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

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the June 2017 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

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

SECTION A

Question 1

At common law, there are three elements which must be satisfied for an agreement to constitute a lease: exclusive possession, fixed and ascertainable duration and a term which is at least one day shorter than the duration of the grantor's estate. This applies to both commercial and residential leases.

Although many leases are granted in return for the payment of a rent, this is not essential. In Ashburn Anstalt v Walter John Arnold and W. J. Arnold & Company Limited (1989) the Court of Appeal held that there is no requirement that a lease reserve a rent. This is consistent with Law of Property Act 1925, s 205(1)(xxvii) which provides that a term of years absolute may take effect either in possession or reversion "whether or not at a rent". It is evident, therefore, that at least one of Lord Templeman's supposed 'constituent elements' is not in fact an essential characteristic of a landlord and tenant relationship.

The most important, but also the most troublesome, of the three elements identified in the statement by Lord Templeman in relation to the creation of a lease is exclusive possession. This has been described as the "touchstone" of a tenancy (Street v Mountford (1985)). Exclusive possession entitles the tenant to exclude the entire world, including the landlord, from the property for the duration of the term (save to the extent that any rights of entry have been reserved under the lease). As explained in Street v Mountford, the central issue in determining whether exclusive possession has been conferred is the degree of control which the owner is entitled to exercise over the land notwithstanding that it is occupied by another (ie the tenant) for the term of their agreement. Inevitably, such an enquiry will take in all the circumstances, which will

necessarily vary according to the facts of a given case and a given tenancy. In this connection Marchant v Charters (1977) (exclusive possession not granted where a resident housekeeper had daily access to the room in question) can usefully be contrasted with Street v Mountford (exclusive possession granted where the landlord provided "neither attendance nor services").

Prudential Assurance v London Residuary Body (1992) illustrates the need for the other two common law requirements also to be satisfied: an agreement granting possession until land "was needed" did not create a lease because there was no fixed and ascertainable duration for the agreement and hence no 'term'; the question whether the tenant had exclusive possession was never raised.

If the term is not certain, then the agreement cannot be a lease: Mexfield Housing Association v Berrisford (2011).

Where all three elements are present, it would appear that it is irrelevant that the lease is created out of what might be regarded as an inferior interest: Bruton v London and Quadrant Housing Trust (1999).

Even if the necessary elements for categorising an agreement as a lease are present, they may be disregarded if the agreement falls within the recognised exceptions set out in the case of Facchini v Bryson (1952). These exceptions extend to agreements where there is a lack of intention to create legal relations, or an existing relationship which is inconsistent with the claimed relationship of landlord and tenant (eg service occupancy: Norris v Checksfield (1986)), or where the supposed 'landlord' has no power to grant a tenancy. If one of the exceptions applies, a presumption is raised that no tenancy was granted. In Cobb v Lane (1952), for example, a sister granted her brother the right to live rent free in accommodation she owned. While the court accepted her brother had been granted exclusive possession, no tenancy arose as the parties lacked the intention to create legal relations. As with all presumptions, the presumption that a tenancy was not granted may be rebutted by tendering evidence to the contrary.

There are also a number of grey areas where the authorities do not appear to be consistent. For example, in the case of charities, in Family Housing Association v Jones (1990), the Court of Appeal refused to take into account the fact that the underlying purpose of the grant was charitable but in Westminster City Council v Clark (1992), the underlying charitable nature of the grant prevented the tenant from acquiring exclusive possession. To some extent, these decisions were a consequence of the then terms of Housing Act 1996, s 7 and its predecessors.

The methods of interpretation used by the courts when faced with multiple agreements are another case in point. In Stibling v Wickham (1989), for example, the Court of Appeal advocated the adoption of a common sense approach to determine the "substance and reality" of multiple transactions but other authorities have adopted a more legalistic approach.

It should also be noted that when examining the rights and obligations of the parties the courts draw a distinction between residential and business occupiers. In the case of business agreements, the courts are more likely to regard landlords' attempts to retain control of the premises as genuine. For example in Dresden Estates v Collinson (1987), the court accepted that exclusive possession had been retained by the landlord, despite the fact that the licensees were paying rent for a term and were the exclusive occupiers of the land. The argument that such reasoning was counter to Lord Templeman's speech in Street

v Mountford was rejected on the basis that "the attributes of residential premises and business premises are often quite different".

Some, however, would argue that these are not examples of a failure to apply established principles, but instead reflect the reality that the facts of any given case, rather than the law, can be complex or give rise to nuances of interpretation which cannot always be easily assigned to one or other side of the lease/licence distinction.

In summary, Lord Templeman's statement remains an accurate description of the law in the vast majority of cases. It is, therefore, perhaps treated as a general rule rather than as an exhaustive definition.

Question 2

A landlord's statutory duties to lawful visitors and trespassers are to be found in the Defective Premises Act 1972 (DPA 1972) and the Occupiers Liability Acts 1957 and 1984 (OLA 1957 and OLA 1984) respectively. These will be considered in turn.

(a) DPA 1972

Under DPA 1972, s 4 a landlord owes a duty of care to anyone (including the tenant) who might reasonably be expected to be affected by defects in the state of premises let by the landlord. The duty is to take "such care as is reasonable in all the circumstances" to see that the tenant, and anyone else who might be affected, is reasonably safe from personal injury or damage to property caused by a "relevant defect" (DPA 1972, s 4(1)).

Under OLA 1957, s 2 a landlord owes a common duty of care to anyone (including a tenant) to take "such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there".

On the face of it, therefore, a landlord would appear to owe concurrent duties to a visitor under both DPA 1972 and OLA 1957. However, in Drysdale v Hedges (2012) the court noted that OLA 1957, s 4 (which dealt specifically with a landlord's duty of care to visitors), had been repealed and replaced (in similar, although not identical, terms) by DPA 1972, s 4. Against that background, the court considered that "it is to [DPA 1972, s 4] that one has to look, in the first place, to find the extent of the landlord's duty in tort."

The duty of care under DPA 1972, s 4 arises if the tenancy:

- imposes an obligation on the landlord to maintain or repair the premises (DPA 1972, s 4(1));

- gives the landlord the right (express or implied) to enter the premises to carry out maintenance or repair of the premises (DPA 1972, s 4(4)) - typically this will be a right to carry out repairs which are the primary responsibility of the tenant under the terms of the lease but which the tenant has failed to carry out.

The latter element imposes a significant burden on the landlord in relation to premises which the landlord has no contractual obligation to repair, not least because the duty arises when the landlord knew or ought to have known of the defect. Consequently, many leases typically include a covenant by the tenant to

notify the landlord of any defect that may give rise to the landlord being liable under DPA 1972.

The duty imposed by DPA 1972, s 4 is in addition to, rather than substitution for, any other duty which the landlord owes to the tenant under the lease (DPA 1972, s 6(2)). However, at the heart of both the statutory and any contractual duty is the concept of 'disrepair', ie the statutory duty is only engaged if a state of disrepair exists at the premises. The existence of disrepair is determined in accordance with well-established common law principles: see, for example, Sternbaum v Dhesi (2016) and Dodd v Raeburn Estates (2016).

Where the disrepair arises from the tenant's failure to fulfil its own repair or maintenance obligations, the landlord will not be liable to the tenant for any defect in the state of the premises arising from the (DPA 1972, s 4(4)), but the landlord will still owe a duty to anyone else who might reasonably be expected to be affected by the defect. See, for example, Lafferty v Sherwood DC (2016).

DPA 1972 applies to commercial and residential premises. The expression "tenancy" includes any contractual right of occupation (eg an agreement for lease, underlease or licence to occupy (DPA 1972, s 4(6)) as well as a tenancy at will or on sufferance (DPA 1972, s 6(1)(b)).

(b) Occupiers' liability

A landlord's potential liability to trespassers for defects in premises is governed by OLA 1984. Under OLA 1984, s 1 an "occupier" of premises owes a duty of care to a trespasser in respect of any risk of the trespasser being injured on the premises because of the state of the premises or things done or omitted to be done on them. The nature of the duty is that an occupier must take such care as is reasonable in all the circumstances of the case to see that the trespasser does not suffer injury on the premises by reason of the risk concerned.

A landlord will be an "occupier" (and hence subject to the duty of care) under OLA 1984 if he would be an "occupier" for the purposes of OLA 1957 (OLA 1984, s 1(1)(2)(a)). OLA 1957 does not itself contain a definition of "occupier": instead, it relies on the pre-existing common law definition.

Under OLA 1984, s 1(3) the duty of care to trespassers arises where the occupier:

- is aware of the danger or has reasonable grounds to believe that it exists
- knows or has reasonable grounds to believe that the trespasser is or may come within the vicinity of the danger concerned, and
- the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

This imposes a relatively low duty on a landlord in relation to trespassers. The terms of the statutory language mean that not only the existence of any duty but also the nature and extent of the steps required to fulfil it will be determined by the particular facts of any given scenario.

Question 3

Prior to the enactment of the Housing Act 1988 (HA 1988), a landlord who wished to recover possession of a property which had been let in the private rented sector invariably had to establish a statutory basis for terminating the tenancy. This was because the vast majority of tenancies in that sector enjoyed security of tenure under the Rent Act 1977 (RA 1977)). Under RA 1977, a tenant can only be deprived of that security if the landlord is able to establish one or more of the statutory 'cases' for doing so (RA 1977, s 98 and Sch 15, Part I). This state of affairs was replicated in broadly similar terms in relation to assured tenancies under HA 1988 (albeit that that Act refers to 'grounds' for possession): see HA 1988, s 7 and Sch 2, Part II).

If the tenant who has the protection of RA 1977 or an assured tenancy under HA 1988 is unwilling to give up possession, a court hearing will be required before a possession order can be made. Under both statutes, the 'fault-based' cases or grounds for possession on which landlords most typically seek to rely as the basis for recovering possession (eg non-payment of rent, persistent delay in payment of rent, or breach of the tenancy agreement) do not lead inevitably to the making of a possession order; instead, these grounds give the court a discretionary power to make a possession order if the court 'considers it reasonable' to do so (see HA 1988, s 7 and RA 1977, s 98). The court also has full power to stay or suspend the operation of any possession order which it makes. In some instances, the period over which a possession order is stayed or suspended can last for months or even years.

Although much about the new assured tenancy was familiar to practitioners, HA 1998, s 20 (as originally enacted) contained something new. It established the assured shorthold tenancy (AST) in an attempt to make letting in the private rented sector more popular. RA 1977 was considered to be unduly tenant-friendly in view of the measures which it contained in relation to security of tenure, rent protection and succession rights. Although adoption of the AST was initially limited, changes introduced by the Housing Act 1996 mean that since 1997 the AST has become the 'default' tenancy of choice in the private rented sector.

The attractiveness of the AST to landlords lies in the terms of HA 1988, s 21. This provision entitles a landlord to regain possession of a property which has been let on an AST without the need to establish a case or ground for possession and also without a court hearing, where the relevant criteria apply.

HA 1988, s 21 applies to both fixed-term and periodic tenancies. In either case, a landlord can terminate the AST (and hence trigger an incontestable right to possession) if he gives the tenant at least two months' written notice that the landlord requires possession of the property (HA 1988, s 21(1) and s 21(4)). However, the landlord does need to take a certain amount of care in relation to the termination date which he specifies in the section 21 notice because:

- in the case of a fixed-term tenancy the termination date cannot be earlier than date on which the fixed term expires, and

- in the case of a periodic tenancy the termination date cannot be earlier than date on which the periodic tenancy could otherwise have been terminated by a notice to quit.

Upon proof that the relevant statutory criteria have been satisfied, the court will make a possession order by way of an administrative act rather than holding any

sort of hearing. In most cases the tenant will be ordered to give up possession of the property within 14 days of the date of the order; even if the tenant is able to prove that a possession order will cause exceptional hardship to him, the maximum period which can elapse between the date of the order and the date for possession is 42 days.

It should be noted that a landlord's right to invoke HA 1998, s 21 is not completely unrestricted. First, regardless of when a section 21 notice is served, a possession order cannot be made for a date which is less than six months from the date when the tenancy began (HA 1988, s 21(5)): this means that a tenant will have at least six months' use of the property before he can be required to leave. Secondly, a landlord may be debarred from serving a section 21 notice if he (or his letting agent) has failed to protect any deposit provided by the tenant with an approved deposit protection scheme and/or he has failed to provide the tenant with prescribed information about the arrangements relating to the protection of the deposit (see HA 1998, ss 212 - 214).

The absence of any requirement to prove fault on the part of the tenant, nor indeed to prove any specific reason at all for requiring possession of the property, coupled with the relatively straightforward and inexpensive procedure for obtaining a possession order, are a radical improvement of the landlord's position compared to the position which existed prior to the introduction of the AST. For those reasons, it can justifiably be said that the AST has radically altered the balance between landlord and tenant in the private rented sector.

Question 4

Every "residential occupier" is entitled to the benefit of the Protection from Eviction Act 1977 (PEA 1977). The term "residential occupier" means any person "occupying … premises as a residence"): see PEA 1977, s 1. This definition is intentionally broad; as a consequence of it, the protection afforded by PEA 1977 extends to:

(a) any premises which are used by the residential occupier as a residence, regardless of the number of residences which the occupier may have (ie the protection is not limited to the occupier's main or principal home: see Langford Property Co, Ltd v Tureman (1949))

(b) every occupational arrangement under which a person is lawfully in occupation of the premises "under a contract or by virtue of any enactment or rule of law" (thus encompassing tenants, subtenants licensees, lodgers, service occupiers and others)

(c) occupiers who unlawfully remain in occupation of premises once their lawful period of occupation has expired (see PEA 1977, s 3).

PEA 1977, ss 1(2), 1(3) and 1(3A) respectively create a single offence of unlawful eviction and separate offences of harassment. By virtue of PEA 1977, s 1(2) a property owner commits a criminal offence if he "unlawfully deprives the residential occupier of any premises of his occupation of the premises or any part thereof, or attempts to do so", ie if he evicts or attempts to evict a residential occupier. The act complained of must have the character of an eviction. Consequently, a refusal by a landlord to replace a key which the tenant had lost (the result of which was that the tenant could not gain access to the property for a day) did not amount to an unlawful deprivation of possession: see R v Yuthiwattana (1984).

By virtue of PEA 1977, s 1(3) a person commits a criminal offence if he "does acts calculated to interfere with the peace or comfort of the residential occupier or members of his household, or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence" with the specific intent of causing a residential occupier to leave the property or to refrain from exercising any right or remedy to which he is entitled in relation to the property. This is one of two 'harassment' offences created by PEA 1977. The second such offence was introduced into PEA 1977 (as PEA 1977, s 1(3A)) by the Housing Act 1988 (HA 1988). PEA 1977, s 1(3A) - which is in largely identical terms as PEA 1977 s 1(3) in terms of the conduct which will amount to harassment - applies only to landlords and requires a lower degree of criminal intent: it is sufficient to secure a conviction if it is established that the landlord had "reasonable cause to believe" that his conduct might cause the occupier to leave or to refrain from seeking redress.

The penalties for all three offences include a maximum term of two years' imprisonment, a fine or both.

Although PEA 1977 penalises the criminal conduct of the wrongdoer, it does not take any account of the significant financial benefit which may accrue to the wrongdoer as a result of securing vacant possession of the property, and thus it fails to provide any mechanism for depriving the wrongdoer of that benefit. These deficiencies are made good by HA 1988, ss 27 and 28 which:

(a) create the statutory tort of unlawful eviction, and

(b) entitle the victim of such an eviction to claim damages calculated on the basis of the difference in value between the landlord's interest if the tenant had remained in occupation and the value of the landlord's interest as a result of the tenant having vacated the property.

As a matter of general law, a landlord has long been entitled to the self-help remedy of peaceable re-entry onto the demised property in the exercise of a right of forfeiture or re-entry for a breach of covenant or condition by the tenant. Prior to PEA 1977, the law took little account of the fact that, in the case of a residential tenant, the lawful exercise of such a right by the landlord would necessarily result in the eviction of the tenant and/or anyone else who was living in the property at the time. PEA 1977, s 2 prevents a landlord from enforcing a right of re-entry or forfeiture by means of peaceable re-entry if "any person is lawfully residing in the premises".

This provision is supplemented by PEA 1977, s 3 which provides that a landlord may only recover possession of "premises which have been let as a dwelling" from the occupier of them if the landlord has first obtained a court order. The occupier does not have to be the tenant: a court order will be required if any person is lawfully residing in the property or a part of it.

PEA 1977 therefore ensures that residential occupiers receive a minimum level of protection: they are not to be unlawfully evicted or hounded from their homes, and any legitimate re-taking possession of possession must be achieved under the authority of a court order (which itself ensures, except in strictly controlled circumstances, that there will have been a prior hearing at which all the circumstances of the case will have been considered). The imposition of criminal and civil sanctions for failure to adhere to this minimum level goes some way to deterring landlords from taking the law into their own hands.

SECTION B

Question 1

It appears that Carmen has a rack rent tenancy of residential accommodation. Given that the tenancy was granted after 15 September 1989 it will be regulated by the Housing Act 1988 (HA 1988) so long as it:

(a) meets the requirements of HA 1988, s 1; and

(b) is not excluded by virtue of HA 1998, s 43.

As regards HA 1988, s 1 the property, be it a flat or a house, appears to be "a dwelling house" which has been let "as a separate dwelling" and is occupied by Carmen as her "only or principal home" and thus satisfies the qualifying criteria contained in that section. None of the prescribed circumstances in HA 1998, s 43 arises. Consequently, Carmen's tenancy is regulated by HA 1988.

HA 1988 provides that any tenancy which is regulated by that Act will be either an assured tenancy or an assured shorthold tenancy. Prior to amendments introduced by the Housing Act 1996, a tenancy would be an assured tenancy unless the landlord served written notice on the tenant prior to the grant of the tenancy that the tenancy was to be an assured shorthold tenancy. In the present case, it appears that Carmen did not receive any such notice; consequently it can properly be assumed that she has an assured tenancy of her home.

It is also appropriate to assume that her tenancy is a periodic tenancy. This will be because either:

(a) it was originally granted as a periodic tenancy and has continued as such ever since; or

(b) it was originally granted for a fixed term which has expired, after which it will have been the subject of a statutory conversion into a periodic tenancy under HA 1998, s 5(2).

As regards periodic assured tenancies, HA 1988, s 5(1) specifies the permitted methods by which such a tenancy may be brought to an end; service of a notice to quit is not one of the permitted methods: in fact, s 5(1) specifically provides that the service by the landlord of a notice to quit is of no effect.

However, HA 1998, s 5(1) does allow a landlord to terminate an assured periodic tenancy by obtaining a possession order from the court under HA 1988, ss 7 or 21. Section 21 is not relevant given the prior assumption that Carmen's tenancy is an assured tenancy and not an assured shorthold tenancy. HA 1998, s 7, however, allows the landlord to obtain a possession order on a number of grounds, including arrears of rent or persistent delay in paying rent: see HA 1988, Sch 2, Part II, Grounds 8, 10 and 11. Ground 8 is a mandatory ground for possession, whereas Grounds 10 and 11 are discretionary grounds.

Prima facie therefore, Carmen is vulnerable to a claim by Daisy for a possession order based on one or more of these grounds. However, there are a number of statutory protections which may work to Carmen's advantage. First, proceedings under HA 1988, s 7 cannot be commenced until a notice has been served by Daisy under HA 1988, s 8 which:

(a) notifies Carmen of Daisy's intention to bring possession proceedings;

(b) is given at least two weeks before proceedings are commenced;

(c) states the ground(s) for possession on which Daisy will rely.

On the facts, no such notice has been served. Consequently, Daisy cannot presently take any steps to obtain a possession order. Potentially, therefore, Carmen still has a window of opportunity within which to pay off the arrears without further action being taken: doing so would preclude service of a section 8 notice based on Grounds 8 or 10.

If Carmen cannot pay off the arrears before a section 8 notice is duly served, and if possession proceedings are subsequently commenced, it would still be open to Carmen to pay off some or all of the arrears if she can. Reducing the amount of the arrears below the relevant level specified in Ground 8 would mean that Daisy would be prevented from relying on the only mandatory ground for possession which is available to her; instead, she would need to persuade the court to exercise its discretion in her favour. So Carmen should institute her payments to reduce the arrears as soon as she possibly can, in the hope that by the time of any court hearing the amount still owing will be too low to engage Ground 8.

If some rent arrears still exist at the date of any court hearing, Daisy will be entitled to invoke Ground 10 and/or Ground 11 and claim a possession order. Given that these are both discretionary grounds, it will be incumbent upon Daisy to persuade the court that it is reasonable to make such an order: see HA 1988, s 7(4). Assuming that by the time of the hearing Carmen is not only paying the current rent as it falls due but is also making regular reductions in the amount of the arrears, it is possible that the court may, in the exercise of its discretion, decline to make a possession order. More likely, however, is an order which reflects the court's extended discretion under HA 1988, s 9(2)(a) to stay or suspend any possession order which it makes on condition that Carmen continues to pay future rent as it falls due and also pays down the arrears.

Question 2

Part II of the Landlord and Tenant Act 1954 (LTA 1954) gives 'security of tenure' to a tenant who occupies premises under a qualifying tenancy for the purposes of a business: see LTA 1954, s 23(1). 'Business' includes any trade, profession or employment and any activity carried on by a body of persons, whether corporate or unincorporate: see LTA 1954, s 23(2)).

Where a tenant is protected by LTA 1954:

(i) the tenancy can only be terminated in accordance with the statutory procedures laid down by LTA 1954: see LTA 1954, ss 25 to 27 (these are in addition to any contractual or common law requirements regarding termination);

(ii) once the tenancy has been lawfully terminated, the tenant has a right to remain in occupation and to request a renewal tenancy once termination of the existing tenancy has occurred (with only limited grounds on which the landlord can object to such a request: see LTA 1954, s 30(1)).

Consequently, the existence of a right of security of tenure in relation to any of the occupational arrangements featured in the question will present a significant

obstacle to Ben's plans. In the present case, it would appear that the only live issue as regards whether those arrangements enjoy security of tenure under LTA 1954 is whether the premises are being used for the purposes of a business.

2(a)

Charles

Although Charles is the proprietor of a business, it seems doubtful (on the basis of the evidence presently available) that he uses the storage unit for any purpose which is associated with that business. Even if it is assumed (as appears to be the case) that the car is owned by the business rather than by Charles personally, it does not appear that the car is being stored at the unit pending its ultimate sale by the business. Instead, the car is being stored there for what appears to be Charles' personal use and enjoyment.

However, further enquiry might reveal evidence which contradicts this conclusion. It may be, for example, that the car bears logos, branding or other get-up which advertises Charles' business. Alternatively, it may be that the car (even if unadorned by advertising) is displayed before races at a stand or similar at which Charles promotes his business. If Charles is able to mount a plausible case that the car is being used not purely to satisfy his own personal enthusiasm for racing but is also being used as a means of promoting his business, then he may stand a better chance of arguing that his tenancy enjoys security of tenure.

Davina

Storage of paper files and documents is an integral aspect of the operations of many businesses. Accountancy is clearly a 'trade, profession or occupation', and so it is submitted that Davina is clearly using her storage unit for the purposes of her accountancy business.

EFP

EFP does not appear to generate any income nor to incur much, if anything, by way of expenditure. It almost certainly does not make a profit. Although these elements are undeniably the hallmarks of many businesses, the statutory definition of 'business' extends to 'any activity carried on by … a body … corporate'. EFP is clearly a 'body corporate', and it is submitted that the activities which it undertakes in fulfilling its charitable objectives are (when viewed collectively) an 'activity' to which LTA 1954 applies.

2(b)

As regards the steps which are available to Ben to terminate the tenancies, much depends on whether the tenants are willing to vacate their units voluntarily, thereby relieving Ben of the need to observe any common law or statutory requirements in relation to termination as a prelude to recovering possession.

If any one or more of the tenants is willing to vacate voluntarily, Ben will be able to negotiate a surrender of the relevant lease specifying any date of termination on which he and the tenant can agree. The advantage to Ben is that this is likely to be far quicker than having to 'force' his tenants to leave, thereby meeting his objective of beginning the redevelopment as soon as possible. However, the tenants may well negotiate a 'price' for the surrender in the form of a cash payment, so Ben should be prepared for this. The fact that a tenant has the benefit of security of tenure does not prevent them from agreeing to surrender

their tenancy, but there are procedural steps under the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 which will need to be followed in order to ensure that any such agreement is binding on the tenant.

If one or more of the tenants refuses to leave voluntarily, Ben will have to satisfy the legal requirements for terminating the relevant tenancy before he can obtain possession. These are discussed below.

Each tenancy is a periodic tenancy. As a matter of common law, each must therefore be terminated by the service of a notice to quit. The notice to quit must be clear and unambiguous. It must state when the notice expires and it must give sufficient notice (which in each case will be six months). Where LTA 1954 does not apply – which on the facts only seems possible in relation to Charles – this is all that Ben will need to do in order to terminate the tenancy.

However, where LTA 1954 applies Ben will also need to terminate the tenancy in accordance with the requirements of LTA 1954 (as noted above). Ben will need to serve a notice under LTA 1954, s 25. The notice must be in the prescribed statutory form, it must give each tenant at least six (but not more than twelve) months' notice of termination, it must specify a termination date which is not earlier than the date on which the tenancy could have been determined contractually or at common law, and it must specify any ground on which Ben will oppose the grant of a renewal tenancy under LTA 1954, s 30(1). In this case, Ben should specify ground (f) in view of of the proposed demolition of the storage units. In order to succeed on this ground, Ben will need to establish that he has a settled intention to carry out the proposed works and that he needs possession of the premises in order to carry them out. The fact that he has already obtained planning permission will be probative of that intention, but it is likely that he will also need to provide proof of funding and viability.

A section 25 notice can also serve as a common law notice to quit (meaning that Ben need only serve one notice rather than two) provided that it satisfies all the requirements of both the common law and LTA 1954.

Question 3

The Landlord and Tenant Act 1987 (LTA 1987) grants certain tenants of flats a collective right of pre-emption (or first refusal) when their landlord intends to sell his interest in the premises in which those flats are situated. The right of pre-emption allows the tenants to acquire the landlord's interest at the price for it which has been agreed or determined in the open market. The relevant qualifying criteria will now be considered in more detail.

The right of pre-emption is available to those tenants who are "qualifying tenants" (as defined in LTA 1987, s 3(1)). All the tenants at Arbor Court would appear to satisfy this requirement because they all hold long leasehold interests in their respective flats.

By virtue of LTA 1987, s 1, the right of pre-emption applies to a disposal of the landlord's interest in premises if:

(a) the premises consist of the whole or part of a building (LTA 1987, s 1(2)(a)); and

(b) they contain two or more flats held by qualifying tenants (LTA 1987, s 1(2)(b)); and

(c) the number of flats held by such tenants exceeds 50 per cent of the total number of flats contained in the premises (LTA 1987, s 1(2)(c)).

The requirements in LTA 1987, s 1(2)(b) and (c) are clearly satisfied. It is also clear that the blocks are occupied for residential purposes (LTA 1987, s 1(3)). There is no suggestion from the facts that the landlord is an "exempt landlord" to whom the provisions of LTA 1987, Part I do not apply (LTA 1987, s 1(4). Finally the transfer of the reversion (which will include a transfer of internal and external common parts) will amount to a "relevant disposal" within the meaning of LTA 1987, s 4(1).

It should be noted that in terms of LTA 1987, s 1(2)(a) the facts would appear to demonstrate that Arbor Court in fact consists of two separate sets of premises, because each block of flats consists of a "whole … building". This means that for the purposes of LTA 1987, s 1 there are in fact two proposed disposals by TPL, one of which relates to The Laurels and one of which relates to The Cedars. This has consequences in relation to the steps which must be followed under LTA 1987, ss 5 and 6 in order to give effect to the right of pre-emption: that procedure is discussed in more detail in the following paragraphs.

Where the right of pre-emption applies to a landlord's proposed disposal of his reversionary interest in "premises", the landlord must offer that interest to the qualifying tenants. That offer must be in the form of a notice (an 'offer notice') which satisfies the requirements of LTA 1987, s 5 by setting out the principal terms of the proposed disposal, offering to sell the property to the tenants, specifying a period of acceptance of not less than two months and a further period for the tenants to specify the nominee purchaser.

The landlord must serve a separate offer notice in relation to each "premises" or "building" that he is proposing to dispose of: see LTA 1987, s 5(3). In the present case, this would appear to mean that TPL must serve one offer notice relating to the disposal of The Laurels on at least nine of the tenants whose flats are in that block (see LTA 1987, s 5(5)) and a separate office notice relating to the disposal of The Cedars on at least nine of the tenants whose flats are in that block. Consequently, the letter from TPL would not appear to be a sufficient offer notice because it refers only to a disposal of Arbor Court and does not sever the transaction so as to deal with each block of flats separately. TPL will need to serve fresh offer notices.

An offer notice can be accepted by the service of a notice (an 'acceptance notice') which satisfies the requirements of LTA 1987, s 6. Principal amongst these requirements is that the acceptance notice must be served by the "requisite majority" of the qualifying tenants on whom an offer notice has been served: see LTA 1987, s 6(3). "Requisite majority" is defined in LTA 1987, s 18A as meaning more than 50% of the qualifying tenants within each "premises" or "building" referred to in the offer notice which was served on them.

If new offer notices are served, then it would seem that a requisite majority of the tenants in The Laurels will be able to serve a section 6 notice (because six of the ten flats are held by qualifying tenants). However, the same will not hold true for the tenants in the Cedars (because the number of flats held by qualifying tenants who wish to serve an acceptance notice equals <u>but is not more than</u> 50 per cent of the total number of flats contained in the block).

If Hazel and her fellow tenants are determined to proceed with acquiring the entirety of Arbor Court, she must either:

(a) persuade another tenant in The Cedars to participate in the acquisition; or

(b) try to argue that the entirety of Arbor Court constitutes a single set of "premises" in relation to which only a single offer notice needs to be served (because in that scenario there are already 11 of the 20 qualifying tenants who wish to serve an acceptance notice and so the "requisite majority" for doing so already exists): but for the reasons outlined above it is suggested that this argument is unlikely to prevail.

Once a valid acceptance notice has been served TPL will not be able to dispose of its reversionary interest (the 'protected interest') to HML (or anyone else) for the periods specified in the offer notice. Concurrently, the tenants will have to select a nominee purchaser to acquire TPL's interest. Within one month of being notified of the identity of the nominee purchaser, TPL must either inform the nominee purchaser that it will not be proceeding with the disposal of the protected interest (in which case TPL will not then be able to dispose of that interest for 12 months) or it must send a sale contract for the protected interest to the nominee purchaser. Once the contract has been sent to the nominee purchaser, exchange of contracts must occur within two months.

Question 4

The facts indicate that there has been either an assignment or an underletting by Frank in breach of the absolute prohibition in the lease. Strictly speaking, Gideon would only be 'the Tenant' under the lease from Ellice in the case of an assignment, but his use of the words "I'm the tenant now" is probably ambiguous in this respect, so it is certainly possible that he is an undertenant.

If there has been an underletting, Frank is still 'the Tenant' under the lease, and so is in breach of covenant with regard to all the rent in arrear (including the unpaid quarter's rent which was due on 1 June 2017) and also with regard to the underletting (because it was made in breach of the absolute prohibition in the lease).

If there has been an assignment of the tenancy, the provisions of the Landlord and Tenant (Covenants) Act 1995 (LTCA 1995) in relation to 'new tenancies' will apply. In particular:

(a) the lease vests in the assignee (Gideon) and Frank is no longer 'the Tenant' under the lease (LTCA 1995 s 1(3));

(b) the burden of post-assignment performance of the tenant covenants in the lease passes to Gideon as the incoming assignee (LTCA 1995, s 3);

(c) the assignor (Frank) is automatically released from liability in relation to post-assignment performance of those tenant covenants (LTCA 1995, s 5);

all of which would mean in the ordinary course that Frank would have no liability to Ellice for the non-payment of the quarter's rent which should have been paid on 1 June 2017.

However, in the present case any such assignment will have occurred in breach of the absolute prohibition against assignment of the lease. This means that it is an 'excluded assignment' for the purposes of LTCA 1995, s 11. The consequence of this is that although the assignment will have been effective in law to vest the lease in Gideon and also to make him responsible for future performance of the

tenant covenants (ie it will have achieved (a) and (b) above), it will not have released Frank from liability in relation to post-assignment performance of the tenant covenants. This means that Frank will be liable to Ellice for the non-payment of the quarter's rent which should have been paid on 1 June 2017. That liability is joint and several with Gideon's liability to pay the same amount. Frank will also be in breach of covenant with regard to the assignment (because it was made in breach of the absolute prohibition against assignment).

Given that both Frank and Gideon are in breach of covenant in the various respects identified above, Ellice is entitled to claim damages and/or to forfeit the lease. Whether he chooses to forfeit the lease will depend on whether he thinks that he will readily be able to install another tenant in the shop once he has recovered possession of it. Although peaceable re-entry is a permissible means of forfeiting the lease, it is submitted that Ellice should be advised to bring possession proceedings and obtain a court order for possession. Frank and/or Gideon (the latter either as the tenant or the undertenant of the shop, as the case may be) would be entitled to apply in those proceedings for relief from forfeiture: see Law of Property Act 1925, s 146(2) and (4).

Alternatively, the fact that the lease contains an absolute prohibition against assignment, subletting or parting with possession does not prevent Frank and/or Gideon from asking (in this case retrospectively) for Ellice's consent in order to regularise what has actually happened. However, the absolute prohibition means that Ellice is not subject to any contractual or statutory constraints when it comes to the reasons which he needs to have either for refusing consent or for imposing conditions which will need to be satisfied before his consent is given.

If Ellice wishes to forfeit the lease, he should take care not to engage in any conduct which might appear to constitute a waiver of the breaches which have occurred. A waiver will occur if Ellice expressly or impliedly represents that he is treating the lease as continuing notwithstanding any breach which has occurred (eg by continuing to accept rent). It is possible that the proposed seizure of the jewellery (which is discussed in more detail below) would constitute such conduct.

Ellice should be advised not to proceed with the proposed seizure of the jewellery – and not merely because of the possible waiver which might arise. The Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) imposes significant restrictions on what was formerly a landlord's right to distrain against his tenant's goods by seizing and selling a sufficient quantity of them to satisfy the amount of any commercial rent arrears. The principal safeguards for a tenant which now exist in relation to commercial rent arrears recovery (CRAR) are:

- the landlord must give the tenant at least 7 days' prior written notice of the intended seizure (unless the landlord obtains a court order which authorises a shorter period);

- the seizure must be carried out by a duly authorised (ie court approved) enforcement agent;

- the landlord must not seize goods which are on the premises but which do not belong to the tenant.

It is distinctly possible that Ellice will fall foul of each of these, in that: (i) he does not appear to have given any prior notice of the proposed seizure and does not appear to have the benefit of a court order which allows him to give 'short' or no notice, (ii) there is no evidence that his 'business associates' are duly

authorised enforcement agents, and (iii) one of the potential factual scenarios in this case is that there has been an underletting, in which case Gideon is not 'the Tenant' under the lease (and so does not owe any rent to Ellice) but nevertheless is the owner of all the jewellery in the shop (having bought it from Frank as part of the stock-in-trade of the business which he now runs from the shop).

A breach of the CRAR regime is a criminal offence punishable by a term of imprisonment, a fine, or both.