LEVEL 6 - UNIT 9 – LAND LAW
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

When considering title to a property, it is important to recognise that title exists in both law and equity. Equitable ownership of property is of particular relevance in two situations – where a party claims a share in land despite not having legal ownership; and where the court has to consider the share an owner may have on sale, regardless of whether they possess legal title or not. The mechanism used to allow for this equitable title in land law is that of the trust. While it is entirely possible for the parties to create an express trust of land (as long as this complies with the requirements in s53 of the Law of Property Act 1925 ('LPA 1925')) it is not uncommon in domestic situations (and indeed in many commercial ones) that such legal forethought is not present. In particular, where there is a breakdown in a relationship between cohabiting parties, in the absence of marriage or a civil partnership the court must turn instead to the concept of implied trusts.

One form of such trust is the resulting trust, which operates by raising a presumption that those who contribute to the purchase of a property intend to gain an equitable interest in it. At its most straightforward, a resulting trust will operate to provide such an interest to all parties who thus contribute, and will determine the size of their share by the size of their contribution. Thus in Bull v Bull (1955) a mother who had contributed to the purchase of a property with her son without becoming a legal owner was entitled to a proportionate share of the whole in equity. The traditional approach in a resulting trust is to not enquire too deeply into the context of the transaction – which could mean, for example, the creation of rights even when the purchase arrangements were designed to assist in the commission of a fraud (Tinsley v Milligan (1992)). While traditionally only direct contributions to the purchase price were deemed relevant when determining the existence and size of the equitable share, there is case law which suggests a wider approach, such as the application of a "right to buy" discount (Springette v Defoe (1992)) and even subsequent mortgage contributions (Laskar v Laskar (2008)).

However, the presumption that the contributor intended to gain equitable rights may be rebutted. Most commonly, this will be done by evidence that the money was intended as a loan or a gift (for example, Re Sharpe (1980)). Historically it was also possible to rebut the presumption under the principle of advancement, which applies where a husband buys property in the name of his wife, or a father in the name of his children. While this technically remains law, it is unlikely to be followed and is scheduled for abolition when s199 of the Equality Act 2010 becomes law. Most importantly, recent case law suggests that any attempt to argue a resulting trust in relation to residential property (bought for habitation rather than investment purposes) is unlikely to succeed, as the court will prefer to use the mechanism of a constructive trust (Jones v Kernott (2011)).

The starting point for the imposition of a constructive trust is considerably less mechanistic – it is whether it would be unconscionable for the legal owner to deny the equitable beneficial interest. It has long been settled law that when there is an express agreement that a non-legal owner will have rights in the property, equity will uphold this agreement (even though the agreement would not meet the formalities required for the grant of a legal estate or express trust). Thus a constructive trust was found in Eves v Eves (1975) where a man told his partner that, were she aged 21, he would have put the property in joint names, and in Grant v Edwards (1986) where a man told his partner that he omitted her name from the legal title to avoid prejudicing her divorce proceedings.

The law relating to constructive trusts was restated by the judgment in Lloyds Bank plc v Rosset (1990) which made it clear that even express agreement trusts also require the claimant to demonstrate detriment – however, this is a relatively low bar to meet and does not need to include a contribution to "bricks and mortar" (see e.g. Grant v Edwards). A more difficult situation arises in the absence of such an express agreement. Rosset recognised that the courts had developed a doctrine of implying such an agreement, but rejected some of the wider formulations of the doctrine (e.g. Hussey v Palmer (1972)). Instead, the claimant must show "common intention", defined by Lord Bridge as including contributions to the purchase price or to mortgage repayments, but he went on to state that it was "extremely doubtful whether anything less would do". This reaffirmed the stricter approach taken in cases such as Burns v Burns (1984) which had refused to allow a claim by a woman who had given up her career, become the primary carer for the couple's children and paid bills from her own funds.

While often criticised, the decision in Rosset remains the starting point in so-called "sole ownership" cases. Where the claimant is not on the legal title, they must demonstrate the implied common intention and Lord Bridge's judgment has ensured that courts have felt constrained to do so narrowly. However, comments made in the "joint ownership" cases heard by the House of Lords in Stack v Dowden (2007) and the Supreme Court in Jones v Kernott (2011) have arguably signalled a wider approach may now be taken – although the factual difference between joint and sole ownership cases means that these comments are purely *obiter*, as is the disapproval of the Privy Council of overt reliance on Rosset in Abbott v Abbott (2007).

If a claimant can successfully establish this common intention in a sole ownership case, the court will then move to what would otherwise be the main issue in a joint ownership case – the quantification of the shares of the parties. It should be noted that where both parties do appear on the legal title, the starting point remains that equity follows the law; thus they hold as beneficial joint tenants (and upon severance would have equal shares). However, this presumption can be rebutted if it can be shown the common intention of the parties was to hold their shares in some other, unequal, proportions. Since the Court of Appeal decision in Oxley v Hiscock (2004) there has been much judicial debate as to how best to approach this exercise, but it has generally been accepted that wider evidence than direct financial contributions should be considered.

In Stack v Dowden, the Oxley approach of subjectively imputing an intention to the parties on the basis of "fairness" was rejected, with the House of Lords preferring to objectively infer an intention on the basis of the "whole course of conduct" of the parties. While arguably a more orthodox approach, this decision still allowed the court to depart from these principles in "exceptional cases". This bar was then lowered by the Supreme Court (notably by Lady Hale who in clarifying her earlier judgment appeared to widen the category) in Jones v Kernott. The effect of Jones was to in some ways re-establish the approach advocated in Oxley, albeit only when the court could not on the evidence infer the parties' intentions from an objective standpoint. At this stage, it is clear, a judge is now entitled to instead impute them on the basis of fairness.

Subsequent decisions in the Court of Appeal such as Barnes v Phillips (2015) have understandably received much academic attention. Some commentators have argued that the judiciary has rightly avoided the temptation to reach for imputation except as a last resort, while others claim that the courts remain too wedded to the objective certainty of financial contributions and have not seized their opportunity to take a more contextual approach. What is certainly true is that constructive trusts have become ever more differentiated from their more rigid resulting trust counterparts.

Jones v Kernott expressly disapproved the use of resulting trusts in cases involving residential properties and it would seem that the resulting trust will, in future, be a mechanism only invoked in disputes regarding commercial, or at least investment, properties. This diminution of the role of resulting trusts can be welcomed as allowing courts to take a more sensitive and wide-ranging approach in cases involving the breakdown of a relationship between ordinary people with no legal knowledge; however it is inarguable that an element of certainty has been lost. Issues certainly remain with the constructive trust – along with the inconsistent approach of judges to quantification, one could point to the inordinate weight placed on a single conversation many years previously and the still unresolved overlap between trusts and proprietary estoppel. However, it is clear that, in residential property, the constructive trust remains in the eyes of the courts the best method for resolving disputes.

Question 2

An easement is a right to do something on someone else's land falling short of a right to possession. In order to be an easement a right must fall within the criteria laid down by Lord Evershed MR in Re Ellenborough Park (1955). The right must:

- relate to a dominant and servient tenement;
- which are owned or occupied by different persons;
- accommodate the dominant tenement;
- and 'be capable of forming the subject matter of a grant'.

An easement must be held by an identifiable dominant tenement over an identifiable servient tenement, each owned (or occupied) by a different person.

The right must also accommodate the dominant tenement, which means that the right must benefit the actual land rather than its current owner alone. Thus a right which merely benefits the current owner's business, such as in Hill v Tupper (1863) will not be upheld as an easement. Furthermore, in the words of Byles J in Bailey v Stephens (1863) "there can be no right of way over land in Kent appurtenant to an estate in Northumbria", as there would not be sufficient propinquity between the two pieces of land. In the context of car parking rights, it is highly likely that the right to park would be considered a benefit to the land itself when one considers the prevalence of private vehicles in modern society. However, it will need to be shown that the dominant tenement is sufficiently geographically proximate to the servient land.

The most important element of the Re Ellenborough criteria, as it relates to car parking, is that the easement must be capable of forming the subject of a grant. While there are a number of issues which can be collated under this head, the most relevant in this context is the so-called 'ouster principle'. It has long been settled law that an easement cannot have the effect of depriving the servient owner of making any use whatsoever of the land over which the easement is claimed. It was long believed that this principle would prevent the courts from recognising an easement consisting of a claimed right to leave a vehicle on the servient land, as this would have the effect of ousting the owner of the land. Such an approach was demonstrated in Copeland v Greenhalf (1952) where a claim for the right to leave an unlimited number of cars on the servient land was rejected as being a claim for joint user of the land, rather than a mere easement.

The decision of the High Court in London & Blenheim Estates v Ladbroke Retail Park (1992) was seen by some as a potential softening by the courts to claims for an easement to park. In this case it was held that it was possible to establish an easement to park where the parking space claimed was only a small part of the servient land as a whole, with the court essentially positing the test as being a question of degree. It should be noted that the actual claim failed in this case due to a problem with the grant of the easement and thus the remarks noted above could only be considered *obiter*. However, subsequent authority such as Hair v Gillman (2000) followed this approach and it became clear that it would be possible to claim an easement to park a car as long as the space in question was sufficiently small compared to the overall size of the land.

However, any further extension of the right to park was halted by the Court of Appeal in Batchelor v Marlow (2003), which reaffirmed that where the right claimed was too extensive relative to the size of the land, it would not be upheld. Tuckey LJ provided a different test to the "question of degree" in his judgment, stating that the question to be asked was whether the easement would render the servient owner's ownership of the land "illusory". In this case, the Court of Appeal agreed that the right to park vehicles on essentially all of the land in question, throughout the working week, was so extensive as to create such "illusory" ownership.

Just four years later the matter was considered by the House of Lords. However, as the case in question had originated in Scotland the judgment in Moncrieff v Jamieson (2007) can only have persuasive effect in the English courts. Despite this, the Law Lords did not shy away from addressing the English law of easements and indeed from commenting directly on the decision in Batchelor v Marlow, with Lord Scott particularly disapproving of the "illusory ownership" test, preferring instead to consider whether the owner simply retains possession of the land.

Due to the fact that Batchelor remains the highest binding authority in England and Wales, the courts have continued to apply the test, despite the comments of the House of Lords in Moncrieff. An example of a case applying the test soon after the Moncrieff decision is Virdi v Chana (2008), where the land in question was extremely small – in fact small enough that the right claimed was merely that to park half of a car. The servient owner claimed that parking a car across this land would render his use illusory but, while the High Court used this test, the judge found that as the servient owner did not have rights over the adjacent land and thus could not park his own car on the property, the right of the dominant owner to park did not deprive him of any use. A number of other examples can be given, such as Polo Woods Foundation v Shelton-Agar (2010) and Kettel v Bloomfold (2012), where judges have taken a similarly wide approach to applying the test. To take one particular example, in Begley v Taylor (2014) it was found that the ability to alter the surface of the land (here to pave it with stone) demonstrated that the servient owner retained the use of it.

Clearly the courts, while respecting that they are bound by the decision in Batchelor, have taken the wider approach advocated in Moncrieff to heart. It could be said that today the relevant test is from Batchelor, but the spirit in which it is applied is very much from Moncrieff. It would indeed seem that as long as some form of use by the servient owner, however limited and of however little benefit to them, can be identified, then ownership of the land will not be held to be rendered "illusory".

Question 3

Before considering whether the land is registered or unregistered, any claimant of adverse possession must first show that the basic requirements for such a claim have been met. Powell v MacFarlane (1979) highlights that the claimant must demonstrate factual possession, together with the intention to possess, although as stated in Pye v Graham (2002) this need not be the intention to own. Furthermore, the possession must be 'adverse', in that it is without the consent of the paper title holder. The intention must be demonstrated by evidence of outward conduct (Prudential Assurance Co Ltd v Waterloo Real Estate Inc (1999)).

Factual possession is present where the claimant has a high degree of control over the land, although what may constitute "control" and the degree required will depend on the land in question – thus a claim over land of little use except for hunting required much less control than a claim over land fronting on to a busy pedestrian street (compare Red House Farms (Thorndon) Ltd v Catchpole (1977) with Balevents Ltd v Sartori (2014)). In most cases the best evidence of factual possession is likely to be through the claimant having restricted access to the land, such as enclosure by a fence or wall (Seddon v Smith (1887)).

Assuming these requirements are fulfilled, the final element to a claim in unregistered land is time. Under the Limitation Act 1980, s15, once the squatter has been in adverse possession for 12 years, the paper owner loses their title and the right to reclaim the land. Unlike registered land, there is thus no requirement for the squatter to take positive steps to obtain a title – it will occur automatically. This is because the squatter obtains a common law title as soon as they enter into possession of the land and, once the requirements have been met for 12 years, the paper owner's title is extinguished. It should be noted that this time limit does not apply to certain land; notably Crown land, foreshore and land held by those under a mental disability. A broadly similar procedure applied to registered land under the Land Registration Act 1925 (subject to the additional requirement for a formal application to be made by the squatter to be registered as the new proprietor of the existing registered title once the limitation period had accrued); transitional provisions may continue to apply in favour of a squatter who acquired an entitlement to be registered under that Act.

The relatively simple (lack of) procedure in relation to unregistered land contrasts with the regime established in relation to registered land by Schedule 6 to the Land Registration Act 2002 ('LRA 2002'). Again, the common law requirements for adverse possession must be met as a precondition to any application, but the Limitation Act 1980 is largely disapplied and replaced by the Schedule 6 procedure. In registered land the squatter needs just ten years in possession – however, rather than there being any automatic transfer of title or entitlement to be registered, this simply allows the squatter the right to apply to be registered as proprietor.

On receipt of such an application, the Land Registry will notify the registered proprietor of the land. It will also notify any other interested party, such as a mortgagee. On receiving notice of the application, the registered proprietor has 65 days to make one of three responses. They may choose to simply consent to the registration of the squatter (which would also be implied if no response is made); they may object on the basis that the squatter has not met the common law requirements (for example, that the applicant is actually on the land with consent as a licensee or tenant); or they may serve a counter-notice requiring the Land Registry to deal with the application under paragraph 5 of Schedule 6.

The effect of this latter response is that the Land Registry must reject the application unless one of the three exceptions found in paragraph 5 of Schedule 6 applies. These exceptions are: entitlement by estoppel; that the squatter is "some other reason" entitled to be registered (which may for example mean pursuant an otherwise unenforceable agreement to acquire ownership of the land); and - perhaps the most common exception - whether the matter relates to a mistaken boundary. This latter reason imposes further requirements – the applicant must demonstrate that the boundaries of the land have not been determined by the Land Registry and that they reasonably believed the land belonged to them.

If the registered proprietor does serve a counter-notice and none of the exceptions apply, then the squatter's application will fail. At this point, the registered proprietor has two years to remove the squatter from the land. If they fail to do so, the squatter may apply again and this time will be registered without provision for any counter-notice (although some exceptions apply, notably if the owner has commenced possession proceedings).

It is therefore clear that in the vast majority of cases, a squatter on registered land will only be successful in a claim for adverse possession if the owner has not only "gone to sleep" regarding ownership of his land, but ignores the "alarm clock" of the Land Registry notification. While it is of course true that an owner of unregistered land may also relatively easily remove a squatter at any point during the 12 year period (or stop time running by granting express permission), the notification requirement in relation to registered land ensures that even the most somnolent owner will have the opportunity to prevent adverse possession, and will have two years in which to do this. It is worth noting that, if the land is residential, the owner now has additional weapon in his arsenal from s144(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which makes it a criminal offence to squat on residential land. This may make it easier for the paper owner to remove a squatter, but does not impact on any claim to ownership through adverse possession (<u>Best v Chief Land Registrar</u> (2014).

Question 4(a)

As a contractual agreement, a lease will be governed by the common law principles of contract law, as well as by the LPA 1925. As a starting point, as parties to the contract, the original landlord and tenant may enforce their obligations against one another. This also has the effect that, even when they have disposed of their interest in land to a successor in title, the original parties remain liable for any breach of covenant committed by that successor. This is confirmed by s79 of the LPA 1925, which implies such liability in the absence of express wording. It should be noted that whilst these original parties retain liability, the only remedy which could be awarded against them for breach by a successor would be damages.

In order to protect themselves against such a claim, the original party could either rely on the implied indemnity covenants implied under s77 of the LPA 1925 (if they were a tenant), which allowed a claim against the immediate successor, or through the rule in Moule v Garrett (1872) which avoided this chain by permitting an indemnity action directly against the incumbent successor. However, the original party would have little recourse where, as in Hindcastle v Barbara Attenborough Associates (1996), the successor did not have the means to pay.

Regarding the ability of successors to the freehold reversion or the tenancy to sue or be sued upon the covenants in the lease, this was *prima facie* not possible due to the strict rule of privity. The LPA 1925 attempted to allow for such a claim by a successor in title to the freehold, as s141 allows the benefit of a covenant to pass with the reversion as long as it has reference to the subject matter of the lease. Similarly, s142 will pass the burden of the landlord's obligations with the same proviso. However, there was no statutory method (prior to the Landlord and Tenant (Covenants) Act 1995) which allowed an assignee of the tenancy the right to enforce these covenants, making s142 of use only to the original tenant.

At common law it is possible for the burden and benefit of leasehold covenants to run as long as there is 'privity of estate' between the parties (i.e. enforcement is only possible between the current landlord and current tenant) and the covenant 'touches and concerns' the land. This concept was defined in P & A Swift Investments v Combined English Stores Group (1989) as a covenant which: (a) benefits the estate owner for the time being and would cease to benefit if separated from the ownership of the estate; (b) affects mode, use or value of the benefited estate, and: (c) is not a personal covenant.

Clearly there were two particular problems with these traditional rules – firstly, that parties who had long since disposed of their interest in land could retain liability for subsequent breaches by successors in title; and secondly, that there was a disparity between landlords and tenants. A landlord or their successors could relatively easily enforce obligations against either the current tenant or the original party, whereas for a tenant to enforce an obligation of the landlord they would need to meet all of the criteria under common law.

4(b)

To address these issues, the Landlord and Tenant (Covenants) Act 1995 ('the 1995 Act') was created. The 1995 Act applies to all leases granted on or after 1st January 1996 and in such leases the LPA 1925 provisions discussed above cease to apply to such leases.

First and foremost, the 1995 Act (under ss2 and 3) operates to automatically pass the benefit and burden of covenants to successors in title of both landlords and tenants, unless the covenant is merely personal. It is clear from First Penthouse v Channel Hotels and Properties (2003) that what is considered 'personal' will be a matter for the court to judge on a case by case basis.

Secondly, the 1995 Act also releases the assigning tenant from liability for breach of covenant at the moment of assignment (s5). It should be noted that this will not apply in certain situations as set out in s11 (e.g. bankruptcy) or where assignment without the landlord's consent is itself in breach of covenant (s22). Furthermore, the landlord may, in certain circumstances, require a tenant who wishes to assign to enter into an Authorised Guarantee Agreement ('AGA') under the lease (see s16), whereby the assigning tenant provides a guarantee that their successor in title will not breach the covenants – thus creating liability against the assigning tenant if breach does in fact take place. If the assignee then assigns the lease in turn, the original AGA will cease to take effect. Note that the landlord is not automatically released from liability for breach by their successor on assigning the reversion, although they may serve a notice of their wish to be so released to the tenant, and if the tenant refuses an application may be made to the County Court for such release (ss6-8 of the 1995 Act).

The regime introduced by the 1995 Act should be welcomed for having created a logical and automatic procedure for the running of both the benefit and burden of covenants to assignees. Perhaps even more importantly, it provides much needed protection for former tenants to avoid liability for the breaches of successors – even with an AGA in place a tenant is liable at most for only their own breaches and those of their immediate assignee. The landlord is not unduly affected, as they retain the right to sue both the current tenant and (with an AGA) their immediate predecessor. There are also provisions in the 1995 Act such as s17 which offer some limited protection to tenants under leases created before 1996. It is noticeable that the Law Commission referred with approval to the 1995 Act regime in its report on reform of freehold covenants, *Making Land Work* (2011).

SECTION B

Question 1

Proprietary estoppel is an equitable device by which a person with a legal estate in land is estopped from denying the interest of another. The basic requirements for such claim derive from Wilmott v Barber (1880), and require that:

(i) the claimant made a mistake as to his or 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.

While these "probanda" have been refined in more recent cases, the issue of mistake still pervades a claim for estoppel – essentially any such claim will be brought when the claimant has been unaware of the non-binding nature of the grant of an interest in land which fails to comply with s2 Law of Property (Miscellaneous Provisions) Act 1989 (i.e. must be in writing, signed etc.). The courts have made it clear that those engaging in commercial transactions cannot avoid these formalities through estoppel (Yeoman's Row Management v Cobbe (2008)) but that estoppel will be available in "farm and family" cases. However, the modern test does not mention such a mistake expressly, instead looking for a clear assurance of rights, reliance on that assurance, and detriment as a result (Taylor Fashions v Liverpool Victoria Trustees (1982)).

Thus the first requirement for a claim of proprietary estoppel is to evidence a representation that assured the claimant of an interest in the property in question. This may be express, such as in Pascoe v Turner (1979) where Mr Pascoe clearly stated to Mrs Turner, in front of witnesses, that the house and everything in it would be hers. However, as such representations are relatively rare, the courts will be willing to allow more imprecise assurances, although only within certain limits. In Coombes v Smith (1986) vague statements amounting to a promise to provide for the claimant were held not to constitute a sufficient assurance. Further, the representation must refer specifically to rights in the land – thus in Layton v Martin (1986) a promise of "financial security" could not suffice. However, in the leading case of Thorner v Major (2009) the House of Lords reversed the Court of Appeal's decision that a lack of an unequivocal representation was fatal to a claim for estoppel. Instead, the House of Lords suggested that what will constitute a sufficient representation will be a matter for the judge in each case, and one which should be approached in the context of the parties' relationship. The repeated implications that a right had been granted were sufficient, despite the absence of an express statement.

Applying this to Amelie's situation, it is difficult to make a bold prediction as to the decision a court may come to. In her favour, her father was a taciturn man and had behaved as if he planned to give Amelie a greater right in the farm than her siblings, notably by giving her the documents pertaining to title and by repeatedly referring to "your farm". However, it could well be seen that the absence of any express representation specifically relating to the farm would prevent any claim for estoppel – "taking care" of Amelie could refer to a much wider range of potential bequests than rights over this property.

If it is held that there was a sufficient assurance, Amelie will next have to demonstrate that she relied upon this assurance. While reliance and detriment remain separate elements of an estoppel claim, in practice the evidence for both is often the same. While Amelie appears to have been willing to stay with her father in the absence of his assurance, this would not in itself stop her from still having relied upon it – see e.g. Campbell v Griffin (2001). Furthermore, Amelie clearly wished to move to Manchester and it is established that turning down alternative opportunities can be considered both reliance and detriment (Re Basham (1986)).

Similarly, it could be argued that she did not act to her detriment as she was paid for her work on the farm. However, Gillett v Holt (2000) establishes that the court must balance any benefits against any detriments suffered. When comparing her relatively modest salary against her potential earnings as a graduate, the work she put into caring for her father alongside the farm, and even the inevitable effect on her social life (see Davies v Davies (2014)), it is likely that on balance Amelie can demonstrate she suffered a detriment overall.

The final step in a claim for estoppel is to award a remedy. This is a difficult exercise for the court, as it is inevitably depriving a third party of what would otherwise be their legal right. This has led to a retreat from the traditional approach of awarding what the claimant had expected from the original assurance. Thus in Jennings v Rice (2002) the Court of Appeal referred with approval to the comments of Scarman LJ in Crabb v Arun DC (1976) – the remedy should be "the minimum equity to do justice to the plaintiff".

Realistically, it is difficult on this basis to envisage a particularly generous award to Amelie, considering the circumstances. Even if she can demonstrate a sufficient assurance it is clear that she already stands to earn over £1 million from her share of any sale. Indeed, even applying the traditional test it could be argued that she will in any event receive what she was promised – her father has "taken care" of her financially. On this basis it is highly unlikely that Amelie would be awarded the freehold of the entire property, or even the right to reside there for any more than a short period of time (especially as there are others who may want a sale of the property).

However, it would potentially be inequitable to refuse to take account of the additional sacrifices Amelie has made in caring for her father and running the farm. As such, the court may well award a remedy of financial compensation, allowing for Amelie to receive more of the proceeds of sale than her siblings. When quantifying that sum, the court will likely follow the approach in Jennings v Rice and use reliance loss as the measure – what financially has Amelie 'lost' during her years caring for her father?

Question 2(a)

A mortgage can be defined as "a transaction under which land or chattels are given as security for the payment of a debt", per Lindley LJ in Santley v Wilde (1899). A mortgage of land can exist either at law or in equity, depending on how it is created and whether it is registered. A mortgage must be created by deed under s23 of the LRA 2002 (and under s52 LPA 1925), and under s27 of that Act it is a registerable disposition and thus must be registered in order to take effect at law. An otherwise valid mortgage not created by deed and/or not registered will take effect in equity only. If a mortgage is created other than by deed, there will need to be a written document signed by both parties to meet the requirements of s2 of the Law of Property (Miscellaneous Provisions) Act 1989.

Thus when considering the four financial agreements entered into by Danny, the mortgages from Eagle Bank and Griffin Finance have both complied with the requisite formalities and will be considered legal mortgages. The agreement with the Chartered Bank has not been registered, and so until this occurs, it will take effect in equity only. It is assumed for the purposes of this answer that all three deeds comply with the requirements set out in s1 Law of Property (Miscellaneous Provisions) Act 1989. As regards Fallon's agreement, this would appear not to be made by deed, and thus could only take effect as an equitable mortgage. It has been protected by a notice in the register, but as an equitable charge, this will only protect such priority as Fallon's agreement already had; it will not confer any greater priority (s32 LRA 2002).

Prima facie, according to s28 LRA 2002 interests in land are ranked in order of their date of creation, irrespective of whether they have been registered. However, where there is a "disposition…for valuable consideration" a special rule of priority under s29 operates to instead confer upon that disposition (when registered) priority over any prior interest which has not been protected by substantive registration or by entry of a notice and does not take effect as an unregistered overriding interest. Thus registered charges will take priority over any unregistered (and otherwise unprotected) charges, and registered charges will be ranked, as between themselves, in the order of their date of registration (s48 LRA 2002).

Applying these rules to the situation set out in the question, it is clear that as an unregistered mortgage the loan by Chartered Bank will have the lowest priority of the three mortgages created by deed – thus Chartered Bank can only recover its loan after both Eagle and Griffin (as prior chargees) have done so. As between Eagle Bank and Griffin Finance, the Griffin Finance charge was registered on 12 June 2017 and so takes priority over the Eagle Bank charge registered on 18 June, despite having been created later; this is because the Eagle Bank charge was not protected (for the purposes of s29 LRA 2002) at the date the Griffin Finance charge was registered. The subsequent registration of the Eagle Bank charge does not have any retrospective effect and it therefore continues to rank behind the Griffin Finance charge. Both these registered charges have priority over Fallon's charge because it was created after them.

The two equitable mortgages will therefore rank after the two registered charges. However the rules relating to the priority of two or more equitable interests are not the same as those set out in the LRA 2002 in relation to registered legal charges. Instead, equity follows the rule that "where the equities are equal, the first in time prevails". This equitable maxim means that where there are two equitable interests, they will take priority in the order in which they were created (in the absence of any external factor such as fraud). This is reflected in the basic 'first in time' rule of priority under s28 LRA 2002. Thus an equitable mortgage which was created earlier than another will take priority, even if the latter mortgage is protected by a notice on the register of title (<u>Mortgage Corporation v Nationwide Credit</u> (1994)). Therefore the Chartered Bank's mortgage will have priority over Fallon's agreement because it was created first; the entry of a notice in the register (or any failure to do so) will not affect this position.

To summarise, the order of priority is Griffin Finance first, followed by Eagle Bank, Chartered Bank and finally Fallon. If any remedies claimed by the mortgage holders such as a sale of the property fail to realise the full amount lent, it will likely be these later mortgagees, ranking after the first mortgagee, who may recover less than their original loan.

2(b)

As noted in (a), Griffin Finance holds a valid legal mortgage over the restaurant and thus has a number of methods of enforcing the loan.

The most common method of realising the security under a mortgage is to enforce the sale of the property. In order to obtain the power of sale, the mortgagee must, under s101 of the LPA 1925, meet three conditions: that the mortgage is made by deed; there is no contrary provision in the deed; and that the legal date for redemption has passed. Once this is established, the mortgagee must still satisfy one of the conditions from s103 LPA 1925 to actually exercise the power: three months default of payment after notice has been issued; two months default of interest payments; or a breach of some other covenant.

It is clear that the Griffin Finance mortgage was executed by deed. Assuming that this is a normal institutional mortgage, it is highly unlikely there is any contrary provision preventing sale, and the redemption date is likely to be no more than a few months after the agreement in June 2017. Thus it is likely the power of sale has arisen. Assuming Danny's arrears include a failure to pay interest in the last two months, it can also be exercised.

In order for the property to be attractive to buyers, Griffin may well want to sell with vacant possession. Thus, even though in commercial property there is no need to gain an order for possession, it would be of benefit to Griffin. Such an order is likely to be granted.

When selling the property, it is clear from case law such as Cuckmere Brick Co v Mutual Finance (1971) that the mortgagee is under a duty to the mortgagor to take reasonable care when selling the land. This duty will extend to other mortgagees with lower priority as well, so Griffin Finance should take care to obtain the best price reasonably obtainable for the land, or it may have to pay the shortfall itself (see Raja v Lloyds TSB Bank plc (2001)). On sale, assuming the property realises more than £20,000 (plus interest, plus the expenses incidental to the sale), Griffin will hold the remainder on trust for the other mortgagees, whose loans will be paid off in the order of priority established above. If any money remains after that, this will be repaid to Danny as the mortgagor.

Another option instead of, or during the time prior to, sale would be the appointment of a receiver, under s109 LPA 1925 (which can be done where s101 and s103 are satisfied). While this is most usual in property which is leased to a tenant, it could be used here if the business is making a profit. However, to be an effective remedy this would require there being money left from the business after the receiver pays outgoings and his own commission and expenses – as the restaurant appears to be only a limited success, this remedy may not be appropriate.

Finally, there are two other remedies available to the mortgagee – foreclosure and suing on the mortgagor's covenant to repay. The former is seen as draconian and rarely used in modern land law, while the latter is almost certainly of limited value here as Danny is unlikely to have the personal assets to repay the loan. If foreclosure were to be threatened, Danny would be able to apply under s91 LPA 1925 for the court to substitute an order for sale.

Question 3

In order to protect his property as he wishes, Matthieu will need to use the mechanism of freehold covenants, which he can incorporate into the transfers of the houses to their purchasers. As terms of a binding contract, all three potential covenants would be enforceable against the original purchasers if they are so included.

However, in order for Matthieu to enforce the covenants against successors in title to those purchasers, or for his own successors to do so, both the benefit and the burden of the covenant will need to pass either at law or in equity.

At law, there are four requirements for the burden to pass. It must "touch and concern" the land, as defined in P & A Swift Investments v Combined English Stores Group (1989). Thus it must be shown that the covenant (a) benefits the estate owner for the time being and would cease to benefit if separated from the ownership of the estate; (b) affects mode, use or value of the benefited estate, and: (c) is not a personal covenant. Furthermore, the covenantee must have the legal estate of the dominant tenement and any successor must also derive title from him, and finally it must have been intended that the covenant would run with the covenantee's land. This final requirement is now assumed under s78 of the LPA 1925.

In this instance, any assignee of Matthieu's property should be able to take the benefit of the covenants. However, in order to enforce them against any successor(s) in title to the original purchasers of the other houses, the burden of the covenants must also have run. At law, the case of Austerberry v Oldham Corporation (1885) as approved by the House of Lords in Rhone v Stephens (1994) makes it clear that the burden will not usually run. Thus *prima facie* none of the covenants could be enforced by Matthieu or his successors in title as against any future owners of the other houses.

There are a number of exceptions to this strict rule, such as creating a chain of covenants where each successive purchaser agrees to indemnify their predecessor, enabling the original covenantor to be sued yet recover their losses back down the chain. Other methods include estate rentcharges and the grant of a lease rather than a freehold, as it is easier to enforce a leasehold covenant against a successor in title. However the most relevant exception for Matthieu, as regards the second proposed covenant (upkeep of roads and sewers), is the doctrine of "mutual benefit and burden" as created in Halsall v Brizell (1957). This allows the burden of a covenant to be transferred to a successor in title if they also receive a commensurate benefit from the related right. It is clear from case authority such as Thamesmead Town v Allotey (1998) and Wilkinson v Kerdene (2013) that the doctrine will only apply where the burden of payment is directly related to the benefit of the right enjoyed.

Assuming that the transfers of the other houses include the right to use the roads and sewers, then the doctrine will operate to ensure that the burden of paying a contribution towards these facilities runs with the land. It is worth noting that such a covenant does not require registration in order to be enforced against successors in title, see Goodman v Elwood (2013). Regarding the first covenant, to keep the exterior of their house in good repair, the doctrine in Halsall v Brizell has no application as there is no commensurate right granted in exchange for the liability. If Matthieu wishes to make this covenant enforceable against successors, he would have to rely on one of the other exceptions. As he wishes to sell the land as freehold (which would also increase its value) he may be forced to rely on a chain of indemnity covenants, which requires the original covenantor to be locatable and solvent, and only leads to a remedy in damages. This would also be the case regarding the third covenant.

In equity, the benefit of a covenant may pass in one of three ways: by annexation, by assignment or by a building scheme. Annexation is relatively straightforward as s78 LPA 1925 will assume annexation was intended unless there are express words to the contrary in the conveyance (as held in Federated Homes v Mill Lodge Properties (1980). Thus prima facie the benefit will run as long as no such words are present, and the benefited land is clearly identified (Crest Nicholson v McAllister (2004)). As Matthieu will be transferring the other houses, it should be straightforward to ensure this is done. Therefore the benefit of all three covenants should run in equity.

It is possible in the circumstances that Matthieu could also rely on the building scheme method first established in Elliston v Reacher (1908) but this is better suited to situations where a developer wishes to create mutual obligations between all owners, and in light of the availability of annexation it seems unnecessary to conduct the formalities (e.g. the definite scheme of development) required for this method.

Again, in order for the covenant to bind successors in title to the original purchasers the burden must also be passed. Tulk v Moxhay (1848) remains the pre-eminent authority on what is required for this: the covenant must be restrictive in nature; there must be benefited and burdened land, the covenant must touch and concern the land; and it must be intended to run with the covenantor's land. The first requirement means that only the burden of a negative (i.e. restrictive) covenant can run in equity. The courts will look not at the wording of the covenant, but at the 'pocket test' – would compliance with the covenant require the covenantor to spend money? Applying this test to Matthieu's covenants, the first and second covenants would fail as being positive in nature.

It should be noted that the requirement to seek consent, while seemingly positive in requiring positive action, is actually restrictive in that it prevents development without consent – see the case of 89 Holland Park (Management) v Hicks (2013), which also confirmed that such a covenant would be seen to benefit (i.e. touch and concern) the land itself. There is clearly servient and dominant land and s79 LPA 1925 presumes the intention that the burden will run; thus the burden of the third covenant will pass in equity. It is worth noting that the covenant will need to be protected by entry of a notice on the register of title if it is to bind a subsequent purchaser.

In conclusion, the first covenant will be enforceable by Matthieu and his successors, but only as against the original purchasers. The second covenant is likely to be enforceable by and against the respective successors in title under the doctrine of mutual benefit and burden, while the burden of the third covenant will run in equity.

Question 4

It is a founding principle of land law that real property is distinguishable from personal property. This is of particular importance on the transfer of land, as the vendor retains title to personalty, usually referred to as "fittings" but anything considered part of the realty ("fixtures") will pass to the purchaser. Today, when a property is conveyed, it is usual for the seller to complete the TA10 Fittings and Contents Form which aims to limit disputes as to whether a particular object is a fixture or a fitting and whether or not it is included in the sale. However, in the absence of such a form (or other contractual terms or documentation) the courts have developed a number of tests to provide guidance.

The first test to be developed was the "degree of annexation" test. This test holds that the more attached an object is to the land, the more likely it is to be a fixture. Thus in Holland v Hodgson (1872) spinning looms bolted to the floor of a factory were held to be fixtures, whereas machinery unattached to the land has been held to be a chattel, see e.g. Hulme v Brigham (1943). However, while simple, the test is problematic, especially regarding objects which must be attached to the land to be of use. Thus the common law developed the "purpose of annexation" test, which became predominant over the older degree test. This test asks why the object has been fixed to the land – is it so that the object can be used (and thus may remain a fitting) or is it to improve the land itself (which makes the object likely to be a fixture)? A good example of the test in action can be found in two cases relating to cinema seating, Vaudeville Electric Cinema v Muriset (1923) and Lyon & Co v London City & Midland Bank (1903). In the former case, seating installed in a building designed as a cinema was held to be a fixture, as it was fixed for the permanent benefit of the property. In Lyon & Co, the seating was by contrast installed for temporary use, and thus remained a fitting despite being attached to the floor.

The modern approach of the courts to the tests can be found in the House of Lords judgment in Elitestone Ltd v Morris (1997). While allowing that the tests retained some use, the Law Lords found them of only limited value when assessing whether a bungalow on concrete blocks could be considered a fixture or a fitting. Instead, the court advocated a "common sense" approach – as moving the bungalow would destroy it, it must surely be a fixture. Similar reasoning can be found in TSB v Botham (1996) where the court also suggested that the degree of permanence of an item may be of relevance, along with the level of damage caused in removing it.

Looking at the items on Vivek's land, it is clear from Botham that Willa was wrong to have removed the fitted kitchen. Fitted furniture such as this has a high degree of attachment to the land, is attached to improve the property not just so it can be used, and can cause serious damage on removal. However, the white goods such as the washing machine and dishwasher are likely to be removable if they are only connected by e.g. water pipes, as they are items with a limited lifespan and are only attached to the land in order to be used. Similarly, the purpose of attaching curtains and blinds is not to create a permanent improvement to the house but to enjoy their visual effect. Using the "common sense" approach it is clear that they may be removed – although one note of caution is that if the curtains are antique and formed part of a 'scheme of décor', Vivek may have an argument that they are fixtures under the decision in Re Whaley (1908).

Regarding the objects in the outbuildings, the set of handsaws is clearly a chattel. There is no evidence they are attached to the land, nor do they improve it. Vivek must return these handsaws, as Willa has retained ownership of them (if nothing else, these are objects found where the true owner is known, see e.g. Parker v British Airways (1982)), but it is somewhat less clear whether the large table saw is a fixture or fitting. Under the traditional test, it appears to have a high degree of annexation, but it could be argued that this is simply for the purpose of using the item. Elitestone may apply here – how easily can the saw be removed from the building? Thus in conclusion Vivek may demand the return of the fitted kitchen (or damages to replace it) but nothing else, and will have to return at least the handsaws to Willa.

Regarding the actions of Drillpower Ltd, the starting point when assessing the boundaries of land is that the owner of land owns *ad coelum et ad inferos* – that is, to the heavens above and the depths below. As such, any intrusion into the air above or ground below a piece of land is a trespass against the owner. As a matter of common pragmatism, these limits have been reduced by both the courts and by statute (regarding the air space, see for example Bernstein v Skyviews Ltd (1978)). However, it is still clear that the landowner's rights do descend beneath the ground, such as over a cellar beneath the property (Grigsby v Melville (1974)).

The doctrine was, perhaps surprisingly, strongly reaffirmed in the case of Star Energy v Bocardo SA (2010). The Supreme Court held that ownership of land extended to at least the depths at which land could be practically used, if not to the "centre of the Earth". Thus the drilling by Bocardo at 2800 feet below ground was a trespass, albeit one for which only £1000 was awarded in damages. Thus at common law, Vivek would have a strong claim that Drillpower must ask his permission to install pipes beneath his land, or commit an actionable trespass.

However, there is a long history of state involvement in land beneath the ground, as a result of the valuable minerals which can be found therein (see for example the Case of Mines (1586) and Coal Act 1938). Thus, as a result of the potential economic advantages from increased use of hydraulic fracturing ('fracking'), the government passed the Infrastructure Act 2015. This allows the use of these techniques without permission as long as it is 300 metres or more below surface level. If Drillpower Ltd fall within the remit of that Act (it would need to be licenced etc) then this may allow for the deeper pipe to be placed without trespass.

It should be noted that as of the time of writing, there are proposals for a statutory compensation scheme which would apply in situations such as this one. It would also be open to Vivek to make an agreement with Drillpower whereby he grants permission (i.e. a licence) to drill under his land in exchange for a mutually agreed sum. This may be preferable for Vivek, as any claim in trespass may face the difficulty of quantifying any actual loss he has suffered.