

PROPERTY: OVERVIEW:
CONTRACT FOR THE SALE OF LAND

Contracts for the sale of land

A contract for the sale of land, or of any interest in land, is void unless it complies with s 2 Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989). It must:

- be in writing
- contain or incorporate all of the terms expressly agreed by the parties, and
- be signed by or on behalf of the parties

If a contract is varied after exchange then the variation must be in a document that itself complies with s 2.

It is possible that the elements required to comply with s 2 could be contained in an email. The judge in *J Pereira Fernandes v Mehta* said that he had 'no doubt that if a party creates and sends an electronically created document then he will be treated as having signed it to the same extent that he would in law be treated as having signed a hard copy of the same document'. Consequently, any email that contains the terms of a proposed agreement should state that they are 'subject to contract' to avoid inadvertently and prematurely creating a binding agreement.

In *Khan v Clements* the parties' solicitors exchanged contracts without checking that the draft transfers were in identical form. Each side then argued that its own version of the contract formed the basis of the deal. The court held that there was no contract capable of satisfying the requirements of s 2.

In exceptional cases the court has 'saved' contracts from the full rigour of s 2 by finding that terms omitted from the contract did not relate to the sale of the land, but formed a separate 'collateral' contract.

S 2 does not affect the creation or operation of resulting, implied or constructive trusts. Consequently, the court may also excuse non-compliance with s 2 where equity demands enforcement of the parties' bargain. There were concerns that excessive use had been made by the courts of this equitable jurisdiction, detracting from the policy of contractual certainty that underpinned the 1989 Act. The House of Lords' recent ruling in *Yeoman's Row v Cobbe* suggests that in commercial transactions the court will be reluctant to assist a person who has failed to ensure his own protection by exchanging a valid contract.

Standard Conditions of Sale

Both residential and commercial contracts are generally formed by incorporating standard conditions. For residential contracts the current form is the Standard Conditions of Sale (4th edn) (the 'SCs'), and for commercial the Standard Commercial

Property Conditions (2nd edn) (the 'SCPCs'). Where standard conditions are incorporated the parties may decide to exclude or vary them. Exclusions or variations will be set out in the special conditions and will prevail over the standard conditions.

The SCs and SCPCs both provide that the sale will be with full title guarantee unless the contract states otherwise. In any case where limited, or no, title guarantee is to be given an express provision is needed to negate that standard condition.

The standard conditions for residential and commercial transactions take a different approach to the passing of risk. The SCs provide that risk remains with the seller on exchange. Consequently, if the property is destroyed or damaged between exchange and completion the buyer may withdraw from the transaction. The SCPCs are silent on this point so that the 'open contract' position applies and risk passes to the buyer on exchange.

The SCPCs are divided into 'Part 1' and 'Part 2' conditions. The 'Part 2' conditions will apply only if (and to the extent) that they are specifically incorporated into the contract. They deal with (i) VAT, (ii) capital allowances and (iii) reversionary interests in flats and in each case provide a 'menu' of clauses to fit the requirements of the transaction. For VAT alternative clauses are given for use where the transaction will be exempt, standard rated or the transfer of a going concern.

Enforcement

Time is not of the essence for completion. A strict deadline for completion, and for termination if that deadline is not met, must be established by serving a notice to complete. Only if the defaulting party still does not complete can the other party terminate the contract. Both the SCs and the SCPCs cater for service of a contractual notice to complete. In each case the person serving the notice must be 'ready, willing and able to complete'. The court has held that a seller was 'ready, willing and able' even though it did not have, among other things, the resignations of the outgoing directors and new bank mandates for the buyer available. These were merely administrative matters which could have been put in place very quickly had the buyer been ready to complete.

Where one party is in fundamental or 'repudiatory' breach of the contract (eg by misrepresentation), the other party may terminate the contract and claim damages. No notice to complete is required.

Where the buyer is in default and the contract is terminated (or where specific performance is not ordered) the seller is generally entitled to retain any deposit received. However, the court always has discretion to order the deposit's return to the buyer. Factors may include whether the seller will suffer any loss or if the seller is itself responsible in some way. The court has no power to return part of the deposit. It is all or nothing. The court may decide not to order its return if that would leave the seller significantly out of pocket.

Clauses purporting to exclude s 49(2) LPA 1925 serve no purpose. A seller can still sue a buyer and claim damages for any loss as a result of the failure to complete. This could cover the difference between the contractual price and the price for which the seller eventually sells the property as well as any additional expenses on the subsequent sale.

PROPERTY: PRECEDENT:
CONTRACT FOR SALE: FREEHOLD SUBJECT TO LEASES

DATE *[insert date of contract]*

PARTIES

[insert name of Seller] of *[insert address]* *[incorporated in England and Wales with company registration number]**[insert company registration number]* (the 'Seller')

[insert name of Buyer] of *[insert address]* *[incorporated in England and Wales with company registration number]**[insert company registration number]* (the 'Buyer')

1 Definitions

Arrears	the amounts due from the Tenants up to and including Completion but which have not been received by the Seller or its agents as cleared funds before Completion
[Charges]	[the charges appearing at entr[y][ies] <i>[insert entry numbers]</i> on the Charges Register of title number <i>[insert title number]</i> at <i>[insert date of official copy entries]</i>
[Chattels]	the items listed at Schedule [1]
[Chattels Price]	£ <i>[insert figure]</i>
Completion	the date of the Transfer of the Property and references in the Standard Conditions to 'actual completion' are to be read accordingly
Completion Date	<i>[insert date]</i>
Deposit	<i>[insert figure]</i> % of the Price
Occupational Leases	the leases[, licences] and supplemental documents listed in Schedule [2] and any other supplemental document entered into by the Seller in connection with the management of the Property between today and Completion
Property	the freehold property known as <i>[insert details]</i> registered at the Land Registry under title number <i>[insert title number]</i>
Price	£ <i>[insert figure]</i>
Standard Conditions	the Standard Commercial Property Conditions (Second Edition) and references to 'Part 1 Conditions' and 'Part 2 Conditions' are to the conditions so designated within the Standard Conditions
Tenants	any person in occupation under the Occupational Leases
Transfer	the transfer of the Property from the Seller to the Buyer in the form annexed to this contract
VAT	value added tax payable by virtue of the Value Added Tax Act 1994 or any similar tax levied in addition to or by way of

replacement for VAT

2 Interpretation

- 2.1 Words and phrases defined in the Standard Conditions have the same meaning in this contract, unless they have been defined in clause 1.1
- 2.2 Clause headings are for reference only and do not affect the construction of this contract
- 2.3 This contract incorporates the Part 1 Conditions, except to the extent that they are varied by or inconsistent with the terms set out in this contract.

3 Agreement to sell

The Seller will sell and the Buyer will buy the Property for the Price [and the Chattels for the Chattels Price] in accordance with this contract

4 Deposit

Payment of the Deposit is to be made either by direct credit or, if the Seller's Solicitors agree (and the Seller gives the Seller's Solicitors authority so to agree), by a cheque drawn on a solicitor's client account held at a clearing bank. The Deposit will be held by the Seller's Solicitors as stakeholder in accordance with Standard Condition 2.2.2

5 Title

- 5.1 Standard Condition 6.2 does not apply to this contract
- 5.2 **[For registered land]:** [The Seller is registered at the Land Registry as proprietor with *insert class of title* to the Property, and the Buyer, having received from the Seller before the date of this contract an official copy of entries subsisting on the register of the Property [and of any title plans and copies or abstracts of any documents noted on that title [other than the Charge[s]]] and copies of the Occupational Leases, must accept the Seller's title without further enquiry or requisition

[For unregistered land]: [Title to the Property will begin with *specify root of title*]. The Seller's title, including copies of the Occupational Leases, having been produced to the Buyer before the date of this contract, the Buyer will accept the Seller's title without further enquiry or requisition]
- 5.3 Standard Condition 6.4.2. is varied by the deletion of the words 'if to do so is reasonable' and the addition in their place of the words 'if the contract so states' and by the deletion of the words 'to obtain or pay for' and the addition of the words 'at the Buyer's expense' in their place, and by adding the following at the end: 'the Seller shall not be required to include any matter in the statutory declaration which is not, after reasonable enquiry, within [its] [the] personal knowledge[.][of *insert name of individual who is to make the statutory declaration*]

If you would like to receive the complete version of this document please email: lexispsl@lexisnexis.co.uk

PROPERTY: PRECEDENT: DRAFTING NOTE:
CONTRACT FOR SALE - FREEHOLD, VACANT POSSESSION

Clause 1 — Definitions 'Chattels'

A separate definition of Chattels is included to identify items of particular importance or value to the Buyer, and to allow for apportionment of the Price between the Property and the Chattels. Stamp Duty Land Tax is not payable on any part of the Price properly attributed to Chattels. However, the value attributed to the Chattels must be realistic. Attributing excessive value to Chattels as a means of reducing or avoiding liability to pay Stamp Duty Land Tax can amount to the fraud on the Revenue. A separate definition of Chattels is included to identify items of particular importance or value to the Buyer, and to allow for apportionment of the Price between the Property and the Chattels. Stamp Duty Land Tax is not payable on any part of the Price properly attributed to Chattels. However, the value attributed to the Chattels must be realistic. Attributing excessive value to Chattels as a means of reducing or avoiding liability to pay Stamp Duty Land Tax can amount to the fraud on the Revenue.

Saunders v Edwards [1987] 2 All ER 651

Clause 4 — Deposit

This clause assumes that the Deposit will be held as stakeholder, which is the default position under the Standard Conditions. If the parties have agreed that the Deposit may be used for the Seller's own purchase or other transaction it should be held as agent, and this clause will require amendment. Where a deposit is held as agent, a charge to VAT is triggered when the Deposit is paid over (ie on exchange of contracts). Where the Deposit is held as stakeholder, the relevant 'tax point' is completion of the sale and purchase. This clause assumes that the Deposit will be held as stakeholder, which is the default position under the Standard Conditions. If the parties have agreed that the Deposit may be used for the Seller's own purchase or other transaction it should be held as agent, and this clause will require amendment. Where a deposit is held as agent, a charge to VAT is triggered when the Deposit is paid over (ie on exchange of contracts). Where the Deposit is held as stakeholder, the relevant 'tax point' is completion of the sale and purchase.

Higher Education Statistics Agency v Commissioners of Customs and Excise [2000] All ER (D) 413

Clause 16 — VAT

The conditions set out in Part 2 of the Standard Conditions are incorporated into the Agreement only if expressly stated. Paragraph A1 of Part 2 is for use where the sale of the property (in this case, the grant of the Lease) will constitute a standard rated supply for VAT purposes. It disapplies Standard Conditions 1.4.1 and 1.4.2 which are the Seller's warranty that the sale is exempt and the Seller's confirmation that it will not

elect to waive exemption. Inclusion of this clause – or incorporation of any other Paragraph from Part 2, requires careful analysis of the VAT situation

Clause 22 — Release of the Seller

This clause relates to the statutory procedure for release applicable to 'new' tenancies. A 'new' tenancy is one granted on or after 1 January 1996 unless there was an earlier agreement for lease or court order for its grant. Sellers should use the statutory procedure only where all of the leases in the Property are 'new' tenancies. The effect of the statutory release is that the outgoing landlord is released from the burden of all landlord covenants of the tenancy, but also loses the benefit of all tenant covenants. The risk, where there are 'old' tenancies at the Property is that the outgoing landlord will remain liable to those tenants in the event that the new landlord defaults. If the former landlord is required to perform any significant covenants (eg replacing the roof or carrying out major structural repairs) it would be unable to recover costs from any of the 'new' tenants affected by the statutory release. It is always worth checking whether the statutory release procedure is necessary. The outgoing landlord's liability can come to an end where the terms of the relevant lease provide that it is to last only so long as the landlord retains its interest in the Property. This clause relates to the statutory procedure for release applicable to 'new' tenancies. A 'new' tenancy is one granted on or after 1 January 1996 unless there was an earlier agreement for lease or court order for its grant. Sellers should use the statutory procedure only where all of the leases in the Property are 'new' tenancies. The effect of the statutory release is that the outgoing landlord is released from the burden of all landlord covenants of the tenancy, but also loses the benefit of all tenant covenants. The risk, where there are 'old' tenancies at the Property is that the outgoing landlord will remain liable to those tenants in the event that the new landlord defaults. If the former landlord is required to perform any significant covenants (eg replacing the roof or carrying out major structural repairs) it would be unable to recover costs from any of the 'new' tenants affected by the statutory release. It is always worth checking whether the statutory release procedure is necessary. The outgoing landlord's liability can come to an end where the terms of the relevant lease provide that it is to last only so long as the landlord retains its interest in the Property.

Avonridge v Mashru [2006] 1 EGLR 15