

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 2 - Formation of Contract
Chapter 5 - Form
Section 1. - In General

The general rule

5-001

The general rule of English law is that contracts can be made quite informally: no writing or other form is necessary. At common law there was only one exception to this rule: a corporation had to contract under seal until the last vestiges of this rule were abolished in 1960.¹ At present, all formal requirements in the law of contract are contained in legislation which deals with specific contracts. There are four main purposes for making such formal requirements.² First, they may serve as clear evidence of a transaction and of its terms. Secondly, they may have a cautionary effect, thereby deterring hasty, premature or ill-considered contracts being made. Thirdly, they may have a “channelling” function, offering “a legal framework into which a party may fit his actions”.³ Thus, formalities may mark off transactions from one another and create a standardised form of transaction.⁴ Fourthly, formal requirements may be used as a device to protect the weaker parties to contracts. There has been an increasing tendency to impose such requirements with this last purpose in view: for example, in the cases of tenants, employees, debtors and sureties under consumer credit agreements⁵ and consumers of certain classes of services, such as package holidays⁶ or “timeshare” accommodation.⁷ Formal requirements are discussed in relation to a number of specific contracts in Vol.II of this work.⁸ In the present volume, which deals with general principles, there would be no point in attempting to make an exhaustive list of contracts for which formal requirements are imposed by statute. But four general matters may usefully be discussed here: types of formal requirement; the effects of non-compliance; the impact of estoppel; and contracts made by electronic communications.

Types of formal requirement

5-002

Legislative requirements of form differ widely from one another. In a few cases, contracts are required to be made by deed: this is true, for example, of a lease for more than three years.⁹ More frequently the requirement is that certain contracts must be in, or evidenced in, writing; but even requirements of this kind vary a good deal in stringency. Some statutes simply require, in general terms, that the contract must be in writing, or that there must be a note or memorandum in writing.¹⁰ Others set out the formal requirements in great detail and even specify the size of the lettering and the colour of the print and paper.¹¹ Yet others do not require the contract to be, or to be evidenced in, writing at all, but only require one party to give the other written notice of specified terms of the contract.¹² The form of a contract may also affect the regulation which it attracts, rather than going to its validity. Thus, for example, the scheme of rules governing “construction contracts” as first enacted under Pt II of the Housing Grants, Construction and Regeneration Act 1996 applied only “where the construction contract is in writing”, any other agreement between the parties being “effective for the purposes of this Part only if in writing”.¹³ However, “[t]his was interpreted restrictively by the courts such that all of the non-trivial terms of construction contracts had to be ‘in writing’ for Part 2 to apply”. The Act has been amended so as to remove this general requirement, whilst prescribing that various matters must nonetheless be in writing.¹⁴

Duties of information as requirements of form

5-003

⚠ The law sometimes imposes on a business or professional a pre-contractual duty to provide information relating to certain matters, as in the case of consumer credit agreements.¹⁵ Information requirements are particularly prevalent in EU contract law, where they have been imposed on traders towards consumers generally¹⁶ as regards contracts concluded in certain circumstances (“distance contracts” and “offpremises contracts”¹⁷) and in respect of certain types of contract such as “timeshare”¹⁸ ⚠ and package travel, package holidays and package tours.¹⁹

Effect of non-compliance

5-004

Non-compliance with statutory requirements of form may produce various effects. It may make the contract void,²⁰ or unenforceable,²¹ or unenforceable by one party²² or enforceable only on an order of the court.²³ It may simply deprive the transaction of certain effects which it would have had, if the formal requirement had been observed, without generally impairing its validity or enforceability; this would be the case, for example, if a lease for more than three years were not made by deed²⁴; if an assignment of a chose in action were made orally²⁵; or if the sort of promise which is normally contained in a bill of exchange or promissory note were made orally. Failure to comply with formal requirements may also be a criminal offence, and in some cases this is the sole consequence of failure which is actually specified in the relevant statute.²⁶ The civil consequences of failure to comply with a statutory requirement of form in such a case would presumably depend on the court’s view of the objects which the legislature sought to achieve in imposing the requirement. If the requirement was imposed to protect one of the parties to a contract, that party would probably be able to enforce the contract notwithstanding the formal defect; whether the other party could enforce it would depend on principles discussed elsewhere in this book.²⁷

Requirements of form and estoppel

5-005

As will be described in more detail below in relation to contracts for the sale or other disposition of an interest in land, the application of the various doctrines of estoppel have sometimes caused difficulty in relation to contracts invalid for want of the applicable formality.²⁸ In this regard, the House of Lords in *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA*²⁹ in the context of s.4 of the Statute of Frauds made clear that while in an appropriate case where there had been a clear representation by a party that the contract was valid (despite any want of formality),³⁰ the courts should not found an estoppel simply on the informal agreement itself.³¹ As Lord Hoffmann observed:

“The terms of the Statute of Frauds therefore show that Parliament, although obviously conscious that it would allow some people to break their promises, thought that this injustice was outweighed by the need to protect people from being held liable on the basis of oral utterances which were ill-considered, ambiguous or completely fictitious. This means that while normally one would approach the construction of a statute on the basis that Parliament was unlikely to have intended to cause injustice by allowing people to break promises which had been relied upon, no such assumption can be made about the statute ... [I]t must not be construed in a way which would undermine its purpose.”³²

Contracts made by electronic communications

5-006

The Electronic Communications Act 2000 created a power in the appropriate Minister to issue statutory instruments in order to modify provisions of: "... any enactment or subordinate legislation ... in such manner as he may think fit for the purpose of authorising or facilitating the use of electronic communications" for a number of purposes, including the making of contracts.³³ Moreover, art.9(1) of the European Directive on Electronic Commerce 2000³⁴ provides that:

"Member States *shall* ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their being made by electronic means."³⁵

Article 9 continues by allowing Member States to provide for exceptions to this principle notably in "contracts that create or transfer rights in real estate, except for rental rights"³⁶ and "contracts of suretyship granted and on collateral securities furnished by persons acting outside their trade, business or profession".³⁷ Where it applies, this obligation on Member States is not limited to the conclusion of the contract, but extends to all aspects of the contractual process.³⁸

Impact on formality requirements

5-007

At first sight, art.9 of this Directive might appear to have required the United Kingdom to revise a good deal of its law of contractual formalities, much of which requires a contract to be contained or evidenced in writing and/or signed, neither of these appearing to be able to be achieved by electronic means. However, the Law Commission advised the Government that in general requirements of "writing" and of "signature" can be fulfilled via some electronic means without any changes being made to the law.³⁹ So, as to "writing" this requirement can be fulfilled by electronic mail and website trading, but not by electronic data interchange as this does not involve any visible text so as to satisfy s.5 of the Interpretation Act 1978's definition of writing.⁴⁰ Its view is that "writing" does not need any "physical memorial", such as paper.⁴¹ Secondly, the Law Commission's view was that requirements of signature can generally be interpreted in a functional way, by asking whether or not the conduct of a would-be signatory indicates an authenticating intention to a reasonable person, though each requirement must be considered in its own statutory context.⁴² Following this approach, a requirement of signature can be fulfilled in a number of ways: by "electronic signature" using a dual-key encryption system and a certification authority⁴³; by use of a manuscript signature scanned into a computer and incorporated into an email or other document; by a person typing their name or initials or by setting up a system by which this occurs automatically⁴⁴; and even by a purchaser on a website "clicking" a button after entering onto the web details of the goods that they wish to purchase, confirming payment and personal details.⁴⁵ The Law Commission concluded that:

"... there is no need for general legislative reform, because we consider that legislation is not only unnecessary but also risky. It is difficult to envisage a simple global reform that would be effective in all eventualities ... [So], it is only in very rare cases that the statute book will conflict with Article 9 of the Electronic Commerce Directive."⁴⁶

Where legislative change is needed, it can be effected by exercise of the power contained in s.8 of the Electronic Communications Act 2000. One particular context in which this may need to be the case is s.2 of the Law of Property (Miscellaneous) Provisions Act 1989. For, as will be explained, in this context it has been said that "signature" must be given its ordinary linguistic meaning, so as to require each of the parties to contracts for the sale or other disposition of an interest in land to write their names with their own hands upon the document.⁴⁷ However, some or all of the contracts contained within this category may come within one of the exceptions to art.9 of the EU Directive so

as to allow English law to retain a formal requirement which is inconsistent with the effectiveness of a contract made by electronic means.⁴⁸ Moreover, the courts may well consider that in some other statutory contexts (for example, contracts of guarantee under s.4 of the Statute of Frauds) either “writing” or “signature” should not be interpreted as broadly as the Law Commission generally propose, in the interests of the protection of the person to be bound thereby.⁴⁹ Here, without legislative intervention, a conflict may arise between the interpretation of the English courts and the requirements of art.9 of the Electronic Commerce Directive, which does allow a Member State to make an exception for contracts of suretyship but only where undertaken by persons “acting outside their trade, business or profession”.⁵⁰

Electronic signatures

5-008

⚠ In 1999, the EU legislator enacted the Electronic Signatures Directive,⁵¹ ⚠ whose purposes were to facilitate the use of “electronic signatures” and to contribute to their legal recognition, and to establish a legal framework for electronic signatures and certain certification-services: it expressly did not cover aspects relating to the conclusion or validity of contracts or other legal obligations where there are requirements as regards form imposed by national or Community law, nor the rules and limits governing the use of documents.⁵² ⚠ An “electronic signature” was defined by the Directive as “data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication”.⁵³ ⚠ The United Kingdom implemented the Electronic Signatures Directive 1999 by two instruments. First, s.7 of the Electronic Communications Act 2000 provided for the admissibility in evidence of electronic signatures and certification by any person of such a signature “in relation to any question as to the authenticity of the communication or data or as to the integrity of the communication or data, and followed for this purpose the definition of “electronic signature” in the Directive.⁵⁴ ⚠ On its terms, this provision is broad enough to include evidence for the purposes of formal requirements of a contract (such as s.2 of the Law of Property (Miscellaneous Provisions) Act 1989⁵⁵ ⚠), but, if it were so interpreted, it would go beyond the scope of the requirements of the 1999 Directive. Secondly, the Electronic Signatures Regulations 2002 provided for the supervision and liability of “certification-service-providers” (i.e. persons who issue certificates or provide other services related to electronic signatures) and for consequential matters relating to data protection.⁵⁶ ⚠ However, the Electronic Signatures Directive 1999 was repealed and replaced by the EU Electronic Identification and Electronic Trust Services Regulation 2014 (the “eIDAS Regulation”, applicable in general from July 1, 2016),⁵⁷ ⚠ which lays down the conditions under which Member States mutually recognise “electronic identification means of natural persons and legal persons falling under a notified electronic identification scheme of another Member State”, and “rules for trust services, in particular for electronic transactions”; and which establishes “a legal framework for electronic signatures, electronic seals, electronic time stamps, electronic documents, electronic registered delivery services and certificate services for website authentication”.⁵⁸ ⚠ Following the pattern of the 1999 Directive, the eIDAS Regulation provides expressly that it “does not affect national or Union law related to the conclusion and validity of contracts or other legal or procedural obligations relating to form”.⁵⁹ ⚠ Instead, its main purpose is to ensure that businesses and individuals can use their own national electronic identification schemes (eIDs) to access public services in other EU countries where electronic identification schemes are available; it also aims to create a European internal market for electronic trust services—electronic signatures, electronic seals, time stamps etc.—by ensuring that they will work across borders and have the same legal status as traditional paper-based processes.⁶⁰ ⚠ By way of implementation of some aspects of the eIDAS Regulation, the UK revoked and replaced the Electronic Signature Regulations 2002 by the Electronic Identification and Trust Services for Electronic Transactions Regulations 2016, which came into force on July 22, 2016.⁶¹ ⚠ The 2016 Regulations also amended s.7 of the Electronic Communications Act 2000 so as to follow the simplified definition of “electronic signature” in the eIDAS Regulation as:







“so much of anything in electronic form as–

(a)

is incorporated into or otherwise logically associated with any electronic communication or electronic data; and



(b)

purports to be used by the individual creating it to sign.” ⁶² 

The main import of s.7 remains the same, viz. to make general provision for the recognition of electronic signatures as evidence in legal proceedings. ⁶³  The 2016 Regulations also make new provision for electronic seals and related certificates, electronic time stamps and related certificates, electronic documents and related certificates and electronic registered delivery service and related certificates. ⁶⁴  However, the eIDAS Regulation itself (as earlier noted ⁶⁵ ) does not affect the law governing the definitions of signature for the purposes of formal requirements of English contract law ⁶⁶ ; nor does its provision for “electronic seals” affect the common law or statutory requirements for the execution of a deed. ⁶⁷  It is submitted that the uncertainty as to the impact of s.7 of the Electronic Communications Act 2000 in relation to these same formalities remains after its amendment by the 2016 Regulations. ⁶⁸ 


Electronic documents and deeds

5-009

 Following the recommendations of the Law Commission, ⁶⁹ the Land Registration Act 2002 made provision for the creation of a framework in which it will be possible to transfer and create interests in registered land by electronic means through a network controlled by the Land Registry. ⁷⁰ In order to permit this, Pt 8 of the Act makes provision for the fulfilment electronically of formality requirements by the transactions in question, doing so by assimilating certain qualifying electronic documents to deeds for the purposes of any enactment requiring the dispositions to which those documents relate to use a deed. However, the system of electronic conveyancing which these legislation provisions envisaged has not been brought into being and the Law Commission has consulted on a different scheme. ⁷¹ 










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1. Corporate Bodies' Contracts Act 1960.
 2. Fuller (1941) 41 Col.L.Rev. 799; Law Commission No.164 (1987), pp.6–7; Whittaker, *Themes in Comparative Law in Honour of Bernard Rudden* (2002), p.199.
 3. Fuller (1941) 41 Col.L.Rev. 799, 801.
 4. Law Com. No.164 (1987), p.7.
 5. Landlord and Tenant Act 1985 s.4 (provision of rent books); Consumer Credit Act 1974 ss.60, 61, 105 (form and content of agreement; form of securities) and see Vol.II, paras

39-080—39-081.

6. The Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) reg.9, on which see Vol.II, paras 38-132—38-133.
7. Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) reg.15, replacing the Timeshare Act 1992 (as amended) on which see Vol.II, paras 38-136—38-139.
8. See Vol.II, Chs 34, 37, 39, 40 and 45.
9. Law of Property Act 1925 ss.52, 54, as amended by Law of Property (Miscellaneous Provisions) Act 1989 s.1(8), Sch.1 para.2.
10. e.g. Statute of Frauds 1677 s.4 discussed Vol.II, paras 45-042 et seq.
11. e.g. Regulations made or to be made by the Secretary of State under the Hire-Purchase Act 1965, under the Consumer Credit Act 1974 s.60 see Vol.II, para.39-080.
12. e.g. Landlord and Tenant Act 1985 s.4; Employment Rights Act 1996 ss.1–2, 4–6 (as amended); Estate Agents Act 1979 s.18.
13. Housing Grants, Construction and Regeneration Act 1996 s.107 (which defined what was meant by agreement in writing for this purpose) on which see *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270, [2002] 1 W.L.R. 2344; *Hatmet Ltd v Herbert (t/a LMS Lift Consultants)* [2005] EWHC 3529 (TCC) at [23]; *Allen Wilson Joinery Ltd v Privetgrange Construction Ltd* [2008] EWHC 2802 (TCC), [2009] T.C.L.R. 1. Section 107 of the 1996 Act was repealed as explained in the following footnote.
14. UK Government's Explanatory Notes to the Local Democracy, Economic Development and Construction Act 2009. The Housing Grants, Construction and Regeneration Act 1996 s.107 was repealed by Local Democracy, Economic Development and Construction Act 2009 Sch.7(5) para.1. The various matters which must be in writing are contained in s.108 of the 1996 Act (as inserted by s.139 of the 2009 Act).
15. On which see Vol.II, paras 39-076—39-077. See also, e.g. Estate Agents Act 1979 s.18.
16. Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 art.5 implemented in UK law by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) especially reg.9 ("on-premises contracts"), and see Vol.II, paras 38-056 et seq. especially paras 38-097—38-098.
17. Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 art.6 implemented in UK law by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) especially regs 10–11, 13, and see Vol.II, paras 38-056 et seq. especially paras 38-091—38-096.
18.  Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] O.J. L33/30 art.4 implemented in UK law by the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) regs 12–13 on which see Vol.II, paras 38-136—38-138. The 1990 directive is repealed by Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1, art.4 of which sets a general principle of full harmonisation and must be implemented by January 1, 2018.
19. Directive 90/314/EEC on package travel, package holidays, and package tours [1990] O.J. L158/59 arts 3 and 4 implemented in UK law by the Package Travel, Package Holidays and Package Tours Regulations 1992/3288 regs 7 and 8 on which see Vol.II, paras 38-132—38-138.

- [20.](#) Bills of Sale Act (1878) Amendment Act 1882 s.9; Law of Property (Miscellaneous Provisions) Act 1989 s.2.
- [21.](#) e.g. Law of Property Act 1925 s.40 subsequently repealed and replaced by s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 see above, paras 1-108, 1-112 and below, para.5-039.
- [22.](#) Consumer Credit Act 1974 s.65; Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) regs 20–24 (“right of withdrawal”).
- [23.](#) Consumer Credit Act 1974 s.127.
- [24.](#) Law of Property Act 1925 s.52 (“void for the purpose of conveying or creating a legal estate”); and see s.54, as amended by the Law of Property (Miscellaneous Provisions) Act 1989 s.1 and Sch.1 para.2.
- [25.](#) Below, paras 19-007, 19-016, 19-037.
- [26.](#) e.g. Landlord and Tenant Act 1962 s.1, repealed and replaced by Landlord and Tenant Act 1985 s.4; *Shaw v Groom* [1970] 2 Q.B. 504.
- [27.](#) i.e. on the principles stated in *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 Q.B. 267; below, paras 16-152 et seq.
- [28.](#) See below, paras 5-041—5-049.
- [29.](#) [2003] UKHL 17, [2003] 2 A.C. 541.
- [30.](#) e.g. *Shah v Shah* [2001] EWCA Civ 527, [2001] 4 All E.R. 138.
- [31.](#) [2003] UKHL 17 at [9], [25].
- [32.](#) [2003] UKHL 17 at [20]. On the Statute of Frauds s.4, see Vol.II, paras 45-042—45-061.
- [33.](#) Electronic Communications Act 2000 s.8(1).
- [34.](#) Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] O.J. L178/1.
- [35.](#) Emphasis added.
- [36.](#) Directive 2000/31 art.9(2)(a).
- [37.](#) Directive 2000/31 art.9(2)(d).
- [38.](#) Directive 2000/31, Recital 34; Beale and Griffiths (2002) L.M.C.L.Q. 467, 468.
- [39.](#) Law Commission, Electronic Commerce: Formal Requirements in Commercial Transactions (2001), available in full at <http://lawcommission.justice.gov.uk> and see a shorter version in Beale and Griffiths (2002) L.M.C.L.Q. 467 to which the following references will relate.
- [40.](#) Beale and Griffiths (2002) L.M.C.L.Q. 467, 471–472. The Interpretation Act 1978 s.5 states that: “‘Writing’ includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly.”
- [41.](#) Beale and Griffiths (2002) L.M.C.L.Q. 467, 472.
- [42.](#) Beale and Griffiths (2002) L.M.C.L.Q. 467, 473.

43. And see below, para.5-008.
44. In *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 2 All E.R. 881 at [25]–[30], it was held that the automatic insertion of an email address in a message by an internet service provider did not constitute a signature by the writer of the message as it did not represent any intention to authenticate the message by the writer. However, Judge Pelling Q.C. accepted that: “[I]f a party or a party’s agent sending an e-mail types his or her or his or her principal’s name to the extent required or permitted by existing case law in the body of an e-mail, then ... that would be sufficient signature for the purposes of section 4 [of the Statute of Frauds]” (at [31]), the learned judge noting the position of the Law Commission to this effect. In *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] EWCA Civ 265, [2012] 1 Lloyd’s Rep. 542 at [32] it was common ground before (and accepted by) the CA that an electronic signature is sufficient for the purposes of s.4 of the Statute of Frauds and that a first name, initials or perhaps a nickname will suffice, as long as it was done in a manner which indicates that it is intended to authenticate the document. And in *Bassano v Toft* [2014] EWHC 377 (QB), [2014] E.C.C. 14 at [42]–[44] it was held that clicking an electronic “I accept” button and thereby generating a document sent to the other party bearing the “signatory’s” typed name constituted signature for the purposes of s.61 of the Consumer Credit Act 1974: see Vol.II, para.39-084.
45. Beale and Griffiths (2002) L.M.C.L.Q. 467, 473–474.
46. Beale and Griffiths (2002) L.M.C.L.Q. 467, 473.
47. *Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567, 1574–1577 and see below, para.5-037.
48. Directive 2000/31 art.9(2)(a), above, para.5-006.
49. cf. *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 2 All E.R. 881 at [31], where the Law Commission’s broad approach was approved (and see above, n.44).
50. Directive 2000/31 art.9(2)(d), above, para.5-006.
51. ! Directive 1999/93 on a Community framework for electronic signatures [2000] O.J. L13/12.
52. ! Directive 1999/93 art.1.
53. ! Directive 1999/93 art.2(1).
54. ! Electronic Communications Act 2000 s.7(2) (as enacted).
55. ! On which see Vol.I, paras 5-010 et seq.
56. ! SI 2002/318.
57. ! Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] O.J. L 257/73 art.52(2) (with the exceptions there noted).
58. ! Regulation (EU) 910/2014 art.1.
59. ! Regulation (EU) 910/2014 art.2(3) and recital 21.
60. ! See EU Commission, <https://ec.europa.eu/digital-single-market/en/trust-services-and-eid>.

61.  SI 2016/696.
62.  SI 2016/696 reg.5, Sch.3 para.1(2). The definition of certification of such an electronic signature was amended to similar effect: SI 2016/696 reg.5, Sch.3 para.1(3).
63.  Electronic Communications Act 2000 s.7(1).
64.  Electronic Communications Act 2000 ss.7A–7D (as inserted by SI 2016/696 reg.5, Sch.3 para.1(4)).
65.  Regulation (EU) 910/2014 art.2(3). Later general statements, such as the statement in art.25(2) that “[a] qualified electronic signature shall have the equivalent legal effect of a handwritten signature” must be read subject to the general definition of the scope of the Regulation in art.2(3).
66.  “Signature” is relevant to the formal requirements imposed, inter alia, by the Law of Property (Miscellaneous Provisions) Act 1989 s.1 in relation to deeds (on which see Vol.I, para.1-118); by s.2 of the same Act in relation to contracts for the sale or other disposition of an interest in land (on which see Vol.I, paras 5-010 et seq. and esp. para.5-037); and by the Statute of Frauds s.4 in relation to contracts of guarantee (on which see Vol.II, paras 45-042 et seq. and esp. para.45-057). The position as regards the so-called rule in *L’Estrange v F Graucob Ltd* [1934] 2 K.B. 394 which governs the incorporation of written terms by signature (on which see Vol.I, para.13-002) is more arguable as it is not clear that the incorporation of contract terms relates to the “conclusion and validity of contracts or other legal or procedural obligations relating to form” within the exclusion from the scope of the eIDAS Regulation reg.2(3).
67.  See Vol.I, paras 1-113 et seq.
68.  For further discussion of “signature” and electronic communications see Emmet & Farrand on Title (updated to June 2016), paras 2–041—2–041.06.
69. Law Commission, Land Registration for the Twenty-First Century, A Conveyancing Revolution (2001), Law Com. No.271 and see above, para.1-116.
70. See Smith, *Property Law*, 8th edn (2014), pp.113–115 discussing the Land Registration Act 2002 ss.91 and 93 and noting that in 2011 the Land Registry halted the e-conveyancing project: Land Registry Annual Report and Accounts 2010–2011, p.26; Megarry and Wade, *The Law of Real Property* 8th edn (2012) by Harpum, Bridge and Dixon, paras 7-157—7-163.
71.  See further Law Commission, Updating the Land Registration Act 2002, A Consultation Paper (Consultation Paper No.227, 2016) Ch.20.

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Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Form

Section 2. - Contracts for the Sale or Other Disposition of an Interest in Land

Legislative history

5-010

The Statute of Frauds was passed in 1677 and in ss.4 and 17 it required that six classes of contracts must be supported by written evidence. Its object was to prevent fraudulent claims based on false evidence, but in practice it worked badly as it enabled contracting parties to rely on what were considered to be technical defences. Hence the statute was, whenever possible, whittled down by judicial construction and it was largely repealed by the Law Reform (Enforcement of Contracts) Act 1954. Nevertheless, the statute still applies to contracts of guarantee ⁷² and its provisions governing any "contract or sale of lands, tenements or hereditaments, or any interest in or concerning them" in s.4 were re-enacted in a modified form in s.40 of the Law of Property Act 1925, which applies to contracts for the sale or disposition of interests in land made on or before September 26, 1989. ⁷³ However, by the Law of Property (Miscellaneous Provisions) Act 1989 s.2, the Law of Property Act 1925 s.40 was itself repealed and new requirements were enacted which apply to all contracts for the sale or other disposition of interests in land made on or after September 27, 1989. The present edition of this work discusses the law under the 1989 Act and while on occasion cases discussing the old law where of use for the interpretation of the new, care must be taken in doing so. As Peter Gibson L.J. observed in *Firstpost Homes Ltd v Johnson* ⁷⁴:

"... the Act of 1989 seems to me to have a new and different philosophy from that which the Statute of Frauds 1677 and s.40 of the Act of 1925 had. Oral contracts are no longer permitted. To my mind it is clear that Parliament intended that questions as to whether there was a contract, and what were the terms of the contract, should be readily ascertained by looking at the single document said to constitute the contract."

Law of Property (Miscellaneous Provisions) Act 1989 s.2

5-011

The law relating to the formal requirements of contracts for the sale or other disposition of an interest in land was significantly changed by the Law of Property (Miscellaneous Provisions) Act 1989 s.2. This provision, which followed recommendations for reform of the law by the Law Commission in its report, *Formalities for Contracts for Sale etc. of Land* ⁷⁵ supersedes s.40 of the Law of Property Act 1925 ⁷⁶ in relation to contracts made on or after September 27, 1989. ⁷⁷ Section 2(1) states:

"A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each."

This change was prompted by a concern to settle the uncertainty surrounding s.40, in particular as regards the status of letters made “subject to contract” as memoranda for the purposes of that section ⁷² and the ambit of the doctrine of part performance after the decision of the House of Lords in *Steadman v Steadman*. ⁷³ Section 2 makes a strict formal requirement whose effect is to preclude the existence of any contract for the sale or other disposition of land unless it is *made* in writing. Unlike the position under the old law, written evidence by way of a memorandum or note of the contract is clearly not enough. Moreover, the doctrine of part performance, at least in its normal form, is abolished. ⁸⁰ On the other hand:

“... the demise of the doctrine of part performance has not brought about such wideranging effects as might at first have been supposed ... and has simply thrown a heightened emphasis upon the application of alternative equitable doctrines,” ⁸¹

notably, constructive trust and proprietary estoppel. ⁸²

Agreements made “subject to contract”

5-012

In *Enfield LBC v Arajah* ⁸³ the Court of Appeal held that, quite apart from the question whether the formal requirements contained in s.2 of the 1989 Act had been satisfied, a letter which was headed “subject to contract” and which was relied on by a tenant as creating a new tenancy, clearly envisaged that a new lease would be completed before the parties were bound, with the result that, while this qualification was in force, the relationship did not become binding on either party unless and until there was an exchange of lease and counterpart.

^{72.} See Vol.II, Ch.45.

^{73.} For discussion of the old law under s.40 of the Law of Property Act 1925, see Chitty on Contracts, 29th edn (2008), paras 4-010—4-051. For an example of the continuing use of this law, see below, para.5-014, regarding the meaning of “disposition” for the purposes of s.2 of the 1989 Act.

^{74.} [1995] 1 W.L.R. 1567 at 1576 and see *McCausland v Duncan Lawrie Ltd* [1996] 4 All E.R. 1995, 1001.

^{75.} Law Commission, Formalities for Contracts for Sale etc. of Land Law Com. No.164 (1987). While the Law Commission’s report may be of use in the interpretation of the 1989 Act, care needs to be taken in so doing, given that “Parliament chose to enact in s.2(1) of the 1989 Act a regime which differs materially from that proposed by the Law Commission in its draft Bill”: *North Eastern Properties Ltd v Coleman* [2010] EWCA Civ 277, [2010] 1 W.L.R. 2715 at [41] and see also *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch. 259 at 283–285, 295 (on “exchange of contracts”, below, para.5-035).

^{76.} Law of Property (Miscellaneous Provisions) Act 1989 s.2(8).

^{77.} Law of Property (Miscellaneous Provisions) Act s.5(3), (4).

^{78.} Law Com. No.164 (1987), paras 1.4–1.6.

^{79.} [1976] A.C. 563 and see Law Com. No.164, para.1.9.

^{80.} This part of para.5-011 in an earlier edition was quoted with approval by Simon Brown L.J. in *Godden v Merthyr Tydfil Housing Association* [1997] 1 N.P.C. 1.

- [81.](#) Gray and Gray, *Elements of Land Law*, 5th edn (2008), para.8.1.34.
- [82.](#) Below, paras 5-040—5-049.
- [83.](#) [1995] *E.G.C.S.* 164.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Form

Section 2. - Contracts for the Sale or Other Disposition of an Interest in Land

(a) - Contracts within s.2 of the Law of Property (Miscellaneous Provisions) Act 1989

General

5-013

The formal requirements in the 1989 Act apply to contracts ⁸⁴ for the “sale or other disposition of an interest in land”. ⁸⁵

“Sale or other disposition of an interest in land”

5-014

⚠ The 1989 Act itself defines the term “interest in land” for the purposes of the formal requirements in s.2 as “any estate, interest or charge in or over land”. ⁸⁶ Section 2(6) of the 1989 Act specifies that “*disposition*” has the same meaning for this purpose as for the Law of Property Act 1925, which provides that this term “includes a conveyance and also a devise, bequest, or an appointment of property contained in a will” ⁸⁷ and this wide definition includes a mortgage, charge, lease, release and disclaimer. ⁸⁸ ⚠

“Interest in land”: case-law under the Statute of Frauds

5-015

Under earlier case-law, s.4 of the Statute of Frauds was applied to many contracts that concerned land even though they were not contracts of sale. ⁸⁹ Thus an agreement to convey an equity of redemption in land was within the statute, for a court of equity treated the equity of redemption as the land itself, or at all events as an interest in land. ⁹⁰ Contracts for the disposition of an interest in land were held to include: an agreement that if the plaintiff, the tenant of a farm, would surrender her tenancy to her landlord, and would prevail on her landlord to accept the defendant as his tenant in place of the plaintiff, the defendant would pay the plaintiff £100 ⁹¹; an agreement by the defendant, the landlord of a house, to put certain furniture into the house in consideration that the plaintiff would become tenant thereof ⁹²; an agreement to grant a lease of furnished premises ⁹³; and an agreement by the plaintiff to let a house to the defendant, to sell him furniture and fixtures therein, and to make alterations and improvements in the house, the defendant agreeing to take the house, and to pay for the furniture, fixtures and alterations. ⁹⁴ An agreement to extend the time for acceptance, or an agreement that an acceptance which is out of time shall be treated as valid so as to create a contract, was held not to be an agreement which the statute required to be evidenced in writing, provided that the note or memorandum contained in the signed offer is otherwise sufficient. ⁹⁵ An agreement to sell a debt, secured by bond and also by a mortgage of land, ⁹⁶ or to sell debentures of a company possessed of land charging all its property whatsoever and wheresoever, ⁹⁷ was held to be within s.4

of the Statute of Frauds. An agreement by A, who had borrowed a sum of money from his bankers in July, to repay the loan out of the rent of a farm to become due to him at the Michaelmas following, ⁹⁸ was held within the section; so also was an agreement for regulating the height of a party wall, which was to be pulled down and rebuilt, and the position and shape of skylights on either side of it. ⁹⁹

Section 2 and “executory” or “contingent” agreements

5-016

It has been held that s.2 of the 1989 Act applies equally to an executory agreement, that is in this context, an agreement which was made at a time when neither of its parties possessed any proprietary interest in the property in question, ¹⁰⁰ and to an agreement contingent on another event, such as the giving of consent by a landlord to the assignment of a lease. ¹⁰¹

“Contracts for the disposition of an interest” and “contracts of disposition”

5-017

⚠ The formal requirements created by s.2 apply to “contracts *for* the sale or other disposition of an interest in land”. ¹⁰² This raises the question whether they apply to contracts *of* sale or other disposition of an interest in land, i.e. contracts by which the contract itself transfers the interest as opposed to imposing an obligation on the party (transferor) to do so. In *Target Holdings Ltd v Priestley* ¹⁰³ an oral agreement to vary the terms of repayment of a loan under an executed second mortgage contract was held to fall outside the terms of s.2 of the 1989 Act. According to Judge Hicks Q.C., the legislative history of s.2 and ss.51 to 55 of the Law of Property Act 1925 (which concern the *disposition* of interests as opposed to contracts *for* the disposition of interests) disclose that a distinction had been consistently drawn between contracts *for* the disposition of land and contracts *of* disposition of land. According to the learned judge, the second mortgage fell into the latter category and so outside the ambit of s.2: this provision should not be applied to instruments for which the formal or evidential requirements are governed by ss.51–55 of the 1925 Act. As a result, in his view, any variation of the second mortgage also fell outside the ambit of s.2. In *McLaughlin v Duffill* ¹⁰⁴ the Court of Appeal approved the distinction drawn by Judge Hicks Q.C. in *Target Holdings Ltd v Priestley* in the context of the question whether an agent’s authority to sign on behalf of a party to an instrument itself requires writing, it being held that writing is not required by s.2 of the 1989 Act for the conferral of such authority for contracts *for* the disposition of an interest in land, in contrast to contracts of disposition of an interest in land for which writing is required by s.53(1)(a) of the Law of

Property Act 1925. ¹⁰⁵ ⚠ A similar approach was taken by the Court of Appeal in *Eagle Star Insurance Co Ltd v Green*, ¹⁰⁶ where it held that a mortgage executed by deed must fulfil the formal requirements for a deed (contained in s.1 of the Law of Property (Miscellaneous Provisions) Act 1989) rather than the formal requirements for a contract for the disposition of an interest in land (contained in s.2 of the same Act). So, a mortgage executed by deed does not have to comply with the formal requirements of s.2 of the 1989 Act, but a contract to create a mortgage would have to do so, as would an equitable mortgage or charge arising out of the deposit of documents which have been held to find their basis in an implied contract. ¹⁰⁷ Similarly, in *Rollerteam Ltd v Riley*, under the terms of a settlement agreement A agreed to pay B and C certain sums of money if B executed declarations of trust by deed over two London properties in favour of A and D. B executed the declarations of trust, but A paid only a much lesser sum, arguing that the settlement agreement was for the disposition of interests in land and did not satisfy the formal requirements in s.2 of the 1989 Act. The Court of Appeal observed that “section 2 of the 1989 Act applies only to executory contracts for the future sale or other disposition of an interest in land, and does not apply to a contract which itself effects such a

disposition”. ¹⁰⁸ ⚠ The contract before the court was construed as being a unilateral contract, A agreeing to pay the money to B and C in exchange for the “performance” in the shape of the

execution of the two declarations of trust. ¹⁰⁹ ⚠ As a result, at no point did B undertake an executory or future obligation to execute the two deeds and so the agreement included an immediate disposition of interests in land rather than being a contract for the disposition of interests in land and fell outside the scope of s.2. ¹¹⁰ ⚠

Variations

5-018

In *McCausland v Duncan Lawrie Ltd* ¹¹¹ the Court of Appeal held that material variations of contracts of sale, etc. of an interest in land also have to fulfil the formal requirements contained in s.2 of the 1989 Act. According to the court this means that the contract as varied has to be in writing and incorporated in one document, or each document if contracts were exchanged, and signed by or on behalf of each party to the contract. ¹¹² On the facts of *McCausland*, the variation was held to be material as it attempted to advance the contractual date for completion and therefore the time when either party might make time of the essence by service of a notice to complete ¹¹³, and it has later been held that in a contract for the sale of land the price is always a material term so that “any variation to the price, even a modest one, is a variation of a material term for these purposes”. ¹¹⁴ On the other hand, the Court of Appeal has held that s.2 does not apply to an agreement by a party to a contract to waive a term inserted for his benefit as such an agreement does not vary the contract. ¹¹⁵

Boundary agreements between neighbours

5-019

⚠ In *Joyce v Rigolli* ¹¹⁶ the Court of Appeal considered whether a boundary agreement between neighbouring landowners constituted “a contract for the sale or other disposition of an interest in land” within the meaning of s.2 of the 1989 Act. In this respect, the court adopted the distinction drawn by Megarry J. in *Neilson v Poole*, ¹¹⁷ in the context of the requirement of registration of such an agreement as an “estate contract” within s.10(1) of the Land Charges Act 1925, between agreements which constitute an exchange of land and those by which the parties merely intend to “demarcate” an unclear boundary referred to in title documents, “a contract merely to demarcate and confirm [not being] a contract to convey”. ¹¹⁸ According to the Court of Appeal, for a contract to be one “for” selling or disposing of land within the meaning of s.2:

“... it must have been part of the parties’ purposes, or the purposes to be attributed to them, in entering into such a contract that the contract should achieve a sale or other disposition of land. The fact that the effect of their contract is that land or an interest in land is actually conveyed, when that effect was neither foreseen nor intended nor was it something which ought to have been foreseen or intended, is not the acid test.” ¹¹⁹ ⚠

Where, therefore, an agreement has a disposing effect, but no disposing purpose, s.2 does not apply, whether or not the transfer of land is trivial. ¹²⁰ Moreover, s.2 remains inapplicable even if (as on the facts of *Joyce v Rigolli*) one of the parties to a demarcation agreement consciously thought that he was giving up a small amount of land ¹²¹: the important public policy in upholding informal boundary agreements which are “act[s] of peace, quieting strife and averting litigation” ¹²² means that Parliament could not have intended s.2 to apply to transfers of land pursuant to demarcating boundary agreements simply because a trivial transfer or transfers of land were consciously involved. It should, moreover, be presumed, until the contrary is shown, that any transfer of land effected by such an agreement is trivial for this purpose. ¹²³ The Court of Appeal has further held that there is no need for there actually to have been a boundary dispute for an agreement to demarcate a boundary to fall within the principle set out in *Joyce v Rigolli*. ¹²⁴ Indeed, it has been held that the principles in *Joyce v Rigolli* are not restricted to boundary or demarcation agreements, as they turn rather on the question whether the agreement in question counts as a “contract for the sale or other disposition of an interest in land” that is, whether it has a “disposing purpose”. ¹²⁵ As a result, a contract under which two neighbouring landowners compromised a dispute between them as to whether one had acquired adverse possession over the land of which the other was the registered proprietor fell outside s.2 on the basis that the parties had no such disposing purpose, even though it had a (non-trivial) disposing effect. ¹²⁶

Options and rights of pre-emption

5-020

In *Spiro v Glencrown Properties Ltd* ¹²⁷ the question arose whether an option granted by a vendor of land is a “contract for the sale or other disposition of an interest in land” within the meaning of s.2(1) of the 1989 Act. ¹²⁸ Hoffmann J. held that it was, but that the notice by which the option was exercised was not: the section

“... was intended to prevent disputes over whether the parties had entered into a binding agreement or over what terms they had agreed. It prescribes the formalities for recording their mutual consent. But only the grant of the option depends upon consent. The exercise of the option is a unilateral act. It would destroy the very purpose of the option if the purchaser had to obtain the vendor’s countersignature to the notice by which it was exercised.” ¹²⁹

As Scott L.J. observed in a later case, the alternative view which Hoffmann J. rejected, and according to which the exercise of options is subject to the section’s formal requirements, would mean that it “had by an unintended side wind destroyed the enforceability of options”. ¹³⁰ The approach of Hoffmann J. has been held to apply equally to a “put option” in a lease (i.e. one where it is the potential grantor or lessor who is to exercise it), as well as to a “call option” (as in *Spiro v Glencrown Properties Ltd*, ¹³¹ where it is the potential grantee or purchaser who can exercise the option). ¹³² On the other hand, the position of a right of pre-emption (under which a person holding an interest grants another person a right to acquire it if he chooses to sell) is less clear. ¹³³ As regards registered land, a right of pre-emption is deemed by statute to have effect “from the time of creation as an interest capable of binding successors in title” and this strongly suggests that it should be regarded as an “interest in land” for the purposes of s.2 ¹³⁴; but as regards unregistered land a right of pre-emption has been held to confer:

“... no immediate right upon the prospective purchaser. It imposes a negative obligation on the possible vendor requiring him to refrain from selling the land to any other person without giving to the holder of the right of first refusal the opportunity of purchasing in preference to any other buyer.” ¹³⁵

For this reason, the 1989 Act is thought not to apply to any contract which creates a right of pre-emption over unregistered land. ¹³⁶ However, this leaves the question as to the application of s.2 to any subsequent agreement arising from the right of pre-emption. In *Bircham & Co, Nominees Ltd v Worrell Holdings Ltd*, ¹³⁷ a clause in a lease was held to have created a mere right of pre-emption (as opposed to an option) in a landlord in respect of its tenant’s interest in the land and the tenant notified the landlord of the circumstances giving rise to the latter’s opportunity to acquire this interest in exercise of this right. In these circumstances, the Court of Appeal held that any “acceptance” by the landlord of this offer by the tenant in its notice could take effect only by contract and had therefore to conform to the formal requirements of s.2 of the 1989 Act.

Equitable mortgages

5-021

In *United Bank of Kuwait Plc v Sahib*, ¹³⁸ the Court of Appeal held that equitable mortgages or charges arising out of a deposit of documents of title found their basis in an implied contract and that such a contract could exist only if the rigorous formal requirements of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 are satisfied. ¹³⁹ But it is less clear whether this provision applies where the equitable mortgage secures a guarantee which would attract the less rigorous requirements of s.4 of the Statute of Frauds. ¹⁴⁰ In *Deutsche Bank A.G. v Ibrahim*, ¹⁴¹ which was

decided under s.40 of the Law of Property Act 1925,¹⁴² the plaintiff bank sought a declaration that a deposit of documents of title by the defendants created an enforceable equitable mortgage in its favour. However, the court accepted the defendants' argument that where a third party pledges property with a creditor for the purposes of providing security for the liability of a debtor, that third party is a guarantor up to the value of the pledged property and the transaction is therefore governed by the formal requirements contained in s.4 of the Statute of Frauds rather than s.40 of the Law of Property Act 1925, and therefore held that the doctrine of part performance was inapplicable.¹⁴³ However, as one commentator has noted, there was no clear reason given by the court for giving priority to s.4 of the Statute of Frauds in this way, particularly given that the plaintiff had relied on the equitable mortgage rather than on the guarantee.¹⁴⁴ It may be thought instead that where two analyses of a transaction exist in parallel, each with their own formal requirements, the more demanding set of requirements should prevail, and, if this were accepted, then s.2 of the 1989 Act would apply to cases like *Deutsche Bank A.G. v Ibrahim*. It is submitted, however, that a better view would be to apply those formal requirements which apply to the analysis of the transaction on which the claimant is relying before the court. Thus, where a claimant seeks a remedy such as foreclosure which can only be justified by treating the transaction as an equitable mortgage, s.2 of the 1989 Act should apply.¹⁴⁵

Equitable leases

5-022

Before the 1989 Act, a lease which was required to be made by deed¹⁴⁶ but which had been merely put in writing could take effect in equity as a contract to create a legal lease as the writing would satisfy the formal requirements of s.40 of the Law of Property Act 1925.¹⁴⁷ However, this equitable relief depended on the availability of specific enforcement of a contract to create the lease and this would clearly not be available if this contract were a nullity owing to its failure to comply with the formal requirements of s.2.¹⁴⁸ While under the old law a purely oral contract to create a lease could be enforceable as long as there existed sufficient part performance, with the exception of short leases,¹⁴⁹ such an oral contract for a lease would also fall foul of s.2.

Conditions in planning agreements

5-023

In *Jelson Ltd v Derby City Council*¹⁵⁰ it was held that a planning agreement made between a developer and a local authority under s.106 of the Town and Country Planning Act 1990 under which the developer agreed to transfer the housing site to a third party was a contract for the purposes of the formal requirements contained in s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 and had failed to fulfil these requirements for want of signature in that third party.¹⁵¹ However, in *Milebush Properties Ltd v Tameside MBC*¹⁵² Arnold J. refused to follow this approach, preferring instead the view taken by Neuberger J. (as he then was) in *RG Kensington Management Co Ltd v Hutchinson IDH Ltd*¹⁵³ and the doubts expressed as to *Jelson* in *Nweze v Nwoko*.¹⁵⁴ In Arnold J.'s view, "it would substantially frustrate the statutory scheme contained in section 106 of the [Town and Country Planning Act 1990] to interpret section 2 of the 1989 Act as invalidating section 106 agreements which benefit third parties".¹⁵⁵

"Lock-out agreements"

5-024

Where a prospective vendor of land agrees with a prospective purchaser for a clear specified period not to deal with any other purchaser and this agreement is supported by consideration,¹⁵⁶ this agreement is in principle enforceable and is commonly known as a "lock-out agreement".¹⁵⁷ Although such an agreement clearly relates to the sale of land, the Court of Appeal has confirmed that its negative nature means that it is not a contract for the sale of any interest in land and is not therefore subject to the requirements of s.2 of the 1989 Act.¹⁵⁸

Contracts to sell land to third party

5-025

In *Nweze v Nwoko* ¹⁵⁹ the Court of Appeal held that a compromise agreement between two parties to an executed contract of sale of land under which, inter alia, the buyer agreed to sell the property with vacant possession at the best price available on the open market (so as to be in a position to pay the price of the earlier purchase to the sellers) was not a contract for the sale or other disposition of an interest in land within the meaning of s.2. In doing so, Waller L.J. relied on the Law Commission's Report, Formalities for Contracts for Sale, etc. of Land, ¹⁶⁰ which "is clearly concerned with contracts or dispositions under which land or an interest in land is actually sold or disposed of". ¹⁶¹ While the compromise agreement required the buyer to sell the property (to a third party), it did not itself effect a sale of the property. ¹⁶²

Mutual wills

5-026

Where two testators, such as a husband and wife, make mutual non-revocable wills, in principle a court will enforce the underlying contract against the estate of the survivor. ¹⁶³ Where such a contract is for the sale or disposition of an interest in land, then it must conform to the formal requirements of s.2 of the 1989 Act: "an undertaking not to revoke a testamentary disposition is the same in effect as a promise to make that disposition". ¹⁶⁴ So, for example, where two persons with a joint interest in real property execute mutual wills in identical form, it has been held that there is no contract since their underlying agreement is void for failing to comply with these requirements. ¹⁶⁵ For, "if the mutual will compact falls to be regarded as one agreement, it is clear that there is no single document signed by both parties", nor is it possible to construe the handing over of the parties' respective wills to the same solicitor for safe-keeping as "an exchange of contracts" within the meaning of s.2(3) of the 1989 Act. ¹⁶⁶ If, on the other hand, the mutual will compact is analysed as two contracts, one by each party in mirror image terms, then neither will fulfil the formal requirements of s.2 as neither is signed by both parties nor do either of them contain any terms as to the consideration for the undertaking (and the precondition for its becoming binding upon each of them), namely that the other shall maintain his or her will unrevoked until death. As a result, neither will incorporate all the terms or even the essential terms as s.2(1) requires. ¹⁶⁷ Despite this, a court may give the underlying agreement represented by mutual wills some effect in equity by way of constructive trust, ¹⁶⁸ as it may be judged inequitable after the death of one of the parties to frustrate that person's expectations by the other seeking to pass on property received otherwise than in accordance with its terms. ¹⁶⁹

Part 36 settlements

5-027

In *Orton v Collins* the question arose whether a settlement that is alleged to arise under CPR Pt 36 which, if implemented, would require the sale or other disposition of an interest in land falls within s.2 of the 1989 Act, so as to require in particular that the settlement is contained in one document rather than two for it to be enforced. ¹⁷⁰ It was held that while "a Pt 36 offer may well create a contract and probably does so in the vast majority of cases", it can be enforced by the court even where for some reason there is no contract as "the regime of Pt 36 ... does not depend upon contract law" ¹⁷¹; the parties' obligation to perform such a settlement is sui generis and rests on the court's jurisdiction to administer "justice according to law in a regular, orderly and effective manner". ¹⁷²

Partnerships

5-028

In *Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd* ¹⁷³ it was held that an overall bargain for the

creation of a joint venture involving the development of premises which consisted of a number of individual contracts could include contracts falling within and attracting the formal requirements of s.2 of the 1989 Act and that this remained the case even though the contract was expressed as a partnership. In so holding, the court rejected the argument, based on nineteenth century authority,¹⁷⁴ that an oral partnership agreement can be validly made but that if the partnership assets include land, then the land is held on a constructive trust for the partnership¹⁷⁵; unlike the Statute of Frauds, the 1989 Act created a “substantive rule of law which prohibits the making of an oral contract for the sale or disposition of an interest in land” even if “it is wrapped up in an alleged partnership”.¹⁷⁶

Composite agreements

5-029

In *North Eastern Properties Ltd v Coleman* the Court of Appeal considered the question as to how the requirements of s.2 of the 1989 Act apply to composite agreements.¹⁷⁷ There the parties to a series of contracts for the sale of flats expressly kept out of their written agreement that part of their earlier oral agreement according to which the buyer would receive a “finder’s fee” of 2 per cent of the purchase price for each contracting purchaser of the flats payable on exchange of contract. The written contract also contained a clause according to which “[t]his Agreement contains the entire agreement between the parties”. Briggs J. (with whom Longmore and Smith L.JJ. agreed) noted that even though “it was no part of Parliament’s intention by enacting s.2 of the 1989 Act to make it easier for people who have genuinely contracted to escape their contractual obligations ... because of the rigorous discipline which [s.2 of the Act] imposes upon parties to land contracts, it does ... enable persons who have genuinely contracted” to escape their contractual obligations by looking around “for express terms which have not found their way in the final form of land contract which they have signed”.¹⁷⁸ Having reviewed “the apparent disharmony constituted by the dicta on this point”,¹⁷⁹ Briggs J. reconciled their differences as follows:

“(i)

Nothing in section 2 of the 1989 Act is designed to prevent parties to a composite transaction which includes a land contract from structuring their bargain so that the land contract is genuinely separated from the rest of the transaction in the sense that its performance is not made conditional upon the performance of some other expressly agreed part of the bargain ...¹⁸⁰

(ii)

By contrast, the parties to a composite transaction are not free to separate into a separate document expressly agreed terms, for example as to the sale of chattels or the provision of services, if upon the true construction of the whole of the agreement, performance of the land sale is conditional upon the chattel sale or service provision. That would, albeit for reasons which seem to me to frustrate rather than serve the purposes for which the 1989 Act was passed, fall foul of section 2(1), however purposively construed. So would a series of separate contracts for the sale of separate parcels of land, if each was conditional upon the performance of the other.

(iii)

Since the splitting into separate contracts of parts of a composite transaction is inherently likely to give rise to uncertainties as to whether performance of the one is conditional upon performance of the other, the parties are free, and in my opinion should positively be encouraged, to make plain by express terms whether or not that conditionality exists. To do so serves rather than evades or frustrates the purposes of section 2, an important part of which is to encourage clarity rather than

uncertainty in land transactions.” ¹⁸¹

While the “normal purpose for the inclusion of an entire agreement clause is to dispose of the risk that some collateral contract or additional terms may be discovered in the undergrowth of the parties’ negotiations”, such a clause could also

“serve the valuable purpose, (in a composite transaction which includes, but does not entirely consist of, a land contract), of ensuring that the land contract will not accidentally be construed as conditional upon the other expressly agreed terms, so as to render the land contract void under section 2.” ¹⁸²

In the circumstances of the case, commercial common sense dictated that the entire agreement clause should be construed in this way. Furthermore, on the “unusual facts” of the case before the Court, and even without the entire agreement clause, Briggs J. held that performance of the land contracts was not conditional upon performance of the finder’s fee agreement. ¹⁸³

Collateral contracts

5-030

Related to the question of the application of s.2 of the 1989 to composite transactions is the approach of the courts to contracts collateral to a contract for the sale or other disposition of an interest in land. So, while s.2(1) of the 1989 Act makes clear that “all the terms which the parties have expressly agreed” must be incorporated in one document or, “where contracts are exchanged, in each” this does not prevent the existence of a valid contract (which does not have to satisfy s.2’s formal requirements) *collateral* to the main contract for the sale or other disposition of an interest in land (which does). ¹⁸⁴ So, for example, in *Record v Bell* ¹⁸⁵ the question arose whether the formal requirements contained in s.2 had been satisfied where a contract in two parts had been duly signed by the respective parties and was awaiting exchange and then some term was orally agreed immediately prior to exchange and was confirmed by the exchange of letters. On the facts, the vendor had made an undertaking as to the state of his title in order to induce the buyer to exchange contracts. ¹⁸⁶ The court held that it resulted from s.2 of the 1989 Act that such a term would only be incorporated into the contract of sale if the latter referred to it, ¹⁸⁷ but it felt able to construe the oral agreement as to the new term as an independent collateral contract, which was valid so long as it was not itself a sale of an interest in land. ¹⁸⁸ In this way, the requirements of s.2 had been fulfilled. However, in *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* the Court of Appeal took a more restrictive approach to the recognition of such a collateral agreement, though s.2 had not been relied on. ¹⁸⁹ There the parties entered discussions and exchanged correspondence (all “subject to contract”) towards the renewal of a lease, the negotiations concerning provision in the draft lease concerning the lessee’s repairing covenants. The lease was executed with the provision in question amended, but (according to the lessee) not in the way which had earlier been agreed. The lessee therefore contended that this agreement in the course of negotiations could take effect as a collateral contract. For this purpose, the Court of Appeal agreed ¹⁹⁰ with Lightman J. in *Inntrepreneur Pub Co Ltd v East Crown Ltd* ¹⁹¹ that the question whether a pre-contractual statement made in the course of negotiations should be treated as having contractual force rested on a finding of the parties’ objective intention based on the totality of the evidence and that for this purpose:

“... one important consideration will be whether the statement is followed by further negotiations and a written contract not containing any term corresponding to the statement”

as there “the prima facie assumption will be that the written contract includes all the terms the parties wanted to be binding between them”. Another consideration will be any lapse of time between the

statement and the making of the contract; and, finally, “a representation of fact is much more likely intended to have contractual effect than a statement of future fact or future forecast”. More generally, the Chancellor of the High Court, Sir Andrew Morritt, recognised that:

“... the law relating to collateral contracts is well-established but in connection with sales or leases of land needs to be applied with caution if not the suspicion to which Lord Moulton referred in *Heilbut Symons v Buckleton*.¹⁹² Thus, if the promise said to be binding as a collateral contract is in truth one of the terms for the sale or other disposition of land it will be unenforceable unless it is contained in the written contract required by s.2 ... In a normal conveyancing transaction in a commercial context with both parties represented by experienced solicitors the usual course of dealing is to ensure that all agreed terms are put into the contract and the conveyance, transfer or lease. Accordingly those who assert a collateral contract in relation to a term not so contained must show that it was intended to have contractual effect separate from the normal conveyancing documents.”¹⁹³

On the facts, the Court of Appeal found that on executing the lease¹⁹⁴ the parties had not intended to conclude a collateral contract relating to the tenant’s covenants, this view being supported by the fact that the representation relied on related to “future events in unforeseeable circumstances”, a commitment which would be “wholly uncommercial”¹⁹⁵; that the statement in question was followed by further negotiations¹⁹⁶; and that these negotiations were followed by the actual amendment of the lease which was executed, which “is to be seen as the parties’ considered agreed conclusion of the negotiations”.¹⁹⁷

Excluded contracts

5-031


Section 2(5) of the 1989 Act excludes from its formal requirements contracts to grant short leases,¹⁹⁸ contracts regulated under the Financial Services and Markets Act 2000, other than a regulated mortgage contract, a regulated home reversion plan, a regulated home purchase plan or a regulated sale and rent back agreement¹⁹⁹ and those made in the course of a public auction. The last of these exclusions represents a change, as such contracts were subject to a requirement of a written memorandum under the Law of Property Act 1925 s.40.²⁰⁰ The Law Commission considered that the retention of this requirement fulfilled no cautionary or protective purpose as the practice is that the auctioneer may sign as agent for both the purchaser and vendor.²⁰¹

^{84.} Jenkins (1993) Conv. 13, 18 et seq. contends that the term “contract” for the purposes of s.2 of the 1989 Act does not include “arrangements” effected by deed. However, it is difficult to see why a court should wish to allow avoidance of the special formal requirements imposed on contracts for the sale, etc. of interests in land contained in s.2, simply because such a contract is contained in a deed. The historical differences between covenant and assumpsit on which Jenkins relies should not be permitted to defeat the clear purpose of s.2 which was to make one set of clear requirements in relation to this type of contract in the interests of certainty.



^{85.} Law of Property (Miscellaneous Provisions) Act 1989 s.2(1).

^{86.} Law of Property (Miscellaneous Provisions) Act 1989 s.2(6) (as amended). The Trusts of Land and Appointment of Trustees Act 1996 removed the reference to any interest “in or over the proceeds of sale of land”.




^{87.} Law of Property Act 1925 s.205(1)(ii).

^{88.}  Thus, e.g. a contract which would create an option the exercise of which would release a

charge on land falls within s.2: *Tuscola (110) Ltd v Y2K Co Ltd* [2016] EWHC 1124 (Ch) at [205]–[213] (though it was held that no such contract had been concluded).

89. *McManus v Cooke* (1887) 35 Ch. D. 681, 687–690, and cases there cited.
90. *Massey v Johnson* (1847) 1 Exch. 241, 255.
91. *Cocking v Ward* (1845) 1 C.B. 858, 867; followed in *Kelly v Webster* (1852) 12 C.B. 283. (In both these cases there was a “part performance”, but this could not assist the plaintiffs in courts of common law before the Judicature Acts.)
92. *Mechelen v Wallace* (1837) 7 A. & E. 49.
93. *Inman v Stamp* (1815) 1 Stark. 12; *Edge v Strafford* (1831) 1 Cr. & J. 391; *Thursby v Eccles* (1900) 17 T.L.R. 130.
94. *Vaughan v Hancock* (1846) 3 C.B. 766.
95. *Morrell v Studd and Millington* [1913] 2 Ch. 648, 658.
96. *Toppin v Lomas* (1855) 16 C.B. 145.
97. *Driver v Broad* [1893] 1 Q.B. 744.
98. *Ex p. Hall* (1879) 10 Ch. D. 615.
99. *McManus v Cooke* (1887) 35 Ch. D. 681.
100. *Singh v Beggs* (1996) 71 P. & C.R. 120. cf. *McManus v Cooke* (1887) L.R. 35 Ch. D 681 (executory contract within s.4 of the Statute of Frauds 1677).
101. *Representative Body of the Church in Wales v Newton* [2005] EWHC 631 (QB), [2005] All E.R. (D) 163 (Apr).
102. A variation in the beneficial interests of the parties in the net proceeds of sale of a house has been held not to constitute the disposition of an interest in the house: *Lancashire Mortgage Corp Ltd v Scottish and Newcastle Plc* [2007] EWCA Civ 684, [2007] All E.R. (D) 68 (Jul) at [54].
103. [1999] Lloyd’s Rep. Bank. 175.
104. [2008] EWCA Civ 1627, [2010] Ch. 1 at [20]–[24]
105.  See also *Helden v Strathmore Ltd* [2011] EWCA Civ 542, [2011] Bus. L.R. 1592 at [27] where a claim advanced to the court was described by Lord Neuberger M.R. (with whom Smith and Elias L.JJ. agreed) as proceeding on a “fundamental misunderstanding of the reach and purpose of [s.2], ... [which] is concerned with contracts for the creation or sale of legal estates or interests in land, not with documents which actually create or transfer such estates or interests”. See further *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 W.L.R. 2855 at [8]; *Rollerteam Ltd v Riley* [2015] EWHC 1545 (Ch) at [45].
106. [2001] EWCA Civ 1389.
107. *United Bank of Kuwait Plc v Sahib* [1997] Ch. 107 on which see below, para.5-021. cf. *Clark v Chandler* [2002] EWCA Civ 1249, [2003] 1 P. & C.R. 15 at [13]–[17] where the document could not be construed as an immediate and unconditional disposition so as to fall outside the requirements of s.2 of the 1989 Act and within s.53(1)(c) of the Law of Property Act 1925.
108.  [2016] EWCA Civ 1291, [2017] Ch. 109 at [38] (Henderson L.J. with whom David Richards

and Tomlinson L.JJ. agreed).

- [109.](#)  [2016] EWCA Civ 1291 at [44]-[45]
- [110.](#)  [2016] EWCA Civ 1291 at [45].
- [111.](#) [1997] 1 W.L.R. 38; *Eyestorm Ltd v Hoptonacre Homes Ltd* [2007] EWCA Civ 1366, [2007] All E.R. (D) 284 (Dec). cf. *Morall v Krause* [1994] E.G.C.S. 177 (decided under the Law of Property Act 1925 s.40).
- [112.](#) The Court of Appeal thereby followed the approach of the House of Lords in *Morris v Baron & Co* [1918] A.C. 1, 31 and 29 and Willes J. in *Noble v Ward* (1867) L.R. 2 Ex. 135, 137, though in relation to different formal requirements. cf. *H.L. Estates Ltd v Parker-Lake Homes Ltd* [2003] EWHC 604, [2003] All E.R. (D) 245 (Apr).
- [113.](#) cf. *HL Estates Ltd v Parker-Lake Homes Ltd* [2003] EWHC 604 (Ch).
- [114.](#) *MP Kemp Ltd v Bullen Developments Ltd* [2014] EWHC 2009 (Ch) at [37].
- [115.](#) *Glen Courtney v Corp Ltd* [2006] EWCA Civ 518 at [12]-[14].
- [116.](#) [2004] EWCA Civ 79, [2004] All E.R. (D) 203 (Feb) applied in *Styles v Smith* [2005] EWHC 3224 (QB), [2005] All E.R. (D) 167 (Dec).
- [117.](#) (1969) 20 P. & C.R. 909.
- [118.](#) *Neilson v Poole* (1969) 20 P. & C.R. 909, 918-920.
- [119.](#)  *Joyce v Rigolli* [2004] EWCA Civ 79 at [31], per Arden L.J. These observations should not be interpreted as meaning that s.2 applies where the parties intended the contract to effect an immediate disposition of an interest in land, as it applies only to executory contracts: *Roller team Ltd v Riley* [2016] EWCA Civ 1291, [2017] Ch. 109 at [40]-[42], as noted above, para.5-017.
- [120.](#) *Yeates v Line* [2012] EWHC 3085 (Ch), [2013] 2 W.L.R. 844 at [30].
- [121.](#) *Joyce v Rigolli* [2004] EWCA Civ 79 at [30], [32].
- [122.](#) *Nielson v Poole* (1969) 20 P. & C.R. 909, 919, per Megarry J.
- [123.](#) *Joyce v Rigolli* [2004] EWCA Civ 79 at [32]-[34]. cf., at [45] Sir Martin Nourse referring to the “de minimis principle”; *Yeates v Line* [2012] EWHC 3085 (Ch), [2013] 2 W.L.R. 844 at [30]. cf. *Nata Lee Ltd. v Abid* [2014] EWCA Civ 1652, [2015] 2 P. & C.R. 3 at [28]-[34] (agreement to move boundary so as to transfer land from one neighbour to another falls under s.2’s formal requirements).
- [124.](#) *Melhuish v Fishburn* [2008] EWCA Civ 1382 at [21]-[22].
- [125.](#) *Yeates v Line* [2012] EWHC 3085 (Ch), [2013] 2 W.L.R. 844 at [35].
- [126.](#) [2012] EWHC 3085 (Ch) at [36]-[37].
- [127.](#) [1991] Ch. 537; and see Jenkins [1993] Conv. 13.
- [128.](#) As Scott L.J. remarked in a later case “[i]t is evident that the draftsman of this section did not take account of options”: *Trustees of the Chippenham Golf Club v North Wiltshire DC* (1991) 64 P. & C.R. 527, 530.
- [129.](#) [1991] Ch. 537, 541, per Hoffmann J.; *Bircham & Co, Nominees Ltd v Worrell Holdings Ltd*

- [2001] EWCA Civ 775, (2001) 82 P. & C.R. 34 at [39]–[45].
- [130.](#) *Trustees of the Chippenham Golf Club v North Wiltshire DC* (1991) 64 P. & C.R. 527, 530; and see further *Tootal Clothing Ltd v Guinea Properties Ltd* (1991) 64 P. & C.R. 452, 455.
- [131.](#) [1991] Ch. 537. See also *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2012] 1 P. & C.R. 12 at [11].
- [132.](#) *Active Estates Ltd v Parness* [2002] EWHC 893, [2002] B.P.I.R. 865.
- [133.](#) Smith, *Property Law*, 8th edn (2014), pp. 103–104; Farrand, *Emmet on Title* (looseleaf updated to April 2015) paras 2.085–2.089.
- [134.](#) Land Registration Act 2002 s.115. cf. Farrand, *Emmet on Title* (looseleaf updated to April 2015) para.2.089.
- [135.](#) *Mackay v Wilson* (1947) 47 S.R. (NSW) 315, 325, per Street J. quoted with approval by Goff and Stephenson L.JJ. in *Pritchard v Briggs* [1980] Ch. 338, 390 and 423 respectively.
- [136.](#) Smith, *Property Law*, 8th edn (2014) p.104, but see the discussion in Farrand, *Emmet on Title* (looseleaf updated to April 2015), para.2.086; Megarry and Wade, *The Law of Real Property* 8th edn (2012) by Harpum, Bridge and Dixon, para.15-018.
- [137.](#) [2001] EWCA Civ 775, (2001) 82 P. & C.R. 34.
- [138.](#) [1997] Ch. 107; *Dean v Allin and Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep. 249 at [43].
- [139.](#) *Ross v Bank of Commerce* [2012] UKPC 3 at [20]. cf. *De Serville v Argee Ltd* (2001) P. & C. R. D12 where it was observed that *United Bank of Kuwait v Sahib* [1997] Ch. 107 did not hold that all liens were contract-based, but merely that any lien created by deposit of title deeds alone was contract-based. This leaves the possibility of a document which intends to make an immediately effective disposition of an interest in land taking effect as long as it conforms to the formal requirements contained in the Law of Property Act 1925 s.53(1)(a) and see, above, para.5-017.
- [140.](#) See below, Vol.II, paras 45-042 et seq.
- [141.](#) *Financial Times*, December 13, 1991 and January 15, 1992, noted by Baughen [1992] Conv. 330.
- [142.](#) See above, para.5-010.
- [143.](#) cf. above, para.5-011.
- [144.](#) Baughen [1992] Conv. 330 at 332.
- [145.](#) Baughen [1992] Conv. 330 at 332.
- [146.](#) The Law of Property (Miscellaneous Provisions) Act 1989 s.1 changed the law relating to the formal requirements for deeds, abolishing the requirement of sealing and replacing it with requirements of a clear intention as to the making of a deed, of signature and of attestation: see above, paras 1-117 et seq.
- [147.](#) Gray, *Elements of Land Law*, 2nd edn (1993), p.744.
- [148.](#) Howell [1990] Conv. 441, 443.
- [149.](#) See below, para.5-031.

150. [1999] E.G.C.S. 88.
151. [1999] E.G.C.S. 88 transcript at [44].
152. [2010] EWHC 1022 (Ch) at [61]–[66], [2010] 2 E.G.L.R. 93 (affirmed on other grounds [2011] EWCA Civ 270, [2011] All E.R. (D) 195 (Mar)).
153. [2002] EWHC 1180, [2003] 2 P. & C.R. 13 at [57].
154. [2004] EWCA Civ 379, (2004) 2 P. & C.R. 33 at [21] and see further below, para.5-025.
155. [2010] EWHC 1022 (Ch) at [66].
156. Such an agreement would be valid in the absence of consideration if contained in a deed, but this would possess its own formal requirements: see above, paras 1-117 et seq.
157. *Walford v Miles* [1992] 2 A.C. 128, 139.
158. *Pitt v P.H.H. Asset Management Ltd* [1994] 1 W.L.R. 327.
159. [2004] EWCA Civ 379, [2004] 2 P. & C.R. 33. See similarly *Payne v Zafiropoyloy* [1994] C.L.Y. 3513. (Eastbourne CC) and cf. *Simmons v Simmons* [1996] C.L.Y. 2874. See also *Young v Lauretani* [2007] EWHC 1244 (Ch), [2007] 2 F.L.R. 1211 (agreement to apply proceeds of sale of property to the reduction of the mortgage of another property not within s.2).
160. (1987) No.164.
161. *Nweze v Nwoko* [2004] EWCA Civ 379 at [25].
162. [2004] EWCA Civ 379 at [31].
163. *Re Goodchild* [1997] 1 W.L.R. 1216 CA; *Olins v Waters* [2008] EWCA Civ 782, [2009] Ch. 212. Even where a will is stated to be irrevocable or where, the testator has agreed contractually with another person not to revoke it, a subsequent testament will be admitted to probate, even though its making constitutes a breach of contract: e.g. *Re Heys (Deceased)* [1914] P 192.
164. *Healey v Brown* [2002] 19 E.G.C.S. 147, transcript at [19], per David Donaldson Q.C. and see *Jiggins v Brisley* [2003] EWHC 841, [2003] W.T.L.R. 1141 at [66].
165. *Healey v Brown* [2002] 19 E.G.C.S. 147. cf. *Olins v Walters* [2007] EWHC 3060 (Ch) at [31] (affirmed on other grounds), [2008] EWCA Civ 782.
166. *Healey v Brown* [2002] 19 E.G.C.S. 147 at [20], per David Donaldson Q.C. On these aspects of the formal requirements, see below, para.5-035.
167. *Healey v Brown* [2002] 19 E.G.C.S. 147.
168. This is expressly preserved by s.2(5) of the 1989 Act and see below, para.5-040.
169. *Healey v Brown* [2002] 19 E.G.C.S. 147 at [26], [27]; *Olins v Waters* [2008] EWCA Civ 782, [2009] Ch. 212 at [36], [37] and [41].
170. [2007] EWHC 803 (Ch), [2007] 3 All E.R. 863 especially at [53].
171. *Orton v Collins* [2007] EWHC 803 (Ch) at [60] and [62], per Peter Prescott Q.C.
172. [2007] EWHC 803 (Ch) at [62] referring to the overriding objective found in CPR Pt 1.
173. [2004] EWHC 2547 at [193]–[195], [200]–[204]. The decision was affirmed on other grounds: [2005] EWCA Civ 1355, [2006] 1 P. & C.R. DG20.

- [174.](#) *Forster v Hale* (1800) 5 Ves. Jr. 308; *Dale v Hamilton* (1846) 5 Hare 369.
- [175.](#) [2004] EWHC 2547 at [200]–[204].
- [176.](#) [2004] EWHC 2547 at [203], per Lewison J.
- [177.](#) [2010] EWCA Civ 277, [2010] 1 W.L.R. 2715.
- [178.](#) [2010] EWCA Civ 277 at [43].
- [179.](#) [2010] EWCA Civ 277 at [46]–[53], notably *Tootal Clothing Ltd v Guinea Properties Ltd* (1992) 64 P. & C.R. 452, 456 (treated by the CA in *North Eastern Properties v Coleman* as expressly obiter): [2010] EWCA Civ 277 at [49]); *Godden v Merthyr Tydfil Housing Association* [1997] 1 N.P.C. 1; *Grossman v Hooper* [2001] EWCA Civ 615, [2001] 2 E.G.L.R. 8 at [34]–[35]. These cases are discussed and explained in *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 W.L.R. 2855 at [34]–[48].
- [180.](#) Citing Chadwick L.J. in *Grossman v Hooper* [2001] EWCA Civ 615, [2001] 2 E.G.L.R. 82 at [20].
- [181.](#) [2010] EWCA Civ 277 at [54]. See also [2010] EWCA Civ 277 at [81] (Longmore L.J.). The question whether a particular undertaking constitutes a promise to do something if the other party enters the agreement which is subject to s.2 of the 1989 Act or whether it instead constitutes an express term of that agreement is a question of fact and, therefore, may not be capable of resolution before trial: *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 W.L.R. 2855 at [31]–[33].
- [182.](#) [2010] EWCA Civ 277 at [57], per Briggs J.
- [183.](#) [2010] EWCA Civ 277 at [58]–[64].
- [184.](#) cf. above, para.5-029.
- [185.](#) [1991] 1 W.L.R. 853. See Harpum [1991] C.L.J. 399.
- [186.](#) *Record v Bell* [1991] 1 W.L.R. 853 at 862.
- [187.](#) [1991] 1 W.L.R. 853 at 860.
- [188.](#) [1991] 1 W.L.R. 853 at 861–862.
- [189.](#) [2007] EWCA Civ 622, [2007] L. & T.R. 26.
- [190.](#) [2007] EWCA Civ 622 at [46], [60]–[61]. The CA also relied on the leading general authority on collateral warranty, *Heilbut Symons & Co v Buckleton* [1913] A.C. 30. *Record v Bell* [1991] 1 W.L.R. 853 was not discussed.
- [191.](#) [2000] 2 Lloyd's Rep. 611 at 615.
- [192.](#) [1913] A.C. 30 at 47.
- [193.](#) *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] EWCA Civ 622 at [42], [43].
- [194.](#) It was held that this was the relevant time owing to the negotiations being “subject to contract”: [2007] EWCA Civ 622 at [45].
- [195.](#) [2007] EWCA Civ 622 at [47] (Sir Andrew Morritt).
- [196.](#) [2007] EWCA Civ 622 at [60] (Lloyd L.J.).

- [197.](#) [2007] EWCA Civ 622 at [57] (May L.J.).
- [198.](#) Under the Law of Property Act 1925 s.54(2). See, e.g. *Looe Fuels Ltd v Looe Harbour Commissioners* [2008] EWCA Civ 414, [2009] L. & T.R. 3 (oral agreement for a lease at a rent which would cover the landlord's total capital outlay in three years held to be "at the best rent which can reasonably be obtained" within the meaning of s.54(2)).
- [199.](#) Law of Property (Miscellaneous Provisions) Act 1989 s.2(5) (as amended). Under s.2(6) of the 1989 Act "regulated mortgage contract", "regulated home reversion plan", "regulated home purchase plan" and "regulated sale and rent back agreement" must be read with Financial Services and Markets Act 2000 s.22, any relevant order under that section and Sch.2 to that Act.
- [200.](#) *Kenworthy v Schofield* (1824) 2 B. & C. 945, 947; *Bartlett v Purnell* (1836) 4 A. & E. 792; *Phillips v Butler* [1945] Ch. 358.
- [201.](#) Law Com. No.164 (1987), para.4.11. For another exclusion from the ambit of s.2, see Channel Tunnel Rail Link Act 1996 ss.41(1) and 56(1).

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Volume I - General Principles
Part 2 - Formation of Contract
Chapter 5 - Form
Section 2. - Contracts for the Sale or Other Disposition of an Interest in Land
(b) - Formal Requirements

“Made in writing”

5-032

As has been noted, the most important change introduced by the 1989 Act was that contracts for the sale, etc. of an interest in land:

“... can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document, or where contracts are exchanged, in each.” ²⁰²

So, for example, where it was held that a single contract was contained partly in a letter between the parties and partly in signed writing (which made no express reference to the earlier agreement in the letter), then the requirements of s.2 were not fulfilled as all the express terms of the contract were not contained in “one document” as is required. ²⁰³ On the other hand, s.2(3) explains that:

“The terms may be incorporated in a document either by being set out in it or by reference to some other document.” ²⁰⁴

No longer is a note or memorandum which may serve as evidence of the contract enough.

“All the terms which the parties have expressly agreed in one document”: generally

5-033

⚠ At first sight, the omission of an express term of an oral agreement would seem to have the effect of rendering the whole contract a nullity as one can “only be made ... by incorporating all the terms ...

expressly agreed”. ²⁰⁵ ⚠ However, s.2(4) of the Act recognises the power of the court to order the rectification of a written document so as to conform with the express terms of the oral agreement which it records and provides that where a written document relating to the sale of land has been so rectified, “the contract shall come into being, or be deemed to have come into being, at such a time as may be specified in the order”. In *Firstpost Homes Ltd v Johnson*, ²⁰⁶ the Court of Appeal explained what is meant by the requirement that the contract be made in one document. There, an owner of certain farm property had agreed orally with a director of a company to sell the property to it at a cost of £1,000 per acre. The director had then typed a letter purporting to come from the owner agreeing to sell the land at this price, with a place for her signature and with an enclosed plan, which showed the land in question outlined in colour and which was signed by the director. The Court of Appeal held that, on these facts, the requirements of s.2 of the 1989 Act had not been fulfilled, as the letter and

the plan constituted two documents (the former referring to the latter as being enclosed with it), but the letter (which allegedly contained the contract) had not been signed by the director on behalf of the company as was required. ²⁰⁷ This decision was applied in *Francis v F Berndes Ltd*, ²⁰⁸ where the document allegedly recording the agreement “was in form no more than a counter-signed offer, and ... did not set out in writing the obligation to purchase” by the claimants. ²⁰⁹ While

“this is a highly technical distinction, and one which may be productive of injustice in cases where the nature of the ‘missing’ term is obvious once the document is construed in its factual context, ... one of the main purposes of the 1989 Act was to produce certainty in relation to contracts for the sale of land, and to reduce as far as possible the need for extrinsic evidence to establish the terms of the contract.” ²¹⁰

“All the terms which the parties have expressly agreed in one document” and rectification

5-034

Section 2(4) of the 1989 Act provides that:

“Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.”

The Act therefore expressly acknowledges the possibility of a court rectifying a document so as to allow a contract to conform to its formal requirements. So, in *Firstpost Homes Ltd v Johnson* the Court of Appeal noted that while on its terms the letter contained no commitment by the company to purchase the property, the company could have applied to the court to rectify the letter so as to reflect the oral agreement. ²¹¹ In *Robert Leonard (Developments) Ltd v Wright*, ²¹² the Court of Appeal exercised its power to order rectification of the terms of documents exchanged by the parties’ solicitors by telephone so as to include reference to the sale of the chattels which had been included in the parties’ previous oral contract, and the court also ordered that this rectified contract should be deemed to come into being from the date of the exchange of documents. The Court of Appeal recognised that allowing rectification detracted from the legislative purpose of s.2 which was to prevent disputes either as to whether the parties had entered into a binding agreement or as to what terms they had agreed, but the availability of rectification showed that:


“... it was clearly the intention of the Act that the all terms requirement should not be so inflexible as to cause hardship or unfairness where there has been a mistake resulting in a venial non-compliance with the Act.” ²¹³

In *Oun v Ahmad* ²¹⁴ Morgan J. agreed that a court could sometimes apply the conventional rules governing rectification of written instruments, ²¹⁵ even though the effect of rectification in the context of the 1989 Act is to rescue an otherwise invalid agreement. ²¹⁶ Morgan J. further held, however, that the court could not order rectification of a document so as to include all the terms of the would-be contract where there was an express agreement to omit a term or terms from the written record of the agreement since in these circumstances there was no mistake in the recording of the agreement. ²¹⁷ And in *Francis v F. Berndes Ltd* ²¹⁸ Henderson J. followed this approach, holding that, unless available on “conventional grounds”, rectification should not be ordered so as to save an agreement from invalidity owing to the formal requirements in s.2 whatever the explanation for the omission of an express term may be:

"Ignorance of the 1989 Act, or a misapprehension about its operation, cannot ... suffice, because the policy which underpins section 2 is the need for certainty in contracts for the sale of land and the avoidance of disputes about what the parties agreed which can be resolved only by recourse to extrinsic evidence." ²¹⁹

"Exchange of contracts"

5-035

 In *Commission for the New Towns v Cooper (Great Britain) Ltd*, ²²⁰ the Court of Appeal explained the significance of the alternative formal requirement in s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 that all the terms of the contract which the parties have expressly agreed be incorporated "where contracts are exchanged, in each [document]". According to Stuart-Smith L.J. ²²¹ the expression "exchange of contracts", even if not a term of art, possesses the following features:

"1.

Each party draws up or is given a document which incorporates all the terms which they have agreed, and which is intended to record their proposed contract. The terms that have been agreed may have been agreed either orally or in writing or partly orally or [sic: and] partly in writing.

2.

The documents are referred to as 'contracts' or 'parts of contract', although they need not be so entitled. They are intended to take effect as formal documents of title and must be capable on their face of being fairly described as contracts having that effect.

3.

Each party signs his part in the expectation that the other party has also executed or will execute a corresponding part incorporating the same terms.

4.



At the time of execution neither party is bound by the terms of the document which he has executed, it being their mutual intention that neither will be bound until the executed parts are exchanged.

5.

The act of exchange is a formal delivery by each party of its part into the actual or constructive possession of the other with the intention that the parties will become actually bound when exchange occurs, but not before.

6.

The manner of exchange may be agreed and determined by the parties."

As a result, the Court of Appeal held (through strictly obiter) that this requirement was not satisfied by the mere exchange of a signed letter of offer and a signed letter of acceptance, even if each had contained the (same) express terms of the contract as alleged. ²²² Moreover, as a result of the requirement of the third feature of an “exchange of contracts” as set out by Stuart-Smith L.J., there can be no “exchange of contracts” within the meaning of s.2(1) where the documents in question contain substantial differences. ²²³ While in general the time for considering whether a document complies with s.2 is the time of the agreement, ²²⁴  there is no rule preventing the exchange of a document which has been assembled, or altered, by the signatory or with his authority, after signature. ²²⁵  So, for example, in *Rabiu v Marlbray Ltd* a contract for the purchase of a 999-year lease of a London hotel room was made at a “sales fair” by a purchaser by signing a standard first page of the contract, the purchaser at the same time instructing solicitors to proceed to exchange of contracts. ²²⁶ This contract satisfied the requirements of s.2, as the document exchanged by the purchaser’s duly authorised solicitors had contained all its terms, even though the purchaser had signed only the first page. ²²⁷

Signature

5-036


Section 2(3) requires that:


“The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.”

This provision requires both parties to the contract to sign, ²²⁸ though it recognises the possibility of valid signature by the agent of either vendor or purchaser. ²²⁹

Meaning of “signature”

5-037

 In *Firstpost Homes Ltd v Johnson*, ²³⁰ the Court of Appeal held that “signature” in s.2 of the 1989 Act should be given its ordinary linguistic meaning, with the result that the section requires that the parties must write their names with their own hands upon the document. The court thereby rejected the applicability of earlier authorities on the meaning of “signature” for the purposes of the Statute of Frauds 1677 and s.40 of the Law of Property Act 1925. ²³¹ As Balcombe L.J. observed:

“... the clear policy of [section 2] is to avoid the possibility that one or other party may be able to go behind the document and introduce extrinsic evidence to establish a contract, which was undoubtedly a problem under the old law.” ²³² 

However, it has been held that a party can sign a document by writing only his initials, provided that it is clear that he intended to authenticate the full terms of the document. ²³³ On the other hand, in *Firstpost Homes Ltd*, Peter Gibson L.J. accepted that the principle laid down by the House of Lords in *Caton v Caton* ²³⁴ in relation to the Statute of Frauds 1677 to the effect that the party’s signature must be inserted in such a way as to authenticate the whole instrument applies equally to the requirement of signature made by s.2 of the 1989 Act. Thus, where a letter in which A agrees to sell a piece of land to B refers to a plan of the land in question and the court considers that the letter and the plans constitute a single document, B’s signature of the plan may well not constitute authentication of the

whole.²³⁵ Similarly, while a manuscript initialling of a document may constitute its “signature”, the mere initialling of corrections at the margins of a document does not constitute its signing for the purposes of s.2 of the 1989 Act, as it does not evidence assent to the whole document.²³⁶

Signature by agent

5-038

⚠ Section 2(3) requires signature “by or on behalf of each party to the contract”.²³⁷ ⚠ Clearly, no difficulty arises where an authorised agent signs on behalf of a principal who is named in the document otherwise satisfying the section.²³⁸ ⚠ On the other hand, a signature made without authority clearly does not satisfy the section (as not made *on behalf of* the would-be party) and it is to be noted that a solicitor is not necessarily authorised to sign the writing on behalf of his client merely as a result of the solicitor-client relationship.²³⁹ However, where a person with authority to sign does so “as agent only” and no principal is named or identifiable from the document, it has been said that the section is presumably not satisfied as one of its parties is not named,²⁴⁰ this view apparently resting on the proposition that the identity of the contracting party is a term of the contract, all the terms of the contract being required to be incorporated in the document by s.2(1).²⁴¹ A similar argument can be put as regards the significance of signature by the agent of an undisclosed principal²⁴² and in both cases this strict approach can be supported from the purpose of the section in terms of certainty.²⁴³ On the other hand, the Law Commission’s Working Paper which led to the Act intended to “let the ordinary principles of agency operate”²⁴⁴ and it can be argued that an agent: “... signs ‘on behalf of’ the principal whenever he signs with authority to do so and intending to act for his principal” and if this were accepted, it would allow both unnamed and undisclosed principals to enforce or be liable under the contract.²⁴⁵ It would certainly be a surprising (and practically very inconvenient) effect of the 1989 Act if signature by the agent of an undisclosed principal were held insufficient to satisfy its formal requirements and it would mark a significant change from the old law²⁴⁶ apparently not envisaged in course of the preparation of the Act.²⁴⁷

^{202.} Law of Property (Miscellaneous Provisions) Act 1989 s.2(1).

^{203.} *Dolphin Quays Development Ltd v Mills* [2006] EWHC 931, [2007] 1 P. & C.R. 12.

^{204.} e.g. *Glen Courtney v Corp Ltd* [2006] EWCA Civ 518 at [11], [30].

^{205.} ⚠ Law of Property (Miscellaneous Provisions) Act 1989 s.2(1). Section 2 does not affect the court’s approach to the interpretation of the contract, so that the usual principles apply, including as to the relevance of background facts where appropriate and the correction of mistakes: *Westvilla Properties v Dow Properties Ltd* [2010] EWHC 30 (Ch), [2010] 2 P. & C.R. 19 at [19]–[20]; *Rabiu v Marlbray Ltd* [2013] EWHC 3272 (Ch) at [14] and [91] (one of joined cases reversed on other grounds sub nom. *Marlbray Ltd v Laditi* [2016] EWCA Civ 476) and see generally below paras 13-041 et seq. The questions discussed in this paragraph are to be distinguished from the question as to whether and, if so, how s.2 applies to composite transactions, that is, where the parties have chosen to structure their agreement so that the land contract is separated from the rest of the transaction, on which see above, para.5-029.



^{206.} [1995] 1 W.L.R. 1567.




^{207.} See below, paras 5-036—5-038.

^{208.} [2011] EWHC 3377 (Ch), [2012] 1 All E.R. (Comm) 735.

^{209.} [2011] EWHC 3377 (Ch) at [26].

^{210.} [2011] EWHC 3377 (Ch) at [27], per Henderson J.

- [211.](#) *Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567, 1576, 1577.
- [212.](#) [1994] N.P.C. 49. See also *Peters v Fairclough Homes Ltd Unreported December 20, 2002 Ch D* at [26]–[27] (contractual document rectified so as to include longstop date included in correspondence between solicitors). cf. *Enfield LBC v Arajah* [1995] E.G.C.S. 164 (where apparently the possibility of rectification was not raised).
- [213.](#) [1994] N.P.C. 49 at [10], per Henry L.J.
- [214.](#) [2008] EWHC 545 (Ch), [2008] All E.R. (D) 270.
- [215.](#) [2008] EWHC 545 (Ch) at [55] and see [2008] EWHC 545 (Ch) at [36] referring to 1989 Act s.2(4) which states that after rectification “the contract shall come into being, or be deemed to have come into being”. For the law of rectification generally see above, paras 3-057 et seq.
- [216.](#) [2008] EWHC 545 (Ch) at [36] referring to 1989 Act s.2(4) which states that after rectification “the contract shall come into being, or be deemed to have come into being”.
- [217.](#) [2008] EWHC 545 (Ch) at [42]–[48]. Morgan J. accepted the difference between the case before him and contracts where “there are two separate contracts and not one composite contract”: [2008] EWHC 545 (Ch) at [33] and see cf. para.5-029.
- [218.](#) [2011] EWHC 3377 (Ch), [2012] 1 All E.R. (Comm) 735.
- [219.](#) [2011] EWHC 3377 (Ch) at [43].
- [220.](#) [1995] Ch. 259.
- [221.](#) [1995] Ch. 259, 285.
- [222.](#) The Court of Appeal distinguished its earlier unreported decision in *Hooper v Sherman* November 30, 1994 which took a different position adding that it had been made on the basis of a wrong concession by counsel: [1995] Ch. 259, 289, 295.
- [223.](#) *De Serville v Argee Ltd* (2001) 82 P. & C.R. D12. See also, above, para.5-026 (mutual wills).
- [224.](#)  *Rabiu v Marlbray Ltd* [2013] EWHC 3272 (Ch) at [14], relying on *Koenigsblatt v Sweet* [1923] 2 Ch. 314 at 326 (decided under the Statute of Frauds s.4). While the judgment in *Rabiu v Marlbray Ltd* was the subject of considerable criticism (and was reversed in part) by the CA sub nom. *Marlbray Ltd v Laditi* [2016] EWCA Civ 476, [2016] 1 W.L.R. 5147 (on which see below, para.5-038), the point in the text was not subject to appeal.
- [225.](#)  *Rabiu v Marlbray Ltd*. [2013] EWHC 3272 (Ch) at [14], relying on *Koenigsblatt v Sweet* [1923] 2 Ch. 314 at 320 and 326 (decided under the Statute of Frauds s.4); *Gavaghan v Edwards* [1962] 1 Ch. 220 CA (decided under the Law of Property Act 1925 s.40). While the judgment in *Rabiu v Marlbray Ltd* was the subject of considerable criticism (and was reversed in part) by the CA sub nom. *Marlbray Ltd v Laditi* [2016] EWCA Civ 476, [2016] 1 W.L.R. 5147 (on which see below, para.5-038), the point in the text was not subject to appeal.
- [226.](#) [2013] EWHC 3272 (Ch).
- [227.](#) [2013] EWHC 3272 (Ch) at [88]–[91] and [94].
- [228.](#) Under s.40 of the Law of Property Act 1925, signature was necessary only for “the party to be charged” without it being signed by the other party: *Barber v Rowe* [1948] 2 All E.R. 1050. Under the 1989 Act, a third party who is intended as transferee of the interest in property need not sign: *RG Kensington Management Co Ltd v Hutchinson IDH Ltd* [2002] EWHC 1180, [2003] 2 P. & C.R. 13 at [57] not following *Jelson Ltd v Derby CC* [1999] 3 E.G.L.R. 1991; *Nweze v Nwoko* [2004] EWCA Civ 399, (2004) 2 P. & C.R. 33 at [21] above, paras 5-023 and 5-025.

- [229.](#) See below, para.5-038.
- [230.](#) [1995] 1 W.L.R. 1567.
- [231.](#) Notably *Evans v Hoare* [1892] 1 Q.B. 550, 561: see [1995] 1 W.L.R. 1567, 1574-1577.
- [232.](#)  [1995] 1 W.L.R. 1567, 1577. For criticism of this view of “signature” for the purposes of s.2 of the 1989 Act see Emmet & Farrand on Title (updated to June 2017), paras 2–041—2–041.06. Nevertheless, Emmet & Farrand on Title concludes that “conveyancers should be as cautious as practicable and prefer in practice ‘wet ink’ signatures for contracts for the sale of land”: Emmet & Farrand on Title at para.2.041.05, not following the view expressed by the Law Society in its practice note, Execution of documents at virtual signings or closings (February 16, 2010) (available at <http://www.lawsociety.org.uk>). In *Ramsay v Love* [2015] EWHC 65 (Ch) at [7], Morgan J. observed (obiter and in the context of s.1(3) of the 1989 Act rather than s.2 of the same Act) that the statements in *Firstpost Homes Ltd v Johnson* which require signature by an executing party to be made with a pen in his own hand were not designed to distinguish between signing in such a way and by the use of a signature writing machine.
- [233.](#) *Newell v Tarrant* [2004] EWHC 772, (2004) 148 S.J.L.B. 509 at [47].
- [234.](#) (1867) L.R. 2 H.L. 127.
- [235.](#) *Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567, 1573 (though on the facts the Court of Appeal held that the letter and plan before them constituted two documents: see above, para.5-033).
- [236.](#) *Newell v Tarrant* [2004] EWHC 772, (2004) 148 S.J.L.B. 509 at [48].
- [237.](#)  Signature is required by each party to the contract, not each party to the prospective conveyance or transfer: *RG Kensington Management Co v Hutchinson* [2002] EWHC 1180, [2003] 2 P. & C.R. 13. For this purpose an agent’s authority may be oral or in writing: *McLaughlin v Duffill* [2008] EWCA Civ 1627, [2010] Ch. 1 especially at [21]–[24], distinguishing the rule requiring writing for the authorisation of signature by an agent of “dispositions of an interest in land” to which s.53(1)(a) of the Law of Property Act 1925 applies. It has been said that, where a party (A) to a contract signs on behalf of another person (B) but without that person’s actual or ostensible authority, ratification by B can operate so as to render him or her party to the contract, and in this case the requirements of s.2 are satisfied: *Simpole v Chee* [2013] EWHC 4444 (Ch) at [8]–[10]. Where A signs a document setting out a contract of sale with B in respect of obligations expressed as joint and several, not only on his own behalf but also on behalf of C in respect of her joint and several obligations but without her authority, in principle the contract is valid between A and B as long as it is, on an objective interpretation, not conditional on C’s having authorised him to sign on her behalf, as the joint and several provision of the contract make it clear that A and C do not constitute a “composite” purchaser: *Marlbray Ltd v Laditi* (on appeal from sub nom. *Rabiu v Marlbray Ltd*) [2016] EWCA Civ 476, [2016] 1 W.L.R. 5147 at [56] and [68]. If in these circumstances the document signed by A and B contains all the terms of the several contract, then it satisfies the requirements of s.2 of the 1989 Act, it being irrelevant that A did not sign identifying the precise capacity in which he did so, i.e. as principal obligor under his several contract: [2016] EWCA Civ 476 at [71]. A is therefore bound under his contract with B, even though C is not.
- [238.](#)  Bowstead and Reynolds on Agency, 20th edn (2014), para.8-004. cf. *Braymist Ltd v Wise Finance Co Ltd* [2002] EWCA Civ 127, [2002] 3 W.L.R. 322 (a person who signs a contract for the purchase of land as agent of a company not yet incorporated and who can, therefore, sue on the contract by virtue of s.36C(1) of the Companies Act 1985 (now s.51 of the Companies Act 2006), is properly to be treated as having signed the agreement on its own behalf for the purposes of s.2 of the Act 1989); *Royal Mail Estates Ltd v Maple Teesdale (a firm)* [2015] EWHC 1890 (Ch), [2016] 1 W.L.R. 942.
- [239.](#) Farrand, *Emmet on Title*, (looseleaf updated to April 2015), para.2.042.

- [240.](#) Bowstead and Reynolds on Agency, para.8-004.
- [241.](#) Above, para.5-033.
- [242.](#) Bowstead and Reynolds on Agency, para.8-004.
- [243.](#) Above, para.5-011.
- [244.](#) Law Com. Working Paper No.92 (1985), s.5.16.
- [245.](#) Bowstead and Reynolds on Agency, para.8-004.
- [246.](#) Bowstead and Reynolds on Agency, para.8-003 citing, inter alia, *Basma v Weekes* [1950] A.C. 441.
- [247.](#) cf. *Government of Sierra Leone v Davenport* [2003] EWHC 2769, [2003] All E.R. (D) 99 (Nov) at [69] where some of these difficulties were noted.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 5 - Form

Section 2. - Contracts for the Sale or Other Disposition of an Interest in Land

(c) - The Effect of Failure to Comply with the Formal Requirements

Effect of non-compliance

5-039

Unlike s.40 of the Law of Property Act 1925, which made unenforceable those contracts which did not comply with its requirements, ²⁴⁸ any agreement not complying with the requirements contained in s.2 of the 1989 Act is void and ineffective, ²⁴⁹ as a contract governed by the section “can only be made in writing”. The Law Commission considered that the principal effect of this would be to exclude the operation of the doctrine of part performance ²⁵⁰: “[w]ithout writing there will be no contract for either party to perform”. ²⁵¹ Certainly, the courts could hardly use the doctrine of part performance as such to enforce an oral agreement. However, the doctrine is itself merely part of a wider equitable principle, viz that equity will not allow a statute to be used as an engine of fraud ²⁵² and this principle is left untouched by the Act: indeed, it has been considered difficult to see how the operation of such a principle could be excluded by the legislature. ²⁵³ In *Singh v Beggs* ²⁵⁴ Neill L.J. doubted the view that s.2 of the 1989 Act had “abolished” the doctrine of part performance, observing (if obiter) that:

“It is true that it is provided by s.2(8) of the 1989 Act, that section 40 of the Law of Property Act 1925 will cease to have effect, but the doctrine [of part performance] is an equitable doctrine, and it may be that in certain circumstances the doctrine could be relied on.” ²⁵⁵

However, the Court of Appeal has later accepted that the doctrine has not survived the 1989 Act, while at the same time qualifying the strict application of the formal requirements by the doctrine of constructive trust. ²⁵⁶ For this purpose, the Law Commission recognised that circumstances may arise in which justice would be denied if a strict requirement of writing were universally upheld. Its view, reflected in s.2(5) of the 1989 Act, ²⁵⁷ was that any potential injustice could be avoided by judicial use of the techniques of collateral contracts, constructive trust or equitable estoppel. This has indeed occurred, although use of proprietary estoppel has been controversial. ²⁵⁸ However, in determining the circumstances in which it will be appropriate to rely on any of these techniques, the courts are likely to bear in mind the general considerations outlined by the House of Lords in *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* ²⁵⁹ as to the proper limits of equitable qualifications on or supplements to statutory rules entailing the formal invalidity of a contract, notably, the importance of not frustrating the purpose of the statutory provisions by simply enforcing invalid executory agreements by another, equitable name. ²⁶⁰ In this respect, while in common with its predecessor, s.40 of the Law of Property Act 1925, s.2 of the 1989 Act can be seen as based on a perceived need to protect people from being liable on the basis of oral utterances which are ill-considered, ambiguous or completely fictitious, ²⁶¹ it was intended to go further and to introduce a greater certainty into the law and stricter formal requirements. ²⁶²

Constructive trust

5-040

⚠ Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989 specifically precludes that section's requirements from affecting "the creation or operation of ... constructive trusts". In *Yaxley v Gotts* ²⁶³ Robert Walker L.J. considered that the relevant "species of constructive" trust for this purpose is one based on "common intention" and is to be found where, in the words of Lord Bridge in *Lloyds Bank Plc v Rosset* ²⁶⁴ there is an:

"... agreement, arrangement or understanding' actually reached between the parties, and relied on and acted on by the claimant ... Equity enforces it because it would be unconscionable for the other party to disregard the claimant's rights." ²⁶⁵ ⚠

In *Yaxley v Gotts* itself, A made an oral agreement to give B the ground floor of a house which he (A) was proposing to buy in exchange for B's supplying labour and materials to convert the house into flats and managing the letting of the property. The house was purchased in the name of A's son, C, who subsequently refused to grant B any interest in the property. At first instance, it was held that C had adopted the oral agreement between A and B and that B and C were bound by proprietary estoppel to grant a 99-year lease of the ground floor to B. The Court of Appeal upheld this result, rejecting A and C's argument based on s.2 of the 1989 Act, but preferring to rely on the ground of constructive trust rather than proprietary estoppel, though seeing these as running together on the facts. ²⁶⁶ While the oral agreement between A and B was void by reason of the 1989 Act, which had abolished the doctrine of part performance and required all contracts for the sale or disposal of land to be in writing, the agreement could be enforced on the basis of a constructive trust in circumstances where, previously, the doctrine of part performance might have been relied upon. ²⁶⁷ Similarly, in *Kinane v Mackie-Conteh* ²⁶⁸ the claimant had loaned money to a company of which one of the defendants was managing director, this loan being intended to be secured by a charge on a house in the form of a "security agreement" signed by himself and his wife. The question arose whether the security agreement came within the formal requirements found in s.2 of the 1989 Act. The Court of Appeal held that on the facts "an estoppel overlapping with a constructive trust" was established so as to come within the exception found in s.2(5) of the 1989 Act, in that the defendants had encouraged the claimant in his erroneous belief that the agreement created an enforceable obligation. ²⁶⁹ A further illustration of the way in which a constructive trust may avoid the formal requirements imposed by s.2 of the 1989 Act may be found in the application of the so-called *Pallant v Morgan* equity. ²⁷⁰ Where A and B agree that A will acquire some specific property for the joint benefit of A and B, and B, in reliance on A's agreement, refrains from attempting to acquire the property, then equity will not permit A, when he acquires the property, to keep it for his own benefit, to the exclusion of B. It has been said that because this equity is in the nature of a constructive trust, it is unaffected by s.2(1) the 1989 Act. ²⁷¹

Estoppel generally

5-041

Despite the absence of any express saving provision in s.2 as is provided for constructive trusts, in *McCausland v Duncan Lawrie Ltd* ²⁷² Neill L.J. considered that the "doctrine of estoppel" (without further specification) was "plainly arguable" to give some effect to the agreement underlying a fairly trivial variation of a contract for the sale etc. of an interest in land, the variation itself being void for informality. ²⁷³ Morritt L.J. observed that:

"Section 2 does not give rise to any illegality if its terms are not observed and the need for an estoppel arises in just those circumstances where there is no enforceable contract. For my part I would not place weight on the contention that an estoppel such as the vendor would advance is impossible as a matter of law but it still has to be made out as a matter of fact." ²⁷⁴

The issue could not, therefore, be determined in an application to strike out a plaintiff's claim. In *Yaxley v Gotts*,²⁷⁵ Robert Walker L.J. had:

“... no hesitation in agreeing ... that the doctrine of estoppel may operate to modify (and sometimes perhaps even to counteract) the effect of section 2 of the Act of 1989. The circumstances in which section 2 has to be complied with are so various, and the scope of the doctrine of estoppel is so flexible, that any general assertion that section 2 as a ‘no-go area’ would be unsustainable.”²⁷⁶

Nevertheless, in deciding whether or how it may apply, the courts must take into account the Act's policy of the need for certainty as to the formation of bargains of this type in the general public interest.²⁷⁷ As will be seen, however, the question of the appropriateness of recourse to the doctrine of proprietary estoppel where an agreement between the parties is void for failure of the formal requirements of s.2 has been more controversial.²⁷⁸

Promissory estoppel (“forbearance in equity”)

5-042

⚠ The Law Commission considered that “promissory estoppel” might apply to qualify the strictness of the formal requirements of s.2 of the 1989 Act.²⁷⁹ In the present context, however, the so-called doctrine of promissory or equitable estoppel, sometimes known as “forbearance in equity”, would not improve a vendor's position owing to its essentially defensive nature, for promissory estoppel cannot create a new cause of action in substitution for the contractual action denied for want of formality.²⁸⁰ Moreover, as Lewison L.J. has observed, “it would be surprising if one could do by promissory estoppel what one could not do by informal contract”²⁸¹ ⚠ and, moreover, in the case of promissory estoppel, “there is no question of a constructive trust of land arising” so as to fall within the exception to the formality requirements provided by the 1989 Act s.2(5).²⁸² ⚠

Estoppel by convention

5-043

It is fairly clear that the courts will not allow the application of estoppel by convention so as simply to give effect to an agreement rendered a nullity by s.2 of the 1989 Act. In *Godden v Merthyr Tydfil Housing Association*²⁸³ a building contractor claimed damages for breach of an oral agreement with a Housing Association, under which he had agreed to purchase a particular site, obtain planning permission for the building of seven houses and prepare the site for development, the Housing Association agreeing to reimburse him for the costs of this acquisition and work and that it would enter a contract with him for the construction of the houses. In response to the Housing Association's claim that this agreement failed the formal requirements of s.2 of the 1989 Act, the builder argued that since both parties had contracted in ignorance of this provision, the Housing Association was precluded by the doctrine of estoppel by convention from relying on this provision so as to deny that there was indeed an agreement reached between the parties. According to Simon Brown L.J., with whom Thorpe L.J. and Sir John Balcombe agreed, this submission:

“... necessarily involves saying that, although Parliament has dictated that a contract involving the disposition of land made otherwise than in compliance with s.2 is void, the defendants are not allowed to say so. That, to my mind, is an impossible argument ... [I]f it were soundly made, it is difficult to see why it should not operate to escape the intended constraints of s.2 in virtually all cases.”²⁸⁴

In Simon Brown L.J.'s view, the doctrine of estoppel may not be invoked to render valid a transaction

which the legislature has, on grounds of general public policy, enacted is to be invalid.²⁸⁵ So, for example, where the effect of the assurance on which the alleged estoppel is based is tantamount to a variation of the contract (itself void as failing to comply with s.2), then giving effect to the estoppel would subvert the policy behind s.2 of the 1989 Act.²⁸⁶

Proprietary estoppel²⁸⁷

5-044

In its work towards the 1989 Act the Law Commission saw proprietary estoppel as a particularly attractive technique for the avoidance of injustice caused by a rigid adherence to the new formality rules because, unlike the doctrine of part performance, it does not simply enforce the underlying agreement but allows a flexible remedy which can vary according to the particular circumstances.²⁸⁸ As has earlier been explained, there are three main elements of proprietary estoppel: a representation made or assurance given to the claimant, reliance by the claimant on that representation or assurance and detriment suffered by the claimant in consequence of such reliance.²⁸⁹ It is to be noted, however, that the representation or assurance must have encouraged the claimant to believe that he has or will in the future enjoy some right or benefit over the owner's property²⁹⁰ and so, even if adopted by a court in a case where an agreement for the sale of land did not satisfy the formal requirements of s.2, it would apply only so as to give a remedy to a would-be purchaser²⁹¹: any claim by a would-be vendor would not be for a right to land nor indeed for a specific asset, but for a sum of money, a simple claim for a debt.²⁹²

The difficulties in applying the contrasting approaches to the three main requirements of proprietary estoppel found in the speeches of the House of Lords in *Cobbe v Yeoman's Row Management Ltd*²⁹³ and *Thorner v Major* have already been discussed.²⁹⁴ The following paragraphs will discuss how the courts have applied the doctrine of proprietary estoppel in the context of the formal requirements of s.2 and their differing approaches as to the appropriateness of so doing.

Earlier cases on use of proprietary estoppel

5-045

An example of the application of proprietary estoppel in this context may be found in *Wayling v Jones*.²⁹⁵ In that case, A had promised his companion of some ten years, B, that he would bequeath B the business in which he worked at very low wages, but A died without having done so. The Court of Appeal held that B was entitled to rely on a proprietary estoppel against A's executors and therefore ordered them to pay the proceeds of sale of the business to B. If, by contrast, B had alleged that he had *contracted* with A that the latter would bequeath him the business in return for working for low wages, his claim would have failed for lack of fulfilling the formal requirements in s.2 of the 1989 Act.²⁹⁶ In *Yaxley v Gotts*,²⁹⁷ Robert Walker L.J. considered that where a constructive trust is based on "common intention", then it is "closely akin to, if not indistinguishable from, proprietary estoppel".²⁹⁸ So, while the Court of Appeal substituted constructive trust for proprietary estoppel (on which the trial judge had relied) as the basis for its decision, this case has been seen as authority for the proposition that:

"... the doctrine of estoppel may operate to modify and counteract the effect of section 2(2) [of the 1989 Act]; and that section 2(5) can cover cases of the equitable intervention of proprietary estoppel *which coincide with or overlap* the concept of a constructive trust, even though section 2(5) does not expressly refer to proprietary estoppel."²⁹⁹

On the other hand, in *Kinane v Mackie-Conteh*³⁰⁰ Arden L.J. and Neuberger L.J. expressed contrasting views as to whether a proprietary estoppel "unassociated with a constructive trust" would avoid the formal requirements found in s.2. According to Neuberger L.J.:

“... one must ... avoid regarding [subsection 2(5)] as an automatically available statutory escape route from the rigours of section 2(1) of the 1989 Act, simply because fairness appears to demand it. A provision such as section 2 ... was enacted for policy reasons which, no doubt, appeared sensible to the legislature ... the Court should not allow its desire to avoid what might appear a rather harsh result in a particular case to undermine the statutory policy.” ³⁰¹

He concluded, therefore, that a “mere estoppel, unassociated with a constructive trust” might not avoid the formal requirements of s.2, especially given the decision of the House of Lords in *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA*. ³⁰² However, here Arden L.J. did not agree, and emphasised that the latter decision was concerned with s.4 of the Statute of Frauds 1677 which contains no exception to its formal requirements equivalent to s.2(5) of the 1989 Act. In her view, proprietary estoppel could form the basis of disapplying s.2(1):

“... the cause of action in proprietary estoppel is ... not founded on the unenforceable agreement but upon the defendant’s conduct which, when viewed in all relevant aspects, is unconscionable.” ³⁰³

Cobbe v Yeoman’s Row Management Ltd

5-046

⚠ However, a very different approach to the appropriateness of recourse to proprietary estoppel in the context of s.2 of the 1989 can be seen in the decision of the House of Lords in *Cobbe v Yeoman’s Row Management Ltd*. ³⁰⁴ There a company which owned a building had orally agreed in principle with a property developer that it would sell the building to him if he obtained planning permission for its redevelopment, this agreement fixing a price and specifying an “overage” payment if the gross resale of the building exceeded a certain sum. The director of the company encouraged the developer to expect that her company would fulfil this agreement even after she had decided not to do so but to renegotiate for more money, and then (acting for the company) reneged on the agreement on the same day on which planning permission was granted. In these circumstances, the House of Lords held that proprietary estoppel could not apply as the person (the property developer) wishing to rely on the doctrine could not point to anything which the other person (the land-owner) could be estopped from relying on or denying in relation to a certain interest in land, but instead could point only to an expectation that that other person would enter into a contract with them on terms some of which remained to be negotiated. ³⁰⁵ In so holding, Lord Scott of Foscote (with whom Lords Hoffmann, Brown of Eaton-under-Heywood and Mance agreed) cast doubt on the use of proprietary estoppel as a means of escaping the formal requirements of s.2 of the 1989 Act. Lord Scott expressed the view (though recognising this as not being necessary for the decision of the House) that:

“... proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of section 2 is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute.” ³⁰⁶

Unlike resulting, implied or constructive trusts, the statute does not recognise any exception from the formal requirements for proprietary estoppel. ³⁰⁷ ⚠

Thorner v Majors

5-047

In *Thorner v Major* ³⁰⁸ a somewhat differently constituted House of Lords (Lords Hoffmann, Scott of Foscote, Rodger of Earlsferry, Walker of Gestingthorpe and Neuberger of Abbotsbury) took a more positive view of the role of proprietary estoppel in relation to the requirements of the 1989 Act, although, as has been explained, ³⁰⁹ its context was domestic rather than commercial. In relation to the 1989 Act Lord Neuberger observed that:

“The notion that much of the reasoning in *Cobbe’s case* ... was directed to the unusual facts of that case is supported by the discussion, at para 29, relating to section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Section 2 may have presented Mr Cobbe [the developer] with a problem, as he was seeking to invoke an estoppel to protect a right which was, in a sense, contractual in nature ... and section 2 lays down formalities which are required for a valid “agreement” relating to land. However, at least as at present advised, I do not consider that section 2 has any impact on a claim such as the present, which is a straightforward estoppel claim without any contractual connection. It was no doubt for that reason that the defendants, rightly in my view, eschewed any argument based on section 2.” ³¹⁰

This observation therefore suggests a distinction between claims for proprietary estoppel based on an assurance reasonably relied on and made in a family or domestic context (where s.2’s requirements of formality are not relevant) and those based on an agreement which would (otherwise) qualify as a contract (where s.2’s requirements of formality are relevant and, arguably, should not be circumvented).

Herbert v Doyle

5-048

⚠ In *Herbert v Doyle* ³¹¹ ⚠ the Court of Appeal, on an application for permission to appeal, considered the approaches taken by the House of Lords in *Cobbe* and *Thorner v Major* to the requirement of certainty as regards constructive trust in the context of s.2 of the 1989 Act. Arden L.J. (with whom Morgan and Jackson JJ. agreed) noted that while the distinction between proprietary estoppel and constructive trust must be kept in mind,

“it appears from *Cobbe* that, in some situations at least, both doctrines have a requirement for completeness of agreement with respect to an interest in property. Certainty as to that interest in those situations is a common component. A relevant situation would be where the transaction is commercial in nature”

as was the case on the facts before her. ³¹² Arden L.J. saw “a common thread running through the speeches of Lord Scott and Lord Walker” in *Cobbe*:

“that, if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement. In other words, at least in those situations, if their agreement (which does not comply with section 2(1)) is incomplete, they cannot utilise the doctrine of proprietary estoppel or the doctrine of constructive trust to make their agreement binding on the other party by virtue of section 2(5) of the 1989 Act.” ³¹³ ⚠

Arden L.J. saw this interpretation of *Cobbe* as consistent with Lord Neuberger's position on the need for certainty in *Thorner v Major*.³¹⁴ For Arden L.J., on the facts before her, the relevant question was "whether, subject to section 2 of the 1989 Act, there was a valid contract" and for this purpose Arden L.J. agreed with the finding of the trial judge below that the agreement of the parties was sufficiently certain.³¹⁵ This suggests that where the agreement is sufficiently certain (notably, where it is not made subject to contract nor is merely "an agreement to agree"), then this agreement may provide the basis for the recognition of a constructive trust or for proprietary estoppel.

Effects of proprietary estoppel

5-049

⚠ One important aspect of the difference between proprietary estoppel and constructive trust lies in the former's greater flexibility of remedial response,³¹⁶ although sometimes, the effect of the application of the two doctrines will be the same.³¹⁷ For:

"... if there is a constructive trust the court must usually give effect to it, often by ordering a transfer of the relevant proprietary interest, whereas if there is an estoppel the court will give a remedy that reflects the value of the equity in question."³¹⁸ ⚠

Restitution: recovery of money paid by purchaser on a failure of consideration³¹⁹

5-050

⚠ The availability of restitution of money paid under an agreement which failed to comply with s.40 of the Law of Property Act 1925 and therefore rendered the contract unenforceable depended on whether the vendor or purchaser defaulted. The general rule was that if the vendor defaulted, the purchaser might recover his deposit on the ground of total failure of consideration.³²⁰ It was, however, possible that, even here, consideration for the payment would not have failed if the vendor had done acts of part performance of the contract and these acts benefited the purchaser.³²¹ If, on the other hand, the purchaser defaulted, he could not recover a deposit paid on the ground of failure of consideration as the consideration for the payment could not be said to have failed.³²²

5-051

⚠ What is the position as regards restitution based on failure of consideration of money paid under an agreement which fails to fulfil the requirements of s.2 of the 1989 Act? If the notion of consideration were understood as the basis on which the payment was made,³²³ ⚠ then this basis would normally be the existence of the contract of sale with the result that, under the new requirements, failure to comply with the formalities nullifies the contract so as to deprive the payment of its basis. If, on the other hand, the receipt of any promised benefit by the purchaser (such as, for example, by entering possession) were to be taken as preventing the failure of consideration even under this non-existent contract, then recovery would be denied. In *Sharma v Simposh Ltd* the Court of Appeal expressly adopted the former interpretation of failure of consideration,³²⁴ noting that the Law Commission had suggested that a purchaser who pays a deposit under an oral agreement for the purchase of land will generally be entitled to recover his deposit if the sale does not go ahead, "for the state of affairs contemplated as the reason for the payment will have failed to materialise."³²⁵ However, the Court of Appeal held that on the facts of the case before them which concerned an agreement "to attempt to create an option giving the claimants the right to buy [a building under construction] within the period leading to its completion for an agreed price in exchange for a non-refundable deposit"³²⁶ there was no failure of consideration "[s]ince the claimants obtained the benefit for which the payment was made",³²⁷ that is, "the defendant took the property off the market pending completion and kept open

its offer to sell it to the claimants at a fixed price.”³²⁸ In the result, therefore, the Court of Appeal saw the benefit obtained under the contract (even though void for informality) as preventing failure of consideration. Moreover, as the claimants had obtained the benefit for which the payment was made and given that they had decided not to proceed with the purchase of the property owing to a sharp fall in the financial market,³²⁹ there was “no merit in their claim and no injustice in the defendant retaining the money. The justice of the matter is entirely on the defendant’s side”.³³⁰ !

It is submitted, though, that where a buyer has paid the full purchase price under a contract for the sale of land and entered into possession of the land for a period, it would be unjust to allow him to rely on the statutory invalidity in order to claim back the price, leaving the seller to any possible counterclaim in restitution on the ground of the buyer’s unjust enrichment in enjoying the property during the period. However, in *Singh v Sanghera* the High Court accepted that “the result of a finding that the ‘contract’ under which the parties were acting was void is that any party must restore benefits the retention of which would unjustly enrich that party”.³³¹ So, where a contract for the disposition of an interest in land (there, the sale of goodwill of a supermarket, including a lease of premises) was void under s.2, the purchasers were held entitled to recover the price paid as “[t]he business they purchased, and its goodwill, meant nothing without the lease, and, as the agreement to acquire the business including the lease was void, they acquired nothing”.³³² Conversely, the sellers were entitled to recover based on the purchasers’ unjust enrichment for benefits derived from the void contract, these including the value of original stock and in respect of indemnity arrangements in relation to the businesses’ bank accounts.³³³

Restitution: recovery of money paid by purchaser under a mistake of law


5-052

! As the previous paragraphs indicate, the traditional ground for recovery of money paid under a contract for the sale, etc. of an interest of land defective for want of formality has been a total failure of consideration. However, in *Kleinwort Benson v Lincoln City Council*³³⁴ ! the House of Lords allowed a party to a contract void under the ultra vires doctrine to recover payments made under it on the ground that at the time of payment it laboured under a mistake of law as to the validity of the contract: restitution for mistaken payments applies in principle to mistakes of law as to mistakes of fact.³³⁵ While, therefore, this decision was not made in the context of a contract which failed to comply with the formal requirements of s.2 of the 1989 Act, the abolition of the mistake of law rule was put in very general terms and it could well be argued that where a purchaser of land pays money under an agreement for the sale etc. of an interest in land thinking it to be a valid contract, but which as a matter of law is void for want of formality, then that purchaser should be able in principle to recover the money on the ground of this mistake of law, whether or not consideration for the payment can be said to have failed. However, such a reopening of executed *land* transactions may be thought undesirable by future courts. In this respect, it is to be recalled that in *Tootal Clothing Ltd v Guinea Properties Ltd* (which was not cited to the House of Lords in *Kleinwort Benson v Lincoln City Council*), Scott L.J. expressed the view that:

“... section 2 [of the 1989 Act] is of relevance only to executory contracts. It has no relevance to contracts which have been completed. If parties choose to complete an oral land contract or a land contract that does not in some respect or other comply with section 2, they are at liberty to do so. Once they have done so, it becomes irrelevant that the contract they have completed may not have been in accordance with section 2.”³³⁶

While in *Kleinwort Benson v Lincoln City Council* Lord Goff of Chieveley (with whom Lord Browne-Wilkinson, Lord Lloyd of Berwick, Lord Hoffmann and Lord Hope of Craighead agreed on this point) rejected a restriction on the ambit of restitution on the ground of mistake of law for the case where a transaction is completed,³³⁷ he did so by reference to the cause of the voidness of the contracts before him, i.e. interest rate swap transactions. These had been held void on the ground that they were ultra vires the local authorities which had entered them and, as Lord Goff concluded:

“... it is incompatible with the ultra vires rule that an ultra vires transaction should become binding on a local authority simply on the ground that it has been completed.” ³³⁸

According to Lord Hope, “the purpose of the ultra vires doctrine is to protect the public” and therefore “it would be unsatisfactory if restitution were to be possible only in the case of uncompleted transactions”, ³³⁹ though he put his rejection of the restriction in very general terms. ³⁴⁰ It is submitted that a future court could take the view that the policy underlying the invalidity of informal transactions relating to land would not be defeated by a rule which prevented the restitution of monies paid under them where they are wholly executed. ³⁴¹  For, while the formalities required by the 1989 Act may to a degree serve a protective purpose of would-be purchasers, the main reason for the requirements is the need for certainty in transactions and where a transaction had been completed there should be no concern on this ground. ³⁴² On the other hand, a court could instead take a position similar to that taken by the Court of Appeal in *Godden v Merthyr Tydfil Housing Association* in relation to the application of the doctrine of estoppel by convention to a land transaction void for informality, where it held that a court should not uphold a transaction declared invalid on grounds of general public policy. ³⁴³ If it did, or if the full force of restitution on the ground of mistake of law is not otherwise restrained, then any payments made under a transaction which was thought valid by the payer, but was void for informality may be recovered.

Restitution: benefits conferred other than money

5-053

Under the Law of Property Act 1925 s.40, a *purchaser* of an interest in land under a contract unenforceable under that provision was able to recover on a quantum meruit for improvements to the land if the vendor allowed him to go on to effect them, but then repudiate the contract, as the permission to enter might be taken as acquiescence in the work being done. ³⁴⁴ Similarly, in *Degelman v Guaranty Trust Co of Canada and Constantineau*, ³⁴⁵ the defendants’ predecessor in title had promised to bequeath a house to the plaintiff, her nephew, if he performed various household tasks. He performed the tasks, but she did not leave the house to him in her will. The Supreme Court of Canada held his acts were not sufficient to satisfy the doctrine of part performance and thus to avoid the effect of the Statute of Frauds, but further held that the plaintiff was entitled to recover on a quantum meruit for the work he had done in the expectation of some remuneration and at his aunt’s request. This law could apparently also apply under s.2 of the 1989 Act, ³⁴⁶ unless the court were to hold that such recovery would undermine the purpose of the statutory requirements in avoiding disputes as to what was agreed. ³⁴⁷

5-054




On the other hand, if the *vendor* of an interest in land improves it at the request of the purchaser and in anticipation of the contract going ahead, it is not clear whether the purchaser will be liable on a quantum meruit in respect of the work, because although he has requested the work done, he has not benefited from its execution. ³⁴⁸ Dicta in the decision of the Court of Appeal in *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* ³⁴⁹ suggest that a vendor should not recover where a contract has failed to materialise owing to his own fault, but should do so only where it is owing to the purchaser’s fault, or perhaps, circumstances beyond either’s control. However, the case concerned an agreement made expressly “subject to contract” which failed to proceed further and it is submitted that, whatever the position under s.40 of the Law of Property Act 1925, a distinction based on the respective fault of the parties is inappropriate to recovery in respect of benefits conferred under a contract nullified under the 1989 Act: a party could not be described as “at fault” merely by relying on the statutory invalidity of an agreement which he has made—an invalidity part of whose purpose was his own protection. ³⁵⁰ On the other hand, if a purchaser is allowed to enter possession under a contract void for failing to fulfil the requirements of s.2 of the 1989 Act, a vendor should be able to recover on a quantum meruit for the purchaser’s enjoyment of the property, this clearly counting as a benefit for this purpose. ³⁵¹


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- [248.](#) *Leroux v Brown* (1852) 12 C.B. 801; *Steadman v Steadman* [1976] A.C. 536, 540, 551, 556; *Elias v George Sahely & Co (Barbados) Ltd* [1983] A.C. 646, 650.
- [249.](#) *Godden v Merthyr Tydfil Housing Association* (1997) 74 P. & C.R. D1 at D3 (“void”); *Yaxley v Gotts* [2000] Ch. 162 especially at 175 (“void”); *North Eastern Properties Ltd v Coleman* [2010] EWCA Civ 277, [2010] 1 W.L.R. 2715 at [57] (“void”); *Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567, 1571 (“ineffective”). cf. *Jelson Ltd v Derby City Council* [1999] E.G. 88 (C.S.) where the court held that it could apply a “blue pencil” test to a clause in a contract failing to comply with the 1989 Act and uphold the remainder of the agreement: it is submitted that this approach conflicts with the judicial treatment of “composite agreements” and rectification: above, paras 5-029, 5-034. In *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 W.L.R. 2855 the CA held that its earlier extempore decision in *Tootal Clothing Ltd v Guinea Properties Management Ltd* (1992) 64 P. & C.R. 452 especially at 455-456 was not authority for the proposition that, in a case in which the parties have purportedly made a contract falling within s.2, but have in fact created a nullity because not all the terms of the sale were included in it, then once the land elements of the purported contract have been completed, either side can then enforce any non-land terms that either were or should have been included in it ([2012] EWCA Civ 900 at [40], [44]–[46]), thereby disapproving Lewison J. in *Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd* [2004] EWHC 2547 (Ch), [2005] 2 P. & C.R. 105 at [198]. As Rimer L.J. (with whom Patten and Laws L.JJ. agreed) observed: “[t]he proposition that a void contract can, by acts in the nature of part performance, mature into a valid one is contrary to principle and wrong”: [2012] EWCA Civ 900 at [47].
- [250.](#) See above, para.5-011.
- [251.](#) Law Com. No.164 (1987), para.4.13.
- [252.](#) *Lincoln v Wright* (1859) 4 De G. & J. 16; *Maddison v Alderson* (1883) 8 App. Cas. 467.
- [253.](#) See Goff and Jones, *The Law of Restitution*, 5th edn (1998), p.580.
- [254.](#) (1996) 71 P. & C.R. 120.
- [255.](#) (1996) 71 P. & C.R. 120, 122.
- [256.](#) *Yaxley v Gotts* [2000] Ch. 162 at 178 (although the point about part performance was agreed by counsel) and see below, para.5-040.
- [257.](#) “[N]othing in this section affects the creation or operation of resulting, implied or constructive trusts.”
- [258.](#) Below, paras 5-040—5-049.
- [259.](#) [2003] UKHL 17, [2003] 2 A.C. 541 (in the context of the Statute of Frauds 1677 s.4) and see above, para.5-005 and Vol.II, para.45-060.
- [260.](#) [2003] UKHL 17 at [8]–[9], [20]–[26], [35], [52]. See further below, paras 5-041—5-049.
- [261.](#) cf. in similar terms, [2003] UKHL 17 at [20], per Lord Hoffmann concerning the Statute of Frauds generally.
- [262.](#) See above, para.5-011.
- [263.](#) [2000] Ch. 162.
- [264.](#) [1991] 1 A.C. 107, 132.

- [265.](#) **!** [2000] Ch. 162 at 180. See similarly *David Vincent S v Susan Ann S (now M)* [2006] EWHC 2892 (Fam), [2007] 1 F.L.R. 1123 at [56]; *Ely v Robson* [2016] EWCA Civ 774, [2017] 1 P. & C.R. DG1. See also *Dowding v Matchmove Ltd* [2016] EWCA Civ 1233, [2017] 1 W.L.R. 749 esp. at [35]-[36] (oral agreement complete in all essential terms intended by both parties to be binding immediately, relied upon by claimants to their detriment). It has been held that where an agreement for the disposition of an interest in land is made subject to a condition, then no constructive trust can arise until the condition is fulfilled so as to allow the “beneficiary” under the would-be trust (the would-be transferee) to require the would-be “trustee” (the would-be transferor) to transfer the beneficial interest (the interest in land in question): *Representative Body of the Church in Wales v Newton* [2005] EWHC 631 (QB), [2005] All E.R. (D) 163 (Apr) especially at [64].
- [266.](#) [2000] Ch. 162 at 180, 181 and 193.
- [267.](#) *Yaxley v Gotts* [2000] Ch. 162 at 179-181.
- [268.](#) [2005] EWCA Civ 45, [2005] W.T.L.R. 345.
- [269.](#) cf. *McGuane v Welch* [2008] EWCA Civ 785, [2008] 2 P. & C.R. 24 where the CA held on the facts that “[a] constructive trust could not be properly inferred or imposed by the court as, to do so, was inconsistent with the express agreement of the parties that the Lease would be held by [the appellant] on an express trust for [the respondent] for a period of three years after which the deed of transfer of the Lease to [the respondent] would take effect”: [2008] EWCA Civ 785 at [35], per Mummery L.J.
- [270.](#) *Pallant v Morgan* [1953] Ch. 43; *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch. 372; *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 2 All E.R. 754.
- [271.](#) *Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd* [2004] EWHC 2547 at [219] (where it was held inapplicable on the facts).
- [272.](#) [1997] 1 W.L.R. 38.
- [273.](#) [1997] 1 W.L.R. 38 at 45.
- [274.](#) [1997] 1 W.L.R. 38 at 50. Tucker L.J. agreed. cf. *King v Jackson* [1998] 03 E.G. 138.
- [275.](#) [2000] Ch. 162.
- [276.](#) [2000] Ch. 162 at 174.
- [277.](#) [2000] Ch. 162 at 174-175 and cf. the approach of the HL in *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17, [2003] 2 A.C. 541, above, paras 5-005, 5-039.
- [278.](#) Below, paras 5-044—5-049.
- [279.](#) Law Commission, Working Paper No.92, para.5.8.
- [280.](#) cf. above, paras 4-086 et seq. especially para.4-099.
- [281.](#) **!** *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123, [2016] 1 P. & C.R. 10 at [33].
- [282.](#) **!** [2015] EWCA Civ 1123 at [33].
- [283.](#) (1997) 74 P. & C.R. D1. On estoppel by convention generally, see above, paras 4-108—4-115.

- [284.](#) (1997) 74 P. & C.R. D1, D3. Simon Brown L.J. thereby approved the statement found in Halsbury's Laws of England, 4th edn, Vol.16, para.962.
- [285.](#) In *Yaxley v Gotts* [2000] Ch. 162, 174 Robert Walker L.J. agreed that estoppel by convention in the context of s.2 of the 1989 Act was "impossible"; Clarke L.J. considered it "likely to fail": at 182.
- [286.](#) *MP Kemp Ltd v Bullen Developments Ltd* [2014] EWHC 2009 (Ch) at [123] (though not stating that the estoppel in question would be by convention and not deciding whether the effect of the estoppel on the facts was tantamount to a variation), applying the approach of the HL in *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17 (decided in relation to the Statute of Frauds s.4), on which see above, para.5-039 and Vol.II, para.45-060.
- [287.](#) See above, paras 4-139 et seq.
- [288.](#) Law Com. No.164 (1987), para.5.5.
- [289.](#) *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [15], [29], [72] and see above, paras 4-149 et seq.
- [290.](#) Megarry and Wade, *The Law of Real Property*, 8th edn (2012) by Harpum, Bridge and Dixon paras 16-007, 16-011. In *Capron v Government of Turks and Caicos Islands* [2010] UKPC 2 [36]–[38] it was emphasised that proprietary estoppel arises from a representation that the claimant would acquire a *certain* interest in land.
- [291.](#) Davis (1993) 13 O.J.L.S. 101, 103.
- [292.](#) (1993) 13 O.J.L.S. 101, 104 and see *Godden v Merthyr Tydfil Housing Association* (1997) 74 P. & C.R. D1.
- [293.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752.
- [294.](#) [2009] UKHL 18, [2009] 1 W.L.R. 776.
- [295.](#) [1995] 2 F.L.R. 1029.
- [296.](#) cf. *James v Evans* [2001] C.P. Rep. 36 (no defence of proprietary estoppel on the facts).
- [297.](#) [2000] Ch. 162, above, para.5-040.
- [298.](#) [2000] Ch. 162 at 180; *McGuane v Welch* [2008] EWCA Civ 785, [2008] 2 P. & C.R. 24 at [37], per Mummery L.J. cf. Lord Walker's "lesser enthusiasm" for the complete assimilation of "common intention" constructive trust and proprietary estoppel in *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432 at [37].
- [299.](#) *Lancashire Mortgage Corp Ltd v Scottish and Newcastle Plc* [2007] EWCA Civ 684, [2007] All E.R. (D) 68 (Jul) at [55], per Mummery L.J. (emphasis added).
- [300.](#) [2005] EWCA Civ 45, [2005] W.T.L.R. 345.
- [301.](#) [2005] EWCA Civ 45 at [40].
- [302.](#) [2003] UKHL 17, [2003] 2 A.C. 541.
- [303.](#) [2005] EWCA Civ 45 at [29].
- [304.](#) [2008] UKHL 55, [2008] 1 W.L.R. 1752. See also at *Capron v Government of Turks and Caicos Islands* [2010] UKPC 2, [33]–[40].
- [305.](#) See further above, paras 4-146 et seq.

- [306.](#) [2008] UKHL 55 at [29].
- [307.](#) **!**[2008] UKHL 55 at [29]; *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123, [2016] 1 P. & C.R. 10 at [33] (doubting the law as expressed in *Yaxley v Gotts* [2000] Ch. 162 noted in Vol.I, para.5-045) by reference to Lord Scott of Foscote's view). Lord Walker considered that it was not "necessary or appropriate to consider the issue of section 2" of the 1989 Act: [2008] UKHL 55 at [93].
- [308.](#) [2009] UKHL 18, [2009] 1 W.L.R. 776. The decision was applied in *Suggitt v Suggitt* [2011] EWHC 903 (Ch), [2011] 2 F.L.R. 875.
- [309.](#) Above, paras 4-149—4-152.
- [310.](#) [2009] UKHL 18 at [99] referring to *Cobbe* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [129].
- [311.](#) **!**[2010] EWCA Civ 1095, [2010] N.P.C. 100. See also *Kinnear v Whittaker* [2011] EWHC 1479 (QB), [2011] All E.R. (D) 78 (Jun) (allowing the possibility of proprietary estoppel and preferring the approach of the CA in *Yaxley v Gotts* [2000] Ch. 162 (above, para.5-040) to the approach found in Lord Scott's speech in *Cobbe*, quoted above, para.5-046; *Ghazaani v Rowshan* [2015] EWHC 1922 (Ch) at [192] and [197] (allowing the possibility of proprietary estoppel/constructive trust in the "exceptional circumstances" of the case); *Muhammad v ARY Properties Ltd* [2016] EWHC 1698 (Ch) at [32]–[50]; *Pinisetty v Manikonda* [2017] EWHC 838 (QB) at [39]–[42] (agreement not sufficiently certain to be enforced).
- [312.](#) [2010] EWCA Civ 1095 at [56].
- [313.](#) **!**[2010] EWCA Civ 1095 at [57]. According to the CA in *Dowding v Matchmove Ltd* [2016] EWCA Civ 1233, [2017] 1 W.L.R. 749 at [32], Arden L.J. was not intending to describe three different situations in which s.2(5) would not apply, but rather to describe the *Cobbe* case in three different ways, which taken together meant that the party "never expected to acquire an interest in the property otherwise than under a legally enforceable contract" (quoting Lord Scott in *Cobbe* [2008] UKHL 55 at [37]). See also *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 2 All E.R. 754 at [107] and [133].
- [314.](#) [2010] EWCA Civ 1095 at [58] referring to [2009] UKHL 18 at [93].
- [315.](#) [2010] EWCA Civ 1095 at [71] and [73]) and see similarly Morgan L.J. [2010] EWCA Civ 1095 at [91].
- [316.](#) Goff and Jones, *The Law of Restitution*, 7th edn (2007), p.579-580.
- [317.](#) Megarry and Wade, *The Law of Real Property* 8th edn (2012) by Harpum, Bridge and Dixon, para.11-032.
- [318.](#) **!***Representative Body of the Church in Wales v Newton* [2005] EWHC 631 (QB), [2005] All E.R. (D) 163 (Apr) at [62], per Antony Edwards-Stuart Q.C. For general discussions of the remedial flexibility of proprietary estoppel see *Jennings v Rice* [2002] EWCA Civ 159, [2002] All E.R. (D) 324 (Feb); *Powell v Benny* [2007] EWCA Civ 1283, [2007] All E.R. (D) 71 (Dec); *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P. & C.R. 10 esp. at [39]–[42]; Gardner (1999) 115 L.Q.R. 438 and (2006) 122 L.Q.R. 492 and above, paras 4-173—4-180.
- [319.](#) See Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), Ch.12 preferring to describe this law as "restitution on the ground of failure of basis". See further below, paras 29-057 et seq.
- [320.](#) *Pulbrook v Lawes* (1876) 1 Q.B.D. 284, 289, subject to the discretion of the court under the Law of Property Act 1925 s.49(2).

321. cf. Goff and Jones, *The Law of Restitution*, 7th edn (2007), paras 1-054—1-055. Of course, if the acts of part performance were sufficient to satisfy the doctrine of part performance, then the contract might be enforced in equity: *Steadman v Steadman* [1976] A.C. 536.
322. *Thomas v Brown* (1875–76) L.R. 1 Q.B.D. 714, 723 subject to the discretion granted to the court under the Law of Property Act 1925 s.49(2).
323.  Birks, *An Introduction to the Law of Restitution* (revised edn 1989), p.223; and see Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), para.12-003; below, paras 29-057 et seq.
324. [2011] EWCA Civ 1383, [2012] 1 P. & C.R. 12 at [24] quoting Birks, n.300. Failure of consideration was “the only suggested ground” of recovery of the deposit: [2011] EWCA Civ 1383 at [55] and cf. below, para.5-054.
325. [2011] EWCA Civ 1383, [2012] 1 P. & C.R. 12 at [25].
326. [2011] EWCA Civ 1383, [2012] 1 P. & C.R. 12 at [9].
327. [2011] EWCA Civ 1383 at [55], per Toulson L.J. giving judgment of the Court.
328. [2011] EWCA Civ 1383 at [26] (the reasons given by the judge below).
329. [2011] EWCA Civ 1383 at [8].
330.  [2011] EWCA Civ 1383, [2012] 1 P. & C.R. 12 at [55], per Toulson L.J. *Sharma v Simposh* was applied by the CA in *Marlbray Ltd v Laditi* (on appeal from sub nom. *Rabiu v Marlbray Ltd*) [2016] EWCA Civ 476, [2016] 1 W.L.R. 5147 at [81]–[93], [96], esp. at [92] where it was held that a deposit paid by a joint and several purchaser off-plan of a long lease of a flat in a large block should not be returned on the basis of a failure of consideration, even if the contract was void under s.2 of the 1989 Act (which it was held not to be), as the purchaser had the benefit of the specific unit chosen being taken off the market; the flat had been secured at a specific price; the developer had (apparently) completed the works with the deposit as collateral; and the purchaser had become entitled to 10 free days at a London hotel. For this purpose, it made no difference that the deposit was held by a third-party stakeholder: [2016] EWCA Civ 476 at [99].
331. [2013] EWHC 956 (Ch) at [33], per H.H.J. Purle Q.C.
332. [2013] EWHC 956 (Ch) at [33].
333. [2013] EWHC 956 (Ch) at [38]–[41].
334.  [1998] 2 A.C. 349. See also *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558 and Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 9-101 et seq., especially paras 9–71 and 9–89 et seq.
335. See further, below, paras 29-047 et seq.
336. (1991) 64 P. & C.R. 452, 455. cf. *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 W.L.R. 2855 at [42] where Rimer L.J. interpreted this passage as saying “no more than that the fact that any agreed land transaction may not be compliant with section 2 does not prevent the parties proceeding to its practical completion (for example, in the most conventional case, by an assurance of the land interest against payment of the price)”.
337. [1998] 2 A.C. 349, 385-387. Lord Goff thereby rejected an argument to this effect found in Birks (1993) 23 U.W.A.L.R. 195, 230.
338. [1998] 2 A.C. 349, 387.

- [339.](#) [1998] 2 A.C. 349, 415.
- [340.](#) [1998] 2 A.C. 349, 415-416 and see *Burrows* [1995] R.L.R. 15, 18–19.
- [341.](#)  cf. *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558 where the HL considered whether the statutory tax regime under which the payments in question were paid was incompatible as a matter of policy with restitutionary recovery on the ground of mistake of law and found that it was not. See further Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), para.2-21 et seq. which observes that “[t]he courts may refuse to allow a claim in unjust enrichment where this would lead to the enforcement of a transaction that a statute deems to be unenforceable. To decide whether a claim should be allowed, the courts must identify the policy of the statute and then decide whether this would be stultified if restitution were awarded”.
- [342.](#) See *Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567, 1576, per Peter Gibson L.J., quoted above, para.5-010.
- [343.](#) (1997) 74 P. & C.R. D1 at D3. cf. *McCausland v Duncan Lawrie Ltd* [1997] 1 W.L.R. 38, 45, 50 and see above, para.5-043.
- [344.](#) *Pulbrook v Lawes* (1876) L.R. 1 Q.B.D. 284.
- [345.](#) [1954] 3 D.L.R. 78 and cf. below, para.29-086.
- [346.](#) cf. *Bentley & Coughlan* [1989] 10 L.S. 325.
- [347.](#) cf. below, para.29-086. It may be thought that a more appropriate basis for recovery on facts such as *Deglman* would be proprietary estoppel, on which see above, paras 5-044—5-049.
- [348.](#) cf. below, para.29-082 referring to *Craven-Ellis v Canons Ltd* [1936] 2 K.B. 403 (void contracts) and 29-086 (unenforceable contracts) referring to *Deglman v Guaranty Trust Co of Canada and Constantineau*.
- [349.](#) [1954] 1 Q.B. 428, 434, 437, 438.
- [350.](#) See Law Com. No.164 (1987), para.2.9.
- [351.](#) Goff and Jones, *The Law of Restitution*, 5th edn (1998), p.581. This passage does not appear in subsequent editions. cf. above, para.5-051 regarding *Singh v Sanghera* [2013] EWHC 956 (Ch).