LEVEL 6 - UNIT 9 – LAND LAW
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

Under s205 (1) (ix) Law of Property Act (LPA)1925 land is defined as including all corporeal and incorporeal hereditaments.

Incorporeal hereditaments are intangible rights over the land of another, which benefit the land of the original right holder to which they are attached, for example, easements and restrictive covenants. The transmission of the benefit of such rights to a new purchaser will be implied into the conveyance of the estate unless there are words expressing the contrary (s62 LPA 1925).

Corporeal hereditaments are tangible, physical things that can be seen or touched. The maxim *Quicquid plantatur solo, solo cedit*, meaning whatever is attached to the ground becomes a part of it finds support in s62 (1) & (2) LPA 1925. s62 states unless there is a contrary intention, a conveyance of land includes all buildings, other structures which may have been erected on the land and all fixtures attached to the land.

Thus, a fixture is considered to be part of the land and title to it vests in whoever owns the freehold land, whereas a fitting is considered to be a chattel, which does not form part of the freehold property and is, therefore, separate from the land.

The practical importance of the need for the law to be able to distinguish adequately between fixtures and fittings is in part due to the fact that once a contract for the sale of land has been completed the seller is unable to remove any fixtures.

In determining what amounts to a fixture, the courts now use two separate but related tests: the degree of annexation and the purpose of annexation. The

courts frequently use both tests to reach a conclusion as to whether an object is a fixture or fitting.

In Holland v Hodgson (1872) Blackburn J stated, 'If an object is attached to the land other than by its own weight it is generally [held] to be a fixture.' In this case spinning looms bolted to the floor of a mill were held to be fixtures and thus a part of the land.

In contrast, in Hulme v Brigham (1943) heavy printing presses that did not need to be attached to the floor, as they weighed several tons and were fixed in place by their own weight, were held not to be fixtures, as they had not been physically bolted down or attached in any way. Furthermore, fitted and integrated kitchen appliances that remained in position by their own weight have also been held not to be a fixture: Botham v TSB Bank (1997).

The degree of attachment test alone cannot be conclusive. If it were, fixed items such as pictures and curtains would necessarily be part of the land. The purpose of annexation assists in the determination of such items by sensibly questioning the reasoning behind the attachment.

The courts, when applying the second test, are uninterested in the subjective intentions of the person who put the object there but with the objective external circumstances of the case. The purpose of annexation test assesses whether the object was attached for its own benefit, that is without such attachment it could not be fixed in place, in which case it is likely to remain a fitting. Alternatively, if it was primarily attached for the benefit of the land, it may well be regarded as a fixture.

Thus similar objects can be determined either way, which can cause uncertainty. Two such cases are Vaudeville Electric Cinema LTD v Muriset (1923) and City & Midland Bank (1903). In both cases, chairs were attached to the floor of the building, but in the first case they were held to be fixtures and for the permanent benefit of the building, whilst in the latter they were merely temporary and thus held to be fittings.

In Leigh v Taylor (1902) the House of Lords sensibly held that tapestries nailed to a frame which itself was nailed to the wall of the property were fittings and did not become part of the freehold. The court objectively determined that the common purpose of hanging a picture, painting or tapestry was for the appreciation of the object itself and not to benefit the house as a whole (contrast Re Whaley (1908)).

However, in the earlier case of D'Eyncourt v Gregory (1866) marble statues of lions, figures, vases and garden seats in a garden were held to be fixtures, regardless of any attachment as they were part of the architectural scheme of the grounds of the land. Fortunately, the law seems to have progressed since D'Eyncourt in recognising that an 'architectural scheme of décor' is not as relevant in modern times as it once was (see Berkley v Poulett (1976) and Re Whaley (1908)).

In addition to the above two tests the Court of Appeal in Botham v TSB Bank (1997) made it clear that the permanence of the attachment is also a relevant consideration. How long the object is likely to be attached to the land is a quite separate issue from the degree of attachment. For example, in that case, the carpets and curtains were not capable of becoming fixtures, due to their temporary attachment and lack of permanent improvement to the building.

Moreover, the House of Lords in Elitestone v Morris (1997) although applying both tests appeared to take a more pragmatic and logical approach to determining into which category a bungalow, resting on concrete blocks, fell. If it were established as a fitting, the tenant would not have received protection from eviction, and the threatened demolition of his home, under the Rent Act 1977. The House held that since it formed part of the land, it was a fixture.

In conclusion, neither test is wholly satisfactory, especially since there is a large degree of overlap between the two. This can create uncertainty for purchasers of land who may be in dispute with the previous owner concerning whether a chattel is or is not part of the land. However, at least the law appears to be giving primary importance to the more logical test of looking at the purpose and permanence of the chattel, rather than focusing on an inherently uncertain test based on 'degree'. Nevertheless, as recent case law shows much still depends on the particular circumstances of each case.

Question 2

Proprietary estoppel is an equitable device which can create proprietary interests and estates over land based on informal promises. Importantly, the doctrine may be used both as a 'shield and a sword' in order to estop the legal owner from relying on his/her strict legal rights (Crabb v Arun DC (1976)).

Traditionally, the doctrine had strict requirements. The claimant had a heavy burden in meeting the five probandi derived from Wilmott v Barber (1880):

(i) the claimant made a mistake as to his/her legal rights;

(ii) the claimant expended money or did some act on the faith of that mistaken belief;

(iii) the defendant was aware of the true position;

(iv) the defendant was aware of the claimant's mistake; and

(v) the defendant encouraged the claimant in making the expenditure of money or acts of reliance.

Modern case law has moved away from the Wilmott probandi and favours a more flexible approach, seemingly making it easier for informal promises relating to land to be upheld. The doctrine requires an assurance or representation (express or implied) made by the legal owner to another who has relied upon it to his/her detriment. (Thorner v Major (2009))

Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A) requires contracts which either transfer or create an estate or interest in land to be made in writing, signed by the parties (or on their behalf) and incorporate all the express terms. Clearly such informal agreements arising under the doctrine of proprietary estoppel do not comply with these requirements.

It should be noted that such a conflict was not in issue prior to the 1989 Act, as the section then in force permitted interests in land to be created by oral agreements if evidenced by part performance (such part performance was recognised by equity as a detrimental act): s40 (LPA 1925)

Importantly, 'implied, resulting and constructive trusts' are exempt from the formality requirements: 2(5) (LP(MP)A) (other exemptions include certain short leases and contracts made at auction).

Particular difficulties have obviously arisen in justifying a doctrine which appears to flatly contradict s2(LP(MP)A). This is especially so, where the agreement is based on a commercial arrangement between the parties, as opposed to family arrangements where the parties are less astute to the legalities required to make and enforce contracts concerning land (see Lord Scott's comments in Yeoman's Row v Cobb (2008)). This has led the courts to consider the relationship between proprietary estoppel and s2, and the relationship between proprietary estoppel and constructive trusts (s2(5) exemption). However, the courts have not spoken with one voice.

In Godden v Merthyr Tydfil Housing Association (1997), Mr. Godden unsuccessfully attempted to plead that the defendant was estopped from using s2 (LP(MP)A). The defendant wanted to deny the validity of their informal oral agreement for a right of way. The Court of Appeal stated, 'it is a cardinal rule that the doctrine of estoppel may not be invoked to render valid a transaction which the legislature has enacted to be invalid.'

However, in contrast, Robert LJ in the Court of Appeal in Yaxley v Gotts (2000) held that he had 'no hesitation in agreeing…that the doctrine of estoppel may operate to modify (and sometimes perhaps even counteract) the effect of s2 of the 1989 Act.' The claimant appealed against the decision that an oral agreement, concerning a promise to grant the defendant an interest in land, was valid under the doctrine of proprietary estoppel. The court dismissed the appeal, the pleading of an estoppel was held successful, as it gave rise to a constructive trust, and therefore was exempt from formality by s2(5).

The effect of resorting to a constructive trust and treating the claims as overlapping or synonymous has meant that a party can avoid complying with s2 formalities in controversial situations, such as mortgages (Kinane v Mackie-Conteh (2005)).

In Yeoman's Row v Cobbe the House of Lords considered an oral agreement for the sale of land. The agreement had been withdrawn after Cobbe had carried out extensive, costly investigations and had acquired planning permission. The court held that since the agreement had not been completed, there was no basis for either proprietary estoppel or a constructive trust. Significantly, Lord Scott considered the question whether a completed agreement in non-compliance with s2 (1989 Act) would be specifically enforceable via the route of proprietary estoppel. His, obiter, view was '…proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void…Equity can surely not contradict the statute.'

Post Cobbe courts are reticent in allowing equitable concepts to be used to avoid formality requirements, and a mere plea of estoppel should not automatically give rise to a constructive trust so that s2(5) can be pointed to as a way round s2.

In Thorner v Major (2009) the House of Lords distinguished Cobbe on the basis of the commercial nature of the transaction. In the 'classic farm and family' proprietary estoppel case there is no 'contractual connection'. Therefore, no issue concerning the avoidance of s2 (LP(MP)A); the question of an unenforceable contract simply cannot arise. In Thorner, the claimant worked on his father's cousin's farm for no pay on the expectation of receiving it on his death, as such a claim for proprietary estoppel was found valid.

Despite the Lords' decisions subsequent courts have continued to permit the claim of estoppel to succeed in commercial transactions that do not comply with

the formalities (see, for instance, Herbert v Doyle (2010) and Whittaker v Kinnear (2011)).

In conclusion, there is a diverse range of judicial opinion and conflicting case law decisions which have significantly contributed to uncertainty in the role in which proprietary estoppel can play in avoiding the formality requirements in s2 LP(MP)A 1989. Although the House of Lords' has attempted to restrict the circumstances, particularly concerning informal business agreements, it has by no means resolved the issue. Unless and until there is a definitive explicit statement from the Supreme Court, such avoidance will continue in use; non-legal owners will be able to assert beneficial interests in another's land despite their being no valid contract or conveyance.

Question 3(a)

A freehold covenant is a promise made in a contract between fee simple owners that restricts or regulates the way in which freehold land may be used. The agreement binds the original parties under the privity of contract rule.

The benefit of a freehold covenant can pass to a successor in title at common law or in equity if at the time of creation the covenant 'touches and concerns' the benefited land. The general guidelines are that the covenant must not be expressed as personal, and it must enhance the nature, quality, mode, or the value of the land (P&A Swift Investments v Combined English Stores Group (1989), Smith & Snipes Hall Farm Ltd v River Douglas Catchment Board (1949)). If the covenant 'touches and concerns' the land, there are further different and overlapping rules in equity and law.

At law, both the covenantee, the original party to the covenant, and his successor in title must hold a legal estate in the benefited land. (Webb v Russell (1789). However, the successor in title's estate need not be the same as the covenantee's, so long as his title is derived therefrom (s78 LPA 1925 (Smith & Snipes Hall Farm Ltd). Lastly, the covenantee and the covenantor must have intended the covenant to run with the benefited land (annexation). This can be evidenced expressly in by implication under s.78(1) Law of Property Act 1925 (see below).

In equity, the successor in title must own some estate in land, but this does not have to be a legal estate. Similar to common law, the covenant must be annexed.

For express annexation, the rules in equity are stricter than those at law. Essentially the words in the covenant must not be merely personal to future owners but must refer to passing to the benefited land of future owners (compare Renals v Cowlishaw (1878) with Rogers v Hosegood (1900)). If the benefit is expressly annexed it will be attached to 'every part of the land, unless a contrary intention is shown' (compare Re Ballard's Conveyance (1937) and Wrotham Park Estate Co Ltd v Parkside Homes (1974), Federated Homes Ltd v Mill Lodge Properties Ltd (1980)).

Implied annexation is exceedingly rare, provides uncertainty and ought not to be relied upon (Marten v Flight Refuelling Ltd (1962).

Statutory annexation occurs under s78 LPA 1925 as it does at law, and applies to all covenants created after 1925. Federated Homes has simplified this method. A covenant that touches and concerns benefited land will automatically pass, so long as the benefited land is clearly identified in the covenant (Crest Nicholson

Residential (South) Limited v McAllister (2004) CA), and s78 has not been expressly excluded (Roake v Chaddha (1984)).

The benefit can also pass to a successor in title if the covenant has been assigned to him personally i.e. not by annexation to the land (Miles v Easter (1933). However, the benefit is lost if the chain is broken.

Thus, under limited circumstances, the benefit of a freehold covenant can run at law or in equity to successors in title, but the different rules are unnecessarily complicated.

3(b)

In Equity only burdens of restrictive covenants can run with the land to successors in title (Tulk v Moxhay 1848). Restrictive covenants are ones that usually require the burdened owner to expend money. The requirements that must be met were laid down in Tulk. There must be benefited and burdened land, and the burden must 'touch and concern' the benefited land (see P& A Swift Investments, as above). The covenantee must also own benefited land (London CC v Allen (1914). The original parties must have intended the burden to run with the land and not be merely personal to the covenantor (Tulk). Although originally the intention must have been expressed, since 1926 the intention can be presumed under s.79 LPA 1925 unless words in the covenant indicate a contrary intention. Lastly, the successor must have had notice of the restrictive covenant burdening the land. In general, this means that it must have been registered either as a Class D (ii) land charge (LCA 1972) if the land is unregistered or if registered by a notice entered on the charges register of the burdened land (s29, 33 LRA 2002).

At law, the burden of covenants, positive and negative, will not run with the land (Austerberry v Oldham Corporation (1885), affirmed in Rhone v Stephens (1994)). The result is that positive covenants cannot generally be enforced in English law. This has created significant problems for freeholders of land; therefore, exceptions exist that provide an indirect method of passing the burden to a successor in title, ensuring ways of enforcement.

Under the principle in Halsall v Brizell (1957) where the covenant relates to a 'mutual burden and benefit' a successor in title will not be able to take the benefit without the corresponding burden. For example, in Halsall the use of a private road and drains was on condition of a financial contribution to its maintenance.

In Thamesmead Town v Allotoy (1998) the Court of Appeal affirmed that the burden must directly relate to the benefit taken; there must be a sufficient nexus between the two. However, the limitation is that the successor in title can reject the burden, as long as he does not take the benefit (Halsall and Allotoy).

Another method, based entirely on contract law, is where a chain of indemnity is taken by each successor in title of the burdened land. Although the original covenantor remains liable for any breach of covenant, he seeks an indemnity (reimbursement) from his successor, who in turn seeks an indemnity from his successor.

The weakness is that the last successor in title can only sue the covenantor for damages; an injunction or specific performance is unavailable as the covenantor is no longer the owner of the land. Moreover, the chain is easily broken if a successor dies, is insolvent or cannot be ascertained.

Another method is if the covenantor grants a long lease, for instance 999 years, to the successor in title. However, this can be costly and is only enforceable by the landlord.

The burden may also pass in a very unwieldy and limited fashion by the creation of an estate rentcharge attached with a right of re-entry.

As recognised by the Law Commission in 2011 (Report no 327) the rules governing the transmission of burdens (and benefits) of freehold covenants are strict, archaic and unnecessarily complicated. If its recommendations are enacted, all freehold covenants will take effect as land obligations and will bind successors in title as registered interests on both the burdened and benefited land. This would obviate the need for the exceptions and provide greater clarity and certainty.

Question 4

'A mortgage is a transaction under which land or chattels are given as security for the payment of a debt or the discharge of some other obligation'. (Santley v Wilde (1899)) Since 1926, a legal mortgage may be created either by the execution of a deed of a term of years or by the most commonly used method of the execution of a 'charge by deed' (s85(1) and 87 LPA 1925). Essentially, a mortgage grants the mortgagee a proprietary legal interest in the mortgagor's land until the mortgage is repaid.

Under contract law, the mortgagor has the contractual right to redeem the mortgage on the date stated in the mortgage contract; this is known as the 'legal date of redemption'. However, this afforded the mortgagor little protection, since if he failed to repay the loan on the stipulated date, the mortgagee was entitled to keep the mortgagor's land. Equity recognised the hardship this caused and as a result introduced the concept of the equitable right of redemption, under which the mortgagor has a right to redeem his land once he has paid the total sums due under the mortgage, even though the 'legal date' for redemption had passed.

In fact, the equitable right to redeem is just one part of the armoury a mortgagor has under the equity of redemption, which recognises the whole of the mortgagor's rights in the legal estate in the property beyond that of the total sum of the mortgage owed to the mortgagee. This protection for the mortgagor is demonstrated in various ways.

Firstly, as a mortgage cannot be made irredeemable (Cheah v Equiticorp Finance Group Ltd (1992)), any term that purports to limit or unduly postpones the right to redeem, will be viewed cautiously by the courts. It will look very carefully at the agreement, the bargaining power of the respective parties, and the circumstances surrounding the mortgage.

For example, the term might try to prevent redemption altogether, or state that only a certain person is allowed to redeem the mortgage, or impose a condition that the mortgage is not allowed to be redeemed for a very long time. However, if two equal parties freely entered into the agreement, the court will not always interfere. In Fairclough v Swan Brewery Co Ltd (1912) the right to redeem was postponed until six weeks before the end of a lease and the court held it void as it rendered the right to redeem 'illusory' as there was no property worth redeeming. By contrast, in Knightsbridge Estates v Byrne (1939) postponement of 40 years on a freehold property was upheld as valid since the reciprocal arrangement was entered into freely by two businesses.

Secondly, the courts are cautious regarding terms that may act as a clog or fetter on the right to redeem. The enduring principle, as stated by Harman LJ, is 'once a mortgage, always a mortgage and nothing but a mortgage' in Grangeside Properties Ltd v Collingwood Securities Ltd (1964) (see also Seton v Slade (1802)). For example, a mortgagor may be protected where a term in the mortgage grants the mortgagee an option to purchase. If the term is regarded as unconscionable due to the fact of unequal bargaining power, it can be declared void (Samuel v Jarrah Timber & Wood Paving Corporation Ltd (1904), Jones v Morgan (2001)). However, if the option is granted separately and independently after the mortgage, it can be validly regarded as not part of the mortgage contract and not interfering with the mortgagor's rights (Reeves v Lisle (1902)).

Thirdly, Equity has also protected the mortgagor by prohibiting any attempt by the mortgagee to stipulate unfairly for any 'collateral advantage'. The basis is that the mortgagee's entitlement ends on the return of the loan together with interest and costs and any attempt to obtain an additional obligation from the mortgagor is naturally ambiguous. Once the mortgagor has paid back the full amount, he must not be burdened by any further conditional terms (Bradley v Carritt (1903)). In Jones v Morgan (2001) the Court of Appeal declined to uphold a term that the mortgagor would transfer to the mortgagee a one-half share in the mortgaged land. The term was added to the mortgage, three years after the mortgage was created.

It has been held in Noakes v Rice (1902) that only a collateral advantage that does not exist beyond the equitable redemption date is valid as the mortgagor is entitled to have his land unencumbered after he has redeemed the mortgage. However, it seems that if there is a commercial mortgage made between parties of equal bargaining power so long as the collateral term is not unfair or unconscionable there is no reason why the collateral advantage cannot exist beyond the equitable date of redemption. This was the decision of the House of Lords in Kreglinger v New Patagonia Meat & Cold Storage Co Ltd (1914) where the term that granted the mortgagee a pre-emption for a period of 5 years was upheld, even though the mortgagor had redeemed the mortgage in the third year. Terms in a commercial mortgage which unfairly place a restraint on the mortgagor's trade (solus ties) will generally be invalid. Such a term is regarded as repugnant to the mortgagor's equity to redeem, if it purports to remain in force after the redemption of the mortgage (Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd (1968).

Fourthly, the court will strike down any unconscionable or oppressive terms (Knightsbridge Estates). For example, a mortgagee who imposed a high rate of interest has been held to be 'taking advantage of [the] vulnerability' of a mortgagor (Cityland & Property (Holdings) Ltd. v Dabrah (1968)). However, the term may be upheld as not being contrary to the public policy of protecting the mortgagor, if it is merely unfair or unreasonable. Particularly, if the parties are of equal bargaining power, and the mortgagor has received independent advice, as was the case in Multiservice Bookbinding Ltd v Marden (1979) (see also Jones).

It has been shown that although the mortgagor is protected under the equitable doctrine of redemption, the courts are increasingly astute to not extending its operation into commercial transactions where the parties freely enter into the arrangement, are of equal bargaining power and deal with each other at arm's length.

SECTION B

Question 1(a)

Easements are proprietary rights that attach to land which allow a landowner to do something on someone else's land, excluding a right to possession. To be capable of amounting to an easement each right must satisfy the four characteristics set out by the Court of Appeal in Re Ellenborough Park (1956):

i) there must be a dominant and a servient tenement,
ii) the dominant and servient tenements must not be owned or occupied by the same person,
iii) the right must accommodate the dominant tenement, and
iv) the right must be capable of forming the subject matter of a grant.

The first two characteristics can clearly be satisfied. Tulip Cottage is the dominant tenement of the right to park. Kempston Manor House is the servient tenement. However, the reverse is true of the right of way; Kempston Manor House is the dominant tenement, and Tulip Cottage is the servient tenement. Different persons have occupied both tenements since 2009.

A right accommodates if there is reasonable geographical proximity between the tenements, and the primary use of the right benefits the dominant land, not merely the personal individual owner. An example is Hill v Tupper (1863) where the right to put pleasure boats on a canal for profit did not accommodate the land itself, merely the dominant owner's business (contrast Moody v Steggles (1873), Platt v Crouch (2003)).

The fourth characteristic includes many aspects. There must be a capable grantor and grantee. The right must fall within the general nature of rights already recognised as easements and must be sufficiently definite. Importantly, the right must not be equal to exclusive or joint possession.

A right of way over servient land has long been recognised as capable of meeting the Re Ellenborough Park requirements. Varma should have no difficulty here. However, the right to park has proved a little more uncertain, especially concerning exclusive or joint possession.

The court in London and Blenheim Estates v Ladbrook Retail Parks Ltd (1992), stated obiter, that a right to park over a large area of land may be capable of being an easement if the servient owner retained reasonable use.

The Court of Appeal in Batchelor v Marlow (2001) affirmed that the test for exclusive possession is the 'no reasonable use' test. If the servient owner has no reasonable use of the land, whether for parking or anything else, it cannot amount to an easement.

However, this approach was not followed in Moncrieff v Jamieson (2007).The Scottish House of Lords preferred a more lenient test of whether the servient owner 'remains in possession and control' whereby the range of use is wider than the 'no reasonable use' test.

English case law has confirmed the Batchelor 'no reasonable user test' (see Virdi v Chana (2008), Kettel v Bloomfold Ltd (2012), but in a manner reflecting Moncrieff. In Kettel, an easement to park in a designated space was upheld on the basis that the servient owner could make reasonable use of the land by right of way when the car was not parked and by use of the airspace above or the

surface beneath the parking space.

Thus, Miranda's right to park may be capable of qualifying as an easement, if Varma has 'reasonable use' by right of way, building over or under, and making repairs to the driveway.

1(b)

The court may imply a grant of the right to park, by one of four methods. However, only two methods are available to impliedly reserve the right of way, both of which require a higher burden of proof.

First, easements may be impliedly granted or reserved out of necessity. Necessity is interpreted strictly by the courts and will only apply where the land cannot be used at all without the right being implied (Union Lighterage Co v London Graving Dock Co (1902), Nickerson v Barraclough (1981), Wong v Beaumont (1965)). The classic example is where the land is said to be landlocked (see the exceptional facts of Moncrieff). No easement will be implied out of convenience.

As the right of way is used as a 'shortcut', there is no necessity. Similarly, as Miranda has direct access to the cottage via the main road, the right to park is not of necessity.

Secondly, easements may be impliedly granted or reserved where the objective common intention was that the land be used for a particular use and the easement is necessary to give effect to that use (Pwllbach Colliery Co. Ltd v Woodman (1915), Jones v Pritchard (1908), Liverpool City Council v Irwin (1977)).

The House of Lords in Irwin held the common intention must have been to grant a right of way to use the stairs and lift to access a ninth-floor flat. Although the Court of Appeal impliedly reserved a right of way in Peckham v Ellis (2000) this has been viewed as generous and dependent upon its unusual facts.

In Re Webb's Lease (1958) a landlord, with the tenant's knowledge, hung advertisements on the leased premises. The Court of Appeal refused to impliedly reserve the right into the renewed lease, as it was unnecessary for the continuation of the business on the dominant land.

It seems likely that the right of way will not be impliedly reserved since it is unnecessary for the continued use and enjoyment of the land; mere convenience to occasionally access the local train station will be insufficient to evidence a common intention. This can also apply to the use of Tulip Cottage as a residence, particularly as it has direct access to car parking on the main road (contrast the situation in Moncrieff). As a result, it seems that a common intention may not be implied. Varma will be unsuccessful in claiming a right of way over the garden of Tulip Cottage.

The additional methods below can only be discussed concerning the possible implied creation of Miranda's car parking right.

Thirdly, an implied grant can be created under the rule in Wheeldon v Burrows (1879). However, this requires evidence of a 'quasi- easement' in existence immediately prior to the renewal of the lease in 2015. As there was diversity of occupation arising from the original lease in 2010, this method cannot be used. Moreover, even when Varma occupied the whole land he had made no use of

Tulip Cottage.

However, under s62 Law of Property Act 1925 rights will be implied into a transfer of an estate in land where there is pre-existing diversity of occupation, so long as s62 has not been expressly excluded in the renewed lease (P & S Platt Ltd v Crouch (2003).

Importantly, s62 operates to transform precarious rights into easements. In Hair v Gillman (2000), a landlord's mere permission to use the forecourt became an easement on the purchase of the freehold by the tenant. Notwithstanding that the permission could have been withdrawn any time before the transfer (International Tea Stores v Hobbs (1903), Wright v Macadam (1949)).

Miranda should be advised that if the right to park is not considered as amounting to exclusive possession the personal licence, granted by Varma, will be upgraded into a validly created easement under s62.

Question 2

Since the property was conveyed into Simon's sole legal name any equitable interest that Alex may have must arise under implied co-ownership. As she is not registered on the legal title of the property, she will need to show that she has acquired an equitable interest from an express, resulting or common intention constructive trust.

In acquiring a common intention constructive trust Alex's actions following the purchase are of the greatest significance.

There does not appear to be any express trust declared in favour of Alex, particularly at the time of the purchase. The facts state that there was 'no mention of any beneficial interest.' If a trust had been formally declared in compliance with s53(1)(b) LPA 1925 (i.e. evidence in signed writing), the courts would treat this as conclusive evidence of Alex's equitable interest (Goodman v Gallant (1986)). It should be noted that resulting and constructive trusts are exempt from the formality requirements in s53(1)(b).

Since Alex did not contribute to the purchase price of the home or the mortgage at the date of purchase, a resulting trust cannot be found (Curley v Parkes (2004)). Moreover, current judicial preference is to avoid the use of the presumed resulting trust in family home contexts and to reserve its use for commercial relationships (as approved by the House of Lords in Stack v Dowden (2007) and Jones v Kernott (2011)).

Alex will, therefore, need to try to establish an equitable interest under a common intention constructive trust. In general, the requirements are a common intention to share the property, detrimental reliance or change of position based on that intention.

Furthermore, where property is registered in a sole legal owner's name, the presumption is the sole legal owner is also the beneficial owner. The burden of rebutting the presumption falls on the non-legal owner (Stack, *dicta* of Baroness Hale). In this case, it is Alex who will have the burden of proof, and the first stage is establishing whether in fact a common intention constructive trust has been acquired.

In Lloyds Bank v Rosset (1990) Lord Bridge made it clear that a common intention could only arise by one of two methods (stemming from the House of

Lords decisions in and Pettitt v Pettitt (1970) and Gissing v Gissing (1971)). The first is by an express common intention based on an agreement, arrangement or understanding, either at the time of acquiring the home, or, exceptionally, at a later date. Thus, there must be evidence of actual discussions between the parties that the non-legal owner was to have an interest in the property, however 'imperfectly remembered' (per Lord Bridge).

Case examples include Eves v Eves (1975) and Grant v Edwards (1986) where the legal owners in both cases provided excuses at the time of the acquisition of property as to why the other non-legal owner could not have their name registered on the legal title.

In relation to an express agreement or understanding between Simon and Alex, on the facts, this is not apparent, and therefore, further information from Alex is necessary to see whether Simon agreed to any such promise.

Secondly, where there is no express agreement, Lord Bridge stated that a common intention might be inferred from the conduct of the parties. However, the only acceptable conduct would be direct financial contributions at the time of acquisition of the property or possibly later where the non-legal owner contributes to the mortgage installments.

Six months after moving into the property, Alex has made contributions to the utilities, household expenditure, mortgage installments and paid for the building of a conservatory. She has also cared for the home and welfare of the family. On a strict application of Rosset, the only significant contribution will be the payments towards the **mortgage.** It appears that this satisfies the inference of a common intention. **The other contributions will show detrimental reliance as well as possibly increasing the size of her share.**

However, Simon is likely to argue that this fact has no bearing on any 'common intention' as he clearly did not need any assistance from Alex in order to contribute to the mortgage (*dicta* from Gissing).

If Alex is unsuccessful in satisfying a common intention under the first and second methods in Rosset, **it may be possible to argue that the court should take into account the whole course of dealing** from which to infer a common intention. This new move away from Lord Bridge's strict approach towards a **more holistic approach** comes from recent senior court decisions (HL in Stack v Dowden (2007), PC in Abbott v Abbott (2007) and the SC in Jones v Kernott (2011)).

In which case, all of **Alex's indirect contributions** may bear more weight in the first stage of determining her claim of acquiring an equitable interest in the property. Importantly, however, the courts, even under this new approach, will not find an inference based solely on indirect contributions. There must be a **genuine intention** on behalf of both the parties that the legal title does not represent their equitable interests (Geary v Rankin (2012)).

If Alex is successful in establishing that she has acquired an equitable interest, which seems likely based on her contribution to the mortgage, the court will proceed to the next stage of quantification. This stage addresses the size of the share to be awarded, and it is here that the court has the most flexibility. It is quite clear that the courts are now able to take a more holistic approach, which takes into account the whole course of dealings with the property, and with the relationship that existed between the parties (Kernott and Stack). Any evidence that points to the actual size of the share Alex has acquired will be taken into

account, including all her indirect contributions, and the purpose of the purchase as a family home.

As a result, the court can award a share on the basis that it reflects the true nature of the parties common intention (Kernott).

Unfortunately, as Simon and Alex are not married, Alex's position is less clear and certain. In the unlikely event that a common intention constructive trust is not found, it is likely that Alex will receive compensation for the financial contributions she has made.

Question 3(a)

The answer depends on whether the agreements are licences or leases. A lease, or term of years absolute, is capable of existing at law as one of two legal estates (s1 Law of Property Act 1925 (LPA 1925)), as such they are proprietary rights and capable of binding third party purchasers who acquire the freehold. In contrast, a licence is merely a personal right that is not capable of binding third parties (Lloyd v Dugdale (2001), in which case all three occupiers would have to vacate the premises at Lindsey's request.

In order for the agreements to amount to a lease, it must satisfy the requirements laid out by Lord Templeman in Street v Mountford (1985). The occupier must have exclusive possession of the property, for a certain term, at a rent. It should be pointed out that it is now clear payment of rent is no longer a necessary requirement as confirmed in Ashburn Anstalt v Arnold (1989) applying s205 LPA 1925. Furthermore, it is abundantly clear, as evidenced from Street itself, that when determining whether the requirements have been met the court shall look at the substance of the agreement and the nature of the relationship, rather than relying simply on the expressed words.

Exclusive possession requires that the tenant has total control of the whole, and the ability to exclude everyone else, even the landlord (other than for certain agreed purposes). It is evident from the document that Julie drew up that she intended to grant two separate licences, one each for Bob and Claire, and avoided granting each of them a separate tenancy whereby neither has exclusive possession of the whole apartment. However, they may argue that despite the separate agreements they have exclusive joint possession under a joint tenancy.

In order to have a joint tenancy, the House of Lords in AG Securities v Vaughan (1990) made it clear that the four unities must be complied with. These are unity of title, time, possession and interest. As in Vaughan, Bob and Claire have signed two separate agreements on different days; so, it appears that there is no unity of title or time. Although, they are not paying different amounts in rent as were the occupiers in Vaughan. In Mikeover v Brady (1989) the Court of Appeal held that two occupiers who signed identical licence agreements, containing the same monthly amounts, which each was individually responsible for, did not have unity of interest, and thus each held only a licence.

However, a more directly relevant case in support of the fact that Bob and Claire hold as joint tenants is Antoniades v Villiers (1990). Cohabitees signed two separate but identical licence agreements. Each contained similar terms to those signed by Bob and Claire purporting not to grant exclusive possession. The House of Lords held that the couple had been granted a joint tenancy despite the landlord's sham, which was a pretence and could, therefore, be ignored. The two documents could be read as one, which meant there was also unity of title.

Moreover, in Aslan v Murphy (1990)) the occupier was required to vacate the premises for one and a half hours every day in order that the room be cleaned. The Court of Appeal held that the term was a mere sham: not intended ever to be carried out. It would appear that, similarly, by Julie's reply to Claire when she informed her that she prefers to do all the cleaning, this too was inserted as a sham. In any case, the court will want to know if the service was indeed ever carried out, if not this supports the assertion of a sham.

Therefore, assuming Julie knew that Bob and Claire were married, the couple's agreements are likely to be regarded as interdependent; it is inconceivable that one would have taken the occupancy without the other, or indeed continued it. In which case, following Antoniades and Murphy, the agreement may amount to a lease; the licences regarded merely as a pretence.

If Bob and Claire have a lease, since it is in writing and provided that it contains all agreed terms and is signed (s2 Law of Property (Miscellaneous Provisions) Act 1989) it may be a specifically enforceable contract which equity will regard as an equitable lease (Walsh v Lonsdale (1882). As such if they were in occupation at the time of the sale to Lindsey, it would be an overriding interest under Land Registration Act 2002 (LRA 2002) Sch. 3 para 2).

Alternatively, the lease may be regarded as legal periodic tenancy (s52(2)(d) and s54(2) LPA 1925); again, it would be an overriding interest (para 1 of Sch. 3 LRA 2002).

In either case, Lindsey will be bound only according to its terms.

3(b)

The arrangement between Julie and Zita appears to be based solely on a family arrangement. Julie's act of allowing Zita to move in under particular circumstances and upon an uncertain term (Lace v Chantler (1944) can be regarded as an act of charity, kindness and generosity. As such this seems likely to fall within one of the exceptional circumstances stated by Lord Templeman in Street v Mountford. In which case, in spite of the fact of exclusive possession, it will not amount to a lease, primarily as there is no intention to create legal relations (Heslop v Burns (1974)). The result would be that Zita is a lodger, and the licence does not bind Lindsey.

However, if Zita is paying rent or some other significant contribution that can be regarded as rent, it is possible, that the court would find an intention to create legal relations (Nunn v Dalrymple (1989), Ward v Warnke (1990)). In this case, an oral periodic legal tenancy may be implied (52(2)(d) and s54 LPA 1925) in Zita's favour. The result would be that Lindsey would be bound according to its terms.

Question 4

Olivia may claim that she has rights over the land by way of adverse possession. The first step to any claim based on adverse possession is that the claimant must prove that they have satisfied two fundamental requirements. As stated in Powell v MacFarlane (1979) and reaffirmed in the House of Lords in Pye v Graham (2002), these are factual possession an intention to possess, and the possession must be adverse.

Factual possession is effectively exclusive possession (Buckinghamshire County

Council v Moran 1990). This requires that the claimant has a sufficient degree of physical possession and control of the land. The level required will depend on the nature and quality of the land in question. The claimant must also have been dealing with the land for her own benefit as the paper title owner might have done (Powell v MacFarlane). Although it is fact specific, enclosure by a fence or wall is sound evidence of factual possession (Seddon v Smith (1877)).

An intention to possess requires an intention to exclude the world including the paper title owner, as far as it is reasonably practical to do so. It does not require that the claimant had the intention to own for the requisite period, without the consent of the legal paper title owner (approved by the House of Lords in Pye v Graham (2003)). The intention must be demonstrated by evidence of outward conduct.

In 1991, there is no indication at all of any factual possession by Olivia and, arguably no evidence of an intention to possess, despite the subjective intentions of Olivia. It is also extremely doubtful whether Olivia had factual possession in 1993, as her acts of occasional maintenance are likely to be considered trivial and equivocal.

However, by 1995 the use, particularly the creation of the hard standing, the erection of the aviary, and the enclosure of the garden area, quite clearly demonstrate the fact of possession, which may also assist with the intention to possess (Moran). Furthermore, the fencing may also be evidence of the outward demonstration of the intention to possess.

The fact that the fence was erected to keep out Yaz's children and to keep the birds safe does not necessarily negate evidence of an intention to exclude the world. It is the overall effect of the action of fencing, alongside the other actions, and not merely the motive that determines such an intention (Chambers v Havering (2011), Hounslow LB v Minchinton (1997).

The fact that the council has not objected does not of itself mean that Olivia's possession is not adverse.

Therefore, it is likely that in 1995 Olivia meets the basic requirements, and this is when adverse possession begins, although further information about the fencing would be conclusive.

The next step is the registration procedure.

Since 12 years adverse possession has not been completed before 13 October 2003 when the Land Registration Act 2002 (LRA 2002) came into force, Olivia's situation is governed entirely by that Act.

Under Schedule 6 of the LRA 2002, Olivia can make an application to the Land Registrar to be registered as proprietor because she has at least 10 years' adverse possession. If the Registrar is of the view that Olivia has an arguable case to be registered, this will trigger a notice to Rob, as the current registered legal titleholder (and to other interested parties such as mortgagees).

Rob, will then have 65 days within which he can respond in three ways. He can consent to Olivia's application in which case she will be registered. He can simply object, perhaps on the basis that adverse possession is not made out as Olivia lacks the necessary intention due to the fencing issue as discussed above. Indeed, he should also be advised to negate Olivia's adverse possession on the basis that Kempston Council clearly had planned use of the land and, therefore, was not dispossessed (Stacey v Gardner (1994)). However, usually, this

response is only used when the registered proprietor is certain of his case. Therefore, Rob ought not to use this on its own.

The better response is for Rob to object and use the final option, which is to serve a counter-notice. The counter-notice requires that the Registrar deal with the application according to para 5 Schedule 6 to the 2002 Act. If this is the case, Olivia will only be registered as proprietor of the land if the Registrar is satisfied that her case falls within one of three grounds. Firstly, that she is entitled to some form of estoppel based on unconscionability. Secondly, she is entitled for some other reason (for example an incomplete contract); or, thirdly, the claim relates to a boundary dispute. The schedule provides, *inter alia*, that Olivia must reasonably have believed the land belonged to her. It would appear that none of the grounds apply to Olivia. Neither Rob nor Kempston has ever made any assurances to Olivia concerning the land. Further, the facts clearly state that Olivia was aware of the Council's proposed plan of development.

If Rob (or other interested party) makes no response, Olivia will be registered as proprietor, so it is important that he objects.

If Olivia's claim does not fall within one of the three categories, Rob has a further two years to take action to repossess the land. Only if after the two-year period Olivia manages to stay in possession will she be able to be registered as proprietor.