

**CHIEF EXAMINER COMMENTS WITH  
SUGGESTED ANSWERS**

**JANUARY 2021**

**LEVEL 3 - UNIT 19 – RESIDENTIAL AND COMMERCIAL LEASEHOLD  
CONVEYANCING**

**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 overall performance of this cohort of candidates was very satisfactory. The stronger candidates produced high level answers and were awarded distinction grades. There were several very weak papers that gave the impression of having been sat with limited preparation.

The evidence of poor preparation for the assessment in the entries that failed was supported with a number of these papers referring to the old Code of Conduct rather than the SRA Standards and Regulations 2019. The poor performance on leasehold specific areas was apparent when reviewing performance on the VAT treatment of commercial lease assignments and the operation of the Landlord and Tenant Act 1954.

No real evidence of time management issues was apparent from the candidates' papers.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

**Question 1** Most candidates gained reasonable marks on Q1. Candidates should, however, appreciate that an estate in land can only exist as a legal estate if it has the capacity to be legal.

**Question 2(a)** required a detailed and structured review of the SRA Standards and Regulations. Candidates should state the relevant Principle before examining the applicable paragraphs in the code. Candidates should illustrate the relevant conflict before identifying any possible exception.

**Question 2(b)(i)** was answered well by most candidates.

The answers to **2(b)(ii)** required application for full credit. When considering the limitations of a lender's valuation the answer should indicate why such a valuation is inappropriate on the stated facts. The conclusion of a full structural survey also required fact related justification.

**Question 2(c)** was answered well by most candidates but could have realised greater credit if full consideration had been given to the specified incumbrances.

**Question 2(d)** showed that many candidates did not understand the circumstances that would lead to execution by the transferee.

**Question 2(e)** was answered well. Consider the additional consequence of failure to pay SDLT leading to the risk that the protection of the OS1 priority period could be lost.

**Question 3(a)** was answered very well. Consider the need to check identity to comply with both the Lender's Handbook and Land Registry identity requirements.

**Question 3(b)** was answered well by most candidates. This was a question about searches and enquiries and most candidates could recognise the applicable searches and apply the requirement to carry out these checks to the facts.

**Question 3(c)** was a question about the methods of completion and general conveyancing knowledge resulted in high scores on this question.

**Question 4(a)** considered the liability for "clean up" provisions of the Environmental Protection Act. This was understood by the vast majority of candidates.

**Question 4(b)** was concerned with VAT. A clear distinction could be drawn here between the distinction candidates who produced complete and clear answers and the weaker students who appeared to have little understanding of this part of the syllabus.

**Question 4(c)** also revealed a similar divide when it came to producing a clear, structured answer based on the analysis of the lease clause dealing with repair.

**Question 4(d)** was dealt with well as most candidates appeared to have had the relevant knowledge, but weaker candidates appeared to have little awareness of this statute.

## SUGGESTED ANSWERS

### LEVEL 3 - UNIT 19 – RESIDENTIAL AND COMMERCIAL LEASEHOLD CONVEYANCING

#### Question 1

Whether Fouad's lease is legal will depend upon the issues of capability and formality.

**Section 1(1) Law of Property Act 1925 (LPA)** recognises that a lease is capable of being legal.

I would advise Fouad that, although a deed is usually required for the creation of a legal lease, the absence of any written document will not prevent the lease from being legal if the conditions of **s.54(2) LPA** (a 'parol lease') are satisfied.

As Fouad's occupation is for a term of three years or less, and as he appears to have been entitled to occupy the flat immediately, the rent appears to be a reasonable market rent and there is no suggestion of a purchase price having been paid, his lease would appear to be a legal lease.

#### Question 2(a)

Solicitors are required to act in accordance with the SRA Standards and Regulations 2019 (STARs 2019) and comply with the SRA Codes of Conduct for Solicitors and Firms (SRA Codes).

SRA Principle 7 states that solicitors must act in the best interests of their clients. They cannot do this where there is a conflict of interest as it is then impossible to act in the best interests of each client.

Paragraph 6.2 of the SRA Codes states that a solicitor or firm cannot act where there is a client conflict, or a significant risk of a client conflict, unless certain limited circumstances apply.

There is such a limited circumstance in paragraph 6.2 (a) which allows the solicitor or firm to act, subject to safeguards, where the clients have a substantially common interest in relation to the transaction.

This limitation is subject to safeguards:

- (i) all clients give written informed consent;
- (ii) where appropriate, effective safeguards are in place to protect the clients' confidential information; and
- (iii) the solicitor is satisfied that it is reasonable to act for both parties.

Taking the provisions of the STARS 2019 and the SRA Codes into account, there is a high risk of a conflict where a solicitor acts for both sellers and buyers of land for value, as would be the case here. For this professional conduct reason, Sana and Fouad will be advised that it is not possible for Kempstons to act for Stuart as well.

**2(b)(i)**

I would advise my clients to have a survey as the buyer has the onus of discovering any physical faults in the property, due to the principle of '*caveat emptor*'.

**2(b)(ii)**

I would advise my clients not to rely upon the lender's valuation. Midland Counties Building Society will carry out a valuation, in order to establish whether the property will be adequate security for the amount of the loan they are providing (£250,000). Fouad and Sana have secured a 50% mortgage and as the valuation is essentially carried out for the lender's own purpose it would be sensible for them to consider other options. The valuation does not give them the same level of protection as an independent survey would.

I would, therefore, advise Fouad and Sana to consider another type of survey. They could choose from a Condition Report, a HomeBuyer Report or a full structural survey.

It is advisable that a full structural survey is commissioned in this case. The justification for this choice would be based upon the age of the property (a sixteenth century property) and its unusual design (a converted clock tower) in addition to their stated concerns about major issues such as the roof.

**2(c)**

I would identify the following errors in the contract:

The Property description should refer to a leasehold estate, rather than a freehold estate.

The Property description should refer to the unexpired residue of the lease.

The Title number quoted should relate to the sellers' leasehold title, not the landlord's title.

The Specified incumbrances should:

- i) not indicate that the sale is subject to the existing charges on the title; and
- ii) refer to the exceptions, reservations, covenants and conditions contained or referred to in the lease.

The balance shown is incorrect. The deposit has to be deducted, not added to the purchase price.

## **2(d)**

The seller, Stuart, will be required to execute the transfer as he is disposing of his estate in the land.

The buyers, Fouad and Sana, will need to execute as they are joint buyers and will be making a declaration of trust as to their joint ownership.

In practice, it is regarded as good practice for the buyers to execute in all cases.

## **2(e)(i)**

The time limit within which the SDLT must be paid is 14 days from completion. Penalties become payable and interest is chargeable if SDLT is filed late.

## **2(e)(ii)**

Without the correct duty having been paid, HMRC will not issue an LTR certificate (SDLT 5 or online equivalent).

Without this certificate registration of a notifiable transaction cannot be completed at HM Land Registry. The legal title would not transfer to the new registered proprietors, Fouad and Sana, and there is a risk that the priority period of the OS1 pre-completion search could be lost.

## **Question 3(a)**

I asked Kevin Butterworth to bring in his passport and utility bill because as a firm of solicitors we are under a specific duty to check the identity and residence of our clients.

This obligation arises under the Money Laundering Regulations 2017, which are extremely important. Breach of the regulations has serious consequences, including criminal sanctions. In addition, these checks are important for compliance with the Lender's Handbook and Land Registry identity requirements.

Two documents are normally required and they must be current. By the term 'current' we mean not more than 3 months old.

## **3(b)**

I would carry out a number of pre-contract searches and enquiries on behalf of my client at this stage of the transaction.

Any **four** of the following matters could be mentioned:

As the land on which the flats are being built was formerly undeveloped, a commons registration enquiry should be made. This can be made as an optional enquiry on Form Con 290 (Optional Enquiries of the Local Authority). This enquiry would reveal whether the land has been registered as common land or a village green which would prevent building on the land.

Flood risk search to check against the risk of flooding, as the property is built on the banks of a river.

Environmental search/survey, because of the risk of the land being contaminated. Many firms regard such environmental searches as standard and best practice and so would regard that one should be done in all cases. In this case, we are located nearby to a disused factory which increases the risk of contamination.

In any case, as we act for the lender, it is likely that they will require such a search. This search could also be used (depending on its scope) to check for flood risk.

Chancel repair search, to check against possible liability for chancel repair. Many firms consider this a routine search. Further, there has been no sale for value of the land on which the property has been built since October 2013.

Company search, as the seller is a company and we should check that it exists and has power to buy and sell land, and that there is no evidence of undisclosed charges or that it is insolvent.

Personal inspection may be necessary to check for boundary issues, evidence of occupation by non-owning parties and physical checks on the property.

### **3(c)**

The three methods of completion are: in person; by agent and by post.

### **Question 4(a)**

I would explain to Silverdale that the principal liability for clean-up, under the Environmental Protection Act 1990, lies with the party responsible for polluting the site.

If the original polluter cannot be identified, it is possible that liability could fall on the owner or occupier of the site (Silverdale).

As the business park has been built on the old steel works, there is a potential that the site could be contaminated.

### **4(b)(i)**

I would explain to Alan that the transaction, being a sale of a commercial leasehold property, is categorised as a chargeable supply, but is an exempt transaction (i.e. not subject to VAT).

### **4(b)(ii)**

I would identify that, although the transaction is exempt (i.e. not subject to tax), the seller can choose to charge VAT on the transaction if he so wishes.

If he decides to charge VAT, the buyer will have to pay VAT on top of the purchase price.

The reason why the seller may consider such a choice (or election), is that by making such a choice he will be able to recover the VAT incurred in relation to the property, now being transferred, that had been incurred before the sale (e.g. VAT incurred by the seller when carrying out repair or refurbishment to the property).

#### **4(c)**

I would advise Silverdale that their liability for the damage to the unit depends upon the covenants that they have entered into in the lease.

The tenant, Lafferty Engineering Limited, has an obligation in clause 6.1 to repair the property.

As the fire has caused damage to the internal wall, this indicates that the property is in a state of disrepair.

The covenant in clause 6.1 makes a reference to the obligation being related to the property.

Property is presented in the clause as a defined term and the definition of 'Property' appears in the interpretation section 1.5.16 and relates to the whole of Unit 5 as a detached property, and therefore the reference to property will include the internal walls of that unit.

Lafferty, therefore, have an obligation to repair the wall, but this obligation is limited by clause 6.2, if the disrepair is caused by an insured risk. Insured risk is a defined term in clause 1.5.1 and the definition makes a specific reference to 'fire' damage, and so the damage caused to the wall is related to such an insured risk.

This would mean that Lafferty would not be liable to repair the wall. However, clause 6.2 a) limits this exception from the repair obligation in circumstances where the tenant, or, as in this case, their worker, has caused the insurance money to be withheld.

As a consequence Lafferty would become liable for the repair, not Silverdale.

#### **4(d)(i)**

The tenant would gain statutory protection under **Landlord and Tenant Act 1954 Part II (LTA 1954)** if they could satisfy the conditions in **s.23(1) LTA 1954**.

There must be a tenancy. The tenant's occupation will have to combine exclusive possession and certainty of duration.

The premises must be occupied by the tenant.

The premises must be occupied for business purposes

The tenancy must not be excluded from the protection of the **LTA 1954**, for example by the tenancy having been contracted out.

#### **4(d)(ii)**

The tenant will acquire three rights if their lease is protected by the **LTA 1954**.

The tenant will have a continuation tenancy; the right to remain in occupation indefinitely until the lease is brought to an end under one of the ways permitted under the **LTA 1954**. Such a lease will continue on the terms of the original lease.

The tenant has the right to apply for a new lease. This can arise either as a result of the landlord attempting to terminate the original contractual tenancy under **LTA 1954** or as a result of the tenant applying for such a new lease.

The tenant can, in certain circumstances, become entitled to compensation under the **LTA 1954**.