

## Answers to end of chapter Q&A

### Question 1: Are formality requirements necessary?

The formality requirements for dealing with land are generally stricter than those for other types of property and therefore the reasons for the imposition of these requirements ought to be considered. To answer this question fully, it is necessary both to consider why formality requirements are imposed and then make an assessment as to whether you consider them to be “necessary”. The reasons for the imposition of formality requirements have been considered in Part I of this chapter. You should review, in particular, the reasons suggested by Birks and by the Law Commission in the extracts from their works in part 1. Additionally, you will find it useful to refer to chapter 1 in which we consider the factors that make land unique. To what extent do these factors assist us in understanding why formality requirements are imposed? Once you have identified why formality requirements are imposed, you are able to assess whether they are “necessary”. Remember that necessity is a high criterion to fulfil. You should be critical in your assessment. It may help to consider what you think would happen if land could be dealt with in the same way as personal property.

### Question 2: Assess the role of rectification, collateral contracts and proprietary estoppel under section 2 of the LP(MP)A 1989.

This question focuses on the specific formality requirements for contracts for sale of land contained in section 2 of the LP(MP)A 1989. The background to that provision, and the formality requirements it contains, are outlined in part 3. This question is concerned specifically with the requirements under the section for a contract for sale of land to be “made in writing” and to contain “all the terms which the parties have expressly agreed”. It is important to keep in mind that in the absence of compliance, no contract exists. Rectification and collateral contracts are relevant to the requirement that the contract contains “all the terms”. They are devices that may be used to enable documents to be contracts for the purposes of section 2, but they operate in different ways.

- Rectification. We have seen in part 3.6 that the courts may rectify documents where the terms agreed by the parties have not been recorded, or have been recorded wrongly. The possibility of rectification is specifically envisaged by 2(4) of the LP(MP)A 1989.
- Collateral contracts. We have seen in part 3.5 that parties to a contract for sale of land may be considered, in addition, to have entered a collateral contract, the terms of which do not need to be recorded in the contract for sale of land. However, we have seen that in *Grossman v Hooper* [2001] EWCA Civ 615, extracted in part 3.5, a strict approach was sign-posted and collateral contracts can be found only in relation to matters that are not part of the bargain for the sale of land.

Proprietary estoppel is concerned with the requirement for the contract to be “made in writing” and concerns the consequences of oral agreements relating to land. We have seen in part 3 that one of the consequences of section 2 is the abolition of the doctrine of

part performance. We have noted, in the extract from the Law Commission in part 3.7, that the Law Commission was confident that estoppel would enable the courts to achieve justice in hard cases where formality requirements would otherwise cause injustice. However, as we have seen in the case law discussed in part 3.7 the courts have been far from certain as to whether estoppel can be used; particularly in those cases where the claimant could not also invoke a constructive trust, the operation of which is specifically permitted by section 2(5) of the LP(MP)A 1989.

### **Question 3: Compare and contrast a deed, a “non-deed” and an escrow**

To answer this question you should review the material in part 4 of this chapter. A deed is the specific legal instrument that is generally required to create or transfer a legal right in land. The statutory requirement to use a deed (and the exceptional cases where one is not necessary) is contained in sections 52 and 54 of the LPA 1925. The formality requirements for a document to be a deed are contained in section 1 of the LP(MP)A 1989. By section 1(3)(b) of the LP(MP)A 1989, a deed takes effect when it is “delivered as a deed”. For convenience, during the course of a transaction, a deed may be lodged with a solicitor without being “delivered as a deed” (and therefore without yet passing legal title). Where this occurs, the document may be lodged either as a “non-deed” or an escrow. The difference is important as regards the legal status and effect of the document. You should refer to the extract from *Longman v Viscount Chelsea* (1989) 58 P&CR 189 in part 4. There, Nourse LJ explained that a “non-deed” is revocable and has no legal effect unless and until it is delivered as a deed. An escrow, or conditional deed, is irrevocable and will take effect as a deed automatically if and when specified conditions are fulfilled. For example, an escrow may take effect upon receipt of payment. This distinction was crucial to the outcome of the case. The Court of Appeal held that a document granting a new lease had been lodged as a “non-deed” rather than an escrow. As a result, following delays in completing the grant, the landlord was able to revoke the document and make a fresh offer with a vastly increased rent. This would not have been possible if the document had been an escrow.

### **Question 4: What are the key advantages of registration of title?**

The advantages of registration of title are considered in part 5.1 of this chapter. From that discussion, the key advantages can be divided into two categories:

- Advantages inherent in the system of registration of title;
- Advantages in registration of title comparative to alternative systems of governing ownership of land; in particular, systems based on unregistered titles and deeds registration.

The inherent advantages include the provision of a single, updated record of title. Neither of the other systems is able to provide this. In the modern era, the advantages of a single, updated record have become ever more apparent through the amount of information relating to title to land that can be obtained through on-line searches. In part 5.1 and 6 we have seen that in its work leading to the LRA 2002 the Law Commission linked the completeness and accuracy of the register to the introduction of e-conveyancing. Compared to alternative systems, registration of title is the only system that prevents the

need for title to be investigated fresh on every transfer by an examination of the title deeds; a process that is repetitive, cumbersome and ultimately expensive.

**Question 5: What is the registration gap and how will it be closed by e-conveyancing?**

The registration gap, discussed in part 5.4, is the name currently given to the period of time between the transfer of legal title (the execution of a deed by the transferor) and the registration of the transferee as proprietor; the time at which legal title vests. During this period of time, legal title remains with the transferor (who is still the registered proprietor) but he or she will hold the title on trust for the transferee. The registration gap is inherent in section 27(1) of the LRA 2002, which provides that a disposition of a registered estate or charge “does not operate at law” until the requirements of registration have been met. The limitation of this provision to operation “at law” ensures that the imposition of a trust (a creature of equity) is unaffected. The source of the trust is the doctrine of anticipation, discussion in chapter 12. Then gap will be closed by e-conveyancing as transfer and registration will occur simultaneously. The operation of e-conveyancing in this respect is explored in part 6.1.

**Question 6: What do you understand by “indefeasibility” of title? To what extent is a title registered under the LRA 2002 indefeasible?**

“Indefeasibility” is described by Cooke, in the extract in part 5.6, as the affirmative warranty of title provided by registration. This warranty of title is backed by an indemnity through the insurance principle; one of three principles of registration of title identified by Ruoff in the extract in part 5.2. The extent to which a registered title is indefeasible is determined by whether the title can be lost because of factors that existed at the time of registration.

Indefeasibility is not a term used in the LRA 2002 and express discussion of the concept is relatively new in English law. The term is far more common in discussions of Torrens systems of registration, such as those used in Australia and New Zealand. However, as Cooke argues, our approach to indefeasibility is important for shaping the law and answering ambiguities within it. In essence, it determines how secure the guarantee of title (another of Ruoff’s three principles) that is said to be provided by registration really is. In its work leading to the LRA 2002, the Law Commission described its approach as “qualified indefeasibility”. Under the LRA 2002, provision is made for the register to be “rectified”. This is defined in schedule 4, paragraph 1 as an alteration of the register to correct a “mistake” in a manner which “prejudicially affects the title of a registered proprietor”. Under schedule 8, paragraph 1, the availability of an indemnity is directly linked to rectification. However, special protection is provided in schedule 4, paragraph 3 for registered proprietors in possession who are innocent of the mistake. Their title is not rectified unless it would be “unjust” not to do so. The extent to which a registered title is indefeasible is therefore dependent on the operation of these provisions. You may find it useful to refer to part 5.6.2 for an illustration of their application, including discussion of what constitutes a “mistake”.

**Question 7: What impact will the introduction of e-conveyancing have on existing formality requirements?**

To answer this question you should review the current paper-based formality requirements discussed in chapter 9 and consider the impact on these of the introduction of e-conveyancing discussed in part 6. In this chapter, we have considered the three stages typical of the creation or transfer of legal rights in land: contract; creation or transfer; and registration. We have already noted (in question 5) that one effect of e-conveyancing will be the merger of the second and third of these stages. Transfers of land will therefore become a two stage process: contract followed by simultaneous transfer and registration. The other impact of e-conveyancing relates to how these two stages will be fulfilled. Currently, both a contract for sale of land and a deed to transfer title are paper-based documents, subject to the formality requirements imposed by sections 1 and 2 of the LP(MP)A 1989. Under e-conveyancing, both will become electronic documents. This is provided by section 93 of the LRA 2002, extracted in part 6.1. As regards to deeds, for the purposes of electronic transactions, the requirements of section 1 of the LP(MP)A 1989 are superseded by section 91 of the LRA 2002, extracted in part 6.2. Central to the electronic deed is provision for electronic signatures, the operation of which is considered in part 6.3.