

Chapter 8

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 section 8.1. You should review, in particular, the reasons suggested by Birks and by the Law Commission in the extracts from their works – including the “invisibility of real rights”, and ‘policy’ arguments such as the need for certainty and the prevention of fraud. 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 will be 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 s 2 of the LP(MP)A 1989. The background to that provision, and the formality requirements it contains, are outlined in section 8.3. 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 s 2, but they operate in different ways.

- *Rectification.* We have seen in section 8.3.7 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 s 2(4) of the LP(MP)A 1989.
- *Collateral contracts.* We have seen in section 8.3.6 that parties to a contract for sale of land may be considered, in addition, to have entered a collateral contract. If so, the contract of sale will not be invalid for failure to include all of the parties’ terms of sale, for s 2 does not prevent parties from entering such a composite transaction. Whether a collateral contract exists is a question of fact: a strict approach to this question is signposted by the decisions in *Grossman v Hooper* and *North Eastern Properties Ltd v Coleman*, which are extracted in section 8.3.6; and is confirmed in *Keay v Morris Homes*. The court will need to be satisfied that the land contract is a genuinely separate transaction.

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 section 8.3.1 that one of the consequences of s 2 is the abolition of the doctrine of part performance. We have noted, in the extract from the Law Commission in section 8.3.8, that the Law Commission was confident 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 section 8.3.8, 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 s 2(5) of the LP(MP)A 1989. Compare, for instance, the *obiter dictum* of Lord Scott in *Cobbe v Yeoman’s Row* with the approach adopted in more recent cases, such as *Sahota v Prior*. Academics have long been more favourable towards the use of estoppel – see, for example, Lord Neuberger’s extrajudicial commentary, extracted in section 8.3.8. The point is that a claim based on proprietary estoppel is *not* based on any contract between the parties, and so any formality requirement which applies only to contracts, such as s 2, should not be relevant.

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

To answer this question, you should review the material in section 8.5; and in particular section 8.5.2. 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 ss 52 and 54 of the LPA 1925. The formality requirements for a document to be a deed are contained in s 1 of the LP(MP)A 1989. By s 1(3)(b) of the LP(MP)A 1989, a deed only 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* in section 8.5.2. 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: How do the rights of a purchaser on completion vary from their rights at the point of entry into a contract of sale? How do the rights of a purchaser on registration vary from their rights at the point of completion?

Where A makes a contract to grant B a particular estate or interest in land, completion occurs where A has done everything A must do to grant B that right (e.g. by executing a deed of transfer). In many cases, however, B can only acquire the intended legal estate or interest by registering that right. Equally, B can acquire an equitable interest in A’s land even before completion, for example as a result of the contract between A and B. Completion, nonetheless, is an important stage; not only because it discharges A’s duties under the contract with B, but also because it may have an impact on the position as between B and a third party. For example, completion means that, in the terms used by the LRA 2002, there has been a “disposition” to B, and the timing of the disposition is important in interpreting various provisions of the LRA 2002 that give B protection against the rights of third parties. Further effects of completion are noted in section 8.5.1.

Question 5: What is the registration gap and how did it arise on the facts of *Baker v Craggs*?

Where A grants B a legal estate in registered land, the registration gap, discussed in section 8.6.5, is the period between completion and registration. Completion occurs where A has done everything A must do to grant B that right (e.g. by executing a deed of transfer). The legal title vests in B only at that later point when B is registered as its holder. Before then, legal title remains with A (who is still the registered proprietor) and B has, at most, an equitable interest in the land. The impact of the gap on B is, however, limited in various ways, as noted in section 8.6.5.

The registration gap is inherent in s 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, which is discussed in section 8.4. E-conveyancing, once implemented, will close the registration gap as transfer and registration will occur simultaneously. The introduction of e-conveyancing, though, has been placed on hold by Land Registry, and so this solution to the problem of the registration gap remains some way off.

In *Baker v Craggs*, the registration gap was relevant because, in the period between A’s execution of the deed of transfer and B’s registration, A granted a legal easement over the land to C. B had applied to be registered

before A's grant of the easement, and so B would usually have been protected from any such right of C; but the problem arose as there was an error in B's application, which had to be made again. This meant B did not receive that usual protection until the later application was made, after A had granted the easement to C (although, on the facts, B was able to rely on this actual occupation of the land such that the equitable interest he acquired, before registration, could take effect as an 'overriding interest' under Sch 3, para 2 LRA 2002).

Question 6: What is the best way to solve problems caused by the registration gap?

The effect of the registration gap on B is already limited in various ways. For example, where B's application for registration is successful, B's right will be 'backdated': it will be regarded as having been registered from the time of the application. It is therefore only rarely that the registration gap causes any problems in practice. Some of those possible problems can already be avoided by the parties if they are well-advised. For example, as noted by Norris J in *Stodday Land*, where A's land is subject to a lease, and A sells that land to B, A could, when completing, give B authority to exercise A's powers as landlord, as A's agent. A more direct way to deal with the registration gap would be to change the law so that completion and registration occur at the same time: there is, for example, provision under s 93 of the LRA 2002 for rules to be made requiring completion (or even the contract between A and B) to be valid only once registered electronically. There is no current prospect of such rules being made, as there are no current plans for the introduction of compulsory full-scale e-conveyancing; indeed, the Law Commission now favours a more limited proposal – that e-conveyancing be made mandatory in certain circumstances, but without requiring simultaneous completion and registration (see section 8.6.5.3).