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

should become payable on default by the mortgagor, the court's power to adjourn or stay execution under s 36 could only be exercised if it appeared likely that the mortgagor could pay the *whole* sum within a reasonable period. This plainly defeated the intention of the 1970 Act in most cases as the period of the stay envisaged is short, and the likelihood of the mortgagor being able to repay the entire redemption figure remote. Accordingly, s 8 of the Administration of Justice Act 1973 now provides that a court may treat as due under the mortgage only those instalments actually in arrear, but shall not exercise the power to postpone the order for possession unless the mortgagor will be able to catch up within a reasonable period. This means that not only must he be able to pay the instalments due month by month but also the arrears within a reasonable time.

It should be noted that where a house is owned by a husband and is mortgaged to secure the loan, the interest of the wife occupying the home overrides the lender's claim under the mortgage and the court may refuse a possession order (*Williams & Glyn's Bank Ltd* v *Boland* (1980) (see later in this chapter)).

It is worth noting that the discretion of the court to refuse an order for possession has been widened by the Trusts of Land and Appointment of Trustees Act 1996, s 15. In general terms, before this Act the primacy of the lender seeking the order was indicated by the case law. However, now where, say, the matrimonial home is charged as security for a mortgage and is held on trust by husband and wife as joint tenants, the court may consider to a greater degree than before, e.g., the potential homelessness of children of the family and the general welfare of the family in residence. Having used this wider discretion in *Mortgage Corporation* v *Shaire* [2001] Ch 743 the court refused to grant a possession order to the claimants for mortgage arrears.

However, there is nothing to stop the lender from suing the borrower on his personal undertaking to pay the debt, even though if he or she cannot pay the judgment there may be a bankruptcy and the trustee in bankruptcy may seek an order to sell the property. A claim on the borrower's covenant to repay is not an abuse of process said the Court of Appeal in *Alliance and Leicester plc* v *Slayford* [2000] NLJR 1590.

Taking possession without a court order

In *Ropaigealach* v *Barclays Bank plc* [2000] 1 QB 263 the Court of Appeal ruled that a lender could take possession at common law without a court order. In the case the lender served a valid demand for payment to which the borrower did not respond and then wrote to him telling him that the house was up for sale. The sale was later declared by the court to be valid. The borrower was not living in the house at the time and although this undoubtedly facilitated the sale it does not seem essential to the possession ruling.

Possession order and money judgment

Lenders have been extracting from the courts in the same proceedings an order for possession and also a money judgment. If the sale of the property does not cover the loan then the money judgment can be used to attack other property of the borrower to get in the shortfall and there is no need to go to court again. This approach was sanctioned by the Court of Appeal in *Cheltenham and Gloucester Building Society* v *Grattidge* (1993) 25 HLR 454. It is a particularly useful approach in times of negative equity.

Foreclosure

The mortgagee may obtain a foreclosure order from the court if the mortgagor fails to pay for an unreasonable time. The first order is a *foreclosure order nisi* providing that the debt must be

paid within a stated time. If it is not so paid, the order is made *absolute* and the property becomes that of the mortgagee, the mortgagor's equity of redemption being barred, and the property vesting in the mortgagee, free from any right of redemption either in law or equity. Such orders are seldom used, for it is still open to the court to reopen the foreclosure, i.e. to give the mortgagor a further opportunity to redeem. In addition, the court has power to order a sale instead of foreclosure on the application of any interested party. An order for sale is likely to be made, e.g., if the value of the property exceeds the mortgage debt. Section 36 of the Administration of Justice Act 1970 excluded the power to postpone a foreclosure order because it was considered that the court's power to give the mortgagor time to redeem when granting the decree *nisi* was an adequate remedy. The Payne Committee recommended including actions for foreclosure, and they are now included by the Administration of Justice Act 1973, s 8(3). Thus the courts now have power to postpone an order for foreclosure.

Right of sale

Normally this is the most valuable right of the mortgagee. Subject to certain conditions he can, on the default of the mortgagor, sell and convey to a purchaser the whole of the mortgaged property, and recoup himself out of the proceeds. Unless the mortgagee is a building society (Building Societies Act 1986, Sch 4), he is not a trustee of the power of sale for the benefit of the mortgagor. However, he must not fraudulently, wilfully or recklessly sacrifice the property of the mortgagor (*Kennedy* v *De Trafford* [1897] AC 180) and in addition owes a duty to the mortgagor to take reasonable care to obtain the best price that can be had in the circumstances (*Cuckmere Brick Co Ltd* v *Mutual Finance* [1971] 2 All ER 633).

Strictly speaking, the power of sale only arises when the money lent on mortgage has become due and the fixed date for redemption is past. However, most mortgages are drafted to provide that the mortgage money is due immediately on the signing of the mortgage deed, though the lender will not try to recover it at once if the terms of the mortgage are complied with.

The general rule is that a mortgagee cannot sell to himself or to his nominee. Although a mortgagee is not a trustee of the power of sale and need not get the best possible price (though a building society must), the conflict of interest where he sells to himself is one which equity generally forbids. However, it is thought that the mortgagee could purchase the property, subject to the mortgage, if he had leave from the court, which is the general rule for trustees who wish to buy the trust property, and provided the mortgagor did not object and possibly also if no other purchaser at an adequate price could be found. It is also probable that a mortgagee could buy the property at an auction since in that event the sale is not directly to himself but through an intermediary, i.e. the auctioneer, and given that there is no collusion between the mortgagee and the auctioneer there would seem to be no good reason why the mortgagee should not buy the property in.

In *Tsi Kwong Lam* v *Wong Chit Sen* [1983] 3 All ER 54, the Privy Council decided that a sale by a mortgagee exercising his power of sale to a company in which he had an interest would not necessarily be banned by the law provided the sale was made in good faith and that the mortgagee had taken reasonable precautions to obtain the best price reasonably obtainable at the time, namely by taking expert advice as to the methods of sale and the steps which ought reasonably to be taken to make the sale a success.

It should be noted that the court may, at its discretion, under s 91 of the Law of Property Act 1925, order the sale of a mortgaged property at a value insufficient to repay the mortgage (see *Palk* v *Mortgage Services Funding* [1993] Ch 330). This at least enables the borrower to clear a large amount of his borrowing so that interest accruing on the balance is reduced to manageable proportions.

The *Palk* case was applied in *Polonski* v *Lloyds Bank Mortgages Ltd* [1998] 1 FCR 282, where the High Court held that in addition to financial matters relating to the clearing of the mortgage it could also take into account social considerations. The claimant was a single parent living in a run-down area who wished to sell her property to move to an area where she would have a better chance of employment and her children would have better schooling.

Sale price and guarantors

Failure to obtain the current market value is a breach of duty certainly in the case of a building society, but it does not release a guarantor of the loan from all liability but rather reduces to that extent the amount for which the guarantor is liable (see *Skipton Building Society* v *Bratley* (2000) *The Times*, 12 January and *Stott* v *Skipton Building Society* [1999] All ER (D) 1408).

To sue for the money owing

The mortgage is a pledge for the repayment of the money, but mortgagors almost invariably give a personal covenant to repay. This is of value should the property be destroyed or lose its value. When the date fixed for redemption is passed, the mortgage money is due and the mortgagee can sue for it. He will rarely do so, for in most cases the other remedies will be more satisfactory. (But see above possession orders and money judgments which may be asked for.)

An action to recover the sum lent is barred unless it is brought within 12 years from the date when the right to receive the money accrues which is the date fixed by the mortgage deed for repayment. However, on each occasion that some part of the sum lent or interest on it is paid or the borrower gives a written acknowledgement of his liability to pay the period of 12 years begins to run again so far as what is left to pay is concerned. In the case of interest, only arrears for six years are recoverable (Limitation Act 1980).

The right to appoint a receiver

The Law of Property Act 1925, s 109 gives the mortgagee the right to appoint a receiver to receive the rents and profits on the mortgagee's behalf in order to pay the money due. However, since the powers under the Law of Property Act 1925 are limited, the mortgage deed frequently contains a power to appoint a receiver with wide powers given in the deed. The receiver is deemed to be the agent of the mortgagor, who is liable for his acts and defaults unless otherwise provided by the mortgage. The mortgagee thus avoids the disadvantage of strict accountability to which he would be subject if he entered himself because it is the borrower not the lender who is responsible for the acts and defaults of the receiver.

Remedies of equitable mortgagees

Where the mortgage is equitable and is created by deed, then the mortgagee has virtually the same remedies as have been set out above. Otherwise, if the mortgage is by a deposit of title deeds and a written mortgage instrument, then the mortgagee must ask the court:

(*a*) for an order to sell; or
(*b*) for an order appointing a receiver.

Other rights of mortgagees

A mortgagee has other rights and he may, where the mortgage is created by deed, insure the mortgaged property against loss by fire up to two-thirds of its value, and charge the premiums on the property in the same way as the mortgage money.

A mortgagee has a right to the title deeds of the property, and if the mortgage is redeemed by the mortgagor, the mortgagee must return the deeds to him in the absence of notice of a second or subsequent mortgage, in which case the deeds should be handed to the next mortgagee.

There are other important rights which a mortgagee may exercise in appropriate circumstances as follows.

Consolidation

Where a person has two or more mortgages, he may refuse to allow one mortgage to be redeemed unless the other or others are also redeemed. This right is particularly valuable where property might fluctuate in value, and where a mortgagor might redeem one mortgage where the security was more than adequate, leaving the mortgagee with a debt on the other property not properly secured.

Consolidation is only possible if the right to consolidate was reserved in one of the mortgage deeds. The contractual date for redemption must have passed on all mortgages and they must have been created by the same mortgagor, though not necessarily in favour of the same mortgagee. Nevertheless, in such cases where it is proposed to consolidate two mortgages, both the mortgages must have been vested in one person at the same time, as both the equities of redemption were vested in another.

Tacking

The right to tack may bring about a modification of the priority of mortgages. It is now confined to the tacking of further advances. Thus, where a person has lent money on a first mortgage and there are second and third mortgages, if the first mortgagee agrees to advance a further sum, he may tack this to his first mortgage and thus get priority over the second and third, which would normally rank before the tacked mortgage. This can now only be done if the intervening mortgagees agree, or if the further advance is made without notice of an intervening mortgage, or if the prior mortgage imposed an obligation to make further advances.

Attornment clause

A mortgage may contain an attornment clause by which the borrower attorns or acknowledges himself as a tenant at will, or from year to year, of the lender at a nominal rent such as a peppercorn. The advantage of such a clause was that it entitled the lender to evict the borrower for failure to pay the mortgage instalments and so obtain possession more speedily. However, changes in the rules of court from 1933 to 1937 made a speedy procedure available to mortgagees as such, and there is now no substantial advantage in an attornment clause.

Solicitor disclosure

Legal action by mortgage lenders against solicitors has prompted the Law Society and the Council of Mortgage Lenders to agree a standard set of conveyancing instructions under which solicitors are obliged to disclose relevant information on borrowers as part of the conveyancing service they offer to lenders. This will involve disclosure by solicitors of information in their possession to the effect that the borrower has, e.g., existing mortgage arrears. This will mean that borrowers with a record of bad debts will find it harder to get a mortgage. Solicitors have been successfully sued, and on an increasing scale, for failing to make these disclosures to mortgage lenders on the grounds of confidentiality which will now no longer apply, at least in this context.

Priority of mortgages

The Land Charges Act 1925 introduced the principle of registering charges on land. The object of searching the Land Charges Register is to discover the rights, if any, of third parties which are enforceable against the land. It is a general principle that a purchaser or mortgagee of land is deemed to have actual notice of all third-party rights capable of registration and actually registered, whereas he acquires his interest in the land free from third-party rights capable of registration and not registered. There are five separate registers kept in the Land Charges Department of the Land Registry. Search is usually done by filling in an appropriate form and sending it to the Land Charges Superintendent. This results in an *official search certificate*.

Where there is a mortgage of a legal estate with deposit of title deeds, the mortgage ranks from the date of its creation and such a mortgage cannot be registered.

Where there is a mortgage of a legal estate without deposit of title deeds, the mortgage ranks from its date of registration as a land charge.

Regarding mortgages of equitable interests, the question of priority is based on the rule in *Dearle* v *Hall* (1828) 3 Russ 1, and such mortgages rank from the date on which the mortgagee gave notice of his mortgage to the trustees of the equitable interest, though such notice will not postpone a previous mortgage of which the mortgagee giving notice was aware. Equitable mortgages of interests other than equitable interests rank in priority according to the date of creation. Thus, an equitable mortgage created in January 1996, would take priority over one created in May 1998. Legal mortgages take precedence over equitable mortgages, but an equitable mortgagee who obtains a legal interest does not thereby gain priority over an equitable interest of which he has constructive notice. Thus, if A obtains an equitable interest in property, e.g. a contract to purchase land, in January 1996, and fails to register it as an estate contract until May 1998, and B, in February 1998, obtains an equitable mortgage over the land which is converted into a legal mortgage in April 1998, at a time when B knows or ought to know that A has an interest, as where A is on the land and carrying out works, then B's mortgage, although legal, will not rank over A's equitable interest (*McCarthy and Stone* v *Julian S Hodge & Co* [1971] 2 All ER 973).

Where there are two or more lenders with a mortgage on the same property, they can alter the priority of their mortgages without the consent of the borrower, who is not affected since he must pay both mortgages off in order to recover his property loan-free (see *Cheah* v *Equiticorp Finance Group Ltd* [1991] 4 All ER 989).

The Leasehold Reform Act 1967

Where, under the provisions of this Act, a leaseholder buys the freehold, the conveyance automatically discharges the premises from any mortgage even though the lender is not a party to the conveyance (s 12(1)). However, the leaseholder must apply the money which he is using to buy the freehold, in the first instance, in or towards the payment (or redemption) of the mortgage (s 12(2)). If the lender raises difficulties, the tenant may, in order to protect his interest, pay the money into court (s 13). The lender (or mortgagee) must accept not less than three months' notice to pay off the whole or part of the principal secured by the mortgage, together with interest to the date of payment regardless of any provisions to the contrary in the mortgage (s 12(4)).

The court is also given power, under s 36, to alter the rights of the parties to a mortgage in order to mitigate any financial hardship which may arise as a result of the purchase of a freehold under the provisions of the Act.

If it is desired that a mortgage of the former leasehold interest should be extended to cover the freehold, this may be done by requesting the borrower to execute a deed of substituted

security. If a tenant acquires an extended lease a lender is entitled to possession of the documents of title relating to the new lease (s 14(6)) and should ask for them when the borrower obtains an extended lease. The borrower should also be required to execute a mortgage of the extended lease.

Leasehold Reform, Housing and Urban Development Act 1993

Similar provisions relating to discharge of mortgages on interests acquired under this Act apply as in the acquisition of the freehold in the 1967 Act. Mortgage interests are discharged and payment of the mortgage is governed by similar rules to those in the 1967 Act. The 1993 Act references are s 35 and Sch 8. In the case of both Acts, failure to observe the mortgage pay-off procedures means that the mortgage *is not discharged*.

Registration of land charges

The object of searching the Land Charges Register is to discover the rights, if any, of third parties which are enforceable against the land.

The present system of registration of land charges is governed by the Land Charges Act 1972 in the case of unregistered land, and by the Land Registration Act 2002 in the case of registered land.

Registration of rights affecting unregistered land

Registration at the Land Registry constitutes notice to buyers, lenders or other interested persons, whether they search the relevant register or not. Failure to register means that a buyer in good faith takes free of the charges or right, i.e. is not affected by it.

The most usual types of rights to be registered are:

(*a*) pending actions, including a petition in bankruptcy;
(*b*) claim forms and orders affecting land, including a bankruptcy order;
(*c*) deeds of arrangement affecting land, as where a creditor has used the land as an asset in reaching a compromise for his debts to creditors, e.g. to pay over a period up to 75p in the pound;
(*d*) land charges, such as mortgages, estate contracts, restrictive covenants and equitable easements (an estate contract could be a contract to buy freehold land but as yet there is no completion);
(*e*) Class F rights of occupation of a dwelling house given, e.g. to a spouse or civil partner under the Family Law Act 1996 (as amended).

Compulsory registration of title

Titles which are not yet registered must become so. Freehold sales or leases granted for seven years or more must be registered within two months of the transaction at HM Land Registry, the title then becoming registered. This rule applies to the whole of England and Wales.

The Land Registration Act 2002 (LRA 2002) extended compulsory registration to leases on creation where the term is for seven years or more. Formerly only leases with terms of 21 years or more were compulsorily registrable. The effect for business is that most office leases will now be registrable. Section 4 of the LRA 2002 applies. In addition, under that section

compulsory registration applies on the assignment of leases with more than seven years left to run. The above provisions apply to leases entered into after the LRA 2002 came into force, i.e. 13 October 2003. However, it is possible to register voluntarily as distinct from compulsorily an existing lease that has more than seven years to run. Voluntary first registration also applies now to franchises and profits *à prendre* such a fishing and shooting rights.

Land Registration Act 2002

The major aim of s 4 of this Act is to increase the rate at which unregistered land is brought on to the register of title kept by the Land Registry. This will simplify the transfer of the property. Unregistered land must be registered on sale and purchase, but under the Land Registration Act 1997 transfers by way of gift trigger registration, as does the creation of a first mortgage which is protected by deposit of the documents of title with written memorandum. There is also a fairer provision for those who suffer loss by reason of some error or omission in the register. This covers losses that continue even after an error is rectified, as where a restrictive covenant in a conveyance is omitted from the register which is later rectified but the covenant is ineffective against a lease granted *before* rectification. Section 3 LRA 2002 gives a more flexible regime for charges for voluntary registration as a basis for doing a 'deal' with the Land Registry on charges.

Registered land

Registration is under the Land Registration Act 2002 and provides a record at HM Land Registry of the owners of registered land and of rights affecting it.

It is not, however, a complete record of all rights. In particular, rights known as 'overriding interests' affect land whether or not they are mentioned in the Land Registry entries.

The Register

This is in three parts:

(a) The property register. This gives a short description of the land and a reference to a filed map, together with rights which may benefit the land or affect it such as rights of access. However, there may be overriding interests which are not mentioned.

(b) The proprietorship register. This indicates whether the land is freehold or leasehold, and shows the registered proprietor and whether there are any restrictions on dealings with the land.

(c) The charges register. This gives details of third party rights, such as those of lenders who have taken a mortgage on the land, and, e.g., restrictive covenants.

Classes of title

The main ones are as follows:

(a) Absolute freehold or leasehold title. This gives an effective guarantee that the registered proprietor owns the land subject to any matters shown on the register and to 'overriding interests'.

(b) Good leasehold title. This is similar to the absolute title except that it does not guarantee that the lease was validly granted.

(c) Possessory freehold or leasehold title. This deals with titles under the Limitation Act 1980. A squatter can register a possessory title when he has successfully barred the rights of the true owner and subsequently. Sections 96–98 of the Land Registration Act 2002 now deal with adverse possession registration. The provisions are considered at p 614.

The squatter is subject to all the terms of a lease over which he has acquired rights by adverse possession. An example of acquisition by adverse possession is provided by *Central London Commercial Estates Ltd* v *Kato Kagaku Ltd* [1998] 4 All ER 948 where Kato acquired a title to the west courtyard of Bush House in London in this way. The adverse possession consisted of use as a car park.

Inspection by public

The Land Registration Act 1988 allows any person to apply to the Land Registry or a District Registry for an office copy of entries. This can be of use to creditors in establishing whether a particular piece of land is owned by a debtor and whether there are any charges over it. This facility is not available for unregistered land.

Overriding interests

These may not be mentioned on the register and yet para 3 of Sch 3 of the Land Registration Act 2002 states that all registered land is subject to overriding interests listed in the section. Easements and profits are or may be overriding interests because they can be created without the use of documents, as by implication or long user. However, an easement or profit will be an overriding interest only if it is within the actual knowledge of the person acquiring the land or would have been obvious on a reasonable and careful inspection of the land subject to the easement or profit (para 3 Sch 3, LRA 2002). The position where an express grant of an easement or profit is made is that it should now be registered since these express grants are no longer overriding interests. If not registered, these interests take effect only in equity. Specific grants were regarded as overriding interests before the LRA 2002 and for that reason were often not registered. They should now be registered to obtain legal status. Most important, however, are 'rights of occupation'.

Overriding interests and the Land Registration Act 2002

The LRA 2002 deals in Schs 1 and 3 with overriding interests. The Act adds profits such as shooting and fishing rights to the list of registrable rights. Leasehold interests of not more than seven years are now overriding on first registration. Leases of more than seven years must be registered. The rights of persons in actual occupation are preserved. However, the overriding rights of an individual who receives rents and profits of registered land but is not in actual possession remain overriding only while that individual continues to receive the rents and profits.

The matrimonial home

The Family Law Act 1996 contains a type of land charge referred to as Class F. It restores the legal position to what it was before the decision of the House of Lords in *National Provincial Bank Ltd* v *Ainsworth* [1965] 2 All ER 472. In that case it was decided that a deserted wife had no special right or 'equity' to continue to occupy the matrimonial home though there had formerly been such a right. The effect of the decision in *Ainsworth*'s case was that a husband who was the owner of the matrimonial home could, having deserted his wife and children, sell or mortgage the house to a third party who would in most cases be able to get an order for possession in order to enforce his rights. In these circumstances the deserted wife and children would have to give up occupation of the matrimonial home and find other accommodation.

The 1996 Act provides that where one spouse owns or is the tenant of the matrimonial home, the other spouse has certain 'rights of occupation' (s 30) and cannot be evicted without

an order of the court. Where a spouse is not in occupation of the matrimonial home he or she has a right, with the leave of the court, to enter and occupy the house. However, the court may order a spouse who is occupying the matrimonial home by reason of the Act to make periodical payments to the other spouse in respect of that occupation. It should be noted that the Act protects husbands as well as wives.

It should be noted that s 1 of the Act 1996 provides that either of the spouses may apply to the court for an order prohibiting, suspending, or restricting the exercise by either spouse of the right to occupy the dwelling house or requiring either spouse to permit the exercise by the other of that right.

The Family Law Act 1996 provides that the rights of occupation provided for in s 30 are a charge on the estate or interest of the other spouse (s 31), registrable as a type of land charge (Class F) under the Land Charges Act 1972. Where the land is registered land, a notice or caution must be registered under the LRA 2002. A purchaser or mortgagee is deemed to have notice of rights of occupation which have been properly registered. Rights of occupation may be registered on marriage though in most cases registration will not take place unless and until the marriage breaks down.

Where a spouse registers rights of occupation, the house is unlikely subsequently to be an acceptable security for a loan because the rights of occupation represent a prior charge on the property which cannot be sold with vacant possession. However, a spouse who is entitled to rights of occupation may, under Sch 4 of the 1996 Act, agree in writing that any other charge shall rank in priority to his or her charge.

However, even if the spouse's right of occupation is not registered, it may still be recognised by the court.

Williams & Glyn's Bank Ltd v *Boland*, 1980 – An overriding interest (**501**)

The Land Registration Act 2002 and boundaries

Under ss 60 and 61 of the LRA 2002 provision is made for a registered owner to have a boundary determined. Boundary disputes between neighbours may become a thing of the past under the new rules. Prior to the enactment of the new rules general boundary lines were drawn and loosely marked on Ordnance Survey maps held with the title deeds of the relevant property. The procedure requires the submission of the relevant form accompanied by a plan or a plan with a verbal description identifying the exact line of the boundary. The procedures to be followed on receipt of these documents by the Registrar are set out in rules. However, any ensuing dispute will be settled by the Registrar at the expense of those who want a boundary exactly fixed. The procedure could be time consuming and costly and the Registrar is likely to try to dissuade people from the boundary fixing exercise and agree a boundary. The existence of the procedure may encourage agreement. A previous procedure under the Land Registration Rules 1925 was used from time to time.

Land certificates and charge certificates

Instead of issuing a certificate to the registered proprietor of land or a charge over it the Registry will issue an official copy of the register showing all the entries that exist on the register on completion of the application for registration together with an official copy of the title plan and a Title Information Document giving the title number, property description and names of registered proprietors. Existing certificates will cease to have any legal significance.

Land Registry Adjudicator

The Land Registration Act 2002, Part 11 (ss 107–114), which is now in force, sets up the judicial office of Adjudicator to HM Land Registry. The office provides an independent dispute resolution procedure for land registration matters, both in regard to paper conveyancing and the e-conveyancing network. Unfortunately, it does not deal with disputes between applicants and the Land Registry but only with disputes between applicants to the Registry. Disputes with the Registry, e.g. whether a title satisfies the requirements for registration as an absolute title, are still matters for the ordinary courts and the method of proceeding is by judicial review of a Registry decision. The Registry procedure will deal with applicants' disputes regarding such matters as boundaries, squatters and claims to ownership of or rights to land.

Local land charges

Search on a transfer of property will also be made in the local land charges register kept by the local authority. A common example of a local land charge is road charges, i.e. charges against land which the local authority incurs in regard to the cost of making up a road which adjoins that land.

Planning matters also appear, though it should be emphasised that the standard enquiries ask questions which concern the property and not the neighbourhood. They will not, e.g., disclose planning permissions granted on adjoining property. A buyer who needs information outside the standard search should make special enquiries of the planning office or instruct his solicitor to do so.

Mortgages of personal chattels

Just as land can be used as a means of securing debts, so also can personal chattels. There are two principal ways in which this can be done.

(a) By mortgage. In this case the borrower retains possession of his goods but transfers their ownership to the lender to secure the loan.

This raises a problem because, since the borrower retains the chattels, he also retains an appearance of wealth, and this may mislead others into giving him credit. Accordingly the Bills of Sale Acts 1878–82 were passed, and under the statutory provisions, where chattels are retained by the mortgagor, a bill of sale must be made out. Where ownership of the chattel passes to the mortgagee conditionally upon its being reconveyed to the mortgagor on repayment of the loan, the bill of sale is called a 'conditional bill'. An absolute bill of sale is one which transfers completely the ownership in chattels by way of sale, gift or settlement.

All bills of sale must be attested and registered within seven days of execution. Registration is currently in the Central Office of the Supreme Court. Conditional bills of sale must be reregistered every five years if they are still operative.

A conditional bill of sale is totally void if it is not registered, whilst an unregistered absolute bill of sale is void against the trustee in bankruptcy and judgment creditors of the grantor so that the chattels represented by the bill are available to pay the grantor's debts. However, an absolute bill of sale will not be void for want of registration unless the chattels remain in the sole possession, or apparent possession, of the transferor (or grantor) of the bill.

Koppel v *Koppel*, 1966 – What is apparent possession? (502)