**Chapter 4**

**Question 1: What contracts are governed by section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989? Where that provision applies, what is the effect of: (i) compliance; and (ii) non-compliance with the statute?**

Section 2(1) of the LP(MP)A 1989 provides that ‘A contract for the sale or other disposition of an interest in land can only be made in writing ….’. (see **4.6**).Its basic scope thus covers many forms of dealings in land, including eg agreements to transfer a freehold or lease, or to create a charge, easement, or lease. There are some limited exceptions set out in section 2(5), including leases of three years or less that comply with section 54(2) of the LPA 1925 (see **4.34**), contracts made by public auction and a regulated mortgage contract under the Financial and Services and Markets Act 2000. The dealings in land that fall both within and outside section 2(1) are discussed at **4.10-4.12**.

A contract that complies with section 2(1) creates enforceable contractual rights – it is like any other contract. Thus, if the contract is breached by either party, the other party is entitled to a claim for damages. In addition, specific performance is a discretionary remedy that the courts usually will order where a contract for the sale or disposition of an interest in land is breached. This is because the subject matter (ie the land) is generally viewed as unique so that damages are an inadequate remedy. Where A is under a contractual duty to transfer a property right in land to B, or to grant B a property right in land, then B may also acquire an immediate equitable interest, even before the contract is performed: see **4.3**, **5.83-5.86**,and **5.87-5.92**.

Section 2(1) provides that the contract ‘can only be made’ in the form specified there. Thus, an agreement that does not comply cannot take effect as a contract (see **4.19-4.20**). This does not mean, however, that the agreement can has no legal effect at all: it may form the basis of a different, non-contractual claim, such as a proprietary estoppel claim: see **4.26-4.31**.

**Question 2: How can a valid contract for sale of land be created using: (i) a single document; and (ii) two documents?**

Section 2(1) provides that a valid contract can only be made in writing incorporating all the agreed terms ‘in one document or, where contracts are exchanged, in each.’ Section 2(3) also provides that each party (or his or her agent) must sign the document incorporating the terms (or, where contracts are exchanged, one of the documents incorporating them) to acknowledge that they are bound by its terms.

Thus, where the contract comprises one document, both parties must sign that document. Alternatively, and this is the course most often adopted in practice, each party signs one copy of identical documents and then passes the copy they have signed to the other party, receiving in exchange the identical copy document signed by the other party. This is what is known as exchange of contracts.

Note that section 2(2) provides that terms may be incorporated into a document by reference to another document. These requirements, along with the case law that has developed over the meaning of terms such as ‘one document’, ‘exchange’ and ‘signed’ are considered at **4.13-4.18**.

The courts have also had to deal with the problems presented where an agreed term is missing or, where documents are exchanged, their terms are not identical. In some cases, they have adopted rectification or used the concept of collateral contracts to overcome the difficulties caused by missing or non-identical terms. These possible options are considered at **4.21-4.25**.

**Question 3: Explain the different roles played by contracts for the sale of land and deeds. What requirements must be met for a document to be a deed?**

These issues are introduced at **4.2-4.4** and examined in more detail at **4.32-4.38**. The contract for the sale of land provides a plan for how completion is to be achieved. It sets out the parties’ respective obligations in terms of what they must do, how they must do it and when they must perform those obligations. A contract is often desirable as it crystallises the parties’ obligations at an early stage and enables the parties to prepare for completion knowing that they and the other party are legally bound. Once the parties enter into a valid contract under which A has a duty to transfer a property right in land to B, or to grant B a property right in land, B may immediately acquire an equitable interest in A’s land: see **4.3**, **5.83-5.86**,and **5.87-5.92.** However, a contract is not essential. Many legal interests in land are created and transferred directly, without bothering with the initial contract stage.

As noted at **4.33**, section 52 LPA 1925 demands the use of a deed to create or transfer a legal estate in land with only some limited exceptions detailed in section 52(2) and section 54. The most common of these exceptions, set out in s 54(2), is for a lease of three years or less which takes effect in possession and is for a market rent.

Outside of those exceptions, a deed is thus necessary, but it will not be sufficient where registration is also required – see Question 4 below. The process by which a seller executes and delivers the deed in return for the purchase price paid by the purchaser is known as completion (see **4.2** and **4.32-4.36**)– it signifies the completion of the contract by performance.

The legal requirements for a deed are found in s1 of the LP(MP)A 1989. The document must state that it is a deed and it must be signed as a deed by the grantor or transferor and that signature must be witnessed. In addition, a deed must be delivered in the sense that the grantor or transferor demonstrates that they are legally bound by their deed and that it is not conditional on any further event or act. These requirements are explained in more detail at **4.35-4.37**.

**Question 4: In what circumstances and in respect of which legal estates is registration of title compulsory? Where registration is compulsory, what is the effect of: (i) registration; and (ii) a failure to register?**

Registration of land is now governed by the Land Registration Act 2002 (LRA 200). Registration can be required both where the legal title being transferred is a registered estate or where the estate is currently unregistered and the dealing triggers compulsory first registration.

As set out by s 27 of the LRA 2002, in most cases involving the transfer or creation of a legal estate in land, registration is required (see **4.56**). The major exception is for the creation of leases of seven years or less: the creation of such a lease is not usually a registrable disposition, and so B can acquire a legal lease of seven years or less without needing to register that title.

Where registration is required, B will not acquire a legal property right without registration. B must apply for registration armed with the deed executed by A. Upon becoming registered, the legal title to the registered estate will pass to, or be created in, B. Failure to register carries the consequence that legal title will not be transferred. Title remains with the transferor, although, in the case of a sale, it is likely to be held in trust for B as a result of A’s contractual duty to B: see **4.3** and **5.83-5.86**.

**Question 5: Advise A in the following circumstances:**

**a) A was the registered proprietor of land. A has discovered that a fraudster impersonating him has transferred his title to B (an innocent party), who is now the registered proprietor.**

**b) A was the registered proprietor of land. A has discovered that a fraudster impersonating him transferred his title to B, who has subsequently sold the land to C. C purchased the land with mortgage finance provided by D. C is now registered proprietor of the land and D has a registered charge. B, C, and D are all innocent of the fraud.**

The central issue in both these scenarios is should the Proprietorship Register be rectified, as a result of a mistake by the Land Registrar, to show A as the registered proprietor and, if so, whether a party who has suffered loss as a result of this rectification (such as B in case (a)) is entitled to an indemnity payment? These issues are perhaps the most difficult land registration questions to resolve and the courts have struggled to reach a logical position (see **4.66-4.83**).

First, the mere act of registration acts positively to confer title even if under the general law the registered proprietor is not entitled, for example because the transfer to them was as a result of fraud – see section 58 LRA 2002 (**4.66**). This ‘conclusiveness’ of the register is qualified by the possibility that the register can be rectified in the event of a mistake by the Land Registrar – Schedule 4 LRA 2002. Although mistake is not defined in the LRA 2002, it is clear that it does cover such instances where a transfer is obtained by fraud, as then the Land Registrar has mistakenly registered a party as the proprietor. The LRA 2002 thus adopts the approach of ‘qualified indefeasibility’ (see **4.73**) which allows A an opportunity to have the register changed in some circumstances. In the case of fraud, rectification generally must occur unless there are exceptional circumstances. However, this preference in favour of A is displaced if B is a ‘proprietor in possession’ - unless B has contributed to the mistake as a result of fraud or lack of proper care (see **4.73**).

**Case (a)** above looks at the simpler two-party situation – see **4.70** and **4.74-4.75**.

A is entitled to succeed in a claim for rectification unless there are exceptional circumstances. The transfer to B was made as a result of fraud and thus void under the general law – the registration of B as registered proprietor is thus ‘a mistake’ and may be rectified. Rectification will follow unless there are ‘exceptional circumstances’ which justify a court not ordering rectification. However, if B is in possession of the land, and did not cause or substantially contribute to the mistake by his or her own fraud or lack of proper care, then rectification will *not* occur, unless it would be for any other reason unjust not to rectify (see LRA 2002, Sch 4, para 6). If rectification does occur, B will be entitled to an indemnity unless the loss suffered by B arises wholly or partly as a result of B’s own fraud, or wholly as a result of B’s lack of proper care. Similarly, if rectification does not occur, A will be entitled to an indemnity, unless the loss suffered by A arises wholly or partly as a result of A’s own fraud, or wholly as a result of A’s lack of proper care (see LRA 2002, Sch 8, para 5).

**Case (b) above** illustrates the more difficult multiple party situation – see **4.70** and **4.76-4.77**.

In this scenario there are 4 parties: A,B,C and D. As a first step B has obtained title from A and is deemed by s 58 of the LRA 2002 to have title, and thus the owner’s powers given by s 26, even though the title was obtained by fraud. As the registered proprietor B has the power to dispose of the property to C by virtue of s 26. Accordingly, there is an argument that the registration of C, and of D, was not a ‘mistake’, as it resulted from the exercise of owner’s powers by a registered party. If there is no ‘mistake’, however, A cannot recover registered title, and nor can they claim an indemnity, as the indemnity provisions depend on loss having been suffered through a ‘mistake’.

It is therefore not surprising that, as discussed at **4.77**, the courts have moved to the view that there is a relevant ‘mistake’ in case (b): either because the registration of C and D is itself a mistake, or because rectification can be seen as necessary to address the consequences of the original mistake in removing A from the register. This does of course undermines the conclusiveness of the register conferred by section 58, but the Law Commission (2018) have confirmed this approach, noting that the indefeasibility conferred by the LRA 2002 was only ever meant to be a ‘qualified’ and not an ‘absolute’ indefeasibility.

So, in case (b), A can recover their title by obtaining a rectification of the register leaving C, and in turn, D to claim an indemnity. Alternatively, if rectification is refused so C and D retain their titles (eg because C is ‘a proprietor in possession’), A can at least claim an indemnity. The Law Commission has called for this approach to be enshrined in their proposed amendments to the LRA 2002 – see **4.82-4.83**.

**Question 6:** **What requirements must be met for a person to be in adverse possession of land? Consider, in particular: (i) what is meant by ‘dispossession’ and ‘discontinuance in possession’; (ii) when possession is ‘adverse’; and (iii) how ‘factual possession’ and an ‘intention to possess’ can be established.**

Adverse possession and its effect on the involuntary acquisition of ownership is discussed at **4.84-4.131**.

‘Dispossession’, of the paper owner by the squatter, and ‘discontinuance of possession’, by the paper owner, indicates the time of commencement of adverse possession. It is difficult to establish ‘discontinuance of possession’ since any small act by the paper owner in relation to land will count as possession. It is thus more common for a claim based on adverse possession to be triggered by ‘dispossession’ of the paper owner although that does not necessitate ouster of the paper owner but the assumption of sufficient possession by the squatter – see **4.88-4.90**.

Possession is adverse when it is taken, or continued, without the permission of the paper owner: see **4.94-4.97**. Thus, whilst a tenant or licensee may initially be in possession/occupation with the consent of the paper owner, if that permission expires or is revoked, the occupier’s possession becomes adverse.

Adverse possession is established by proof of sufficient factual possession AND an intention to possession: see **4.98-4.107**. Factual possession must demonstrate sufficient acts of physical control and custody over the land to demonstrate that the squatter is using the land as an owner would do. Thus, the acts of trespass themselves will depend on the nature of the land itself.

An intention to possess calls for proof of ‘the intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title’ (see *Powell v McFarlane* (1979)). It should be noted that an intention to own, as opposed to possess, is not required. Proof of an intention to possess is generally evident from the acts of adverse possession themselves particularly where they are unequivocal in terms of being qualitatively strong. Where the acts of physical possession are qualitatively weaker, proof of a sufficient intention becomes more problematic since the courts are reluctant to attach much weight to self-serving statements of intent. This dilemma is considered further at **4.104-4.107**.

**Question 7**: **A client, S, comes to see you and shows evidence that she has been in adverse possession of registered land for the past ten years. What steps must S take to obtain title to the land and in what circumstances will she be successful in doing so? Will it make a difference to your advice if S’s claim to adverse possession is that she has been living in a house?**

The effect of adverse possession on registered land is governed either by the LRA 1925 or by the LRA 2002 Sch 6. These provisions are considered at **4.116-4.120**, where the LRA 1925 governs the position, and at **4.121-4.131**, where the LRA 2002 applies. The question of which legislation applies depend on whether or not 12 years of adverse possession has been completed before 12 October 2003 (the date when the LRA 2002 came into force). If the required period of adverse possession has been completed by that date, the LRA 1925 applies. The registered owner title is effectively extinguished and they will hold the registered estate on trust for the squatter – see s75 LRA 1925. Where the 12-year period of adverse possession is not completed by 12 October 2002 so the LRA 2002 applies, schedule 6 sets out the process by which the squatter may be able to become registered as the owner of the land. The process is fully described at **4.123-4.131**.

In this question, our client S has been in adverse possession for 10 years ie well after 12 October 2002 so the LRA 2002 applies. This is unfortunate for S as the process is more demanding and will alert the registered owner to her application which may well trigger a claim for her eviction.

It will make no difference whether S has been squatting in a house even if her entry was forced and thus potentially criminal under section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The relationship between the criminalisation of squatting and adverse possession is examined at **4.132-4.136**. In *Best v Chief Land Registrar* (2015) (**4.134**)the Court of Appeal held that the fact a person’s claim to adverse possession includes acts that are a criminal offence under section 144 should not affect a claim to legal title to the land under schedule 6 of the LRA 2002. In *Best*, Sales LJ explained that Sch 6 of the LRA 2002 provides a careful balance between protecting registered proprietors from the loss of their title by adverse possession and the public interest in the active use and marketability of land and the positive role that adverse possession plays in this respect. He rejected an argument by the Chief Land Registrar that criminalisation made a critical difference to how the balance should be drawn due to the strong public interest in ensuring that people do not benefit from their crimes. Sales LJ considered that LASPO was not intended to draw (or re-draw) the balance between these competing interests, but to assist owners of residential buildings in a practical way, particularly by helping owners gain entry when squatters have moved in.