Answers to end of chapter Q&A

Question 1: Are formality requirements necessary?

The formality requirements for dealing with land are generally stricter than those for other types of property and therefore the reasons for the imposition of these requirements ought to be considered. To answer this question fully, it is necessary both to consider why formality requirements are imposed and then make an assessment as to whether you consider them to be “necessary”. The reasons for the imposition of formality requirements have been considered in part 1 of this chapter. You should review, in particular, the reasons suggested by Birks and by the Law Commission in the extracts from their works in part 1. Additionally, you will find it useful to refer to chapter 1 in which we consider the factors that make land unique. To what extent do these factors assist us in understanding why formality requirements are imposed? Once you have identified why formality requirements are imposed, you are able to assess whether they are “necessary”. Remember that necessity is a high criterion to fulfil. You should be critical in your assessment. It may help to consider what you think would happen if land could be dealt with in the same way as personal property.

Question 2: Assess the role of rectification, collateral contracts and proprietary estoppel under section 2 of the LP(MP)A 1989.

This question focuses on the specific formality requirements for contracts for sale of land contained in section 2 of the LP(MP)A 1989. The background to that provision, and the formality requirements it contains, are outlined in part 3. This question is concerned specifically with the requirements under the section for a contract for sale of land to be “made in writing” and to contain “all the terms which the parties have expressly agreed”. It is important to keep in mind that in the absence of compliance, no contract exists. Rectification and collateral contracts are relevant to the requirement that the contract contains “all the terms”. They are devices that may be used to enable documents to be contracts for the purposes of section 2, but they operate in different ways.

- Rectification. We have seen in part 3.8 that the courts may rectify documents where the terms agreed by the parties have not been recorded, or have been recorded wrongly. The possibility of rectification is specifically envisaged by 2(4) of the LP(MP)A 1989.
- Collateral contracts. We have seen in part 3.7 that parties to a contract for sale of land may be considered, in addition, to have entered a collateral contract, the terms of which do not need to be recorded in the contract for sale of land. However, a strict approach to finding a collateral contract is signposted by the decisions in Grossman v Hooper [2001] EWCA Civ 615 CA and North Eastern Properties Ltd v Coleman [2010] 1 WLR 2715, which are extracted in part 3.7 and is confirmed by Keay v Morris Homes [2012] 1 WLR 2855. The court will need to be satisfied that the land contract is a genuinely separate transaction.
Proprietary estoppel is concerned with the requirement for the contract to be “made in writing” and concerns the consequences of oral agreements relating to land. We have seen in part 3 that one of the consequences of section 2 is the abolition of the doctrine of part performance. We have noted, in the extract from the Law Commission in part 3.9, that the Law Commission was confident that estoppel would enable the courts to achieve justice in hard cases where formality requirements would otherwise cause injustice. However, as we have seen in the case law discussed in part 3.9 the courts have been far from certain as to whether estoppel can be used; particularly in those cases where the claimant could not also invoke a constructive trust, the operation of which is specifically permitted by section 2(5) of the LP(MP)A 1989. Academics have long been more favourable towards the use of estoppel, as is Lord Neuberger in his extrajudicial writing extracted in part 3.9.

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

To answer this question you should review the material in part 4 of this chapter. A deed is the specific legal instrument that is generally required to create or transfer a legal right in land. The statutory requirement to use a deed (and the exceptional cases where one is not necessary) is contained in sections 52 and 54 of the LPA 1925. The formality requirements for a document to be a deed are contained in section 1 of the LP(MP)A 1989. By section 1(3)(b) of the LP(MP)A 1989, a deed take effect when it is “delivered as a deed”. For convenience, during the course of a transaction, a deed may be lodged with a solicitor without being “delivered as a deed” (and therefore without yet passing legal title). Where this occurs, the document may be lodged either as a “non-deed” or an escrow. The difference is important as regards the legal status and effect of the document. You should refer to the extract from Longman v Viscount Chelsea (1989) 58 P&CR 189 in part 4. There, Nourse LJ explained that a “non-deed” is revocable and has no legal effect unless and until is delivered as a deed. An escrow, or conditional deed, is irrevocable and will take effect as a deed automatically if and when specified conditions are fulfilled. For example, an escrow may take effect upon receipt of payment. This distinction was crucial to the outcome of the case. The Court of Appeal held that a document granting a new lease had been lodged as a “non-deed” rather than an escrow. As a result, following delays in completing the grant, the landlord was able to revoke the document and make a fresh offer with a vastly increased rent. This would not have been possible if the document had been an escrow.

Question 4: What are the key advantages of registration of title?

The main advantage of a scheme of registration of title is provision of a single, updated record of legal title. Registration is central to the ‘acquisition question’ as in most cases the formal creation or transfer of a legal estate in land is only complete when registered (part 5.1). To ensure the register is kept up to date, subsequent dispositions of a registered title are also required to be registered (part 5.4). In part 5.6 we outline the information provided on a registered title.
Question 5: What is the registration gap and how will it be closed by e-conveyancing?

The registration gap, discussed in part 5.5, is the name currently given to the period of time between the transfer of legal title (the execution of a deed by the transferor) and the registration of the transferee as proprietor; the time at which legal title vests. During this period of time, legal title remains with the transferor (who is still the registered proprietor) but he or she will hold the title on trust for the transferee. The registration gap is inherent in section 27(1) of the LRA 2002, which provides that a disposition of a registered estate or charge “does not operate at law” until the requirements of registration have been met. The limitation of this provision to operation “at law” ensures that the imposition of a trust (a creature of equity) is unaffected. The source of the trust is the doctrine of anticipation, which is discussed in chapter 9. The gap will be closed by e-conveyancing as transfer and registration will occur simultaneously. The operation of e-conveyancing in this respect is explored in part 6. As we note in that part, the introduction of e-conveyancing has been placed on hold by Land Registry and so this solution to the problem of the registration gap remains some way off.

Question 6: What impact will the introduction of e-conveyancing have on existing formality requirements?

The legal impact of e-conveyancing is discussed in part 6.1. The principal impact of e-conveyancing is contained in section 93 of the LRA 2002, which is extracted in part 6.1. Under that provision, a contract for the disposition of a registered estate and the disposition will have no legal effect unless made in electronic form. Hence, the paper-based formalities for these stages of a transaction that we have considered in chapter 6 will be replaced by electronic formalities. Under section 27 of the LRA 2002 (extracted in part 5.4) a disposition following the paper-based requirements ‘does not operate at law’ until registration requirements are met. In contrast, under section 93, an electronic transaction ‘only has effect if it is made by means of a document in electronic form’. The different between these provisions is significant, as on its face it appears to preclude equitable intervention. However, at the current stage it is a matter of speculation how the courts will interpret section 93 when claims under equitable doctrines are made. Hence, as we note in the extracts in part 6.1 Dixon has predicted an ‘estoppel boom’ while Cooke has advised a more cautious approach.