

Commentary

This is a typical, straightforward subject assessment question that requires a point-by-point well-structured answer. You must make sure that the structure of your answer is clear, highlighting the necessary points for the examiner. The answer below adopts a structured approach with headings and in point form. You have been given enough information to appreciate that there are three sections to the answer and you should ensure that you provide detailed answers to all three to earn high marks. It is bad examination practice to concentrate on one section of a multi-section question. Unless the marks for each section are shown on the paper and it is clear from those marks that a concentration of effort is required in one section, then you should balance your efforts between the several sections concerned. In this particular question there is no such marking guidance and, in its absence, you should therefore spread your efforts more or less equally between the three sections without giving any preference to any of them.

The areas concerned are leasehold covenants, post-completion requirements, and your entitlement to inspect the superior title. You will therefore appreciate that the spread of information required is wide and you should only answer a question of this nature if your knowledge is sufficiently detailed in all three areas to enable you to answer the question with confidence.

Suggested answer

There are three elements to this question, first a consideration of the amendments to the draft lease concerning tenant's covenants, secondly post completion requirements, and thirdly an examination of the buyer's entitlement to inspect the superior or freehold title. Each section will be considered separately as follows: -

i) Amendments to draft lease

Clause 2(a).

This covenant is an absolute bar on assignments, mortgages, underlettings, and other aspects of alienation. This is an unacceptable restriction in a one hundred and twenty five year lease of a residential flat. A tenant will almost always have to make a payment to obtain the lease and will therefore want to be able to dispose of it and recover the premium perhaps with a profit. Indeed the tenant may wish to mortgage the property and will probably need to finance the acquisition itself by way of a loan from a bank or building society. The lease should be amended to allow assignments etc. of the whole premises subject to lessor's written consent (although an absolute bar in connection with part only of premises would be acceptable). S. 19 (1) (a) of Landlord and Tenant Act 1927 will then apply so that consent cannot unreasonably be withheld. The lessor will be able to demand payment of reasonable legal expenses incurred in giving consent.

Clause 2(b).

Again, this is an absolute bar on alterations or additions and must therefore be considered unacceptable in a lease of this length. The lease should be amended to allow alterations with the lessor's written consent. To the extent that proposed alterations amount to

improvements, s.19 of Landlord and Tenant Act 1927 will then apply so that consent cannot be unreasonably withheld, and the lessor cannot demand any payment beyond its reasonable legal and other expenses incurred in granting consent. However, to avoid any argument about whether an alteration is or is not an improvement, the clause should be amended to allow alterations or additions with the lessor's consent, such consent not to be unreasonably withheld. In this way the lessor will be required to justify any refusal of permission, ultimately in court, and would therefore not be an avenue the landlord would go down without real justification. It should be noted that the statute does not stop the lessor from seeking a reasonable sum should the proposed amendments diminish the value of the premises or indeed any adjacent premises in the ownership of the same lessor. Similarly if the alteration or addition does not add to the letting value of the premises the statute does not prevent the lessor from obtaining from the tenant a covenant to reinstate the premises to their former condition at the end or sooner determination of the lease.

ii) Action following completion

To avoid a penalty fee from HMRC for late payment a buyer must send a signed Stamp Duty Land Tax return (SDLT1) to the Stamp Office within 14 days of completion and: -

- 1) Submit payment at the same time for the full Stamp Duty Land Tax. This will be on the full price at the relevant rates/slices being in this case £1,500. (This amount is made up of no tax up to 125000 and 2% from £125,000 to £200,000). There is also SDLT to be paid on the rent. The SDLT charge will be at a rate of 1% on the net present value (NPV) of the total rent payable over the term of the lease. Future rents will be discounted at 3.5% per annum in order to arrive at the NPV. Leases where the NPV of the rent over the term of the lease does not exceed £150,000 will be exempt. This being the case it would appear that there will be no SDLT payable on this rental as it will clearly be below the tax threshold. After payment of SDLT the buyer needs a HMRC certificate of payment without which no application to the Land Registry can proceed.
- 2) A buyer's solicitor must then apply for first registration of the lease with a new and separate registered title. This is because the new lease is being granted out of a registered title for more than seven years. In these circumstances s. 4 of the Land Registration Act 2002 requires such a deed to be submitted to the Land Registry for first registration within two months of the date of completion. On completion of the process of first registration the lease will then also be noted within the charges register of the Lessor's Title. It should be noted that the new legal estate is only created on registration and that the effect of failure to apply for first registration is that the transaction stalls and the effect is that there is a contract made for valuable consideration to grant the legal estate concerned. (See s.7 Land Registration Act 2002.) If this happens then, in theory, the title has not been perfected and all the buyer can claim is a mere contractual right. If this is the case then it could be that the seller will be a bare trustee for the buyer until such time as the first registration of the lease is finally completed.

iii) Entitlement to inspect the superior or freehold title

On the grant of a lease, the tenant has no automatic right to investigate the lessor's freehold title unless the lessor agrees otherwise. If this is the case the purchase contract should contain a provision requiring the seller to deduce the freehold title. Please see Standard Condition 8.2.4 that requires the seller to deduce a title that will enable the buyer to register the lease at Land Registry with an absolute title. Of course, in these circumstances, the freehold title will have to be deduced to ensure the grant of an absolute title. Accordingly the purchase contract must be checked firstly to ensure it is drawn up on the basis of the fifth edition of the Standard Conditions and secondly that no attempt has been made in the special conditions of that contract to limit or exclude Standard Condition 8.2.4.

If title is not investigated the tenant runs the risk that the lease may not have been validly granted or may not bind a mortgagee of the freehold. For example, the freehold maybe in mortgage and the mortgage may specifically preclude the borrower or seller from granting any leases. There is also the risk of being bound by unknown third party interests affecting the freehold, being either overriding interests or other interests protected by entry on the registers of the freehold title when the lease was granted. These risks are of course unacceptable to the tenant.