

Commentary

The crucial point to appreciate in this question is that you are acting on a sale of part and by its nature it will necessitate a more complex contract than a sale of whole. There is the need in particular to consider a new accurate description of the part being sold, the grant and reservation of easements, and the imposition of new covenants. Consequently it is an area of property law and practice that finds favour with examiners.

On the Legal Practice Course you should expect some drafting questions because drafting is one of the core skills of the course. Here is one that asks you to exhibit that skill in the context of property law and practice - something that may fill some of you with unease!

Ideally you will need time to go away and consult a precedent book (or computer software) and unless the examiner is feeling particularly mean, you will not face part (a) in an examination room (although don't bank on it, especially in these days of open book exams!). Generally speaking, you are more likely to find this type of question as part of a writing and drafting skills assessment, with a return date of say - two or three weeks ahead.

Before searching for the precedent or precedent clauses, always stop and ask yourself what is the client trying to achieve? Remember that a precedent is only your guide and it will have to be adapted to suit the client's specific needs and requirements. If the precedent is in a book, take a photocopy of it and amend it after careful thought. You will rarely satisfy your client's requirements by copying slavishly word for word from a precedent.

Fortunately your instructions here are quite common in a situation where land is sold off for development and you should have covered a scenario similar to this in class. Remember that part of your job as the seller's conveyancer is to ensure that your client is adequately protected in terms of receiving the benefit of appropriate covenants and the reservation of appropriate easements. A failure to do this on your part could adversely affect your client's ability to offer a good and marketable title to prospective buyers of the retained land. So again, do not slavishly follow your client's instructions - he is not a property lawyer and doubtless will not have thought of everything. Here for example, Mr. Brown does not appear to have considered that if the buyer is permitted to share the use of the driveway and existing drains, then he ought at least to share the cost of maintaining them.

As well as the seller's requirements, the question also asks you to consider the needs of the buyer. From your instructions, anticipate the easements a buyer would want and include them as well. This is courteous to the buyer's solicitor and will avoid unnecessary delay. The question also invites you to explain the relevant points so you must understand what the clauses mean and why they are necessary. Give your explanation before each draft condition - that way it is easier to mark.

Part (b) raises the topic of revenue law which of course pervades property law and practice. This problem is straightforward provided you spot that the relevant tax is Capital Gains Tax. Note the significance of the area being sold ('approximately half a hectare'). Do not be drawn into a discussion about stamp duty land tax - this is only payable by purchasers - and advising the clients that they will be paying VAT on your costs is astute but really misses the point! Finally, note the apportionment of marks between parts (a) and (b); the tax advice need only be brief, so stick to general principles.

Suggested answer

ABBHEY & RICHARDS, SOLICITORS
INTERNAL MEMORANDUM

To Property partner
From Trainee solicitor

Re land to the rear of Wellington Road

a)

1. Description

As this is a sale of part it is important to describe accurately the land being sold. This will be done by adapting the existing description of 14 Wellington Road on the title register and referring to a scale plan annexed to the contract. For example,

'All that freehold land shown edged red on the plan annexed hereto ("the Plan") being part of the land known as 14 Wellington Road, Midchester registered at HM Land Registry with title absolute under title number MB 34857.'

The land being retained by the client should also be described accurately in the contract by reference to blue edging on the plan. It should be defined as 'the Retained Land'.

2. Negate implied grant of easements in favour of buyer

On a sale of part the buyer may acquire certain rights over the Retained Land by virtue of the Law of Property Act 1925, s.62 and the rule in *Wheeldon v Burrows* [1879] 12 ChD 31. As the nature and extent of the implied rights is not always clear, it is prudent to exclude the effect of these rules and set out expressly the rights and reservations required by the parties. If implied rights of light or air were granted to the buyer here, this could hinder any plans Mr. Brown may have in the future to build on the Retained Land.

A suggested negation of implied rights clause would be:

'The Transfer to the Buyer shall contain an agreement and declaration that the Buyer shall not by implication or otherwise become entitled to any rights of light or air which would restrict or interfere with the free use of the Retained Land for building or other purposes.'

3. The grant and reservation of new easements

The creation of new easements in favour of the buyer are called 'grants'; the creation of new easements in favour of the seller are called 'reservations'. When acting for a seller wishing to **reserve** easements, reliance should never be placed upon s.62 of the Law of Property Act 1925 or the rule in *Wheeldon v Burrows* (1879) 12 ChD 31 because both of these relate to implied **grants** not implied reservations.

The following special condition is suggested to cover our instructions:

'The Transfer to the Buyer shall contain the following rights in favour of the Buyer and the Buyer's successors in title:-

- a) A free and uninterrupted right of way at all times and for all purposes with or without vehicles over the accessway shown hatched black on the Plan leading across the Retained land ("the Accessway") subject to the Buyer paying a fair proportion according to user of the cost of maintaining, repairing, and renewing the said accessway;
- b) The right to lay, maintain, and use for all proper purposes connected with the Property a new drain and sewer ("the new services") under the Retained Land along the route marked with a broken [orange] line on the Plan;
- c) The right to connect into the Seller's existing drain and sewer ("the existing services") on the Retained Land and to use the existing services in common with the Seller subject to the Buyer paying a fair proportion of the cost of maintaining, repairing, and renewing the existing services and making good any damage caused to the satisfaction of the Seller;
- d) The right on giving reasonable notice and at reasonable times (except in the case of emergencies) to enter the Retained Land for the purpose of inspecting, maintaining, and repairing the new services and the existing services the person exercising such right causing as little damage as possible and making good any such damage caused.'

It should be noted that the seller has been protected by the provision for the buyer to make good any damage caused to the Retained Land and for repairs to be carried out only upon prior notice, save in the case of an emergency. The route of the new services has also been specified so as to avoid unnecessary intrusion onto the Retained Land.

From the information you have provided, it appears that the only reservation Mr. Brown will require is the right to remove the greenhouse. The following special condition would cover the point:

'The Seller reserves the right to remove the greenhouse on the Property provided that the Seller shall exercise this right before completion and shall cause no unnecessary damage to the Property.'

If the Protocol is being used the right to remove the greenhouse could be taken care of by mentioning this on the standard Fixtures, Fittings, and Contents Form.

4. The imposition of new covenants

Mr. Brown has imposed some specific conditions and each one will be the subject of a new covenant imposed on the buyer. Although not mentioned in our instructions it would be prudent in addition, (a) to restrict the use of the new property to residential only (this is probably a condition of the planning permission anyway), (b) to prohibit the buyer from obstructing the driveway and, (c) to impose a general covenant against causing a nuisance or annoyance to the owners and occupiers of the Retained Land.

Wherever possible when acting for a covenantor, the covenants should be drafted so as to be restrictive (that is, to say, negative) in nature because the burden of a **positive** covenant will not run with the land (*Tulk v Moxhay* 1848 2 Ph 774). This will be done here in the case of the new building on the plot. Rather than say 'The buyer will build only a single storey dwelling ...', say 'Not to erect any building save for ...' This cannot be done in the case of the obligation to build the fence, but we should stipulate a time limit, a minimum height, and its type.

The benefit of the covenants should also be expressly annexed to the Retained Land.

The following special condition is suggested:

'The Buyer shall in the Transfer enter into a covenant with the Seller to the intent that the burden of such covenant shall run with and bind the Property and every part thereof and that the benefit of such covenant shall be annexed to and run with the Retained Land and every part thereof to observe and perform the following:

- a) Not to erect on the Property any building or other structure other than one bungalow and garage for residential use and occupation by one family in accordance with plans previously approved in writing by the Seller or the Seller's successors in title;
 - b) Within three months from the date of completion to erect and forever thereafter maintain a close-boarded fence not less than six feet in height along the boundary between the Retained Land and the Property between the points marked A and B on the Plan;
 - c) Not to park vehicles on or otherwise obstruct or cause or permit to be obstructed the Accessway;
 - d) Not to do or permit to be done on the Property anything which may be or grow to be a nuisance or annoyance to the owners or occupiers of the Retained Land.'
- b)** We should advise Mr. Brown of his potential liability to Capital Gains Tax (CGT) that can arise on the disposal of an interest in land.

It should be noted that if the land he is retaining (14 Wellington Road and part garden) is his principal private dwelling house, he will enjoy an exemption from CGT provided the land being sold does not exceed 0.5 hectares. We are told that the area of the land is approximately half a hectare so it will be important to requisition a survey in order to establish the precise area.

If the land exceeds 0.5 hectares the gain will be calculated by taking the sale price and deducting from it incidental acquisition costs (including legal fees) and incidental disposal costs. The client has an annual exemption, which can be set against the chargeable gain. Any gain above the exemption figure will be charged to CGT at the prevailing rate.

Trainee Solicitor: time engaged 55 minutes
