LEVEL 6 - UNIT 9 – LAND LAW
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

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

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

An intention to possess requires an intention to exclude the world including the paper title owner, as far as it is reasonably practical to do so. It does not require that the claimant had the intention to own for the requisite period, without the consent of the legal paper title owner (approved by the House of Lords in Pye v Graham (2003)). Demonstration of the intention must be by evidence of outward conduct (Prudential Assurance Co Ltd v Waterloo Real Estate Inc (1999)). Furthermore, acknowledgement of the legal paper title's ownership defeats the claim of intention (e.g. Colchester Borough Council v Smith 1992 CA Lambeth LBC v Bigden (2000), Ofulue v Bossert (2009)).

Possession must be adverse, although Pye discards any special meaning of 'adverse'; this requires that the possession must be without the owner's consent (e.g.Lambeth London Borough Council v Bigden (2000), Ofulue v Bossert (2009).

If a squatter satisfies these fundamental requirements over land that is unregistered any claim based on adverse possession is governed by the Limitation Act 1980 (LA 1980), which sets out a limited period of time after which the unregistered owner may not bring any action against the squatter to recover his land. The usual limitation period required is that of 12 years (s15 LA 1980), subject to certain exceptions (e.g. Sole charitable organisation, Crown land, foreshore, and land held in trust with a remainderman). Once the squatter has been in adverse possession for 12 years, the unregistered owner's paper title and right to sue is automatically, statutorily extinguished (s17 LA 1980) and the squatter becomes the new legal owner. Therefore, a squatter in unregistered land is highly likely to succeed since he need only show that he has satisfied the requirements of adverse possession for a continuous period of 12 years.

Where the squatter claims adverse possession in registered land, any claim is governed by the Land Registration Act 2002 (LRA 2002), which significantly reformed the effects of adverse possession on the legal registered owner. Furthermore, where adverse possession is completed after 13 October 2002, the date at which the LRA 2002 came into force, the paper owner's title is not automatically extinguished.

Moreover, unlike the position in unregistered land, there is no limitation period in which a registered owner can lose his title merely because a squatter is in adverse possession for a fixed period of time (s96 LRA 2002).

Instead, under Schedule 6 of the LRA 2002, a squatter can make an application to the Land Registrar to be registered as proprietor if they have at least 10 years' adverse possession. If the Registrar is of the view that the squatter has an arguable case to be registered, this will trigger a notice sent to the current registered legal estate owner (and to other interested parties such as mortgagees).

The registered landowner will then have 65 days within which he can respond in three ways. He can consent to the squatter's application in which case the squatter will be registered. He can simply object, perhaps on the basis that adverse possession is not made out as the squatter lacks the necessary factual intention, in which case the application is halted until the objection is resolved.

The better response is for the registered landowner to object and use the final option, which is to serve a counter-notice.

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

The counter-notice requires that the Registrar deal with the application according to para 5 Schedule 6 to the 2002 Act. If this is the case, the squatter will only be registered as proprietor of the land if the Registrar is satisfied that the squatter's case falls within one of three grounds. Firstly, that the squatter is entitled to some form of estoppel based on unconscionability. Secondly, the squatter is entitled for some other reason (for example an incomplete contract for the sale and purchase of the registered land, or where the squatter is entitled under a will of the deceased proprietor). Thirdly, the claim relates to a boundary dispute between the neighbouring squatter's land and the registered owner's land. The Schedule provides, *inter alia*, that the squatter must reasonably have believed the land belonged to her. The overall effect is that the squatter even with adverse possession is unable to be registered as the new owner unless one of the three exceptional grounds is proven.

Significantly, if the squatter's claim does not fall within one of the three categories since an application to be registered has been made, the registered landowner has an automatic right to a further two years in which to take court action to repossess the land. This right applies regardless of how long the squatter has been in adverse possession. Furthermore, the action requires merely that the registered owner prove his title by his paper registration. It is only if after the two-year period the squatter manages to stay in possession he will be able to be registered as proprietor.

It should also be noted that under s144(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 the new criminal offence for squatting in residential premises does not mean that a squatter charged with this offence cannot claim title by way of adverse possession; illegality does not impact on registration of title under LRA 2002 (Best v Chief Land Registrar (2014)). However, it possibly makes it easier for any landowner to evict the squatter.

It can clearly be seen that a squatter is much more likely to succeed in a claim for adverse possession over unregistered land than registered land. This is especially so given the fact that there is no automatic extinction of the registered owners title; no limitation period; the LRA 2002 is based on a system of application by the squatter and notification to the registered owner; difficult grounds to satisfy; and a further 2 year grace period in which the registered owner can take action of recovery. The fact that it is harder to be successful as an adverse possessor of registered land should not come as a total surprise given that the founding principle of the LRA 2002 is that title guaranteed by the State should not be easily defeated by a 'mere' squatter's possession.

Question 2

Generally, a person in actual occupation of the land is either a tenant or a mere licensee, which depends on the construction and interpretation of the agreement.

A lease, or term of years absolute, is capable of existing at law as one of two legal estates (s1 Law of Property Act 1925 (LPA 1925)), as such, they are proprietary rights and capable of binding third party purchasers who acquire the freehold. In contrast, a licence is merely a personal right that is not capable of binding third parties (Lloyd v Dugdale (2001)). Furthermore, a licensee cannot avail themselves of various statutory protections, such as the right to be protected from eviction (Protection from Eviction Act 1977).

In order for an agreement to amount to a lease, it must satisfy the requirements laid out by Lord Templeman in Street v Mountford (1985). The occupier must have exclusive possession of the property, for a certain term, at a rent.

It should also be pointed out that it is now clear that payment of rent is no longer a necessary requirement as confirmed in Ashburn Anstalt v Arnold (1989) applying s205 LPA 1925 (see also Prudential Assurance v London Residuary Body (1992)). However, generally residential leases require the payment of a rent such as periodic tenancies, in which case the date for payment in each period must be certain.

Certainty of term requires that occupation of the land is certain as to when it begins and ends. For example in Lace v Chantler (1944) the court held that the term was not certain where it was stated to be 'for the duration of the war'. At the time of the agreement, there was no certainty when the war would end.

Exclusive possession requires that the tenant has total control of the land he is occupying, and the ability to exclude everyone else, even the landlord (other than for certain agreed purposes). It follows that if an occupier does not have exclusive possession he cannot be a tenant but instead will usually be a licensee. The requirement has caused difficulty for the courts, particularly concerning residential agreements.

For example, in Somma v Hazelhurst (1978) separate written agreements were given to a young couple 'renting' a bedsit. One of the terms in the agreement gave the owner the right to occupy it with them, or to put someone else in with them. The term was held by the Court of Appeal to be evidence of the fact that there was no intention of exclusive possession by the parties, and thus no lease. Importantly, Lord Templeman in Street overruled Somma, recognising that focusing the concept of exclusive possession on the intentions of the parties would invariably ride roughshod over the various legislations enacted to protect residential tenants but not residential licensees.

It is now abundantly clear, as demonstrated from Street itself, that when determining whether any of the requirements have been met the court will look at the substance of the agreement and the nature of the relationship, rather than relying simply on the expressed words. As can be seen from the case of Somma, this approach is particularly important in the requirement of exclusive possession.

The courts are also more astute to the use of sham agreements by landlords that are deliberately devised in order to look like a licence and not a lease with all the corresponding obligations it entails. Thus, the courts will not look merely at the label of an agreement, even if it specifically calls itself a "licence" or contains a term purporting to deny exclusive possession.

Two contrasting cases of AG Securities v Vaughan (1990) and Antoniades v Villiers (1990) clearly demonstrate this principle. In both cases, there were joint occupiers of a flat where each of the occupiers signed a separate "licence".

In Antoniades, cohabitees signed two separate but identical "licence" agreements on the same day for the "shared" occupation of a one-bedroom flat, each agreeing to pay half of the rent. The cohabitees moved in together on the same day. Each contained terms purporting not to grant exclusive possession. The House of Lords held that the couple indeed had exclusive possession and had been granted a joint tenancy despite the landlord's sham, which was a pretence and could be ignored. The two agreements could be read as one, which meant there was also unity of title.

However, in Vaughan, four occupiers signed separate non-identical "licence" agreements for the occupation of a four-bedroom flat, but each moved in at different times paying different rents. The House of Lords held that there was no genuine joint tenancy: hence they were mere licensees.

Furthermore, in Aslan v Murphy (1990) the occupier was required to vacate the premises daily for one and a half hours so that his room could be cleaned. The Court of Appeal held that the term was a mere sham not intended ever to be carried out; as such the agreement was a lease.

It must be acknowledged, that an occupier of residential land with exclusive possession might, nevertheless, still be a licensee falling within one of the exceptional circumstances specified by Lord Templeman in Street. Nearly all are primarily based on the fact that there is no intention to create legal relations

(e.g. Heslop v Burns (1974) - generosity, Margaret Wagons v Smith (1951) – charitable friendship, Norris v Checksfield (1992) – service employee).

Legal lease

Where an agreement has been held to be a lease under the Street requirements, in order to be legal it must have been created in a deed (s52 LPA 1925). The deed must also comply with the requirements in s1 Law of Property Act (Miscellaneous Provisions) Act 1989, so it must declare itself to be a deed, be signed by both parties, witnessed and delivered.

Unless the lease falls within the recognised exception: it is made in writing, takes effect in possession immediately, for the best market rent and is for three years or less, in which case it may be orally created and still be legal (s54 (2) LPA 1925).

Equitable lease

In order to be an equitable lease the agreement must be made in writing, signed and contain all the terms (s2(1) LP (MP)A 1925). A further requirement is that the written agreement is specifically enforceable (Walsh v Lonsdale (1882)).

In conclusion, whether an occupier of residential land is a tenant under a lease is fundamentally determined by the courts pragmatic matter of fact approach when assessing the agreement to see if it grants the occupier exclusive possession, in spite of the label a landowner may attach to it. However, it should not be forgotten that if the formalities required to create a legal or equitable lease have not been complied with, even with exclusive possession, such an occupier is a mere licensee.

Question 3(a)

Easements are proprietary rights in or over land which create interests in land that are capable of binding subsequent owners.

It is trite law that in order to be capable of amounting to an easement the right must satisfy four characteristics set out by the Court of Appeal in Re Ellenborough Park (1956):

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

It is the fourth characteristic that, whilst including many aspects, requires that the easement must not confer a right that amounts to the user having exclusive possession (or joint possession) of the land: if it does it cannot be the subject matter of a grant of an easement. Exclusive possession is equivalent to the grant of an estate in land, such as a lease (Street v Mountford (1985) and not merely the grant of a right in or over that land.

The problem lies where rights have been granted which confer such an extensive use over the land that it effectively amounts to exclusive possession. The difficulty being establishing when the right crosses that line, as is so clearly illustrated in the right to park and the right to storage cases. For example in

Copeland v Greenhalf (1952) the right to store and repair any number of vehicles on the plaintiff's land, for as long as the defendant liked was considered too extensive to be an easement; instead, he ought to have claimed ownership under the law of adverse possession. In contrast, in the earlier case of Wright v Macadam (1949) the Court of Appeal held that a right to store coal in a shed, which effectively amounted to exclusive possession, was a valid easement. However, in the later case of Grigsby v Melville (1972) Brightman J, in following Copeland, held that a right of storage in a cellar on servient land was too extensive to exist as an easement as it amounted to exclusive use.

In Newman v Jones (1982) a right to park a vehicle at any time anywhere in a car park was held to be a valid easement. However, in Batchelor v Marlow (2001) the exclusive right to park three cars in three parking spaces for 9.5 hours each weekday was held to be an invalid easement as it was so extensive that it rendered the proprietor's ownership of the land 'illusory'. The Court of Appeal approved the test for exclusive possession as the 'no reasonable use' test taken from the *obiter* comments made in London and Blenheim Estates v Ladbrook Retail Parks Ltd (1992). The test is that if the servient owner has no reasonable use of the land, whether for parking or anything else, it cannot amount to an easement, as he cannot be said to have exclusive possession. This is also known as the 'ouster principle'.

It should be noted, that the Law Commission in its Report No. 327 has recommended that rights which prevent the servient owner from making any reasonable use of his land should not invalidate easements; reversing the decision in Batchelor. (Law Com. No. 327 Making Land Work: Easements, Covenants and Profits A Prendre 2011). This recommendation would make it much clearer as only rights that actually grant exclusive possession would be invalid as easements. However, the recommendation is yet, if ever, to be implemented.

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

English case law, not being bound by Scottish law, has confirmed the Batchelor 'no reasonable user' test but appear to carrying it out in a manner that embodies Moncrieff (see Virdi v Chana (2008), Kettel v Bloomfold Ltd (2012)). For example, in Kettel, easements to park in designated spaces were upheld on the basis that the servient owner could make reasonable use of the land by right of way when the car was not parked and by use of the airspace above and the surface beneath the parking space. These activities seem to fit well with the 'remaining in possession and control' test rather than being of any 'reasonable user' test. A further difficulty is that the decision is in direct contrast to that of Batchelor, yet, in both cases the right to park was claimed on a plot of land only large enough to accommodate that vehicle. Therefore, the estate owner in Batchelor could have equally undertaken the so-called 'reasonable' uses of the land identified in Kettel.

In conclusion, although it is perfectly clear that the grant of a proprietary right over another's land with exclusive possession is incapable of being an easement, the extent and point at which a right amounts to exclusive possession are less clear, as has been shown in the right to park cases. Until either the Law Commission's recommendation is enacted or the Supreme Court provides a

definitive ruling this area of law remains difficult to predict, complicated and ambiguous.

3(b)

Reservation occurs when a landowner transfers part of his land but reserves rights over the part transferred. The general rule is that reservations of easements must be expressly granted (Wheeldon v Burrows (1879). In the absence of an express reservation, the only two methods of implication are: necessity and common intention.

Both methods are rare and require a higher burden of proof than a transferee who claims an implied grant of easement, as the grantor must not derogate from his grant. Moreover, both are capable of being defeated if words in the transfer expressly show a contrary intention (e.g. Nickerson v Barraclough (1981)).

Reservation by necessity

Implied reservation by necessity is strictly interpreted and requires that the retained land cannot be used at all without the right being claimed. If the easement is merely necessary for the reasonable enjoyment of the land that will be insufficient to a finding of necessity (compare Union Lighterage Co v London Graving Dock Co (1902) and Wong v Wong Beaumont Property Trust (1965) with Walby v Walby (2012) where there was no necessity for a reserved right of drainage).

The classic case of necessity is where land is completely landlocked. A right of way that is merely convenient is, again insufficient. So, if there is an alternative right of way, no matter how impractical, there will be no necessity. For example, in Titchmarsh v Royston Water Co Ltd (1899) there was no necessity where the alternative right of way to access land was down a 20-foot embankment.

However, necessity is a question to be determined from the facts of each case as illustrated in Sweet v Sommer (2014).

Reservation by common intention

Easements may be impliedly reserved where the objective common intention was that the land be used for a particular use and the easement is necessary to give effect to that use (Pwllbach Colliery Co. Ltd v Woodman (1915)).

The right must be necessary for the continued enjoyment and use of the retained land in a way that is contemplated by the parties: it is insufficient if the right claimed is merely reasonable or convenient, it (see Re Webb's Lease (1951), Peckham v Ellison (2000) and Liverpool City Council v Irwin (1977)).

Whilst reservation of easements by implication is possible, the requirements are specific and exacting, and they are in no way a satisfactory alternative to reserving an easement expressly.

Question 4

Since a legal mortgage must be created by deed (s85(1) and 87 Law of Property Act 1925 (LPA 1925)), essentially, it grants the mortgagee a proprietary legal interest in the mortgagor's land until the mortgage is repaid.

Where the mortgagor has defaulted upon the mortgage, mortgagees have a range of rights and remedies available to them that may be pursued either

concurrently or successively and can even be used in the alternative if faced with a defence to one of the remedies by the mortgagor. Importantly, in exercising its rights, the mortgagee is entitled to consider its own interests: it is not a fiduciary and is under no general duty of care, but must exercise its powers *bona fide* (Downsview Nominees v First City Corporation (1993) PC)).

The mortgagee has a personal remedy by suing the mortgagor for payment of the principal sum and any interest on the personal covenant contained in the mortgage agreement (Palk v Mortgage Services Funding (1993)). However, this will be pointless if the mortgagor has no available assets, which may be likely given that he has defaulted.

Regardless of any default by the mortgagor, due to the legal mortgagee being vested with a term of years (s85 and s87 LPA 1925) a mortgagee has the inherent immediate right to possession from the date of the mortgage as is oft quoted: "before the ink is dry" Per Harman J Four Maids Ltd. v Dudley Marshall (Properties) Ltd (1957). The right, though perhaps better described today as a remedy given the restrictions placed on it by the courts, may be expressly or impliedly excluded by the mortgagee (e.g. by the express terms in the mortgage (Birmingham Citizens Permanent Building Society v Caunt (1962)). Although there is no statutory duty, common law requires that it be exercised *bona fide* (use only as mortgagee for the purposes of enforcing its security Quennell v Maltby (1979) CA). Furthermore, it is often used in conjunction with the mortgagee's right of sale where there has been a default by the mortgagor.

The mortgagee is strictly entitled to seek possession and to use reasonable force, without an order from the court (Ropaigealach v Barclays Bank plc (2000)). However, particularly in cases of mortgaged residential property the mortgagee rarely seeks possession without having obtained a court order first. Obtaining a court order, avoids the risk of prosecution under the Protection from Eviction Act 1977 (s1) or, indeed, criminal prosecution under Criminal Law Act 1977 (s6).Where the mortgagee applies for such an order the court has discretionary power to grant relief to the residential mortgagor under s36-39 Administration of Justice Act 1970 (AJA 1970). Essentially, it may adjourn possession actions or postpone possession if it appears that the mortgagor is likely to be able to pay the principal sum and any interest (s8 AJA 1970) within a 'reasonable period'. The mortgagor must demonstrate a realistic prospect of paying the arrears, not simply a mere possibility. Moreover, a 'reasonable period' was generally considered to be two years. However, the Court of Appeal in Cheltenham and Gloucester Building Society v Norgan (1996) accepted the postponement of mortgage arrears until the end of the mortgage. Obviously, both the original loan and the arrears must be secured against a house with sufficient value.

Most legal mortgage agreements contain an express provision giving the mortgagee the power of sale, in the absence of which the mortgagee has a statutory power of sale under s101 LPA 1925 which is implied into every legal (& equitable) mortgage made by deed unless a contrary intention is shown from an express provision in the mortgage deed.

The power of sale arises as soon as the legal date for redemption of the mortgage has passed, usually six months after the mortgage is created, or usually when one payment is in arrears in the case of instalment mortgages, (Twentieth Century Banking Corporation v Wilkinson (1977)). However, the power is only exercisable when one of the three conditions in s103 LPA 1925 has been met. This requires default on the mortgage repayments for 3 months after a notice in writing (s196 LPA 1925); or two months default of payment of interest (this is the most typical breach by mortgagors of residential mortgages);

or breach of a provision in the mortgage deed (e.g. lease without mortgagee's permission). It should be noted that these conditions, as with s101, are very easily satisfied and therefore work well for the mortgagee.

If, before the power of sale becomes exercisable the mortgagee sells the property, the mortgagor is entitled to sue the mortgagee (104 LPA 1925, Corbett v Halifax (2003)). The mortgagee is free to choose when to sell the property and is not obligated to wait for better market conditions. However, the mortgagee cannot sell at a reduced price, simply to recover its money (Palk); it has a responsibility to 'take reasonable precautions to obtain the true market value of the mortgaged property as held in Cuckmere Brick & Co. Ltd. v Mutual Finance Ltd. (1971). Throughout the process of sale, common law demands that the mortgagee acts with reasonable care and in good faith (Cuckmere). A mortgagee who exercises its power of sale effectively confers title free of all subsequent mortgages but not prior mortgages.

Once the power of sale becomes exercisable under s103, the mortgagee has a statutory right to appoint a receiver (s109 LPA 1925). The receiver acts as agent of the mortgagor and is responsible for any breach of duty: not the mortgagee (Medforth v Blake (2000)). The receiver manages the mortgaged property; his primary duty being to collect all the income derived from the mortgaged land, to pay all sums due including payments owed under the mortgage (s101 LPA 1925). The power may be particularly useful if the residential property is rented, but it can be costly so is usually only used where the property is producing a high yield of income.

The mortgagee's remedy of foreclosure is powerful but rarely used today. Foreclosure terminates the mortgagor's equitable right to redeem; the result is the transfer of the mortgaged land to the mortgagee free from any interest or rights of the mortgagor. The effect is the mortgage is extinguished as the transfer of the property to the mortgagee satisfies the debt. If the charged land is in "positive equity" this can mean a windfall for the mortgagee. Thus the court is likely in such a situation to use its discretion conferred in s91 LPA 1925 and order a sale of the property instead of foreclosure.

Whilst there is an armoury of rights and remedies available where the mortgagor has defaulted on the mortgage, the feasible option in most cases will be for the mortgagee to seek a possession order with a view to exercising the power of sale.

SECTION B

Question 1

Proprietary estoppel is an equitable device that can create proprietary interests and estates over land based on informal promises that do not comply with statutory formalities. Traditionally, the strict five *probandi* derived from Wilmott v Barber (1880) had to be proven. However, the modern flexible approach requires the claimant prove a representation, reliance and detriment, and that it would be unconscionable to deny the claimant a remedy (Taylor Fashions v Liverpool Victoria Trustees (1982), Thorner v Major (2009)). It should be noted, that that the courts take a more 'holistic approach' looking at the facts 'in the round' as illustrated in Gillett v Holt (2001) and Jennings v Rice (2002).

Benjamin

Arguably, in 2002 when Harold tells Benjamin "it would be in your best interest to return as it will all be yours one day - after me" Harold has expressly made a

clear representation over identifiable land (the "it" referring to Pickwick Estate in the context of the whole conversation) that Benjamin will receive Pickwick estate when (Harold) dies.

What counts as a sufficient enough representation is 'hugely' context specific as identified by Lord Walker in Thorner v Major. Moreover, the fact that Benjamin's case is a typical 'family and farm' case, similar to that identified in Thorner, means that if the representation is not absolutely clear and unambiguous this will not prove fatal. In Thorner, the claimant who had worked on his father's cousin's farm for thirty years with no pay could not point to any express representation instead his claim was based on inferences of fact that led him to expect that he would receiving the property after death.

In any case, from 2005, after Benjamin has moved back into Pickwick Estate, when Harold repeatedly states " the whole estate is yours when I'm gone–it's all been dealt with in my will" this is a clear and unambiguous representation.

Detriment is a broad concept and does not require financial expense on the land; it is sufficient if the claimant has done something or omitted to do something that is substantial (Gillet). For example, in Pascoe v Turner (1970) detrimental acts included acting as unpaid mistress and housekeeper.

However, whatever the detriment consists of, it must have been made in reliance on the representation. This inevitably requires a causal link between the representation and detrimental reliance.

In 2001, it can be argued that Benjamin clearly relied to his detriment on Harold's representations; he relocated from one area of the country to the other, gave up a lucrative and professional career and job offer, and a salary of £50,000 in order to take on the role of assisting his father with the farm for no pay.

A counter argument may be that these actions are only causally linked to the initial unsuccessful representation Harold made in 2002 (following the earlier argument). However, from 2005, where there is evidence of unambiguous express representations there are also causally linked acts of detrimental reliance: Benjamin continues to work arduously for no pay and expends all his savings on rebuilding the farm.

The fact that he was provided with the benefit of 'rent free' accommodation does not outweigh the detriment he has endured, illustrated by the Court of Appeal in Gillett.

Moreover, since a clear express representation has been made by Harold Benjamin may be able to rely on the presumption that he acted in reliance on the representation, in which case it will be for the executors or Family Farmers to prove otherwise (See Greasley v Cooke (1982) CA Grant v Edwards (1986)).

Once proprietary estoppel is established it does not mean that it is easy to predict the actual remedy the courts will award as the number of remedies can range from the conveyance of the fee simple (Pascoe) to an award of nothing (Sledmore v Dalby (1996)).

However, the court will assess which is the appropriate remedy by giving effect to the claimant's reasonable expectations whilst ensuring that the remedy is proportionate to the detriment suffered (see Jennings, Lord Walker's comments

that the court must take a principled approach and not exercise absolute discretion).

Benjamin could argue that transferring the legal fee simple in Pickwick Estate together with an award of monetary compensation is proportionate to the extensive and considerable detriment he has suffered, despite the rent-free accommodation. Such an award would also amount to a reasonable expectation given that Harold's representations make it clear that Benjamin would be left Pickwick estate in his will. Moreover, a transfer of the fee simple to Benjamin with a monetary compensation is in this case the 'minimum equity to do justice' (for a similar decision and outcome see Gillett).

A further, and perhaps final, consideration in assessing the award to be given will be the fact that Family Farmers is a mere beneficiary under Harold's will i.e. not a purchaser having given value for the legal estate.

In conclusion, it seems highly likely that Benjamin has a successful enforceable claim under the doctrine of proprietary estoppel: it is unconscionable for Family Farmers, in the circumstances, to assert their strict legal rights arising under Harold's will.

Natalia

Natalia's oral commercial arrangement for the purchase of the field does not fulfill the requirements for a contract transferring an estate in land. Such contracts, under s 2 Law of Property (Miscellaneous Provisions) Act 1989 (s2(LP(MP)A 1989) must be made in writing, incorporate all the terms and be signed, unless the informal agreement amounts to a constructive (or resulting) trust (s2 (5) LP(MP)A 1989.

The courts have had difficulties in justifying a claim for proprietary estoppel which appears to flatly contradict s2 (LP(MP)A 1989) especially in commercial situations (see Lord Scott's comments in Yeoman's Row v Cobbe (2008)). This has led the courts to sometimes make an order based on the finding of a constructive trust rather than under proprietary estoppel (e.g. Yaxley v Gotts (1999) and Kinane v Mackie – Conteh (2005)).

However, a particular issue for Natalia is that the agreement is incomplete, and as such she will be unable to prove there has been any valid representation or assurance (express or implied) by Harold upon which she relied to her detriment. The facts clearly state that Natalia agrees to purchase but at a lower price yet to be agreed and only if she "obtains planning permission"; these two fundamental terms are yet to be finalised. Given her occupation and experience as a property developer, neither can she show that she reasonably but mistakenly believed the agreement to be complete and binding. In Cobbe the House of Lords considered an oral agreement for the sale of land. The agreement had been withdrawn after Cobbe had carried out extensive, costly investigations and had acquired planning permission. The court held that since the agreement had not been completed, there was no basis for either proprietary estoppel or a constructive trust. Cobbe has subsequently been followed Herbert v Doyle (2010).

Therefore, following Cobbe and Doyle, Natalia will be unable to enforce the incomplete commercial arrangement under a proprietary estoppel, or indeed by way of a constructive trust. (If the agreement was completed then it is possible to argue otherwise.)

Question 2(a)

Whenever there is co-ownership of land, i.e. where two or more concurrent owners hold an interest in the land, a statutory trust of land arises (Trusts of Land and Appointment of Trustees Act 1996 (TLATA 1996)). The legal title can only ever be held by a joint tenancy (s1 (6) Law of Property Act 1925 (LPA 1925)); the maximum number of joint tenants being four (s34 (2) LPA 1925). A joint tenancy means that each joint tenant shares the whole land, there are no separate shares, and effectively they hold the land as one single owner. Furthermore, a legal joint tenancy cannot be severed (s36 (2) LPA 1925). Instead, the right of survivorship applies, which means that whenever one of the joint tenants dies the remaining joint tenants hold the estate.

In equity, co-owners can hold as either joint tenants or as tenants in common. An equitable tenancy in common requires only unity of possession, and each tenant owns a separate quantifiable share. They are free to deal with their share as they wish e.g. sell it, or transfer it to another during lifetime or upon death. However, a joint tenancy in equity requires the existence of the four unities (possession, interest, time and title, see Antoniades v Villiers (1990)).

Whether the co-owners hold in equity as joint tenants or tenants in common depends on the circumstances existing when the land was conveyed, which can include equitable presumptions. However, as the conveyance expressly declares that they are "beneficial joint tenants', in 2012, the position is that Carol, Edith, Patricia and Seren hold the legal estate as joint tenants on trust for themselves as beneficial joint tenants.

The fundamental distinction between a legal joint tenancy and an equitable joint tenancy is that the latter may be severed by each joint tenant who then takes an equal share as a tenant in common according to the number of joint tenants existing at the time of the severance. There are three recognised methods of severance at common law (Williams v Hensman (1861) per Page-Wood VC). Firstly, acting upon one's own share such (e.g. alienation as in Re Hewett (1894), bankruptcy as in Brown v Randle (1796), and homicide as in Re Crippen (1911) (subject to relief under the Forfeiture Act 1982 see Re K (1985)). Secondly, by mutual agreement (Burgess v Rawnsley (1975)). Thirdly, a course of dealing (Re Draper's Conveyance (1969). The one statutory method is notice in s36 LPA 1925.

Carol's death/will: the right of survivorship

Although Carol has died and left all her estate to Edith in her will, Carol's estate will not include any interest in Calamity House as she dies as a joint tenant. She has not severed her share in equity before her death, so the doctrine of the right of survivorship operates immediately on her death and takes precedence over any testamentary dispositions (Gould v Kemp (1834)). Thus, there can be no severance in equity by a joint tenant making a will. The effect of the right of survivorship is that the remaining joint tenants, Edith, Patricia and Seren, are now the three legal and beneficial joint tenants of the house. Of course, Carol's estate passes to Edith but without passing any interest in Calamity House.

Edith's letter: severance by notice in writing

The issue is whether Edith has severed the equitable joint tenancy before she dies so that she becomes a tenant in common of her share, in which case her share in the property passes to Deepak under her will.

Severance can occur by one joint tenant giving notice of her intention to sever in writing (s36(2) LPA 1925). Notice is unilateral and does not require the consent of the remaining joint tenants. Therefore, the fact that there is no reply to the letter is irrelevant. No specific form is required other than it is in writing; it need not even be signed. Moreover, it does not need to explicitly state that it is a s36(2) notice (Re Draper's Conveyance (1969), affirmed by CA in Harris v Goddard (1983)). However, the intention to sever must be immediate (Harris) as is evidenced by Edith's urgent request to sell, and notice must be served on all the joint tenants (see Goodman v Gallant (1986) and Williams v Hensman (1861)). The fact that Patricia has not read the letter is not fatal as the letter is deemed as having being served on the remaining joint tenants when it is 'left at the last known abode…',' i.e. when it is delivered to Calamity House (s196(3) LPA 1925, Kinch v Bullard (1998)).

Thus, Edith's letter is sufficient to constitute a 'notice', which upon delivery severs the joint tenancy in equity, so that Edith immediately holds a separate share as a tenant in common. Upon her death, her share falls into her estate and passes to Deepak under her will. The result is that Patricia and Seren are now the legal joint tenants holding on trust for Deepak as tenant in common of one-third and themselves as joint tenants of the remaining two-thirds.

Patricia's sale: an act operating on her share

Patricia's act of selling her beneficial interest is a disposition of an equitable interest under a trust and therefore must be made in signed writing (s53(1)(c) LPA 1925). Assuming this has occurred, she has severed the equitable joint tenancy by the method of 'acting upon her share' (Hensman). Robert takes as a tenant in common since there is no unity of title. The result is that Seren and Patricia remain the legal joint tenants holding on trust for Deepak, Robert and Seren as tenants in common of one-third each (Re Hewett (1894)).

2(b)

The Trusts of Land and Appointment of Trustees Act 1996 (TLATA 1996) contain the relevant provisions concerning dispute resolutions involving the sale of property held on trust.

Seren and Patricia, as trustees, are under a duty to consult with Deepak and Robert regarding the dispute, and they should take into account the majority wishes of the beneficiaries (s11).

Seren as a beneficiary has a *prima facie*, right to occupy; especially given the fact that Calamity House was bought and used as a residential property for Seren (and the others) to live in. The fact that she is pregnant will also be taken into account but so will the wishes of the other beneficiaries: Deepak and Robert (s12 & s13).

Importantly, Deepak (and Robert) as an 'interested party' in the property can apply to the court to ask them to make an order for sale (s14). In determining whether or not to make an order for sale, the court will take into account a number of factors including the purpose of the trust and the welfare of any children residing in the property (s15).

The court will take into account Seren's wish to remain, and her current personal situation. However, it is likely to decide that the original purpose is no longer workable given the fact that Seren remains as the only original beneficiary of the

trust; the remaining two new beneficiaries do not reside in the property and want it to be sold. Therefore, to not order a sale is highly likely not to be in the best long-term interests of all three beneficiaries. However, the court may postpone the sale for a fixed period until Seren has had her baby, can move out and find alternative accommodation.

Question 3(a)

The 'basic rule of priority' is that third party interests affecting a registered estate rank in order of creation regardless of whether or not they have been registered (s28 Land Registration Act 2002 (LRA 2002)).

However, where there has been a registrable disposition of a registered estate for value (not nominal value or marriage consideration s132 LRA 2002) completed by registration the purchaser takes the land subject only to registered charges, protected registered interests and interests that override within the provisions of Schedule 3 to the LRA 2002 (s29 LRA 2002). This is the 'special priority rule'.

The transfer of a registered freehold is a registrable disposition in s27 of the LRA 2002 (including the grant or transfer of leases exceeding seven years, and the grant of legal mortgages or legal easements). Thus, Omar's transaction with Maria is a registrable disposition, which has been completed by registration since Omar is the new 'registered proprietor' and presumably made for value since Blackberry Farm was 'sold' to him. Therefore, the 'special priority rule' in s29 LRA 2002 applies to Omar. He will be bound only by those interests that have already been entered on the register of title or those that override within the provisions of Schedule 3 to the LRA 2002 (s29 LRA 2002).

Gill

Maria has expressly granted Gill an easement of a right of way over her registered land (Re Ellenborough Park (1955). Although the grant of the easement has been correctly made by deed (s52(1) Law of Property Act 1925 (LPA 1925), s1(2) & (3) Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989)), it must also be for a period equal to a freehold or leasehold duration (s1(2)(a) LPA 1925). As it is an express grant over registered land, it requires compulsory registration to be both legal and binding upon subsequent purchasers (s27(2)(d) LRA 2002).

If the easement has been registered the burden will bind Omar (s29 LRA 2002). In which case, he cannot refuse Gill permission to cross Meadow Field. However, if the grant has not been completed by registration the easement cannot be legal, but instead, operates as an equitable easement (s27(1) LRA 2002).

An equitable easement cannot bind Omar as an overriding interest, as under Sched. 3 para. 3 LRA 2002 only informal legal easements arising by implication or by prescription is included (reversing Celsteel v Alton (1985) and Thatcher v Douglas (1996)).

However, equitable easements can be protected by placing a notice (s33 LRA 2002) in the charges register of the burdened land, which then safeguards the priority of the interest, although it does not confirm the validity of it (s32 LRA 2002). If a notice was entered and the easement is valid it has priority; Omar is bound (s29 LRA 2002). He cannot now refuse Gill permission to cross Meadow Field. Alternatively, if no such entry is in the register Omar is within his rights to refuse Gill access to Meadow Field.

In summary, Omar, as a purchaser of registered land, will only be bound by the burden of the easement if either it is legal by virtue of its registration (s27 LRA 2002) or because it has been protected by means of a notice (s33 LRA 2002). Otherwise, Omar takes free from the easement and is entitled to tell Gill to stop using Meadow Field.

Felicity

It appears that Felicity and Maria have entered into an agreement that amounts to a lease, one of the two estates capable of existing at law (s1(1) LPA 1925). On the limited facts, all the hallmarks or essential requirements for a lease, as defined in Street v Mountford (1985) appear to be present: exclusive possession, rent, although this is no longer necessary (see Ashburn Anstalt v Arnold (1989) and s205 LPA 1925) and the term is certain.

Generally, in order to create any legal interest in land, including a legal lease, the parties must execute a deed: s52(1) LPA 1925. However, leases granted for a period of three years or less which take effect in possession, with no premium and at market value may be created orally, without the need for any writing or deed (s54(2) LPA 1925). Therefore, provided the oral agreement fulfils the above requirements it is a legal lease (s54(2)). As the lease is less than seven years**,** it also does not require compulsory substantive registration (s27(2)(b) LRA 2002) in order to be legal and binding. Furthermore, as the lease is for three years it cannot be protected by entry as a notice (s33 LRA 2002).

Instead, legal leases of seven years or less take effect as interests that override a subsequent registered disposition (Sched. 3 para. 1 LRA 2002). Overriding interests have automatic priority; they do not have to be registered anywhere to take effect against the registered proprietor. Therefore, the legal lease automatically overrides Omar's subsequent registration as proprietor meaning he is clearly bound by the interest. Felicity does not have to leave Tulip Cottage and can stay for the remainder of the three year lease. However, Omar could give notice to quit according to the terms of the lease, presumably one month's notice.

Joseph

The option to purchase Blackberry Farm may be a specifically enforceable estate contract provided the agreement complies with the requirements of s2 LP(MP)A 1989. Thus, aside from the writing requirement that is clearly present on the facts, the agreement must contain all the terms and be signed by both parties. Whether these last two requirements have been met will depend on the contents of the writing. Such a contract confers an equitable interest that can be protected by means of a notice against Blackberry Farm (s33 LRA 2002). If it was protected, provided it is valid, it has priority over Omar's subsequent registration as new proprietor (s32 LRA 2002). However, if it was not protected, Omar will not be bound (s29 LRA 2002).

It should be pointed out that Joseph's interest could not override, as it does not fall within para. 1 and 3, and he clearly was not in actual occupation according to para. 2 (Sched 3).

3(b)

Gill

An expressly created easement by a valid deed is a legal interest (s52(1) LPA 1925) (s1(2)&(3) LP(MP)A 1989). Legal interests in unregistered land create

rights *in rem* that are binding on the world including Omar.

Felicity

As explained in (a) above, if the oral agreement complies with s54(2) LPA 1925 then the agreement is a legal lease, which means Felicity has a legal interest in unregistered land that binds the world: Hence, the lease binds Omar.

Joseph

As an estate contract it would need to be registered as a Class C(iv) Land Charge (s2 Land Charges Act 1972) against the name of the estate owner at the time of the grant: Maria. If it is registered, the equitable interest is protected and is binding on a purchaser, such as Omar, since registration of it is deemed to constitute actual notice (s198(1) LPA 1925).

If it has not been registered, then it is void against a purchaser of the legal estate for money or money's worth including nominal value but not marriage consideration (s4(6) LCA 1972). Therefore, as Omar is such a purchaser, it would not be binding regardless of whether or not Omar had notice or was *bona fides*, see Midland Bank Trust Co Ltd v Green (1981).

Question 4

The problem relates to the law governing the enforceability of freehold covenants. As between the original parties these are easily enforceable under the privity of contract. Generally, covenants will only be enforced where the benefit and burden has passed to the respective subsequent owners of the dominant and servient tenement either in law or in equity.

The benefit of a covenant will pass at common law if certain requirements have been met. Firstly, at the time the covenant was made it 'touches and concerns' the benefited land (P&A Swift Investments v Combined English Stores Group (1989)). Secondly, the benefit must have been intended to run with the land by the original covenantee (but see s78(1) Law of Property Act 1925, which deems such an intention (Federated Homes v Mill Lodge (1980)). Thirdly, the covenantee must have held a legal estate in the benefited land (Webb v Russell (1789)) and lastly, the successor in title derived their title therefrom (though not necessarily the same legal estate) (Smith & Snipes Hall Farm Ltd v River Douglas Catchment Board (1949)).

All five covenants appear to have passed the benefit at common law in that they touch and concern the land. None is personal, but all affect the nature, quality and value of the land. In the absence of words to the contrary, Len, as successor in title to Khalid, has the benefit of the first three restrictive covenants: the restriction on business usage, the limitation on only one new building and the placement of only one sign. He also has the benefit of the fourth positive covenant to pay half the costs of maintaining the shared driveway. Amelia has, as successor in title to Indya, the benefit of the positive covenant to keep the exterior of Hampton in a good state of repair.

Although the general rule is that the burden of covenants will not run with the land at common law, as held in Austerberry v Oldham Corporation (1885) and re-affirmed by the House of Lords in Rhone v Stephens (1994)), there are exceptions which provide an indirect method of enforcement.

Importantly, the rule of "mutual burden and benefit" as held in Halsall v Brizell (1957) applies where there is a shared utility or service, the benefit of which

corresponds to a related burden. In Thamesmead Town v Allotoy (1998) the Court of Appeal held that the burden must directly relate to the benefit taken; there must be a sufficient nexus, and it must be possible for the successor in title to be able to reject the burden as long as she does not take the benefit.

Len should be advised that *prima facie* the general rule that burdens do not pass at common law applies to the positive covenant in relation to the payment of half the maintenance of the 'shared' driveway. However, Amelia clearly has both the benefit of the use of the driveway with its corresponding obligation to pay for such a benefit. Therefore, an exception may arise under the mutual benefit and burden principle. However, if Amelia genuinely no longer makes use of the shared driveway she has a possible right to disclaim and, if so, will not be obliged to pay for any further costs (Rhone v Stephens (1994)). In relation to the covenant to keep the exterior of Hampton Industrial estate in a good state of repair, there is no such mutual benefit and burden. Therefore, the general rule in Rhone v Stephens applies so that Amelia will be unable to enforce it against Len directly or indirectly under this exception.

Another possible indirect method of enforcement is if there is a chain of indemnity by successive purchasers of the servient tenement. Under this method, the dominant owner of the benefit sues the original covenantor for breach of the covenant, but the original covenantor then seeks an indemnity from their successor, who in turn seeks an indemnity from his or her successor. The weaknesses are that each subsequent transfer of the servient land must continue this process of indemnity; the chain may be broken if, for example, a successor has deceased, is insolvent or cannot be ascertained. Provided such a chain was taken out, Len and Amelia may enforce both positive covenants indirectly. However, the claim will be for damages only.

The benefit of a covenant will run in equity where it touches and concerns the dominant tenement, and the original parties intended it to run. Intention can be shown either by a chain of assignments or annexation. Importantly, for covenants created after 1925 the Court of Appeal in Federated Homes Ltd held that the intention will be deemed to have automatically run if the covenant "touches and concerns" benefited land. The benefited land must also be clearly identified in the covenant (Crest Nicholson Residential (South) Limited v McAllister (2004) CA) and s78 must not have been expressly excluded (Roake v Chaddha (1984)).

Again, subject to the requirements being met, the benefits of the first four covenants appear to have passed to Len and the benefit of the last covenant to Amelia.

Now it must be determined whether the burden has also passed in Equity. Equity allows for the burden of a covenant to run if the requirements in Tulk v Moxhay (1848) are satisfied. Firstly, the covenant must be restrictive in nature. Secondly, it must touch and concern the dominant tenement. Thirdly, it was intended to run with the land, but intention can be presumed under s79 LPA 1925 unless there are words in the covenant indicating a contrary intention. Lastly, the successor has notice of the restrictive covenant, which means that it is appropriately registered.

Len should be advised that it seems likely that the benefit and burden has run in Equity in relation to the first three restrictive covenants. In which case, he may seek an injunction in order to prevent Amelia from constructing another building on the land, using the land for the additional purpose of a spa clinic and prevent her from putting up another sign. But as discussed above, he will only be able to

enforce the positive covenant to pay half the maintenance of the shared driveway against Amelia under the principle of mutual benefit and burden, if Amelia continues to make use of the driveway.

It is also likely that the burden has not run in relation to the positive covenant that Len maintains the exterior of Hampton Industrial Estate. In which case, Amelia will be unable to enforce the covenant against Len requiring him to make good the repairs. However, if Len entered into a chain of indemnity Amelia may be able to indirectly enforce the covenant based on a claim for damages only; specific performance will be unavailable.