Land Law and Conveyancing

CPD Update

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This update has been prepared by ILEX Tutorial College (ITC) to assist Fellows and Members of the Institute of Legal Executives (ILEX) in meeting their continuing professional development (CPD) or lifelong learning requirements for 2008. Fellows are required to complete 16 hours of CPD in 2008 and Members eight hours of CPD. It has been written for Fellows and Members currently practising in this area and it is assumed, therefore, that those using it have a level of knowledge equivalent to an ILEX Level 6 Professional Higher Diploma in Law pass.

Each update contains information on developments in law and/or practice in 2007 and early 2008. Studying each update and completing the accompanying self-assessment test will account for four hours of CPD. Fellows and Members are entitled to two free updates a year.

Details of the completion of the self-assessment test should be recorded by Fellows in their CPD logbooks using the reference code printed inside the front cover of the update. It is not necessary to return the completed self-assessment test to ILEX. All completed self-assessment tests should be retained, however, as ILEX may request their return for monitoring purposes.

Any queries about completion of the self-assessment test and any other CPD issues should be made to the Membership Operations Division on 01234 845733.
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Chapter 1: Home Information Packs

Pursuant to the Housing Act 2004 and the Home Information Pack (No. 2) Regulations (SI 2007/1667) the regime for Home Information Packs (HIPs) has been introduced piecemeal as follows:

1 August 2007 for dwellings with four or more bedrooms
10 September 2007 for dwellings with three or more bedrooms
14 December 2007 for dwellings with three or fewer bedrooms.

The Housing Act (Commencement No. 11) (England and Wales) Order 2008 (No. 11 Order) now extends the duty to supply HIPs to new properties with effect from 6 April 2008. Prior to the order coming into force residential properties built to energy-efficient standards were exempted from the HIPs regime.

1.1 Sustainability Certificates

The Code for Sustainable Homes (the Code) was introduced in April 2007 and sets voluntary standards which can be used to measure the environmental impact of a property. The Home Information Pack (Amendment) Regulations 2008 came into force on 31 March 2008 and require that where a newly constructed home is marketed, the HIP must include a sustainability certificate. The certificate is a certified assessment of the home against the standards set out in the Code.

This requirement only relates to:

• new homes being designed or constructed and not existing properties that are being converted; and

• those properties where the homes are at the beginning of the construction process rather than those already in the process of being built. The requirement comes into play where a local authority has received a building notice, initial notice or full plans notice after 1 May 2008.

The HIP must include either:

• a sustainability certificate, which must be prepared by a Code Assessor and be based on the assessor's post-construction assessment of the home. The certificate will include a star rating ranging from zero (the minimum) to six (the maximum); or

• a nil rate certificate, which means that no assessment of the home has been made against the Code. The nil rate certificate can be prepared by anyone but must be in the form specified in the Code.

Sustainability certificates are intended to complement energy performance certificates. The obligation comes into play only when the new home is “finished”. This means that the construction stage is sufficiently advanced to enable post-construction assessment to be made by a Code Assessor.

Chapter 2: Energy Performance Certificates (EPC)

The requirement to obtain an energy performance certificate (EPC) for commercial properties (i.e. any property that is not a dwelling) is being phased in as follows:

6 April 2008 properties with more than 10,000 square metres of useful floor area
1 July 2008 properties with more than 2,500 square metres of useful floor area
1 October 2008 all remaining properties.

2.1 What is an EPC?

An EPC is a certificate containing information about the energy efficiency of a building. The certificate must include:

- an asset rating – this is expressed on a scale of A to G, similar to energy efficiency labels on domestic appliances. A is the highest rating and G is the lowest;
- a reference value – this is a benchmark against which the asset rating of the building can be judged. For example, the benchmark for an average dwelling in England and Wales is E;
- the reference number under which the EPC is registered – see below;
- the address of the building;
- an estimate of the total useful floor area of the building – this is defined as the total of all enclosed spaces measured to the internal face of the external walls. This is comparable to the RICS definition of “gross internal area”;
- the name of the energy assessor;
- the date issued;
- the name of the accreditation scheme of which the energy assessor is a member.

2.2 When is an EPC required?

An EPC is required when a property is:

- to be sold (including the assignment of a lease);
- to be let (including the grant of a sub-lease);
- newly constructed; or
- converted and the services (e.g. heating, hot water or air conditioning) are modified.
2.3 At what point in the transaction?

On a sale or a letting an EPC must be given free of charge to the prospective buyer or tenant at the earliest opportunity but no later than:

- when written information concerning the building has been provided in response to a request from the buyer/tenant; or
- when the property is viewed; or
- in any event, before entering into a contract to sell or let.

2.4 Which buildings require an EPC?

The Energy Performance of Buildings (Certificates and Inspectors) (England and Wales) Regulations 2007 define a building as "a roofed construction having walls for which energy is used to condition the indoor climate". This includes buildings that have fixed heating, mechanical ventilation or air conditioning. Buildings that only have hot water or electric lighting do not require an EPC.

An EPC is not required on the construction, sale or letting of the following types of building:

(a) places of worship;
(b) temporary buildings with a planned time of use of two years or less;
(c) industrial sites and workshops with low energy demand;
(d) non-residential agricultural buildings with low energy demand;
(e) stand-alone buildings with a total useful floor area of less than 50 square metres;
(f) buildings that are to be demolished.

2.5 Recommendation report

If an EPC is required it must be accompanied by a recommendation report. This contains suggestions to improve the energy performance of the building and is issued by the energy assessor who issued the EPC.

2.6 How long does an EPC last?

An EPC is valid for 10 years from the date of issue. However, if a HIP is required then any EPC cannot be more than 12 months old when the building is first marketed.
2.7 Transitional provisions

Transitional rules apply only where the property was on the market on the trigger date (i.e. either 6 April or 1 July depending on the size of the building). Once contracts have been exchanged the seller or landlord is to commission an EPC as soon as reasonably practicable and give it to the buyer or tenant once it has been obtained (even if this is after completion).

2.8 Display energy certificates (DECs)

From 1 October 2008 DECs will have to be displayed in buildings:

- with a total useful floor of more than 1,000 square metres; and
- occupied by public authorities and institutions providing services to large numbers of people visiting the premises.

Circular 02/07: the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (EPB Regulations 2007) state that public museums and swimming pools will require DECs but hotels and retail outlets will not. Further guidance is due to be published shortly.

The EPB Regulations 2007 do not prescribe the form of the DEC but reg 17 requires the following specific information to be included:

- the asset rating of the building;
- the operational rating of the building – this is the amount of energy consumed over a period of 12 months assessed from meter readings;
- a reference value;
- the reference number under which the DEC is registered (see below);
- the address of the building;
- an estimate of the total useful floor area of the building;
- the name of the energy assessor and his/her approved accreditation scheme;
- the date the DEC is issued;
- the nominated date – this is chosen by the energy assessor and must be within three months of the period over which the operational rating is calculated. A DEC is valid for 12 months from the nominated date.

In addition to the DEC, occupiers must obtain an advisory report containing recommendations for improving the energy efficiency of the building. The advisory report is valid for seven years.

The Government's aim is to enable the public to compare the energy efficiency of public buildings and promote improved energy use.
2.9 Inspection of air-conditioning systems

The requirement to have an air-conditioning system inspected by an energy assessor at least every five years is being phased in as follows.

(1) If the system was put into service after 1 January 2008 the system must be inspected within five years of the date it was brought into service.

(2) If the system was in service on 1 January then:

- a system with an output of more than 250 kW must be inspected before January 2009;
- a system with an output of more than 12 kW must be inspected before 1 January 2011.

2.10 Registration of certificates

Part 6 EPB Regulations 2007 requires the Secretary of State to maintain a register of EPCs, DECs, recommendation reports and advisory reports. The register is operated by Landmark Information Group. The energy assessor is responsible for registering the document.

2.11 Enforcement

Enforcement is via trading standards officers and the penalties vary according to the type of property involved:

- failing to comply when selling or renting a dwelling is £200;
- failing to comply when selling or letting a commercial property is set at 12.5 per cent of the rateable value of the property with a minimum penalty of £500 and a maximum penalty of £5,000.

It remains unclear whether these penalties can be repeatedly imposed until the EPB Regulations 2007 are complied with. The regulations are not clear on the point.
Chapter 3: Land Registry

3.1 New triggers for compulsory registration

Land Registry proposes to extend the triggers for compulsory registration as follows:

- the appointment of a new trustee of unregistered land where land vests in a new trust by deed or by other instrument in writing or by a vesting order made by the court; and

- partitioning of unregistered land held in trust among beneficiaries of the trust.

Land Registry believes that the changes will significantly increase the area of land that is registered in England and Wales and achieve the goal of a “comprehensive land register”.

3.2 On-line access to documents

Following concerns about fraud, Land Registry will no longer supply copies of documents referred to on the register via Land Register Online, although these can still be obtained via Land Registry Direct. Members of the public can still obtain copies of such documents via a postal application or visiting the Land Registry.

This step by Land Registry is intended to reduce the risk of a fraudster obtaining copies of documents from which the registered proprietor’s signature can be copied and the property transferred and/or mortgaged fraudulently. To put this into context, Land Registry have paid statutory compensation in the region of £12.5 million as a result of fraud in 70 claims since 2004. One single claim amounted to £8 million.

Owners of registered land can protect themselves by:

- registering up to three addresses for service including an e-mail address and ensuring that those addresses are kept up to date. However, this will not assist where the disposition is one where the registered proprietor appears to be a party;

- registering a standard restriction in Form LL. This requires the applicant to produce a certificate signed by a conveyancer confirming that the conveyancer is satisfied that the document submitted for registration is executed by the registered proprietor. The restriction reads: “No disposition of [the registered estate or the registered charge dated (date) referred to above] by the proprietor [of the registered estate or of that registered charge] is to be registered without a certificate signed by a conveyancer that he is satisfied that the person who executed the document for registration as disponer is the same person as the proprietor.”

3.3 Identity checks

As from 3 March 2008 certain applications lodged by people who are not legally represented will not be considered by Land Registry unless accompanied by evidence of identity. This relates to applications to register:
• a transfer (including gifts);
• a lease (including gifts);
• mortgages;
• discharges;
• application for first registration where the deeds have been lost or destroyed.

The unrepresented person must complete either form ID1 for an individual or form ID2 for a corporate body. Identification must be verified by either a Land Registry customer information centre, a solicitor, licensed conveyancer, legal executive or notary public.

The result of this is that conveyancers may be asked to verify the identity of people attempting to carry out their own conveyancing. Some firms have already instructed their fee earners not to do this and it is clear that many conveyancers would not be happy to verify the identity of a stranger.

3.4 Extending priority

This is a simple reminder that it is not possible to extend the 30 working day priority period of a Land Registry search in form OS1. This is a popular misconception.

Land Registry Practice Guide 12 makes clear that if the completion of the disposition is delayed so that the application for registration is unlikely to be delivered within the priority period, a second search application may be made, (whether or not the priority period under the first official search certificate has expired). But the issue of the second official search certificate will not extend the priority afforded by the first. All it will do is provide a second priority period and this will not provide priority over any application lodged before its priority period started.

It is therefore important to lodge the application for registration within the priority period of the official search.

3.5 The Land Registration (Proper Office) Order 2007

Land Registry will not treat an application for registration as having been received unless it is sent to the proper office. If an application is sent to the wrong office then the risk is that by the time it is rejected the priority period of the Land Registry search will have expired.

As from 1 April 2008 the proper offices for applications within certain areas have changed as set out below:

<table>
<thead>
<tr>
<th>Administrative area</th>
<th>Former proper office</th>
<th>New proper office</th>
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</thead>
<tbody>
<tr>
<td>Brent</td>
<td>Harrow</td>
<td>Swansea</td>
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<tr>
<td>Harrow</td>
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<td>Camden</td>
<td>Harrow</td>
<td>Groydon</td>
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<tr>
<td>City of Westminster</td>
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</tbody>
</table>
3.6 **Electronic conveyancing**

Following a trial of a prototype chain matrix and having reviewed the responses to a wide consultation Land Registry has decided to focus its resources on electronic discharges, charges and transfers as the priorities in its e-conveyancing programme in 2008 and 2009.

Chain transparency and funds transfer are still very much part of Land Registry’s long-term vision, but the focus now is to deliver core registration services electronically in the short term.

This would seem to mean that electronic conveyancing is unlikely to be a reality before 2010 at the earliest.
Chapter 4: General Law relating to Conveyancing Practice

4.1 Contracts

4.1.1 Variation of agreement

In *Eyestorm Ltd v Hoptonacres Homes Ltd [2007] EWCA Civ 1366* a dispute arose in relation to an agreement for the sale of 14 newly constructed flats. The buyer failed to complete and the seller served a notice to complete. The parties then came to an agreement to postpone completion to a later date. The buyer failed to complete on the later date after a notice to complete was served but argued that the seller was not ready, willing and able to complete as the seller was in breach of the varied agreement.

The court held that the varied agreement was invalid as it had been settled via correspondence between the parties’ respective solicitors and did not comply with s2 Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989). That section states that a contract for the sale of other disposition of land (e.g. the creation of an easement) must:

- be in writing;
- contain all the expressly agreed terms;
- signed by or on behalf of the parties;
- in one document or where contracts are exchanged in each document.

In the case of *McClausland v Duncan Lawrie Ltd [1996] 4 All ER 995* the obligation to comply with s2 was held to extend to any variation of a material term of the contract including the alteration of the completion date.

The more recent case merely confirms this decision. Any variation of a contract must comply with s2 in order to be valid and enforceable.

4.1.2 Different versions of the contract

In *Khan & Partners Ltd v Clemments [2007] All ER (D) 138* the draft contract sent to the buyer's solicitors contained a draft transfer in form TR1. The parties exchanged contracts using Law Society Formula B. It then became apparent that the parties were relying on different versions of the contract. In the buyer's part of the contract sections of panel 12 of the TR1 had been deleted which were included in the seller's part of the contract.

The court held that the contract did not satisfy s2 LP(MP)A 1989 as the parties had agreed on differing versions of the contract and therefore not all the expressly agreed terms were set out.

Prior to effecting exchange of contracts it is important to check that the buyer's and the seller's versions of the contract are identical, particularly where the contract has been heavily negotiated and numerous amendments have been made.
4.1.3 **Rectification**

In certain circumstances it may be possible to rectify a contract where it does not accurately reflect what the parties agreed either because words were wrongly omitted or included or that the parties did not understand the legal effect of the words used.

In *Ali Oun v Ishfaq Ahmad [2008] EWHC 545 (Ch)* the parties drew up an agreement for the sale of a partly retail, partly residential property. That agreement did not include terms in relation to any apportionment between the property fixtures and fittings and goodwill or terms in relation to the trading stock. A second document was drawn up.

The court held that:

- the first document did not comply with s2 LP(MP)A 1989 as it did not contain all the expressly agreed terms;
- rectification was not available as the parties had expressly agreed not to record the terms as to apportionment of the price in the first document. And it was beyond the court’s power to write in terms which the parties agreed should not be recorded in the first document.

4.2 **Deposit**

**s49(2) Law of Property Act 1925 (LPA 1925)** states:

*where the court refuses to grant specific performance of a contract, or in any action for the return of the deposit, the court may, if it thinks fit, order repayment of any deposit.*

The judge in *Country and Metropolitan Homes Surrey Ltd v Topclaim Ltd [1996] Ch 307* had indicated that it was possible to exclude the effect of the section.

In *Aribisala v St James (Grosvenor Dock) Limited [2007] EWCH 1694 (Ch)* contracts were exchanged for the purchase of two properties and a 10 per cent deposit paid. The buyer did not have a firm mortgage offer when exchange took place and failed to complete. The buyer failed to comply with a notice to complete and the seller rescinded the contract and forfeited the deposit. The contract sought to exclude the effect of s49(2) LPA 1925. The buyer argued that the deposit should be returned because of:

- the size of the deposit;
- his unfamiliarity with the conveyancing process in English;
- his attempts to obtain mortgage finance;
- the relative financial strengths of the parties;
- his request for an extension of time;
- the seller's refusal to negotiate once the completion date had passed;
- the profit of £366,000 made by the seller on a subsequent sale; and because
• it was a residential transaction.

The court held that it was not possible to exclude the section by contract. **s49(2)** confers a jurisdiction on the court rather than a right on either party. A provision in a contract seeking to oust the jurisdiction of the court was void and of no effect on the ground of public policy.

Where the buyer could not perform the contract or offer a sensible alternative to the seller it would be exceptional for the deposit to be returned. The court would take account of the economic impact on the seller but an increase in the market value of the property was not in itself an exceptional circumstance, meaning that the deposit would be repaid.

The deposit formed a small part of the buyer's assets and he was aware of the risk of losing the deposit if he failed to complete. For those reasons and reasons of certainty the court refused to exercise its discretion.

In *Midill (979L) Limited v Park Lane Estates Limited* [2008] EWHC 18 (Ch) the sale of the property for £4 million was structured as the sale of shares in a special purpose vehicle (in order to reduce the amount of stamp duty land tax payable). The contract included the Law Society Standard Conditions of Sale 4th edition, a deposit of £400,000 was paid on exchange of contracts and a further £800,000 two months before the completion date. The buyer failed to complete after a notice to complete had been served. The buyer argued that the seller had not been ready, willing and able to complete on the basis that the documents required to complete the sale of shares (i.e. the resignations of the directors and the secretary of the company) were not available on either the date the notice to complete was served or the date it expired. The buyer also argued that the deposit should be returned. The seller conceded that **s49(2)** applied to the contract.

The court held as follows.

**Ready, willing and able to complete**

The buyer had failed to provide names of the new directors and company secretary and on that basis the directors of the seller were reluctant to resign until they knew who they were resigning in favour of. The court indicated that whether a party is ready, willing and able to complete is a question of fact and the burden lay with the other party. The seller argued that it was able within the time reasonably required to do so to set up the necessary administrative arrangements to enable completion to take place. The court agreed.

**Return of the deposit**

The buyer argued that as the seller had re-sold the property for a higher value than the contract price the deposit should be returned. The buyer relied upon *Tennaro Ltd v Majorach Ltd* [2003] EWHC 2601 where it was found that the fact that the seller had re-sold the property for a profit was a special circumstance in which the court could order the return of the deposit. However, the court preferred the approach in *Omar v El-Wakil* [2001] EWCA Civ 1090 where in the absence of special circumstances a deposit would not be returned. The seller making a profit on a subsequent re-sale was not a special circumstance and there were no other special factors to justify departing from the normal approach.
4.3  Options

4.3.1  Deed

In order to be valid, an option agreement must either be supported by consideration or be in the form of a deed. For the latter the document must comply with s1 LP(MP)A 1989 and:

- make clear on the face of the document that it is intended to be a deed;
- be executed as a deed; and
- be delivered as a deed.

In **HSBC Trust Company (UK) Ltd v Quinn [2007] EWHC 1543 (Ch)** the parties signed a handwritten memorandum which used formal language and indicated a clear intention to create legal relations. The parties had signed their full names and their signatures had been witnessed. However, the document was not described as a deed.

The court held that the agreement did not satisfy the requirements for a deed and as the agreement was not supported by consideration it was not a valid option.

4.3.2  Unprotected option

In **Coles v Samuel Smith Old Brewery (Tadcaster) [2007] PLSCS 247** an option had been granted in relation to unregistered land. The option had not been protected by registration of a class C(IV) entry in the land charges register. This would render the option void against a purchaser of the legal estate (s4(6) Land Charges Act 1972). The grantor of the option sold the land to a subsidiary company at a price well below its market value and argued that **Midland Bank Trust co Ltd v Green (No. 1) (1981) AC 513** established that a purchaser does not need to act in good faith or pay the market value of the land.

The Court of Appeal accepted that the sale to the subsidiary company was a genuine sale at a genuine price and was not a sham, therefore the option agreement did not bind the subsidiary company. However, the grantor remained liable under the option (via privity of contract) and had transferred the land to a company over which it had control. The court therefore granted an order for specific performance requiring the grantor to procure that the subsidiary company would transfer the land to the person to whom the option had been granted.

Had the land been sold to an independent third party the option would not have bound that third party purchaser; however the grantor would have remained liable in damages for its failure to comply with the option.

4.4  Conditional contracts and long stop dates

In **Glenmere plc v F Stokes & Sons Ltd (unreported)** arguments arose as to the meaning of “requisite consents” within a conditional contract. Within the contract this was defined as:
“planning permissions, building regulation consents, by-law approvals, and other consents, licences and authorisations required from any competent authority, statutory undertaker, or person either for the carrying out of the Development or its intended use that were necessary for the commencement of the Development.”

Once the “requisite consents” were obtained the developer was obliged to construct a building for the landowner and was entitled to take a transfer of certain land from the landowner to develop for residential purposes for its own gain.

The developer obtained planning permission but the landowner sought to terminate the contract on the basis that certain other consents had not been obtained. The landowner argued that consents were needed in relation to planning conditions and also consent from the beneficiary of a restrictive covenant.

The court held that:

- the consents needed for planning permission did not amount to requisite consents as the ambit of the contract was for the developer to obtain either a full or outline planning permission but did not require the developer to obtain approvals for planning conditions;

- the need to obtain approval for the restrictive covenant was not a requisite consent as the contract included specific provisions to deal with this and therefore the parties did not intend for such a consent to come within the definition of a requisite consent.

### 4.5 Overage

In order to successfully claim damages for the tort of deceit it must be shown that:

- a false statement of fact has been made;
- either knowingly or recklessly;
- with the intent that the other party will act on it;
- that reliance is placed on it; and
- damage is suffered as a result.

In *Connolly Ltd v Bellway Homes Ltd [2007] EWHC 895 (Ch)* the parties had agreed that the developer would pay an additional sum on the grant of planning permission to represent an increase due to inflation. When the planning permission was granted, the landowner realised that the figure set out in the contract estimating sale prices at the date of the agreement was too high and accordingly he would not be entitled to the overage payment. The landowner asked the court to rectify the agreement or alternatively the landowner claimed damages in deceit.

The court refused to rectify the agreement as the parties were not mutually mistaken but the landowner had made an error of judgment. The court awarded damages for the tort of deceit on the basis that:

- as a matter of fact the developer knew that the price inserted in the contract was not genuine;
- the figure was sufficiently inflated for the court to infer that the developer had been dishonest; and
the developer intended for the landowner to believe that the price was genuine and the landowner did so believe.

In *Chartbrook Ltd v Persimmon Homes Ltd [2008] EWCA Civ 183* a dispute arose as to how the wording of the overage provision should be interpreted. The words were: “Additional Residential Payment means 24.3 per cent of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value less the Costs and Incentives.”

Chartbrook argued that this meant it was entitled to 23.4 per cent of the net proceeds of sale of each residential unit in excess of the minimum guaranteed amount (less costs and incentives). The developer argued that Chartbrook was entitled to an additional payment only if 24.3 per cent of the net sales proceeds exceeded the minimum guaranteed amount (from which costs and incentives were then to be deducted). The sums involved were that Chartbrook argued for a payment of £4.6 million as opposed to the developer’s calculation of £900,000.

The Court of Appeal did not believe that the words used were unclear or ambiguous. On this basis it refused to rectify the agreement and found for Chartbrook. The developer’s solicitor may have achieved what was intended by using a mathematical expression rather than words.

In order to ensure that an overage provision works, it is important that there is certainty. The following should be considered.

(1) What are the trigger events – is this obtaining planning permission or development of the land? What kind of planning permission will trigger payment? If outline planning, this may be at too early a stage for the developer to pay. If the payment is linked to development then this could be when implemented, completed or sold. Thought needs to be given to the type of disposals that would trigger payment. For example, does this include the grant of a lease?

(2) How long should the overage provisions last – is the trigger event likely to be in the near future or is the prospect of payment in the distant future (for example when selling farmland where a future owner may obtain planning permission to develop 10 years later)?

(3) Will the obligation need to bind future owners of the land – this can be achieved either by means of a charge (which may cause problems with the developer’s other lenders) or a positive covenant to pay linked to a restrictive covenant whereby the owner cannot sell without procuring a direct covenant by the new owner (itself protected by a restriction only permitting a disposal if such a direct covenant is given)? Alternatively a restrictive covenant could be used but there is a risk that this could be challenged by the developer at the Lands Tribunal under *s84 LPA 1925*.

(4) How much is to be paid – the decision in *Chartbrook* (above) indicates that a mathematical formula may be the best way to achieve clarity.

### 4.6 Delivery of a deed

In *Bank of Scotland v King [2007] EWHC 2747 (Ch)* the buyer exchanged contracts for the purchase of a property at a price of £1.5 million with a mortgage of £1.2 million. The buyer’s solicitor sent a large part of the purchase price on completion but left £362,354.50 outstanding. The seller’s solicitor
repaid the charges on the title, sent out the completion documents and sent the balance of the purchase price to the seller. Ten months later when the outstanding sum had not been paid the sellers denied that completion had ever taken place.

The court held that when a transfer is delivered and there are monies outstanding the transfer will usually take effect in escrow rather than taking effect as a deed. However, the seller's solicitor had sent the transfer to the buyer's solicitor with a covering letter confirming completion with no indication that the transfer was to be held conditionally. On this basis the court found that the transfer took effect as a deed. The moral of the story is of course that when acting for the seller you should not send out the completion documentation until all the money has been received.

### 4.7 Transactions at an undervalue

The Court of Appeal in *Haines v Hill [2007] EWCA Civ 1284* confirmed that a property adjustment order as part of divorce proceedings will not be viewed as a transaction at an undervalue under s339 Insolvency Act 1986. This is on the basis that the consideration for such a transfer is to be taken as equal to the value of the property being transferred. Consequently such a transfer cannot be set aside by a trustee in bankruptcy if the transferor is subsequently declared bankrupt. Rix LJ said: “In the ordinary case, where there is no dishonest collusion, and where a court approves or determines the sum or property to be transferred, it would be entirely foreign to the concept of a “clean break” if the husband’s creditors could thereafter seek to recover, in bankruptcy, the property transferred or its value.”

### 4.8 Tendering the correct amount

In *Chinnock v Hocaoglu [2008] EWHC 2933 (Ch)* contracts were exchanged for the sale of a property and a 10 per cent deposit paid. The contract included a provision that the buyer pay the seller’s solicitors’ costs in the sum of £500 plus VAT. The buyer failed to complete and a notice to complete was served. On the last day of the notice the buyer tendered the balance purchase monies but did not include the sum of £500 plus VAT. The seller rescinded the contract and forfeited the deposit.

The court held that although there was no express reference to the costs being paid on completion the clause had that effect when read with other provisions in the contract. Therefore the buyer’s failure to pay that sum on completion meant that the seller was entitled to rescind.

This principle would also extend to payment of compensation under either the Standard Conditions of Sale (SCS) or the Standard Commercial Conditions of Sale (SCPC) in circumstances where completion has been delayed by the buyer and the seller is entitled to compensation calculated in accordance with SCS7.3 or SCPC9.3.

### 4.9 Mines and minerals

In *Coleman v Ibstock Brick Ltd [2008] EWCA Civ 73* a landowner sold a 196-acre farm subject to a reservation to “the vendor her heirs and assigns the mines beds and seams of coal and ironstone and other metals and minerals within and under” the land sold. Ibstock subsequently acquired the land and
claimed to be entitled to the ironstone, fireclay, brick shale and clay at the site and to the airspace created by the extraction of those materials. The question for the court was whether other minerals included ironstone fireclay brick shale and clay. The High Court thought that it did.

The Court of Appeal considered three factors:

1. if the words were not clear then they had to be given the meaning that would be understood at the time of the grant by the mining industry and the landowner;

2. was the substance in question exceptional or special in its use, character value or not the ordinary soil of the district; and

3. were there any express powers or limitations on working that could give an indication on whether it was intended that the substance should be worked.

On the facts the Court of Appeal agreed with the ruling of the High Court, which was based on expert evidence as to the vernacular meaning at the time of the reservation.

**4.10 Deduction of title**

Within a contract for the sale of land the seller is obliged to deduce title. If the contract is silent on the issue then in order to show good title the seller either had to be the registered proprietor of the freehold estate with title absolute or in the case of unregistered land to hold the fee simple and be in a position to convey it free of any dispute or litigation. Also in order for the grant of an easement to be effective the seller needs to show good title to all the land over which the right is to be exercised. However, the seller is released from this obligation if he can show that the buyer had knowledge of the title and any defects.

In *Ezekiel v Kohali [2008] EWHC 734 (Ch)* the parties had signed a memorandum following a negotiation meeting. The document complied with the requirements of s2 LP(MP)A 1989 but did not include provisions dealing with the deduction of title. The sellers could not deduce title to a strip of land which was important for the development of the site by the buyer. The buyer claimed either a reduction in the price or damages for misrepresentation. The court held that on the evidence presented the buyer had knowledge of the seller's title and the defect prior to signing the memorandum and on that basis the implied right to good title was rebutted and therefore the buyer could not show any reliance upon the misrepresentation. The buyer was forced to complete with no reduction in the purchase price.

**4.11 Plans for identification only**

*Strachey v Ramage [2008] EWCA Civ 384* is a reminder that where a plan to a conveyance is described as being “for identification purposes only” the words describing the extent of the property within the document will take precedence. Conversely where the words “more particularly delineated” are used, the plan will prevail over the words used to describe the property in the conveyance. The case relates to the sale of two parcels of land in 1988 prior to which the seller had staked out the boundary and erected a boundary
fence. A dispute arose between subsequent owners of the plots as to the precise position of the boundary line. The respondent attempted to rely on the plan attached to the original conveyance which was described as being for identification purposes only.

The court held that such a plan would only be of value where the verbal description of the property was inadequate otherwise those words were an indication that the plan did not show the precise boundaries.
Chapter 5: Planning and Contamination

5.1 Standard planning forms

With effect from 6 April 2008 the Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2008 introduces mandatory standard planning application forms. The form can be accessed directly at: www.planningportal.gov.uk.

Prior to the introduction of the standard form local planning authorities could use a form of their choice. The Government believed that this led to some confusion and intends that the standard form will make the process quicker and easier for the applicant.

The standard form can be used for:

- household consents;
- outline and full planning permission and approval of reserved matters;
- listed building consent;
- conservation area consent;
- advertisement consent;
- consent under tree preservation orders and notification of proposed works to trees in a conservation area;
- lawful development certificates;
- applications for prior notification/approval under the Town and Country Planning (Permitted Development) Order 1995; and
- removal or variation of conditions.

The Department for Communities and Local Government has published guidance in Circular 02/2008.

5.2 Heritage Protection Bill

The Government has published a Bill following the consultation conducted by the Department for Culture, Media and Sport. The main proposals are as follows.

(1) Responsibility for maintaining “heritage assets” is to devolve to English Heritage replacing the current two-tier system whereby the Secretary of State makes the decision to list a building on the advice of English Heritage.

(2) English Heritage is to maintain a heritage register of assets of special interest. These are special because of their special historic, archaeological, architectural or artistic interest. An asset does not mean just a building but can be, for example, a cave, an earthwork, or an open space (e.g. a battlefield or a garden).

(3) The relevant authority must consult widely prior to either adding or removing an asset from the register. The aim is to give the public a greater say in what gets protected.
Planning and Contamination

(4) Heritage asset consent (HAC) will be required for any works resulting in the damage or destruction of the asset. HAC will replace listed building consent and scheduled monument consents.

5.3 Contaminated land – Class A persons

Local authorities are empowered to identify contaminated land and require its remediation by service of a remediation notice on the appropriate person. This is either:

- any person who has knowingly permitted the contamination – a Class A person; or
- the owner or the occupier of the land – a Class B person.

This is in line with the “polluter pays” policy. Land is only treated as contaminated under the legislation if there is significant harm (or a significant risk of harm) being caused or pollution of controlled waters. There must also be a pollutant linkage. This means that there must be a contaminant plus a receptor which may be harmed by the contaminant (e.g. humans, buildings, etc.) and a pathway (i.e. a route by which the receptor could be exposed to the contaminant).

In 2006 the High Court made it clear that a statutory body was liable as a Class A person for the actions of its statutory predecessor. In *R (on the application of the National Grid Gas plc) v The Environment Agency* [2006] EWHC 1083 (Admin) a housing estate had been developed in the 1960s on the site of an old gasworks. In 2001 an underground pit filled with coal tar was discovered in a back garden. The house building company had knowledge that the site had been used as a gas works and would therefore have qualified as a Class A person. However, it could not be “found” (as is required by the *Environmental Protection Act 1990*) as it had long since ceased to exist. The owners of the houses were potentially liable as Class B persons but had been expressly relieved by the Environment Agency as they had bought the properties in good faith and without notice of the contamination. The Environment Agency argued that Transco should be responsible for the remediation costs as a consequence of the activities of its statutory predecessors. The High Court agreed after considering the discussions in Parliament prior to the legislation being enacted when the Government had made clear that bodies such as British Gas should be responsible for the acts of its statutory predecessors.

National Grid Gas plc has now appealed direct to the House of Lords using the leapfrog procedure. The House of Lords has overturned the decision of the High Court (*R (on the application of National Grid Gas plc) v The Environment Agency* [2007] UKHL 30) as follows.

(1) The words of the statute are clear and there was no need to go behind the words and look at the discussions in Parliament.

(2) The emphasis of the statute is on the actual polluter. Clearly Transco had not polluted the site and there was nothing in the clear language of the Act to impose on Transco a liability for the actions of its predecessors.

(3) The liabilities transferred under the transfer schemes made under the relevant *Gas Acts* were limited to those existing “immediately before” the transfer date and so did not (and could not) include liabilities which arose in 1995 when the contaminated land regime was introduced.
5.4 **Community infrastructure levy**

The Government proposed to replace the current system of planning obligations with the planning gain supplement. This has now been dropped in favour of the **community infrastructure levy (CIL)**.

Local authorities will have to calculate what infrastructure is required and the cost, and identify the level of contribution that each development should make to that cost. The sum received should be used on either new infrastructure or improving existing infrastructure to the extent that it is affected by the development (for example in increasing capacity). The Government is also looking at ways of CIL spanning more than one local authority – the so-called “sub-regional infrastructure”.

CIL will not replace planning obligations and **s106 Town and Country Planning Act 1990** will continue to allow the negotiations between a developer and local authority to be formalised. Local authorities will not be under an obligation to use CIL, but if they do then CIL will complement planning obligations.

CIL would be payable on commencement of development by the land owner but may be paid by instalments.

Full details may be viewed at: http://www.communities.gov.uk/documents/planning and building/pdf/674479 .
Chapter 6: Statute Law Developments

6.1 Companies Act 2006 execution of documents

Section 44 Companies Act 2006 was brought into force on 6 April 2008 by the Companies Act 2006 (Commencements No. 5 Transitional Provisions and Savings) Order 2007. The section allows a company to execute a document in any of the following ways:

- by using the company’s common seal;
- by the signature of two directors;
- by the signature of one director and the company secretary;
- by the signature of one director in the presence of a witness.

Section 44(5) Companies Act 2006 means that there is a presumption that the document has been executed properly in favour of a purchaser “in good faith for valuable consideration (including a lessee, mortgagee or other person who for valuable consideration acquires an interest in property)”.

6.2 Empty rates relief

As from 1 April 2008 empty non-domestic properties enjoy empty rates relief of 100 per cent for the first three months it is vacant. After that full rates must be paid. This is the effect of the Rating (Empty Properties) Act 2007. Prior to the Act coming into force non-domestic property owners enjoyed rates relief of 100 per cent for the first three months and thereafter 50 per cent until the property was re-occupied. The Government has made the change to encourage property owners to re-let or otherwise use the property more promptly.

6.3 Mental Capacity Act 2005

The Mental Capacity Act 2005 enables the creation of lasting powers of attorney (LPA), which allow the donor to authorise the donee to make decisions about the donor’s personal welfare or the donor’s property. An LPA can only be validly created if:

- made in the prescribed form;
- the donor is over 18 and has capacity to sign the LPA;
- the donee(s) is/are over 18 and not bankrupt; and
- the CPA is registered with the Public Guardian who will issue a certificate to this effect.

Where a buyer is dealing with the donee where an LPA has been registered but would not otherwise be valid (e.g. the donor lacked the necessary capacity) then the buyer can treat the LPA as valid provided that the buyer had no knowledge of the reasons why the LPA was not validly created.

6.4 Building regulations

With effect from 6 April 2008 and the Building (Amendment) Regulations 2008 (SI 2008/671) the time limit for enforcing building regulations was extended to two years from six months from the date of breach of just those building regulations relating to climate change. However, it seems that the
Government plans to implement a similar extension in the time limit to all breaches (not just those relating to climate change). See the **Housing and Regeneration Bill**.
Chapter 7: Professional Conduct

7.1 Mortgage fraud and money laundering

In March 2008 the Law Society issued a practice note about mortgage fraud. This can be viewed at: http://www.lawsociety.org.uk/productsandservices/practicenotes/mortgagefraud/522.article#mf1.

Mortgage fraud may occur where a person obtains a higher mortgage than he was entitled to by providing misleading information about, for example, his identity, income, employment or other debt obligations. Larger scale transactions often involve more than one property and may involve a fictitious buyer (including a company) or an over-inflated value. The practice note advises that conveyancers should check the identity of the client carefully plus the identity of any beneficial owners and not be afraid to question the client if anything arouses suspicion. Some fraudsters will pose as a conveyancer so if the conveyancer on the other side is not known to you, check their identity.

The practice note also sets out some warning signs including, for example, that either the deposit or some part of the purchase price has been paid direct.

In addition the Council of Mortgage Lenders (CML) updated its fraud policy in February 2008 and set out four categories of fraud:

- application fraud, where someone knowingly supplies incorrect or misleading information on the application form;
- identity fraud, where someone uses another person’s identity;
- registration fraud, where someone has fraudulently registered a property in his name and then seeks to mortgage the property; and
- valuation fraud, where a deliberately inaccurate valuation is provided.

The CML wants to ensure that conveyancers are aware of these kinds of fraud and report any suspicions to them and in particular ensure that the true price of the transaction is reported to the lender.

The House Builders Federation has revised its code of practice to try to create greater price transparency for both buyers and lenders. This follows concerns that incentives may distort the real price being paid for a new property. Members:

- must provide buyers with a sales reservation showing the full cost less any incentives;
- cash discounts or deductions must be shown on both the sales reservation and the sale contract;
- a copy of the sales reservation must be sent to the buyer’s conveyancer as a matter of course and a copy provided to the lender on request;
- all payments to third parties in excess of 5 per cent of the price must be disclosed to the buyer’s conveyancer;
- any incentives agreed post-reservation must be notified to the buyer’s conveyancer.
7.2 Money laundering regulations


The regulations require “relevant persons” to maintain systems and policies to guard against the possibility of their business being used for money laundering whether by a series of transactions as part of a business relationship or a one-off transaction. The regulations catch lawyers giving financial advice (other than on a very occasional basis) and those involved in property transactions (although not those merely preparing Home Information Packs).

The lawyer must carry out customer due diligence which involves verifying the identity of the client and any beneficial owner who is not the client before entering into a business relationship. The Law Society has indicated that “beneficial owner” has a wider meaning than a traditional understanding of the term (see reg 6); however the scope of this is not certain. The obligation to carry out customer due diligence also extends to existing clients where the relationship was established prior to 1 March 2004 and there has either been a gap in the retainer for three years or more or the nature of the transaction gives rise to suspicion. A record must be maintained of how the client's identity was verified. Having satisfied himself of his client's identity the lawyer must then monitor the transaction on an ongoing basis, particularly in relation to the source of the money used in the transaction.

Failure to comply with the regulations carries a maximum penalty of two years' imprisonment, a fine or both and this is irrespective of whether money laundering has actually taken place.

The Law Society has published a practice note in relation to the regulations which can be viewed at: http://www.lawsociety.org.uk/productsandservices/practicenotes/aml/455.article#h4bogc.
8.1 Law Commission

On 28 March 2008 the Law Commission published a consultation paper on easements, profits à prendre (i.e. the right to take something from another’s land, for example fishing rights) and covenants. This can be viewed at: http://www.lawcom.gov.uk/docs/cp186.pdf.

The main proposals include:

• creating a new single method of creating an easements by prescription and abolishing the effect of s62 LPA 1925 and the rule in *Wheeldon v Burrows [1879]*;

• rationalisation of the current law on the extinguishment of easements;

• creation of a new interest in land, the “land obligation” to replace positive and restrictive covenants;

• modernisation of the statutory means of discharging or modifying restrictive covenants (i.e. s84 LPA 1925) and implementing the new system to both easements and profits à prendre.

Stuart Bridge, the commissioner leading the project, said: “Easements and covenants are of practical importance to a large number of landowners. Recent Land Registry figures suggest that at least 65 per cent of freehold titles are subject to one or more easements and 79 per cent are subject to one or more restrictive covenants. The rights can be fundamental to the enjoyment of property. Their effective operation is also crucial to the successful development of land for housing. The obscure terminology and dry legal complexity of the current law should not hide the fact that easements and covenants remain vitally important in the 21st century and the time has come to bring them up to date.”

8.2 Tree preservation order (TPO)

A local authority may issue a TPO in relation to a tree. Once issued it is a criminal offence to cut down, uproot or wilfully damage the tree in such a way that may destroy it. This includes lopping the tree. Such works can be carried out to the tree either because:

• formal permission has been sought from the local authority to fell or lop the tree; or

• the lopping, cutting down or uprooting is necessary either because the tree is dead or dying or has become dangerous or for so far as may be necessary to prevent or reduce a nuisance.

In *Perrin v Northampton Borough Council [2007] EWCA Civ 1353* the Court of Appeal had to decide on the meaning of the word “necessary” in the context of necessary to prevent or reduce a nuisance.

The facts were that the roots of a mature oak tree subject to a TPO appeared to be causing damage to a neighbouring property. The landowner unsuccessfully applied for consent to fell the tree. The neighbouring owner brought proceedings against the local authority and the landowner seeking a declaration that they
were entitled to fell the tree as this was necessary to prevent nuisance. The local authority argued that it was not necessary to fell the tree as an alternative would be for the neighbouring owner's house to be underpinned.

The Court of Appeal agreed. The word necessary meant “if and so far as necessary” ensuring that the tree remained protected unless there was a need to lift that protection. All possible means should be considered to abate the nuisance and only then the local authority should evaluate whether works needed to be carried out on the tree. On this basis alternative engineering solutions were relevant and it was not necessary to fell the tree.

### 8.3 Estate agents

In *John D Wood (Residential and Agricultural) Limited v Craze [2007] EWHC 2658 (QB)* Mr Craze appointed John D Wood to sell his flat. An offer of £1.5 million was made, accepted and contracts were exchanged. Post-exchange the buyer became aware of a history of noise problems with the flat and refused to complete instead seeking to rescind the contract on the ground of misrepresentation by Mr Craze who had indicated in replies to enquiries that there were no disputes and that the noise dispute had been resolved. John D Wood invoiced Mr Craze for its commission but Mr Craze refused to pay and John D Wood pursued a debt claim arguing that as unconditional contracts had been exchanged it was entitled to its commission even though the contract had not been completed. Mr Craze argued that “unconditional contracts” must mean an exchange of contracts where no conditions remained unfulfilled and where the contract would be enforceable at law. The court agreed and on that basis no commission was payable.

However the court also implied a term into the agency agreement that the property owner would not make fraudulent representations that would render the contract unenforceable and prevent a sale. This was to achieve business efficacy. John D Wood was entitled to claim damages on the basis of what would have happened if those representations had not been made and instead Mr Craze had revealed the true position. Presumably that would have involved a significant price reduction and therefore reduced John D Wood’s level of commission.

In *Foxtons Ltd v Pelkey Bicknell & Another [2008] EWCA Civ 419* a property was marketed via a sole agency with Foxtons for £1.4 million. The property was viewed by Mrs Low but no offer was made and there was no further contact between Mrs Low and Foxtons. The sole agency with Foxtons came to an end and the property owner appointed Foxtons and Hamptons under a multi-agency agreement. Mrs Low subsequently purchased the house for £1.15 million and commission was paid to Hamptons. Foxtons argued that the commission should be paid to them on a sole agency basis as they had introduced the buyer. Foxtons’ standard terms read that the property owner would be liable to pay Foxtons commission when unconditional contracts are exchanged:

“with a purchaser introduced by us during the period of our sole agency or with whom we have had negotiations about the property during that period; or with a purchaser introduced by or offering via another agent during that period.”
The High Court agreed with Foxtons that “a purchaser introduced by us” meant a person who at some time in the future becomes a purchaser. In the Court of Appeal the property owner argued that the words should mean a person who becomes a purchaser as a result of our introduction. The Court of Appeal agreed on the basis that:

- it is the normal principle of an agent that the commission is earned on the successful outcome of the transaction;

- there was no reason why a sole agent should benefit from a transaction that he had no responsibility for after the end of the sole agency.

8.4 Personal searches

The Home Information Pack (No. 2) Regulations 2007 permit personal searches to be used in HIPs if they meet the general requirements for search reports. Some local authorities limit the information available to a personal search, and this can cause problems in terms of how reliable a personal search is. para 4 Sch 6 Home Information Pack (No. 2) Regulations 2007 allows that personal search companies could use insurance for those parts of the search where access was denied until 1 April 2008. The Home Information Pack (Amendment) Regulations 2008 now extends that period to 1 January 2009.

By 1 January 2009 the Government hopes to achieve a level playing field between local authorities and personal search providers. The Department for Communities and Local Government has issued good practice guidance for both local authorities and personal search providers. It requires local authorities to provide access to all unrefined data needed to compile a local search within one working day. The practical effect should be that personal searches are as reliable as an official search.

8.5 Stamp duty land tax (SDLT)

8.5.1 Zero-carbon homes

The zero-carbon relief on new homes introduced by the Stamp Duty Land Tax (Zero-Carbon Homes Relief) Regulations 2007 is extended with retrospective effect from 1 October 2007 to residential flats. The relief only applies to new flats on their first sale. As with houses, the relief is not available on any subsequent sale.

8.5.2 Changes to notifiable transactions and abolition of Form SDLT 60

As from 12 March 2008 taxpayers will no longer have to notify commercial or residential land transactions where the consideration is less than £40,000 and no self-certificate (Form SDLT 60) is required. The Government’s aim is to reduce the administrative burden of SDLT.

H M Revenue & Customs (HMRC) have confirmed abolition of SDLT self-certificates for land registration purposes. There are now no circumstances in which a Form SDLT 60 is required and HMRC have confirmed as follows:
“It may also help to mention that the acquisition of a chargeable interest other than a major interest in land remains notifiable only where there is chargeable consideration for which SDLT is due at a rate of 1 per cent or more. The acquisition of an easement, for example, is an acquisition of a chargeable interest other than a major interest in land. So, if the chargeable consideration on it was at the rate of 1 per cent or higher the transaction would be notifiable.”

For further detail see: http://www.hmrc.gov.uk/so/budget-changes-notreg.htm.
Chapter 9: Recent Land Law Developments

9.1 Adverse possession

9.1.1 Human rights

In *J A Pye (Oxford) Ltd and J A Pye (Oxford) Land Ltd v The United Kingdom [2007]*, the European Court of Human Rights held that the acquisition of land by adverse possession under the *Land Registration Act 1925* and the *Limitation Act 1980* does not violate the right to peaceful enjoyment of possessions. The Grand Chamber considered that the existence of the 12-year limitation period for actions for recovery of land pursued a legitimate aim in the general interest. The result is that Pye has lost its land and is not entitled to compensation by arguing that its human rights have been infringed.

The Land Registry has confirmed that, in its view, the decision in *Pye* does not affect current domestic case law. On an application to the Land Registry to register title acquired by adverse possession the applicant must still show that its possession was inconsistent with the use, or intended use, of the land by the owner and not merely that it was without the owner's consent. Land Registry has updated Practice Guide 05 as a consequence. However, this appears out of step with both the House of Lords' decision in *Pye* and the following decision of the Court of Appeal.

9.1.2 Adverse possession against a lender

In *National Westminster Bank plc v Ashe [2008] EWCA Civ 55* the borrowers granted a mortgage and then subsequently defaulted. The bank sent formal demands for payment to the borrowers but took no steps to enforce its security or otherwise protect its position. The borrowers made some payments to the bank (but more than 12 years prior to the action) and the husband was adjudicated bankrupt. The trustee in bankruptcy sought a declaration that the bank's mortgage was no longer valid on the basis that no payments had been made for 12 years and no enforcement action had been taken.

The Court of Appeal held that the bank was statute-barred from taking enforcement action. The borrowers were in adverse possession both at the time the mortgage was created and when they made the last payment to the bank. Adverse possession should be given the same meaning as in *Pye*, that is, ordinary possession meaning possession without the consent of the owner. The bank had not given the borrowers consent to remain in the property, it had merely taken no action to enforce its rights.

9.1.3 Adverse possession a mistaken belief

In *Ofulue v Bossert [2008] EWCA Civ 7* squatters occupied a property from 1981, paid rates and carried out repairs to the property. Two years later O returned and asserted ownership but did not have the money to launch possession proceedings. The squatters argued that they should be granted a 14-year lease in return for the repairs. The squatters also made offers to purchase the property which were rejected by O. In 2003 O started possession proceedings. The squatters claimed that the paper title had been extinguished in 1999. The court considered the decision in Pye and decided that the squatters had taken factual possession in 1987 and had intended to do so satisfying the claim for adverse possession.
O appealed, arguing that the squatters did not have the necessary intention to possess the property as they believed that they were tenants and that the offer to purchase the property in 1992 was an acknowledgement of O's title.

The Court of Appeal applied the House of Lords' decision in *J A Pye (Oxford) Ltd v Graham [2002] UKHL 30* which held that:

- a squatter is a person against whom time can run under the Limitation Act 1980;
- the requirement is directed to the capacity of the person, not the nature of his possession;
- a squatter need only prove that he is in possession of the land with the intention of possessing it and without the consent of the paper owner.

On the facts, the squatter who wrongly believes himself to be tenant is still in possession and need not prove that he intended to exclude the paper owner to acquire title. The squatters' offer to purchase the property had not started time running afresh under the Limitation Act 1980 as the offer was protected by without prejudice notices.

### 9.2 Restrictive covenants

#### 9.2.1 Compensation under s84 Law of Property Act 1925

s84 LPA 1925 permits an application to the Lands Tribunal to release or modify restrictive covenants on certain grounds. In *Winter v Traditional & Contemporary Contracts Ltd [2007] EWCA Civ 1088* the developer had demolished a single dwelling and constructed two houses on the land subject to a restrictive covenant limiting the use of the land to one dwelling-house. The developer applied to the Lands Tribunal for a release or modification of the covenant under s84(1)(aa), which states that:

> in a case falling within subsection (1A) below the continued existence [of the restrictive covenant] would impede some reasonable user of the land for public or private purposes.

Under s84(1A) the Lands Tribunal can release or modify the covenant if it:

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or discharge or disadvantage (if any) which any person will suffer form the discharge or modification.

The Winters had the benefit of the restrictive covenant and did not oppose the modification but argued that they should be entitled to compensation calculated as a proportion of the profit the developer made (the “negotiated share” approach) claiming a sum of £50,000.

The Lands Tribunal and the Court of Appeal disagreed. Compensation under s84 is based on the reduction in value of the objector's property and should reflect the objector's actual loss rather than the applicant's gain. The “negotiated
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"share" approach was acceptable if the reduction in value to the objector would be unfair but the shared value must relate closely to the actual loss suffered by the objector. The appropriate percentage will probably be around 5 per cent; where modification is granted under s81(1A)(a), on the ground that the restriction secures no substantial value or advantage to the persons entitled to its benefit, there should be no expectation of a windfall of 50 per cent of released development value.

Applications under s84 have always been viewed by practitioners as expensive, long-winded and with no guarantee of success. However, the method of calculating compensation to reflect the actual loss to the objector rather than a negotiated share may make such an application far more attractive.

9.2.2 Release under s84 Law of Property Act 1925

In the matter of land at Alisha House [14 December 2007] LP/83/2005

the land was bound by a restrictive covenant as follows:

"Not to use the property for any purpose other than as a coach depot with an associated bungalow for residential use. Occupation of the bungalow must be linked to the use of the land as a coach depot and the bungalow cannot be sold or leased separately from the depot."

Easington District Council held the benefit of the covenant and subsequently granted planning permission for the residential development of the site. An application was made under s84(1)(aa) (see 9.2.1).

The Lands Tribunal was clear that the covenant secured practical benefits for the council as it allowed the council to control the future use of the site and help to prevent complaints from neighbouring residential land of the industrial nature of the use of the property. The benefits were therefore secured for planning purposes. This meant that there was a strong link between the council as landowner and as planning authority. The council in granting planning permission no longer had a practical benefit to protect.

This Lands Tribunal decision would seem to suggest that there are circumstances when a local planning authority can be prevented from enforcing a restrictive covenant where it has the benefit of the covenant but has also granted planning permission for the development.

9.2.3 s610 Housing Act 1985

s610 Housing Act 1985 (HA 1985) permits an application to the County Court to vary the terms of a lease or a document containing restrictive covenants where either the term of the lease or restrictive covenants prevent the conversion of a property where:

- because of changes to the area it would be much easier to let the property if divided into several flats; and
- planning permission has been granted for the conversion.

The aim of the section is to increase housing supply with more intensive use of existing properties, particularly when larger houses are no longer needed as single family homes.
In *Launton Ltd v Camenzuli [2007] EWCA Civ 949* the developer bought No. 7, which was subject to a restrictive covenant not to divide it into flats. It obtained planning permission to divide the property into two flats and successfully applied to the County Court under *s610 HA 1985* for discharge or modification of the restrictive covenants.

The Camenzulis owned No. 5 and objected to the developer's application. They argued that the court should consider the additional factors set out in *s84 LPA 1925* as follows:

- there had not been any change in character of the estate that would make the covenants obsolete;
- the covenants did not impede a reasonable use of No. 7;
- the beneficiaries of the covenants had not agreed to them being discharged or modified;
- the proposed discharge or modification would injure the Camenzulis and their neighbours.

The Court of Appeal dismissed the Camenzulis' appeal and gave guidance as to how the court should exercise its discretion under *s610 HA 1985*:

- the court has a wider discretion under *s610 HA 1985* than under *s84 LPA 1925*;
- the court must balance the harm done by any modification against the benefit of the same. There may be a public interest in the modification of the covenant;
- the court should take account of all relevant factors and decide what weight should be given to them.

The court then considered the external appearance of No. 7, the possibility of increased noise, congestion and parking, preserving the character of the area, the precedent that would be set by a release and the urgent need for more housing in London. On balance it was right to modify the covenant. The court also indicated that it was able to order compensation to be paid where appropriate.

### 9.2.4 Whose consent is required?

In *City Inn (Jersey) Ltd v Ten Trinity Square Ltd [2008] EWCA Civ 156* City Inn wanted to carry out alterations but was bound by a covenant not to do so without the consent of the “Estate Officer for the time being of the Transferor”. The Transferor was defined in the relevant transfer as the Port of London Authority (PLA) with no reference to successors in title although the covenant itself was expressed to be for the benefit of the PLA and its successors in title. City Inn obtained the consent of the PLA.

The question for the court was whose consent was required – that of the PLA (who no longer owned any of the benefitted land) or that of their successors in title (who happened to be the owners of a neighbouring hotel)?
The Court of Appeal held that on the interpretation of the transfer the term “Transferor” was reference to the PLA alone and not to any successors in title. Had the draughtsman intended for consent to be obtained by the PLA’s successors in title then those words would have been added.

Before drafting such a covenant it is important to think about what is intended. Is it the original seller's consent that is required or a successor in title to the original seller? Then use clear and consistent language to convey that intention.

9.3 Easements

9.3.1 Parking

In order for an easement to be established there must be:

- a dominant and servient tenement (parcel of land);
- the right must accommodate the dominant tenement (i.e. improve its amenity or value);
- the dominant and servient land must be owned by different people; and
- the right must be capable of forming the subject-matter of a grant.

The last point above has always created difficulties in relation to the right to park a car. From recent authorities it seemed as though an easement could only be created over a larger area on a first-come-first-served basis or in relation to a specified space that the servient owner could indicate which space was to be used from time to time. In a Scottish case, Moncrieff v Jamieson [2007] UKHL 42, the House of Lords considered the earlier authorities.

In Blenheim Estates v Ladbroke Retail Parks Ltd [1992] 1 WLR 1278 the court stated that:

“The essential question is one of degree. If the right granted in relation to the area would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it could not be an easement though it might be some larger or different grant”.

For example, it could be the grant of a lease or the dominant owner effectively taking adverse possession of the area. In Batchelor v Marlow [2001] EWCA Civ 1051 a claim was made for an exclusive right to park six cars between certain hours on weekdays. The court held that such a grant meant that the servient owner’s “right to use his land is curtailed altogether for intermittent periods throughout the week. Such a restriction would, I think, make his ownership of the land illusory”.

The House of Lords decided that it is possible for an easement of parking to exist and that the approach adopted in the above two cases is wrong. The proper question to ask is whether the servient owner can be said to retain possession and control over the servient land. A right to park vehicles does not generally confer exclusive possession on the dominant owner, even if it does severely restrict the use the servient owner can make of its land. As a matter of law, the servient owner can do whatever it likes with its land, provided that it does not interfere with the dominant owner's right to park there (for example
construct walls or erect advertising hoardings). By contrast, the dominant owner is entitled only to park a car on the land. Neuberger LJ thought that there was little common sense in a right to park one car in a space allowing for 200 cars to be an easement but a right to park one car in a space just big enough for one car would not be an easement. However, strictly speaking these comments were *obiter*, but they do indicate the approach that the House of Lords would be likely to take.

9.3.2 Public right of way

*s31 Highways Act 1980* provides that when a right of way has been enjoyed as a public right for 20 years it will be deemed to be dedicated as a highway unless there is sufficient evidence that there was no intention to dedicate it. In *R (On the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2007] UKHL 28* the landowners were seeking to prevent two rights of way from appearing on the definitive map and argued that a letter to the local planning authority and a clause in an agricultural tenancy were sufficient to evidence their intention not to dedicate the rights of way.

The House of Lords did not agree with the landowners’ argument that “intention” is a state of mind as the private thoughts of a landowner were not enough to amount to “sufficient evidence”. The legislation sets an objective test requiring the landowners to communicate their intentions. The *Highways Act 1980* offers two methods of communicating such intentions:

- erect notices on the land, visible to members of the public; or
- deposit maps with the local authority with a statement indicating which paths (if any) have been dedicated followed by a statutory declaration every 10 years that they have not dedicated any other paths.

9.3.3 Extent of easement

In *Risegold Ltd v Escala Ltd [2008] EWHC 21 (Ch)* the claimant had the benefit of an easement “to enter (without vehicles) upon such part of the yard to the rear of the Adjoining Property as is necessary for the purpose of carrying out maintenance repair rebuilding or renewal to the Property”. The claimant had obtained planning permission to demolish the existing single-storey building and replace it with a five-or-six storey mixed user development. In order to develop, the claimant would need to maintain fencing and scaffolding on the yard and oversail a crane. The parties agreed that the work was neither maintenance nor repair but the claimant argued that the work amounted to rebuilding and/or renewing.

The court held that the term “rebuild” implicitly meant that what had been there before was substantially replaced. Similarly the term “renew” implied to make new again. The terms did not extend to fresh construction. Therefore the works proposed fell outside the scope of the easement.

9.4 Trust of land

*Fowler v Barron [2008] EWCA Civ 377* demonstrates how the court will now apply *Stack v Dowden [2007] UKHL 17* where the House of Lords ruled that:
in the absence of an express declaration of trust the applicable principles of law were the same whether or not the couple were married;

in the case of a joint legal tenancy the starting point was that equity followed the law and that there was also joint beneficial ownership. A conveyance into joint names indicated both legal and beneficial joint tenancy unless the contrary was proved;

in proving the contrary the court would seek the result that reflected what the parties must have intended in the light of their conduct. Many factors other than financial contributions might be relevant including how the parties had arranged their finances and their individual characters and personalities.

The parties bought a property with the aid of a joint mortgage and transferred it into joint names. The deposit and the balance of the purchase price was paid for by Mr Barron, who also paid the mortgage instalments and other outgoings on the property. The parties’ relationship ended and an argument arose as to their respective interest in the property. The judge at first instance considered that Mr Barron had only placed the property into joint names so that Ms Fowler would benefit on his death. As she had not made any financial contributions the entirely of the equity should belong to Mr Barron. Ms Fowler appealed.

The Court of Appeal held that in the absence of any express agreement the intentions of the parties should be inferred from their course of conduct, applying *Stack v Dowden*. Putting the property into joint names establishes a presumption that the equity would also be held in joint names. It was for Mr Barron to rebut that presumption. On the evidence the court found that the parties had not intended that it would make any difference either which of them paid for what expenses or the relative size of their contributions. Therefore the presumption had not been rebutted and there was a beneficial joint tenancy.
Land Law and Conveyancing

Self-assessment Test

Name: .................................................................

Date: .................................................................

Membership No: ..................................................
Self-assessment Test

Question 1

From what date was it compulsory to prepare a Home Information Pack for a five-bedroom house at the point of marketing?

(a) 1 July 2007  □
(b) 1 August 2007 □
(c) 10 August 2007 □
(d) 1 September 2007 □

Question 2

What type of property is being marketed if a sustainability certificate is provided?

Question 3

On what date will all the sale or letting of any commercial property require the provision of an energy performance certificate?

(a) 6 April 2008  □
(b) 1 July 2008   □
(c) 1 October 2008 □
(d) 1 December 2008 □

Question 4

An air-conditioning system put into service after 1 January 2008 must be serviced by an energy assessor every:

(a) 3 years □
(b) 4 years □
(c) 5 years □
(d) 6 years □

Question 5

Name ONE of the new triggers for compulsory first registration proposed by Land Registry.

Question 6

Name ONE of the methods by which the owner of registered land can protect himself from the risk of the property being transferred (and subsequently mortgaged) fraudulently?

Question 7

Which of the following applications does NOT require a certificate of identity to be presented to Land Registry with an application by a person who is not legally represented:
Question 8

Why is it important to ensure that any application to Land Registry is sent to the proper office?

Question 9

Which of the following is NOT a requirement for the creation of a valid legal contract:

(a) be in writing
(b) signed as a deed
(c) in one document
(d) containing all the expressly agreed terms

Question 10

If following exchange of contracts a contract is varied, for example the date for completion changes, what must this variation comply with in order to be valid?

Question 11

Which section of the Law of Property Act 1925 allows the court discretion to order the return of the deposit paid on exchange:

(a) s47(1)
(b) s47(2)
(c) s49(1)
(d) s49(2)

Question 12

Is it possible to exclude the effect of s49(2) Law of Property Act 1925 by contract?

Question 13

What are the requirements to create a deed?

Question 14

Which of the following accurately reflects the effect of failing to protect an option in unregistered land by the registration of a class C(IV) land charge:
(a) void against the purchaser of any interest for valuable consideration
(b) void against the purchaser of the legal estate for value
(c) void against the purchaser of any interest for money or money’s worth
(d) void against the purchaser of the legal estate for money or money’s worth

Question 15

In *Coles v Samuel Smith Old Brewery (Tadcaster) [2007] PLCS 247* the option agreement was not protected by the registration of a class C(IV) land charge but the court enforced the option. Why was this?

Question 16

Which of the following most accurately reflects the factors to be taken into account when drafting an overage provision:

(a) the amount to be paid, the length of the obligation and to ensure that it is binding on the parties
(b) the trigger events, the length of the obligation and to ensure that it is binding on the original parties
(c) the trigger events, the amount paid, the duration and ensure it will bind future owners
(d) the amount to be paid, the length of the obligation and the trigger events

Question 17

Imposing a restrictive covenant on the buyer is one method of ensuring that overage provisions are binding on future owners of the land. What is the risk in using this method?

Question 18

When acting for a seller what is the risk in sending out the completion documents when part of the purchase price remains outstanding on completion?

Question 19

Which of the following sections deals with transactions at an undervalue:

(a) s339 Insolvency Act 1986
(b) s239 Insolvency Act 1986
(c) s339 Companies Act 1985
(d) s339 Companies Act 2006
Question 20

Which of the following best describes the decision in Ezekiel v Kohali [2008] EWHC 734 (Ch):

(a) the seller had not complied with his obligation to deduce title and the buyer could rescind the contract

(b) the buyer had knowledge of the seller's title and was obliged to complete with but with a price reduction

(c) the seller had not complied with his obligation to deduce title but the defect was insufficient for the buyer to rescind

(d) the buyer had knowledge of the seller's title and was obliged to complete without a price reduction

Question 21

Which one of the following best describes the meaning of the phrase “for identification purposes only” where used in a conveyance to describe a plan:

(a) the plan has no meaning and can be ignored

(b) the plan always takes precedence over the wording of the conveyance

(c) the words of the conveyance take precedence over the plan

(d) if the words of the conveyance are unclear is the plan always prevails

Question 22

Which of the following is NOT a method by which a company can execute a document:

(a) by signature of the company secretary before a witness

(b) by using the company’s seal

(c) by the signature of one director before a witness

(d) by the signature of one director and the company secretary

Question 23

What are the maximum penalties for failing to comply with the Money Laundering Regulations 2007?

Question 24

Where a tree is the subject of a tree preservation order state ONE situation when the landowner may carry out works to the tree without committing a criminal offence.
Question 25

H M Revenue & Customs abolished SDLT Form 60 (self-certification) with effect from:

(a) 6 March 2008  
(b) 12 March 2008  
(c) 6 April 2008  
(d) 12 April 2008

Question 26

In unregistered land what is the period of uninterrupted possession that must be shown to make a claim under the Limitation Act 1980 for adverse possession?

Question 27

Which of the following best describes an application to the Lands Tribunal under s84(1)(aa):

(a) the restrictive covenant will be released and no compensation payable  
(b) the restrictive covenant will be released and compensation payable  
(c) the restrictive covenant may be released and no compensation payable  
(d) the restrictive covenant may be released and compensation payable

Question 28

What is the advantage of paying compensation under s84 Law of Property Act 1925?

Question 29

In addition to s4 Law of Property Act 1925 what other piece of legislation allows for an application to release or modify a restrictive covenant?

Question 30

Which of the following is not a requirement for the creation of an easement:

(a) A dominant and servient tenement (parcel of land)  
(b) The right must not accommodate the dominant tenement  
(c) The dominant and servient land must be owned by different people  
(d) The right must be capable of forming the subject-matter of a grant
Feedback

Question 1
The answer is (b). The Government introduced a watered-down and delayed version of Home Information Packs on 1 August 2007.

Question 2
A sustainability certificate is required when a new home is designed and constructed where the building notice is issued after 1 May 2008. The certificate must be prepared by a Code Assessor. However, the sustainability certificate is not mandatory and a nil rate certificate can be provided to confirm that no assessment has been made against the Code for Sustainable Homes.

Question 3
The answer is (c). The Government is phasing in the introduction of energy performance certificates for commercial property but by 1 October 2008 all properties will be caught by the requirements.

Question 4
The answer is (c). The Government is phasing in the introduction of inspection requirements for air-conditioning but any system brought into service after 1 January 2008 must be inspected every five years by an energy assessor.

Question 5
Land Registry proposes to introduce two new triggers for compulsory first registration:

(a) the appointment of a new trustee of unregistered land where land vests in a new trust by deed or by other instrument in writing or by a vesting order made by the court; and

(b) partitioning of unregistered land held in trust among beneficiaries of the trust.

Question 6
The owner of registered land can protect himself from the property being fraudulently transferred (and subsequently mortgaged) by either:

(a) Registering up to three addresses for service including an e-mail address and ensuring that those addresses are kept up-to-date.

(b) Registering a standard restriction in Form LL. This requires the applicant to produce a certificate signed by a conveyancer confirming that the conveyancer is satisfied that the document submitted for registration is executed by the registered proprietor.

Question 7
The answer is (a). Land Registry requires a certificate of identity for applications by persons not legally represented for transfer, lease, discharge, mortgages and for first registration following the loss of the title deeds. No such certificate is required for a unilateral notice.
Question 8

It is important to ensure that any application to Land Registry is sent to the proper office otherwise the application will be rejected and by the time the application has been returned following rejection the priority period afforded by the official search will have expired.

Question 9

The answer is (b). There is no requirement for a contract to be executed as a deed. **s2 Law of Property (Miscellaneous Provisions) Act 1989** requires that the contract is signed by both parties either in one document or where exchanged in two identical contracts.

Question 10

Any variation to the contract must comply with **s2 Law of Property (Miscellaneous Provisions) Act 1989** in order to be valid and enforceable.

Question 11

The answer is (d). It is **s49(2) Law of Property Act 1925** that allows the court the discretion to order the return of the deposit paid on exchange.

Question 12

The answer is no. The court in **Aribisala v St James (Grosvenor Dock) Limited [2007] EWCH 1694 (Ch)** made clear that it is not possible to exclude the effect of the section by contract. **s49(2)** confers a jurisdiction on the court rather than a right on either party. A provision in a contract seeking to oust the jurisdiction of the court was void and had no effect on the ground of public policy.

Question 13

The requirements for the creation of a deed are set out in **s1 Law of Property (Miscellaneous Provisions) Act 1989**:

1. make clear on the face of the document that it is intended to be a deed;
2. be executed as a deed; and
3. be delivered as a deed.

Question 14

The answer is (b). **s4(6) Land Charges Act 1972** states that an unregistered Class C(IV) land charge is void against the purchaser of the legal estate for value.

Question 15

The Court of Appeal accepted that the sale to the subsidiary company was a genuine sale at a genuine price and was not a sham, therefore the option agreement did not bind the subsidiary company. However, the grantor remained liable under the option (via privity of contract) and had transferred the land to a company over which it had control. The court therefore granted an order
for specific performance requiring the grantor to procure that the subsidiary company would transfer the land to the person to whom the option had been granted.

Question 16

The answer is (c). It is not sufficient to ensure that the overage provisions will bind the original parties but also future owners of the land.

Question 17

There is a risk that a future owner could make a successful application under s84 Law of Property Act 1925 to release or modify the covenant.

Question 18

Unless the completion documents are sent conditionally the transfer will take effect as a deed and completion cannot be denied. This is the decision in Bank of Scotland v King [2007] EWHC 2747 (Ch).

Question 19

The answer is (a). s339 Insolvency Act 1986 enables transactions at an undervalue to be set aside in favour of a trustee in bankruptcy.

Question 20

The answer is (d). The court held that on the evidence presented the buyer had knowledge of the seller's title and the defect prior to signing the memorandum and on that basis the implied right to good title was rebutted and therefore the buyer could not show any reliance upon the misrepresentation. The buyer was forced to complete with no reduction in the purchase price.

Question 21

The answer is (c). In Strachey v Ramage [2008] EWCA Civ 384 the court held that such a plan would only be of value where the verbal description of the property was inadequate otherwise those words were an indication the plan did not show the precise boundaries.

Question 22

The answer is (a). The Companies Act 2006 permits the following methods of execution by a company:

- by using the company's common seal;
- by the signature of two directors;
- by the signature of one director and the company secretary;
- by the signature of one director in the presence of a witness.

Question 23

Failure to comply with the Money Laundering Regulations 2007 carries a maximum penalty of two years' imprisonment, a fine or both, and this is irrespective of whether money laundering has actually taken place.
Question 24

Works can be carried out to a tree protected by a tree preservation order either where:

- formal permission has been sought from the local authority to do so; or
- the work is necessary either because the tree is dead or dying or has become dangerous or for so far as may be necessary to prevent or reduce a nuisance.

Question 25

The answer is (b). H M Revenue & Customs have confirmed abolition of SDLT self-certificates with effect from 12 March 2008. There are now no circumstances in which a Form SDLT 60 is required.

Question 26

In unregistered land the claimant under the Limitation Act 1980 must show 12 years' possession of the land without the owner's consent.

Question 27

The answer is (d). It is at the discretion of the Lands Tribunal whether to order the release or modification of a restrictive covenant. Compensation is payable.

Question 28

The advantage of paying compensation under s84 Law of Property Act 1925 is that such compensation will be calculated to reflect the actual loss suffered by the objector rather than paying a proportion of the profit to be achieved by the development (the negotiated share approach) as would be the case if a release was sought from the landowner with the benefit of the covenant.

Question 29

s610 HA 1985 permits an application to the County Court to vary the terms of a lease or a document containing restrictive covenants where either the term of the lease or restrictive covenants prevent the conversion of a property where:

- because of changes to the area it would be much easier to let the property if divided into several flats; and
- planning permission has been granted for the conversion.

Question 30

The answer is (b). There is a requirement that the easement should accommodate the dominant tenement, that is, enhance the amenity or value of the dominant land.