

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021  
LEVEL 6 – UNIT 10 - LANDLORD & TENANT LAW

### 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 June 2021 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 better performing candidates showed similar characteristics in that they used case law appropriately to underpin their analysis and had good knowledge and understanding of the law. Candidates who did less well did not have a sufficient legal foundation on which to base any sort of reasoned argument or (in terms of the Section B questions) advice. Citation of relevant statute or case law was scant.

Weaker candidates tended simply to recite everything that they were able to recall about a particular topic (whether or not it was germane to the question posed). This tended to be more prevalent in relation to the Section A questions, where many candidates would conclude with a single sentence along the lines of 'this shows/proves/demonstrates that...', or 'I therefore agree/disagree with the statement in the question'.

In relation to the Section B questions, a failing which is common to a large number of candidates is a reluctance to commit to a conclusion and/or offer a pragmatic explanation or advice. Learning/recall must be accompanied by reasoned discussion and/or application if higher grades are to be achieved.

Candidates are expected to cite statutory provisions and/or case law in relation to legal principles which they refer to. They are also expected to be accurate. No credit is given for statements such as 'In a decided case...', or 'In the case

about...' or 'In [blank] v [blank]....' or 'The Landlord and Tenant Act 1927 deals with this...'.  
Excessive or unnecessary recitation of the facts of particular cases receives no credit.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Question 1

This question required candidates to discuss one of the major reforms recently proposed by the Law Commission in relation to long leasehold residential properties.

Only two candidates answered this question, which was disappointing given the publicity which has both preceded and accompanied the publication of these proposals, elements of which had already been brought forward in draft legislation before the exam. Neither candidate achieved a Pass grade.

### Question 2

This question required candidates to discuss the common law characteristics of a lease and to engage in a critical analysis as to whether the quoted statement was an accurate description of the current law.

This topic is a fundamental element of the Landlord and Tenant course and is doubtless familiar to those with knowledge of past exam papers. It was hardly surprising, therefore, that this was by far the most popular question on the question paper most candidates performed well, achieving at least 13 marks.

### Question 3

This question required candidates to discuss the statutory duties which are owed by a landlord to both lawful visitors (under the Defective Premises Act 1972 and the Occupiers' Liability Act 1957) and trespassers (under the Occupiers Liability Act 1984).

The discussion under part (b) was poor – none of the candidates appeared to have a firm grasp of the law on this topic. None of the candidates embarked on a critical evaluation of the statutory provisions.

### Question 4

This question required candidates to discuss whether the assured shorthold tenancy (AST) has unfairly altered the balance between landlord and tenant in relation to security of tenure in the private rented sector.

Most all the candidates could discuss the nature and effect of an AST, only a handful engaged in a detailed analysis of the kind required by the question.

## SECTION B

### Question 1

This question required candidates to discuss non-derogation from grant and the covenant for quiet enjoyment.

The knowledge displayed in the answers was generally adequate, but there was little citation of relevant case law. The principal failing lay in not applying the law to the facts of the scenario in any degree of detail or with any real sense of conviction.

### Question 2

This question required candidates to discuss covenants against assignment and the requirements of the Landlord and Tenant Act 1988 in relation both the nature of a valid application and the landlord's duties once such an application is received.

In the main, candidates were able to recite the common law principles in relation to reasonableness of a refusal to grant consent but were on shakier ground when discussing the application and consequences of the Landlord and Tenant Act 1988. Very few considered waiver.

### Question 3

This question required candidates to discuss when and how a person might succeed to a tenancy that, when it was originally granted, was protected under the Rent Act 1977. Nearly all candidates were able to identify the nature of the original tenancy, the consequences of the expiry of the original fixed term and the first succession. Matters became less assured when considering whether there could be a second succession, what sort of tenancy it might be, and whether Peter qualified as the tenant under it. Very few candidates paused to wonder if Peter was also excluded from benefitting from the Protection from Eviction Act 1977.

### Question 4

This question required candidates to consider: (i) the formalities for creating a valid lease, (ii) equitable leases and the rule in Walsh v Lonsdale, (iii) periodic tenancies and (iv) the possible application of Part II of the Landlord and Tenant Act 1954.

An average mark of just over 9 for part (a) indicates that candidates did not deal with this topic particularly well – in fact only a few achieved the equivalent of a pass grade for that part. Most candidates were decidedly tentative as to the basis on which FFA occupied the premises. Inevitably, therefore, their discussion of the adequacy of the notice in question was, in the main, distinctly equivocal.

**SUGGESTED POINTS FOR RESPONSES  
LEVEL 6 – UNIT 10 - LANDLORD & TENANT LAW**

The purpose of this document 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 2021 examinations. The Suggested Points for Responses 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. Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

**Section A**

Question Number	Suggested points for responses	Max Marks
Q1	<p>An answer which consists of reasoned evaluation, offering opinion/analysis which is supported by reference to known problems with the regimes for obtaining lease extensions in relation to long leasehold residential houses and flats.</p> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• A brief outline of the existing regimes re lease extensions under LRA 1967 and LRHUDA 1993</li> <li>• Identifying the five broad reasons advanced by the Law Commission               <ul style="list-style-type: none"> <li>- the inherent unfairness of leasehold tenure</li> <li>- inconsistency of the two regimes</li> <li>- complexity and uncertainty</li> <li>- cost of lease extension procedure</li> <li>- undesirable incentive structures</li> </ul> </li> <li>• A discussion of the problem identified by the Law Commission and how the proposal for reform set out in the question seeks to address that problem</li> </ul> <p><b>Responses could include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of whether the proposal for reform will solve the identified problem(s)</li> <li>• Discussion of criticisms of the existing regimes from other sources (but must be on the topic of lease extension only)</li> <li>• Discussion of other proposals for reform (but must be on the topic of lease extension only)</li> </ul>	25

Question Number	Suggested points for responses	Max Marks
Q2	<p>An answer that consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against the proposition set out in the question.</p> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of concept of exclusive possession, with reference to cases such as <u>Street v Mountford</u> (1985), <u>Marchant v Charters</u> (1977), <u>Prudential Assurance v London Residuary Body</u> (1992), <u>Mexfield Housing Association v Berrisford</u> (2011)</li> <li>• Recognition that rent is not an essential characteristic for the creation of a landlord and tenant relationship, with reference to <u>Ashburn Anstalt v Walter John Arnold and W. J. Arnold &amp; Company Limited</u> (1989)</li> <li>• The three main <i>Facchini</i> exceptions (<u>Facchini v Bryson</u> (1952), examples of which can be found in <u>Cobb v Lane</u> (1952), <u>Booker v Palmer</u> (1942), <u>Norris v Checksfield</u> (1986) and <u>Errington v Errington and Woods</u> (1952), namely: <ul style="list-style-type: none"> <li>- no intention to create legal relations</li> <li>- occupation arises from some other legal relationship (eg a service contract)</li> <li>- landlord has no power to grant a tenancy</li> </ul> </li> </ul> <p><b>Responses could include:</b></p> <ul style="list-style-type: none"> <li>• Reference to <u>Bruton v London and Quadrant Housing Trust</u> (1999) as example of a contractual or non-proprietary lease.</li> <li>• Reference to ‘grey areas’ where the authorities do not appear to be consistent, eg <u>Family Housing Association v Jones</u> (1990), <u>Stribling v Wickham</u> (1989) and <u>Dresden Estates v Collinson</u> (1987)</li> </ul>	25

Question Number	Suggested points for responses	Max Marks
Q3(a)	<p>An answer that consists of reasoned analysis, breaking down the discussion into sections, and using supporting case law for and against propositions discussed in the answer.</p> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• The nature and extent of a landlord’s duty of care in relation to defective premises, with specific reference to DPA 1972, s 4 (including when the duty arises and the occupational arrangements to which it applies)</li> <li>• The ‘graduated’ nature of the duty according to the category of visitor (eg children at one end of the spectrum and specialist visitors at the other)</li> <li>• The concept of ‘relevant defect’, with a subsequent discussion of the well-established common law principles in relation to repair (with reference to cases such as <u>Sternbaum v Dhesi</u> (2016), <u>Dodd v Raeburn Estates</u> (2016) and <u>Lafferty v Sherwood DC</u> (2016))</li> <li>• The inter-relationship between the landlord’s statutory liability and any contractual liability of the tenant to repair</li> </ul> <p><b>Responses could include:</b></p> <ul style="list-style-type: none"> <li>• Noting that the duty under DPA 1972, s 4 has replaced the duty under OLA 1957, s 4;</li> <li>• Although the “common duty of care” under OLA 1957, s 2 has not been repealed, <u>Drysdale v Hedges</u> (2012) suggests that DPA 1972, s 4 should be referred to first when determining a landlord’s liability to visitors – better candidates may discuss the extent to which this is correct</li> <li>• Many leases try to deal with the concept of notice by requiring a tenant to notify the landlord of a relevant defect</li> </ul>	16
Q3(b)	<p>An answer that consists of reasoned analysis, breaking down the discussion into sections, and using supporting case law for and against propositions discussed in the answer.</p> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• The nature and extent of a landlord’s duty in relation to trespassers, with specific reference to OLA 1984, s 1 (including when the duty arises)</li> </ul>	9

	<ul style="list-style-type: none"> <li>The factors that may engage the duty (nature of premises, nature of defect, risk of injury, characteristics of trespasser, foreseeability, etc)</li> </ul> <p><b>Responses could include:</b></p> <ul style="list-style-type: none"> <li>Contrasting the extent of the duty under OLA 1984 with the duty under DPA 1972, and noting that the former is fact-driven</li> </ul>	
<b>Total: 25 marks</b>		

<b>Question Number</b>	<b>Suggested points for responses</b>	<b>Max Marks</b>
Q4	<p>An answer that consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against the proposition set out in the question.</p> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>The principal features of an AST in the context of the question, ie: <ul style="list-style-type: none"> <li>landlord’s ability to recover possession without having to establish a case/ground for possession (as otherwise required by RA 1977, s 98 and HA 1988, s 7)</li> <li>requirements under HA 1988, s 21 for terminating a fixed term and a periodic AST</li> <li>ability to invoke the accelerated possession procedure in relation to ASTs</li> <li>maximum duration of any period of suspension - usually 14 days, but potentially 42 days if exceptional hardship is established</li> </ul> </li> <li>Discussion of: (i) the statutory limitations on the ability of a landlord to invoke HA 1988, s 21 and to use the accelerated possession procedure, and (ii) the extent to which that mitigates the benefits of the s 21 procedure for the landlord</li> </ul> <p><b>Responses could include:</b></p> <ul style="list-style-type: none"> <li>Discussion of s 21 in its historical context (ie the ‘mischief that it was intended to resolve)</li> </ul>	25

## Section B

Question Number	Suggested points for responses	Max Marks
Q1	<p>An answer that breaks down the question into sections according to the issues presented by the scenario, accurately sets out the relevant law, and then engages in a reasoned application of that law to the given facts in order to arrive at practical and pragmatic advice.</p> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• The principal features of the covenant for quiet enjoyment, illustrated by reference to relevant case law, eg <u>Markham v Paget</u> (1908), <u>Browne v Flower</u> (1911), <u>McCall v Abelesz</u> (1976) and <u>Sampson v Hodson-Pressinger</u> (1981)</li> <li>• The principal features of the principle of non-derogation from grant, illustrated by reference to relevant case law, eg <u>Aldin v Latimer Clark, Muirhead &amp; Co</u> (1894) and <u>Kelly v Battershell</u> (1949)</li> </ul> <p><b>Responses may include:</b></p> <ul style="list-style-type: none"> <li>• Discussion re whether TechTech can exercise a right of set-off (against likely background that lease excludes this, albeit that it is not referred to in the question)</li> </ul>	25
Question Number	Suggested points for responses	Max Marks
Q2	<p>An answer that breaks down the question into sections according to the issues presented by the scenario, accurately sets out the relevant law, and then engages in a reasoned application of that law to the given facts in order to arrive at practical and pragmatic advice.</p> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of common law principles and LTA 1927, s 19(1) in relation to qualified covenants against assignment</li> <li>• Discussion of statutory requirements under LTA 1988, s 1(3) – with specific reference to whether a valid application has been made and, if so, the ‘reasonable time’ for dealing with it</li> <li>• Discussion of waiver (with specific reference to the ‘automated’ payment of rent in the scenario)</li> <li>• Reasoned conclusions re the above points</li> </ul>	25

Question Number	Suggested points for responses	Max Marks
Q3	<p>An answer which breaks down the question into sections according to the issues presented by the scenario, accurately sets out the relevant law, and then engages in a reasoned application of that law to the given facts in order to arrive at practical and pragmatic advice.</p> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of status of tenancy (originally contractual and then periodic) as protected under RA 1977</li> <li>• Discussion of first succession by Noreen</li> <li>• Discussion of potential for a second succession (but only by way of an assured tenancy and only by way (in the circumstances) of a 'member of the family')</li> <li>• Discussion that relevant 'family' is not Oswald/Peter, but Marlon/Noreen/Peter, and seems no basis on which it can be argued that Peter was ever a member of Marlon's family</li> <li>• Discussion of possible application of the Protection from Eviction Act 1977 (on the basis that Peter occupied under a licence from a lawful occupier (Noreen (if competent) or Oswald), but should conclude that (per PEA 1977, s 1) Peter does not occupy "under a contract [with the landlord] or by virtue of any enactment or rule of law"</li> </ul> <p><b>Responses may include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of Oswald's rights of succession (but only if the conclusion is that they are not relevant because Oswald did not himself succeed and Peter cannot claim some sort of 'derivative' right based on whatever rights Oswald might have had if he had survived)</li> </ul>	25
Question Number	Suggested points for responses	Max Marks
Q4(a)	<p>An answer which breaks down the question into sections according to the issues presented by the scenario, accurately sets out the relevant law, and then engages in a reasoned application of that law to the given facts in order to arrive at practical and pragmatic advice.</p> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of formalities for creation of a legal or equitable lease and the consequences of the lease not being formally executed nor signed (with reference to (i) Law of Property (Miscellaneous Provisions) Act 1989, ss 1 and 2(1), and (ii) <u>Walsh v Lonsdale</u> (1882)</li> </ul>	18

	<ul style="list-style-type: none"> <li>• Discussion re likely periodic tenancy</li> <li>• Discussion of consequences in terms of exclusion from the 1954 Act</li> </ul> <p><b>Responses may include:</b></p> <ul style="list-style-type: none"> <li>• Discussion of tenancy at will, but only if ultimately rejecting it as a basis for occupation on the ground that the terms on which possession was originally taken are inconsistent with a tenancy at will (apparent fixed term, requirement for termination on notice, no extant negotiations for the grant of a lease (<u>Javad v Agil</u> (1991)))</li> <li>• Credit reasoned argument that there is an annual periodic tenancy which is protected by LTA 1954, and therefore (on the facts) the contractual notice to quit is necessarily ineffective</li> </ul>	
Q4(b)	<p>An answer which breaks down the question into sections according to the issues presented by the scenario, accurately sets out the relevant law, and then engages in a reasoned application of that law to the given facts in order to arrive at practical and pragmatic advice.</p> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Common law requirements for a notice to quit re a periodic tenancy</li> <li>• Effect of security of tenure under LTA 1954 and requirement for a valid notice under LTA 1954, s 25</li> <li>• Reasoned application of the law to the facts, with practical and pragmatic conclusions/advice</li> </ul>	7
<b>Total: 25 marks</b>		