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## Question 1

### Commentary

When you come across a question like this it is important not to be panicked into writing everything you know about contracts for the sale of land. You will appreciate reading this chapter that the question concerns new properties but in the pressure cooker atmosphere of the exam room, crucial matters can get overlooked. The question asks specifically for matters which are peculiar to the sale of a **new property in the course of construction** and you should concentrate your mind on this, not contractual matters of a more general nature. Notice also that the house has not yet been built, which is a crucial factor in the form the contract will take.

The question invites a wide discussion of the contract from both the seller's and buyer's perspective. Do not be afraid to put each side's case - you will be given credit for explaining why the seller wants something included but the buyer does not, or vice versa. You have not received a memorandum so you can simply write your answer in a conventional format.

### Suggested answer

This transaction is a sale of part of the seller's title and so the usual sale of part considerations apply. The seller will want to negate any implied grant of easements in favour of the buyer under the Law of Property Act, s.62 and the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31. The contract should make appropriate provision for the grant and reservation of new easements and the imposition of new covenants. The easements will cover such matters as rights of way and the right to run services over the remainder of the estate, and the right to enter to inspect, maintain, and repair accessways and services. The buyer must be satisfied that the new covenants do not unduly restrict the buyer's intended use and enjoyment of the property. Typical covenants include: restricting the use to residential only, not making any alterations without the seller's consent (the buyer should be advised to limit this in time to say, three years) and to maintain one or more fences around the plot. It should be noted that the easements and covenants will be actually created in the purchase deed, not the contract, but the contract will govern the contents of the purchase deed, so the contract will normally stipulate the exact wording of the easements and covenants.

Another important consideration on a sale of part is to ensure that the contract contains a full and accurate description of the property being sold. This should be done by reference to a scaled plan attached to the contract showing the individual plot edged red. The description will be short with the added words, 'more particularly described on the plan', thereby indicating that the plan is to prevail in the case of conflict or uncertainty (*Neilson v Poole* (1969) 20 P & CR 909).

The builder cannot be absolutely sure when the house will be physically completed and ready for the buyer to move in. A fixed completion date therefore cannot be agreed on exchange of contracts. The contract should provide instead for legal completion to take place within a certain period after the seller's solicitors have notified the buyer's solicitor that the property has been completed and is fit for occupation. The period in question must be sufficient to allow time for the buyer to carry out the pre-completion searches, to request the

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drawdown of any mortgage advance, and for the buyer's (and probably mortgagee's) surveyor to carry out a final inspection of the property. Fourteen days should be sufficient and is normally acceptable to both builder and buyer.

One point to note where the buyer is purchasing with the aid of a mortgage is that the mortgagee will not release the mortgage advance until the property has been completed to the satisfaction of the mortgagee's surveyor. The buyer's solicitor should therefore consider a provision in the contract whereby the buyer cannot be forced to complete until the mortgagee's surveyor is satisfied in this respect.

The buyer will also require a 'long stop date' for completion being a date, say six or nine months hence, after which the buyer may withdraw from the contract. Without this provision, if the property was never physically completed or the seller's notice was not served, the contract would remain open indefinitely, a state of affairs which ultimately would be unsatisfactory for both parties.

The builder/seller will want to ensure that the buyer carries out the investigation of title before exchange and that no requisitions may be raised on the title after exchange. This will be covered by a special condition. The buyer should be happy with this provided he has enough time to carry out the title investigation.

Assuming that the property will not be finished by the time contracts are exchanged, the seller should be responsible for it between exchange and completion. Standard Condition 5.1.1 is not appropriate as the purchaser will not be assuming the risk until completion. This condition should therefore be excluded or amended, although the special condition doing so must make it clear that the risk remains with the seller until legal completion. Otherwise, the open contract position would apply and the buyer would assume the risk from exchange.

The builder is described in the question as 'well-known and reputable' so presumably the company is registered with the National House Building Council (NHBC). The new property will therefore have the benefit of the NHBC Buildmark scheme which provides a ten year insurance for structural defects. The contract should specify that the builder will provide NHBC protection and that the NHBC documentation will be supplied to the buyer before completion.

The property is in the course of construction and the buyer would prefer to see a contractual obligation on the builder/seller to build the property and the rest of the estate in a good and workmanlike manner in accordance with the planning permission and the agreed plans and specifications. The buyer would also want the right (together with the buyer's mortgagee) to inspect the property during its construction and again, finally, when it is finished. Associated with this will be a provision requiring the seller to rectify any minor defects (known as 'snagging items'), either before legal completion or within a specified time thereafter. A snagging list is normally prepared by the buyer's surveyor on final inspection. A prudent buyer would also insist on a clause in the contract whereby the seller agrees to remove all builders' rubbish before completion, to erect boundary fences, and to landscape the garden and adjoining areas. The builder may prefer to confirm these points in its solicitors' replies to pre-contract enquiries rather than amend its standard form of contract.

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Whilst it may be the intention of the builder to build the property in accordance with the agreed plans and specifications, the builder may wish to reserve a right to vary the method of construction or the materials used in the construction. The buyer will be reluctant to accept such a clause unless it is qualified to provide that such variation will not diminish the value of the property or the accommodation to be provided.

Like anyone in business the builder will be keeping a watchful eye on cash-flow and will therefore normally expect to receive a full 10% deposit from the buyer on exchange of contracts. Normally, the builder will want the deposit to be held by its solicitor as agent for the seller rather than as stakeholder, so that the deposit can be released to the builder as soon as the contracts are exchanged. The seller's solicitor should therefore cover the point and amend the Standard Conditions by a special condition to this effect. Conversely, the buyer would prefer the deposit to be held by the seller's solicitor as stakeholder, so that it remains secure in the solicitor's client account until completion! The argument can be put forward on behalf of the buyer that it may be several months before the transaction is completed and if the deposit is released to the seller and the seller later defaults (for example, because of insolvency), the buyer, as unsecured creditor, may never recover the deposit.

Finally, if the buyer is paying an additional price for 'extras' (for example, specially designed kitchen or bathroom fittings) then, having regard to s.2 of the Law of Property Act (Miscellaneous Provisions) Act 1989, the contract should specifically deal with this by itemising the extras and clearly stating the additional sum.

## Question 2

### Commentary

This question is in the form of a memo and asks for a memo in reply so do not write an essay on the subject! As you have to list **and explain** the items, it may be worth spending a few minutes first, jotting down on a piece of rough paper the items that you feel are relevant. That way you can calculate how long you will spend on each explanation. It would be frustrating to find near the end of the allotted time for this question that you have spent practically the whole time discussing at some length the contract and purchase deed, but left yourself no time to explain the other items. You may appreciate their significance but unless you can actually put it down on paper, sadly you will fail the question and this is something that regrettably happens all too often.

With the reference to fixed and floating charges, you may think that a comprehensive knowledge of secured lending is required in order to achieve high marks on this question. It is not - all you need do is stick to basic conveyancing principles. Every property law and practice student, whether specialising in commercial property or not, should appreciate the requirements for the release or discharge of a mortgage on completion of sale of land.

Once again, ensure that your answer is germane to the question. You are told that the properties are freehold so you will get no marks for discussing leasehold issues; nor will you get any credit for writing about mutual rights of support because the properties are detached! Note also that the builder is a 'major player in the U.K. building industry', a clear pointer to registration with NHBC. Don't make the mistake though of saying that the NHBC documents

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will be included in the pre-contract package - these are not released to the buyer until after exchange.

### **Suggested answer**

ABBHEY & RICHARDS SOLICITORS  
INTERNAL MEMORANDUM

**To: Property Partner**  
**From: Trainee Solicitor**

### Re Character Homes Ltd

I refer to your memo and report that, in my opinion, the following items should be prepared by us (or obtained) and sent to each buyer's solicitors, as and when sales are agreed, subject to contract:

1. The draft contract with a copy for the buyer's solicitor's use. On the sale of a new property the form of purchase deed is usually stipulated in the contract and this is permitted by the LPA 1925 s.48. To comply with s.2 of The Law of Property (Miscellaneous Provisions) Act 1989 the contract must incorporate all the terms agreed by the parties.
2. The draft purchase deed will be prepared by us at the same time as the draft contract and annexed to it. The draft contract and purchase deed together will be sent in duplicate to each buyer's solicitors. We will inform the other side that no amendments to the documentation of substance will be accepted. This is prudent policy for a seller of multiple plots on a building estate who will prefer to have uniformity and standardisation of its legal documentation. The purchase deed will set out expressly all necessary grants and reservations of easements together with the new covenants being created.

We are not told whether the title is registered or unregistered. If the title is registered, a Land Registry transfer (TP1) will be the appropriate purchase deed. We can ask the Land Registry for prior approval of the form of transfer. If the title is unregistered, a draft conveyance will be appropriate (or if we prefer, a Land Registry transfer (TP1) as the plots will be compulsorily registrable).

3. The buyers will require evidence of our client's title to the site so that the title can be investigated in the normal way. If the land is registered we will supply official copies of the title and the title plan. The title plan may be too large and unwieldy in which case it will be easier for us to send the Land Registry a plan showing the layout of the estate and ask them to issue a Form CI for each plot shown on the plan. The Form CI will certify that the property to which it relates is within our client's title. It will also indicate those entries on the filed plan that affect the plot in question. Form CI will help the buyer's solicitors when they do their pre-completion Land Registry search because they can simply quote the plot number on the Form CI when the search application is made.

Chapter 17: New properties

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If the land is unregistered, we should prepare an abstract of our client's title or, alternatively, an epitome of title with copy documents attached. It may be worth considering applying for voluntary first registration of our client's title as deducing title to registered land is likely to be simpler. We should especially consider voluntary registration if the unregistered title is complex.

4. Replies to buyer's enquiries before contract. We should prepare our own which we can gear specifically to the purchase of a new dwelling on a housing estate. In this event we shall be diverting from the standard forms under the Protocol and so we must advise the buyers' solicitors that the Protocol is not being used. This can be done in our initial letter (see 8 below).
5. Replies to standard pre-completion enquiries and requisitions on title. As our client has mortgaged the site each prospective buyer will require confirmation that on completion the mortgage will be discharged by Modern Finance over that plot. Each buyer will also require a letter of non-crystallisation from Modern Finance in respect of the floating charge. Other matters that can be dealt with in these replies are the arrangements for collection of keys on completion and the furnishing of our bank details for transmission of funds by the buyer's solicitors on completion.
6. Copies of the planning permissions for the development and any building regulation approvals (although the latter are unlikely to be available yet). The buyers will want to be satisfied that the local planning authority has authorised the construction of the estate, and that the builder has complied or will comply with all conditions of the planning permissions. We could advise the buyer's solicitors of any reserved planning matters in our initial letter (see 8 below).
7. Copies of agreements and supporting bonds under the Highways Act 1980 s.38 and the Water Industry Act 1991 s.104.

The roads and street lighting on a new estate will only become adopted by the local authority (and thus maintainable at the public expense) after the estate has been physically completed. The local authority is empowered to make up the roads and charge the house buyers for the cost of doing so. The buyers will therefore require our client builder to enter into an agreement with the local authority under s.38 of the Highways Act 1980, in which the builder agrees to make up the roads and street lighting to an adoptable standard and the authority agrees to adopt them subsequently. The buyers will be concerned that the builder may default in making up the roads (for example because of liquidation) resulting in the local authority making them up and charging the cost to the buyers. To protect against this, the s.38 agreement is supported by a bond or guarantee from the builder's bank or insurers which provides for the buyers to be indemnified for any costs paid to the local authority should the builder default.

Our client should complete a similar agreement and supporting bond in respect of the making up and adoption of the drains and sewers on the estate. This agreement is made with the local water authority under s.104 of the Water Industry Act 1991.

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8. A standard letter for each buyer's solicitor enclosing the package of documents. The letter can confirm that we do not intend to use the Protocol. It can also provide useful general information about the new estate covering such matters as the anticipated dates for physical completion of the houses and details of where plans and specifications can be inspected. A general information pack could also be provided. We can make it clear at this early stage that no material amendments to the draft documentation will be accepted.

As a large reputable building company, Character Homes will, of course, be registered with the National House Building Council (NHBC). Accordingly our letter will confirm that our client is so registered and that we shall forward the appropriate NHBC documentation to the buyers' solicitors following exchange of contracts.

Trainee Solicitor: time engaged 35 minutes