

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

LEVEL 6 – UNIT 17 – CONVEYANCING

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses 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 2022 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses 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 stronger performing candidates exhibited similar characteristics, in that they possessed both good knowledge and understanding of the relevant principles and procedures of conveyancing, coupled with the ability to offer practical and pragmatic advice in relation to the issues with which they were presented. Weaker candidates were found wanting in one or more of these respects. Better candidates had clearly made good use of the opportunity to consider the case study materials in advance of the exam.

Weaker candidates tended to produce answers which were generalised and discursive, with occasional suggestions of sheer guesswork.

It was disappointing how many candidates failed to deal with fundamental principles and procedures of conveyancing correctly.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

A disappointing number of candidates scored no marks on this question. The better candidates recognised that the question was referring to the fact that the Lease contained a qualified covenant against assignment – which was clause 2 (g) in the Lease. So, the lease can only be lawfully assigned if consent from the landlord was obtained. Entry number 4 reflects this and confirms that the registration of the assignee as registered proprietor is subject to the rights of and possible defeasance by the Landlord if consent was not obtained.

(b)

Again, this was not well answered. It concerned the forfeiture clause and stronger candidates pointed out that whilst a forfeiture clause was normal, the fact that this operated on the tenant's death, bankruptcy or breach of covenant would not be acceptable to a Lender, in this case the Nationwide Building Society. Candidates should have concluded that the Landlord should have been approached to obtain a deed of Variation so that the property will be mortgageable.

(c)

Most candidates recognised that clause 2(g)(i) of the lease contained a covenant against assignment of the Lease and that the Landlords consent would be needed and obtained by the tenant at the tenant's expense. Stronger candidates recognised that S 19 of the Landlord and Tenant Act 1927 converts the covenant into a fully qualified covenant which means that the consent of Landlord cannot be unreasonably withheld. Standard conditions 8.3.2(a) and Standard condition 8.3.3. should also have been referred to.

(d)

This was completed with varying degrees of accuracy. The name of the seller caused a problem to weaker candidates. Edward Morgan was on the title with his mother Olga who had died. They held as joint tenants, so Olga was not a party to the contract as the right of survivorship applied. Nor was Mr Morgan's Wife a party as she was not on the title at all. All candidates mentioned the correct buyers, but some did not mention their present address. For the full mark candidates were required to give the correct names and address as well. There were varying responses to "specified incumbrances" – and stronger candidates referred to the official copies -date and time they were issued except for financial charges.

The balance purchase price caused problems for some candidates. For the additional signatories' requirements, most candidates stated the trio of Suzanne, Molly and Christian Morgan to sign as occupiers, although some diverse answers were stated as well.

Question 2(a)

Most candidates drafted a reasonably efficient email to the clients stating that they would not be able to carry out their intentions to use the property as they wish because of the restrictive covenants contained in the 1980 Conveyance. Stronger candidates offered a way forward and the three main solutions were : approaching the person having benefit of the covenant – who better candidates correctly identified as Maurice Weaver,(although a substantial number of candidates

went for Marshall Builders);the Upper Chamber (Land Tribunal)for a release under S 84 LPA 1925 and indemnity insurance .

The question did not require a discussion of any planning requirements but despite this being made clear in a note on the paper some candidates pursued this area. Unfortunately, no marks were available for that area.

2(b)

Candidates were required to explain what errors or omissions were in the Transfer – drafted by the seller’s lawyer as is the current trend, and included in the contract package. The Transferor was shown as Dorothy Deborah Jean Isherwood -most candidates spotted that she had purchased in the name of Jones – this was not the issue- the issue was, as strong candidates explained, that her and Edward has bought this property as tenants in common and the fact that he is now deceased means a second trustee must be appointed. Strong candidates explained the overreaching provisions, and a few offered wording for the appointment of second trustee. Most candidates picked up the fact that there were typos in Mrs Morgan’s name. Mostly all candidates realised that a full title guarantee should be given. Quite a few candidates stated that an indemnity clause should be included as there was a covenant contained in the 1980 and 1985 Conveyance. Some offered wording

Question 3(a)

Stronger candidates realised that Christian could have a resulting trust in the property and also as he was going into occupation, he could have an overriding interest under LRA 2002. The Lender will of course require a first charge on the property; so, if Christian goes ahead with the loan a deed of postponement will be necessary for the charge or form of consent so that the Lenders charge has priority over Christian’s interest. The consent of the lender would have to be obtained and the client’s consent obtained to report the matter to the Lender.

(b)

Stronger candidates realised that there was already a right granted over Sea Lane by virtue of the 1980 Conveyance which is carried over in the 1985 Conveyance, and this was subject to a contribution as to its maintenance. So it was a question of finding out the current state of the road and whether or not the Sellers had been called upon for its maintenance and how much they had to pay. Weaker candidates completely overlooked that the right was already in existence so there were diverse comments as to how they could proceed or whether the clients should proceed as they feared the property would be land locked.

(c)

This was answered reasonably well with most candidates gaining at least half of the 6 marks available for stating that the sale would require a formula C exchange as there was a chain, but the purchase was now at the top of the chain so a formula B transaction could take place. The question went on to ask what undertakings would be involved here. Whilst the stronger candidates stated correctly that the implied undertakings in an exchange were that the clients’ signed contract would be put in the post or DX that evening together with the deposit if not held to order; some weaker candidates got confused with postal completions and stated the undertakings implied on completion, which of course was not relevant to an exchange.

Question 4(a)

This was somewhat of a mixed range of answers. The title being unregistered candidates should have stated that a K15 Land Charge search should have been made against the seller in the name of Jones – her maiden name and her married name of Isherwood, and against the full name of her late husband and also Marshall Builders. The relevant period of years should be included. The question also asks what possible entries might be revealed and stronger candidates stated that the covenants contained in the 1980 Conveyance should be registered as a D ii Land Charge.

The other required search is a K16 Bankruptcy search against your clients, the buyers in their full names. However, quite a proportion of candidates ignored the fact the title was unregistered and stated that an OS1 was required. A few candidates missed that the fact that the question referred to pre-completion searches and detailed searches they would requisition in a pre -exchange scenario.

(b)

This question was answered reasonably well by most candidates. The post completion steps were firstly to pay the Stamp Duty Land Tax – an online calculator was provided, and the majority of candidates worked out that it was £12,500 and that it must be paid within 14 days.

The other aspect was the submission to the Land Registry as a first registration within a period of two months. A minority of candidates stated that an AP form would be submitted but the stronger candidates correctly stated that the forms required would be an FR1 together with the original deeds listed on DL and also a form DI -relating to any potential over riding interests and a cheque to cover the fee payable.

SUGGESTED POINTS FOR RESPONSE**LEVEL 6 – UNIT 17 – CONVEYANCING**

Question Number	Suggested Points for Responses	Max Marks
1(a)	The Lease contains a qualified covenant against assignment (clause 2(g)). Any assignment of the Lease will, therefore, only be 'lawful' if the Landlord's consent is obtained. If consent is not obtained, the Lease is vulnerable to forfeiture by the Landlord. Where the Landlord's consent is not lodged with HM Land Registry when an application is made to register an assignment, HM Land Registry cannot be satisfied that the Lease has lawfully been assigned. Entry 4 reflects this and confirms that the registration of the assignee as registered proprietor is subject to the rights of, and possible defeasance by, the Landlord if consent was not obtained.	6
1(b)	The right to forfeit entitles a landlord to re-enter the property (ie to determine the lease and recover possession from the tenant) on the happening of specified events. Where a tenant has acquired leasehold property with the assistance of mortgage finance and has charged the property as security for the amount advanced, the lender will lose its security if a specified event	9

	<p>occurs during the term of the mortgage. This will be unacceptable to the lender: see (in relation to insolvency) section 5.14.2 of the UK Finance Mortgage Lenders' Handbook ('the Handbook').</p> <p>The Buyers are purchasing 20 Chapel Drive with a mortgage from the Nationwide Building Society. Clause 5 of the Lease provides for forfeiture of the Lease on the bankruptcy or death of the Tenant during the Term. Although the Buyers' conveyancer could enquire if the Nationwide would accept the forfeiture clause as it stands, there is no reason to believe that the Nationwide would agree to this (see Part 2 of the Handbook).</p> <p>If that is the case, our clients will have to approach the Landlord and try to obtain a deed of variation so that the offending provision can be removed from the Lease. They will have to do this at their own expense and the time required may impact on the timescales for exchange and/or completion.</p>	
1(c)	<p>Responses should include:</p> <p>Clause 2(g)(i) of the Lease contains a qualified covenant against assignment. This means that the Sellers cannot sell (assign) 20 Chapel Drive without first obtaining the Landlord's written consent. Section 19 of the Landlord and Tenant Act 1927 converts this covenant into a 'fully qualified' covenant: this means that the Landlord's consent cannot be unreasonably withheld. In the present case there is no basis for thinking that the Landlord has any justifiable basis to refuse consent.</p> <p>You will need to identify the current Landlord (recent ground rent receipts should provide this information) and make a written application to them for consent. Section 1(3) of the Landlord and Tenant Act 1988 requires the Landlord to deal with the application for consent within a reasonable time.</p> <p>The consent will typically be given by way of a formal licence to assign, which will need to be provided to the Buyers' conveyancers on completion.</p> <p>As between the Landlord and the Tenant, the Tenant must pay the costs (see clause 2(g)(i) of the Lease). As between the Seller (Tenant) and the Buyer, the costs are again the responsibility of the Seller (see Standard Condition 8.3.2(a)).</p> <p>Responses could include:</p> <p>Candidates may refer to Standard Condition 8.3.3 (potential for rescission if licence to assign is not obtained at least three working days before the completion date).</p>	9
1(d)	<p>Seller: Edward Morgan of 20 Chapel Drive, Giffard Park, Milton Keynes MK14 5LA</p>	5

	<p>Buyer: Richard Henson and Fiona Anne Henson both of 123 Mount Hill Avenue, Old Stratford, Milton Keynes, MK12 5AL</p> <p>Specified Incumbrances: Those disclosed in the official copies dated 5 January 2022 and timed at 14.38.24 (except for the financial charge referred to at entry number 1 in the charges register)</p> <p>Balance: £361,500</p> <p>Additional Signatories: Suzanne Frances Morgan, Christian Morgan and Molly Morgan</p>	
Question 1 Total:		29 marks

Question Number	Suggested Points for Responses	Max Marks
2(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Identifying the restrictive covenants in the Schedule to the 1980 Conveyance and relating them to the clients' wish to use the property to offer bed and breakfast accommodation, to keep bees and poultry and to sell home-produced eggs and honey • Advising of the potential breach of covenant that might arise, and the possible remedies of damages and/or injunction • Identifying that the real risk is not the breach per se, but the existence of someone who has the benefit of the covenants and is prepared to enforce them • <u>Outlining possible options, with appropriate discussion of advantages and disadvantages of each:</u> <ul style="list-style-type: none"> ▪ abandon the purchase ▪ abandon their proposed use ▪ carry on regardless and hope no-one comes forward to enforce the covenants ▪ negotiate a release ▪ apply to the First-tier Tribunal (Lands Chamber) under Law of Property Act 1925, s 84 to modify or discharge the covenants ▪ take out restrictive covenant indemnity insurance with an offer to obtain an illustrative quote so that the clients can assess the potential cost <p>Responses could include:</p>	13

	<p>Candidates may advocate a particular option (with reasons) or may ask the clients to consider the options and then invite instructions and/or offer the opportunity of further discussion. Either approach is acceptable.</p>	
2(b)	<p>Transferor: Dorothy Deborah Jean Isherwood <i>and</i> [X].</p> <p>Given that Mr and Mrs Isherwood held the property as beneficial tenants in common prior to his death, a second trustee needs to be appointed to give a good receipt for the purchase monies.</p> <p>Transferees: Edward Morgan and <i>Suzanne Frances</i> Morgan.</p> <p>These are simple (but significant) ‘typos’.</p> <p>The transferor transfers with: <i>Full title guarantee</i>.</p> <p>Mrs Isherwood has full power to convey. There is no reason why she should not give full title guarantee.</p> <p>Additional provisions:</p> <p>(a) There ought to be an indemnity covenant by the transferees in favour of the transferor in relation to the restrictive covenants contained in the Conveyance dated 9 December 1980. Better candidates may note that the omission of it works in their clients’ favour, so they might suggest saying nothing at this point.</p> <p>Possible wording: <i>“The transferees covenant with the transferor by way of indemnity only to observe and perform the covenants contained in the Conveyance dated 9th December 1980 made between (1) Maurice Ernest Weaver and (2) Marshall Builders (Skegness) Limited and to keep the transferor and her estate indemnified against all actions, proceedings, costs, claims, demands and expenses arising from any future con-compliance with them.”</i></p> <p>(b) A second trustee needs to be appointed (see above).</p> <p>Possible wording might be: <i>“So that the transferor can give a good receipt for the purchase price, the transferor in exercise of her statutory power appoints [X] to be a trustee of the property with her.”</i></p>	11
Question 2 Total:		24 marks

Question Number	Suggested Points for Responses	Max Marks
3(a)	<p>Responses should include:</p> <p>A contribution of £25,000 towards the acquisition cost of Windy Ridge raises the possibility that Christian might claim a beneficial interest in the property under either a resulting or a constructive trust. If Christian were then to go into occupation (as is the current intention – see Document 2), that beneficial interest would then be protected by actual occupation and so might qualify (under the Land Registration Act 2002) as an overriding interest. which achieves priority over the Society’s mortgage. The Society requires us to obtain a first legal charge in its favour (which means that its charge must not rank behind any other interest).</p> <p>The counter-argument to this is that there is no ‘moment in time’ between completion of the purchase and the grant of the mortgage during which the overriding interest could come into existence.</p> <p>The problem would be avoided altogether if Christian were to make the loan to our clients after the purchase of Windy Ridge has completed, so that it is treated as being simply a loan towards the cost of the repairs.</p> <p>If the clients do decide to persist with the loan before completion, we would have to inform the Society (see Section 5.13 of the Handbook). We would need our clients’ consent to do so, and if they refused their consent we would have to stop acting for the Society. If we continued to act for the Society, we would need to ensure that Christian signs a form of consent under which he consents to the mortgage and confirms that the Society’s mortgage has priority over any interest that he might have in the property.</p>	11
3(b)	<p>Responses should include:</p> <p>Access to the property over Sea Lane (it seems reasonable to assume that the Sellers do use it, given that it features as part of the address for the property is enjoyed by virtue of the express grant of a right of way with or without vehicles under the 1980 Conveyance (which is ‘carried over’ in the Conveyance dated 23 November 1985). However, the exercise of that right is subject to a contribution towards the cost of maintaining that road. It will be necessary to make further enquiries as to the current state of the road, who maintains it and whether the Sellers have ever been called on to contribute to the costs of maintaining it.</p> <p>Responses could include:</p> <ul style="list-style-type: none"> • suggesting that the clients purchase an indemnity insurance policy suggesting that the clients apply to HM Land Registry for registration of the claimed easement 	8
3(c)	<p>Responses should include:</p> <p>The sale of 20 Chapel Drive is part of a chain transaction, and so Formula C would be appropriate.</p>	6

	<p>The purchase of Windy Ridge is not now (and probably never was) capable of being a chain transaction (given the improbability of Mrs Isherwood being able to achieve simultaneous completion on her sale and purchase). Mrs Isherwood is effectively at the top of the chain, and given that each conveyancer is holding their clients' respective signed contracts, this means that Formula B would be appropriate.</p> <p>The undertakings I will give are:</p> <ul style="list-style-type: none"> to send my clients' signed part of the contract to the other by first class post or DX to pay £45,000 (the 10% deposit) to Skidbrooke & Co 	
Question 3 Total:		25 marks

Question Number	Suggested Points for Responses	Max Marks
4(a)	<p><u>Searches</u></p> <p>1. A K15 land charges search should be made in relation to each of the following for the dates specified:</p> <p>Marshall Builders (Skegness) Limited – 1980 to 1985 Albert Douglas Isherwood – 1985 to [year of death] Dorothy Deborah Jean Isherwood – [1985 or year of marriage] to date Dorothy Deborah Jean Jones – 1985 to date</p> <p>Verbal explanation that candidates cannot (for the purposes of the exam) know the exact dates of Mrs Isherwood's marriage or Mr Isherwood's death on the basis of the case study materials, but that they would insert the relevant dates from information gathered from requisitions that they would have raised.</p> <p>2. A K16 Bankruptcy search should be made in relation to Edward Morgan and Suzanne Frances Morgan.</p> <p><u>Anticipated entries</u></p> <p>A class D(ii) entry in relation to Marshall Builders (Skegness) Limited in respect of the restrictive covenants contained in the 1980 Conveyance.</p>	11
4(b)	<p>Responses should include:</p> <p><u>Pay SDLT</u></p> <ul style="list-style-type: none"> Pay SDLT to HM Revenue and Customs Submit return online or send paper form SDLT1 Form must be submitted/sent and SDLT due must be paid within 14 days after completion 	11

	<ul style="list-style-type: none"> • The amount of SDLT due is £12,500 <p><u>HM Land Registry</u></p> <ul style="list-style-type: none"> • Apply to register transfer (using Form FR1) and charge (to be lodged at same time, no form required) • Time limit for registration of transfer is 2 months from date of completion • Send form SDLT5 confirming receipt of SDLT paid • Send Form DL • Fee is £135 (via portal) – fee is Scale 1 for registration based on value of consideration, with fee exemption for registration of the charge <p>Responses could include</p> <p>Candidates may discuss providing proof of the discharge of any mortgage on Windy Ridge. However, they have not been given any evidence that there is a mortgage, so any discussion is irrelevant and should not be credited.</p>	
Question 4 Total:		22 marks