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# Examiner's report 2009

## 2660003 Land law Zone B

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### Introduction

Overall, the general standard of candidates' script 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).

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### 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 5 and 6) 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.

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## Specific comments on questions

### Question 1

Ruth, a plumber, bought her workshop in the late 1980s. She soon noticed that the neighbouring property, a warehouse, was disused and dilapidated. Matt had recently acquired the registered title to the warehouse so that he could convert it into a block of luxury apartments.

In 1990 Ruth decided to park her van on the forecourt of the warehouse. By 1991 she had begun using the warehouse to store her tools and plumbing materials. She repaired the leaking roof to protect them from damage. In later years she installed a generator to supply electricity and, after intruders broke in, she secured the warehouse by fitting padlocks and a burglar alarm. Matt occasionally drove past the warehouse and once or twice waved to Ruth when he saw her driving away from the forecourt.

Last month Matt sold the warehouse to Housemate, a builder's merchant. Housemate has written to Ruth insisting she vacate the warehouse immediately.

Advise Ruth.

Candidates should remember to take care when deciding what the questions are about. Although most candidates who attempted this popular question correctly identified it as being exclusively about adverse possession (see subject guide, Chapter 11), a not insignificant number misdiagnosed it as requiring a discussion of easements – perhaps because of the reference to Ruth parking her car on the forecourt. The question invites a forensic consideration of the facts to determine how Ruth may or may not claim her use of the warehouse fulfils the legal requirements of factual possession and intention to possess (drawing on decisions such as *Pye* and *Moran*). Typically, this aspect of the question was reasonably well handled. What seems to have posed greater challenges was determining when the limitation period might have begun (though dispossession or discontinuation) and the effect of this uncertainty on Ruth's claim. This sometimes resulted in an overemphasis on the details of the new legislative scheme contained in the LRA 2002. Moreover, some candidates did not deal with the facts on the basis that Matt had disposed of the registered title in the warehouse to Housemate. In a number of scripts there was also a wholly unjustified and irrelevant excursion into the case law dealing with the human rights dimension of the topic.

## Question 2

In 2007 Ian purchased a café, Ian's Plaice. Ian's Plaice has a large car park. Although Ian paid the deposit from his savings, he obtained the balance of the purchase price by entering into a mortgage with one of his suppliers, Prize Pies plc. Ian had spent months unsuccessfully trying to find a bank that would grant him a mortgage. Ian's mortgage agreement with Prize Pies plc contains the following terms:

- a) the monthly interest rate will be calculated by using the highest prevailing interest rate in the world;
- b) the borrower must buy all his pies from Prize Pies plc, at a price to be determined by reference to the list price that Prize Pies plc charges all its other customers;
- c) the borrower cannot redeem the mortgage until the final year of the twenty year term;
- d) the lender will have a right of pre-emption to purchase the car park belonging to Ian's Plaice, which pre-emption it may exercise for a period of two years after redemption of its mortgage.

Advise Ian about the enforceability of the mortgage terms.

This relatively straightforward problem question produced some pleasing answers which examined several key aspects of the way the law protects the mortgagor's position (subject guide, 10.2). The better answers dealt with the terms of each of the numbered paragraphs in turn. These showed that many candidates had an awareness of how questions can and do prompt the most sensible (and obvious) way to organise and order the answer. However, even where some candidates adopted this approach they felt the need to open their answer by giving a fairly lengthy introduction, containing irrelevant general material (such as a description of the forms mortgages may take, and a historical sketch of the development of the equity of redemption). The better answers focused exclusively on the case law (or statutory provisions) Ian might use in arguing that clauses (a) to (d) may or may not be enforceable against the mortgagee, Prize Pies plc. Here the Examiners were looking to give credit to those candidates who considered as many potential causes of action as might conceivably apply, even if some were raised only to dismiss their availability on the facts.

## 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.

Advise Belinda. If Seaview is sold, who would be entitled to the proceeds of sale?

This was quite a popular question, which attracted answers of uneven quality. As the better answers showed, moving through the events chronologically gives 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 agreed 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 agreed that her friend's son, David, a trainee hairdresser, and his girlfriend, Tina, could live in the first-floor flat. Rita drew up a 'licence' agreement and insisted 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 exclusive 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

'The rules governing the passing of benefit and burden of freehold covenants could and should be simplified.'

Discuss.

In general the answers to this essay question on freehold covenants (subject guide, Chapter 9) were of a disappointing quality. Most candidates were content to limit themselves to describing the existing rules about the passing of benefit and burden. There was seldom any trace of an argument, or an attempt to engage with the quotation itself. This is surprising. Even before the Law Commission published its most recent work (*Easements, Covenants, and Profits a Prendre: A Consultation Paper*, Consultation Paper No 186, (2008)) there have been many calls for reform of the law. For instance, there are well-known academic and other critics of the rule (endorsed by the House of Lords in *Rhone v Stephens* (1994)) which prevent the burden of positive covenants from being enforced against successors in title to the covenantor. Moreover, it can be readily argued that one effect of *Federated Homes* is to simplify the (equitable) rules relating to passing of the benefit of covenants.

### 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

Matt has recently purchased Grange Farm from Oliver; title to Grange Farm has always been registered. Oliver has since moved to live in Australia. Matt has now discovered the following information.

- a) Roy, a local gardener, claims that he has a two year lease of a barn on Grange Farm in which to store his gardening tools.
- b) Caroline, Oliver's wife, has recently returned from Norway where she spent a year running a hotel. Caroline did not know about the sale of Grange Farm. She paid the deposit when Oliver purchased the property some years ago. Caroline insists she still has rights to Grange Farm.
- c) Ruth, the owner of a neighbouring farm, Brookfield, claims she has acquired an easement to use the underground drains that run across Grange Farm.
- d) Ed, a tenant farmer of part of Grange Farm, claims that he has an agreement to buy the land over which he has the tenancy.

Advise Matt about his legal position in relation to any claims made by Roy, Caroline, Ruth and Ed.

Briefly indicate how your answer would differ if *unregistered* land law principles could still govern both title to, and the above claims to rights over, Grange Farm.

This problem concerns issues about which of the competing property rights may take priority over (be enforceable against) Matt's title to Grange Farm. As such, it depends upon a secure and detailed grasp of the rules and ability to apply them in an economical way. The question asks for a brief comparison of how the relevant rules of unregistered land (notably land charges and overreaching: subject guide, Chapter 2) might determine the same priority disputes. But this only serves to underline the fact that the principal focus of the answer should be on the relevant parts of the Land Registration Act 2002 (subject guide, Chapter 3). There were two major recurring failings worth highlighting. First, some candidates misinterpreted the question and wrote about determining what, if any, property rights existed (for instance, leases and easements) rather than dealing with the way in which they can or had (or had not) been protected. Second, a number of candidates spoiled their answers by revealing fundamental confusion of the unregistered land rules and ideas, on the one hand, with those that apply in registered land, on the other. When tackling a question on this topic it is crucial to have a clear understanding of the separate systems, and the different form of protection each offers both Matt and those who are claiming to have rights that bind his registered title.