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 June 2019 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

Six candidates achieved 30 marks or less. In the main their answers displayed very little knowledge of the relevant law and discussed the issues in the most generalised terms. There were, however, a handful of instances (more than this Chief Examiner can remember being the case in previous years) where the candidate appeared to have misunderstood the topic that was being raised by the question: consequently, their answer (although correct in what it chose to discuss) was unfortunately completely off-topic.

As to the remainder, common themes (which will be all too familiar to any regular reader of these reports) include:

- poor knowledge of the relevant law; even if the relevant principle was stated it was often not supported by any authority: candidates receive credit for citing specific cases, and not for phrases such as ‘in the case about…’ or even simply writing ([blank] v [blank])
• failing to address the question (often by appearing to recite an answer which they had previously memorised, without any attempt to tailor it to the circumstances of the question before them)

• failing to read the question fully (typically characterised by launching ‘headlong’ into a demonstration of what they knew, regardless of its relevance - see the comments above under Question Paper Performance for examples of this)

• failing (in the case of the Section A questions) to offer any sort of evaluation or critique of the proposition contained in the question or (in the case of the Section B questions) to provide an answer or offer any meaningful advice

Of the seven candidates who were within 10 marks of a Pass, six produced a script where their worst answer was at least ten marks lower than their best answer: this may suggest that candidates are not revising sufficient topics in sufficient detail to give themselves the best chance of passing the exam.

Very few candidates appeared to run out of time and all followed the exam rubric correctly.

**CANDIDATE PERFORMANCE FOR EACH QUESTION**

**SECTION A**

**Question 1**

This question required candidates: (a) to consider the conditions that must be met for an occupier of premises to be afforded protection under the Landlord and Tenant Act 1954, and (b) to discuss the particular ground of opposition to a renewal tenancy under s 30(1)(f) of the Act. Part (a) alone carried sufficient marks to pass this question.

This was a popular question - 19 candidates answered it - but an average mark of 11.63 illustrates that most candidates failed to engage in a sufficient discussion. Of the 10 candidates who passed this question, none achieved more than 18 marks - mostly attributable to a lack of statutory or case law references. 7 candidates achieved 10 marks or less: this is disappointing since part (a) simply required candidates to discuss the component elements of s 24 in a reasonable level of detail.

A surprising number of candidates thought that s 30(1)(f) could only be invoked by the landlord if the tenant had served a s 26 request rather than if the landlord had served a s 25 notice.

**Question 2**

This question required candidates to discuss the extent to which the Landlord and Tenant (Covenants) Act 1995 undermines the protection afforded to tenants by section 19 of the Landlord and Tenant Act 1927.

Only 3 candidates attempted this question, and the average mark achieved was just 4. It seems that candidates simply did not understand what the
question was asking for, namely a discussion of how the requirement of reasonableness is qualified by a landlord’s ability to impose ‘pre-conditions’.

**Question 3**

This question required candidates to discuss the procedures laid down by the Rent Act 1977 in relation to obtaining possession, succession and rent protection.

Just over half the candidates attempted this question. The average mark was 15.13, with 13 of the 16 candidates passing the question.

As the numbers suggest, this was a relatively straightforward question which almost all the candidates handled well.

**Question 4**

This question required candidates to discuss the lease/licence distinction and whether it serves any useful purpose given the protection afforded to residential occupiers under the Protection from Eviction Act 1977.

This was the most popular question on the entire question paper. The average mark of 14.45 indicates that candidates were able to discuss either the lease/licence distinction or the 1977 Act (but not both) with a reasonable degree of confidence. However, none offered any sort of reasoned evaluation of the proposition set out in the question.

**SECTION B**

**Question 1**

This question required candidates to discuss: (a) the provisions of the Landlord and Tenant Act 1985, ss 8 and 11, and (b) the common law concept of repair (with particular reference to inherent defects).

57% of candidates answered this question - that number is perhaps a little on the low side given that questions on repair have usually proven to be very popular over the years. Just over half passed the question - a proportion which again seems on the low side based on performance in past years: the average mark was just over 12. The discussion of inherent defects under part (b) was generally poor.

Six of the 17 candidates achieved a mark of 10 or less, which suggests poor revision/choice of question.

**Question 2**

This question required candidates to consider (a) the formalities for the creation of an enforceable agreement for lease, (b) the circumstances in which a tenancy at will or oral periodic tenancy may arise, and (c) the potential consequences in terms of the Landlord and Tenant Act 1954.

50% of candidates attempted this question, but only 4 passed it. The average mark was just 8.8, with 11 of the candidates scoring 10 marks or less.
This is a disappointing outcome - the facts were not particularly complex and the principles involved are all clearly covered in the manual/unit specification. However, most of the answers were decidedly vague as to the nature of Faisan’s occupation.

Disappointingly, a number of candidates answered this question on the basis that Faisan enjoyed security of tenure under his original lease, despite the clear statement to the contrary in the given facts.

**Question 3**

This question required candidates to consider the remedy of forfeiture, with particular reference to the requirements of Law of Property Act 1925, s 146. There was also scope to discuss relief and/or waiver.

16 candidates answered this question, but under half passed it. In some respects, an average mark of just over 10 tells its own story - vagueness as to the specific requirements of s 146 in the different scenarios, discussion of CRAR where the question was specifically about termination and not recovery of arrears, and little/no citation or discussion of relevant authorities.

**Question 4**

This question required candidates to consider the enfranchisement provisions under the Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban development Act 1993.

This appears to be a classic example of a self-selecting question (ie a question which candidates will only choose to answer if they have revised the topic) - 8 candidates attempted this question and none achieved less than 17 marks. For those who had revised this area of the unit specification, this was clearly a rewarding question.

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**SUGGESTED ANSWERS**

**LEVEL 6 - UNIT 10 – LANDLORD AND TENANT LAW**

**JUNE 2019**

**SECTION A**

**Question 1(a)**

In order for an occupier to enjoy security of tenure under Part II of the Landlord and Tenant Act 1954 (LTA 1954), the requirements of LTA 1954, s 23 must be satisfied. Put shortly, these requirements are that the occupier must occupy the premises under a tenancy for the purposes of a business carried on by him.

**Tenancy**

Occupation must be by virtue of a tenancy, so licensees will not qualify for protection. The status of the occupation will be resolved by reference to the principles set out in Street v Mountford (1985), albeit that the ‘indicia’ of a
tenancy identified in that case are not directly transferable to occupation by a business: see Dresden Estates v Collinson (1987).

The tenancy:

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

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

**Occupation**

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

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

**For the purposes of a business**

‘Business’ includes a trade, profession or employment: LTA 1954, s 23(2). The business does not have to be run for profit, so a charity can qualify for protection: but the absence of any trading or profit element will disqualify an occupier from protection (see, for example, Abernethie v A M Kleiman (1970) - tenant running a not-for-profit Sunday school). Nor does the business have to be run from the demised premises; so where a tenant rents a warehouse in which to store goods which he sells from a shop elsewhere, the warehouse is being occupied “for the purposes of a business”: see, for example, Hillil Property and Investment Co Ltd v Naraine Pharmacy Ltd (1979).

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

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

**Carried on by the tenant**

If the tenant personally carries on the business, the tenancy clearly qualifies for protection. In some circumstances, the business can be carried on vicariously and the tenancy will still be protected. Common situations in which this will arise are those where:
• the business is carried on by a manager employed by the tenant
• the business is carried on by a company in which the tenant has a controlling interest (LTA 1954, s23(1A)(a))

• the business is carried on by an individual who has a controlling interest in the tenant company (LTA 1954, s 23(1A)(b))

• the business is carried on by a member of a group of companies, which is part of the same group as the tenant (LTA 1954, s 42)

• the business is a partnership business and the tenancy is held by the partnership (LTA 1954, s 41A).

1(b)

Ground (f) allows a landlord to oppose the grant of a new tenancy on the basis that he intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part of it and cannot reasonably do so without obtaining possession.

The landlord must demonstrate that, at the date of the hearing:

• he has a firm and settled intention to carry out a project at the termination of the current tenancy (or within a reasonable time after it: see, for example, Livestock Underwriting Agency Ltd v Corbett and Newson Ltd (1955)); and

• he has a reasonable prospect of fulfilling that intention.

The court is not required to assess the likely profitability or success of any redevelopment, but nevertheless the court must be persuaded that the landlord’s intention is genuine, more than mere speculation and unlikely to be changed: see, for example, Fisher v Taylors Furnishing Stores Ltd (1956) and Cunliffe v Goodman (1950) - in the latter Asquith LJ said that the requirement was that the project must have “moved out of the zone of contemplation”. The landlord’s purpose or motive is irrelevant (save as material for testing whether a firm and settled intention exists), but in S Franses Ltd v The Cavendish Hotel (London) Ltd (2018), the Supreme Court held that:

• the landlord’s intention must not be conditional on whether the tenant chooses to pursue his claim for a new tenancy, and

• the “acid test” is whether the landlord would intend to do the same works if the tenant left the premises voluntarily.

The landlord is more likely to succeed if he can establish that the premises are ripe for redevelopment, any necessary planning consents have been obtained, releases of adverse rights have been agreed, detailed plans have been prepared, building contracts have been entered into (even if only conditionally) and he has the finance with which to proceed: see, for example, Reohorn v Barry Corpn (1956). However, not every ‘piece of the jigsaw’ needs to be in place at the date of the hearing: it is sufficient that there is a
reasonable prospect that this will happen: see, for example, Gatwick Parking Service Ltd v Sargent (2000) and Dogan v Semali Investments Ltd (2005).

The landlord must intend to carry out the work himself, or through the services of an employee, contractor or agent (which can include a new tenant): see, for example, Gilmour Caterers Ltd v St Bartholomew’s Hospital Governors (1956) and PF Ahern & Sons Ltd v Hunt (1988). However, if the landlord’s plan is to sell to a developer in order that the developer carries out the work, ground (f) will not be satisfied unless the developer is the competent landlord by the date of the hearing: see, for example, Marks v British Waterways Board (1963).

Question 2

The Landlord and Tenant Act 1927 (LTA 1927), s 19 provides certain protections to tenants in relation to two types of qualified covenant which are commonly found in commercial and/or residential leases (but not agricultural or mining leases: see s LTA 1927, 19(4)).

Alienation

A covenant not to assign, underlet, charge or part with possession of the demised premises (or any part of them) without landlord’s consent is deemed to be subject to a proviso that consent is not to be unreasonably withheld: LTA 1927, s 19(1). This provision does not apply to absolute covenants.

The implied proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent - for an example of the right to charge a ‘standard’ fee for consent to a sub-letting of residential premises, see for example: Proxima GR Properties Ltd v McGhee (2014).

Whether a refusal of consent is ‘reasonable’ is a question of fact, and so is dependent on the particular circumstances of any case. However, case law provides some assistance to tenants by establishing guidelines which should be applied when considering whether consent has been reasonably withheld: see, in particular, International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd (1986) and Straudley Investments Ltd v Mount Eden Land Ltd (1996), as endorsed by the House of Lords in Ashworth Frazer Ltd v Gloucester CC (2001). The “overriding principles” (per Ashworth) are that: (a) the landlord cannot refuse consent on the basis of something which has nothing to do with the landlord and tenant relationship, and (b) the landlord is only required to show that a reasonable man would have refused consent.

It is for the landlord to prove that consent has been reasonably withheld: see Landlord and Tenant Act 1988 (LTA 1988), s 1(6)).

Alterations/Improvements

A covenant not to make alterations without landlord’s consent is deemed to be subject to a proviso that consent is not to be unreasonably withheld where the alterations amount to an ‘improvement’: LTA 1927, s 19(2). This provision does not apply to absolute covenants or to alterations which do not qualify as ‘improvements’. In relation to the latter, the practical effect of a qualified covenant is the same as an absolute covenant.
What is an ‘improvement’ is judged from the point of view of the tenant (with the almost inevitable consequence that any tenant’s alteration is also an improvement), but the burden of proving that the landlord unreasonably withheld consent lies on the tenant (contrast the position in relation to alienation as a result of the LTA 1988).

There is little case law on what is a ‘reasonable’ withholding of consent to alterations, but in *Iqbal v Thakrar* (2004), the Court of Appeal applied (with necessary modifications) the principles laid down in *International Drilling*.

The landlord may, as a condition of granting consent, require payment of:

- a reasonable sum for damages to or diminution in the value of the property, or the value of any neighbouring property owned by the landlord
- a sum of money for legal costs or any other properly incurred expenses in connection with the granting of consent.

In addition, if the improvement does not add to the letting value of the holding, the landlord may also require as a condition of such licence or consent, where it would be reasonable to do so, an obligation to reinstate.

If the landlord should unreasonably withhold its consent, the tenant may carry out the works regardless. Although there is no ‘reasonable time’ within which the landlord needs to provide its consent (again, contrast the position under the LTA 1988 in relation to alienation), a period of significant delay in providing consent may well be construed as an unreasonable withholding of consent.

**Impact of the Landlord and Tenant (Covenants) Act 1995**

The Landlord and Tenant (Covenants) Act 1995 (LT(C)A 1995) inserted a series of new subsections ((1A) to (1F)) into LTA 1927, s 19. The principal provision is subsection (1A), which provides that, in relation to any lease entered into on or after 1 January 1996 (often referred to as a ‘new’ tenancy) the parties can set out in the lease, or in any other document, the circumstances in which the landlord’s consent to an assignment can be withheld and/or the conditions subject to which any such consent may be given. Where a landlord invokes one of those circumstances and/or conditions, he cannot be said to have acted unreasonably.

The effect of LTCA 1995 in relation to the assignment of new tenancies is potentially significant. In theory, it allows a landlord to sidestep altogether the requirement of reasonableness implied by LTA 1927, s 19(1) along with the associated case law; as a result, a landlord could impose all manner of arbitrary requirements. However, in practice this ability is subject to: (a) the bargaining strength of the parties when negotiating the lease, and (b) the adverse effect which ‘unreasonable’ provisions would have on the marketability of the premises and subsequent rent reviews. As a result, established circumstances for refusing consent (e.g. proposed assignee not being of sufficient financial strength) and/or conditions imposed on the giving of consent (e.g. the provision of an authorised guarantee agreement by the outgoing tenant) have emerged.
LTCA 1995 has no impact on any other forms of alienation, nor on covenants which restrict alterations or use. Nevertheless, the ability to control assignments by means which are not regulated by LTA 1927, s 19(1) as originally enacted tilts the ‘balance of power’ significantly in the landlord’s favour. In effect, reasonableness is a legal requirement only insofar as the landlord is prepared to allow it to be.

Question 3

The Rent Act 1977 (RA 1977) applies to private tenancies granted before 15 January 1989 which satisfy the qualifying criteria laid down under that Act. RA 1977 also applies to tenancies which are granted after that date to an existing Rent Act tenant by the same landlord.

Rent Act tenants are ‘protected’ tenants if they are in occupation under a fixed or periodic term (RA 1977, s 1), or ‘statutory’ tenants if they are in occupation following the termination of a fixed or periodic term (RA 1977, s 2).

Possession

Under RA 1977, a protected tenancy (which can be determined by effluxion of time, or a break notice or a notice to quit), continues automatically as a statutory tenancy. The tenant occupies the property on the same terms and conditions as were applicable under the protected tenancy so far as they are consistent with the Act (RA 1977, s 3(1)). The landlord can only recover possession after the end of the contractual term by serving the appropriate notice and then obtaining an order for possession based on one of the statutory grounds (or ‘cases’).

RA 1977, Sch 15, Part I sets out ten discretionary cases for possession. Of these, perhaps the most significant are: Case 1 (any breach of the tenancy agreement), Case 2 (conduct which is a nuisance) and Case 6 (unlawful assignment and subletting). If a landlord makes out a discretionary case, the court “may” make a possession order (RA 1977, s 98(1)) but only if: (i) “it considers it reasonable” to do so, and (ii) suitable alternative accommodation is or will be available for the tenant. In considering reasonableness, the court should take “a broad, common-sense view”, per Lord Greene MR in Cumming v Danson (1942). An illustration of this approach is Battlespring Ltd v Gates (1983), where evidence as to the personal attachment of the tenant to the flat of which she had been a tenant for 35 years was considered relevant. The court can (RA 1977, s 100) stay or suspend possession or postpone the date for possession “as the court thinks fit”. This is particularly common in relation to claims for possession based on arrears of rent, where tenants are frequently allowed to pay off the arrears by instalments.

RA 1977, Sch 15, Part II sets out 10 mandatory cases for possession, none of which is based on tenant default. Under RA 1977, s 98(2) the court must make a possession order if: (i) a mandatory ground is established, and (ii) the tenant was informed in writing no later than the relevant date (which is typically the day on which the tenancy commenced) that he or she might be evicted on the basis of that specific ground. In relation to four of the cases (11, 12, 19 and 20), the court can waive the notice requirement but only if “it would be otherwise just and equitable to make a possession order.” The court can postpone possession, but typically only for 14 days (although in cases
where possession may cause exceptional hardship the postponement can be for up to 6 weeks).

Additional grounds for possession are available in relation to Rent Act tenants who are agricultural workers: see RA 1977, s 99 and Sch 16. The court must not make a possession order unless the court considers it reasonable to make such an order and it is satisfied that alternative accommodation (whether or not provided by the local housing authority) is available to the tenant.

**Succession**

On the death of the tenant, the tenancy can be transferred to a surviving spouse (including a same-sex spouse) or civil partner by succession in accordance with RA 1977, Sch 1, Part 1 (paragraphs 1 and 2). The spouse or civil partner will occupy the property as a statutory tenant. Other family members can succeed to the tenancy but only as assured tenants paying a market rent, and only if they have lived in the property for at least two years before the death of the original tenant (under paragraphs 1 and 3). In all cases, any successor has to demonstrate that they lived with the original tenant.

**Fair rent**

RA 1977 lays down rules for setting fair rents for ‘regulated tenancies’ - this being the umbrella term for both protected and statutory tenancies (RA 1977, s 18(1)). Under RA 1977, s 67 the landlord, the tenant, or both can apply to the Rent Service for a “fair rent” to be set in accordance with RA 1977, s 70 (which contains a number of statutory assumptions and disregards). Notwithstanding those statutory rules, it is still open to the adjudicator to “adopt any method or methods of ascertaining a fair rent” provided those methods are not “unlawful or unreasonable”, per Lord Reid in Mason v Skilling (1974). A number of methods have been used over the years, but in all cases scarcity value is ignored. As a result, Rent Act properties are typically let at levels which are below the open market rental value.

Once the fair rent is set and registered, this is the maximum rent that the landlord can charge during the contractual and statutory periods of the tenancy (unless the rent is either reviewed or cancelled): RA 1977, ss 44 and 45. The amount set will then increase from year to year in line with the retail prices index. If a fair rent is registered after the tenancy was granted, the fair rent is the maximum payable even if the tenancy provided for a higher rent.

Rents can be re-registered every two years and an application for re-registration by the landlord will be accepted one year and nine months after the effective date of the previous registration. Applications can also be made at any time where there has been a significant change in circumstances or where a joint application is made by the landlord and the tenant: see RA 1977, s 67(3).

**Question 4**

An arrangement under which a person takes up residential occupation of premises which belong to another is, on the face of it, equally as consistent with the grant of a lease as it is with the grant of a licence. However, there are three circumstances (as identified by Lord Templeman in the leading case
of Street v Mountford (1985)) which, if present, will justify the conclusion that a lease rather than a licence has been granted. The relevant circumstances are: (i) exclusive possession of the premises in question, (ii) the right to occupy those premises for a period which is of fixed and ascertainable duration, and (iii) the period of permitted occupation must be at least one day shorter than the duration of the grantor’s estate. Payment of rent might also be an indication of a tenancy, but in fact rent is not required for a tenancy to exist: see Ashburn Anstalt v Arnold (1988) and AG Securities v Vaughan (1990).

Circumstance (ii) is occasionally problematic: see, for example, Lace v Chantler (1947) where a lease granted “for the duration of the war” was held to be invalid. But the first and most important circumstance identified by Lord Templeman (and the one which invariably generates most litigation in this area) is whether exclusive possession has been conferred on the occupier. It is the right of exclusive possession (described by Lord Templeman as the “touchstone” of a lease) which entitles a tenant to exclude the entire world, including their landlord, from the premises for the duration of the period of occupation.

As explained in Street v Mountford, the central issue in determining whether exclusive possession has been conferred is the degree of control which the owner is entitled to exercise over the premises in question notwithstanding that they are occupied by another for the duration of their agreement. Where control lies with the occupier, exclusive possession will have been conferred: see, for example, London College of Business v Tareem (2018). Inevitably, such an enquiry will take in all the circumstances, which will vary from case to case and will produce different outcomes: contrast Marchant v Charters (1977) (exclusive possession not granted where a resident housekeeper had daily access to the room in question) with Street v Mountford itself (exclusive possession granted where the landlord provided “neither attendance nor services”).

Even though the application of these common law principles may justify the conclusion that an occupational arrangement has all the characteristics of a lease, there are nonetheless exceptional situations where the courts will not conclude that a lease has been granted. These exceptions extend to agreements where there is a lack of intention to create legal relations, or an existing relationship which is inconsistent with the claimed relationship of landlord and tenant, or where the supposed ‘landlord’ has no power to grant a tenancy. If one of the exceptions applies, a presumption arises that no tenancy has been granted: see, for example, Cobb v Lane (1952) and Booker v Palmer (1942). In Cobb, for example, a sister granted her brother the right to live rent free in accommodation which she owned. While accepting that her brother had been granted exclusive possession, the court held that no tenancy arose as the parties lacked the intention to create legal relations. As with all presumptions, the presumption that a tenancy has not been granted may be rebutted by tendering evidence to the contrary.

The Protection from Eviction Act 1977 (PEA 1977) does not attempt to distinguish between tenants and licensees of residential premises. Instead, it applies to anyone who is “occupying ... premises as a residence”, i.e. a residential occupier. PEA 1977 provides the following protections to a residential occupier:
any notice to quit must be in writing and must be of at least 4 weeks’ duration (PEA 1977, s 5)

the owner of the premises in question cannot recover possession of them from the occupier without first obtaining a court order (PEA 1977, s 3)

it is a criminal offence to evict a residential occupier unlawfully (PEA 1977, s 1(2)), or to engage in acts or to withhold services with the intention, knowledge or reasonable belief that doing so will cause the residential occupier to leave the premises (PEA 1977, ss 1(3) and 1(3A)).

PEA 1977, s 1(2) is augmented by the Housing Act 1988, ss 27 and 28. These sections create a statutory tort of unlawful eviction. A victim of an unlawful eviction may claim damages calculated on the basis of the difference between the value of the owner’s interest subject to the residential occupier’s right of occupation and the value of that interest free of the right of occupation.

One of the principal differences between a residential lease and a residential licence is that the former (as the result of statutory intervention in the guise of the Rent Act 1977 and/or the Housing Act 1988) offers security of tenure to the occupier, whereas the latter does not. If the lease/licence distinction were only relevant to the issue of security of tenure, then (in the case of residential occupiers) it is submitted that it serves no useful purpose in light of the protection which is afforded to such occupiers by PEA 1977 (as described above). The very fact that the PEA 1977 makes no distinction between tenants and licensees means that the distinction itself is irrelevant. However, the distinction serves other purposes: for example, (i) a lease is assignable (ie it can be bought and sold) whereas a licence is not, (ii) a lease survives changes in the identity of the holder of the superior interest, whereas a licence does not, and (iii) in the absence of any express provision, a periodic licence is terminable on reasonable notice whereas a periodic lease can only be terminated by a notice whose duration matches the ‘period’ of the lease.

SECTION B

Question 1(a)

Armand has expressly covenanted in his assured shorthold tenancy agreement (AST) to ‘keep the interior and exterior of the premises, and the landlord’s fixtures and fittings in them, in good and substantial repair and condition’. At first sight, therefore, Armand would appear to be responsible for:

- replacing the roof tiles and repairing the guttering (both of which form part of the exterior of the first floor flat);
- replacing the internal plaster; and
• repairing (and if needs be replacing) the boiler, on the assumption that the boiler was in the flat when the tenancy was granted and so constituted a landlord’s fixture or fitting.

However, Landlord and Tenant Act 1985 (LTA 1985), s 11 protects certain residential tenants from being subjected to onerous repairing obligations and instead places the repairing obligation on their landlord. This statutory protection applies even if the lease contains a covenant by the tenant which purports to exclude or restrict the landlord’s statutory obligation (see LTA 1985, s 12(1)) unless the inclusion of that covenant has been authorised by the county court (which does not appear to be the case here).

The qualifying criteria for this protection are contained in LTA 1985, s 13. The lease (which for these purposes includes an AST) must be a lease of a ‘dwelling-house’ granted after 24 October 1961 for a term of less than seven years. The term ‘dwelling-house’ is not defined in LTA 1985, but Lord Irvine noted in Uratemp Venture Limited v Collins (2001) that the term ‘dwelling’ has “a long pedigree” and was a matter of fact which was to be determined by the “judges of trial”. On the facts, there seems little doubt that Armand’s AST meets the qualifying requirements. None of the exclusions in LTA 1985, ss 14 or 32 appears to apply.

On that basis, Armand is entitled to rely on LTA 1985, s 11. This section imposes an obligation on the landlord to keep various elements of the ‘dwelling-house’ in repair and/or proper working order. These include:

• “the structure and exterior … (including drains, gutters and external pipes)” and

• “the installations … for space heating and heating water”.

As stated in Irvine v Moran (1992), the ‘structure’ of a dwelling-house “consists of those elements … which give it its essential appearance, stability and shape”. This formulation was subsequently approved by the Court of Appeal in Grand v Gill (2011).

The roof would seem to fall within the common law definition of ‘structure’ as set out in Irvine. LTA 1985, s 11(1)(a) specifically refers to gutters as constituting part of the “structure and exterior”. On that basis, both the missing roof tiles and the defective guttering fall within KIL’s repairing obligation under LTA 1985, s 11. KIL is therefore currently in breach of that obligation and is also wrong to suggest that Armand must replace the missing roof tiles and repair the guttering.

At first sight, the damp plaster within the flat might not appear to be part of the “structure and exterior” of a dwelling-house. However, Grand (above) is recent authority for the proposition that internal plasterwork can constitute part of the overall structure: consequently, it would appear that the repair/replacement of this would also fall within KIL’s statutory repairing obligation.

The boiler amounts to an installation “for space heating and heating water”. As such, KIL must keep the boiler in “proper working order” (see LTA 1985, s 11(1(c))). Again, therefore, KIL is currently in breach of that obligation and is also wrong to suggest that Armand must replace the boiler.
LTA 1985, s 11 does not apply to a lease of commercial premises. Consequently, the dispute between KIL and Cordon Bleu will turn on the proper construction of the covenant to repair given by Cordon Bleu in the lease; Cordon Bleu will only be obliged to remedy the deficient waterproofing if the necessary works fall within the common law meaning of ‘repair’.

The authorities draw a distinction between ‘repair’ and ‘renewal’. In Lurcott v Wakeley & Wheeler (1911), Buckley LJ described repair as “making good damage” by the replacement of “subsisting parts”. Renewal, by contrast, is regarded as being more extensive: see Lister v Lane and Nesham (1893) (replacement of timber platform which underpinned the structure of a house characterised as renewal rather than repair). The same was also true in Lurcott in relation to the rebuilding of a wall (which would have required the digging of footings, concrete foundations and the installation of a damp course). In Quick v Taff Ely Borough Council (1986) it was said that an obligation to repair cannot require a party to provide “a better [property] than there was to start with”.

In McDougall v Easington District Council (1989), Mustill LJ identified three tests for determining what amounts to ‘repair’ (which may be applied separately or concurrently):

- do the works apply to substantially the whole of the structure or to only a subsidiary part
- will the works result in a building “of a wholly different character from that which had been let” (if so, the works will not be regarded as repair)
- is the cost of the works substantial relative to the value of the building and will they have a significant effect on the value and lifespan of the building.

Applying those three tests to the present case, it is certainly arguable that the works required to make the cellar watertight go beyond simple ‘repair’ and so fall outside Cordon Bleu’s covenant.

In addition, there is the fact that the current problem is the direct result of the original construction of the cellar. A duty to repair only arises when there is a physical transition from a state of repair to a state of disrepair. As a result, there is no obligation to repair an inherent defect (either of design or construction) even though the defect results in conditions which mean that the property is not fit for purpose, as illustrated by Post Office v Aquarius Properties Ltd (1987), the facts of which bear some similarity to the present.

In light of the above, Cordon Bleu has a good case for arguing that it is not liable to carry out the works identified by KIL; KIL would appear to be wrong in suggesting otherwise. Unfortunately, this conclusion may well not relieve Cordon Bleu of its current predicament, namely the flooded cellar. Even though Cordon Bleu may have no obligation to carry out any necessary works, there does not appear to be any express covenant by KIL which would make it liable to carry out those works either. Such an obligation will not be implied
at common law (against either a landlord or a tenant), as demonstrated by the decisions in Sleafer v Lambeth BC (1960) and Warren v Keen (1954). The upshot would seem to be that neither party is legally obliged to carry out the works.

**Question 2**

Faisan’s original tenancy, which has now expired, did not enjoy security of tenure under Part II of the Landlord and Tenant Act 1954 (LTA 1954). Consequently, when he remained in occupation of the premises after the original tenancy expired by effluxion of time, he was not holding over on the terms of a continuation tenancy in accordance with LTA 1954, s 24. It is therefore necessary to determine whether there is any other basis on which Faisan can claim to be lawfully entitled to remain in occupation of the property.

It seems clear that Faisan has enjoyed exclusive possession of the premises and that he has been paying rent monthly since the old lease expired. Clearly, Naheed also had title to grant a new lease to Faisan. It is arguable that these facts might well be sufficient to allow Faisan to claim that he is now a tenant of the premises under a common law monthly periodic tenancy: all the indicia of a tenancy appear to be present: see Street v Mountford (1985) and Dresden Estates v Collinson (1987). Moreover, because the relevant contracting-out procedure was not adopted prior to that tenancy coming into existence, Faisan might also claim that he enjoys security of tenure under LTA 1954 in relation to his new tenancy. This would mean that his tenancy (and consequent right of occupation) could only be terminated in accordance with the procedures laid down by that Act, and even then Faisan would have the right to apply for a renewal tenancy. The executors certainly would not be entitled to force Faisan to leave on only 7 days’ notice.

However, the factual matrix reveals that Faisan remained in occupation against a background of preparations for the grant of a new lease following an oral agreement as to the terms of that new lease. If that lease had been granted, it seems entirely plausible (given that it had been agreed that the new lease was to be granted on the same terms as the old lease) that the new lease would also have been contracted-out: indeed, the Heads of Terms, which were signed by Faisan, may well have specifically recorded that the lease was to be contracted-out. Against that background, the court might well conclude (adopting the reasoning from cases such as Javad v Aqil (1991)) that there was never any intention that Faisan’s continuing occupation should attract security of tenure; instead, the court might conclude that he occupied the premises under a less formal arrangement, such as a common law tenancy at will (which is a species of tenancy which is not protected by LTA 1954 - see LTA 1954, s 42).

There might even be a question as to whether, at the time when the old lease expired, Naheed had capacity to enter into a new lease on account of the illness from which she appears to have been suffering and which appears to have prevented her from being able to manage her own affairs.

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

The uncertainty as to Faisan’s position creates a curious situation. On the one hand, if Faisan has the apparent benefit of a monthly periodic tenancy (with the attendant danger that that tenancy enjoys protection under LTA 1954), it is in the executors’ best interests to argue that in fact there was at all times a binding agreement for a lease under which Faisan was legally bound to accept the grant of a new five-year lease which would be contracted-out of LTA 1954. On the other hand, if Faisan has the apparent benefit of only a tenancy at will, it then becomes in his best interests to argue for the existence of such an agreement. If such an agreement does exist, equity will regard the lease as granted and the equitable lease will override the terms of any common law tenancy (see Walsh v Lonsdale (1882)).

Does such an agreement for lease exist? Clearly there was an oral agreement between Naheed and Faisan for the grant of a new lease, but such an oral agreement is not a valid contract. By virtue of Law of Property (Miscellaneous Provisions) Act 1989 (LPMPA 1989), s 2(1) a contract for the sale or other disposition of an interest in land (such as the grant of a lease) must be in writing, and only by incorporating all the terms which the parties have expressly agreed in in a single document which is signed by all parties or in separate parts with each party signing their own part and then exchanging those parts. LPMPA 1989, s 2(3) goes on to say that the document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract. Failure to satisfy these requirements means that there is no contract at all.

However, we are told that Naheed’s solicitors sent Heads of Terms (by way of two separate documents) to Faisan. Faisan clearly signed one of those documents and returned it. He retained the other document. That sequence of events would, if the document retained by him was signed by or on behalf of Naheed, be sufficient to constitute ‘exchange’ for the purposes of LPMPA 1989, s 2(1). Even if the document were not signed by Naheed (and given her illness it may well not have been), it might have been signed by her solicitors. Given that they were acting as Naheed’s agents, Faisan could plausibly argue that Naheed would be bound by their signature, with the result that a binding and enforceable agreement for lease has come into existence.

**Question 3**

It is not stated that any of the leases contains a break clause, nor is there any indication that the tenants would be willing to consider a voluntary surrender of their existing leases (although there would be nothing to prevent Renata from attempting to negotiate such a surrender with them). For present purposes, it is assumed that Renata will need to compel the tenants to leave if she can.

Each of the tenants appears to be in breach of covenant. Each lease expressly reserves a right of forfeiture (cf Duppa v Mayo (1669)) - this is the "proviso for re-entry", which Renata is prima facie entitled to invoke for these breaches. As none of the units is being used for residential purposes, Renata has the option of exercising her right of forfeiture either by peaceable re-entry
or by bringing possession proceedings. It is generally advisable for a landlord to choose the latter option.

Sam is in breach of the covenant against assignment. Before Renata can forfeit the lease, she must first serve a notice on Sam under the Law of Property Act 1925 (LPA 1925), s 146. A section 146 notice must:

- identify the breach;
- require the tenant to remedy the breach if it is capable of remedy;
- allow the tenant a reasonable time to remedy the breach;
- require the tenant to pay compensation in money for the breach, if the landlord requires this.

If a section 146 notice fails to give the tenant a chance to remedy a remediable breach, the notice will be ineffective and any forfeiture action will be invalid: see Savva and Another v Houssein (1996) (where the landlord wrongly took the view that an alteration covenant was not capable of remedy).

The issue here is whether Sam’s unlawful assignment of the premises is "capable of remedy". In Scala House and District Property Company v Forbes (1974) the Court of Appeal held that a breach of a covenant against alienation is never capable of remedy, while other breaches turn on their individual facts. In later cases, notably Akici v Butlin Ltd (2005), the Court of Appeal questioned whether the decision in Scala is correct; but for the time being it remains good law. In light of this, Renata should serve a section 146 notice on Sam incorporating the details discussed above and specifying that the breach is not capable of remedy. Renata will not be required to give Sam time to remedy the breach but must still give him a reasonable time to respond.

Points for Renata to note are that:

- it may prove difficult to serve Sam with the section 146 notice given that he is now living abroad: the terms of the lease will need to be checked to see if a notice can be sufficiently served by being left at or posted to the demised premises (even though the notice may not come to Sam’s attention)
- Joe may well apply for relief from forfeiture - this may be accompanied by an application by Sam/Joe for retrospective consent to the assignment.

Tessa is in arrears with her rent. At common law Renata would not be able to forfeit the lease without first serving a formal demand for the amount which is due. Common Law Procedure Act 1852, s 210 does not relieve Renata of this obligation because less than six months’ rent is outstanding. However, by the terms of the lease - “(whether formally demanded or not)” - Tessa has waived her right to insist on a formal demand.

Renata does not need to serve a section 146 notice on Tessa before taking steps to forfeit the lease. However, Renata is not certain to regain possession because Tessa may be entitled to relief from forfeiture, the effect of which is that the lease will continue (LPA 1925, s 146(11)). Tessa will be entitled to “automatic” relief if she pays the outstanding rent and costs of the action into
court at any time within five days before the possession hearing (County Courts Act 1985 (CCA 1985), s 138(2)). Alternatively, Tessa may also claim relief at the time of the hearing or any time within six months of Renata recovering possession by virtue of CCA 1985, s 138(9A): relief would almost certainly be granted if Tessa were to pay the arrears in full and provide sufficient evidence that further arrears would not arise.

Ursula is in breach of the covenant not to alter the premises. As with Sam, Renata must first serve a section 146 notice. Breach of a covenant against alteration is prima facie remediable (see Staughton LJ in Scala), so Ursula may avoid forfeiture if she reinstates the premises, or provides sufficient monetary compensation, or both. Renata’s section 146 notice should specify that the breach is capable of remedy and should allow Ursula a reasonable time to remedy the breach. There are “no hard and fast rules” as to how long a tenant should be given to remedy a breach (Bhajwanui v Kingsley Investment Trust (1992)), but it seems likely that a period of three months would meet the requirement of reasonableness.

Ursula can be expected to argue that the right to forfeit has been waived, with the result that Renata cannot forfeit the lease. Waiver arises where a landlord, with knowledge of a breach of covenant by their tenant which entitles them to forfeit the lease, nonetheless acts in a way which demonstrates that the landlord is treating the lease as continuing: see, for example, Seeagal v Thoseby (1963). The relevant knowledge and/or acts may be on the part of the landlord or their agent. In the present case, Artur’s knowledge of Ursula’s once-and-for-all breach and continued acceptance of rent means that it is very likely that the right to forfeit will be held to have been waived: see, for example, Metropolitan Properties v Cordery (1979) and Central Estates (Belgravia) Ltd v Woolgar (No.2) (1972).

Ursula may also be entitled to seek relief. The court will be obliged to take into account the factors set out in LPA 1925, s 146(2). The court may grant relief on terms, which might include requiring Ursula to reinstate the premises or to pay Renata’s costs of doing so.

Question 4

Michael and Nigel are in a similar situation, in that they both hold long leases of their homes and both wish to acquire the freehold; the statutory term for this acquisition is ‘enfranchisement’. Where the right to enfranchise is established, the fact that the freeholder (and any intermediate leaseholder) may not wish to be bought out is irrelevant; consequently enfranchisement is, in certain senses, a form of compulsory purchase. However, the two situations cannot be considered together because different rules apply to houses and to flats.

In relation to Michael, the Leasehold Reform Act 1967 (LRA 1967) governs the procedure for acquiring the freehold of a leasehold house. The three core qualifying criteria are (i) a long tenancy (ii) of a house (iii) at a low rent (see LRA 1967, ss 1-4). All of these appear to be satisfied. Where the right applies, the tenant is entitled to acquire the house and any appurtenant premises (eg a garden, yard or similar) for an estate in fee simple absolute (LRA 1967, s 8(1)) subject to but with the benefit of such easements and other rights as may be necessary to put both Michael and his landlord in the same position after the sale as they currently enjoy (LRA 1967, s 10(2)).
To start the process, Michael will need to serve a Notice of Tenant’s Claim (commonly referred to as a “desire notice” (LRA 1967, s 5)) setting out his intention to acquire the freehold. The notice is a standard form prescribed by separate statutory instruments for England and Wales. Michael will need to provide the details set out in LRA 1967, Sch 3, para 6 so that the landlord can determine whether his claim is valid. Once the notice has been served, a statutory contract for sale comes into existence for the sale of the house at a price and on such other appropriate terms as may be agreed between the parties or (in default of agreement) determined in accordance with the provisions of the Act (LRA 1967, ss 9-12).

Following receipt of the desire notice, the landlord will have two months within which to give a counter-notice either admitting Michael’s right to acquire the freehold or setting out the reasons why the claim is not admitted (ie disputing that Michael satisfies the statutory qualifying criteria or alleging that the statutory procedure has not been followed correctly). Again, the counter-notice must be in the prescribed form. LRA 1967, ss 20-22 provide a mechanism for deciding whether the landlord’s rejection of the tenant’s claim is justified. If the landlord’s opposition is successful, the desire notice will be rejected and the statutory contract for sale will fall away.

Michael should be advised that, in addition, a landlord may oppose a tenant’s right to acquire the freehold if the house is “reasonably required for occupation” as the only or main residence of the landlord or a member of his family (LRA 1967, s 18). This does not appear to apply in the current case.

Michael will have to pay the landlord the open market value of the freehold interest (as determined in accordance with LRA 1967, s 9 if not agreed) and also the landlord’s reasonable costs of various elements of the enfranchisement process (see LRA 1967, s 9(4)).

In relation to Nigel, the Leasehold Reform Housing and Urban Development Act 1993 (LRHUDA 1993) governs the procedure for acquiring the freehold of a leasehold flat. The first point to note is that this is a collective right only - an individual flat tenant cannot acquire the freehold of their flat, or the block in which it is located, solely on their own account (LRHUDA 1993, s 1). Nigel will not be able enfranchise unless qualifying long leasehold tenants (see LRHUDA 1993, ss 1 and 5) hold at least two-thirds of the flats in the block. This means that Nigel will need to confirm that at least four of the flats in the block (including his own) are held by qualifying tenants. At least half of those tenants must wish to exercise the right (LRHUDA 1993, s 13(2)(b)) - so Nigel will have to persuade at least one of the other qualifying tenants in the block to support the claim.

The tenants who wish to participate in the enfranchisement must join together and appoint a “nominee purchaser” to acquire the freehold on their behalf. Although it is feasible for one of the participating tenants to be nominated, the scale of the potential liability which the purchaser is likely to incur means that the nominee purchaser will typically be a registered company limited by guarantee. The procedure for nomination, and possible subsequent termination of that nomination, is set out in LRHUDA 1993, s 15. The nominee purchaser should ensure that all the participating tenants agree to indemnify it/him/her against all and any liability that the nominee may incur on their behalf.
Once appointed, the nominee purchaser must serve a “notice of claim” to acquire the freehold on the reversioner and must set out prescribed information: LRHUDA 1993, s 13.

Once the notice of claim is served, the nominee purchaser becomes liable for the landlord’s costs (in addition to any costs which have already been incurred, eg solicitors’ and surveyors’ fees). The landlord is required by LRHUDA 1993, s 21 to serve a counter-notice, in which the landlord can admit or deny the claim, or can set out an intention to apply for an order that the claim should not be allowed because the landlord intends to redevelop the whole or a substantial part of the specified premises (and even then the application of this ground is severely curtailed by the requirements of LRHUDA 1993, s 23(1)).

The nominee purchaser will have to pay the landlord the open market value of the freehold interest (LRHUDA 1993, s 32) as determined in accordance with LRHUDA 1993, Sch 6 if not agreed) and also the landlord’s reasonable costs of various elements of the enfranchisement process (LRHUDA 1993, s 33).