise as to rights in land, even though no legal right has been created. As it is entirely equitable, the doctrine is not precisely defined and allows the court a great deal of discretion. However, it is clear since Taylor Fashions v Liverpool Victoria Trustees (1981) that the court will look for a clear assurance, reliance on that assurance, detriment as a result, and a general unconscionability.

Much of the recent law on estoppel has focused on what will constitute a sufficient assurance. Traditionally, the courts looked for a specific positive representation, which referred to an interest in the land directly (see e.g. Inwards v Baker (1965), Layton v Martin (1986) etc.) However, the modern approach has been more generous, especially in "farm and family" cases - this was stressed by the House of Lords in the important case of Thorner v Major (2009). In this case it was emphasised that there may not be a single assurance which gives rise to the estoppel - instead, the court should consider the wider context and even silence. This wide interpretation can be seen in subsequent cases e.g. Suggitt v Suggitt (2012), Davies v Davies (2016), Habberfield v Habberfield (2019) etc.

However, there have been issues with using Wills as an assurance - in Taylor v Dickens (1998) it was suggested that a promise to make a will in the claimant's favour was not in itself an assurance of rights, just a statement of intention. This decision was seemingly over-ruled in Gillett v Holt (2001) but the recent decision in James v James (2018) has muddied the waters.

In the scenario, it could potentially be argued that there is no direct assurance in 2018 - Wallace sees the draft Will but does not see it formalised. If this is the case, he will need to show other evidence of assurances. The words used back in 2016 seem unlikely to suffice as the 'promise' is very vague and refers to financial stability, not rights in land. Perhaps the strongest evidence given is the reference to the Farm being Wallace's "future" in 2019.

If there is sufficient assurance, Wallace will then need to show reliance upon it (in the sense of a change of position). This is a question of fact. It is clear from cases such as Campbell v Griffin (2001) and Re Basham (1986) that mixed motives can be allowed, so Wallace may well be able to show that even though it was partly motivated by concern for his mother's health, moving home after university was in itself reliance on the promise. He can also use the evidence of his increasing work on the farm, for a salary that appears to

be low both in the context of graduate salaries and salaries for similar work in the area (assuming the job offer shows an "average" salary). Turning down this "better" job is in itself very strong evidence of reliance.

Detriment is a separate requirement, but much of the above evidence will apply. However, there is also scope for counter-argument. Wallace has lived rent free at the farmhouse for around five years, representing a considerable saving compared to renting or purchasing a property with a mortgage. While his salary might be low, he has actually been paid. Unlike in many of the "farm and family" cases Wallace has not dedicated decades of his life to work on the farm - if he attended university in his late teens, he is likely only in his mid-20s now. Cases such as Davies v Davies (2016) could be distinguished on this basis - Wallace has not necessarily "missed out" on an "alternative life".

Finally, there does not appear to be anything particularly egregious to go to unconscionability, although this is a catch-all category that can allow a court considerable discretion (see e.g. Sledmore v Dalby (1996)). It seems likely that as long as an assurance can be shown, there will be some form of estoppel, with the court using its discretion as to remedy to "balance" the outcome.

The traditional approach to remedies in estoppel- satisfying the equity by giving the claimant their expectation - has been superceded by the principle of proportionality (see e.g. Jennings v Rice (2003)). Again this will be very fact-sensitive. In the scenario there is a large sum in savings (£1m), but the farm valued at £2m is the main asset. Without estoppel interfering, the Will would mean each sibling gets around £750,000. If Wallace was instead to be given the freehold of Valley Farm, this would mean he received around £2.25m to W while his siblings would get 'just' £250,000 each. This does seem potentially disproportionate, especially as it is a lot more than the actual detriment suffered. In Moore v Moore (2016) the court approached the award on the basis of the minimum needed to do equity - the same could be done here, with some form of award (either financial or in the form of a larger share of the property) reflecting Wallace's work but falling short of him acquiring the outright freehold.