LEVEL 6 - UNIT 10 – LANDLORD & TENANT
SUGGESTED ANSWERS – JANUARY 2017

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 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 students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

SECTION A

Question 1

The right of forfeiture is a landlord's right to terminate a lease early on account of a tenant's breach of the lease. The law 'leans against forfeiture': Duppa v Mayo (1669). At common law, a landlord's right to forfeit will never be implied; it must either be reserved expressly in the lease or it must arise as a result of a breach of a condition of the lease. The latter is rarely encountered, so in practice the landlord must first establish that the lease contains an express right to forfeit and must then prove that the event entitling the landlord to forfeit has occurred. Where there is any ambiguity as to the meaning of the words that have been used in the lease, these will be construed contra proferentem (ie in favour of the tenant): see Doe d Abdy v Stevens (1832).

It is then necessary to distinguish between a breach of covenant in relation to the payment of 'rent' and a breach of any other covenant.

As regards non-payment of rent, the common law requires that the landlord must have served a formal demand at the premises before sunset on the day on which the rent is due before initiating possession proceedings (unless half a year's rent is in arrears and there are insufficient chattels on the premises to enable the landlord to recover rent by distress, in which case formal demand is unnecessary and a 'writ of ejectment' may be served immediately): see Common Law Procedure Act 1852 (CLPA 1852), s 210. Relief from forfeiture is available to the tenant if all rent, arrears and costs are paid before the possession proceedings come to trial (see CLPA 1852, s 212). If a possession order is made, the landlord is entitled to mesne profits for the period from the date for which rent was last paid up to the date when possession is recovered (see CLPA 1852, s 214).

However, there is nothing to prevent the parties from waiving the need for a formal demand, and virtually all modern leases do in fact dispense with this requirement. In addition, there is nothing (other than the tenant's bargaining power) which prevents the landlord from defining a wide range of monetary payments which are or may be due from the tenant under the lease as 'rent', non-payment of which will therefore engage the right to forfeit. So, for example, contributions towards service charge and insurance, as well as sums owed by way of interest or as reimbursement of expenditure incurred by the landlord, are commonly defined as 'rent' along with the passing rent.

As regards the breach of any other covenant, statute has intervened so as to require the landlord to follow the procedure set out in the Law of Property Act 1925 (LPA 1925), s 146. The landlord must serve a written notice on the tenant specifying the breach of covenant which is said to have occurred. Not only must the landlord identify the relevant breach, but the landlord must then correctly characterise the breach as either 'remediable' or 'non-remediable'. LPA 1925 does not provide definitions or examples of either of these terms, but case law has established the proper characterisation of various common types of breach: see, for example, Saava and Another v Hussain (1996) (breach of covenant against alterations is remediable) and Scala House and District Property Company v Forbes (1974) (breach of covenant against assignment is non-remediable, although this was later questioned in Akici v Butlin Ltd (2005)). Where the breach is remediable, the landlord must then specify in the notice a reasonable period of time within which the tenant can remedy the breach in order to avoid the right to forfeit being exercised. Again, LPA 1925 does not define what is a 'reasonable time' and case law establishes that this is a fact-sensitive question (and so may vary from case to case). If the landlord (in the opinion of the court) either wrongly characterises a breach or specifies an insufficient period of time within which that breach can be remedied, then the landlord's s 146 notice will be invalid.

Even if the landlord follows the correct procedure, events subsequent to the breach may still defeat a right to forfeit.

First, there is the common law doctrine of waiver. This doctrine establishes that the right to forfeit will be lost where the landlord, with knowledge of the breach and his right to forfeit, nonetheless takes any step which, viewed objectively, appears to affirm the continued existence of the lease. This objective assessment means that the actual motive or intention of the particular landlord is irrelevant: see Central Estates (Belgravia) Ltd v Woolgar (No.2) (1972) (landlord fully intending not to accept rent and to assert right to forfeit, but nonetheless the right to forfeit was lost when payment of rent was accepted in error). In practice (as illustrated by Woolgar itself), landlords commonly fall foul of the waiver doctrine by accepting rent from the tenant after they have become aware of a breach of covenant; however a range of other positive steps will have the same effect (eg finalising a rent review or dealing with an application by the tenant for a consent which is required under the lease). The position is made even more difficult for landlords because the knowledge of their managing agents will be imputed to them: see Metropolitan Properties v Cordery (1979).

Secondly, tenants have a statutory right to apply for relief from forfeiture in relation to both remediable and non-remediable breaches. There is an automatic right to relief if the tenant pays the amount of any unpaid rent and the costs of the action at least 5 days before the hearing of the landlord's claim for

possession: County Courts Act 1984, s 138. This is rarely used. Of far greater assistance to tenants (and also those with derivative interests, such as mortgagees and sub tenants) is the discretionary right to relief which exists under LPA 1925, s 146(2) and s 146(4) in relation to any breach of covenant other than non-payment of rent. The court's discretion is very wide: generally, the court will grant relief if the tenant remedies the breach, or pays compensation (if compensation is an adequate remedy) in respect of an irremediable breach and the court is convinced that the tenant will perform its obligations under the lease for the remainder of the term.

Question 2(a)

Rent Act 1977 (RA 1977)

RA 1977 sets out two classes of 'case' for ordering possession of premises which are let on a tenancy which is protected by that Act; discretionary cases are set out in RA 1977, Sch 15, Part 1 and mandatory cases are set out in Part II of the same Schedule.

The discretionary cases (cases 1 to 10) include a number of breaches which are commonly committed by tenants, eg non-payment of rent or breach of some other obligation of the tenancy (case 1), conduct which is a nuisance or annoyance to adjoining occupiers (case 2) and unlawful assignment or subletting (case 6).

Under RA 1977, s 98(3) the court 'must' make an order for possession in favour of the landlord if any one or more of the mandatory cases (cases 11 to 20) is established. There is a limited power to postpone possession, but usually this will not be for more than 14 days unless the tenant can establish that the granting of possession may cause 'exceptional hardship', in which case the court may postpone the order for only slightly enlarged period of 6 weeks.

The mandatory cases for possession are not based on tenant default, but reflect a recognition that in certain circumstances a landlord ought to be entitled to insist on regaining possession notwithstanding the existence of the tenancy (eg where a former owner occupier wishes to return to what was previously their home (case 11) or where the landlord wishes to move into the property for their retirement (case 12)).

Each mandatory ground requires the landlord to have given prior written notice to the tenant (usually before the tenancy is granted) that the landlord might seek to recover possession on that ground at some point in the future. In relation to cases 11, 12, 19 and 20, the court can waive the notice requirement, but it will only do so if it is 'otherwise just and equitable to make a possession order'.

Housing Act 1988 (HA 1988)

HA 1988, Sch 2 sets out two classes of 'ground' for ordering possession of premises which are let on a tenancy which is protected by that Act: discretionary grounds are set out in Part II of Sch 2 and mandatory grounds are set out in Part I.

As with RA 1977, the majority of the discretionary grounds are related to tenant default (eg non-payment of rent (ground 10), persistent delay in paying rent (ground 11) and breach of some other obligation of the tenancy (which is made a distinct ground in its own right, namely ground 12). The availability of suitable alternative accommodation is also elevated to a discretionary ground in its own right (ground 9). Under HA 1988 there are two mandatory grounds which do not feature in RA 1977, namely: (i) where the landlord intends to carry out substantial development works (involving demolition or reconstruction (ground 6) and (ii) where there are significant rent arrears (ground 8).

In very large measure, therefore, the two Acts are identical in terms not only of the circumstances in which a landlord can claim possession but also the powers which are available to the court when dealing with such a claim. HA 1988 does, however, contain one noticeable change: ground 8 is the only mandatory ground which is based on tenant default, and appears to recognise that in such a situation the tenant's breach is so serious that the landlord ought to be entitled to insist on taking back possession without having to persuade the court of the reasonableness of his stance.

2(b)

Under RA 1977, s 98(1) the court 'may' (but is not obliged) to make an order for possession in favour of the landlord if it is 'reasonable to make such an order' and either: (i) suitable alternative accommodation will be available to the tenant when the possession order takes effect, or (ii) the landlord establishes one of the discretionary cases. The evidential burden lies with the landlord to show that it is reasonable to make a possession order. The court must take into account all relevant circumstances existing at the time of the hearing when evaluating the reasonableness of the order which is being sought. The tenant does not need to adduce evidence of specific hardship or prejudice: for example in Battlespring Ltd v Gates (1983), where the suitability of the alternative accommodation offered to the tenant was not in dispute, the fact that the tenant had a personal attachment to her current property (derived from over 35 years of uninterrupted occupation) and simply did not want to leave was a sufficient consideration to justify the refusal of a possession order. Provided that the court at first instance carries out a proper evaluation of the relevant circumstances when deciding the question of reasonableness, a landlord will face formidable difficulties in attempting to appeal a refusal of a possession order.

Under HA 1988, s 7(4) the court 'may' (but is not obliged) to make an order for possession in favour of the landlord if it 'considers it reasonable to do so'. HA 1988, s 9 gives the court wide powers to: (i) adjourn the proceedings; (ii) stay, suspend or postpone possession, and (iii) impose any conditions the court thinks fit. The overall ambit and effect of those powers is very similar to the position under RA 1977, s 98.

Question 3

Both the covenant for quiet enjoyment and the principle of non-derogation offer a limited measure of protection to tenants.

(a) Covenant for quiet enjoyment

A landlord's covenant for quiet enjoyment may be express or implied. Under common law, every lease (including an equitable lease: see Markham v Paget (1908)) contains an implied covenant for quiet enjoyment. However, it is usual for this implied covenant to be displaced by an express (and usually more restrictive) covenant on the part of the landlord.

There are three main elements to the covenant for quiet enjoyment. The first two comprise a covenant by the landlord as to his title and also a covenant to put the tenant in possession. These covenants are of limited value to the tenant: if possession is not granted the tenant may sue for breach, but they cease to be of any relevance once the tenant takes possession. Of greater value to the tenant is the third element of the covenant, namely a covenant by the landlord that the tenant will enjoy the property free from physical interruption. This covenant protects the tenant from interference with or interruption to his use and enjoyment of the premises not only by the landlord but also by anyone claiming under the landlord (for example, an employee, agent, licensee, tenant or assignee of the landlord). The covenant has the potential to provide significant protection to the tenant.

However, case law establishes that not every disturbance or disruption will be actionable. An action by the tenant can only be maintained if the disturbance suffered is 'substantial': see Browne v Flower (1911) (where substantial disturbance was regarded as disturbance 'so substantial or intolerable as to justify the tenant in leaving the demised premises'). As a result, disturbances which are of a temporary nature or which impact on the tenant's sensibilities (eg his sense of privacy) have been held not to be sufficiently substantial to justify an action for breach of the covenant. Moreover, the tenant cannot complain about activities on the part of the landlord or those who derive title under him where the tenant must have known at the date of grant that those activities would continue after the grant: see, for example, Southwark LBC v Mills (2001) (noise nuisance from adjoining flats not a breach of the covenant for quiet enjoyment because the landlord (and more particularly its tenants) were using the flats in the same way after the grant as they had been using them prior to the grant).

Many older authorities limited the principle to disturbances that have a physical origin. However, this view was not followed in McCall v Abelesz (1976), where Lord Denning stated that the issue is whether there has been some interference 'with the tenant's freedom of action in exercising his rights as a tenant'. This view was subsequently endorsed in Southwark LBC v Mills (2001) (noise capable of being a substantial interference). Similarly, older authorities tended to limit the ambit of the covenant to activities which took place on the demised premises. Again, however, more modern authorities have focussed on the impact on the tenant at the premises: see, for example, Owen v Gadd (1956) (landlord liable for damage to tenant's business caused by scaffolding erected outside the tenant's shop).

3(b)

Non-derogation from grant

The legal principle of non-derogation from grant embodies the rule of common honesty. If A agrees to confer a benefit on B, then A should not do anything which substantially deprives B of the enjoyment of the benefit. In the specific context of landlord and tenant, this means that every lease contains an implied covenant by the landlord not to do anything which is inconsistent with the purpose of the letting: see, for example, Aldin v Latimer Clark, Muirhead & Co. (1894) (landlord held to have derogated from his grant by obstructing the flow of air over land which he had let as a timber yard).

There are a number of limitations to the covenant. First, the tenant must establish that there was a clear and discernible purpose to the letting which was known to the landlord at the time of the grant. Secondly, the covenant only applies to activities on land which remains under the control of the landlord. Thirdly, the covenant does not extend to matters of mere comfort or convenience: see, for example, Kelly v Battershell (1949). Finally, it is possible to 'contract out' of the covenant by limiting the extent of the grant to the tenant; so, for example, the reservation of a right to build on the landlord's retained premises even though this may interfere with the air and light enjoyed by the demised premises may substantially limit the tenant's future use and enjoyment of the demised premises for the purpose for which they were granted, but the tenant has no grounds for complaint if the landlord carries out the permitted activity.

In summary, the implied covenant of quiet enjoyment and the principle of non-derogation from grant offer some protection to a tenant in his use and enjoyment of the demised premises. Both, however, have limitations which substantially restrict the degree of protection which is provided. If a tenant has significant concerns or requirements regarding his use of the premises throughout the term of the lease, then he would be well advised to ensure that the lease deals with those matters expressly.

Question 4

Part I of the Leasehold Reform (Housing and Urban Development) Act 1993 (LRHUDA 1993) enables long leaseholders of flats to acquire collectively (and compulsorily) the freehold reversion to the building in which their flats are located, along with any associated property and/or rights (see LRHUDA 1993, s 1(1), (3) and (7)). In so doing, they can also acquire any intermediate leasehold interests (see LRHUDA 1993, ss 1(2) and 2).

Although the above statement of principle is relatively straightforward, the language and operation of LRHUDA 1993 are markedly less so. For example, there are complicated provisions which deal with the following matters:

- the building must be a self-contained building or a self-contained part of a building (see LRHUDA 1993, s 3)

- the building must be being used for 'residential purposes' - which in certain cases may only be resolved by a measurement of the floor area of the entire building (see LRHUDA 1993, s 4)

- the person wishing to participate in the claim must be a 'qualifying tenant' (see LRHUDA 1993, s 5)

- there must be a sufficient number of qualifying tenants in the building and a sufficient number of them must want to participate in the enfranchisement (see LRHUDA 1993, ss 3(1) and 13(2)(b))

- the rights of those qualifying tenants who are not invited, or do not wish, to participate in the enfranchisement be dealt with

- a range of statutory exclusions which, where applicable, mean that the right of collective enfranchisement cannot be exercised

- the amount that will have to be paid for the acquisition of the freehold interest and, where applicable, any intervening leasehold interests (see LRHUDA 1993, s 32 and Sch 6))

- the arrangements in relation to existing maintenance and service contracts (if any) once the tenants have acquired the freehold

The qualifying tenants have to be canvassed to ascertain whether or not they wish to participate in the process of collective enfranchisement. This means that they have to be located (many qualifying tenants are not, and do not have to be, residents of the building), served, and then a sufficient number of them have to express a willingness to participate.

Once a sufficient number of qualifying tenants have come forward, they express their interest in acquiring the freehold by serving notice on the landlord (see LRHUDA 1993, s 13). The notice is a technical document, which requires the provision of information about the qualifying tenants who are participating in the acquisition, the interests that they wish to acquire, the other property and/or rights that they also wish to acquire, and the price that they are proposing to pay. These requirements mean that a considerable amount of preparation and investigation will have to be undertaken well before the notice is served. Consequently, the participating tenants will almost certainly need to engage the services of a lawyer and a valuer at a relatively early stage, and will need to make provision for payment of their costs.

A mistake in completing the notice may prove fatal to the claim. Although the service of an invalid notice does not debar the tenants from starting again with a correct notice, they will have to pay the landlord's costs of the earlier unsuccessful claim.

There are then a series of steps which must be taken in accordance with a statutory timetable for progressing the claim. Failure to meet a particular deadline may mean that the claim is deemed to have been withdrawn (see LRHUDA 1993, s 29). Again, the participating tenants will have to pay the landlord's costs of the unsuccessful claim.

The freehold (and any intervening leasehold interest) will be acquired by a 'nominee purchaser' (see generally LRHUDA 1993, ss 13 - 16). Whilst the nominee purchaser could be one or more of the participating tenants, this involves a level of personal liability in terms of costs and other obligations which is unlikely to be attractive and is not ordinarily to be recommended. Most

acquisitions will, therefore, be made by a nominee purchaser which is a limited company (usually limited by guarantee) in which each participating tenant has an interest. The company will need to be incorporated or acquired, and then it will need to appoint officers, engage auditors, file accounts and statutory returns, hold general meetings and communicate with its members (especially during the acquisition process). The company will also need to raise the funding required to buy out all the relevant interests in the building.

Not every freeholder plays his part in the statutory process. When he does not, or if he is absent or unknown (which is not as uncommon as might be supposed), the nominee purchaser will have to apply to the court or the appropriate tribunal in order to drive along the statutory process to a successful conclusion.

In light of all of the above, it is hardly surprising that many tenants consider the process of collective enfranchisement to be complicated, time-consuming and expensive. The process also requires a degree of co-operation and collective action from the tenants which they may be unwilling or unable to provide, especially if costs escalate beyond the levels initially envisaged.

SECTION B

Question 1

The tenancy relates to a dwelling and is for a period of less than 7 years (it is a monthly periodic tenancy). Landlord and Tenant Act 1985 (LTA 1985), ss 11 to 15 therefore impose an obligation on Hilary to keep in repair not only the structure of the flat but also the installations which provide the essential services. This would include the boiler: see LTA 1985, s 11(1)(c). The landlord's obligation to repair cannot be excluded or restricted by agreement: see LTA 1985, s 12(1) (a).

The statutory duty to repair follows common law principles. As a result, Hilary will only be liable for 'replacement of defective parts [and not] renewal or replacement of substantially the whole': see, for example, Lurcott v Wakeley & Wheeler (1911), per Buckley LJ and also McDougall v Easington DC (1989).

A landlord is only obliged to repair once notice of disrepair has been given. On the facts, it is clear that Hilary was given notice of disrepair by Donald.

The landlord's obligation to 'repair' is only engaged by a transition from a state of repair to a state of disrepair. Consequently, if a property has always been defective due to an inherent flaw in its design or construction, then this transition never occurs, and hence no duty to repair arises: see, for example, Quick v Taff Ely Borough Council (1986) and Post Office v Aquarius Properties Ltd (1987).

In addition to the repair obligations contained in LTA 1985, ss 11 to 15, there is also an implied condition that the dwelling is 'fit for human habitation': see LTA 1985, s 8 (but this only applies if the tenancy is at a very low rent).

These general principles must now be applied to the facts.

The first issue concerns the defective boiler. This is clearly an 'installation' to which the landlord's statutory duty of repair applies. Even if Hilary were minded to argue that: (i) there is an express term of the agreement that Donald would

be responsible for 'running repairs' and (ii) the replacement of a broken part within a boiler could be classed as a running repair, she cannot do so because such an agreement contravenes LTA 1985, s 12(1)(a). Given that Donald has paid the costs of a repair for which Hilary is liable, he is entitled to be reimbursed his expenditure. In the absence of any provision to the contrary (and we are not told of any such provision) he is entitled to claim reimbursement by way of set off against money which he is liable to pay to Hilary, which in this case is the rent. So Donald can deduct the cost of the repairs from his next rent payment.

However, Donald is seeking to go further and to claim damages for the period when the boiler was not working. Damages will only be recoverable if Hilary was in breach of an obligation to repair. As discussed above, Hilary could not be in breach until she was given notice of the disrepair, so any claim in relation to the period before Donald told Hilary about the defective boiler cannot be the subject of a claim by him. In relation to the period after notification, liability will turn on whether the time taken to carry out the repair was reasonable having regard to all the circumstances. Hilary's absence abroad is a factor, but not a significant one (as evidenced by the fact that she seemingly had no difficulty in engaging a local engineer to deal with the disrepair). Of far greater significance are the unavailability of the necessary spare part and the limited opportunity for the engineer to gain access to the flat due to Donald's unavailability. It seems likely that the court would conclude that both of these factors were beyond Hilary's control, and hence do not amount to an act or omission on her part which would constitute a breach of her repairing obligation.

The next issue relates to the damp and the condensation, for which Donald is also seeking to claim damages. Again, a claim in damages will require proof of breach. However, as discussed above, a landlord is not liable for an inherent defect or its consequences. Insofar as Donald's complaint appears to involve an allegation that the flat is not fit for human habitation, it may be that there is no legal basis for a claim under this covenant (this will depend on the amount of rent which Donald is paying). In the somewhat unlikely scenario that Donald is only paying a 'low rent' (so that the covenant under LTA 1985, s 8 is engaged), the fact that Donald appears willing to remain in the flat might tend to suggest that the condition of the flat is not as desperate as Donald is claiming it to be.

Question 2(a)

Part II of the Landlord and Tenant Act 1954 (LTA 1954) affords a number of statutory protections (commonly referred to collectively as 'security of tenure') to a tenant who occupies premises for the purposes of a business. Where a tenant is protected by LTA 1954:

(i) the tenant has a right to remain in occupation after the original contractual term of his existing tenancy has expired;

(ii) the tenant's right of occupation can only be terminated in accordance with the statutory procedures laid down by LTA 1954: see LTA 1954, ss 25 to 27; and

(iii) the tenant has a right to ask for a renewal tenancy once termination of the existing tenancy has occurred (with only limited grounds on which the landlord can object to such a request: see LTA 1954, s 30(1)).

As regards Yuri, he occupies the studio under a periodic tenancy. This is a species of tenancy to which LTA 1954 is capable of applying. The real issue here is whether Yuri occupies the studio for the purposes of a business. On the facts, there are two elements which require consideration. First, it is immaterial that Yuri does not yet appear to be particularly successful in his chosen career: the protection afforded by LTA 1954 extends to any 'trade, profession or employment' (see LTA 1954, s 23(2)) and does not depend on profitability: see Abernethie v A M Kleiman (1970) (Sunday school qualifying as business even though operating on a not-for-profit basis). Nor is it relevant that Yuri currently makes a living from a separate (albeit, in this case, related) activity: an actor does not cease to be an actor simply because he works as a waiter whilst he is 'resting'. Secondly, Yuri has latterly been sleeping at the studio. This has the potential to alter the character and nature of his occupation so that it ceases to be occupation 'for the purposes of a business'. The issue is whether the predominant purpose of Yuri's occupation remains use of the premises as a studio rather than as a dwelling; if so, he will remain a 'business tenant': see, for example, Cheryl Investments Ltd v Saldanha (1978). On the facts, it seems that Yuri's residence at the studio is a matter of temporary expedience and so does not constitute a change in the predominant character of the use and occupation of the premises. For present purposes, therefore, Xander should be advised that it is a strong possibility that Yuri's tenancy is protected by LTA 1954 and he should proceed accordingly.

As regards Zak, he too is clearly a tenant in relation to the café. The fact that the amount of rent which he pays is variable according to the level of his business turnover has no bearing on that conclusion. Although the original fixed term of the lease to Zak was below the threshold for protection under LTA 1954, the existence of the right to extend the term for a further 6 months (regardless of whether or not Zak actually chose to exercise it) means that the tenancy fell within the scope of the Act from the outset (see LTA 1954, s 43(3)(a)). Zak clearly carries on a trade from the premises and so he too enjoys security of tenure.

2(b)

Given that both tenancies are to be regarded as being protected under LTA 1954, Xander will only be entitled to terminate each of them by serving notice under LTA 1954, s 25. The notice must be in the prescribed form and must be served on the tenant in accordance with one or more of the permitted methods set out in LTA 1954, s 66 (which adopts the methods of service permitted by Landlord and Tenant Act 1927, s 23).

Each s 25 notice must specify a termination date (which cannot be earlier than the date on which the tenancy would otherwise have come to an end or could have been lawfully terminated by the landlord). Xander will need to take care to ensure that he specifies the correct termination date in each case, because there are different rules as regards a periodic tenancy (Yuri) and a fixed-term tenancy (Zak). The notice must be served not less than 6 months, nor more than 12 months, before the termination date specified in it. In the case of Yuri, the s 25 notice is capable of also serving as a common law notice to quit which will bring Yuri's contractual periodic tenancy to an end.

Each notice must specify whether or not Xander will oppose the grant of a renewal tenancy and must identify the ground on which any opposition by him will be based. This is discussed in more detail below.

2(c)

Xander will only be able to gain vacant possession of the studio and the café if he succeeds in establishing one of the grounds of opposition in LTA 1954, s 30(1). On the facts, ground (f) would appear to be available in relation to both Yuri and Zak.

Ground (f) applies where the landlord intends to carry out works of demolition, reconstruction or substantial construction and cannot do so without regaining possession of the holding. This is a mandatory ground for refusing a renewal tenancy. The proposed conversion works would appear to qualify. Although it does not appear that Xander intends to carry out the works, the necessary intention only needs to be demonstrated at trial and not before: Betty's Cafés v Phillips Furniture Stores (1958). Consequently, it will not matter if the works are actually carried out by Foodmart provided that it is the competent landlord by the date of the hearing (Marks v British Waterways Board (1963)). Xander could therefore sell the property to Foodmart subject to the leases, and any proceedings instituted by him before that sale could be transferred into the name of Foodmart. Otherwise, if time permits, the property can be sold to Foodmart and it can then serve the s.25 notices.

In addition, ground (b) would also appear to be available to Xander in relation to Zak. Although Zak claims that he has made no profit in recent months (so as to justify his non-payment of rent), the lack of profitability is of no relevance. His obligation to pay rent is based on turnover, not profit. He has, therefore, wrongly refused to pay rent. This would entitle Xander to oppose the grant of a new tenancy to Zak on ground (b) within LTA 1954, s 30(1), ie 'that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due'.

This, however, is a discretionary ground, so there is no certainty that Xander would succeed in his opposition to the grant of a renewal tenancy. Xander may, therefore, have to consider the need to negotiate a surrender with Zak if he wants to be sure of gaining vacant possession of the café: nothing in LTA 1954 prevents a business tenant from voluntarily surrendering their tenancy if they wish to do so (see LTA 1954, s 24(2)).

Question 3

The lease to Ready Meal contains a qualified covenant against assignment. That covenant is to be read as if it contained a proviso that the landlord's consent will not be 'unreasonably withheld': this is the effect of Landlord and Tenant Act 1927 (LTA 1927), s 19(1).

The reasonableness of the landlord's response falls to be determined in accordance with the six guidelines expounded in International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd (1986). At the heart of these guidelines is the principle that the landlord's decision must be directly related to the relationship of landlord and tenant in regard to the subject matter of the lease,

As a result, the landlord cannot use the opportunity of its consent being required in order to extract a collateral advantage for itself from the tenant.

The operation of LTA 1927, s 19(1) has been significantly modified by the Landlord and Tenant Act 1988 (LTA 1988). First, the burden of proof is now on the landlord to show that its consent has been reasonably withheld: see Norwich v Shopmoor (1997). Secondly, the landlord must deal with a written application for consent to assign within a reasonable time: what constitutes a 'reasonable time' will always depend on the circumstances of the particular case, but in simple cases it is likely to be measured in terms of weeks rather than months (see NCR Limited v Riverland Portfolio No 1 Limited (2004)). Thirdly, the landlord must give written reasons for a refusal of consent or the giving of consent subject to conditions. Fourthly, those reasons must be reasonable. A landlord who is in breach of any of these duties (which are imposed by LTA 1988, s 1) may be liable to the tenant in damages (see LTA 1988, s 4).

Applying these principles to the facts, it is clear that A2Z took in the region of three months to respond to Ready Meal's request for consent to assign. Assuming that Ready Meal's request was made in writing, A2Z's statutory obligation was to give its decision within a reasonable time. A2Z's explanation for the delay is the illness of its managing director. It will be for A2Z to demonstrate that the managing director was the only person capable of making the decision on Ready Meal's application. If other aspects of A2Z's business were managed effectively despite the managing director's illness, it may be difficult for A2Z to discharge the burden of proof which is upon it in relation to this issue.

In addition, A2Z has attempted to force a break clause onto Ready Meal and/or the proposed assignee as a condition of giving its consent to the proposed assignment. The supposed reason for doing so (namely 'good estate management') is unconvincing. Whilst it would no doubt be advantageous to A2Z to be able to secure vacant possession of both units on the same date if it suited A2Z's commercial interests to do so, the existence of a break right is not essential to the existing landlord and tenant relationship which is the subject matter of the lease. The demand for a break right seems to be unreasonable, and hence also therefore appears to constitute an attempt by A2Z to obtain a collateral advantage.

It would have been open to A2Z to object to the assignment if it did not consider the Ganges to be a suitable tenant. On the facts, there would seem to be grounds on which a reasonable landlord might genuinely be concerned as to whether Ganges would be able to meet its financial and other obligations under the lease. It seems as if A2Z would have been justified in asking for further evidence as to Ganges' financial position (eg asking for audited and/or management accounts) and considering whether or not to make any consent to an assignment conditional on the provision of security by Ganges (eg a rent deposit or guarantees). However, A2Z appears not to have made any enquiries in this regard before reaching its decision and communicating it to Ready Meal. Given that its decision was not based on any such considerations, it would not now be open to A2Z to attempt to justify a refusal of consent on what would now amount to new grounds which were not communicated in writing to Ready Meal t: see Footwear Corporation v Amplight Properties (1998).

In light of the above, it is submitted that A2Z has unreasonably withheld its consent to the proposed assignment. Consequently, Ready Meal would be within

its legal rights to assign the lease without A2Z's consent. In addition, if Ready Meal has suffered financial loss or expense as a result of A2Z's breach of statutory duty, it will be entitled to be recompensed in damages. However, there does not currently appear to be any evidence of such loss or expense.

Question 4(a)

The issue that falls to be determined here is whether Matt and Charlie currently occupy the house under a lease or a licence. A lease confers proprietary rights on an occupier, whereas an occupier under a licence enjoys only contractual rights. Both statute and, to a lesser degree, the common law afford greater protection to tenants than to licensees.

At common law, there are three elements which must be satisfied if an occupational arrangement is to constitute a lease: exclusive possession, fixed and ascertainable duration and a term which is at least one day shorter than the duration of the grantor's estate. Of these, by far the most important is exclusive possession, which has been described as the 'touchstone' of a tenancy (Street v Mountford (1985). Exclusive possession entitles the tenant to exclude the entire world, including the landlord, from the property for the duration of the term.

Although it is often said that a lease must be reserved 'at a rent', there is in fact no requirement in law for a rent to be payable.

Applying these principles to the facts, it is certainly arguable that, at its outset, the agreement between the parties was, or is to be objectively construed as, a lease. There appears to be a fixed or ascertainable period of occupation (namely the duration of the University course on which all three friends were enrolled) and there also appears to be exclusive possession. Although the provisions inserted by Jeff for his protection might ordinarily be effective to defeat an argument that exclusive possession was granted, it seems clear that none of the parties believed that these provisions served any genuine purpose. Matt and Charlie could be expected to argue that: (i) those provisions were, therefore, simply a device designed to give the appearance of a licence; and (ii) given that in this arena the court looks at substance rather than form (Street v Mountford), the only proper conclusion is that the arrangement should be treated as a lease. As stated above, the absence of rent does not affect this conclusion.

However, it is submitted that the agreement between the parties is, in fact, more correctly to be characterised as a gratuitous licence. The common law has long recognised that even if the three elements for categorising an arrangement as a lease are present, they may be disregarded in exceptional circumstances. One of those circumstances is where there is no intention to create legal relations: see Facchini v Bryson (1952). A licence confers a contractual right of occupation, ie it grants permission to a licensee to use the licensor's land for a purpose which, without the permission, would be an act of trespass. However, it does not confer 'possession'.

The argument that Matt and Charlie have a 'mere' gratuitous licence is based on the following factors. First, they have not been paying rent and do not appear to have been providing any other consideration for their right of occupation. Secondly, Jeff has known Matt and Charlie (no doubt as a result of their friendship with Paul) for many years, and the original arrangement under the three boys were to be provided with the house appears to have been intended as

a 'favour' to all three of them on Jeff's part – this suggests a personal rather than a proprietary arrangement. Thirdly, there does not seem to have been any intention that Matt and Charlie should have a right of occupation which was independent of Paul's occupation, which again emphasises the personal rather than proprietary nature of the arrangement. Fourthly, a written agreement only came into existence in the first place because of the need to satisfy the terms of the bursary; in that sense the element of 'sham' in this case is not to be found in the provisions which try to say that the arrangement is a licence rather than a lease, but rather in the existence of any formal agreement at all in relation to that arrangement. Insofar as the existence of the written agreement represents an attempt to defraud the charity and/or to obtain the bursary by deception, this is not something on which Matt and Charlie could rely to argue that the arrangement is not, as between themselves and Jeff, to be treated as a licence.

4(b)

If Matt and Charlie went into occupation as tenants, then they did so under an assured shorthold tenancy (see the Housing Act 1988 (HA 1998), as amended). The fixed term of the tenancy (as discussed above) would appear to have expired, and so the tenancy has been converted into a periodic tenancy under HA 1988, s 5.

Such a tenancy can only be terminated by service of a notice under HA 1988. Although Jeff could invoke one of the grounds for possession set out in Sch 2 to HA 1988 (ground 14 would appear to be available), he would be better advised to invoke the 'summary procedure' provided by HA 1988, s 21 (under which the court must make a possession order if the landlord has given two months' written notice that he requires possession of the property). Jeff should serve such a notice as soon as possible.

If Matt and Charlie are simply licencees, Jeff can terminate that licence simply by serving notice of termination on them. Since no notice period appears to have been specified, the requirement at common law is that any notice must give Matt and Charlie a "reasonable time" to leave. It is suggested that one month would be adequate. In any event, Protection from Eviction Act 1977 (PEA 1977), s 5 requires a minimum notice period of 4 weeks.

4(c)

Jeff should be advised not to proceed with his proposed eviction of Matt and Charlie.

PEA 1977, s 1(2), 1(3) and 1(3A) afford protection to 'residential occupiers' of premises, which Matt and Charlie clearly are. A residential occupier is not to be harassed whilst in occupation of the premises with a view to causing him or her to leave, nor is he or she they to be evicted from the premises unless the landlord is justified in believing that the occupier has abandoned the premises or unless the court has made an order for possession (see PEA 1977, s 3). Breach of any of the provisions of s 1 is a criminal offence.

Any unlawful eviction would also render Jeff potentially liable to pay damages to Matt and Charlie under HA 1988, ss 27 and 28.