

Chapter 4: Technical basics – property documents

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Aims of this Chapter

Trainees in both the conveyancing and private client departments will draft and arrange the signature of important documents every day. These could include the contract of sale or transfer in a conveyancing matter or a will. In most cases, it is vital to ensure that the document has been properly drafted and correctly dated and signed for it to be valid. This chapter will look at a number of these important documents.

This chapter will cover:

- contracts and deeds
- signature of documents (“execution”)
- requirements for a valid contract
- contracts for the sale of land
- different types of conveyancing document, and
- documents – the significance of originals and copies.

CONTINUE

4.1 Contract and deed

4.1.1 The difference between a contract and a deed

4.1.1.1 What is a contract?

A contract is **an agreement giving rise to obligations which are enforceable or recognised by the law**. This means that the parties must be in agreement, and their agreement must be of a kind that the law will recognise and enforce. Therefore, the existence of a contract gives the parties legal rights.

The variety of means by which contracts are made today is enormous. Contracts are entered into by face-to-face interaction, by telephone, by email and via the internet. Most of these are verbal, some are written and some are created simply by the actions of the parties (conduct). A few have to be entered into in a particular way in order to comply with specific statutory requirements, but this is unusual.



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An important example, as we will see, which is central to the conveyancing process is the fact

that a contract for the sale and purchase of land must be in writing.

4.1.1.2 What is a deed?

A deed is **a written document which has to be signed with specific formalities and by which an interest, right or property passes or is confirmed or by which a binding obligation is created.**

A **key difference** between a deed and a contract is that a deed is usually enforceable despite the lack of consideration (i.e. anything given or promised by one party in exchange for the promise of another).

A deed is a legal requirement for transactions such as:

- the transfer of a legal estate;
- the creation of sub-leases; and
- the creation of a mortgage.

Completion must be by **deed** by virtue of **s52 LPA 1925:**

All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

There are some exceptions to this requirement for the conveyance to be by deed which we have already met:

- **s54(2) LPA 1925:** lease for three years or less; and
- **s53(1) LPA 1925:** equitable interests.

A deed is a formal document required when transferring legal title (ownership) to land.

The requirements for the creation of a valid deed on or after 31 July 1990 are now governed by **s1 Law of Property (Miscellaneous Provisions) Act 1989**.

A deed must:

- be in writing;
- make it clear on its face that it is intended to be a deed (e.g. by expressing it to be executed as a deed); and
- be validly executed as a deed by the parties to it.

4.1.2 The requirements for signature and witnessing of a contract and a deed, including e-signatures

There are no specific formalities regarding the signing of a contract. The party to the contract must sign the contract to indicate their acceptance of the terms contained in the contract.



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Typically, in a conveyancing transaction, the conveyancer acting for the buyer and the seller will send the contract to their client for signature who will sign their name in “**wet ink**” (i.e. in pen rather than pencil), and the client will return the signed, undated contract to their conveyancer.

We will see that it is particularly important for the conveyancer to ensure that they hold their clients signed part of the contract in readiness for what is known as exchange of contracts.

The signature to a contract does not need to be witnessed which must be contrasted with the more formal requirements regarding the signing of a deed. **Note** that the technical term

for signing a deed is “**execution**”.

Valid execution requires the deed to be:

- **signed** by the individual in the presence of a witness who attests (i.e. signs to confirm that they have witnessed) the signature. Alternatively, the deed may be signed at the direction and in the presence of the individual if attested by two witnesses who are present; and
- **delivered** by the individual, or by someone authorised by them, to the other party. Delivery by an individual means that the person executing it acted in such a way as to show an intention to be bound by it. By **s1(5)**, if a lawyer or their agent or employee delivers the deed in the course of the transaction, they are presumed to act on behalf of the client.

The requirements for a valid deed are summarised in **Figure 4.1**.

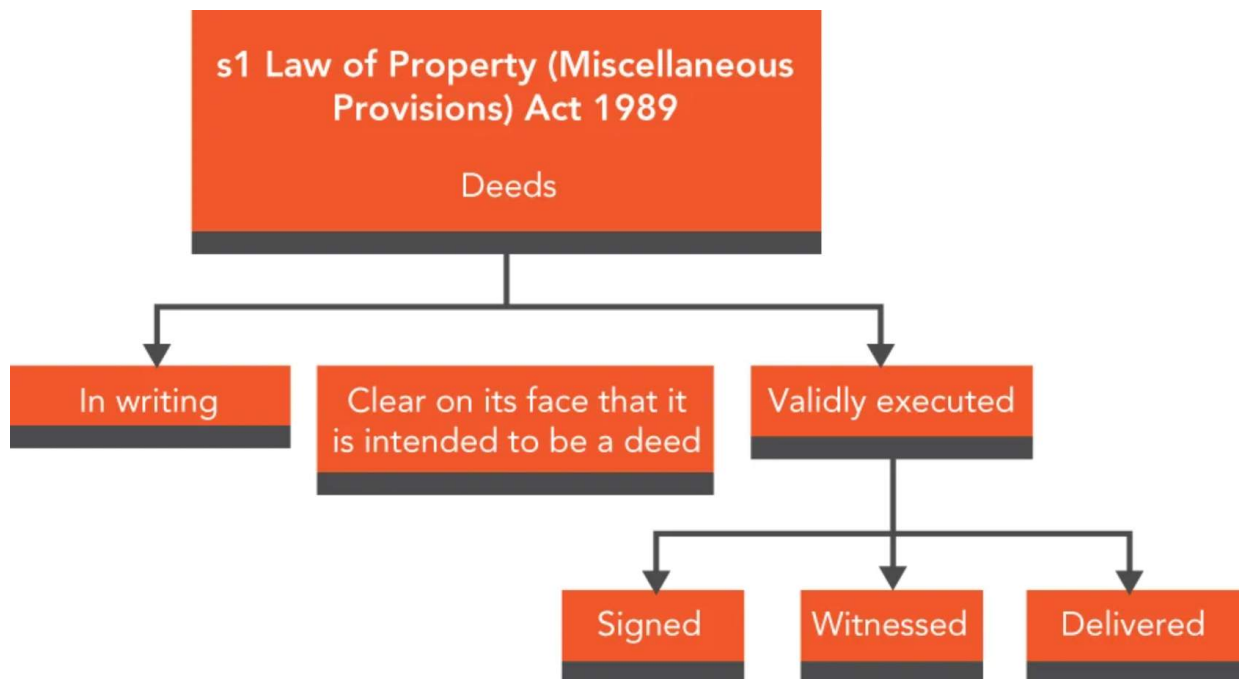


Figure 4.1

We have talked about signing contracts and deeds and in so doing, have been describing the process where someone places their signature on a document by using a pen and signing or writing their name – this is known as a “**wet ink**” signature.

The purpose of requiring a signature on a document is:

- for the signatory to indicate their acceptance of the terms of that document;
- to confirm that they have read and understood the document; and
- to confirm their intention to be bound by the terms of that document.

What is an e-signature and why should you use one?

The *Electronic Signatures and Trust Services Guide*, Department for Business, Energy and Industrial Strategy, August 2019 states:

Electronic signatures deliver a way to sign documents in the online world, much like one signs a document with a pen in the offline world.

Electronic signatures come in many forms, including:

- ***typewritten;***
 - ***scanned;***
 - ***an electronic representation of a handwritten signature;***
 - ***a unique representation of characters;***
 - ***a digital representation of characteristics, for example, fingerprint or retina scan; and***
 - ***a signature created by cryptographic means.***
-

Electronic signatures can be divided into three groups:

Simple electronic signatures —

These include scanned signatures and tickbox plus declarations.

Advanced electronic signatures —

These are uniquely linked to the signatory, are capable of identifying the signatory and are linked to data within the signature that can detect any changes made.

Qualified electronic signatures —

An advanced electronic signature that is created by a qualified electronic signature creation device, which is based on a qualified certificate for electronic signatures.

Qualified electronic signatures (QES) do not require a witness to the execution as the electronic signing process has embedded identity checks within it. QES can currently only be used by firms taking part in a pilot scheme, but HMLR hopes they will be more widely available in due course.

Electronic signatures are only as secure as the business processes and technology used to create them. High-value transactions need better quality electronic signatures – signatures used for these transactions need to be more securely linked to the owner in order to provide the level of assurance needed and to ensure trust in the underlying system.

Better quality electronic signatures can offer:

authentication —

linking the signatory to the information

integrity —

allowing any changes to the information provided to be detected more easily; and

non-repudiation —

ensuring satisfaction (in a legal sense) about where the electronic signature has come from.

Contracts for the sale of land can be signed using an electronic signature. The key point is for the conveyancer to be satisfied that it is their client who has signed the contract and is agreeing to the terms of the document. There is case law confirming that contracts for the sale of land signed electronically are valid.

The development of the signature of deeds in the conveyancing context by electronic means is interesting. There is no definitive case law confirming that a deed signed by electronic means is valid, but the Law Commission produced a report in 2019 by which it concluded that providing the signature of a deed has been properly witnessed, there is no reason to assume that an electronic signature and a deed by the signatory would not be valid.

The Law Commission has now produced its final report *Electronic Execution of Documents* which is available at [Electronic execution of documents – Law Commission](#)

Its key recommendations are that:

- a working group with a multi-disciplinary membership should be established to consider practical issues on the electronic execution of documents;
- the working group should consider practical solutions to the video witnessing of signatures on deeds and wills. Legislative reform should follow;
- the law of deeds should be reviewed more generally.

HMLR's position regarding electronic signatures is now set out fully in *Practice Guide 82: electronic signatures accepted by HM Land Registry*.

This guide can be found at [Practice guide 82: electronic signatures accepted by HM Land Registry - GOV.UK](#)

The guide sets out the different forms of electronic signatures which HMLR can accept, the documents in respect of which they can be used and the steps that must be taken to ensure validity.



Activity

HMLR has set out a specific set of requirements which must be followed for a deed submitted for registration to be valid using the witnessed electronic signature process.

Practice Guide 8 now deals with execution of deeds more generally, although it does contain a limited amount of useful information about electronic signatures.

 **GOV.UK**



Practice guide 8: execution of deeds

Please note that HM Land Registry's practice guides are aimed primarily at solicitors and other conveyancers. They often deal with complex matters and use legal terms. With a few exceptions (section 52(2) of the Law of Property Act 1925), a legal interest in land cannot be conveyed or created without a deed (section 52(1) of the Law of Property Act 1925).

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Practice Guide 82 deals with electronic signatures in detail (see above). Deeds such as transfers can currently, as at April 2023, be electronically signed using one of two methods.

The current methods which are acceptable to HMLR are “**Mercury**” signatures or conveyancer-certified electronic signatures:

- under the “Mercury signing approach”, the deed will be signed in ink and witnessed in person. The signature page is then captured by a phone or scanner to make a pdf, JPEG or similar. Each party then sends a single email to their conveyancer, attaching a copy of the document and the signature page;
- conveyancer-certified electronic signatures are e-signatures made in the presence of a witness and dealt with through an e-signing platform or operating system controlled by a conveyancer. The conveyancer must submit a certificate to HMRC when lodging the registration application, certifying that the applicable requirements set out in Practice Guide 82 have been satisfied.

CONTINUE

4.2 The requirements for a valid contract relating to land

We have looked at the basic difference between a contract and a deed and how each document must be signed. Now let's look at the requirements for a valid contract in more detail.

4.2.1 Essentials of a valid contract

The legal requirements of a valid contract are as follows:

- 1 the parties must be in **agreement**, which traditionally means that one of them has made an **offer** which the other has **accepted**;
- 2 the parties must have each contributed something of value to the bargain, known as **consideration**; and
- 3 the parties must **intend to create a legal relationship**.

If any one of these essential elements is missing, the “contract” will not be enforceable in the courts (**Figure 4.2a**).

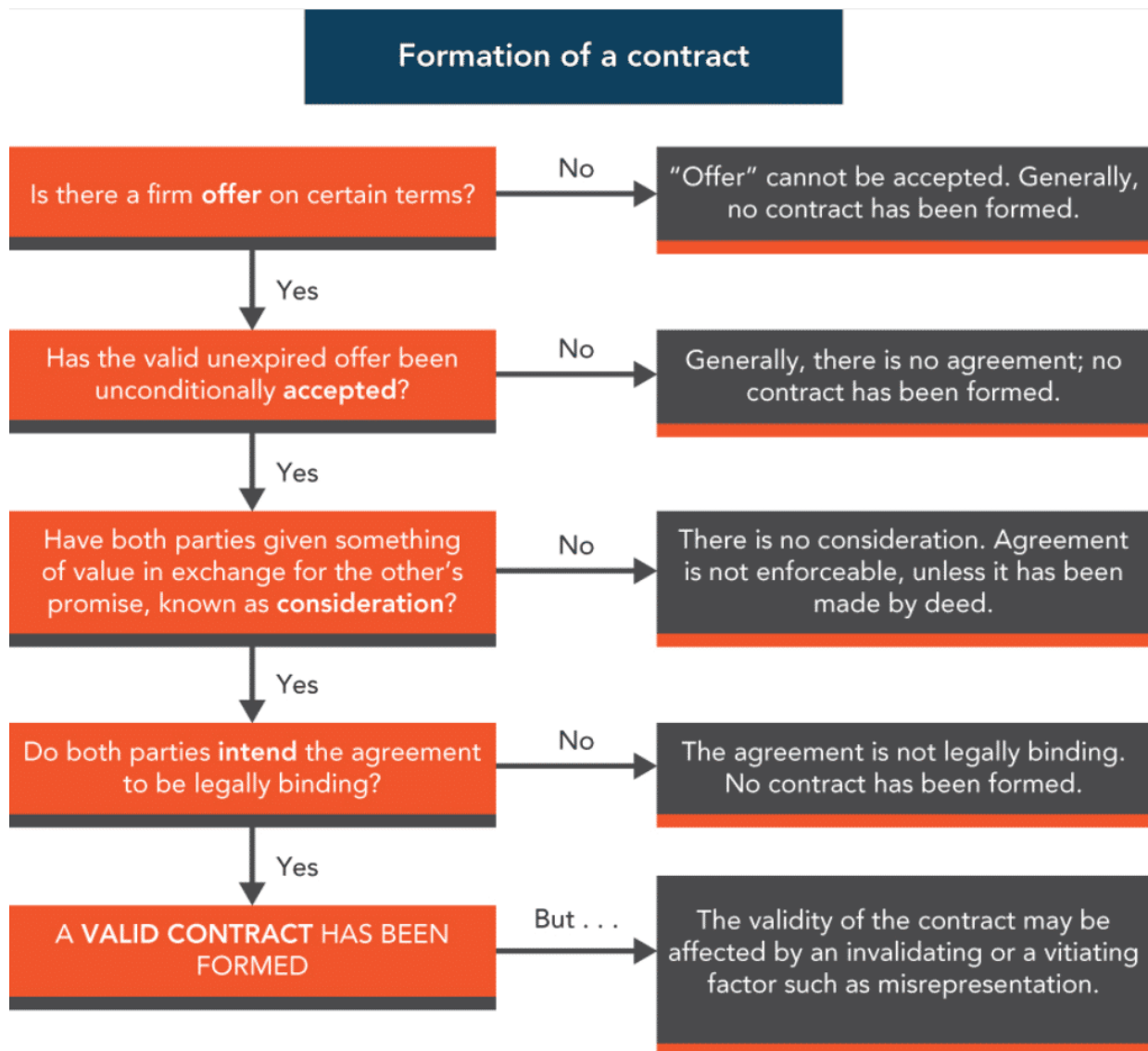


Figure 4.2a

CONTINUE

4.2.2 Privity of contract

The rule of **privity of contract** states that, generally, only the parties to a contract are bound by it. The effect of this rule, in simple terms, is that no one other than the parties to a

contract can bring a court action to enforce a contract.

The leading case here is *Tweddle v Atkinson* [1861], where a man and a woman were engaged to be married. Their respective fathers promised each other that they would each pay some money to Tweddle's son when the couple married. The father of the groom paid as agreed but the father of the bride died before he had done so. Even though the agreement had specifically provided that Tweddle's son should have the right to sue to enforce the promise, his action against his father-in-law's estate failed because he was not a party to the agreement (*Figure 4.2b*).

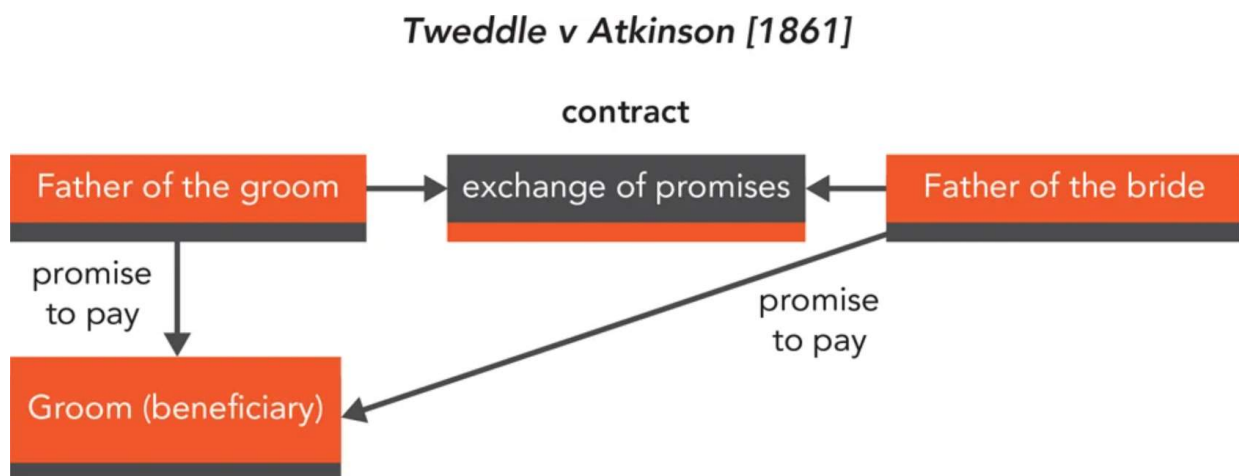


Figure 4.2b

Contract essentials summary

1

The law of contract is concerned with **legally enforceable agreements**. It is of significance in everyday life, since it applies to a great number and variety of transactions.

2

A contract is an agreement which is enforceable by law.

Its essentials are:

- (a) an **agreement**, traditionally consisting of an offer and an acceptance;
- (b) **consideration**; and
- (c) an **intention** to create legal relations.

The absence of one of the essentials means that there is no enforceable contract in existence.

3

The doctrine of **privity of contract** establishes that, generally, only a person who is a party to the contract can sue, or be sued, under it.

Exceptions to this rule have been introduced via statute and case law, but the most crucial exceptions are those set out in the **Contracts (Rights of Third Parties) Act 1999**.



CONTINUE

4.2.3 Requirements of a valid contract

The key elements required to create a valid contract are:

- offer;
- acceptance;
- intention to create legal relations; and
- in writing (for the sale of the land).

CONTINUE

4.2.4 Offer

The party making the offer is called the **offeror**, and the person to whom the offer is made is called the **offeree**.

An **offer** is an expression of willingness to contract on certain terms on which the offeror is prepared to be legally bound following acceptance. It may be made orally, in writing or by conduct.

The offer provides the terms that the offeror proposes to contract on. The law requires that the offer must be sufficiently **certain**. This is done for practical reasons; the offeree cannot be sure about what they were agreeing to if the offer lacks certainty. For example, if I say to you, "*I will sell you a book*", the term "*a book*" is uncertain. Which book are you agreeing to buy from me?



CONTINUE

4.2.5 Making an offer

An offer can be made **orally, in writing** or even **by conduct**, as long as it indicates that the offeror is willing to be bound if their terms are accepted.

When shopping during her lunch break, for example, Emma did not actually exchange any words with the sales assistant in the newsagents, but it was clear from her actions that she was making an offer to buy (i.e. selecting goods and taking them to the cash register). The offer to buy the hamster, however, was made orally.



Further, the offeree must have **knowledge** of the offer, as a party clearly cannot accept something of which they are not aware.



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For example, if Emma had found a cat, recognised it as belonging to her work colleague, and returned it to him without having seen the poster and being aware that a reward was available, she could not claim that reward.

CONTINUE

4.2.6 Offer distinguished from invitation to treat

It is important to be able to distinguish between an offer and an **invitation to treat**, which are instead simply invitations to others to make an offer, or to open negotiations. This is a necessary part of commercial relations, since the parties may want to negotiate before committing themselves to formal contractual obligations.

However, the **distinction** between the two concepts is important as, unlike an offer, an invitation to treat **cannot** be made into a valid agreement simply by being “accepted”. Without an offer made in response to it, an invitation to treat creates no legal liability (*Figure 4.2c*).

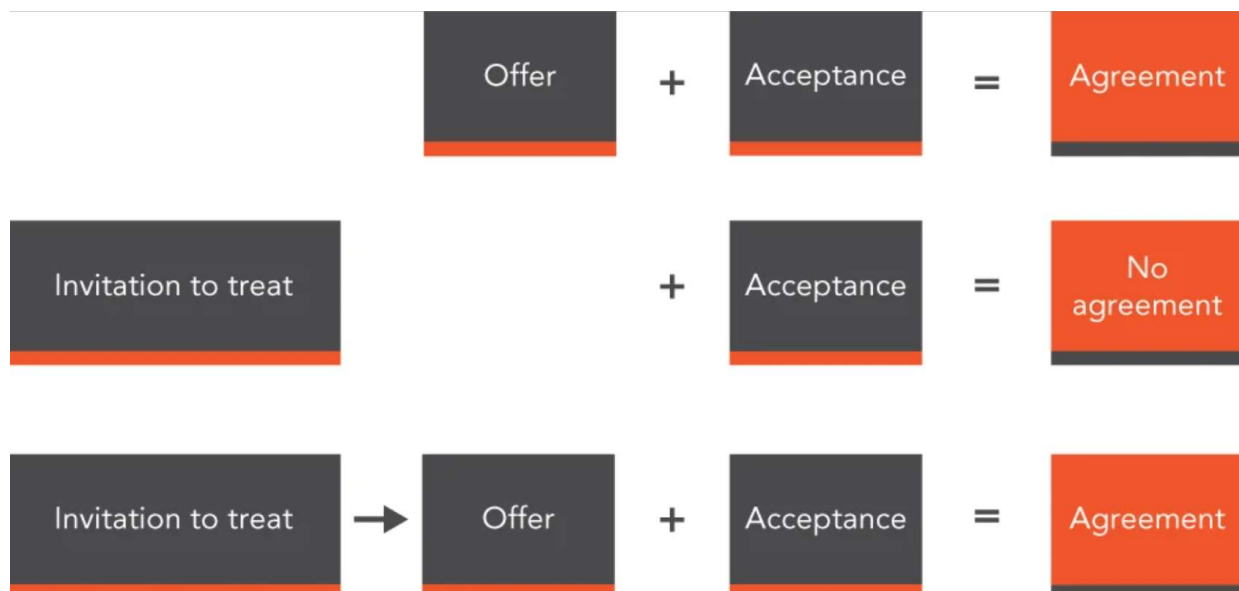


Figure 4.2c

Using the objective approach, a judge will consider each case on its own facts, trying to establish whether the reasonable person would think the parties were intending to make an offer or an invitation to treat. Helpfully, there are a number of situations which have been established as usually involving invitations to treat, including:

- advertisements;
- auctions;
- requests for tenders;
- displays of goods for sale; and
- mere statements of price.



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Let's look, in particular, at auctions and requests for tender because these are situations which you are going to come across in a conveyancing context.

You have no doubt heard of properties being sold at auction - this has become a popular method of selling a property particularly when highlighted by TV programmes such as "***Homes Under the Hammer***"!

A property is advertised for sale in an auction catalogue in advance of the auction. This gives potential buyers the opportunity to view the property and check the title documents which should be available in an "**auction pack**". On the day of the auction, the auctioneer takes bids from people attending the auction (either in person or online). The person who makes the highest bid will be legally bound to purchase the property as soon as the auctioneer's hammer falls (unless there is a reserve price - discussed later). This is the big difference between an auction sale and the conveyancing process as we will discuss in this course book because at an auction, the buyer is legally bound to purchase the property as soon as the hammer falls.

4.2.7 Auctions

The rules in respect of auctions depend on whether the seller of the item places a “**reserve**” on the item. This is a minimum price at which the auctioneer is permitted to sell the item. If the minimum price is not met, the item cannot be sold.



The general rule is that, at an auction with a reserve, the holding of the auction and the request for bids for the item by the auctioneer is an invitation to treat. The bidder responds by making an offer to buy, which the auctioneer accepts by bringing the hammer down.

Where an item is auctioned without a reserve, the rules are different and were outlined in ***Warlow v Harrison [1859]***. Here, the auctioneer is making an offer to sell, and the highest bidder accepts that offer. This is because the phrase “**without reserve**” means that the auctioneer makes a promise to sell the item to the person who places the highest (and so the final) bid.

CONTINUE

4.2.8 Acceptance

The next element which must be in place for the creation of a valid contract is acceptance.

Acceptance is the final and unqualified (or unconditional) agreement to all the terms of the offer, and there is no agreement (and, therefore, no contract) until the offer is accepted.

However, once acceptance has been validly made, the parties will be in a binding contractual relationship (provided that there is also evidence of valid consideration and an intention to be legally bound, which will be considered later).

Just like an offer, acceptance may be expressed **orally, in writing** or it may be inferred from **conduct**. If one party, without expressing anything in words, starts to behave as if they have accepted the offer – for example, by taking your money at the checkout – the court may assume that they have accepted.

Acceptance must correspond exactly with the terms of the offer and must be both final and unconditional. This is sometimes referred to as the “**mirror image**” rule, meaning that the acceptance must completely mirror the offer. This ties in with the idea of establishing a meeting of minds – or *consensus ad idem* – between the parties; the parties are thinking exactly the same thing in terms of their agreement (**Figure 4.2d**).

For example . . .

A → offers to sell B her Contract Law book for £5

← B agrees to buy A's Contract Law book for £5

The above response from B completely mirror A's original offer and there is clearly *consensus ad idem* between A and B = VALID ACCEPTANCE

However . . .

A → offers to sell B her Contract Law book for £5

← B agrees to buy A's Contract Law book, but only if the price is reduced to £4

OR

← B agrees to buy A's Contract Law book **and** her class notes for £5

Neither of the above responses from B completely mirror A's original offer and there is therefore no *consensus ad idem* between A and B
= NO VALID ACCEPTANCE

Figure 4.2d



Link to Practice

Acceptance “**subject to contract**”, which is common in contracts for the sale of houses, is a form of conditional acceptance. It essentially means that the person accepts but only on the condition that a formal binding contract can be agreed later. The “**conditional acceptance**” does not initially bind either party.

This is important in relation to house sales as it allows each party to properly check that they are happy with the deal - for example, the buyer can

check that there is nothing structurally wrong with the house, and the seller can check that the buyer has a mortgage in place.

CONTINUE

4.2.9 Communication of acceptance

The general rule in contract law is that acceptance must be communicated to the other party: the offeree must let the offeror know that they have decided to accept.

In *Entores v Miles Far East Corporation* [1955], Lord Denning said:

“Suppose, for instance, that I make an offer to a man over the telephone and, in the middle of his reply, the line goes ‘dead’ so that I do not hear his words of acceptance. There is no contract at that moment.”

- Lord Denning

It follows that the offeror may not generally take silence for acceptance, nor can they stipulate that silence will constitute acceptance. This rule prevents the imposition of a contract on someone who simply fails to respond to an offer.

Offer and acceptance summary

1

The existence of an agreement is usually established by proof of **offer** and **acceptance**. The courts use an **objective approach** to establish this.

2

An offer:

- (a) must be certain;
- (b) can be unilateral or bilateral;
- (c) can be made orally, in writing or by conduct;
- (d) must be communicated to the offeree, who must have knowledge of it;
- (e) can be made to one person, to a group or to the world in general; and
- (f) must be distinguished from an invitation to treat, examples of which generally include:
 - (i) advertisements,
 - (ii) auctions,

(iii) requests for tenders,

(iv) goods on display in shops, and

(v) mere statements of price.

3

An offer cannot be accepted after it has ended.

Offers end by:

- (a) revocation;
- (b) rejection, or counteroffer;
- (c) lapse of time; and
- (d) acceptance.

4

Once the offer has been **accepted**, the parties are in a contractual relationship, provided that the other requirements for the formation of a valid contract are in place.

Acceptance:

- (a) may be made orally, in writing or by conduct;
- (b) must correspond exactly with the terms of the offer; and

(c) must be communicated in the right way and by the right person.

5

With reference to **communication** of acceptance:

(a) silence does not usually amount to acceptance;

(b) the method used must not be less favourable than any method specified in the offer;

(c) actual communication is not required where the acceptance is by conduct or is of a unilateral offer;

(d) where acceptance by post is acceptable, the acceptance is valid as soon as it is posted; and

(e) with reference to modern methods of communication, there is some legal uncertainty here and no over-arching rule, but the accepted approach seems to be that acceptance (at least in a commercial setting) will occur either on receipt (if this is during normal office hours) or at the point when the sender could expect the message to have been read (if receipt occurred outside normal office hours).

The next key requirement for the creation of a valid contract is consideration.

CONTINUE

4.2.10 Consideration

The mere presence of an agreement between the parties is insufficient to prove that a valid contract exists. There are further requirements, such as **consideration** and that the parties **intend to create a legal relationship**.

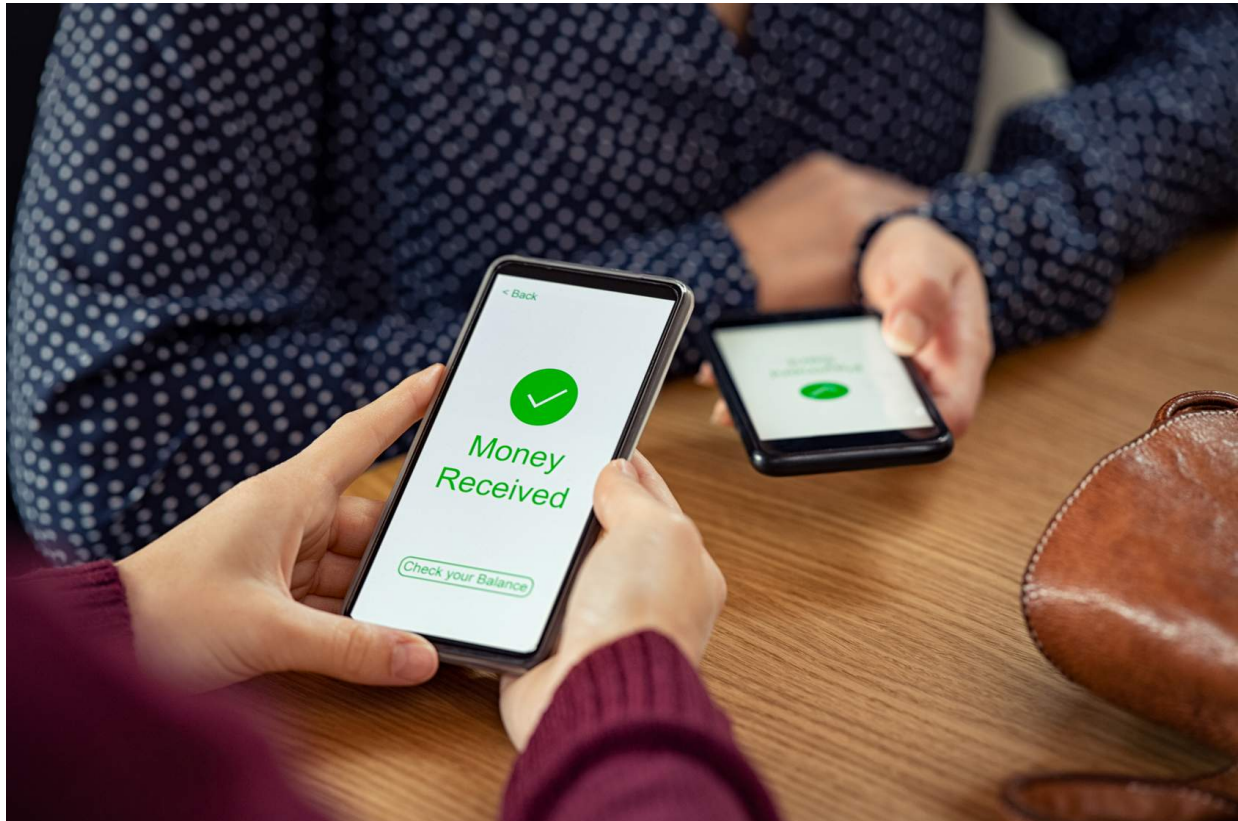
We will look at the following:

- the meaning of “**consideration**”;
- the requirements for **valid** consideration;
- the ways in which the courts identify a party’s “**intention** to create a legal relationship”; and
- the ways in which the courts’ **presumptions** regarding intention can be rebutted.

4.2.11 Consideration defined

Consideration is sometimes defined as “the price paid for a person’s promise”. The person making a promise is known as the **promisor**, and the person to whom the promise was made is known as the **promisee**.

In English law, a promise is not usually legally binding unless the promisee has given something in exchange for the promise. The “**something**” is usually money or the promise of money, but it does not have to be. It may be a promise to perform a service, or to hand over goods, or even a promise to refrain from a certain course of action.



In general terms, there is consideration if the promisor obtains a benefit or the promisee suffers a detriment.

CONTINUE

4.2.12 An essential requirement

Consideration is a necessary element of every contract; an agreement in which there is no consideration that is generally unenforceable, such as where a person agrees to buy a gift for another person. The intended recipient of the gift has not provided any consideration in exchange for that promise; such situations are sometimes called “**bare gifts**” (*Figure 4.2e*).

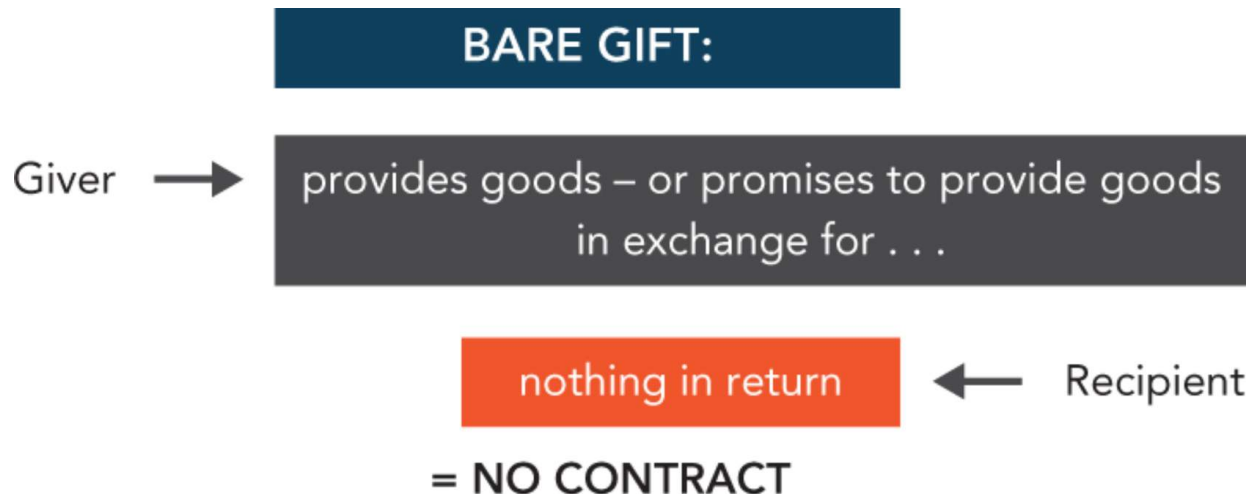


Figure 4.2e

You will remember from our definition of a deed that the **only exception** to this rule is that a promise does not need to be supported by consideration if it is contained in a deed, a formal legal document which (in general terms):

- indicates that it is a deed; and
- has been signed, witnessed and delivered (i.e. acted upon) by the person making it.

A contract made by deed does not require consideration because the witnessed signature of the promisor is such clear evidence of their intention to keep their promise that

consideration is not needed as further evidence of that intention.

Contracts which are **not** made by deed, and which require proof of consideration, are sometimes called “**simple contracts**”. The focus of this course book is on simple contracts.

CONTINUE

4.2.13 Types of consideration

There are two main types of valid consideration:

- 1 executed consideration; and
- 2 executory consideration.

Consideration is called **executed** when a party performs their part of the contract at the time of entering into the contract.

Consideration is called **executory** when the parties exchange promises to do something in the future. It is the promises themselves which form the consideration, and the agreement is binding once they have been exchanged. If one party then fails to carry out their promise, the other can sue them for breach of contract (provided, of course, that all the other essentials of a valid contract are in place; **Figure 4.2f**).

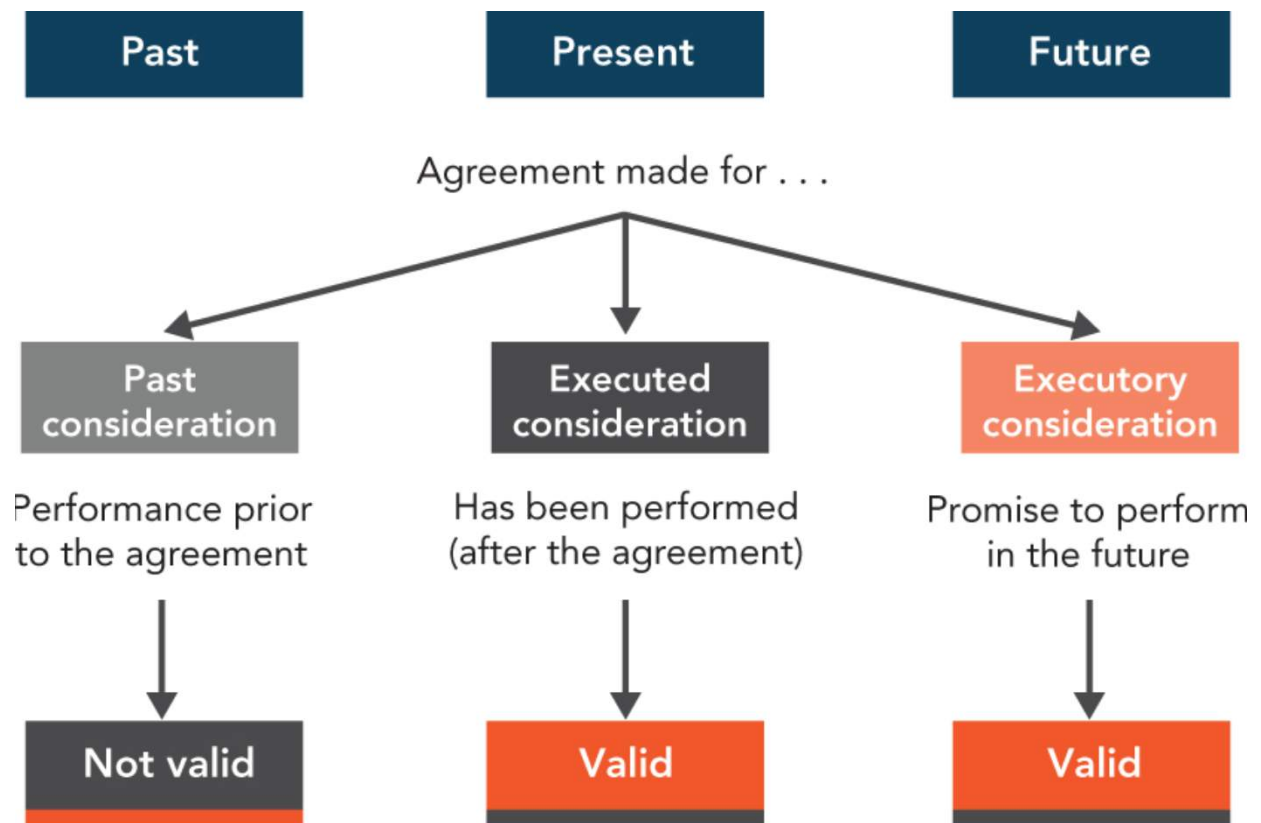


Figure 4.2f

4.2.13.1 The rules governing consideration

Several rules have been developed to determine the validity of consideration:

- consideration must move from the promisee;
- consideration must not be past;
- consideration need not be adequate; and
- consideration must be sufficient.

4.2.13.2 Consideration must move from the promisee

To sue, and enforce a promise, a claimant must usually show that **they** supplied consideration for that promise. The claimant generally cannot sue if the consideration was provided by another person, even if the promise was intended for the claimant's benefit.

4.2.13.3 Consideration must not be past

Generally, if A promises to pay B for something that B has already done (without prior agreement), this is not valid consideration, and there is no obligation to pay. This is because promises in a valid contract are made in exchange for each other, and this cannot apply if one is made **after** the event.

A well-used example is A's promise to pay B £50 in gratitude after B has saved A from drowning. A's promise is made for past consideration and is therefore unenforceable. If B wanted to be sure of being able to claim the money, B should have negotiated a price before they pulled A out of the water.



Past consideration is **not** the same as executed consideration, where a promise is made **in return for** an act. The test for deciding if something is “**past**” is whether or not the act occurs before the promise is made.

A more recent illustration is ***Re McArdle [1951]***. The late Mrs McArdle had lived in a house in which she had a life interest. Ownership of the house passed to her children after her death. One of the children paid for some work to be done on the house and, after this had been completed, the others promised that they would pay a contribution. They later refused to contribute. The Court of Appeal held that their promise to contribute was unenforceable since it was made for past consideration.

4.2.13.4 Consideration need not be adequate

Consideration does **not** need to be economically adequate in the sense that it must be of **equal value** to the thing given in exchange. This is because judges believe that it is for the parties to make whatever contract they want and not for the court to make a fair contract on their behalf. Consequently, very trivial acts can amount to consideration: it would be sufficient consideration to accept a payment of £1 for the sale of your house or business, as shown in the two examples below, even though that sum of money appears to be inadequate.

4.2.13.5 Consideration must be sufficient

Rather than requiring that the promisee gives an “adequate” consideration, the law instead looks for the provision of “**sufficient**” consideration. This is usually expressed by the maxim that “***consideration need only be sufficient and not adequate***”.

In ***Thomas v Thomas [1842]***, sufficient consideration was identified as something which has “*some value in the eyes of the law*”.

As we have seen, consideration is usually defined by reference to the benefit gained by the promisor or the detriment suffered by the promisee. This is the thing “**of value**”, and the usual measure of whether this is sufficient is whether this has **economic** value. So money is obviously sufficient, and the amount is usually irrelevant; in ***Thomas*** £1 was held to be sufficient consideration even though the rental value of the property in question was much more.



Link to Practice



In a conveyancing context, there is generally no problem with establishing consideration because the buyer will usually be paying a considerable sum of money for the property in question.

Follow the link to [The Law Society's contract](#) (incorporating the standard conditions of sale (fifth edition - 2018 revision)). Click on the link **"standard conditions of sale"** - this will take you to the standard form of contract used in the vast majority of residential conveyancing transactions.

You will become very familiar with this contract, and we will look at it in more detail later in the course book. Download the contract and read through it. You will see that the front page of the contract is very self-explanatory in that it requires the parties drafting it (usually the seller's conveyancer) to indicate information such as the seller, buyer and property address.

Towards the bottom of the front page, you will see **"purchase price"**. This is where the seller's conveyancer will insert the sum being paid for the property. This is the consideration being given by the buyer for the promise from the seller to sell the specified property.

CONTINUE

4.2.14 Intention to create legal relations

The third essential part of a contract, besides agreement and consideration, is that the parties should **intend to create a legal relationship**. This rule is primarily in place to prevent agreements never intended to create legal liability taking up the courts' time.

As it is very difficult to establish a person's intention on a date in the past, the courts have developed two **rebuttable presumptions** governing

1. family and social agreements and
2. business agreements.

A rebuttable presumption is an initial assumption that can be overturned by evidence to the contrary.

CONTINUE

4.2.15 Family and social agreements

It is generally presumed that an agreement between family members or between friends in a social context, such as an invitation to dinner or an agreement to meet at the pub, **is not** intended to be a contract.



Most people would be very surprised to find a friend taking them to court simply because they were unable to keep a date.

4.2.16 Commercial or business agreements

An agreement made in the course of business **is** presumed to be legally binding. This is because of the need for certainty in such transactions, and the importance of a trader being able to rely upon a promise that has been made to them in the course of their business.



Link to Practice

For example, when Emma placed the order for printer paper on behalf of her employer, the agreement will be considered to be intended to be legally binding; it is important for the law firm to

know that they can rely on the office supplies firm to deliver the paper as promised and for the office supplies firm to know that they will be paid for the goods provided.

CONTINUE

4.2.17 Rebutting the presumption

There are certain situations in which this presumption will not be followed. For example, where the terms of advertisements are regarded as “**mere puffs**” – extravagant claims not intended to be binding – it is **not** possible to sue if claims such as “*sensational*” or “*delicious*” turn out not to be true. Specific promises like “*free from preservatives*” are enforceable, and in ***Carlill v Carbolic Smoke Ball Co Ltd [1893]*** the court enforced the company’s promise to a user of its product.

Another possible example is a **letter of comfort**, which might be issued when a supplier is considering selling goods to a company, that is, a subsidiary of a rich parent company (in law, each company is a separate legal person). To persuade the supplier to sell goods on credit to the smaller subsidiary company, which may have few assets, the parent company may send a letter of comfort to the supplier. In so doing, the parent company does **not** make any legally binding promise to guarantee its subsidiary’s debt to the supplier, but may indicate that it considers itself morally obliged to pay. Many suppliers might accept this letter and supply the goods on credit to the subsidiary company in the belief that, to maintain its commercial reputation, the parent company will not revoke its promise, irrespective of the fact that it cannot be sued.

Sometimes parties will enter into contractual negotiations and will ultimately reach a point where an agreement is reached but will then mark the correspondence expressing that agreement as being **subject to contract**.

Where the parties (or usually their lawyers) mark their correspondence as subject to contract, this will be taken to indicate that, although an agreement has been reached, the parties do not intend for it to be binding on the parties until there is a formal contract exchanged between them. These are especially useful in contracts relating to the sale and purchase of land, where parties will often reach an agreement on price but will then wish to conduct surveys and other investigations before legally committing themselves to the transaction.

In ***Tiverton Estates Ltd v Wearwell Ltd [1974]***, the Court of Appeal confirmed that marking correspondence as subject to contract will ordinarily displace any presumed intention to enter into a contract until a formal contract is exchanged.

“I cannot myself see any difference between a writing which ... says that the parties are in negotiation or says there is an agreement subject to contract, for that comes to the same thing”,

stated Lord Denning

Consideration and intention to create legal relations summary

Consideration means that both parties must give something and get something from the agreement. It is essential to every contract, unless made by deed.

1

Consideration:

- (a) may be executed or executory;
- (b) must move from the promisee;
- (c) must not be past;
- (d) need not be adequate; and
- (e) must be sufficient.

Insufficient consideration includes acting under:

- (i) an existing public duty;
- (ii) an existing contractual duty; or
- (iii) an existing duty to repay a debt.

2

There can be no contract unless the parties **intended to create legal relations**. There is a rebuttable presumption that agreements in a social context are not intended to be contractual and that those in a business context are intended to be contractual.

3

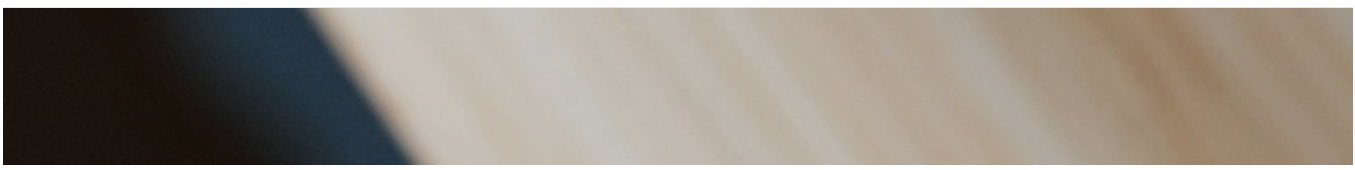
The presumption that a social agreement is **not** intended to be binding might be rebutted if:

- (a) it was made between spouses who have separated;
- (b) the agreement has been made in writing;
- (c) one party placed themselves at a disadvantage; or
- (d) some payment was made.

4

The presumption that a business agreement is intended to be binding can be rebutted if:

- (a) the statement was a mere puff;
- (b) the agreement contains an honour or honourable pledge clause; or
- (c) (possibly) the agreement is contained within a letter of comfort.



CONTINUE

4.2.18 Recap on s1 and 2 of Law of Property (Miscellaneous Provisions) Act 1989

It can be easy to lose our way when thinking about these legal requirements. So let's briefly recap.

We have seen that for any contract to be legally binding, it must contain the key elements of:

- offer;
- acceptance;
- consideration; and
- intention to create legal relations.

As we will see, the contract for the sale of an interest in land is special. We are dealing with a unique and finite commodity. Think about the room in which you are sitting as you read this course book. By definition, there is no other land on the planet occupied by the building where you are sitting. This uniqueness of land as a commodity means that there is an additional requirement for the creation of a valid contract in addition to the points given earlier, and that is: **a contract for the sale of land must be in writing.**

As we have seen, contracts in relation to the creation or transfer of an interest in land are governed by **s2 LP(MP)A 1989**. This provides that a contract for the sale or other disposition of an interest in land will be void unless the contract:

- is made **in writing**;
- **incorporates all the terms** which the parties have expressly agreed in one document or, where documents are exchanged, all the express terms are contained in each; and
- the document incorporating these terms or, where contracts are exchanged, at least one of the documents, must be **signed** by or on behalf of both the buyer and the seller.

The three elements of **s2** are summarised in **Figure 4.2g**.

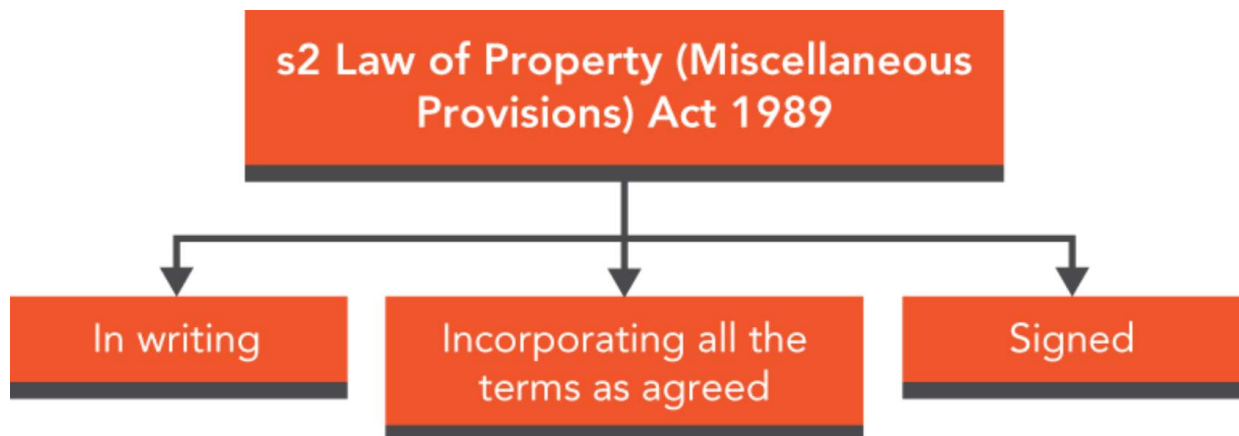


Figure 4.2g

The effect of a failure to incorporate all agreed terms can make the contract a nullity, that is, it will be void. In **Keay and Another v Morris Homes (West Midlands) Ltd [2012]**, a contract varying a pre-existing contract omitted a crucial term. The variation contract failed to include an alleged promise by the seller to carry out defined building works. The failure to

include this term in the variation contract meant that the variation contract was a nullity and could not be enforced as it did not comply with **s2 LP(MP)A 1989**, that is, it did not contain all relevant terms.

There are a number of points to note about **s2 LP(MP)A 1989**.

- The terms may be incorporated into a document either by being set out in the document or by reference to some other document.
- Contracts for items such as curtains and other fittings do not have to comply with **s2** although, for the avoidance of doubt, these items will usually be part of the main contract.
- Most importantly, contracts which relate to the sale of land do **not** actually transfer the ownership of the land itself



Link to Practice

As you will see, the seller's conveyancer will draft the contract for the sale of the property which their seller client is selling. The draft contract will be sent to the buyer's conveyancer in duplicate. This will give the buyer's conveyancer the opportunity to insert their buyer client's details on the front page of the contract, and both conveyancers will agree the terms of the contract as the transaction progresses. When the terms of the contract are agreed, the buyer's conveyancer will return one approved contract back to the seller's conveyancer. This will result in each conveyancer holding an identical contract, and

each will arrange for their respective seller and buyer clients to sign the contract.

When the conveyancers are ready to commit their clients to the transaction and exchange contracts, they will obtain their client's authority to do so. You will see later in the course book that The Law Society's formulae for exchange provide an extra safeguard because just prior to exchange, the conveyancers will go through the contracts together during the telephone call to confirm that each holds a signed identical part. Once exchange takes place, each conveyancer will send their clients signed part of the contract to the other conveyancer – so the identical contracts are literally “**exchanged**”.

As indicated earlier, the contract merely creates the agreement to buy and sell the specified property and the agreed date for the agreed price. In a residential conveyancing transaction, the moving date is the date of completion in the contract. It is the payment of the purchase money and handing over the signed transfer on the completion date, which actually transfers the legal ownership of the land from the seller to the buyer.

Transferring property rights summary

“**Property**” has a very specialised meaning in law. It refers to the rights a person has over that item. These property rights can be transferred from one person to another. Property

rights in most items are transferred either by **contract**, in which the item is exchanged for money, or by **gift**.

In English law, a valid contract consists of three elements:

- an **agreement** which consists of an **offer** by the owner to sell and an unconditional **acceptance** by the buyer of all the terms of the offer;
- an **intention** by the parties that they should be **legally bound**; and
- **consideration** – something of value – given by each party to the other.

The sale of land is not treated in the same way as the sale of goods. The transfer or sale of land from a seller to a buyer usually involves a three-stage process.

Sale “subject to contract” – an unenforceable agreement

At this stage, the buyer and seller informally agree the terms of sale; everything is “**subject to contract**”, which means that the sale is not yet binding. Either party can withdraw from the transaction or try to change the agreed terms, without any legal consequences. During this first stage, a contract is drawn up which states the terms agreed by the parties.

There are invariably two identical copies of the contract:

- one is signed by the buyer and
- one is signed by the seller.

Exchange of contracts – an enforceable agreement

The transaction becomes legally binding only when the contracts are exchanged, that is, the buyer receives the seller's signed contract and the seller receives the buyer's signed contract. At this point, the buyer is obliged to buy the property, and the seller is obliged to sell it. The terms of the sale, such as completion date and price, are fixed. If either side were to default, the innocent party could take court action against them. For example, if the seller refused to complete the transaction, the buyer could force the sale by seeking a decree of specific performance, or they could seek damages.

At this stage, the buyer does not have full property rights in the land, but they do hold an interest in it. They are not the legal owner and do not yet have the right of possession.

Completion – transferring the property

Completion occurs when the property is transferred to the buyer. This must be **by deed (s52 LPA 1925)**. The purchase price is paid at this stage and the buyer takes possession of the property.

Where title to the land is registered, the legal ownership of the land (legal estate) will only pass to the buyer once they are registered as owner (registered proprietor) in place of the seller. This is explained in the course book at **18.5.1**.

CONTINUE

4.3 Different types of document and their significance to conveyancing

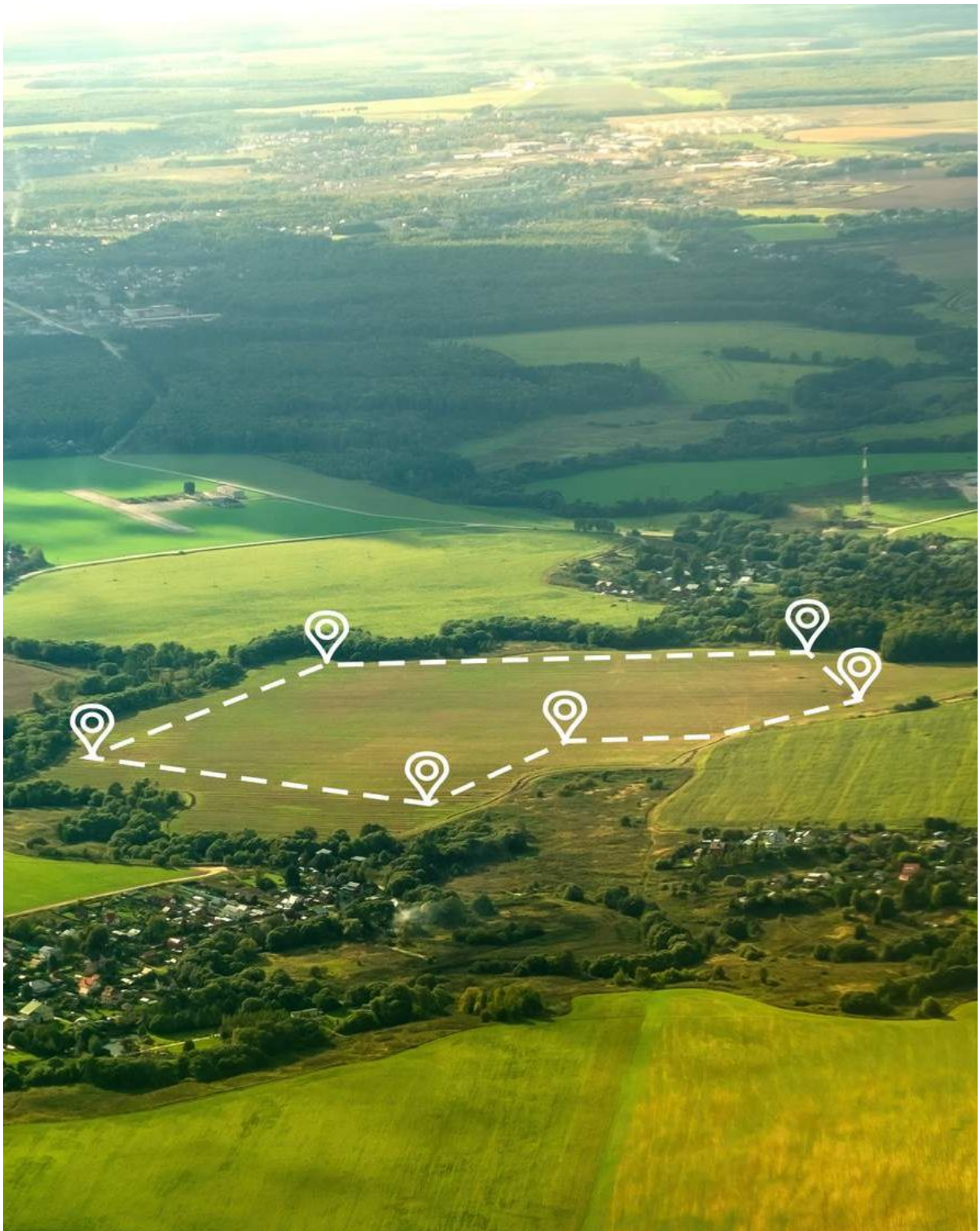
You will come across various types of document when dealing with conveyancing matters. We have already mentioned some of them. Summary of the main documents which you will come across and the significance of originals, photocopies, scanned copies and certified copies are given later.

4.3.1 Unregistered v registered land

As you have seen, when someone wants to sell a property, they must prove that they own the legal title to the land that they are selling.

There are two methods of proving ownership of title to land:

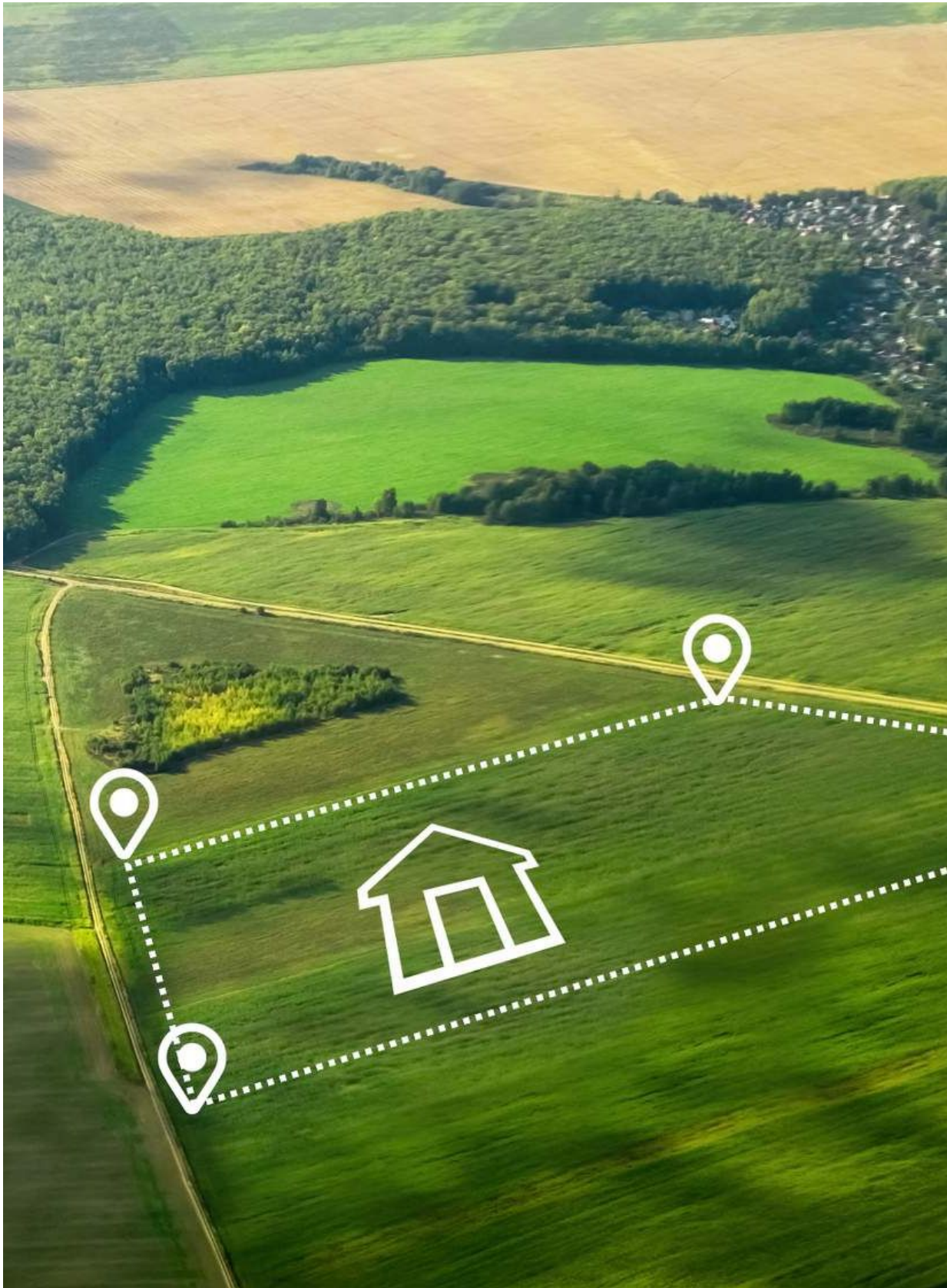
1. the unregistered system and
2. the registered system.



The unregistered system of conveyancing is the traditional method of conveyancing which goes back many hundreds of years and relies on the production of documents to prove ownership. These documents must be inspected every time the property changes hands. You can see that this would be expensive and time-consuming. In addition, if the documents are lost, this would mean that the

landowner would no longer be able to prove they owned the title to the land in question. These drawbacks of the unregistered system are the main reasons that the system of land registration as we know it today was introduced by the **Land Registration Act 1925**. Whilst this act was repealed by the **Land Registration Act 2002**, the system of registration of title to land with HMLR remains the cornerstone of land ownership in England and Wales.

Detail of the unregistered system is outside the scope of this course but you do need to understand the basic difference between the registered and unregistered systems of conveyancing. By way of recap, both systems run in parallel. HMLR contains more than 26 million titles showing evidence of ownership for more than 88 per cent of the land mass in England and Wales. When property with an unregistered title is sold, it is necessary to register that title with HMLR within two months of completion of the sale. The sale is known as a **“trigger”** for first registration of the title. There are other events which trigger first registration.



Once a title is registered with HMLR, the unregistered title documents no longer have any legal significance. The ultimate objective of the land registration legislation is for all of the land in England and Wales to be registered with HMLR. However until that time, conveyancers will need to be able to recognise and deal with unregistered titles.

CONTINUE

4.3.2 Conveyance

A conveyance is the document in the unregistered system of conveyancing which transfers the legal title of the land in question from the seller to the buyer in exchange for money. It is thus often referred to as a “**conveyance on sale**”. You will see that a conveyance is often written in old-fashioned, “legalistic” language. The seller is often referred to as the **vendor** and the buyer is referred to as the **purchaser**.

In the unregistered system, if someone wanted to give their land to someone, a deed of gift would be used. This is a deed which transfers the legal title of the land from the “**donor**” (the person making the gift) to the “**donee**” (the person receiving the gift). No money changes hands where a deed of gift is used, and it was used most often when someone wished to gift land to a family member.

CONTINUE

4.3.3 Transfer

The transfer is the registered land equivalent of the conveyance. This is the document which transfers the title of the land in question from the “**transferor**” to the “**transferee**”. The

transfer is more widely used than a conveyance because it can be used where someone wishes to gift the title of a piece of registered land to someone else.

A transfer will also be used when someone is selling land with unregistered title. As we have seen, this transaction will result in an application for compulsory first registration of the land in question. Thus, it is not necessary to use a conveyance these days even though the land will still be unregistered at the point of sale.

The most common type of transfer is where the whole of the land in a registered title is being transferred in which case a form TR1 will be used.

4.3.4 Transfer of part

As the name implies, this is a form of transfer which is used when a property owner is only selling part of the land that falls within their ownership. In this case, a form TP1 is used. This document can be used for registered or unregistered land. You will see a transfer of part where someone is selling part of their garden, perhaps for someone to build on. You will also see transfer of part when a developer is selling a new build property and an estate to a buyer.



Activity

Please go back and compare the TP1 and TR1 which you have already downloaded.

You will see that HMLR forms are quite straightforward to fill in because they contain instructions in the left-hand margin as to the basic information to be inserted into each numbered box.

Of course, with a transfer of part, the conveyancer still has detailed drafting to do to ensure that the property being sold and that being retained by the seller have all of the appropriate

rights that may be needed (for example, access over a driveway and the right to use the pipes, cables, etc. which serve the property).

CONTINUE

4.3.5 Declarations of trust

You will study co-ownership in [Chapter 6](#).

Co-ownership arises where two or more people acquire an interest in a piece of land. The most common example which conveyancers come across is where two people purchase a house together to live in. You will see that the conveyancer must advise their clients as to how the beneficial interest in the property is to be held. The clients have the choice of holding as joint tenants or tenants in common. If the parties decide to hold as tenants in common, you will see that the conveyancer will advise their clients to enter into a declaration of trust.

This is a document which sets out the circumstances of the purchase of the property by the co-owners and, most importantly, sets out how the sale proceeds should be divided between the parties as and when the property is sold or transferred. These documents can be complex and go into a lot of detail about the arrangements regarding the ownership of the property including issues such as how any mortgage payments are to be split, how maintenance costs are to be handled and possibly giving one party the right to buyout the other party in the event that one wants to sell and the other does not.

Note that the co-owners do **not** have to enter into a declaration of trust but it is advisable that they do so. The point of the declaration of trust is for them to set out at the time of purchase how the sale proceeds are to be

divided and to acknowledge their respective interests in the property. This may save a lot of argument in the event that the parties subsequently split up and cannot agree how the property proceeds should be divided.



Link to Practice

You should also understand that the declaration of trust deals with the behind-the-scenes beneficial interest in the property. It is therefore not a matter of public record, it is a private arrangement between the co-owners. You should not therefore send the declaration of trust to HMLR when making your application to register the co-owner's title.

CONTINUE

4.3.6 Mortgage deed

The mortgage deed is the document which a borrower will be required to sign when they take out a mortgage to fund the purchase of a property. The mortgage deed sets out the obligations between the borrower (buyer) and the lender. You will see in **Chapter 15** that a typical mortgage term for a residential property purchase is 25 years, thus the obligations set out in the mortgage deed could last for a long time. You may notice if you are in practice that a typical mortgage deed is very short, possibly only one page. This is because many

lenders incorporate their detailed mortgage conditions by reference in the mortgage deed rather than setting out in full in every document.

The mortgage deed will secure the obligation to pay the monthly mortgage payments and will require the borrower to keep the property in good condition and properly insured. If the borrower does not keep up their mortgage payments, the lender may take court proceedings to repossess the property and sell it to recover the money loaned to the borrower.

The conveyancer must ensure that the borrower signs the mortgage deed and that it is dated on the day of completion. The mortgage deed must be sent to HMLR with the application to register the borrower's title to ensure that the lender's security is protected by the creation of a first legal charge on the charges register. If the conveyancing firm uses the HMLR portal, a scanned copy of the mortgage deed will be submitted on registration. The conveyancer should check the particular lender's requirements in the Lender's Handbook to find out the lender's requirements regarding the original signed mortgage deed. As it creates the long-term relationship between the borrower and the lender obliging the borrower to make the mortgage repayments, some lenders require the original mortgage deed to be sent to them after completion of the transaction.

CONTINUE

4.3.7 Assent

An assent is another standard HMLR document. This is the document which a personal representative (PR) who is acting in the estate of someone who has died will use to transfer the ownership of a property to the person who is entitled to that property under the terms of the deceased's will or the intestacy rules. In this instance, the person receiving the title is known as the "**beneficiary**".

An assent can be used to transfer the title of land which is unregistered or registered. An assent is another activity which triggers first registration if the title to the land in question is unregistered. The most commonly used form of assent is the AS1, which is the assent of the whole of a title by PRs.

An interesting point is that if a single PR is also the beneficiary of the land in question, the law requires them to assent the property to themselves to effectively transfer the legal estate from the estate of the deceased to the person in their capacity as beneficiary (***Re King's Will Trust [1964]***).



Activity

Follow the link below and download the form AS1 to retain for your records. Compare it with the TR1 and note the differences.



Whole of registered title: assent (AS1)

Application form AS1: for personal representative(s) to assent the whole of a registered title.

[READ MORE GOV.UK](#)

CONTINUE

4.4 Statutory declaration

4.4.1 The purpose of the statutory declaration and swearing formalities

A statutory declaration is a written statement of fact that is signed in the presence of one of a specified list of people which include the following:

- a commissioner for oaths (which includes qualified chartered legal executives);
- a solicitor;
- a notary public;
- a Justice of the Peace (magistrate).

The purpose of a statutory declaration is for the person making the statement (known as the “**declarant**”) to confirm that the information contained in their written statement is true to the best of their knowledge, information and belief. The declarant will simply confirm that the contents of the document are true. Only an individual can make a statutory declaration so one should not be drafted in the name of a company.

Statutory declarations can be used in many situations but in a conveyancing context you are most likely to come across them when a property owner is being asked to confirm

circumstances regarding their property ownership, for example, that the declarant has used a right-of-way for many years.

The conveyancer acting for the declarant will usually draft the statutory declaration on behalf of their client. The document does not need to contain complex legal language. The purpose of the statutory declaration is for the declarant to confirm the accuracy of the contents contained within it and thus the information must be from the declarant's own knowledge. The declarant can include information from a third-party in their statutory declaration provided this is made clear in the declaration.

Very often a statutory declaration relating to conveyancing matters will have a plan attached to it which the declarant should also sign when making the declaration. An attachment to a statutory declaration is known as an "exhibit" and should be referred to in the body of the document.



Link to Practice



Note that an exhibit to a statutory declaration is usually numbered by reference to the initials of the declarant.

For example, if Keith Peter Treeves is making a statutory declaration, and there are three exhibits attached to the declaration, they will be numbered:

- KPT1;
- KPT2; and
- KPT3.

Note that if a conveyancer drafts a statutory declaration for a client, neither the conveyancer, nor anyone in their firm can be the person in front of whom the declarant confirms the contents of the document.

CONTINUE

4.4.2 The basic format

The statutory declaration will comprise a series of numbered paragraphs containing the facts/statement that the declarant is making.

The statutory declaration must start with the following wording:

I (name) do solemnly and sincerely declare, that/as follows.

It must end with the following wording:

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the **Statutory Declarations Act 1835**.

Declared at [FULL ADDRESS]

on [DATE]

Before me:

Signed.....

Commissioner for oaths [OR AS APPROPRIATE]

CONTINUE

4.4.3 The difference between a statutory declaration and a statement of truth

A statutory declaration was the main way of demonstrating occupation of a piece of land or claiming title to a piece of land where the title deeds had been lost for many years. The statutory declaration might be sent to HMLR with an application to register title to the land in question or to support an application to note a right-of-way on a register, for example. However, since 10 November 2008, HMLR will accept an alternative document to a statutory declaration in certain circumstances, known as a statement of truth (as defined in **r215A LRR 2003**).

A statement of truth is a method of providing evidence in support of an application made to HMLR. They might be used in the following situations:

- when an application for registration is made based on adverse possession, that is, based on possession of the land in question and not documentary evidence; and
- when an application is made to register a right acquired by long user, known as prescription.

HMLR Practice Guide 73 contains more details.

Before November 2008, the normal method of providing this evidence was by statutory declaration. After this date, HMLR adopted statements of truth as an alternative form of evidence, following the precedent set by the civil courts.

Except where a procedure requires the production of a statement of truth, a conveyancer can choose to use a statutory declaration or a statement of truth to provide the evidence from their client. However, a major reason to use a statement of truth would be that the person making the statement simply has to sign and date the document, there is no need to swear or affirm the document in front of a commissioner for oaths for example.

There are various requirements for a statement of truth as follows:

- It must be in writing.
- The statement of truth must be signed. HMLR will accept the signature in 'wet ink' but note that they will now accept a statement of truth signed using a conveyancer-certified electronic signature. The procedure set out in section 3.4 of Practice Guide 82 must be followed.
- It must contain a declaration of truth using the following words: *"I believe that the facts and matters contained in this statement are true"*.
- If a conveyancer makes the statement of truth or signs it on someone's behalf, the conveyancer must sign it in their own name and state their

capacity (as opposed to signing it in the name of the firm).

HMLR has different forms of statement of truth for different situations but the two most common likely to be encountered in day-to-day conveyancing are:

- **Form ST3** – statement of truth in support of an application for registration of land based on lost or destroyed title deeds; and
- **Form ST4** – statement of truth in support of an application for registration and/or noting of a prescriptive easement.



Activity

Follow the link below to HMLR's Practice Guide 73. Look at Section 2 of the practice guide and download the five forms of statement of truth to retain for your own records. In particular, look at the information required for forms ST3 and ST4.



Practice guide 73: statements of truth

Please note that HM Land Registry's practice guides are aimed primarily at solicitors and other conveyancers. They often deal with complex matters and use legal terms. A statement of truth is a method of providing evidence in support of an application you send to HM Land Registry.

[READ MORE GOV.UK](#)

CONTINUE

4.5 Documents – originals and copies

4.5.1 The significance of original documents

The importance of original documents in conveyancing cannot be overstated. As you have seen, if the title to a piece of land is unregistered, that is not registered with HMLR, then the documents of title are the only evidence of the seller's ownership of the land in question. If they are lost, an application for title to the land must be made to HMLR based on lost title deeds. The likely outcome is the award of possessory title rather than title absolute.

The significance of an original will is similarly important. When a person dies, their will must be located if they have made one. This is the document which sets out how the deceased wishes their estate to be divided. If the will is destroyed or lost whilst in the custody of a law firm, it is likely that the firm will be negligent if beneficiaries named in the will missed out on their entitlement due to the loss of the will.



If a person dies and has not left a valid will, their estate will be divided in accordance with the intestacy rules. This is a strict list of entitlement and, broadly, follows the bloodline of the deceased. You can see, therefore, that the beneficiaries under a person's will could be very different to the people entitled under the intestacy rules.



It is thus vital for a law firm to ensure that original documents are kept safe and this will often involve the documents being properly catalogued and kept in a deeds strong room which must be fireproof.

In addition, if a firm holds an original will, it is important to ensure that it is not damaged, for example, by having something stapled to it or attached with the paperclip. If this happens, it could lead to difficulties as and when a grant of probate is applied for. If the probate registry thinks that something else has been attached to a will, they may require further information as to what was attached to be provided. This would usually be explained in a document called an "**affidavit of plight**".

CONTINUE

4.5.2 Holding deeds on undertaking to a lender; when to release originals

If a mortgage is created over land with an unregistered title, the lender will hold the title deeds as security for the loan. The purpose of this is to ensure that the legal owner cannot sell the property without the lender's knowledge or consent. Contrast this with the registered system where the lender's mortgage is registered on the charges register of title.

If a conveyancer is instructed on the sale of a property with an unregistered title, the first task is to locate the unregistered title deeds. These might be held by the seller or another law firm. However, if there is a mortgage over the property, they will be held by the lender. In this case, it will be necessary to write to the lender to request release of the title deeds to the seller's conveyancer. They will give an undertaking to the lender to hold the unregistered title deeds "to the order" of the lender. This means that the seller's conveyancer cannot release the unregistered title deeds to anyone until the lender's mortgage is paid off on completion.

So **how does the seller's conveyancer demonstrate the seller's title to the buyer's conveyancer if they cannot release the title deeds?** The answer to this question is that the seller's conveyancer will produce an epitome of title. This is a chronological list of the documents of title which will demonstrate the seller's ownership together with a photocopy of those documents attached.

The seller's conveyancer will redeem the lender's mortgage out of the sale proceeds on completion. They will send the original mortgage deed to the lender to receipt and return. Once the mortgage is paid off, the seller's conveyancer has complied with the undertaking to hold the deeds to the order of the lender and is then able to send the original title deeds, as per the epitome of title, to the buyer's conveyancer together with the transfer signed by the seller.

CONTINUE

4.5.3 The status of photocopied documents; they are not a good link in a chain of ownership and are not acceptable to HMLR in a registration application

We have seen that the seller's conveyancer will produce an epitome of an unregistered title by attaching photocopies of the original title documents to the epitome front sheet. The provision of photocopies of these documents as a means of proving the seller's title is acceptable as a first step.

You can see from the epitome front sheet at **Figure 4.5** that the documents attached to the epitome are numbered, and the details of the date and parties to the document are specified. There is a column on the right-hand side indicating whether or not the original document is to be handed over on completion. The buyer's conveyancer must look at this column very carefully. In most cases, the buyer's conveyancer will expect the original of all documents to be handed over on completion including, for example, conveyances and receipted mortgage deeds.

EPITOME OF TITLE

Drovers Cottage, Dunston Heath, Stafford, Staffordshire

Number	Date	Details	Parties	Original
(1)	15.2.1978	Conveyance	Julian Nelson (1) Agatha Birch (2)	Yes
(2)	15.2.1978	Mortgage (with vacating receipt)	Agatha Birch (1) Midland Bank (2)	Yes
(3)	6.12.1980	Deed of Gift	Agatha Birch (1) Jayne Birch (2)	Yes
(4)	6.12.1980	Land Charges Search results	Julian Nelson, Agatha Birch	Yes

Figure 4.5

There are some documents which will not be handed over on completion because these will be kept by the seller. A grant of probate would be an example of such a document.

The status of the documents which the buyer's conveyancer will receive on completion is very important. This is because a mere photocopy is not acceptable to HMLR, meaning that they will not rely on a photocopy of an original document to prove the contents of it. Thus, a photocopy is not a good link in the chain of title. In addition, a photocopy of a title document is not acceptable in civil proceedings as proof of the contents of that document.

CONTINUE

4.5.4 A “certified copy” and how it is produced

So, the next question to be asked is: **if it is not possible to produce an original, what is an acceptable substitute?**

The answer to this question is the production of a certified copy. **Note** that you will come across certified copies of documents in other areas of law but we are particularly concerned about them in relation to conveyancing and private client. A certified copy of a document is a photocopy of a document upon which someone has certified that it is a true copy of the document at a given date.

Generally, a certified copy of a document is produced first by taking a complete copy of the original document (including colour copies of any plans attached to that document).

The person certifying the document will then either write or use a stamp which states as follows:

‘I certify that this is a true and complete copy of the original.’

The person certifying the certified copy will then need to sign it, print their full name and write the name and full address of the law firm for which they work and add the date. Some firms will have a stamp containing the firm’s details but the signature and date must be in wet ink by the signatory.

It is generally **not** necessary to certify each page of a document although, there are **exceptions**, such as certification of powers of attorney.

The certification will be given in the name of the law firm although the person signing on behalf of the firm will usually print their name. If they are a qualified lawyer, they will indicate as much.

In addition to certifying conveyancing documents as being true copies of the original, you will also come across certified documents when carrying out due diligence and identification procedures in relation to new clients because your firm will often photocopy and certify documents such as passports, photocard driving licences, utility bills and bank statements as being true copies of the original. In addition, photographic identification might also be certified as being a “**true likeness**” of the individual.

A document must be certified by a professional person or someone of “**good standing**” for example, a chartered legal executive, a solicitor or notary, bank or building society official, accountant, teacher or lecturer, dentist or minister of religion.

Many law firms have specific requirements regarding who can certify documents which are being provided by a client for identification purposes. This information will be contained in your firm's policies. If you are in any doubt as to whose signature is acceptable to your firm, check the policy.

In conveyancing and probate transactions, a document will most commonly be certified by someone in another law firm.

The central issue in relation to certifying documents is the ability to check, where possible, that the person certifying or the firm exists.

CONTINUE

4.5.5 An examined copy of a document

An earlier alternative to certifying a document as an original is the production of an "examined copy". You will come across this most frequently in relation to an unregistered title. A conveyancer will write the following on a photocopy of the original document:

'Examined against the original at the offices of [insert firm name]'

The conveyancer who examined the document will then sign and print their name and will insert the date. These words are often written in the margin of the document which has been examined. This means that the solicitor has checked the copy of the document against the original.

In essence, this is an older alternative to certifying a document as a true copy of the original.

It is necessary to check that an “original” certified or examined version of the document in question will be handed over. This means checking the document to ensure that you are looking at an original wet ink signature rather than simply a photocopy of the certified or examined document.

An examined copy of a document is acceptable to HMLR.

CONTINUE

4.5.6 An abstract

An even older practice which you might come across in relation to unregistered conveyancing is an abstract of title. Before photocopiers were commonplace, conveyancers acting on the sale of unregistered land had the same problem that we have today namely that original documents cannot be sent to the buyer’s conveyancer with the draft contract. The conveyancer acting for the seller would therefore prepare an abstract of the title which is a written summary of the documents of title. These used to be hand written but were typed in later years. An abstract of title is a difficult document to interpret because a strange conveyancing “shorthand” is used.

If an abstract of title is being used as a link in an unregistered chain of ownership, it is necessary to ensure that it is an “**examined abstract**” meaning that the abstract must be noted as having been examined against the original documents as above.

4.5.7 An “office copy” of a grant of probate (or letters of administration)

When somebody dies, their personal representatives (PRs) will often need to make an application to the probate registry to obtain a grant of representation. This is the formal document which has a copy of the will attached to it if there is one and is used by the PRs to prove that they have the authority to deal with the assets of the deceased.

If somebody has died leaving a will —

If somebody has died leaving a will, their PRs are called “**executors**”. In fact, the authority of executors to act stems from the will and it is not strictly necessary for a grant of probate to be presented to prove this authority but all banks and building societies will want to see a copy of the grant and it will certainly be required if the executors have to sell a house which falls within the estate.

If someone dies without leaving a will —

If someone dies without leaving a will, their PRs are called “**administrators**”. They do not have authority to act until the grant is issued, and in this case, it is a grant of letters of administration.

There are other forms of grant but these are the most common types of grant in a conveyancing and private client context.

The PRs are faced with a dilemma because they need to retain the original grant but will need to produce copies to banks, building societies and in a conveyancing context to prove

that they are entitled to deal with the land in the estate. It is possible for them to produce a certified copy of the grant which is acceptable.

However, in many cases, the PRs will obtain a few official copies of the grant; these are known as “**office copies**” of the grant.

An office copy of the grant is an official copy which has the imprint of a court seal on it.

From 25 March 2019 the probate registry issues grants of probate containing:

- 1 a digital signature instead of a signature in ink and the old-style version;
- 2 a digital seal instead of the embossed seal and the old-style version;
- 3 a validation telephone number which an interested party can call to check the authenticity of the grant if necessary; and
- 4 a high security hologram.

Grants in the old-style format will continue to be valid.

Note that the online application process through MyHMCTS automatically asks the practitioner to key in how many extra official copies of the grant are required and states the fee for these (you automatically get one free copy).

4.5.8 Use of the HMLR portal; HMLR destroys original documents; the significance to a first registration application for title to land at HMLR

Conveyancers working in law firms which have access to the HMLR portal can use the portal to:

- apply to change the register;
- submit applications and registrations;
- access information from the land register, for example, downloading official copies and title plans;
- apply for searches, for example, official searches with priority and bankruptcy searches;
- get alerts when application results are available to download; and
- reply to notifications online received from HMLR.

HMLR's Map Search service is also available via the portal.

For many years, conveyancers made applications to HMLR using paper copies of the application forms and enclosing either original or certified copies of the documents being

submitted for registration. This process involved completing the appropriate application form and sending it to HMLR via the post or document exchange service with the documents and a cheque for the fee if the firm did not have an account with HMLR. Some firms still adopt this process.

However, most conveyancing firms will use the portal due to the speed and simplicity and the fact that it is not necessary to send documents to HMLR. The firm will complete the appropriate forms and will scan the accompanying documents to create PDFs. These will then be uploaded to HMLR's portal to make the application and the fee will be taken direct from the firm's client account.

Whilst this procedure undoubtedly has the benefit of speed and simplicity it is very important for a firm applying to HMLR to ensure that the documents submitted to HMLR are copied from originals or certified copies as described earlier and are not just scanned from photocopies.

HMLR also has a procedure whereby applications for first registration of title can be submitted using certified copies as opposed to the originals. However, note that in so doing, the conveyancer making the application has to certify that copies have been taken from the originals and further submit a certificate to HMLR confirming that the original documents are in the control of the firm making the application.

It is very important for conveyancing firms to carefully consider what documents are being sent to HMLR and to avoid sending original documents. This is because HMLR now has a policy of destroying original documents once they have been scanned and retained by HMLR.



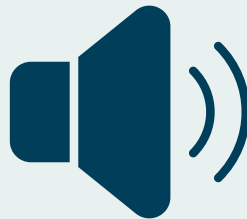
Activity

HMLR has a lot of useful information on its website including screenshots and step-by-step guides as to how to use its services.

Follow the link below and scroll through the explanatory notes and screenshots as to how to make an application for registration via the Digital Registration Service.

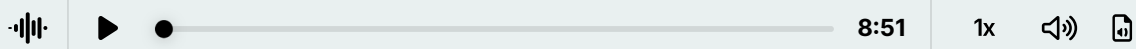
[Digital Registration Service - GOV.UK](#)

The video called **Digital Registration Service Demo: Transfer for Value** will show you the certification process and options.



Law Explained

In this recording we'll be focusing on the topic of deeds and looking at their importance in property law and conveyancing transactions.



Audio Transcript —

In this recording we'll be focusing on the topic of deeds and looking at their importance in property law and conveyancing transactions.

So, first of all, **what is a deed?** The word deed may perhaps initially bring to mind a very old document written by hand in old fashioned language and perhaps even bearing a wax seal. It's true that old deeds can look like this, but modern deeds are very different! Many modern deeds are simply word-processed documents or even standard forms.

Essentially, a deed is a formal written document which must be signed in accordance with specific legal requirements.

Before looking in more detail at when a deed must be used, it's important to appreciate that for a document to be a deed, it must comply with the correct formalities. If it doesn't, then it's not a deed.

The current requirements for a valid deed are set out in Section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. These requirements have applied since 31 July 1990. Prior to this, it was necessary for deeds to be signed, sealed and delivered which is why you may come across older deeds with seals on them.

The current requirements under Section 1 are that the deed must be in writing, must make it clear on its face that it is intended to be a deed and must be validly executed as a deed by the parties to it.

So, **what does all this mean in practice?**

The fact a deed must be in writing doesn't of course mean it has to be hand written. It can be typed or can be a printed form. If you look at a standard mortgage deed for example, this will be a printed form using the particular lender's own layout and branding. If you look at a TR1 transfer deed, this is a standard Land Registry form.

The fact the document must make it clear it is intended to be a deed, is usually dealt with by the wording of the document. It can for example describe itself as a deed, or state it is signed as a deed. For instance, the document may start with the words "This Deed dated" or a mortgage deed will be clearly headed "Mortgage Deed". The clauses where the borrowers sign the mortgage deed will clearly state "Signed as a deed", as will the signature clauses in the transfer Form TR1.

"Execution" is the technical word used to mean the signing of the deed. Basically, in order to be valid, the deed must be signed, witnessed and delivered.

So, **how must it be signed?** Under Section 1, the deed must be signed by an individual in the presence of a witness who then signs to confirm that they have witnessed the individual's signature (known as attesting). Alternatively, a deed can be signed at the direction of, and in the presence of, the individual, if attested by two witnesses who are present. So, for example, if a person was not able to sign themselves because they had a medical condition affecting their hands, they could ask

someone else to sign for them as long as they were present. In that case, two witnesses to the signature would be needed.

The deed must also be delivered. This doesn't mean it has to be physically delivered in the sense of taking it anywhere. It's sufficient that the person granting the interest in the deed makes it clear that they intend to be bound by the deed. This is normally inferred from the fact that the person signed it. If a lawyer is acting for a client and sends the executed deed to the other party's lawyer in the course of a normal conveyancing transaction, the lawyer is presumed to act on behalf of the client and this satisfies the delivery requirement.

It's important to appreciate that if the document does not comply with these formalities, it is not a deed, even if it is labelled as one!

So, **why it is relevant whether a document is a deed or not?**

The main reason is because a deed is required in certain circumstances. At this stage it is important to note that a contract for the sale of land is not in the form of a deed. A contract must be signed by the parties but it does not have to meet the requirements for a deed. For example, the signatures on a contract for the sale of land don't have to be witnessed.

So, **when is a deed required?**

Essentially, if you want to create or transfer a legal estate or interest in land, you must use a deed. This is governed by Section 52 of the Law of Property Act 1925.

Let's take some examples to illustrate this, starting with legal estates under s1(1) of the Law of Property Act 1925:

A freehold estate, more technically known as a fee simple absolute in possession, must be created by deed to be a legal estate. The transfer of a legal estate must also be by deed. So, if Oliver sells his freehold house to William, a transfer deed must be used in the conveyancing process, most commonly Form TR1.

A leasehold estate, more technically known as a term of years absolute, must also be created by deed to be a legal lease.

There is one limited exception for the creation of certain short leases for three years or less, but this is just an exception for these specific leases. The exception is mainly there for practical reasons, in the sense that there are millions of these short-term leases in existence and it would not really be practical to insist on a deed being used every time.

So, if Marko wanted to grant Simon a lease of a house for ten years, this would have to be by deed if the lease was to be a legal lease.

Section 1(2) of the Law of Property Act 1925, sets out the interests in land which are capable of being legal interests. To actually be legal interests, they must (with very limited exceptions) be created by deed.

Let's look at a couple of examples:

Easements are one type of interest dealt with in Section 1(2). Imagine for example that Arshad has agreed to grant Emma a right to use a driveway situated on his land. This will be an expressly granted easement for Emma to use the driveway. This might be important to Emma if, for instance, there was otherwise no access to her garage from the road. If this expressly granted easement is to be a legal easement it must not only be granted for a period equivalent to a legal estate (meaning for ever or for a definite time period such as ten years) but it must be granted by deed. If a deed is not used at all, or if the formalities for a valid deed are not met, this easement cannot be a legal easement. It might be an equitable easement if it is in writing, but it won't be a legal one.

Another interest dealt with in Section 1(2) is a charge by way of legal mortgage, which is the main way of creating a legal mortgage. To be legal, the charge must be expressed to be by way of legal mortgage and must be made by deed.

So, if for example, Amber was buying a house with the assistance of a mortgage loan, the lender would require Amber to enter into a mortgage deed to secure the loan against the property by way of legal mortgage. If a deed was not used, the lender could not have a legal mortgage.

It's relevant to note that any interest which doesn't qualify as a legal estate or legal interest under Sections 1(1) or 1(2) of the Law of Property Act 1925, can only be equitable at best. So, interests which don't comply with the required formalities for a legal interest (in this context because no valid deed has been used) can only be equitable.

Equitable interests do not have to be created or transferred by deed. However, even equitable interests have to comply with some formalities, for example, they must (with specified exceptions), be created in writing, due to the requirements of Section 53(1) of the Law of Property Act 1925.

For example, a lease for 99 years which was not created by deed, but which was in writing, which contained all the agreed terms and which had been signed by the parties, would be an equitable lease.

It is important for lawyers to know whether rights are legal or equitable as there are some significant differences between them. One key difference concerns the way in which they are enforceable against third parties, such as later buyers of the land. This has significance for conveyancers and buyers when properties change hands. A buyer would want to know, for example, whether they were still able to use a right of way over a drive, currently used by the seller. In very general terms, legal rights are normally regarded as being "better" and more secure than equitable ones, as they are more likely to be binding on later buyers of the land.

As you can see, deeds have a great significance in terms of both land law and conveyancing practice, hence the need for lawyers to take care that, if they intend to create a deed, the proper formalities are complied with!

CONTINUE

Knowledge check

This knowledge check is a self-assessment to see how well you understood the content of this chapter and it does not count towards your course mark.

There are 3 questions in this knowledge check.

1. Which of the following is **not** a requirement for the creation of a valid deed under **s1 Law of Property (Miscellaneous Provisions) Act 1989**?

- ☐ a. It must make clear on the face of the document that it is intended to be a deed
- ☐ b. It must be in writing
- ☐ c. It must be validly executed by the parties
- ☐ d. It must include a statement on the face of the document that it is signed, sealed and delivered as a deed

SUBMIT



Complete the content above before moving on.

2. What is the contractual significance of an auctioneer's hammer going down at an auction?

- ☐ a. The bidder's offer is accepted
- ☐ b. The auctioneer makes an offer which the bidder accepts by signing the sale documents subsequently
- ☐ c. The auctioneer makes an invitation to treat

SUBMIT



Complete the content above before moving on.

3. Which of the following people can a statutory declaration be made before?
(Select 3 correct answers)

- ☐ a. Magistrates
- ☐ b. A notary public
- ☐ c. Any professional person
- ☐ d. A qualified chartered legal executive

SUBMIT



Complete the content above before moving on.

4.6 Chapter summary

(1) A contract is an agreement giving rise to obligations which are enforceable or recognised by the law.

(2) A deed is a written document which has to be signed with specific formalities and by which an interest, right or property passes or is confirmed or by which a binding obligation is created.

(3) A deed is required for the transfer of a legal estate.

(4) A deed must be in writing, make it clear that it is intended to be a deed and validly executed.

(5) In most cases, deeds and contracts are signed using wet ink signatures.

(6) There is case law confirming that contracts for the sale of land signed electronically are valid.

(7) Essentials of a valid contract:

- (a) agreement – offer and acceptance;
- (b) consideration; and
- (c) intention to create legal relations.

(8) In addition, for the sale of land, a contract must be in writing.

(9) There are various documents of relevance to the conveyancing transaction.

(10) Conveyance is the document in the unregistered system of conveyancing which transfers the legal title from the seller to the buyer in exchange for money.

(11) Transfer is the registered land equivalent of the conveyance (TR1 (transfer of whole) and TP1 (transfer of part) are the most common).

(12) Declaration of trust sets out the circumstances of the purchase of a property by co-owners and how the sale proceeds should be divided as and when the property is sold or transferred.

(13) Mortgage deed sets out the obligations between a borrower and a lender.

(14) Assent is used when a PR is acting in the estate of someone who has died transfers the ownership of a property to a beneficiary.

(15) Statutory declaration is the written statement of fact signed in the presence of a specified list of people including a commissioner for oaths or notary public.

(16) Statement of truth is a method of providing evidence in support of an application made to HMLR.

(17) Original documents must be kept safe, preferably in a strong room.

(18) Photocopied documents are not a good link in a chain of ownership and are not acceptable to HMLR.

(19) A photocopy of a document can be certified as a true copy; a less common alternative is an examined copy of a document or an abstract of title.

(20) PRs will obtain an original grant of representation authorising them to act in the estate of a deceased; they will often obtain additional copies known as “**office copies**”.

You have completed Chapter 4.

EXIT