
Examiner's report 2009

2660003 Land law Zone A

Introduction

Overall, the general standard of candidates' scripts was broadly similar to those produced by candidates who have taken the examination in recent years. Once again, the question paper reflected the range and variety of topics contained in the syllabus and covered in the subject guide. It is worth remembering that the guide is not merely a valuable learning tool, it also offers a useful resource to help you map the topics and issues upon which you may be examined. It therefore repays careful attention when you are revising and preparing for the examination. In particular, we recommend that you consider the helpful advice, and practise the tips on examination technique, it contains (subject guide, Chapter 1).

General remarks

The quality of legal information in many scripts was sound, suggesting that candidates had learnt the legal principles and detailed case law with commendable care. However, many candidates did not maximise the potential of the material that they had memorised, producing answers in which they did little more than write down what they knew. The better scripts contained relevant and analytical answers. These rely upon important skills, ones that candidates should develop and practise. Of course, success in law exams depends to a considerable extent upon having a thorough and detailed grasp of the legal knowledge derived from studying the topics. But, as previous *Examiners' reports* have repeatedly highlighted, the examination is not simply a memory test. A key aim is to test your understanding of what you have learnt. This means that Examiners value work that shows an ability to discriminate, by selecting only that legal information which is relevant, and then applying it explicitly to the specific facts and issues raised in the problem question. You should also take care not to write out unnecessary case narratives and statutory provisions in full. Similarly, if you elect to tackle an essay question it is crucial you take great care to address the precise terms of the question. Too often the answers ignored the language and requirements of the questions (especially in questions 7 and 8) and resorted to unrelated regurgitation. This is poor technique and limits the marks that will be awarded.

From this year's performance there are two further general points that are worth emphasising. First, candidates should manage the time available so as to ensure that they answer the requisite four questions.

A significant number of scripts contained no more than three full answers. This had a serious impact upon the overall mark awarded for the paper, and in some cases it most probably made the difference between passing and failing the examination. Second, it helps if you make your answers as neat and tidy as possible.

Specific comments on questions

Question 1

Walford District Council owns the registered title to a vacant plot of land adjacent to the southern and western boundaries of the garden belonging to Phil's cottage. In the 1980s the Council granted Phil a licence to use the vacant plot because it lacked money to develop the land. Phil used the plot to graze his goats. The Council were unaware that Terry, Phil's predecessor as registered owner of the cottage, had demolished a fence on the southern boundary between the Council's plot and the garden, and replaced it with a hedge that encroached on to the Council's land by several meters.

When Phil's licence expired in 1988 the Council did nothing with the land. Rather than allow the land to lie empty, Phil continued to use it to keep goats. He repaired the fence on the western boundary to stop the goats from escaping on to the busy main road. In 1990 he bought a horse and built a stable on the land. A year later he installed electricity, a water supply, a security camera and erected a 'Keep Out' sign. Over the years Phil told his friends that he appreciated that he might not be able to use the land indefinitely.

Earlier this year the Council secured the funding it needed to develop the land. It therefore wrote to Phil asking him to leave the land, and insisting he reinstate the fence at the correct point on the southern boundary.

Advise Phil who does not wish to vacate the plot or reinstate the boundary fence.

Briefly state how Phil's legal position would be different if it could be governed by the principles of *unregistered* title.

This question on adverse possession (see the subject guide, Chapter 11) was a particularly popular choice. Generally speaking it was well done, although there were some issues that candidates either overlooked or handled less well than others. One such issue is establishing when time starts to run against the Council and in Phil's favour. This, in turn, may affect whether Phil's claim falls within the scope of Schedule 6 of the LRA 2002 or may be considered by reference to the predecessor legislative provisions contained in the Land Registration Act 1925 (subject guide, 11.2 and 11.3). In matters such as these, it is worth remembering that if the facts allow room to consider both possibilities legitimately, then it is wise to do just that. Candidates were more at ease when it came to exploring the case law that might be used (such as *Pye v Graham*, and *Moran*) to support Phil's claim to be in factual possession of the land with the requisite intention to possess. The better answers managed to deal with a larger range of issues here, and were more adept at showing how the law might or might not assist Phil's claim. For instance, in the better answers candidates explored details such as the significance of the Council's financial inability to develop the land, and the effect of Phil's admission to his friends that he might not be able to stay there indefinitely. One of the other issues worth considering is in the context

of Schedule 6 of the 2002 Act: what, if any, legal significance is there in the changes Terry and Phil have made to the boundary fence (subject guide, 11.3)?

Question 2

In 2000 Kevin, a mechanic, and, his partner, Sally, purchase a garage, Fast Fit, for £500,000. Kevin and Sally live in a flat above Fast Fit's workshop. The property is registered in Kevin and Sally's joint names. Between them they contribute a deposit of £50,000, Kevin and Sally borrows the balance of the purchase price from the Weatherfield Bank as a twenty-year loan secured by way of legal mortgage on the property.

This year Fast Fit is losing business. As a consequence Kevin and Sally start to default in their mortgage repayments. Dev, a local businessman, tells them that he has approached The Weatherfield Bank to discuss the possibility of getting a loan to buy and demolish Fast Fit and turn it into a car park for his supermarket.

Advise Kevin, who wants to know:

- a) whether The Weatherfield Bank can repossess Fast Fit, given that Sally has just been offered a job; and
- b) if the Weatherfield Bank can be compelled to postpone any sale of the property for a few months because Kevin and Sally have read a local estate agent's forecast that the value of business property in Weatherfield is set to rise.
- c) if The Weatherfield Bank can be made to sell Fast Fit at auction, and as a going concern, rather than make a private sale to Dev;
- d) how the proceeds of any sale will be applied.

This problem question concerning the mortgagee's rights to possession and sale (subject guide, 10.3) was quite popular. The better answers wisely followed the structure suggested by the question, where the advice to Kevin is framed by responding to the contents of each lettered paragraph in turn. This appeared to help candidates to ensure that the focus of what they wrote was trained upon the specific matters raised, thereby maximising the extent to which their answers were both relevant and engaged in applying the material to the specific facts. That said, too many answers insisted on offering an irrelevant (and sometimes) lengthy introduction about the types of mortgage and the different methods by which they may be created. It followed that many answers gave insufficient time and attention to explore fully the significant range of points about how Kevin and Sally might benefit from the operation of provisions such as sections 36 of the Administration of Justice Act 1970 and 91 of the Law of Property Act 1925. Otherwise, the better answers recognised that there is normally limited legal control of the mortgagees' preferred method and timing for the sale; and gave appropriately brief attention to dealing with the way section 105 of the 1925 Act determines how the proceeds of sale will be applied.

Question 3

In 2006 four bankers, Andrew, Belinda, Cindy and Davina, purchased Seaview, for them to use as a weekend cottage. They made equal contributions to the purchase price, and title to Seaview was conveyed to all four of them.

In 2007 Andrew decided to emigrate to Australia. He therefore sold his interest in Seaview to Edna. Belinda disliked Edna. She therefore wrote to Cindy and Davina to tell them that she was urgently looking for somebody to buy her share. Belinda subsequently changed her mind about selling when she realised she would be able to use Seaview when Edna was not there.

In 2008 Cindy ran into financial difficulty and offered to sell her interest to Davina. They discussed the possibility over several months but before they could agree terms Cindy was killed in a boating accident. By her Will, Cindy left all her property to her brother, Frank.

Belinda now wants Seaview to be sold, but Davina prefers to retain the cottage.

Discuss.

This was quite a popular question, which attracted answers of uneven quality. As the better answers showed, moving through the events chronologically gave the answer an effective and reliable structure. Having established the co-ownership status of the legal and beneficial estate when Seaview was first conveyed to the four of them, advice to Belinda should track through the subsequent events to examine the possible ways in which there may (or may not have) been severance of the beneficial joint tenancy (subject guide, 5.3) either by statutory notice (under section 36 LPA 1925) or by one or other of the methods outlined in *Williams v Hensman*. This will help to identify which of the original equitable co-owners may claim a share of the proceeds if there is a sale of Seaview in 2009. Surprisingly, a number of candidates made a costly mistake early on by asserting that originally the four must have been beneficial tenants in common. This removed the need to go on to examine how far the dealings between the equitable co-owners from 2007 to 2009 may have had the potential to effect severance of the equitable joint tenancy. Another commonly overlooked part of the problem concerned the TOLATA trust of land, and in particular a consideration of the factors which the court may consider in exercising its jurisdiction under sections 14 and 15 of the 1996 Act to resolve the disagreement between Belinda and Davina about selling Seaview (subject guide, 5.5).

Question 4

Rita owns a property which comprises a ground floor shop and a first floor, one-bedroom, flat. The flat and shop have separate entrances. In 2007, Rita agrees to grant Audrey a lease of the shop for three years at an annual rent of £8,000, the rent to be paid in monthly instalments. The agreement also provides that either party may terminate the lease by giving six months notice. The lease has never been executed; but Rita has moved in and started paying rent each month.

Last year Rita agrees that her friend's son, David, a trainee hairdresser, and his girlfriend, Tina, can live in the first-floor flat. Rita draws up a 'licence' agreement and insists that David and Tina sign separate copies. The agreements provide that they will each pay £300 per week as an 'occupation fee'; and that they will be able to live in the flat for three years 'or until David completes his training'. The agreement also states that David and Tina

must vacate the flat so that it can be cleaned every Tuesday between 12 noon and 2pm. David and Tina have always preferred to do all their own cleaning.

Advise Rita about: (a) how much notice she needs to give Audrey to leave the shop; (b) the legal nature of the agreement she has with David and Tina.

This question invites a consideration of, among other points, equitable leases and the lease/licence distinction. Usually part (b) was handled with a greater level of competence than part (a). The single most serious error in answers to part (a) can be attributed to a failure to read and assimilate the facts with care. Candidates assumed that Rita and Audrey had created a formal lease when the facts clearly state they had only **agreed** to the grant of a lease. As a consequence, the vast majority of answers overlooked the possibility that an equitable *Walsh v Lonsdale* type lease (subject guide, 6.2.2) might exist and help determine the duration of notice Rita needs to give to Audrey. (To their credit candidates were fortunately not misled by the typographical error in line 6, and invariably correctly recognised that it must have been Audrey (rather than Rita) who had moved in.)

In part (b) most candidates recognised that the central issue is to determine if David and Tina can claim to have a lease (as opposed to a licence). On the facts, this depends upon exploring if (i) their agreement gives them exclusion possession of Rita's flat; and (ii) the maximum duration of their term can be said to satisfy the test of certainty as re-stated in the House of Lord's decision in *Prudential* (subject guide, 6.1.3). As to exclusive possession, on the whole, the answers would have been improved had candidates made greater use of the specific terms of the written agreement, and drawn far more extensively on the wealth of case law about establishing whether the couple, as multi-occupiers, have the four unities to establish a joint tenancy.

Question 5

Damien was the registered owner and occupier of Bridge House, which was connected to a studio in which he made pottery. The studio was accessible through an internal door in Bridge House and also by an external door which opened directly on to a small lane at the rear of the property. Damien regularly used the external door as a short-cut to reach the local train station.

In 2003 Damien granted a lease of the studio to an artist, Jennifer, for a period of five years. In 2004 Damien told Jennifer that she was welcome to paint in the garden and to park her motorcycle in the drive of Bridge House whenever she wished. Jennifer did not object to Damien continuing to use the studio's rear entrance as a short-cut whenever he liked. The lease of the studio was renewed for a further five years in 2008.

Damien has now sold the freehold of the house and studio to Eric. Eric has told Jennifer he wants her to stop using the driveway and garden. Jennifer has responded by telling Eric that he must not make use of the rear entrance to the studio.

Advise Eric.

This challenging and full question proved a popular choice, although the quality of the answers was mixed. It raises a range of issues concerning easements, requiring a detailed consideration of three broad questions: (a) which of the three rights being claimed are

capable of being easements; (b) whether any of them have come into existence by one or more of the recognised methods of implied creation (subject guide, 8.2); and (c) issues of priority/enforceability of the easements against third parties (subject guide, 8.4 and 8.5). Too many answers failed to deal adequately (or at all) with the legal points presented by the facts in the problem that relate to (b) or (c). Instead, many answers went no further than examining if any of the three rights claimed could be said to satisfy the characteristics outlined in *Re Ellenborough* (subject guide, 8.1.1). The better answers were able to identify accurately which claims were by implied grant (Jennifer) and that Damien had only two possible methods (necessity and common intention) to support his potential to implied reservation.

Question 6

In 1995 Brian, the owner of Home Farm, sold a field to Jill, for her to start a business keeping chickens. As part of the transaction Jill covenanted “for the benefit of the land retained by Brian”:

- a) to construct only one building on the field; and
- b) to keep the fence between the field and Home Farm in good repair.

In return, Brian covenanted that he would maintain the open drain situated on his side of the boundary between the field and Home Farm. Jill registered a notice against Brian’s title, but Brian failed to take any such steps regarding the covenants entered into by Jill.

In 2000 Brian sold Home Farm to Debbie; and in 2002 Jill sold her field to Tom, a pig farmer, informing him of all the covenants. Debbie is rather annoyed that Tom has not replaced the fence, which blew down last winter. She is also dismayed by news that Tom plans to build two piggeries on the field. For his part, Tom has noticed that because the open drain is blocked waste water is overflowing into his field.

Advise Debbie whether she is entitled to enforce the covenants against Tom and whether she can refuse Tom’s request to clear the drain which she no longer needs to make use of to drain Home Farm.

This question on freehold covenants (subject guide, Chapter 9) was not widely chosen, nor was it tackled particularly well by those who chose it. Most candidates who attempted this question failed to deal adequately with both the benefit and the burden, with some answers focusing only on one or the other. Perhaps the main reason for this is that candidates forgot the basic starting point: that if Debbie (as successor in title to the land belonging to the covenantee) is to be able to enforce covenants (a) and (b) against Tom (as successor in title to the covenantor), she must establish **both** that she acquired the benefit and also that Tom is subject the burden. In turn, this allows candidates to explore: if the covenants are positive or negative in substance (rather than language); the different methods that may apply in equity (especially statutory annexation, *Federated Homes*; and *Crest Nicholson*: subject guide, 9.2.2) by which the benefit may have passed to Debbie; and equity’s pre-conditions for allowing the burden to be enforced against somebody other than the person who accepted the burden. In this regard the better answers went on to consider detailed points such as: the significance of Brian’s failure to register the covenants and the fact that Jill informed Tom about them; and the possible application of the mutual benefit and burden principle (on which see the House of Lords’ discussion in *Rhone v Stephens*) to the drain.

Question 7

Critically assess the contribution that the equitable doctrine of proprietary estoppel makes to modern land law.

Perhaps unsurprisingly relatively few candidates chose to tackle this particularly demanding essay title. Unlike the rest of the examination paper, the subject matter of this question is far less narrowly focused. Answers might legitimately range across the whole of the syllabus. In particular, they might offer a critical assessment of the contribution of estoppel: in the context of formalities for contracts relating to land; to the creation of licences; and for those seeking to establish a beneficial interest in land.

Question 8

"The Land Registration Act 2002 marks a significant development. In particular it strikes an appropriate balance between the needs of the purchaser and those who are entitled to other interests in the land being purchased."

How far do you agree with this assessment of the provisions in the Land Registration Act 2002 other than those relating to adverse possession?

Clearly this demanding question is principally about assessing the impact of the principles introduced by the landmark provisions found in the Land Registration Act 2002 (subject guide, Chapter 3). There is scope to refer both to the ways in which that Act developed the law under the LRA 1925, particularly in allowing fewer non-ownership rights to take effect without some form of protection on the register. It seemed as if most candidates who answered this question were content to simply repeat what they had committed to memory about registered title in general, without attempting to take the terms of (or assumptions in) the quotation apart. The better answers at least managed to avoid confusing the fundamental distinction between registered and unregistered land principles. It is important when choosing a question of this kind to think about and engage with its terms.