

**LEVEL 6 - UNIT 10 – LANDLORD AND TENANT
SUGGESTED ANSWERS – JANUARY 2018**

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

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

SECTION A

Question 1

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 tenancy has expired: see LTA 1954, s 24;
- (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, on terms which will be determined by the court if the landlord and tenant cannot agree them: see LTA 1954, s 26 and ss 32 to 35;
- (iv) there are only limited grounds on which the landlord can object to the tenant's claim for a new tenancy: see LTA 1954, s 30(1)).

The procedure for excluding security of tenure is laid down by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 ('RRO 2003'). Under RRO 2003:

- the landlord must serve a notice warning the tenant that the tenancy which is about to be granted will be excluded from security of tenure;
- the tenant must then make a simple or statutory declaration stating that he has received the notice and has understood it;
- lastly, the parties must record their agreement to exclude security of tenure in the lease.

In order to qualify for security of tenure, the tenant must occupy premises (or part of them) which have been let to him for the purposes of a business.

The first requirement, therefore, is that occupation must be by virtue of a tenancy: consequently, licensees will not qualify for protection. The nature of the occupation will be resolved by reference to the principles set out in Street v Mountford (1985) albeit that the 'indicia' of a tenancy which were identified in that case are not directly transferable to occupation by a business: Dresden Estates v Collinsdon (1987).

Secondly, the tenancy:

- must not be one of the excluded categories of tenancy specified in LTA 1954, s 43 (ie it must not be a tenancy at will, a farming tenancy, a tenancy of a mine or a tenancy of certain categories of licensed premises); and
- must be for a term of more than six months (note that using successive short tenancies as a device to avoid protection under LTA 1954 is prohibited under the aggregation provision in LTA 1954, s 43(3)(b)).

Thirdly, the premises (or part of them) let under the tenancy must be occupied by the tenant for the purposes of a business carried on by him. This third requirement comprises three distinct elements, namely 'occupation by the tenant' which is 'for the purposes of a business' and which is 'carried on by the tenant'.

Occupation need not be constant, but it must be 'real and genuine'. This allows the court to take into account the fact that on certain occasions the premises may inevitably be empty or unoccupied (eg where the tenant is on holiday or is seriously ill, or is carrying out major refurbishment works, or has been forced to vacate temporarily following a fire (Morrison Holdings Ltd v Manders Property Ltd (1976) or where the tenant's business is seasonal: Teasdale v Walker (1958)). In none of these situations would the protection of LTA 1954 be lost. Occupation does not have to be personal, so the tenant can occupy through an agent or a licensee: Groveside Properties Ltd v Westminster Medical School (1983).

Occupation 'for the purposes of a business' includes occupation for the purposes of a trade, profession or employment: LTA 1954, s23(2). The business does not have to be run for profit, (and so a charity can qualify for protection), but the absence of any trading or profit element will disqualify an occupier from protection: Abernethie v A M Kleiman (1970) (tenant running a not-for-profit Sunday school). Nor does the business have to be run from the particular premises; so where a tenant rents storage space in a warehouse to store goods which he sells from a shop elsewhere, the warehouse is being occupied 'for the purposes of a business': Hillil Property and Investment Co Ltd v Naraine Pharmacy Ltd (1979). Use of premises (either wholly or partially) for residential purposes is not inconsistent with business use if the residential use furthers the

tenant's business (so in Groveside a medical school's use of premises as accommodation for its students was held to further the school's business and so qualified for protection under LTA 1954). Business use in breach of a covenant prohibiting such use will not entitle the tenant to protection under LTA 1954: LTA 1954, s 23(4) and Methodist Secondary Schools Trust Deed Trustees v O'Leary (1993).

If the tenant personally carries on the business, the tenancy clearly qualifies for protection. In some circumstances, the business can be carried on vicariously and the tenancy will still be protected. Common situations in which this will arise are those where:

- the business is carried on by a manager employed by the tenant;
- the business is carried on by a company in which the tenant has a controlling interest (LTA 1954, s 23(1A)(a));
- the business is carried on by an individual who has a controlling interest in the tenant company (LTA 1954, s 23(1A)(b));
- the business is carried on by a member of a group of companies, which is part of the same group as the tenant (LTA 1954, s 42);
- the business is a partnership business and the tenancy is held by the partnership (LTA 1954, s 41A).

It should be noted, however, that LTA 1954 does not give qualifying tenants an unrestricted right to be granted a new tenancy. There are seven grounds (set out in LTA 1954, s 30(1) paragraphs (a) to (g)) on which the landlord is entitled to oppose such a grant. The first three grounds are based on tenant default (eg ground b - persistent delay in paying rent that has become due, which covers both a long history of paying numerous instalments late or allowing a few instalments to remain unpaid over a long period of time: Horowitz v Ferrand (1956)). The others may be described as 'situational' (ie they are based on circumstances over which the tenant has no control but which are deemed to be sufficient to justify requiring the tenant to give up possession). Commonly-encountered grounds under this heading include ground (f) (which may be summarised as landlord's intention to carry out significant works) and ground (g) (landlord's intention to occupy the premises or part of them for the purposes of a business of his own'). The question of intention is always a question of fact and as a result different indicators of this intention may be apparent in different cases. Nevertheless, case law has established that the landlord's intention must be 'settled', ie the landlord must prove that his proposal has "moved out of the zone of [mere] contemplation", per Asquith LJ in Cunliffe v Goodman (1950).

Even though a landlord who successfully opposes a renewal tenancy on one of the statutory grounds is obliged to pay compensation to the outgoing tenant, the amount payable (which is based on the rateable value of the premises) is relatively modest and is unlikely to cover the loss incurred by the tenant in having to re-locate.

Question 2(a)

A lease, whether for a fixed or periodic term, creates a 'term of years absolute' (which is one of the only two permissible legal estates in land: see Law of Property Act 1925, ss 1 and 205(xxvii)).

The formalities for the creation of a legal lease are to be found in a combination of the Law of Property Act 1925 (LPA 1925) and the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989).

LPA 1925, s 52(1) provides that all legal leases must be created by deed except those which are not required to be created in writing: see LPA 1925, s 52(2). LPA 1925, s 54(2) then goes on to provide that leases which take effect in possession for a term not exceeding three years at the best rent which can reasonably be obtained do not need to be created by deed; indeed, they do not even need to be created in writing. In Fitzkriston LLP v Panayi (2008), 'best rent' was held to be the equivalent of open market rent (payment of £4,000 not the best rent obtainable for a property with an estimated annual letting value of £12,000).

The definition in LPA 1925, s 54(2) also means that a periodic tenancy will almost certainly not be required to be created by deed (it is virtually inconceivable that a lease would be granted on a periodic basis for periods which exceeded three years).

In order for a lease to be effectively granted by way of a deed, it must satisfy the requirements of LP(MP)A 1989, s 1. In particular:

- LP(MP)A 1989, s 1(2) states that any instrument shall not be a deed unless it makes clear on its face that it is intended to be a deed and it is validly executed as a deed; and
- LP(MP)A 1989, s 1(3) states that valid execution requires both execution by the person making the deed in the presence of witnesses and delivery of the document as a deed.

A contract for a lease is a contract for the 'disposition of an interest in land' within the meaning of LP(MP)A 1989, s 2(1). Consequently, in order for a contract for a lease to be valid it:

- can only be made in writing;
- must incorporate all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each;
- must be signed by or on behalf of each party to the contract (with both either signing a single document or, where contracts are exchanged, by each party signing their own part of the contract).

As with legal leases, there is an exception for those leases which are not required to be created in writing under LPA 1925, 54(2): see LP(MP)A 1989, s 2(5)(a). A number of other exceptions are also set out in LP(MP)A 1989, s 2(5).

2(b)

There is clear judicial authority for the proposition that a contract for a lease is as good as a lease (Walsh v Lonsdale (1882)). The decision recognises that:

- a document which fails to take effect as a deed (because it does not comply with the relevant formalities) may nonetheless be valid as a contract for a lease if the requirements for the creation of such a contract are satisfied; and
- where that contract is capable of being enforced by an order for specific performance, equity will “regard as done that which ought to be done” and so will treat the parties as being in the same position as if a legal lease had been granted.

Whilst it would therefore be true to say that the equitable lease which exists as a result of the intervention of equity is not the same as a legal lease, nevertheless the reality of the position as between the parties is that for all practical purposes there will be very little difference whether the tenant occupies the premises by virtue of a legal lease or an equitable lease. Any obligations will be enforceable by either party against the other by virtue of privity of contract, regardless of whether a legal or equitable estate has been created. Moreover, the statutory regimes that regulate business and residential tenancies apply to equitable as well as to legal leases.

However, there are significant differences between a legal and an equitable lease so far as their respective effect on third parties is concerned. A legal lease is a right in rem and as such is good against the world (subject to the requirement that for leases which are granted for a term of more than seven years then they must be protected by registration at the Land Registry). A lease for a shorter term will constitute an overriding interest even if it is not protected by a notice at the Land Registry. An equitable lease can only be protected by registration of a notice at the Land Registry and will not constitute an overriding interest in its own right if it is not so registered.

In addition, because an equitable lease is not a ‘conveyance’ (see LPA 1925, ss 52 and 205), it cannot engage LPA 1925, s 62 (and so will not be effective to vest in the tenant the benefit of the matters specified in that section).

Consequently, the conclusion must be that a contract for a lease is not as good as a lease.

Question 3

The management of long residential leases is governed principally by a combination of the Landlord and Tenant Act 1985 (LTA 1985) and the Commonhold and Leasehold Reform Act 2002 (CLRA 2002). Between them, these two statutes allow tenants to:

- challenge the amount which their landlord seeks to charge them by way of service charge and/or administration fees;
- be consulted before major contracts are awarded or major works are carried out;
- claim the right to manage the buildings and/or estates in and on which their flats are located.

Challenging service charges and/or administration charges

LTA 1985, ss 18 and 19, along with CLRA 2002, Sch 11, protects long leaseholders from service charges and/or administration charges which are unreasonably incurred or are unreasonable in amount. This applies both to reimbursement of expenditure which has already been incurred by the landlord as well as to on-account payments which the tenant may be making in relation to anticipated future expenditure. What is 'reasonable' must be given a broad common-sense meaning (Veena SA v Cheong (2003)).

Additional provisions of LTA 1985 and CLRA 2002, Sch 11:

- prescribe the form and content of any demand for service charge and/or administration charges;
- impose an 18-month deadline for demanding payment;
- entitle the tenant to withhold payment until a lawful demand has been made and until the tenant has been supplied with sufficient information to enable him to understand how the amount which is being demanded of him has been calculated;
- restrict the landlord's right to forfeit for non-payment of service charge and/or administration charges (even if these are reserved as 'rent' under the lease) until such time as the amount being claimed has been agreed by the tenant or determined by a tribunal;
- limit the landlord's ability to recover the costs of legal proceedings which the landlord has brought to recover unpaid service charge and/or administration charges to those situations where the tenant has acted unreasonably in bringing, defending or conducting the proceedings;

Lastly, Landlord and Tenant Act 1987, s 42 provides that service charge payments made by a tenant are held on statutory trust and can only be used to meet service charge expenditure incurred by the landlord in the relevant year: consequently those payments are protected in the event of the landlord's insolvency.

Consultation

Under LTA 1985, ss 20 and 20ZA a landlord must consult where a tenant will be required to contribute by way of service charge:

- more than £250 in relation to qualifying works, ie building works; or
- more than £100 in relation to qualifying long-term service agreements.

Failure to consult means that the landlord cannot recover more than the amounts set out above in relation to the relevant expenditure.

The requirement for consultation can be dispensed with, but only by the appropriate tribunal and only if it is reasonable to do so (LTA 1985, s 20ZA(1)). Following the Supreme Court decision in Daejan Investments Ltd v Benson (2013), dispensation will be granted if the failure to consult has caused no real prejudice to the tenants.

The right to manage

The right to manage allows the requisite number of qualifying tenants in a qualifying building (ie a block of flats) to take over the management of that building and appurtenant parts of the estates on which the building is located: see, eg, Gala Unity v Ariadne Road RTM Company (2012). The right is available regardless of how the landlord has performed its management functions up to that point (although the right is perhaps more likely to be exercised where the landlord is delinquent or absent).

The right to manage can only be exercised through membership of a right to manage (RTM) company. An RTM company must be a private company limited by guarantee whose articles include the acquisition and exercise of the right to manage the premises as an object. Qualifying tenants are entitled to be members of the company. Landlords are also entitled to be members, but only from the date of acquisition of the right to manage (so it is the qualifying tenants who must form the RTM company and who must initiate the procedure for claiming the right to manage).

Once the right to manage is acquired, all the landlord's management functions are transferred to the RTM company (CLRA 2002, s 96). The RTM company inherits the benefit, but also the burden, of all the management provisions in the lease: consequently the RTM company becomes entitled to enforce tenant covenants in relation to, for example, payment of service charge and becomes entitled to any assets which relate to management functions (eg surplus service charge contributions or monies which are held in a reserve fund). However, an RTM company cannot exercise any right of re-entry or forfeiture for breach of such a covenant, but must instead report the breach to the landlord so that enforcement measures can be taken.

The fact that the management functions are exercisable by an RTM company does not affect the construction of the lease: see, for example, Wilson v Lesley Place (RTM) Company (2010). Consequently, the costs of forming and running the RTM company will not usually be recoverable (because the lease when granted will not have contemplated the creation of an RTM company).

It is not possible to contract out of the right to acquire the right to manage: CLRA 2002, s 106.

Overall, statute affords a reasonable degree of protection to long leaseholders as regards the financial demands which can be made of them and their ability to control the management of the blocks of flats or estates within which they live. However, the number of cases which continue to require determination by tribunals may suggest that the protection is not as simple to invoke and/or operate as perhaps it ought to be.

Question 4

There are three principal remedies which are available to a landlord whose tenant is in arrears with the payment of rent: forfeiture, commercial rent arrears recovery (CRAR) and a money claim for the rent.

Forfeiture

Forfeiture entitles the landlord to eject the tenant from the premises and recover possession of them either by court proceedings or by peaceable re-entry.

A landlord will only be able to forfeit for non-payment of rent if the right to do so is expressly reserved in the lease: the right to forfeit is never implied (see, for example, statements in Duppa v Mayo (1669) and Doe. d Abdy v Stevens (1832)).

At common law, the right to forfeit for non-payment of rent only arises if the landlord has made a formal demand for the rent. However, such a demand will not be required if:

- (a) more than six months' rent is in arrear (Common Law Procedure Act 1852, s 210); or
- (b) the parties have agreed that the right to forfeit may be exercised whether or not the rent has been formally demanded (virtually all leases contain such an agreement).

The right to forfeit may be frustrated by:

- the common law doctrine of waiver, under which the landlord may lose the right to forfeit if, with knowledge of the non-payment, the landlord engages in conduct which amounts to an affirmation that the lease continues to exist (see Metropolitan Properties v Cordery (1979) and Central Estates (Belgravia) Ltd v Woolgar (No.2) (1972)); or
- the tenant's right to seek relief from the courts: relief under County Courts Act 1985 s 138(2) is automatic but is only available in relatively limited circumstances (it only applies where the tenant pays the amount due into court up to five days before the hearing), but Law of Property Act 1925, s 146(2) confers wide powers to the court to grant relief on such terms "as the court ... thinks fit" (which, if relief is granted, will usually involve a requirement to pay the arrears of rent).

Although the threat of forfeiture, or the terms of any order by which relief is granted, may result in the tenant paying the arrears, the actual re-taking of possession does not achieve this objective. Indeed, taking possession may simply add to the landlord's problems: not only will the landlord still be out of pocket in relation to the arrears but the landlord will become fully responsible for the premises once again.

CRAR

Part II of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007), which came into force in April 2014, replaces the ancient common law remedy of distress (TCEA 2007, s 71). The new regime, which is amplified by the provisions of the Taking Control of Goods Regulations 2013 (TCGR 2013), regulates the

circumstances and manner in which a landlord may seize the tenant's goods and subsequently sell them in order to recover arrears of rent.

CRAR is available in relation to all leases of commercial premises (including tenancies at will), whether legal or equitable, provided that the lease is in writing: TCEA 2007, ss 74(1) and 74(2).

CRAR, like distress before it, has the potential to be a highly effective weapon: the actual or threatened seizure of the tenant's goods may well provoke payment by the tenant. However, some of the constraints imposed by TCEA run the risk of substantially reducing the effectiveness of CRAR as a remedy. First and foremost amongst these is the requirement that the landlord must give at least seven clear days' notice of the intended seizure (TCEA 2007, s 72 and Sch 12, para 7 and TCGR 2013, para 6(1)): this appears to give the defaulting tenant ample opportunity to remove any valuable goods from the premises before the landlord can seize them (but the landlord can ask the court to shorten the notice period in appropriate circumstances (TCGR 2013, para 6(3) and 6(4))).

There is also the practical problem for the landlord that not all the goods on the premises may belong to the tenant (the tenant may, for example, lease its office and/or computer equipment) and so the landlord may find it difficult to identify which goods may lawfully be taken and which must be left behind.

Where the premises (or part of them) are occupied by an undertenant, TCEA 2007, s 81 enables the landlord to serve a notice on the undertenant requiring the undertenant to pay its rent directly to the landlord (see also TCGR 2013, paras 53 to 55).

Action for the rent

The landlord can also bring a money claim against the tenant for the amount of the rent. Such a claim may be brought in its own right or in conjunction with a claim for possession. Obtaining a judgment against the tenant is no guarantee that the tenant will pay the amount due: the landlord may still have to take steps to enforce the judgment if the tenant fails to pay.

SECTION B

Question 1

This question involves the nature and extent of a landlord's duty of repair. The duty is one of 'repair, not renewal': the distinction is illustrated by the words of Buckley LJ in Lurcott v Wakeley & Wheeler (1911) where he contrasted "replacement of defective parts" (repair) with "renewal or replacement of substantially the whole" (renewal). While in every case it is a question of degree, the courts are assisted by three tests which were set out in McDougall v Easington DC (1989). These tests "may be applied separately or concurrently" as the circumstances of the case demand and may be summarised as: (i) whole or part, (ii) change in character and (iii) cost of works.

A landlord of residential premises owes a common law duty to ensure that the premises are fit for human habitation at the start of the letting. The statutory obligation to the same effect under the Landlord and Tenant Act 1985 (LTA 1985,

s 8) is unlikely to apply because it is only engaged where the property is let at a very low rent (see LTA 1985, s 8(3)).

In relation to Ornella, it would appear that Nathan is in breach of his common law obligation. The fact that the letter was sent shortly after Ornella moved in to the flat suggests that the flat was infested at the time of the letting. It is likely that an infestation of rats would be regarded by the court as sufficient to justify the conclusion that the premises are unfit for human habitation (cf, for example, Smith v Marable (1843) where a landlord was found to be in breach of his obligation in the light of a finding that the property was infested with "nasty insects, called bugs").

Breach of this obligation could be classified as a repudiatory breach of contract, such as might entitle Ornella to vacate the property and effectively 'tear up' her tenancy agreement with Nathan. However, the situation would be easily remedied if Nathan were to engage the services of a pest controller and so is unlikely to be regarded as being sufficiently extreme to justify repudiation.

In relation to Pdraig, Nathan may be in breach of the implied repairing obligation which is contained in LTA 1985, s 11. This applies where a property has been let as a "dwelling house" for a term of less than seven years (as is the case here). This section requires a landlord to "keep in repair and proper working order the installations in the dwelling house for ... sanitation (including basins, sinks, baths and sanitary conveniences ...". If the slow draining of Pdraig's bath and bathroom sink is caused by a problem outside the flat, then Nathan will almost certainly be obliged to fix the problem. If, on the other hand, the problem has been caused by an accumulation of waste within the drainage pipes which are within the flat, then Nathan may well be correct in saying that the application of some drain cleaner would solve the problem. If that is the case, then that may well be a task which falls within the "little jobs about the place which a reasonable tenant would do" as part of the tenant's duty to use the property in a tenant-like manner: see Warren v Keen (1954), per Lord Denning, who expressly cited the example of a tenant being responsible for unblocking sinks which had become blocked by waste. As a result, Nathan would not be obliged to fix the problem.

In relation to Quinn, the front door is not part of the structure or exterior of any one of the flats, and hence the implied repairing obligation in LTA 1985, s 11(1)(a) does not apply. However, the door appears to one element of the communal parts of the building in which the tenants live, and so Quinn may try to argue that the principle established in Liverpool City v Irwin (1977) applies, namely that a landlord may be under an implied obligation to keep the communal parts of a building in repair. However, there would appear to be two significant obstacles to this. First, Irwin concerned a tower block of flats where the failure by the landlord to keep the communal parts (namely the lifts and the staircases) in repair substantially impinged upon the tenants' use and enjoyment of the premises which had been let to them. This inconvenience would appear to be of a completely different order of magnitude to a front door which sticks, and hence no implied duty may even arise. However, Quinn could argue that the door no longer appears to be capable of fulfilling all the functions that are required of a front door, namely providing security along with protection from the elements: see Post Office v Aquarius Properties Ltd (1987). Quinn's argument might also be enhanced if the landlord's obligation were to keep the door "in good condition" or "good decorative order" or "to maintain" it (see, for example, Credit Suisse v Beegas Nominees Ltd (1995), Welsh v Greenwich (2000) and Janet Reger International Ltd v Tiree Ltd (1996)), but that is not the case here.

In relation to Ruprecht, an important point to note is that the duty to repair does not extend to the remedying of latent/inherent defects. In order for a state of disrepair to exist which engages the duty to repair, there must be a transition from a state of repair to a state of disrepair: a building which has always been defective as the result of a latent or inherent defect does not involve such a transition. Authority for this can be found, for example, in Quick v Taff Ely Borough Council (1986) (where a landlord was not required to repair defective window frames which led to the build-up of condensation).

Question 2

In order to advise Freddie it is first necessary to determine the legal effect and consequences of the occupational arrangements which he has entered into with George and Harry respectively. It will then be possible to advise Freddie as to how he may be able to bring those arrangements to an end.

George and Harry are claiming that they have the benefit of a lease/tenancy of the cottage and the barn respectively. A lease/tenancy arises when a person is allowed into occupation of property:

- for a period which is of fixed and ascertainable duration;
- on terms which confer exclusive possession on the occupier; and
- for a period which is at least one day shorter than the grantor's estate.

The necessity for the first of these requirements is illustrated by Lace v Chantler (1947) where a lease granted "for the duration of the war" was held to be invalid. The necessity for exclusive possession is illustrated by Street v Mountford (1985), in which Lord Templeman regarded it as the "touchstone" of a tenancy.

It is commonly supposed that a lease must also be granted for a 'rent': see, for example, various passages in the speech of Lord Templeman in Street v Mountford (1985) which appear to assume that this is so. However, there is no common law or statutory requirement that a lease must reserve a rent: see, for example, Ashburn Anstalt v Arnold (1989). There is also no requirement for a money payment by the tenant: it is sufficient if the tenant provides consideration for the grant of exclusive possession for a qualifying term. However, the absence of a rent or any other consideration may indicate that no lease/tenancy was intended: see, for example, Colchester Council v Smith (1991).

If the requirements for the creation of a lease are not satisfied in relation to either Harry or George, then they will most likely be held to have the benefit of a contractual licence, or possibly a tenancy at will. A licence or a tenancy at will does not confer any proprietary right in favour of an occupier; instead it creates only a contractual (and purely personal) permission which legitimises what would otherwise be a trespass. It confers no proprietary rights on the occupier. The significance of the distinction between leases and licences/tenancies at will lies in the fact that statute has conferred far greater protection on those who occupy property under a lease rather than under a licence/tenancy at will.

In certain circumstances, the court may conclude that, even though the elements necessary for the creation of a lease are all present, other considerations justify the conclusion that only a licence was intended. So, for example, in relation to social and domestic agreements between friends and family, it is presumed that there is no intention to create legal relations and hence that only the grant of a

licence is intended: see, for example, Cobb v Lane (1952) and Booker v Palmer (1942).

Other circumstances in which the court is likely to find that a licence has been created rather than a lease is where the occupation is one of service, ie the occupier is employed by the owner of the property. The test applied is whether the servant is required to occupy the property in question in order to better perform his duties as a servant: see, for example, Facchini v Bryson (1952) and Norris v Checksfield (1991).

Although George appears to have exclusive possession of the cottage, there are grounds on which Freddie can argue that no tenancy has been created. First, the fact that the cottage was granted to George for as long as he wanted could be regarded as a failure to meet the common law requirement that the lease be of a fixed and ascertainable duration. Secondly, although George may argue that the provision of his labour for free is sufficient to constitute consideration for the grant of a tenancy in lieu of 'rent', Freddie could counter this by arguing that this justifies the conclusion that George has a service occupancy. Thirdly, the fact that Freddie and George are brothers entitles Freddie to argue that there was no intention to create legal relations.

Similarly, Harry would appear to have exclusive possession of the outbuildings. However, the fact that he was allowed to occupy them until such time as Freddie needed them back suggests the agreement was not of a fixed and ascertainable duration: see, for example Prudential Assurance v London Residuary Body (1992) (agreement granting possession until land "was needed" held not to have created a lease). Further, there does not appear to have been any rent or other consideration provided by Harry: the repairs carried out by Harry are explicable as the acts which anyone in Harry's position would have carried out in order to ensure that the machinery and straw which he was storing in the outbuildings were protected from the elements.

It therefore appears that Freddie is entitled to treat both George and Harry as licensees/tenants at will, with neither enjoying any security of tenure. If the arrangement is characterised as a tenancy at will, then at common law Freddie is not actually required to give any notice before terminating the arrangement. However, a prudent approach would be to give notice of the same duration as would be required in the case of a licence and/or by statute. Given that George occupies the property as a dwelling, Freddie must give him at least 4 weeks' notice to quit: see Protection from Eviction Act 1977, s 5(1). It is suggested that it would be sensible to give a similar period of notice to Harry.

Question 3

Part 1

In the absence of any documentation which would contradict Kirk's assertion that he first moved into the property as a tenant in 1986, it would appear that Kirk is the tenant of a dwelling house which was first let to him prior to 15 January 1989. Consequently, he would appear to be a regulated tenant under the Rent Act 1977 (RA 1977), s 18 with his original protected contractual tenancy under RA 1977, s 1 having been automatically converted into a statutory tenancy following the expiry of the initial fixed term (see RA 1977, s 2). None of the exceptions contained in RA 1977, ss 4 to 16 appears to apply.

As a regulated tenant, Kirk enjoys substantial statutory protection. One element of this is that he can only be required to pay a 'fair rent' for the property: see RA

1977, ss 44 and 45 in relation to contractual and statutory tenancies respectively. Either the landlord or the tenant can apply for the amount of the fair rent to be registered, ie determined by a rent assessment committee (now the Rent Service): see RA 1977, s 67.

As regards the supposed new rent of £850 per month, it would appear that Jasmine's agreement with Kirk will be unenforceable. Leaving aside any arguments as to possible duress, Leo's statement that the amount of the rent has been "fixed by the court" would appear to indicate that a 'fair rent' has already been registered in relation to the property. If that is the case, Jasmine would only be entitled to increase the amount of the rent payable by Kirk by following the required statutory procedure, namely serving a notice of increase in accordance with RA 1977, s 49 and then applying for the determination of a new rent by the Rent Service. Jasmine would appear to fall at the first hurdle, because a notice of increase must be in the prescribed statutory form and it seems unlikely that the document written out by Jasmine fulfils that requirement. In any event, the amount of the new fair rent has not been determined by the Rent Service, and so Jasmine cannot recover the revised amount.

Even if a fair rent has not been registered, RA 1977, s 51 requires that in that circumstance any agreement as to the amount of a new rent must contain prescribed information in relation to:

- the tenant's continuing right to security of tenure if he refuses to sign the agreement; and
- the tenant's right to apply for the registration of a fair rent notwithstanding the agreement that has been made.

It does not appear that the document written out by Jasmine contained this information. Consequently she cannot rely on it as setting an enforceable new rent.

However, Jasmine may be able to apply for the registration of a new fair rent if either the current rent was fixed more than two years ago or if there has been a change of circumstance within two years of such a rent being registered which means that the amount of the registered rent is no longer fair: see RA 1977, s 67(3).

Part 2

One of the other key elements of the protection afforded by a regulated tenancy is the right for certain family members of the regulated tenant to succeed to the tenancy following the death of the tenant. As originally enacted, RA 1977, ss 2(1)(b), 2(5) and Sch 1 provided that a child of the deceased tenant would themselves become entitled to a statutory tenancy by succession (with the full protection of RA 1977) if that child had been living with the tenant at the property for at least three years prior to the tenant's death.

However, as a result of amendments introduced by Housing Act 1988 (HA 1988), s 31 a child who has been living with the tenant at the property for at least two years prior to the tenant's death and who succeeds to a statutory tenancy on or after 15 January 1989 becomes entitled to an assured tenancy under HA 1988, s 1.

On the assumption (which appears to be justified by the facts) that Leo had been living with Kirk at the property for at least two years prior to Kirk's death, Jasmine cannot contest Leo's status as an assured tenant of the property who enjoys security of tenure under HA 1988. She can, however, seek to recover possession from Leo on any of the available grounds under HA 1988: see HA 1988, s 7 and Sch 2. Any proceedings for possession would need to be preceded by the service of a notice of proceedings for possession under HA 1988, s 8 in which Jasmine specifies the ground for possession on which she is relying.

Ground 14 in Sch 2 is available where the tenant "has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing ... in the locality". On the face of it, Leo's conduct would appear to fall within this ground. However, there is no certainty that the court would make an order for possession based on Leo's conduct because Ground 14 provides only a discretionary and not a mandatory ground for possession (see HA 1988, s 7(4)). The court will only make a possession order if it thinks that it is reasonable to do so. This will depend very much on the seriousness of Leo's conduct to date and the likelihood of it being repeated if a possession order is not made. Further investigation as to the level of noise is required and steps should be taken to gather evidence in this regard. The merits of any action could then be realistically assessed.

Question 4

Each of the covenants will be considered separately.

The covenant preventing assignment of the lease is a qualified covenant against assignment and as such is regulated by Landlord and Tenant Act 1927 (LTA 1927), s 19(1). This section provides that where a lease states that it cannot be assigned without the landlord's consent, a proviso is to be read into the lease that that consent cannot be "unreasonably withheld". The Landlord and Tenant Act 1988 (LTA 1988) reinforces this requirement by stating (LTA 1988, s 1(3)) that where landlord's consent is required for an assignment, the landlord must give that consent except where it is reasonable to withhold it. This latter provision reverses the burden of proof which would otherwise apply (as is made clear by LTA 1988, s 1(6)).

There is a significant body of case law on how reasonableness is to be assessed in any given situation for the purposes of LTA 1927, s 19(1). In International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd (1986), Balcombe LJ set out a number of general principles. Those principles have been restated and refined in subsequent decisions such as Straudley Investments Limited v Mount Eden Land Limited (1996) and Ashworth Frazer Ltd v Gloucester City Council (2001).

For present purposes, it is submitted that the relevant principles are:

- the landlord is entitled to protect his premises from being used or occupied in an undesirable way, or by an undesirable tenant or assignee;
- the landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease;
- it is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified if they were conclusions which might be reached by a reasonable man in the circumstances;

- it may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease;
- it is permissible to have regard to the consequences to the tenant if consent to the proposed assignment is withheld.

Applying those principles to the facts, it would seem that KPP has reasonable grounds for refusing its consent to the assignment. Although Sampsons would seemingly be a desirable tenant in terms of its ability to fulfil the financial covenants in the lease, that is not the only consideration. First, the proposed use by Sampsons would be in breach of the current permitted user. Secondly, KPP has determined that its best interests as the landlord of the shopping centre lie in trying to create a particular retail environment for shoppers which necessitates, as part of that strategy, the sub-division of the centre into four distinct shopping zones. KPP does not need to prove that it is right or wrong about that, nor even that a majority of landlords in its position would hold the same view. It is enough that a reasonable person could arrive at the same strategy: it is highly unlikely that the court would feel able to conclude that KPP's strategy was so misguided that no reasonable landlord would adopt it. For an example of similar considerations arising in practice (see Moss Bros v CSC Properties (1999), although a potentially distinguishing feature in that case was that the landlord's policy had been made known to the tenants).

The danger in the present case, however, is that all of this is academic. The opportunity for refusing consent may already have passed if the court considers that consent to the assignment has already been given on behalf of KPP by Leonard. In the absence of any provision in the lease that a consent will only be effective if given in writing, it is possible that Leonard's oral statement is a sufficient consent: see, for example, Prudential Assurance v Mount Eden Land Ltd (1997), Next plc v NFU Mutual Insurance Company Limited (1997) and Rose v Stavrou (1999). KPP would counter this by arguing that:

- Leonard had no authority to speak on KPP's behalf, and hence no authority to give consent on its behalf (although this may depend on the extent to which Leonard may historically have acted or been held out as acting as KPP's agent); and
- in any event Leonard's statement could only reasonably be understood as a statement of his personal opinion rather than an unqualified grant of consent.

Even if KPP cannot withhold its consent to the assignment, there remains the covenant against change of use. This is not a covenant to which LTA 1927, s 19(1) or LTA 1988 applies and so there is no requirement that KPP must act reasonably in giving or refusing its consent. Consequently, KPP would be entitled to refuse consent to the request for change of use in the pursuit of its chosen strategy for the centre. Given the nature of Sampson's current business, it would seem that this would mean that Sampsons would no longer be interested in taking an assignment of Jean's shop.