The ruling suggests that there is no absolute right to natural light as some previous cases have suggested.

Distinction between presumption of grant and Prescription Act 1832

It is worth noting that the period of user under the 1832 Act is a period of enjoyment *immediately before a claim* to establish the right is made by bringing an action. However, the period under prescription by lost modern grant is *not limited to the period next before the claim is made*.

For example A uses a track over B's land giving access to a wood from A's house. A uses the vehicular access for 20 years. It is then interrupted by B who orders A to stop using the track. A acquiesces in this for 14 months while he tries to negotiate a compromise with B. This fails and A goes back to using the track. It was held in these circumstances in *Smith* v *Brudenell-Bruce* [2002] 2 P & CR 51 that A succeeded under the rules of lost modern grant but failed under the Act of 1832.

Profits *à prendre*

The general period for prescription here is 30 years under the Act of 1832, though 20 years is enough if the court is presuming a lost modern grant (see *Tehidy Minerals* v *Norman* (1971)).

If an easement is denied or threatened, it would be necessary to ask the court for an injunction to prevent the owner of the servient tenement from acting contrary to the easement, and its existence would have to be proved under one of the headings given above. The court may then:

(*a*) find the easement not proved; or
(*b*) grant an injunction to restrain the owner of the servient tenement from acting contrary to it; or
(*c*) if the infringement is not serious, award damages once and for all, in which case the servient owner will have bought his right to act contrary to the easement.

Reduction of easements

The court has power to reduce the scope of an easement when insistence on full use of it is unreasonable. Thus in *B & Q plc* v *Liverpool and Lancashire Properties Ltd* [2000] 39 LS Gaz R 41 the defendants wished to extend their premises over part of an easement of access possessed by B & Q. The easement of way would not be extinguished but reduced. B & Q asked for an injunction to prevent the extension and the court granted it. B & Q had shown that they would be placed in a difficult access situation otherwise and it was not unreasonable of them to resist a reduction in their easement of way. The High Court made clear however that where the holder of an easement would not be placed in difficulty by its reduction and was unreasonably resisting a reduction the court would not grant relief.

Termination or extinguishment of servitudes

Servitudes may be extinguished by statute, as where the property concerned is compulsorily purchased under statutory powers, or by express or implied release. At law a deed is necessary for express release, but in equity an informal release will be effective if it would be inequitable for the dominant owner to claim that the right still exists.

An example of an easement being extinguished under statutory authority is provided by *Jones* v *Cleanthi* [2006] 1 All ER 1029.

The claimant had a leasehold interest in a flat. The lease gave her access down the hall of the block to a place from which refuse was collected by the local authority. She sub-let the flat and while she was away the local authority, acting under Part XI of the Housing Act 1985, and in connection with the fact that the property was in multi-occupation, served a notice on the landlord to carry out works on the premises. These included building a fire wall across the hall so that that form of access to the refuse are was denied to the claimant. When she returned to the flat she raised before the High Court her right to an easement of way down the hall. The High Court ruled that, since the work had been done under statutory power and in compliance with a statutory duty, the easement of way had been extinguished. The landlord had no alternative but to carry out the instructions of the local authority. The claimant would have to reach the refuse area by a longer route.

If the dominant owner shows by his conduct an intention to release an easement, it will be extinguished. The demolition of a house to which an easement of light attaches may amount to an implied release, but not if it is intended to replace the house by another building. Mere non-use is not enough (see *Tehidy Minerals* v *Norman* (1971)).

We have already seen that an easement is extinguished when the dominant and servient tenements come into simultaneous ownership and possession of the same person, since a person cannot have an easement over his or her own land.

Indemnity insurance. If the existence of an easement is crucial to the purchase of land and its existence is not crystal clear, it will generally be advisable to obtain indemnity insurance from a company specialising in such business, compensating the landowner if the 'easement' is successfully challenged.

Declarations by the court. Although no question of extinguishing the easement arises, it is possible to ask the court for a judgment declaring that the dominant owner will not be able to prevent a particular development on the servient land before the development goes ahead. Thus, in *Greenwich Healthcare NHS Trust* v *London Quadrant Housing Trust* (1998) *The Times*, 11 June the court made such a declaration where the proposed development was the realignment of a dangerous road in the public interest.

Restrictive covenants

A restrictive covenant is essentially a contract between two owners of land whereby one agrees to restrict the use of his land for the benefit of the other. We are not concerned here with covenants in leases, which are governed by separate rules already outlined.

Such covenants were not adequately enforced by the common law because the doctrine of privity of contract applied, and as soon as one of the parties to the covenant transferred his land, the covenant was not enforceable by the transferee because he had not been a party to the original contract. However, the common law realised that this was rather too rigid and went so far as to allow a transferee to enforce the benefit of the covenant against the original party to it. Thus, if A, the owner of Blackacre, agreed with B, the owner of Whiteacre, that he would not use Blackacre for the purposes of trade, if B then sold Whiteacre to C, C could enforce the covenant against A. However, if A sold Blackacre to D, C could not enforce the covenant against D, because the common law would not allow D to bear the burden of a covenant he did not make.

Equity takes a different view, and allows C to enforce the sort of covenant outlined above by injunction, if the following conditions are fulfilled.

(a) The covenant must be substantially negative. Much depends upon the words used in the covenant, and an undertaking which seems *prima facie* to be positive may imply a

negative undertaking and this may then be enforced (see *Tulk* v *Moxhay* (1848), Chapter 10). A covenant to use a house as a dwelling house implies that it will not be used for other purposes, and would be enforceable in the negative sense. If the covenant requires the covenantor to spend money, it is not a negative covenant. Thus in *Rhone* v *Stephens* [1994] 2 WLR 429 it was held by the House of Lords that a positive covenant to repair the roof of an adjacent property did not run with the land, i.e. it did not pass the repairing duty to a subsequent owner.

(b) The covenant must benefit the land. It is often said that the covenant must 'touch and concern' the land and must not be merely for the personal benefit of the claimant. Restrictive covenants usually endeavour to keep up the residential character of the district and benefit the land by preserving value and amenities as a residential property.

(c) The person claiming the benefit must retain land which can benefit from the covenant taken. If X owns a piece of land which he splits up into two plots, selling one plot to Y and taking a restrictive covenant in favour of the plot he has retained, then he can enforce the covenant so long as he retains the land to be benefited. If X now sells the plot he had retained, he will not be able to enforce the covenant for the future, although the purchaser from X will be able to do so.

Kelly v *Barrett*, 1924 – Restrictive covenants: land must benefit (**495**)

There is an exception to this rule in the case of *building schemes* involving an estate of houses. Here the covenants are taken by the owner of the land from each person purchasing a house, and although the owner does not retain any of the land, the covenants may be enforced by the purchasers as between themselves. However, a building scheme will not be implied simply because there is a common vendor and the existence of common covenants. It was at one time thought that there must be a defined area and evidence of laying out in lots (*Re Wembley Park Estate Co Ltd's Transfer* [1968] 1 All ER 457). However, in *Re Dolphin's Conveyance* [1970] 2 All ER 664, Stamp, J held that so long as the covenants held in the conveyances were, as a matter of construction, intended to give the purchasers of the parcels mutual rights, this was sufficient to make them enforceable and there was no need, in particular, to consider lotting.

Since restrictive covenants are in general enforceable only in equity, the question of notice arises. In fact, restrictive covenants created after 1925 are void against a purchaser of the legal estate, even one who has notice of them, unless they are registered as land charges. There is an exception as regards covenants between lessor and lessee. These cannot be registered and will be binding only if known to an assignee of the lease. In practice, it is usual for an assignee to inspect the lease. As regards covenants created before 1 January 1926, they bind all persons who acquire the land which is subject to them with the exception of a purchaser for value of the legal estate in the land without notice, actual or constructive, of the covenants.

The general position regarding assignment of leases and the enforcement of covenants against the assignee is also dealt with by the Landlord and Tenant (Covenants) Act 1995, which has already been considered.

Under s 84 of the Law of Property Act 1925 (as amended by the Law of Property Act 1969, s 28(1) and Sch 3), the Lands Tribunal has power, on the application of any person interested, to discharge or modify a restrictive covenant. However, a developer may try to obtain indemnity insurance against restrictions on development caused by possible restrictive covenants. The time and expense factors involved in a Lands Tribunal application often mean that the developer will choose the insurance route, and get his compensation for his loss that way if the covenant is enforceable against him.

Whether a covenant runs with the land depends upon the words. In *Roake* v *Chadha* [1983] 3 All ER 503 the covenant between plots of land was that no more than one house should be built on each plot. The covenants were expressed to pass *only if specifically assigned*. A plot was sold to the defendant but the covenant was not assigned. He proposed to build more than one house on the plot and the claimant, who owned an adjacent plot, tried to enforce the 'one house' covenant. It was held that he could not do so because the covenant had not been specifically assigned as the agreement required.

Restrictive covenants and competition law

Situations have occurred where the owner of a building has sold it to a purchaser subject to an anti-competitive covenant. For example, suppose a cinema company sells one of its art deco listed cinemas to a purchaser with a covenant that it cannot be used as a cinema again and this is to support an out-of-town multiplex that the cinema company has set up. The purchaser may find that since the building is listed he or she cannot get permission for a change of use to other activities e.g. a health club, and since it cannot be used as a cinema the purchaser is in difficulties in regard to the purchase. The government may have to consider a change in the law otherwise properties may be left unsold or unused which is undesirable. Problems relating to land agreements are not really resolved by the Competition Act 1998 and the Enterprise Act 2002 which are considered in Chapter 16.

Enforcing restrictive covenants

Restrictive covenants may be enforced by an action for damages or a claim for an injunction prohibiting breach. As we have seen, an action for an injunction may be lost by delay and/or acquiescence leaving a claim for damages only (see further Chapter 18).

In *Gifford* v *Graham* (1998) *The Times*, 1 May a landowner had the benefit of a restrictive covenant over adjoining land. With full knowledge of his legal rights he failed to seek relief to restrain the unlawful erection of an indoor riding school and to prevent the unlawful use of the covenanted land by its owner. It was held that he could not be granted an injunction for the demolition of the building and to prevent the use of the land for the riding school business. The landowner was only entitled to damages for the injury to his legal rights. Acquiescence had barred his right to injunctive relief.

There is a presumption that restrictive covenants are intended to bind subsequent owners but this presumption is rebutted (does not apply) if the conveyance states that the relevant covenants are not binding. In any case, the conveyance should refer to successors in title otherwise the covenant might be regarded as operative only between the parties to the conveyance and not beyond. This is particularly likely where some covenants are stated to apply to successors and others remain silent as to this. In such a case, the presumption in s 79 of the Law of Property Act 1925 will not apply. The silence indicates a contrary intention as in *Morrells of Oxford Ltd* v *Oxford United Football Club Ltd* [2001] Ch 459, a ruling by the Court of Appeal.

The transfer of land

The material in this section will be changed in parts under the provisions of the Electronic Communications Act 2000 that received the Royal Assent on 25 May 2000. The Cabinet Office has identified some of the departmental priorities for using the Act to update legislation to allow for the electronic option in conveyancing which could cut the time for buying

property from months to weeks, at least so far as the legal process is concerned. The ambitious proposals include the setting up of nationwide databases allowing the buying, selling and mortgaging of homes online. Without this updating, electronic conveyancing would not be possible since the contract of sale of the land and the deed required to convey the title to it must be in writing and signed. The Law of Property Act 1925 and related statutes passed in that year, together with the Law of Property (Miscellaneous Provisions) Act 1989, are the main measures requiring change. However, since the change to electronic methods may take some time, the following materials should be studied since they represent current procedures.

As regards developments, the paper conveyancing process is speeded up by the Land Registration Act 2002 which came into force on 13 October 2003 in terms of electronic searching of title at the Land Registry. The Registry began piloting e-conveyancing as such in 2006.

The latest position is as follows:

- e-conveyancing will be set up in five tranches between 2006 and 2010.
- *Tranche one* began in the autumn of 2006 and was placed before a small and controlled number of pilot users in Portsmouth, Fareham and Bristol. The pilot had only limited features for users. It ran for six months and was not extended beyond the pilot areas.
- *Tranche 2* will take place as a pilot in 2007. Features will be expanded to include, for example, electronic signatures.
- *Tranches 3, 4 and 5* will come in in 2008, 2009 and 2010, each adding more electronic facilities, including electronic transfer of funds, until a complete e-conveyancing service exists. Relevant changes in the text will be incorporated as the service moves to completion. The issue is mainly one for solicitors in practice and there seems little point in going into depth here about the changes while they are merely at a limited pilot stage.

It is usual, when a disposition of land is contemplated, to draw up a contract. For a contract of sale to be valid both parties must have contractual capacity, the contract must be legal, there must be clear agreement on all the essential terms, and acceptance of the offer must be unconditional. As we have seen, contracts for the sale or other disposition of land are invalid unless they are in writing (Law of Property (Miscellaneous Provisions) Act 1989 (see further Chapter 11)).

When a valid contract for sale exists, the purchaser acquires an equitable interest in the property and the vendor is in effect a qualified trustee for him. Thus, if the property increases in value between contract and completion, the purchaser is entitled to the increase and similarly he must bear any loss. This is particularly important in cases where property is destroyed by fire between contract and completion, since the purchaser would still have to pay the purchase money, even though he only received a conveyance of the land with the useless buildings on it. It is now provided by s 47 of the Law of Property Act 1925 that in such a case the purchaser may become entitled to money payable on an insurance policy maintained by the vendor. However, it is prudent for the purchaser to take out his own insurance in case the vendor has none or his policy is defective. If, as is usual, the Law Society's Standard Conditions of Sale are used, they expressly state that the risk of damage to the property stays with the seller until completion. Thus they impose an obligation on the seller to transfer the property in the same physical state as it was at the date of the contract (subject to fair wear and tear). If between contract and completion there is a change in the physical state of the property which makes it unusable for the contract purpose, the buyer is given an unlimited right to rescind.

On a sale of business property it is fair to say that the above provisions have been resisted, e.g. by modifying the Standard Conditions. For business property, therefore, the buyer will usually need to insure from exchange.

The vendor has a lien on the property sold to the extent of the unpaid purchase money and may enforce this by an order for sale; this lien may be registered as a general equitable charge. The purchaser has a similar lien in respect of money paid under the contract prior to conveyance.

On a sale of land it is usual to use a standard form of contract prepared by the Law Society since this saves much trouble in drafting. In what is called an open contract for the sale of land, the vendor must under s 23 of the Law of Property Act 1969 show a title for at least 15 years, beginning with a good 'root of title', i.e. a document dealing with the whole legal and equitable interests in the land. It may be necessary to go back more than 15 years in order to find such a document. The vendor prepares an abstract of title, listing all the relevant documents in connection with its establishment, and he must produce these documents in order to justify the abstract of title he has prepared. It should be noted that all the above matters are attended to by the parties' solicitors.

The Administration of Justice Act 1985 and the Courts and Legal Services Act 1990 have removed the monopoly on conveyancing which has been possessed by solicitors for many years (see Chapter 3).

A contract for the sale of land will normally contain a completion date which is the time by which the transaction must be concluded. The transfer of land involves the following stages:

(a) The preparation of the contract by the seller's solicitor.

(b) The exchange of contracts between the vendor's and purchaser's solicitors, when the purchaser pays a deposit, usually 10 per cent of the purchase money though the matter is one for negotiation and deposits of only 5 per cent are sometimes taken. It should be noted that a high deposit which is not returnable if the contract does not go through can be set aside by the court as a penalty (see Chapter 18). In *Workers Trust and Merchant Bank* v *Dojap Investments* [1993] 2 WLR 702 a non-returnable deposit of 25 per cent was set aside.

The Standard Conditions of Sale provide that the deposit is to be held by the seller's solicitors as stakeholders and paid to the seller on completion together with accrued interest. This keeps it safe in the remote event of the buyer being entitled to rescind the contract and claim return of the deposit. Where there is a related purchase by the seller the Standard Conditions allow the seller to use the deposit in the related purchase. If there was to be a rescission by the buyer the buyer's claim for a return of deposit would then shift from the seller's solicitor to the seller personally. Except at auction the Standard Conditions require a deposit to be paid by a banker's draft or cheque drawn on the solicitor's bank account. Consequently, the solicitor will ask a buyer for the deposit funds, made payable to the solictor's firm, some days before exchange of contracts is expected.

(c) The delivery by the vendor's solicitors of an abstract of title, or as is more usual today, copies of the documents, e.g. previous conveyances, upon which the vendor bases his title.

(d) The examination of this title by the purchaser's solicitors and the checking of the abstract against the actual deeds to see that it is correct.

In any case, the Law of Property (Miscellaneous Provisions) Act 1994 provides for title guarantees which apply on a transfer of land whether for consideration or not. The Act applies to leases and property other than land such as intellectual property, e.g. copyright. Transferors of the relevant property will give implied guarantees.

If the property is sold with a 'full title guarantee' or with a 'limited title guarantee', there will be implied the following covenants:

- that the person making the disposition has the right (with the agreement of any other person conveying the property) to dispose of the property as he purports to; and

- that that person will, at his own cost, do all he reasonably can to give the person to whom he disposes of the property the title he purports to give.

The full guarantee, in addition, warrants freedom from encumbrances, e.g., mortgages, while the limited guarantee gives freedom from encumbrances limited to matters occurring since the last disposition for value. The limited title guarantee is intended for lenders and receivers not ordinary purchasers. Furthermore, the title warranties are only implied in full in the absence of contrary specific provisions.

(e) After all outstanding queries have been solved, a conveyance is prepared by the purchaser's solicitors which is sent to the vendor's solicitors for approval. The draft conveyance may be exchanged a number of times before agreement is reached. Where the land is registered, a simpler form of transfer deed is used.

(f) Just before completion, the purchaser's solicitors will make the necessary searches in the Land Charges Register and in the register maintained by the appropriate local authority to see what encumbrances are registered in respect of the property.

(g) An appointment is then arranged for completion and the purchaser hands over the money, the vendor handing over the conveyance, which he has signed, together with the title deeds. This brings the transaction to a conclusion. However, today there need not be attendance at an office. Completion is very often carried out by post and payment is by bank telegraphic transfer.

The above procedure refers to unregistered land where the need to examine title is to some extent cumbersome and expensive. The Land Registration Act 1925 provides that the title to land can be examined by and registered with the state and that this is followed by the issue of a certificate guaranteeing ownership. Where there is a sale of registered land, the certificate is handed over and the name of the new owner registered. A transfer, rather than a conveyance, is prepared. This is a more simple procedure than the one outlined above for unregistered land and the legal fees for the transaction are less.

Entry of price paid or value declared

The Land Registration (No 3) Rules 1999 (SI 1999/3462) provide that from first registration of land and on subsequent changes of proprietorship the Land Registry will, whenever practicable, enter on the register the price paid or the value declared. The entry will be removed when the next transfer is registered. The information should be helpful to creditors and former spouses seeking settlements. The Land Registry has announced that house price information is available in regard to any property sold in England and Wales since 1 April 2000 on the Land Registry website at www.landreg.gov.uk. There is a charge (currently £2) for each search.

Home Information Packs

The Housing Act 2004 introduces, among other things, the Home Information Pack (HIP), scheduled to come into force in June 2007 as an essential ingredient of the sale of domestic property. It must be prepared by or on behalf of the seller. Its contents were originally to be quite extensive and its cost high, estimated at £800 for a semi-detached house and £1,000 for a detached house. After much protest and lobbying of Parliament, the HIP will come into force as planned in June 2007 but will no longer be required to contain home condition reports. Instead, it will contain only energy performance certificates (introduced by EU law) and local planning searches.

Personal property

We have already mentioned that personal property is divided into two classes – *choses in action* and *choses in possession*, the latter being divided into *chattels real* (i.e. leaseholds) and *chattels personal*. We have already dealt with leaseholds, and the sale of chattels personal has been codified by the Sale of Goods Act 1979, a full study of which would not be appropriate to a book of this nature. The assignment of choses in action is considered later in this chapter.

Mortgages of land

The following types of mortgage are relevant.

Legal mortgage of freeholds

Under the 1925 legislation the mortgagor (the borrower) does not divest himself of his legal estate, but grants to the mortgagee (the lender) a *demise* (i.e. a lease) for a term of years absolute. Thus, if X owns Blackacre and borrows money on mortgage from Y, he will grant Y a term of usually 3,000 years in Blackacre, both agreeing that the term of years will end when the loan is repaid. X will also agree to pay interest on the loan at a stipulated rate.

Alternatively, under the provisions of s 87 of the Law of Property Act 1925 it is possible to create a legal mortgage of freeholds by means of a short deed stating that a charge on the land is created. Such a charge does not give a term of years, but the mortgagee has the same rights and powers as if he had received a term of years under a mortgage by demise.

Before 1926 mortgages were created by conveying the freehold to the mortgagee. Since 1925 an attempt to create a mortgage by this method operates as a grant of a mortgage lease of 3,000 years, subject to cesser on redemption (Law of Property Act 1925, s 85). This is how solicitors arrived at the enormously long period of lease in a mortgage by demise. There is no need to use such a long term.

Legal mortgage of leaseholds

If X, the owner of a 99-year lease of Blackacre, borrows money on mortgage from Y, he may grant Y a sub-lease of, say, 99 years less 10 days, both agreeing that when the loan is repaid the term shall cease. X also agrees to pay interest. Such a term is known as a *mortgage by demise*.

Alternatively, a legal mortgage of leaseholds may be created by a charge by way of legal mortgage under s 87 of the Law of Property Act 1925, if made by deed. No sub-lease is created but the remedies of the mortgagee are the same as if it had been.

When a person has borrowed money by mortgaging property, he may still be able to borrow further sums, if the amount of the charge is not equal to the full value of the property and there seems to be adequate security for further loans. The owner of freehold land may grant a term of 3,000 years plus one day to another mortgagee, whilst the owner of a lease may grant a second sub-lease of, say, 99 years less nine days. Alternatively, a second charge by way of legal mortgage may be created by a further deed.

The only limit to further borrowing on second and subsequent mortgages is that of finding a lender who is prepared to become a second, third or fourth mortgagee.

Equitable mortgage

A mortgagee who receives a mere equitable interest in the land is said to have an equitable mortgage. Thus, if the borrower's interest is equitable, e.g. a life interest, then any mortgage of it is necessarily equitable. Such an interest may be mortgaged by lease or charge, as in legal mortgages, or by a deposit of title deeds with the lender, usually accompanied by a memorandum explaining the transaction. Such mortgages must be in writing and signed by the borrower or his agent (Law of Property Act 1925, s 53). The requirement of writing is reinforced by s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (see Chapter 11). So writing is required to accompany the deposit of title deeds. A mere deposit of the deeds is not enough (see *United Bank of Kuwait* v *Sahib* (1996) *The Times*, 13 February; Court of Appeal).

An informal mortgage of a legal estate or interest creates an equitable mortgage, e.g. an attempt to create a legal mortgage otherwise than by deed.

Where there is a binding agreement to create a legal mortgage, but the formalities necessary to do so have not been carried out, equity regards the agreement as an equitable mortgage. The agreement can be enforced by specific performance so that the mortgagee can obtain a legal mortgage from the borrower under the rule in *Walsh* v *Lonsdale* (1882). Bexfore there is a binding agreement there must be either written evidence of the agreement, signed by the borrower or his agent, or a sufficient act of part performance by the lender. Given the above requirements the parties can be required to execute a legal mortgage by suing in equity for specific performance.

Joint borrowers: liability

Where for example a business partnership obtains a joint facility for the business secured on property jointly owned by the partners who are joint borrowers and if the lender has to sell the mortgaged property to recoup the loan and there is a shortfall between what is owed and the sale price then where, as is usual, the mortgage contains a joint and several liability clause each borrower is liable under the provision for several liability to pay off the whole balance to the lender with a right to seek a contribution against the other joint borrower(s) (see *AIB Group (UK) plc* v *Martin* [2002] 1 All ER 353). The same would be true of a non-business mortgage that carried a joint and several liability clause.

Rights of the mortgagor or borrower

The borrower has a *right to occupy* the land, unless the lender has taken possession as where the borrower has defaulted on the repayments. There is also a *statutory right in s 99 of the Law of Property Act 1925 to grant leases* which bind the lender and the borrower for up to 50 years or a building lease for 999 years. In practice, however, *the mortgage invariably excludes the right* except with the consent of the lender as s 99(13) allows. *The business application* can arise where a borrower who cannot currently sell the property wishes to rent it but the lender refuses to allow this. The borrower may challenge this decision in court. For example in *Citibank International plc* v *Kessler* [1999] 2 CMLR 603 the borrower challenged the right of the lender to exclude the letting power on the basis that it was contrary to what is now Art 39 of the Treaty of Rome. Mr Kessler had bought a house in England with a view to assisting with BMW's operations here. He moved back to Germany and wished to let it since structural defects and a boundary dispute made it impossible to sell. Article 39 deals with restriction on movement of workers within the EU. The Court of Appeal ruled that his case failed. It was not the object of Art 39 to hinder a bank's financial judgements in this way when it was protecting its security.

A major right of the mortgagor is the right to redeem (or recover) the land. Originally at common law the land became the property of the lender as soon as the date decided upon for repayment had passed, unless during that time the loan had been repaid. However, equity regarded a mortgage as essentially a security, and gave the mortgagor the right to redeem the land at any time on payment of the principal sum, plus interest due to the date of payment. What is more important, this rule applied even though the common-law date for repayment had passed. This right, which still exists, is called the *equity of redemption*, and there are two important rules connected with it:

(a) Once a mortgage always a mortgage. This means that equity looks at the real purpose of the transaction and does not always have regard to its form. If equity considers that the transaction is a mortgage, the rules appertaining to mortgages will apply, particularly the right to redeem the property even though the contractual date for repayment has passed, or has not yet arrived. In the latter case, however, the mortgagor must generally give six months' notice of his intention to redeem, or pay six months' interest in lieu, so that the mortgagee may find another investment. However, if the parties contract at arm's length, and there is no evidence of oppression by the mortgagee, the court will endeavour to uphold the principle of sanctity of contract and will enforce any reasonable restriction on the right to redeem.

> *Knightsbridge Estates Trust Ltd* v *Byrne*, 1939 – Right of redemption postponed (**496**)

(b) There must be no clog on the equity of redemption. This means that:

(i) the court will not allow postponement of the repayment period for an unreasonable time; and
(ii) the property mortgaged must, when the loan is repaid, be returned to the borrower in the same condition as when it was pledged.

> *Noakes* v *Rice*, 1902 – No clog on the equity of redemption (**497**)

Nevertheless, particularly in modern times, so long as the parties are at arm's length when the loan is negotiated, equity will allow a collateral transaction.

It is worth noting that the mortgagor may, where he is in possession of the land, grant leases to third parties subject to any special agreement to the contrary.

In practice, the right in the borrower to lease the property is excluded in accordance with the lender's wishes and the terms of the mortgage require his consent, as s 99(13) of the Law of Property Act 1925 allows. The validity of this exclusion has been challenged in the courts when properties subject to a mortgage cannot be sold in a flat market and the borrower wishes to move to other premises and lease the old one. These challenges have failed (see e.g. *Citibank International plc* v *Kessler* [1999] 2 CMLR 603 where the challenge that failed was based on infringement of the Treaty of Rome, Art 48 (now 39) (free movement of workers)). The Court of Appeal ruled that the Article was not intended to hinder the financial judgement of lenders.

> *Kreglinger* v *New Patagonia Meat*, 1914 – Collateral transaction (**498**)
> *Cityland and Property* v *Dabrah*, 1967 – An unreasonable collateral advantage (**499**)

(c) Sections 140A and 140B of the Consumer Credit Act 1974 (as inserted by the Consumer Credit Act 2006) allow the court to make orders in regard to *unfair relationships* between

creditors and debtors where a term or terms of an agreement are taken to be unfair to the debtor. The court can make a variety of orders to redress the situation, including altering the terms of the agreement and reducing or discharging any sum payable under the agreement by the debtor.

Companies and partnerships of more than four partners are excluded from the unfair relationship test.

(d) A term must not be in restraint of trade. This has already been considered in Chapter 16 where the case of *Esso* v *Harper's Garage* (1967) was discussed.

(e) Undue influence. A mortgage may be set aside for undue influence by the lender or his agent (see Chapter 13).

Powers and remedies of the legal mortgagee

A legal mortgagee (the lender) has the following concurrent powers and remedies.

To take possession

This right does not depend upon default by the mortgagor, but the mortgagee will normally only enter into possession of the property under the term of years granted to him, or under the charge by way of legal mortgage, when he is not being paid the sum due, and when he wishes to pay himself from the proceeds of the property. In addition, the court will grant a possession order where an insurance policy which is the security has been allowed to lapse by the borrower (*Western Bank* v *Schindler* [1976] 2 All ER 393). This is not a desirable remedy, however, because when the mortgagee takes possession he is strictly accountable to the mortgagor, not only for what he has received but for what he might have received with the exercise of due diligence and proper management.

> *White* v *City of London Brewery Co*, 1889 – When a mortgagee takes possession (**500**)

In recent times mortgage lenders have been extracting from the courts at the sale time not only an order for possession but also a money judgment. If during a period of negative equity the sale of the property does not cover the loan, the money judgment can be used to attack other property of the borrower and there is no need to go back to court. This approach was approved by the Court of Appeal in *Cheltenham & Gloucester Building Society* v *Grattidge* (1993) 25 HLR 454.

If the mortgagee is simply concerned to intercept rents, where the mortgaged property is let and the mortgagor is a landlord, he will do better to appoint a receiver under the Law of Property Act 1925, s 109. Most mortgagees who ask for a possession order do so in order to sell with vacant possession. The Administration of Justice Act 1970, which is concerned, amongst other things, with mortgage possession actions, reinstates the old practice of the Chancery masters by allowing the court to make an order adjourning the proceedings, or suspending or postponing a possession order provided it appears that the mortgagor is likely to be able to pay within a reasonable time any sums due under the mortgage (s 36). However, the court cannot suspend the execution of an order for possession indefinitely and must specify the period of suspension (*Royal Trust Co of Canada* v *Markham* [1975] 3 All ER 433).

The Act applies wherever a mortgage includes a dwelling house even though part may be used for business purposes. Unfortunately, it was held in *Halifax Building Society* v *Clark* [1973] 2 All ER 33 that where, as is often the case, the mortgage provided that the whole sum