

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS
LEVEL 3 - UNIT 19 – RESIDENTIAL AND COMMERCIAL LEASEHOLD
CONVEYANCING

JANUARY 2020

Note to Candidates and Learning Centre Tutors:

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

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

CHIEF EXAMINER COMMENTS

The overall performance of this cohort of candidates was weaker than in previous sittings, A number of candidates appeared to be poorly prepared.

The weakest performance was on some leasehold specific areas, as opposed to general conveyancing questions. The questions in the examination paper covering the contractual position on insurance on exchange, notifiable transactions, s.19(2) LTA 1927, often demonstrated that some candidates had a more limited knowledge of the leasehold specific areas of the syllabus and were attempting the examination reliant upon their general conveyancing knowledge. There were also areas of general conveyancing which elicited weak answers, for example, SRA Code of Conduct.

There was no evidence of time management issues.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1

(a) The question on the essential features of a lease was dealt with well and almost all answers were correct.

(b) Most candidates addressed this answer, on the application of the essential features of a lease to a fact pattern, accurately. The areas for consideration would relate to the relevance of the size of the property, to the discussion of exclusive possession and the inclusion of a definition of what would amount to exclusive possession.

Question 2

(a) The answer on describing fixed fee quotes and estimates was generally dealt with well. The answers that required improvement were those that failed to draw clear distinction between the two.

(b) The co-ownership question was generally answered well, but weaker answers lacked the detailed explanation that would gain further credit.

(c) This was a question on the SRA Code of Conduct, considering a conflict of interest. The structure of many answers was poor. Consider the suggested answers for guidance as to how to address the issues in such questions. There was frequently a lack of application and often a failure to reference the indicative behaviours from the Code. The answers often tended to be generic, rather than providing specific guidance.

(d) This was a question about lease analysis. The question required an interpretation of a covenant concerning assignment. Some answers clearly had not appreciated the impact of the statutory provisions that would apply to such situations.

(e) This SDLT question revealed that most candidates could not distinguish between a notifiable transaction and the rates on which SDLT is paid.

Question 3

(a) The identity checks required answers which referenced authority with precision and were specific.

(b) This question on identifying Form OC1 was answered well.

(c)(i) The question on restrictive covenants required precision in interpretation. It is important to consider the fact pattern in detail and then apply the detail in the case study materials and the question to the answer.

(ii) The TPO question was dealt with adequately, but consideration of the local authority action was not included in many answers.

(d)(i) This was poorly answered on the whole. This showed a confusion between appreciating the transfer of risk and the relevance of insurance.

(ii) Candidates need to have a more detailed appreciation of the SCS, as it was clear that many did not understand the position of insurance when related to the lease.

(e) Most answers were accurate identifying the TID.

Question 4

(a) This question was another lease analysis question, this time related to alterations. Some candidates did not appear to have read the question with the necessary detail. Candidates need to be systematic in exploring how the lease provision deals with the issues revealed in the question and answers have to be precise to gain full marks.

(b) This question on leasehold remedies either produced strong or weak answers. Some confuse debt and damages actions, whilst others confuse distress from CRAR.

(c) The final question required a description of an 'institutional lease'. Some candidates appeared to have little idea of the nature of such an arrangement, but those that had revised this area gained good marks.

SUGGESTED ANSWERS

LEVEL 3 - UNIT 19 – RESIDENTIAL AND COMMERCIAL LEASEHOLD CONVEYANCING

Question 1

(a) The three essential features of a lease are:

- certainty of duration;
- exclusive possession;
- granted for a term shorter than that held by the landlord.

(b) Initially, Victoria and Marios's agreement appears to satisfy the three essential features of a lease.

Firstly, the agreement's 18-month provision for occupation will satisfy the characteristic that a lease requires certainty of duration.

Secondly, the agreement's 18-month term is shorter than the freehold estate held by the owner of the flat, and therefore this characteristic is also satisfied.

The final characteristic of a lease would require a determination of whether Victoria and Marios have exclusive possession of the flat. Victoria and Marios' occupation of a small property would appear to exclude the realistic opportunity of a third party also occupying the flat alongside Victoria and Marios. This provides Victoria and Marios with an indication that they have exclusive possession of the flat.

The inspection and repairing service provision in the agreement could, however, undermine their claim to exclusive possession, as it could indicate that the owner has a right to enter and, therefore, they do not have the right

to exclude everyone (including the owner) from the flat. If Victoria and Marios cannot exclude the owner from accessing the flat this would deny their claim to exclusive possession. The unrestricted nature of the inspection right in the agreement, and the fact that this has been exercised by the owner in accordance with the agreement, suggests that Victoria and Marios do not have exclusive possession.

I would conclude, on the facts, that this agreement, in the absence of exclusive possession, is a licence rather than a lease.

Question 2

(a) I would explain that a fixed fee quote differs from an estimate in that the fixed fee quote cannot be changed even if the matter proves to be more complex or time consuming than originally assessed. An estimate can be changed if further factors come to light.

(b) I would explain that a beneficial tenancy in common may be the appropriate option for Victoria and Marios because they are not married.

Further, Victoria has a son from a previous relationship. She may not wish her share of the property to pass automatically to Marios in the event of her death but may wish to provide for her child by leaving a share of the property in her will to her son.

In order for Victoria's share in the property not to pass automatically to Marios, she would have to hold her interest as a tenant in common.

If she were a beneficial joint tenant, the property would automatically belong to Marios on her death due to the right of survivorship. The right of survivorship does not apply to a tenancy in common, as tenants in common own distinct shares in the property, which can be left by will on death.

Additionally, Victoria and Marios are contributing different amounts towards the purchase.

A tenancy in common can recognise the distinct contributions, whilst in the case of a joint tenancy the co-owners own the whole of the property together, rather than having distinct shares.

(c) I would explain that it is usually acceptable for the same solicitor to act for both the borrower and lender as long as there is no conflict of interest. Usually there would be no conflict as both parties share the same interests in securing a good title to the property.

Solicitors are required to act in accordance with the **SRA Code of Conduct 2011 (SRACC 2011)**. This contains mandatory Outcomes and examples of conduct which would demonstrate compliance with the Outcomes, called Indicative Behaviours (**IBs**).

Although the **SRACC 2011** does not contain any specific Outcomes about acting for the lender and borrower, this would usually be dealt with as part of the broad provisions in **Chapter 3 SRACC 2011**. Acting for lender and borrower is possible unless, under **O(3.5)**, there is a conflict or a significant risk of client conflict. As Natwest Bank's mortgage is being offered on standard terms there will be little scope for negotiation and, therefore, less likelihood of a conflict of interest arising.

Even if there is a risk of conflict it is possible to act under **O(3.6)**, if there is a substantially common interest, the conflict is peripheral and certain safeguards are in place.

IB(3.7) provides a relevant example where it may be possible to act for both in a residential transaction.

Therefore, considering **IB(3.7)**, as the mortgage being offered by Nateast is a standard mortgage being used for the purchase of the borrowers' private residence and is subject to Nateast receiving its approved certificate of title (which presumably complies with **SRACC 2011**), as long as I am satisfied that it is reasonable and in my clients' best interests to act, I would be permitted to act for both clients.

(d) The clause in the lease reads as a qualified covenant, i.e. that landlord's consent is required before an assignment takes place. However, the clause is converted into a fully qualified covenant by virtue of **section 19(1)(a) Landlord and Tenant Act 1927** and therefore the landlord cannot unreasonably withhold consent to the assignment.

(e) This is a notifiable transaction.

The transaction is the grant of a lease for a term of seven years or more (120 years) where the price is £40,000 or more (£325,000).

Question 3

(a) I would have asked Emily and George to bring evidence of their identities to the first appointment as it is a requirement of the **Money Laundering Regulations 2017** due diligence process.

I would need to identify the clients and verify their identities on the basis of information obtained from a reliable and independent source.

Failure to comply with the money laundering regulations can lead to firms facing criminal sanctions.

The **Money Laundering Regulations 2017** usually require two items, one for proof of identity and one for proof of address.

Examples of acceptable evidence of identity include: a current signed passport; a photo-card driving licence; a birth certificate or a recent utility bill.

(b) The form which will be used if applying for a paper copy of the register entries and title plan is form OC1.

The seller's conveyancer will check the register at this stage of the transaction to ensure that the seller has a good title to the property, for example, checking: that the seller is entitled to sell the residue of the lease; for any title defects; for any additional documents required and any restrictions to be complied with.

(c)(i) Entry number 1 in the charges register is a restrictive covenant preventing the erection of a wall or fence over one foot in height on the southern boundary of the property.

I would need to check that the southern boundary of Emily and George's land is the southern boundary referred to in the covenant.

The clients have indicated that they intend to erect a new fence along this boundary, at the rear of the garden. I would check the height of the proposed fence, but if it exceeds the one-foot restriction there would be an issue with the entry, as they would be bound by it.

They should, therefore, consider either contacting the party with the benefit of the covenant to secure the discharge, or alteration of the covenant, or arrange insurance cover against the risk of being sued for the breach.

(ii) The entry described in the Local Land Charges search result reveals a tree preservation order. This order will prevent protected trees being felled without permission.

I would advise Emily and George that their proposals could result in the local authority taking action against them.

The first step I would take is to identify whether either of the two trees that are intended to be cut down are protected trees. If they are protected, I would either seek permission from the local authority to fell them or consider suggesting to my clients that they vary their original plans to avoid the need to fell them.

(d)(i) I would advise that following exchange of contracts the risk of physical damage to the property will pass to the buyer.

(ii) I would advise Emily and George that although in many property transactions the buyer will obtain insurance cover from exchange of contracts, in leasehold transactions it is important to check the terms of the lease to see whether the lease includes covenants relating to insurance.

If the lease provides for the tenant to insure, the **Standard Conditions of Sale (SCS)**, require that the seller maintains his insurance until completion. Emily and George would also have a right to inspect the policy or see evidence of its provisions.

If the lease provides for the landlord (or a management company) to insure then the **SCS** require the seller to take all reasonable steps to ensure that the insurance is maintained until completion.

(e) The Title Information Document (TID) and an official copy of the register entries are the documents that Land Registry will issue to Emily and George following completion of the registration.

Question 4

(a) I would explain that as the removal of the demountable partition wall does not require any structural work the tenant requires the consent of the landlord (Clause 19.2).

I would need to consider, however, whether this alteration amounts to an 'improvement'. If it does this could convert the express qualified covenant into a fully qualified covenant by virtue of **section 19(2) Landlord and**

Tenant Act 1927 meaning that the landlord would not be able to unreasonably withhold consent.

The interpretation of what amounts to an 'improvement' has to be determined by reference to the point of view of the tenant.

The landlord has evidence that this reduces the value of his reversionary interest, but this issue must be determined by reference to the point of view of the tenant.

I would explain that the replacing of the existing ground floor exterior front wall with a glass fronted reception wall involves a structural alteration and that the lease has an absolute covenant preventing such alterations and so this work can be prohibited by the landlord (Clause 19.1).

(b) I would advise Sada that Mire Landmark Ventures plc ('Mire') will be able to pursue a number of potential remedies in respect of the tenant's non-payment of rent.

Mire could sue Hilton Trope Limited ('HT') for the debt, but this is unlikely to be useful as the tenant may not have the available money to satisfy any court order to repay the arrears.

Forfeiture (the right of re-entry) would determine the lease and allow Mire to re-take possession. This could be a suitable remedy if Mire are concerned about HT as they could then re-let the property to another tenant.

The commercial rent arrears recovery procedure (CRAR) would allow regulated enforcement agents to enter the Unit after giving at least 7 days' notice. The agents would then be able to take control of items in Unit 6 and after at least 7 days, sell them to pay off the arrears. This may be a suitable remedy depending on whether there are items at the Unit of a sufficient value.

(c) I would describe the features of an institutional lease in the following way:

- The tenant of such a lease pays a 'clear rent'. The landlord will receive the entire income from the tenant without the landlord incurring any costs himself.
- The landlord will impose obligations on the tenant requiring the tenant to repair and insure the property.
- The term of such a lease is usually granted for 10 years or less.
- There will usually be strict controls imposed upon the tenant restricting assignment or underletting.
- The rent review provisions in the lease will provide for upwards only rent review.
- The lease will contain onerous provisions requiring the restoration of property at end of term to its original form.