By

Lara McMurtry

Thesis submitted for the degree of Doctor of Philosophy in Law

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The Statutory Regulation of the Enforcement of Residential Mortgages: 
Historical Foundations and Contemporary Structures

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Abstract

The central concern of this work is to produce a detailed critique of the statutory framework for the enforcement of residential mortgages. It seeks to argue that the law relating to enforcement fails to meet the needs of the twenty-first century mortgage market. Rather, mortgage law is substantially affected by a remedial structure developed from medieval times, which is no longer relevant, applicable or desirable in the modern world. It is contended that the failure of the Legislature to innovate major reform ensures that the legal framework remains hopelessly outdated and needlessly fragmented. Despite the recommendations of the Law Commission, forthcoming financial services regulation, and the advent of human rights, the law as to mortgage enforcement remains securely tethered to centuries past.

As regards the judiciary, the limitations of equitable intervention and the sanctity of common law principle continue to exert a restraining influence. In contrast with the law of landlord and tenant, the judiciary maintains a distorted approach to the rights and remedies of the parties entailing that undue respect is paid to the mortgagee's historical estate rights rather than to the borrower's need for home ownership. An analysis of decided cases concerning possession and sale will demonstrate the extent to which judicial creativity has been hampered by the historical development of mortgage law. In consequence, common law reform to meet the needs of a changing society has been stifled. Although the modern mortgagee is a secured creditor and simply requires mechanisms to safeguard its security interest, it continues to hold rights in relation to the mortgaged property that exceed those necessary for the enforcement of the security. It is simply unthinkable that, if the law of mortgages were to be completely remodelled, the institutional lender would be afforded those advantages that have been enjoyed over the past centuries.
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# List of Abbreviations

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CHAPTER 1
INTRODUCTION

The central aim of this thesis is to produce a critical evaluation of the statutory framework for enforcement in the law that operates in relation to residential mortgages. It is in this sector that the tensions between market forces and the need for regulation are most acute. It is also in this context that the inadequacy of the present law becomes most evident. In view of the fact that the residential mortgage is a relatively new phenomenon, it is ironic that the rights and remedies of the parties are often of ancient origin. Those that are of a modern vintage, moreover, frequently reflect an ethos ill-suited to current social trends and the modern marketplace. Not surprisingly, therefore, a conflict emerges between this aged jurisprudence and the modern demands of a society that prizes the concept of home ownership. This is particularly evident with the piecemeal legislative regulation that has occurred. Such intervention has failed abjectly to produce a coherent, fair and efficient system within which the interests of the mortgagor and the mortgagee are both promoted and protected. It is, undoubtedly, true that the law, particularly in relation to the content and make up of mortgagees' remedies, is in desperate need of considered, structured and wholesale reform. It is, therefore, remarkable that the mortgage law has largely remained immune to substantive re-evaluation and has become woefully out of kilter with contemporary market needs and market strengths.

It will become clear that the modern institutional lender retains an outmoded and somewhat curious collection of primary remedies. The
ancestry of these remedies will be traced back to the distinct historical periods in which each developed and accounted to the different spheres of jurisdiction of common law, equity or statute from which they emerged. A major emphasis within this thesis will be placed upon the relevance of history in the development of the law of mortgages and the pervasive and often unnatural influence that it continues to exert. It will be argued also that an effective modernisation of mortgage law will require both the legislature and the courts to free themselves from the shackles of the past.

**An Overview of History**

As indicated, the remedies available to the modern day institutional lender simply cannot be understood without having close regard to their historical development. Indeed, a central strand of this thesis is that the defects within the framework for enforcement of mortgages are directly attributable to past myopia and reticence. Therein lies the heart of the criticisms made of the modern law. Accordingly, this work is underscored by a thorough historical investigation of how and why the law of mortgages adopted its present and, it is submitted, unsatisfactory shape. Two chapters are specifically dedicated to an exploration of the evolutionary period from Glanvill through to the enactment of the Law of Property Act 1925. The detailed breakdown of each of these chapters is, in part, driven by chronology, but they also chronicle the various claims to jurisdiction made by the common law, equity and Parliament. The focus of Chapter 2 is upon the common law and its temperance by equity. It invokes a time when the law of mortgages was simply the product of the common law. The bargain between lender and
borrower was construed in a strict contractual manner, often producing unjust outcomes. From the mid-fifteenth century, however, equity began to intervene and, over the next four centuries, introduced the equitable right to redeem, developed a protective jurisdiction and fashioned the remedy of foreclosure. By way of a response, conveyancing practices were adapted so as to manufacture a more extensive armoury of remedies for the mortgagee. Express provisions were commonly inserted into the mortgage contract to cater for, say, sale of the property or the appointment of a receiver to collect rents and profits on behalf of the lender. Chapter 3 charts the policy impetus that, in the middle of the nineteenth century, gave rise to a statutory framework. Within this framework, the mortgagees' remedies of sale and receivership were removed from the remit of contract and placed upon a legislative footing.

It is, perhaps, surprising that the history of mortgage law is a neglected area of research. Understandably, only a basic overview of developments can be obtained from even the leading textbooks. The historical narratives contained therein tend, moreover, to trace a familiar outline.\(^1\) While commentators are ready to attribute significance to the history of mortgage law, there has been a marked reluctance to undertake the necessary investigative work. Remarkably, it is nowhere possible to find a detailed, analytical discussion of the law as it developed from its origins through to the statutory framework installed by the Law of Property Act 1925. Many of the significant texts on mortgage law either precede the enactment of the 1925

\(^1\) See, for example, C Harpum (ed), *Megarry & Wade, The Law of Real Property* (Sweet & Maxwell, 6\(^{th}\) ed, 2000); E H Burn, *Cheshire and Burn's Modern Law of Real Property* (Butterworths, 16\(^{th}\) ed, 2001).
Act, do not prioritise historical analysis or focus narrowly upon a specific aspect of the law of mortgages. Of the admittedly few texts on mortgages that endure through new editions, scant further historical evaluation is provided. Accordingly, there remains much to be discovered from a systematic and detailed chronological study of the development of mortgage law. As Lord MacNaghten famously put it in *Samuel v Jarrah Timber & Wood Paving Corp Ltd*, 'No-one ... by the light of nature ever understood an English mortgage of real estate.' It is a central contention of this work that, for such understanding to be achieved, it is necessary to grapple with the historical foundations of the modern law.

The Modern Law

As described above, the early chapters of this work deal with the evolution of mortgage law. In particular, they seek to explain how the mortgagee came to hold its key rights and remedies: the personal action on the borrower's covenant to repay, foreclosure, the appointment of a receiver, the right to possession and the power of sale. Drawing upon this historical analysis, the subsequent chapters explore the chosen manner through which Parliament regulates the enforcement of residential mortgages in a contemporary setting. Each of these chapters will appraise the role of legislation in the regulation of different aspects of enforcement. The availability and exercise of each remedy

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2 See, for example, C H S Stephenson, *The Law of Mortgages* (Effingham, 2nd ed, 1912).
3 See, for example, H Hanbury, *The Law of Mortgages* (Stevens, 1938).
4 See, for example, R Turner, *The Equity of Redemption* (Cambridge University Press, 1931).
5 For example, the latest edition of *Fisher & Lightwood's Law of Mortgages* is a work of around 1100 pages, only 3 of which are dedicated to explaining the historical development of mortgage law (Butterworths, 11th ed, 2002), pp 7-10.
6 [1904] AC 323 at 326.
selected for consideration is evaluated in the context of its history, policy, regulation and interpretation by judges. Statute impacts also upon the judicial discretion to safeguard borrowers. The protection of borrowers caught up in the enforcement process is, therefore, subject to scrutiny.

In cases of default, the most important and commonly exercised remedy for the institutional lender is the power of sale. Sale, in light of the decline of foreclosure, is the main remedy for recovery of the principal debt. Although the power of sale is curtailed by the procedural requirements of the Law of Property Act 1925, the exercise of the remedy is, in practice, hampered by the very practical need to obtain vacant possession of the mortgaged property. It is important also that the action for possession is not confused with an action to ‘enforce’ the security. Technically, to take possession is simply an action to recover the land. Once possession is obtained, it is the remedy of sale that is utilised to enforce the security. In the absence of the mortgagor’s consent, the lender will rarely be in a position to take possession peaceably and without an order of the court.7 This entails that the mortgagee’s ability to sell will often be curtailed by reason of the wide discretion of the court to postpone the effect of a possession order. Accordingly, the mortgagee’s right to possession, and the limitations placed upon its exercise, are apt to assume centre stage in the process of enforcement.

This thesis is designed to reflect the prominence of possession and sale in the enforcement of residential mortgages. In the interests of analytical convenience the work unfolds as follows. Chapter 4 considers the assertion of

7 Cf Ropaigetalach v Barclays Bank plc [2000] QB 263.
the mortgagee’s right to take possession of the mortgaged property and the extent to which this right is curtailed by statute and conveyancing practice. Chapter 5 deals with the exercise of discretion to postpone possession both in equity and under the Administration of Justice Acts 1970 and 1973. Within both chapters there is scope to consider the response of the courts to mortgage enforcement by comparison with the role of forfeiture within the law of landlord and tenant. Chapter 6 details the statutory regulation of mortgages under the Consumer Credit Act 1974 in order to facilitate a comparative study of the jurisdiction considered in the preceding chapter. Chapter 7 examines the regulation of sale under the Law of Property Act 1925 both in a judicial and extra-judicial context. The question of statutory reform is throughout of uppermost concern as each chapter charts the potential interrelationship between past and prospective reforms.

The Context of Social Change

The context of social change is an underlying theme of the thesis. The development of the rights and remedies of the mortgagee to enforce the security, in the event of borrower default, clearly pre-dates the social changes that have seen the use of the mortgage as a means of opening up home ownership to all. Historically, the option of borrowing on mortgage was available and employed only by wealthy landowners who used their property as security for the provision of immediate finance. Ironically, in the contemporary world it is the inability to obtain mortgage finance on a lender’s usual commercial rates that is considered a relevant barometer of poverty.8

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This thesis makes the claim that, in light of the changed role of the modern mortgage, it is necessary to reconsider the framework for enforcement of mortgages. It is contended that the tendency to impose procedural requirements on the actions of lenders is a woefully insufficient legislative response to what are, undoubtedly, structural defects in the law.

In a modern day context, the mortgage appears to cater for the creation of wealth in two separate respects. First, it allows for the acquisition of ownership rights in relation to both residential and non-residential property. Secondly, it allows for the individual to raise money for commercial or private investment based on the security of their property. The development of the home ownership market and, indeed, the origins of the acquisition mortgage can be traced to the beginnings of the building society movement.9 Early building societies were labelled ‘terminating’ societies. This entailed that members’ contributions were accumulated in order to purchase land and their labour employed in the building of houses thereon.10 Members were allocated shares for the purchase of houses, but the houses remained the property of the society until all those within the society had been housed. Permanent building societies, in which members deposited their savings, were formed and developed in the nineteenth century.11 By the end of that century, building societies had largely ceased to build houses and existed instead to provide

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9 For discussion of the evolution of the building society movement: see, for example, M Boddy The Building Societies (Macmillan Press, 1980).

10 Historically, the ideology of building societies is based on Victorian values of thrift and mutual self-help and their origins can be traced back to the co-operative and friendly societies formed … to support migrants to the new industrial urban areas by establishing a mutual fund to finance the purchase of a house for each member’ (R James, C Graham, M Seneviratne "Building Societies, Customer Complaints and the Ombudsman" [1994] 23 AALR 214, p.214).

11 Building Societies were subject to statutory regulation for the first time under the Building Society Act 1836.
finance for home purchases. The capacity for the mortgage to be used for the purchase of a home had, for the first time, been unlocked. The increase in home ownership in the early twentieth century is directly attributable to the willingness of such societies to provide the finance for home purchase. There was, most certainly, no shortage of demand. For the first time, the device of the mortgage offered the prospect of purchasing a home for those who otherwise would have been confined to the private rented sector.

To a large extent, the drive for home ownership was, and remains still, a product of prevailing political ideology. Stewart, for example, explicitly draws the link between the twentieth century development of a mass home ownership market and the movement for property law reform at the turn of the twentieth century. She explains, '... the legal foundation for this expansion emerged from the property law reforms of 1882-1925, at a time when the overwhelming majority of the population rented dwellings from landlords.'

Indeed, a policy designed to simplify and facilitate dealings with property is discernible in both the substance of the property law reforms and the attitude of the courts. Over the last twenty-five years, it is apparent that the government has actively and ambitiously pursued the promotion of home ownership as an integral feature of its social and housing policy. The refinement of this policy is noted by Hughes and Lowe, 'An important strand of Thatcherism was premised upon the belief that council housing was an inherently inferior form of housing provision compared to owner occupation

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12 A Stewart, Rethinking Housing Law (Sweet & Maxwell, 1996), p. 17.
13 As Lord Upjohn explained in National Provincial Bank v Ainsworth [1965] AC 1175 at 1233, 'It is of great importance that persons should be able freely and easily to raise money on the security of their property'.
and represented a stumbling block to the creation of a nation of home owners'. The flagship of this policy movement was, undoubtedly, the innovation of the public sector 'right to buy' scheme. Under this scheme, local authority landlords were obliged to sell a freehold or leasehold estate to existing tenants at a heavily discounted price. Initially, such tenants also had a right to a mortgage from the local authority in order to finance their purchase. Such policies had a correspondingly negative impact on the status of the tenant. As the Grays observe, 'The very fact that the public sector tenant is now given a statutory right to improve his lot by buying (i.e. borrowing) and therefore owning his own home further underlines the negative discrimination against the renter which has so conduced to the general running-down of the rented sector'.

As the clear alternative to increased public spending, the availability of mortgage finance has been pivotal to the achievement of the home ownership dream. The government initially relied upon self-regulation and the market as the appropriate force to regulate an increasingly competitive lending industry. With the deregulation of financial services, lenders were able to offer a wider range of products and services to families who were prepared to borrow. It was inevitable that home ownership, the now preferred housing choice, would open access to mortgage assistance to traditionally excluded groups. This could only accentuate the risks faced by borrowers who might fall into financial difficulties. Even though there has been a sustained period of low

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14 D Hughes and S Lowe, Social Housing Law and Policy (Butterworths, 1995), p. 36.
16 As Hughes explains, 'In a time of recession and high unemployment with mortgage interest rates being much higher than they have historically been, many such owner occupiers are very precariously placed in the housing market, being unable to meet their mortgage commitments or face major repair bills should they fall out of work or reach retirement with
interest rates, the courts remain troubled by mortgagors who have over-stretched financially. As Mummery L.J. admitted recently, the dangers arise from, ' ... a calamitous combination of high borrowing levels by homeowners, rising interest rates charged by lending institutions and volatile housing markets, such as occurred in the late 1980s and early 1990s '.

It is noteworthy that no substantive changes to the framework of the law have been implemented to cater for the radical shift in the function and prevalence of the mortgage transaction and the increased risk of exposure to mortgage default. The most extensive legislative intervention remains the Law of Property Act 1925. Subsequent statutory reform has been fragmented and limited, the most notable contributions being the discretion to postpone possession under section 36 of the Administration of Justice Act 1970 (as amended) and the relevant provisions of the Consumer Credit Act 1974. This lack of legislative initiative is, indeed, remarkable given the detailed attention of the Law Commission to the clear need for reform.

The Law Commission Recommendations

In 1986, the Law Commission published a Working Paper in which the defects of the law of English mortgages were examined. In a bid to simplify and modernise the law, one of the proposals mooted was that there should occur a major structural overhaul of the law. Following a period of lengthy and

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17 Wilkinson v West Bromwich Building Society [2004] EWCA (Civ) 1063 at [2].
active consultation, this proposal was adopted in the Commission's subsequent report.\(^{19}\) The Commission recommended that all existing methods of consensual land mortgage should be abolished and replaced by the formal and informal land mortgage. As regards the form of the mortgage, the Commission produced detailed recommendations pertaining to the rights and duties of the parties during the security and the degree to which the freedom to contract should be restricted by statute.\(^{20}\)

The Report as a whole remains unimplemented. Despite the work involved, the level of consultation undertaken and the drawing up of a draft bill, the political will has never been such as to drive forward the process of substantive change. It is noteworthy that, while the Report has remained shelved, two separate counts of relevant legislative reform have occurred by way of the Financial Services and Markets Act 2000\(^{21}\) and the Land Registration Act 2002.\(^{22}\) As a result there remains no comprehensive or, indeed, extensive statutory restatement of the law of mortgages.

The Advent of Consumer Protection

On the basis of the work of the Law Commission alone, there is much to support the restructuring of mortgage law and the need for a radical re-think as to the rights and remedies of the parties to a modern mortgage. Although Parliament has shied away from the task of substantive law reform, some

\(^{20}\) Detailed recommendations about enforcement of the security are outlined in part VII of the Report.
\(^{21}\) This Act aims to co-ordinate and modernise the provision of financial services of a range of bodies such as building societies and banks: see http://www.fsa.gov.uk/fsma.
\(^{22}\) The possible methods of creating a legal mortgage have now been reduced under the 2002 Act.
increased protection for borrowers has arrived through the vehicle of consumer protection legislation. The Consumer Credit Act 1974 marked the limited introduction of the ethos of consumer protection into the law of mortgages.

At first glance it would appear inevitable that the Act would instil a new ethical approach towards the protection of borrowers. The jurisdiction conferred by the Act, however, applies only to limited types of credit agreement. These are styled 'regulated agreements'. As regards such agreements, the court is afforded extensive powers to postpone or withhold a remedy from a mortgagee. Nonetheless, by comparison with the Administration of Justice Acts, judicial intervention has been limited and unimaginative. The initial focus of Chapter 6 is upon the applicability of sections 129 and 136 under which the court can delay enforcement by issuing a 'time order' and, in appropriate cases, vary the terms of the bargain struck between the parties. As such, the chapter draws parallels with the jurisdiction of the court under section 36 of the 1970 Act to postpone an order for possession. This latter discretion operates where the mortgagor is likely within a reasonable period to repay arrears or to remedy any other default within a reasonable period. As will be demonstrated, the Consumer Credit Act offers the court a more broad based discretion. Nevertheless, the reluctance with which that discretion has been utilised entails that the most effective protection is that which is found within the more limited confines of section 36. A central theme of Chapter 6 is establishing the case for a single statutory statement as to the capacity of the court to deal with enforcement cases. It
will, moreover, argue that more extensive powers should be available to the court in all cases.

Chapter 6 will also examine and evaluate the inadequacies of the extortionate credit provisions and consider the manner in which the goals of consumer protection are becoming increasingly entrenched in the modern law. This is, in part, due to the involvement of the Office of Fair Trading in credit disputes. Most recently, it has been promoted through the medium of the Financial Services and Markets Act 2000. Both the 1974 Act and the 2000 Act, moreover, serve to underscore the observation that developments in mortgage law consistently arise as part of wider projects of law reform. Most recently those wider projects have concerned financial regulation and European integration. This is evident from, for example, the Financial Services and Markets Act 2000, the Human Rights Act 1998 and the Unfair Terms in Consumer Contracts Regulations 1999.

Financial Services Regulation

Under the Financial Services and Markets Act 2000, the Financial Services Authority is charged generally with ensuring an appropriate degree of protection for consumers. This includes the assumption of responsibility for the regulation of some aspects of mortgage lending. The new regulatory regime is a response to the changing mortgage market and the perceived need to extend the protection afforded to consumers. The 2000 Act dictates that the majority of mortgage lenders will be subject to the rules and guidance

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23 The FSMA sets the further statutory objectives of maintaining confidence in the financial system, promoting public understanding and reducing financial crime.

24 Which will govern the practice of institutional lenders from the end of October 2004.
of the Financial Services Authority, as is laid down in the Mortgages: Conduct of Business Sourcebook.\textsuperscript{25}

This regulation of mortgage lending under the Act marks an important development in the course of statutory intervention. In the case of financial services regulation, it may mark the first steps towards an integrated European financial market. From the point of view of the European Commission, the provision of mortgage credit is a significantly valuable financial service that is currently provided only at a national level. Although the regulation of financial services fits generally within a European drive towards a single market, high-level integration can only create problems in terms of the regulation of mortgages. The Financial Services Authority does not support the inclusion of mortgages within the Credit for Consumers Directive\textsuperscript{26} and remains sceptical as to how the European Commission can achieve a cross-border market in mortgages. Nevertheless, the European Commission's Forum Group on Mortgage Credit was established in March 2003. This body was tasked to identify the main obstacles to the functioning of a genuine European mortgage credit market and to formulate political recommendations to the Commission on the most appropriate ways to achieve such integration. Anticipated during 2004, these recommendations will help determine the extent and direction of future regulation and how


\textsuperscript{26} As the Chief Executive of the FSA, John Tiner, explained in a speech on the future shape of EU financial services regulation, '... the UK's strong view is that mortgages should not be included. Secured loans are more complex and pose different risks to consumers than unsecured lending. Including mortgages in a "one size fits all" directive will mean creating standards that are inappropriate and disproportionate for other types of credit' (SP178, Financial Services Authority Conference 2004, London, 19 May 2004).
quickly it will be possible for the average UK borrower to purchase mortgage services from firms in other Member States.

The integrated market is about the provision of set standards of fairness at a contractual level and makes no attempt to impose uniformity in relation to the substantive law of mortgages in separate Member States. In the light of this progression to meet the needs of twenty-first century consumers, it becomes more imperative that the rights and remedies in cases of mortgage default are fully modernised to meet the needs of both parties. A discussion of the financial services regulations works into the thesis on two levels. First, some of the duties imposed on 'responsible lenders' are relevant to the process of enforcing residential mortgages. The work will examine the adequacy of protection for borrowers by appraising the potential impact of mortgage specific rules on the process of mortgage enforcement. Chapter 5 will consider the impact of the 2000 Act upon the exercise of judicial discretion during possession proceedings. Chapter 6, moreover, analyses the compatibility of Financial Services Authority regulation with that currently provided by the Consumer Credit Act 1974. The mortgagee's duties on sale will be the subject of evaluation in Chapter 7.

Secondly, reform under the 2000 Act provides a clear illustration of how mortgage law is effected as merely part of a package of reforms. Such changes are ancillary to a much wider reforming ambition and entail that scant attention is paid to the need to overhaul the substantive law. This theme is pursued in Chapter 6 in the context of the Consumer Credit Act 1974 and in Chapters 3 and 7 which concern the enactment of the 1925 legislation and regulation of the mortgagee's power of sale.
The Human Rights Act 1998

Outside the regulation of financial services, the law of mortgages is subject to further statutory reforms that indirectly emanate from Europe. The Human Rights Act 1998 incorporates provisions of the European Convention of Human Rights into domestic law. Undeniably, this raises questions about the appropriateness and exercise of mortgagees' remedies. It remains unclear, for example, when possession and sale will amount to a deprivation of possessions under the second rule of Article 1, Protocol 1.27 In addition, questions remain regarding the extent of a mortgagee's right to possession and its compatibility with the respect for a mortgagor's home which is enshrined in Article 8.28 The need for a wider understanding of these issues is addressed in Chapter 4. The importation of human rights into mainstream property law might see some smoothing of rough edges of existing law, but any such development occurs in the absence of specific, co-ordinated and considered statutory reform.

Unfair Terms in Consumer Contracts

In relation to unfair contract terms, the law of mortgages is now also subject to the principles of the European brand of consumer contract law. The Unfair Contract Terms Act 1977 has never applied to mortgages.29 Until the mid-1990s, the court could rely only upon its inherent jurisdiction in equity and the

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27 This rule prohibits deprivation of possessions subject to public interest and the general law.
28 See Ropaigealach v Barclays Bank Plc above where s.36 of the Administration of Justice Act 1970 was held to be inoperative in circumstances where the premises already stood empty. It has been suggested that this approach might contravene Article 8: see D Rook, Property Law and Human Rights (Blackstone Press, 2001), p. 199.
29 Unfair Contract Terms Act 1977, Sch 1, para. 1(b).
statutory definition of an extortionate credit bargain as a means by which 'unfairness' might be struck down. In 1994, however, the Unfair Terms in Consumer Contract Regulations were drawn up.\(^3\)\(^0\) This gave effect in the United Kingdom to Council Directive 93/13/EEC on unfair terms in consumer contracts. Any doubt that the Regulations applied to mortgages has been clearly dispelled by recent case law.\(^3\)\(^1\) A new challenge, therefore, faces the domestic courts in terms of its statutory jurisdiction over mortgage law. As the regulations must be construed to give effect to the Directive, the court must look to European law for the purposes of construction and interpretation. The picture is, of course, rendered more complex by the imminent reform of the consumer credit legislation and the separate regulatory structure under the Financial Services and Markets Act 2000. Chapter 6 will address the deficiencies of such fragmented law reform by reference to the lack of interrelationship between the Consumer Contract Regulations and the current provisions under sections 137-140 of the Consumer Credit Act, the Financial Services Authority regulation and the history of judicial intervention. The common thread linking these diverse areas of change is the ongoing assimilation of European Community law with domestic legislation and practice.

**Limits to the Scope of Enquiry**

It would be impractical for this thesis to analyse in detail each and every aspect of the law as it applies to enforcement of residential mortgages. As

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\(^3\)\(^0\) These have now been superseded by the 1999 Regulations.

\(^3\)\(^1\) See, for example, *Director General of Fair Trading v First National Bank* [2002] 1 AC 481.
made clear, primary focus rests upon the right to possession and the remedy of sale. Even with this narrowed canvas, there remains a need for selectivity. It is, therefore, appropriate at this stage to define the parameters of the work.

(a) **Defences to possession actions**

It is open for the borrower to raise a wide variety of defences to a mortgagee’s action for possession. It is not possible to afford each possible defence much, if any, attention. The so-called *O'Brien* defence\(^{32}\), for example, has proved a popular refuge for many desperate defaulting borrowers and continues to trouble the higher courts.\(^{33}\) Nevertheless, this defence falls outside the focus on the role of statute as an agent for mortgage law reform. Hence, it is peripheral to the designated scope of the thesis. Similarly, it is to be acknowledged that the assertion of third party interests (say, those of a tenant of the mortgaged property) can impact upon a mortgagee’s claim to possession. This tendency does not, however, fit within the adopted critique of statutory intervention.

By way of contrast, however, a borrower might contend that the credit bargain with the lender is extortionate under the Consumer Credit Act 1974. A detailed examination of the 1974 Act as it applies to mortgages is, as mentioned above, put forward in Chapter 6. Extortionate credit agreements are included within the thesis with clear justification. First, the central aim of the work is to produce a critical evaluation of role of statutory intervention in the area of mortgage enforcement. As the extortionate credit provisions fall

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\(^{32}\) *Barclays Bank Plc v O'Brien* [1994] 1 AC 180. This was subsequently refined by *Royal Bank of Scotland v Etridge (No. 2)* [2002] 4 All ER 449.

\(^{33}\) See, for example, *National Westminster Bank Plc v Amin* [2002] 1 FLR 735.
within one of the principal legislative initiatives taken after 1925, their inclusion is of obvious relevance. Secondly, the presence in the mortgage contract of certain unfair terms can impose a barrier to mortgage enforcement. It is not uncommon for the spectre of an extortionate credit bargain to be raised as a counterclaim in possession proceedings. Thirdly, the inclusion of extortionate credit bargains serves to develop a recurrent theme that statutory reform of mortgage law tends to occur by a side wind via legislation that is intended to achieve a grander design. This theme is explored with regard both to the policy and goals of the Consumer Credit Act 1974 and the forthcoming statutory reforms affecting the provision of consumer credit.

Accordingly, the thesis does not include substantive discussion of all possible protections for the modern borrower. Some aspects of the law are omitted from discussion entirely or are the subject only of limited evaluation. This is also true in relation to a mortgagee’s principal remedies. As will now become clear, the justification for this selectivity varies according to the particular remedy.

(b) The appointment of a receiver

As most residential property does not generate rents and profits, the role of a receiver is, essentially, confined to the commercial context. Hence, there is no specific chapter devoted to receivership in the modern law. The consideration of the appointment of a receiver in Chapter 3 is necessary only as a means of exploring the historical development of remedies generally. Due to its interrelationship with possession and sale, this discussion is essential to
explain the preference of lenders for particular remedies at particular stages of the development of mortgage law.

(c) **Foreclosure**

In a like vein, there is no substantive chapter on the remedy of foreclosure. Put simply, this is because the remedy has lapsed into obsolescence. Regarded as the most draconian of remedies, foreclosure results in the termination of the mortgagor's equity of redemption. This ensures that the entire value of the mortgaged property is at the disposal of the mortgagee and leaves the borrower with absolutely nothing. In this way, the lender might unjustifiably benefit from a windfall profit by seizing a property valued at much more than the debt outstanding.\(^3\)\(^4\) This is not the only advantage bestowed on a foreclosing mortgagee. Where foreclosure precedes sale, a lender is not subject to the same duties that govern the action of a lender selling under the statutory power of sale.

The disadvantage of foreclosure is that, unlike the power of sale, a foreclosing mortgagee requires an order of the court to effect its remedy. This opens the door for judicial discretion as to whether or not to grant the remedy. As the courts have long viewed foreclosure with distaste, it is now very rarely granted. Other factors have also contributed to its demise. In practice, it is clear that the mortgagees' preferred remedies lie in the appointment of a receiver or the exercise of the statutory power of sale. Foreclosure would not

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\(^{34}\) In theory, foreclosure would work to the advantage of a mortgagor where there is a negative equity. The mortgage would then be at an end and, once the property is sold, the mortgagee would be unable to sue on the covenant to repay: *Perry v Barker* (1806) 13 Ves 198. In reality, however, no mortgagee would elect for foreclosure in such circumstances.
make good business practice in the modern marketplace. It is also an uncertain adventure because, even if granted, the order is liable to be reopened by the court at a future date. There remains the possibility that a mortgagee who does not have a statutory power to sell (for example, under an informal mortgage) might proceed with a foreclosure action in the knowledge that the court will order sale instead. There is, however, no need for this tactic as such a mortgagee can instead apply for judicial sale under section 91 of the Law of Property Act 1925.

As a result of its decline in popularity and the unwillingness of judges to grant it, there are few modern day examples of the exercise of foreclosure. As Nicholls V-C commented in Palk v Mortgage Services Funding Plc, '... foreclosure actions are almost unheard of today and have been so for many years'.\textsuperscript{35} Not surprisingly, the Law Commission has recommended that the remedy be abolished.\textsuperscript{36} An examination of the historical development of foreclosure provides the necessary foundations for the further and focused consideration of the legacy of equitable intervention. Its relevance to the thesis lies in that it is a remedy explicable only in its historical context. It is remarkable that, having fallen into desuetude, this relic of active equitable intervention continues to form part of the present law.

(d) \textbf{An action on the mortgagor's covenant to repay}

The borrower's personal covenant to repay is an ever-present feature of the contemporary mortgage agreement. It should, moreover, expressly extend to

\textsuperscript{35} [1993] Ch 330 at 336.

\textsuperscript{36} Law Com No. 204 op. cit. at para. 7.27.
both interest and capital.\footnote{If there is no express mention of capital, however, this will still be implied into the covenant: \textit{Bristol and West plc v Bartlett} [2003] 1 WLR 284.} It ensures that, in circumstances where the mortgagor is unable to comply with the obligations of the covenant, the mortgagee can bring a personal debt action for the recovery of principal and interest. The availability of this remedy is an explicit reminder of the contractual relationship that is in existence between the parties.

A mortgagee will rarely adopt an action on the personal covenant as the preferred remedy or, indeed, as the only means of recovery of the debt.\footnote{\textit{CitAlliance & Leicester v Slayford} [2001] 1 All ER (Comm) 1 discussed below.} This is because in cases of residential mortgage default, the borrower will simply not be in a financial position to pay that which is owed. Instead, and because of the cumulative nature of mortgagees’ remedies, a personal action will be the final straw in a lender’s attempt to recover the entirety of the debt. Accordingly, if a shortfall exists following the sale of the property the lender will maintain the right to sue the borrower for the outstanding sums. Nevertheless, as Mummery L.J. recently observed, ‘Experience shows that, for a variety of reasons, it can take many years for mortgagees to work their way through all of the rights and remedies available to them for the recovery of the advance.’\footnote{\textit{Wilkinson v West Bromwich Building Society, above at [2].}} A lender must, therefore, take care to ensure that a personal claim does not become statute barred.

The Limitation Act 1980 contains three provisions that are relevant to mortgage debts. First, the principal sum due advanced under a mortgage created by deed is classified as a ‘specialty’ debt and is subject to section 8. This provision does not, therefore, extend to informal mortgages. Section 8
contains the general rule that an action upon a specialty cannot be brought after the expiration of 12 years from the date on which the cause of action accrued. Secondly, section 20(1) restricts the right to bring proceedings to recover the principal sum of money 'secured by a mortgage on property' after the expiry of 12 years from the date the right to receive the money accrued.40 This applies to both formal and informal mortgages. Thirdly, section 5 provides that a claim founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. This conventional limitation period would apply to the recovery of interest under any mortgage.41

Unlike foreclosure, the right to sue on the borrower's covenant to repay is a remedy that continues to play an active, albeit secondary, role in the recovery of mortgage debts. This usage can be illustrated by reference to two independent examples. First, its utility has come to the fore with the relatively recent phenomenon of the negative equity that arises when the mortgaged property is lower in market value than the outstanding mortgage debt. In such cases, therefore, the proceeds of any sale will be insufficient to discharge the mortgage fully. The lender may then pursue an action on the personal covenant to recover this shortfall. Secondly, the existence of third party rights might prevent a mortgagee electing an otherwise preferred action for enforcement. In *Alliance & Leicester v Slayford*,42 the mortgagee sought a money judgment against Mr Slayford in circumstances where Mrs Slayford

40 For the purposes of both s.8 and s.20(1), the limitation period runs from the date the borrower defaults in the instalment payments and the lender's rights and remedies for recovery become exercisable: *ibid.*
41 Limitation Act 1980, s.20(5).
42 Above.
had successfully argued an O'Brien defence to possession. The lender anticipated that initiating a personal action would result in the borrower's bankruptcy. The trustee in bankruptcy would then petition for sale. As a secured creditor, the lender would be adequately protected. The Court of Appeal sanctioned this use of the personal action on the borrower's covenant as not to do so would be tantamount to relegating the mortgagee's position below that of an ordinary judgment creditor. There was nothing to prevent the latter from engineering the bankruptcy of the debtor. This echoes the sentiment expressed Hoffmann L.J. in C & G Building Society v Grattidge that, 'A mortgagee is entitled as of right to a judgment for whatever sum of money is due and payable under the terms of the mortgage. He is entitled to exercise all his remedies concurrently and cannot, in respect of the money claim, be in a worse position than if he had lent unsecured'. Nevertheless, the remedy of a personal action is not the subject of a substantive chapter within this thesis. The lack of attention is justifiable in the light of the limited role that the remedy plays in the mortgage enforcement process. The personal action is merely supplementary to a mortgagee's principal actions for enforcement, that is, possession and sale. Limitation issues aside, the right to sue is, moreover, unregulated by statute. Accordingly, the mortgagee's personal action is considered, where appropriate, in the context of the exercise of those principal remedies.

43 (1993) 25 HLR 454 at 457. This rule, however, appears to give way when a possession order has been sought and suspended. In such circumstances, the practice is that a money order will be suspended also for a similar duration: see Cheltenham & Gloucester Building Society v Johnson (1996) P&CR 293.
Methodology

At the heart of its critique of the legal framework for enforcement of residential mortgages, this thesis argues that the law relating to the enforcement process is burdened by a remedial structure inspired by the jurisprudence of the medieval age. It is a jurisprudence that is no longer relevant, applicable or desirable in the modern world. In relation to the pre-1925 development of the law, the thesis adopts a broad based, historical analysis. Chapter 2 explores the more limited sphere of the impact and limitations of equitable intervention with the common law mortgage. Chapter 3 continues the historical analysis by examining the more localised history of statutory intervention in the law of mortgages. Understandably, the historical chapters require an engagement with a wide range of legal literature. Principally, these embrace reports of decisions found in the English Reports, which cover cases dating from the mid-seventeenth century up until 1865, and consultation of the Yearbooks for reports of earlier cases. As to the early law, the thesis makes reference to a number of key treatises. Glanvill's treatise on the laws and customs of England provides invaluable discussion on the customs of the King's Court at the end of the twelfth century. Bracton utilised the plea rolls in order to discuss the common law in the thirteenth century with illustration from case law. In the fifteenth century, Littleton's Tenures together with Coke's commentary provide a useful discussion on the common law that includes specific reference to mortgages.44 Difficulties relating to the language, arising from the fact that the

44 As J H Baker explains in An Introduction to English Legal History, 3rd ed, 1986, p.165, 'Coke shovelled out his enormous learning in vast disorderly heaps, piled around Littleton’s Tenures to form a phrase by phrase gloss on the text... He wrote like a helpful old wizard, anxious to pass on all his secrets before he died but not quite sure where to begin or end'.
early sources are written in Latin or Law French, are overcome by the translation by others. In the case of both Littleton and Glanvill, their treatises were in Latin and, where necessary, the translation adopted is identified in the text. As regards later historical developments, much can be gleaned from a number of specific mortgages treatises that emerged in the eighteenth and nineteenth centuries. General works of English legal, social and economic history proved invaluable in helping to piece together the various parts as a chronological whole.

In the consideration of the modern law, a doctrinal approach is adopted. This is because the work aims to evaluate the defects of the statutory framework of the modern law. Accordingly there is a necessary focus upon the underlying policy and the interpretation of key statutory provisions affecting the assertion and exercise of mortgagees' remedies in a residential context. Where appropriate, this is achieved by an examination of such primary sources as Committee Reports, Government White Papers, Hansard, case law and the published works of the Law Commission. Particular emphasis is placed upon recent developments in the law such as the new role to be played by the Financial Services Authority and the government's plans to implement reform of the Consumer Credit Act 1974. In addition, the thesis draws upon recent unreported cases and secondary literature is consulted and utilised throughout.

The adoption of a doctrinal approach, however, is not to ignore the importance of socio-political perspectives. An in-depth study of mortgages

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45 See, for example, J J Powel, A Treatise Upon the Law of Mortgages (London, 1822).
46 See, for example, W S Holdsworth, A History of English Law (cited as H.E.L).
must necessarily demand an engagement with such issues. Accordingly, with
focus on the interplay between common law, equity and statute, this work
seeks to interweave a mix of history, law, policy and practice. A doctrinal
approach is adopted because, albeit with an eye on socio-economic context,
the thesis requires a keen appreciation of the deficiencies of the statutory
framework for enforcement.
CHAPTER 2

The Early Law of Mortgages: Equity and the Common Law

Being comprised of an amalgam of contractual, equitable, and statutory rights and obligations, the law of mortgages is highly distinctive and brings with it a curious array of rights and remedies. It has never been subject to wholesale reform and has, since medieval times, developed on a piecemeal basis, roughly fashioned to accord with changing times. In an untidy evolution, many of the historic principles and doctrines have survived to form an integral part of the modern law. It is primarily for this reason that a study of mortgage law cannot be complete without some negotiation of its thorny past. The aims of both this and the succeeding chapter are to chart these historical developments and to appraise their legacy to contemporary jurisprudence. It is intended that both chapters will collectively serve as a platform for the further and focused critique of the statutory regulation of enforcement in contemporary residential mortgages.

The history of mortgage law breaks into distinct periods when its development was steered respectively by the common law, equity and statute. Of these spheres of jurisdiction, it was the influence of the legislature on both the substance and form of mortgages which was the latest to develop. Only in the nineteenth century, when equity was in decline as a reforming influence, did Parliament begin to impose some tentative statutory regulation. By that stage, a succession of Chancellors had left equity's mark in the form of a growing array of fundamental principles and practices. In consequence, the logical starting point is not with statute, but with the earlier interaction between
equity and the common law. It is convenient for the purposes of both chronology and clarity that the advent of statutory reform should, therefore, be the subject of Chapter 3.

The present chapter is concerned to explore the shape and direction of early reform in the law of mortgages. This is in order to understand, first, why the modern law remains tethered to its past; secondly, the extent to which historic principles have continued to pervade the modern law and thirdly, the influence history exerts over contemporary judicial reasoning and approach. The contribution of equity as a formative influence must be distilled and evaluated to this end. The rules of equity, however, as Jessel M.R. made clear, '... are not, like the rules of the common law, supposed to have been established from time immemorial'.

Accordingly, it is necessary to commence this investigation prior to the development of the equitable jurisdiction and consider the approach of the early common law. As will be demonstrated, the common law mortgage, and the rigour with which it was policed, had a significant impact on future law reform. This is because equity did not seek to dismantle the law, but targeted its intervention at the remedy of common law deficiencies. In the oft-quoted words of Maitland, 'Equity had come not to destroy the law, but to fulfil it'. Hence, the early common law was to become the foundation for the Chancery's conscience based intervention and gave impetus to the development of the equitable protective jurisdiction.

The pledge of land as security for a debt is a practice ancient in its origin. Evidence of its existence dates to Anglo-Saxon times and illustrations

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1 Re Hallett's Estate (1879) 13 C D 710 at 710.
2 F W Maitland, Equity: A Course of Lectures (OUP, 1936) p. 17.
are to be found in the Doomsday Book.\textsuperscript{3} Whilst examples of pledges can be retrieved from such historic obscurity, it is only with the early evolution of the common law that the beginnings of the modern English law of mortgages are unearthed.\textsuperscript{4} The development of reports on decided cases and the attendant idea that the law should develop by precedent were not to be encountered until the later middle ages. Although the plea rolls and Register of Writs probably started in the reign of Richard I (1189-1199), it is the books of authority based on these sources which provide the earliest authoritative account of the position at common law. Glanvill's \textit{Tractatus de Legibus Angliae},\textsuperscript{5} written during the reign of Henry II (1154-1189) appears to be the oldest of the books of authority to offer evidence of the prevailing methods of securing a loan in the twelfth and thirteenth centuries.

\textbf{The Glanvillian Gage}

In his discussion of differing forms of pledge, Glanvill describes a significant distinction that derived from the prohibition of usurious transactions. The \textit{vif gage} or 'live pledge' was a lease of the land where the lender took possession and used the profits from farming to pay off the principal sum. Such a transaction was considered to represent respectable commerce. The \textit{mort gage} or 'dead pledge', however, provided a harsher alternative whereby the lender used the profits of the land for personal gain leaving the principal


\textsuperscript{5} The translation relied upon is G Hall, \textit{The Treatise on the Law and Custom of the Realm of England Commonly called Glanvill} (Thomas Nelson, London, 1965).
advance outstanding. Although the *mort gage* was viewed as dishonourable and regarded as a form of usury, the court of the king did not forbid it.⁶ Early pledges took one or the other of these forms, but the detailed means employed by the parties to implement their intentions were apt to vary.⁷ It was not uncommon for an agreement to specify a fixed date for repayment. Some agreements contained the proviso that, if repayment did not take place on the fixed date, the creditor would own the land. This contractual right was absolute. Alternatively, and in the absence of such agreement, the creditor could demand repayment at any time. In relation to its enforcement, the usual practice was then to seek an order from the court that, in default of payment, the land would belong to the gagee. This process required a writ calling on the debtor to acquit the gage.⁸ The court would then fix a date for repayment. On the failure of the debtor to comply, the gage would belong to the creditor. Hence, if the conveyance was not for a fixed term (i.e. it was left open) the lender could go to court at his convenience, seeking an order of payment within a reasonable time and a declaration that in default the land would belong to him.

The forms of gage described by Glanvill were distinctive in that they involved a form of transfer of seisin to the gagee, who held it *ut de vadio* (by way of pledge).⁹ If the gagor was allowed to remain in possession, the gage was viewed as a private covenant and outside the concern of the King's Court. Possession was, therefore, key to the availability of common law

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⁶ See P & M II, 121.
⁷ For a full account, see J L Barton, 'The Common Law Mortgage' (1967) 83 LQR 229.
⁸ See Glanvill, x. 7.
⁹ See Glanvill, xii. 28. Note that the Glanvillian gagee is not seised of a free tenement, but holds a seisin peculiar to the twelfth century.
remedies. The Glanvillian gage did not, however, retain popularity and its failure to develop is, to a large extent, explained by the lack of protection afforded to the gagee.\textsuperscript{10} Being a mere tenant with 'seisina ut de vadio', the gagee did not receive adequate protection from eviction. If a stranger was to cast the gagee out, it was the gagor who had the assize.\textsuperscript{11} Moreover, if the gagee was cast out by the gagor himself, there was no mechanism by which the gagee could recover the land. In both cases, he had no remedy against anyone except his gagor and that was merely a contractual remedy on the writ of covenant. The only option was to obtain a judgment for the debt.\textsuperscript{12} Somewhat remarkably, the debtor could relegate the gagee from secured to unsecured creditor by simply ejecting him from the gaged land. The explanation for this is grounded in the creditor's right, as tenant for a term, to ask the court for no more than that to which he was entitled, that is, the benefit of a contract.\textsuperscript{13} As one commentator notes, 'The termor had no tenure, no freehold, no tenement even; and he was not seised. He was simply not within the contemplation of those feudal customs for which novel disseisin was meant to provide a further sanction ...'.\textsuperscript{14} Hence, it was the lack of protection of the gagee's possession which operated to undermine the value of this pledge and to ensure the inevitable development of a more absolute

\textsuperscript{10} Indeed, it has been remarked of Glanvill's treatise that it is, ' ... obsolete and useless for any practical purpose, owing to the disuse of ancient actions' (J L Barton, \textit{op.cit.} p. 239).

\textsuperscript{11} An assize was a possessory remedy given to anyone who was disseised of a free tenement. As the gagee did not hold rights to the land, it was the gagor who was disseised.

\textsuperscript{12} To compound the gagee's difficulties the courts of the twelfth century also lacked the machinery to effectively compel the debtor to pay in all cases: see P & M II, 121.

\textsuperscript{13} See Glanvill, x. 11.

form of security. As Holdsworth commented, '... the rules of the king's courts as to the kinds of seisin protected by the assizes destroyed the twelfth century estate in mortgage'.\textsuperscript{15} As will be demonstrated, the sanctity of the mortgagee's right to possession was destined to become the construct upon which more modern understandings of the mortgage were based.

The Swelling Lease

It was not until the thirteenth century that the King's Court refined its approach to private covenants, allowing the gagee better means to protect his security interest. This was achieved through the provision of new actions such as *Quare eiecit infra terminum*,\textsuperscript{16} or trespass *quare clausum fregit*.\textsuperscript{17} In effect, the lender still did not have seisin that would be protected by the assize, but he had remedies better to equate his position with the wrongly evicted freeholder. As mentioned, prior to this stage the interest of the lessee for years was enforceable only against the lessor as the other party to the covenant. In the reign of Henry III (1216-1272), however, Bracton's treatise, *De Legibus et Consuetudinibus*,\textsuperscript{18} provides further evidence of change whereby the gagee's

\textsuperscript{15} H.E.L. vol. II, p. 128. It is to be appreciated that the use of the word estate has no relation to the concept of an estate in land. The development of the doctrine of estates began in the late thirteenth century, creating as Pollock and Maitland note, a concept which '...will serve to bring the various proprietary rights in land under one category, that of duration' (P & M II, p. 10).

\textsuperscript{16} This action was established in 1235 and had the effect of restoring the ejected termor to his land. It appears, however, that it could not be used against ejectors in general. Pollock and Maitland argue that it will only lie against a purchaser from the lessor (*ibid*. p. 108).

\textsuperscript{17} This action for trespass was an action for damages against anyone who unlawfully disturbed possession and must, therefore, be distinguished from trespass *de ejectione firmae* which, in the late middle ages, allowed recovery of possession in addition to damages (*ibid*. p. 109).

\textsuperscript{18} The Note Book is the basis of this treatise and contains a collection of two thousand cases from the Plea Rolls; see W S Holdsworth, *Sources and Literature of English Law* (Clarendon Press, 1925), p. 27.
security interest requires description as an identifiable interest in land. The
notion that the gagee took an interest peculiar to the mortgage transaction
was replaced by the need to categorise his interest as a form of tenancy in the
land. This entailed, as Pollock and Maitland outline, that he must be a '... tenant for years, or for life, or in fee'. The form described by Bracton was a
term of years conveyed to the creditor, with a condition that if the debt was not
paid within the lifetime of the lease, the interest of the creditor would enlarge
to owner in fee simple. Like the Glanvillian gage, it too enjoyed only short-
lived prominence. The idea that a lease could swell into a fee simple was
conceptually problematic and met with disfavour. As Holdsworth notes, '... when the rules as to the creation of future estates in land became more
definitely fixed, the lawyers began to think that the second form of mortgage, according to which a term of years swells into a fee by the happening of an
event, is legally impossible'. The gage for years enjoys some similarity with
a popular form of beneficial lease that emerged in the thirteenth century as
both '... serve much the same purpose, that of restoring to a man a sum of
money which he has placed at the disposal of another'. Nevertheless, the
gage always involved the repayment of a debt, whereas the beneficial lease
avoided the need for any debt to be repaid. A 'premium' was paid for the
lease at the outset and through collection of rents and profits the lessee
obtained an ample income without arousing the suspicion of usury.

19 See P & M II, p121. The nature of the remedies available to the gagee, of course, depended
on the interest held. A tenant for a term held a termor's remedies.
20 Bract. 268b; P & M II, p. 122; see generally A W B Simpson, op. cit. p. 142.
21 See, for example, the detailed discussion in Co. Litt. 216-218.
22 H.E.L vol. III, p. 130.
23 See P & M II, p.121.
The Economic Context

Merchants of the twelfth and thirteenth century viewed land as the only opportunity for investment and their methods of creating mortgages are explicable by a desire to shield their true goal of generating profit. Throughout the Middle Ages, the concepts of trade and investment were unsophisticated, and the notion of status or class was fundamental to the medieval mindset. Man was placed in a divine order and lived a life that reflected his status. There was no opportunity to advance in life through the pursuit of wealth. Such ideas were abhorrent to the medieval society in which gain was justified only to support oneself in the established feudal order. Moneymaking was tolerated, 'not as an object, but as the wages of labour'. Hence, the prohibition of usury was at the heart of economic thinking in that period. English law drew heavily on ecclesiastical notions of morality, fairness and justice, and it supported an economy that was built around prohibition. In consequence, the influence of the Church together with the economic conditions of that time had a significant impact on the nature and form of moneylending transactions. The law advocated strict supervision of any lender/borrower relationship to ensure that it was not tainted by usury. It was not until the fifteenth and sixteenth centuries that the growth of trade substantially altered economic thinking and, in the process, made way for a

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24 As Holdsworth notes, in H.E.L. vol. V, p. 113, '... England was in a backward state of development'.
26 Ibid, p. 397.
27 A statute of 1341 reinforces this principle stating that, 'The king and his heirs should have the cognisance of the usurers dead; and that the Ordinaries of Holy Church have the cognisance of the usurers in life, as to them appertaineth, to make compulsion by the censures of Holy Church for the sin, and to make restitution of the usurers taken against the laws of Holy Church' (15 Edward III. st. I c. 5).
challenge on the prohibition of usury. Nevertheless, from the Year Books, early statutes, cases and works of authority, some continuity emerges in a picture of an economy moving slowly from feudalism to industry. For Harding, for example, the period between 1216 and 1642 is best characterised as a movement from status to commerce, 'Monetary considerations and written conditions replace enfeoffment and loyalty; the stable relationships based upon land gave way before flexible but also ephemeral commercial arrangements'. The function of the mortgage was destined to alter with a relaxation in the Usury laws and, more noticeably, with the advent of equitable intervention. The very earliest pledges of land, therefore, were explicable on the basis that there must be the provision of security to the lender and a way of enabling a return on the loan without arousing the suspicion of usury. It is inevitable that early mortgages, as a product of this age, are only understandable in these terms. There was little further development to be discerned from the literature until the time of Littleton.

The Classical Common Law Mortgage

From Littleton's *Book of Tenures*, there emerges the product of centuries of significant change. Writing at the end of the fifteenth century, Littleton describes the prevalent form as *mortuum vadium*, a conveyance in fee simple subject to a condition that if the loan is repaid on the date agreed, the

29 As J H Baker explains in *An Introduction to English Legal History* (Butterworths, 3rd ed, 1986), p353, 'The self redeeming living gage had long since gone into disuse: it cast on the lender the responsibility of refunding himself, perhaps without profit, and it was less attractive than a passive security in the form of land which would become the lender's absolutely if the borrower failed to pay on time'.
borrower may re-enter the land and claim the fee simple.³⁰ This was accompanied by the lender’s covenant that on repayment, he would re-convey the fee simple. Littleton’s explanation of the term mortuum vadium makes no reference to Glanvill, but it differs substantially from the meaning employed in previous centuries to its forebear. For Glanvill, the gage was dead where profits were not used to pay off both principal and interest. Littleton, however, considered that the gage was dead where the debtor failed to pay on the agreed date and his land was lost to him forever.³¹ The mortgage, nevertheless, had developed into a conditional conveyance. In this particular form, the grant to the lender met with defeasance when the debtor repaid and became entitled to re-enter. As Coote notes, ‘... defeasibility was an inherent quality of the estate’.³²

The classical common law mortgage, however, did not emerge until around the sixteenth century. Like the earlier form of mortgage described by Littleton, it consisted of a conveyance of the fee simple, but this time it contained the ‘proviso for reconveyance’. The borrower should repay the principal and interest on an agreed date and the lender would re-convey the fee simple. The seemingly minor alteration that the reconveyance was subject to such a proviso, as opposed to being on condition that the borrower could re-enter on discharging the debt, had far reaching consequences. The

³⁰ ‘... if the feoffment be made upon such condition that if the feoffor pay to the feoffee at a certain day forty pounds of money, that then the feoffor may re-enter; in this case the feoffee is called a tenant in mortgage ... and in Latin mortuum vadium’; (Littleton’s Tenures, s. 332).
³¹ As Littleton makes clear, ‘... it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not; and if he doth not pay, then the land which is put in pledge upon condition for the payment of money is taken from him for ever, and so dead to him upon condition. And if he doth pay the money, then the pledge is dead as to the tenant’ (ibid. s. 332).
mortgagee took the entirety of the estate, subject to the possibility of defeat on the borrower's fulfilment of a condition. Hence, unlike the form employed in the previous century, the mortgagee's estate did not automatically determine as soon as the debt was repaid. In addition, the contract also incorporated an obligation to reconvey. The rise to prominence of this particular form of mortgage is, in part, explicable by the availability of specific performance in equity, which, as Simpson notes, '... allowed this form of mortgage to supersede the older form of mortgage which it resembles'.

This development had the effect of simplifying proof of title because it shifted the proof of title away from payment of the debt to the actual reconveyance. As Chitty L.J. explained, the earlier form was abandoned because of, '... difficulty in ascertaining in whom the legal estate was vested, the title being made to depend on the fact whether the money was or was not paid within the time limited by the condition'.

This latter form of mortgage was to survive until the property reforms of 1925.

Of the methods of effecting a mortgage known to Littleton, it was the conveyance in fee with the right of re-entry that would develop and, as discussed, be replaced by the proviso for reconveyance. Nevertheless, the mortgage by demise, albeit in a variety of forms, enjoyed much currency. It was suitable for the mortgage of both freehold and leasehold interests. In relation to freehold mortgages, the mortgage by demise operated through the direct grant of a lease to the mortgagee. Such mortgages by demise, however, brought with them a disadvantage for the mortgagee because, in

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34 Durham Bros. v Robertson [1898] 1 QB 765 at 772.
comparison to the classical common law mortgage, the fee simple remained in the hands of the mortgagor. Where a lender did not hold the fee simple, his capacity to enforce the security could be lessened. As Coke commented, '... there is this defect, that, if the estate is foreclosed, the mortgagee will only be entitled for his term'.35 This form of mortgage was employed, for example, in the context of family settlements where, in order to provide for younger children, portions were raised via this mechanism.36

Traditionally, leasehold interests were mortgaged by assignment of the term, subject to a covenant to reassign. This particular style of mortgage, however, was to prove unpopular due to the privity of estate that would then exist between the landlord and the mortgagee. The mortgagee would thus become liable on the covenants in that lease, including the payment of rent.37 Not surprisingly, mortgagees sought to minimise potential liability and the practice of creating a mortgage by sub-demise was designed to achieve this end. This technique was employed to ensure that there could be no privity of estate existing between the head lessor and the mortgagee. The mortgage by demise or sub-demise was retained in the Law of Property Act 1925.38

Construction of the Mortgage Agreement

35 See Co. Litt. 204b.
36 Note that by the seventeenth and eighteenth centuries, the danger that the mortgagee would opt to take the mortgaged property had long since disappeared, opening the way for fundamental changes in the function of the mortgage: see further M J Daunton, Progress and Poverty: An Economic and Social History of Britain (Oxford University Press, 1995), p.66. For a general discussion on raising portions in marriage settlements: see R Megarry, H W R Wade, The Law of Real Property (Stevens, 5th ed, 1984) p. 412.
37 See Spencer's Case (1583) 5 Co Rep 16.
38 Law of Property Act 1925, s.86(1). As regards registered land, both methods have now been abandoned: s.23(1)(a) of the Land Registration Act 2002.
The late medieval mortgage was construed like any other estate upon condition. Redemption was subject to strict enforcement and the borrower was provided with a single opportunity to redeem. Failure to do so on the agreed date would entail that the mortgagor's proprietary rights were extinguished at common law. This strict contractual approach was, of course, apt to produce injustice. The inability of the borrower to pay off the debt on the agreed date could leave the lender with an estate valued at considerably more than the loan. As Simpson notes, 'The common law courts construed mortgage transactions strictly and unsympathetically. If the mortgage provided that the mortgagor was to lose his land through defaulting in payment upon a fixed day then that was that; it mattered nought that he defaulted only by a single day or that the property was worth much more than the debt'.

Even in circumstances where the borrower offered the money on the agreed date, the mortgagee could refuse to convey the mortgaged land. The only remedy at common law was an action for damages for breach of the mortgagee's covenant. This might not equal the value of the lost estate, as technically there could be no substitute for the loss of a particular piece of land. This severity of approach can, in part, be explained by the view that the mortgage agreement was comprised of a privately negotiated arrangement between the parties, which fell neatly into an established form of a condition at common law.

This placed the mortgagee in a position of comparative strength because at the heart of the mortgage transaction was a conveyance of the

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40 It has also been argued that the strict enforcement of the conditional feoffment was also attributable to, '... a distaste for interference with a transaction so tainted with illegality as usury': Potter's Historical Introduction to English Law and its Institutions, (Sweet & Maxwell, 4th ed, 1962), p. 620.
mortgagor's estate to the mortgagee. The mortgagee derived an inherent right to possession and, from the point of view of the common law, the entitlement to exercise rights associated with ownership of the estate. Once the condition was broken, the mortgagee became the absolute owner of the estate. This entailed that the mortgagor's failure to pay on the agreed date allowed for the simple and permanent retention of those rights already held from the outset of the mortgage.

The Law of Property Act 1925 reduced to two the number of permissible ways of effecting a legal mortgage of freehold land. These were a charge by deed expressed to be by way of legal mortgage and the demise/sub-demise for a term of years absolute, subject to a proviso for cesser on redemption. Unlike the classical common law mortgage, the charge by deed allowed the mortgagor to retain the legal estate. Hence, it was a basic characteristic of such pre-1925 mortgages, that the mortgaged property is forfeited to the creditor on default of payment. A number of forms of mortgage were experimented with prior to the legislation of 1925, all with the object of achieving forfeiture on default. As Barton notes, '... conveyancing forms adopted to achieve this object have varied, but the pedigree of this type of mortgage can be traced without a break from Glanvill to the present day, when the intervention of equity has transformed it into a very different type of security'. In addition, it is clear that whatever the form employed to create a mortgage, it was heavily dependent upon existing and developing common law doctrines. Hence, reliance on form inhibited analysis of the nature and

41 See generally F W Maitland, Equity: A Course of Lectures, op. cit. p187.
42 Barton, op. cit. p. 237.
substance of the transaction. As Holdsworth explains, this posed an inevitable
difficulty because the common law had hardened into a, '... narrow and
technical system which failed to do justice'. Judicial consideration of mortage agreements, in line with the common law enforcement of conditions was, therefore, strict, contractual and likely to produce unconscionable outcomes. Hence, it was a dogged adherence to common law norms that handed equity the impetus to develop its protective jurisdiction.

An Equitable Right to Redeem?
The common law first recognised the jurisdiction of the Chancery over satisfied mortgages in the reigns of Henry VI (1422-1461) and Edward IV (1461-1470). The Year Book of 9 Ed. IV provides evidence where, in response to the claims of a defendant, it was held that, '... although there is no remedy in our law, he may have a subpoena in Chancery if he pays the money'. The jurisdiction pertained to circumstances where a mortgage debt had been repaid or satisfied out of rents and profits. In such cases, the Chancellor could compel reconveyance or redelivery of the mortgaged property. Relief was awarded on the grounds of conscience and on the merits of each individual case. In Bodenham v Halle, for example, reference is made to the unjust imprisonment of the debtor and the extortionate interest payments to which he had been subject. The prevention of fraud was, hence, the basis for intervention at that time. It is widely accepted that Chancery

43 Holdsworth, Sources and Literature of English Law, op. cit. p. 3.
44 (1456) 10 Sel Soc 137.
45 As D E C Yale notes, '... the jurisdiction of the Chancery to relieve in cases of fraud and accident goes back to the beginnings of the equitable jurisdiction itself, and, indeed, may be safely said to be contemporaneous with it' ("Introduction to Lord Nottingham's Chancery Cases", (1962) 79 SS 7 at 31).
relief afforded to satisfied bonds was similarly motivated.\textsuperscript{46} As was the case with the fifteenth century mortgage, the rigour of the common law could fashion frequent and flagrant injustice. If a payor failed to ensure that a bond was cancelled upon payment, the fact of payment was no defence to the continued existence of the bond. Indeed, at common law this provided the conclusive evidence of debt. Whilst it was clear that the payee could exact unfair advantage, this was a matter not for the court, but for the conscience of the perpetrator. For this principal reason, the mortgage and the bond gave scope for a modest, conscience-based interference by Chancery with the rules based system of the common law. As Turner notes:

'The Chancellor was probably led to decree reconveyance and to relieve against satisfied bonds on the ground of fairness and conscience, treating each case as one of hardship, until soon a custom arose of decreeing reconveyance whenever a mortgage was satisfied out of rents and profits, or by payment at the day named, and the mortgagee would not return the land to the mortgagor according to the agreement of the parties'.\textsuperscript{47}

Although on a general level the Chancellor's fifteenth century jurisdiction was limited and embryonic, the common law mortgage provided a suitable vehicle for its expansion. Jones identifies the classic hallmarks of equity as being, '... the amelioration of duress or misfortune, the protection of the innocent from

\textsuperscript{46} See, for example, Turner, \textit{The Equity of Redemption}, (Cambridge University Press, 1931) p. 22 where the view is advanced that the relief of bonds and relief of satisfied mortgages were, by the lawyers of that time, 'scarcely differentiated'.

\textsuperscript{47} \textit{Ibid.} p. 23.
the ruthless specifications of other courts and their process ... [and] the intervention of reason and conscience according to the merits of each individual case...'. Indeed, as Fifoot notes, equitable intervention evolved because, 'Petitioners invoked the aid of the Chancellor both to fill the gaps of the common law and to soften its asperities'. There is, at this time, no evidence to suggest grounds for equitable intervention where a condition in the mortgage deed was not performed and, in such cases, it followed that the property was forfeited. Nevertheless, the impact of this early intervention, being grounded in conscience, was to bring with it an inevitable expansion of Chancery control. Even before the development of equity as a substantive body of law, and its assertion of a broad jurisdictional influence on the development of mortgage law, the mortgage had been identified as a type of agreement that required the Chancellor's vigilance. The movement towards the provision of relief against such forfeiture was to represent a marked expansion of Chancery interference, but it remains unclear exactly when this assumption of jurisdiction occurred. It may have been sometime in the reign of Elizabeth I (1558-1603), or amounted to a later seventeenth century development. Case law authority, however, appears to support the latter proposition. Of the sixteenth century cases where relief is in evidence, the judgments often fail to offer any adequate explanation of the grounds of

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49 C H S Fifoot, *History and Sources of the Common Law*, (Stevens, 1949) p. 32.
51 It is worthy of note that equity as a jurisdiction was yet in its infancy. As Jones argues, *op. cit.* p. 419 '... when the history of the Chancery is under consideration it may be suggested that a valuable, if arbitrary, guide is to think in terms of conscience, at least before the seventeenth century, and to employ the word 'equity' with reference to that modern and distinct kind of caselaw of which Nottingham was the greatest exponent'.
intervention. In *Langford v Bernard*,\textsuperscript{53} for example, there was no indication as to why relief was granted. The only other reported sixteenth century decision relates to the dismissal of a request for relief because, '... the defendants and those by whom they claim have been in possession by the space of forty years'.\textsuperscript{54} In the absence of convincing evidence to the contrary, the better view is that the jurisdiction over forfeited mortgages is most likely to have evolved in the early part of the seventeenth century. Prior to that date, relief given by the Chancellor involved cases where no date for payment was fixed\textsuperscript{55} or, as discussed above, where the mortgage had been satisfied on the agreed date. There is nothing whatsoever to suggest that relief had been extended to a mortgagor who had failed to perform a condition and incurred forfeiture.

The provision of relief to a mortgagor who failed to pay on the agreed date was, at first, dependent upon special circumstances, such as accident, mistake or fraud. In *Courtman v Convers*,\textsuperscript{56} relief was granted because the failure of the mortgagor to pay on the date fixed was proved to be due to the fault of the mortgagee. In *Wilkey v Dagge*, the unconscionable treatment of the borrower appears to have influenced Sir John Tyndal, who commented, 'I find him a very poor man, and am very creditably informed that the defendants be hard-dealing men'.\textsuperscript{57} Inevitably, a growing number of mortgagors in 'special circumstances' were to test the boundaries of the Chancellor's leniency. Consequently, the availability of relief for a mortgagor

\textsuperscript{53} (1594) Tot. 134.
\textsuperscript{54} *Sedgewick v Evan* (1582-3) Choyce Cases 167.
\textsuperscript{55} See *Bodenham v Halle* above.
\textsuperscript{56} (1601) Mon 764.
\textsuperscript{57} (1608) Mon 107.
who incurred forfeiture became routine and widened to include an increasingly broad spectrum of cases. The requirement of hardship was eventually abandoned and the provision of relief was extended in a customary fashion, except where it was inequitable to do so. This development effected a significant alteration in the balance of power between the parties. The borrower's position became strengthened because, '... the mortgagor considers that he has a right to redeem in the Chancery, although the day has passed for such redemption at law. He no longer asks for relief as of special favour, but asks that the usual clemency shall be shown him'.

Spence argues that this notion of a general equity in the mortgagor to redeem after forfeiture was evident at the beginning of the century. It was certainly firmly established by 1625 when, on the tender of principal, interest and costs, the mortgagor was allowed to redeem in equity after the legal date for redemption had passed, irrespective of circumstances of hardship. Such is evident from Emmanuel College v Evans, where it was held that, '... though the Money not paid at the Day, but afterwards, the said Lease ought to be void in Equity, as well as on legal Payment, it had been void in Law against them'. By this time, therefore, the express terms of the parties' bargain had become the subject of the Chancellor's routine disregard.

The mortgagor's power to redeem after forfeiture was, hence, an attack on the primacy of the mortgage agreement. The seventeenth century development of the law of mortgages was, thereby, characterised by an uneasy tension between conscience and the sanctity of contract. As detailed

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58 Turner, op. cit. p. 27.
59 Spence, op. cit. p. 603.
60 (1625) 1 Ch Rep 18.
above, the prevailing method for the mortgage of freeholds involved an outright conveyance of the property to the mortgagee with a proviso for reconveyance. By express terms in the mortgage agreement, therefore, a stipulation was included for the performance of contractual obligations. This agreement was subject to strict enforcement by the judges of the common law courts. A failure to redeem on the agreed contractual date, for example, exposed the mortgagor to the straightforward consequence that the legal estate remained vested absolutely in the lender. Accordingly, the right to redeem in equity was a right, '... given in direct contradiction to the declared terms of the contract between the parties'.61 The failure of the borrower to repay on the due date was not, however, regarded as being of the essence of the contract. Instead, and although unarticulated at the time, the rationale was, as Romilly M.R. later explained, '... to make a distinction in all cases between that which is a matter of substance and that which is a matter of form; and if it find that by insisting on form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance'.62

The drive to extend the dominion of the Chancery was, understandably, to meet with resistance from common law judges. In 1616, for example, Coke challenged the Chancery prerogative, as claimed by Lord Ellesmere, to re-open cases after judgment at law. This proved unsuccessful

62 Parkin v Thorold (1852) 16 Beav 59 at 66-67. In order to determine whether time is of the essence of a contract, the court considered the express stipulations between the parties, the nature of the property and the surrounding circumstances: see Roberts v Berry (1853) 3 De GM & G 284.
as the King settled the matter in favour of the Chancery. In the context of mortgage law, the impact of such victories is apparent in the contemporaneous extension of relief in the case of forfeited mortgages. Such overt and deliberate interference with the freedom to contract undoubtedly led to the promotion of a 1653 Bill designed to limit redemption to a single year after the entry of the mortgagee for condition broken. It also required that double interest be paid on such redemption and made the mortgagee in possession responsible only for net profits made and not for those which ought to have been made. By a sidestep, therefore, the common law attempted to undermine the growing supremacy of equity and, of course, directly reduce the scope for conscience based interference. Although passed by Cromwell as an Ordinance, the measures did not survive the Restoration. The Bill was met with blatant non-compliance in Chancery, and this illustrates well the extent to which Chancery jurisdiction had by this time become entrenched. The future extension of relief to mortgagors can, therefore, in part be explained in terms of post-Restoration development. Having successfully protected the jurisdiction to enforce redemption, the Chancery set about building upon its ascendancy. Whereas the common law retrieved its jurisdiction over bonds, no such move was made in respect of the mortgage. Hence, it was the Chancery trust and the Chancery mortgage that proved the focus of developments in equity. As Yale notes, in comparison to the Chancery trust, '... the Chancery mortgage, ... was comparatively

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63 James I agreed with Lord Ellesmere that, '... when a judgment is obtained by oppression, wrong and a bad conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party' (Earl of Oxford's Case (1615) 1 Ch Rep 1).
untrammelled and ... offered in many ways the greater scope for judicial policy and expansion'.

The creation of an equitable right to redeem could not of itself prove sufficient as a means of preventing unconscionability and this necessitated the evolution of a larger body of rules. First, there was a need to develop a means for the destruction of the equitable right to cater for circumstances when it was necessary to realise the security. Secondly, it had yet to be worked out how the right could be safeguarded and protected against inevitable attempts to circumvent its exercise. Thirdly, and as a result of such developments, there would be an increased focus on the substance of the mortgage transaction. This would challenge the courts to rethink the nature of the relationship between the parties and the requirements of a security interest. It had the consequence that, as Digby explains, 'When the jurisdiction of the Chancellor was firmly established, the rights and duties of a mortgagor and mortgagee recognised by equity became wholly different to those recognised by law'. Accordingly, the remainder of this chapter will examine the foreclosure of the equitable right to redeem, consider the beginnings of the equitable protective jurisdiction and analyse the focus of equity upon the mortgagee's inherent right to possession of the mortgaged property.

Foreclosing the Equity

The firm entrenchment of the mortgagor's equitable right to redeem inevitably posed the problem of how to set the parameters of that right. An unfettered

64 "Introduction to Lord Nottingham's Chancery Cases" op. cit. p. 34.
right to redeem was wholly inconsistent with the nature of the mortgage transaction, which had to enable the mortgagee to recover capital. By according to the mortgagor a right of redemption, which did not depend on contractual compliance, it followed that a mechanism in equity for the termination of that right became necessary. This was to adopt the form of a remedy of foreclosure. This allowed the mortgagee to extinguish the borrower's rights by enlisting the help of equity, entailing that the court, '... removes the stop it has itself put on'.\(^6\) In *How v Vigures*,\(^7\) the mortgagee sought a decree ordering payment and, on a failure to pay, the mortgagor was foreclosed of his equitable right to redeem. Full legal and beneficial ownership then became vested in the mortgagee. As the court decreed, '... the Heirs at law of the Mortgagor to pay the Plaintiff the £340 with Damages, or in Default, the Premises mortgaged are decreed to the Plaintiff, to be sold for satisfaction of his Debt. This was *nisi causa* and none shewed'. This evolution of extra-contractual jurisdiction threatened to marginalise the mortgage agreement. The contractual date for redemption no longer reflected the point at which the mortgagee took legal and beneficial ownership on default. There had emerged a co-existing regulatory system to challenge the strict common law approach to the mortgagee/mortgagor relationship. As Yale notes, 'Redemption and foreclosure are by the middle of the seventeenth century well established in the equitable jurisdiction'.\(^8\)

As mortgages took the form of a conveyance of the legal estate, it is not surprising that foreclosure became an integral element of English mortgage

\(^6\) *Per* Jessel M.R. in *Carter v Wake* (1877) 4 Ch D 605 at 606.  
\(^7\) (1629) 1 Ch Rep 32. This is the first reported case on foreclosure.  
\(^8\) *Op. cit.* at 33.
law. As indicated, when a borrower failed to pay on the agreed day, this was in breach of a condition sufficient to vest absolute title in the mortgagee. Equity then intervened to re-ignite the mortgagor's rights and put a brake on the absolute title of the lender. The creation of a new right for the borrower, however, brought with it the need for the control of its exercise. As discussed, foreclosure evolved simply because a method was required, in certain circumstances, to destroy the equitable right to redeem. Hence, the adherence to a particular form (i.e. outright conveyance of the legal estate) was the driver for this equitable invention and ensured that the law of mortgages, by comparison to other securities, would develop along its own peculiar lines. By according the mortgagor a right to redeem in equity, it was not long before the nature of the parties' interests required further clarification. With regard to the lender, by the 1670s, the notion that the mortgagee's interest in land was merely a security for money was evolving as a fundamental principle. It was a principle that would be at the heart of new rules regulating the protection of the equitable right to redeem and discouraging the mortgagee from taking possession of the mortgaged property. *Thornborough v Baker* is the first explicit recognition that the interest of the mortgagee was of a personal nature. As the Lord Keeper Finch explained:

' ... for in natural Justice and Equity, the principal Right of the Mortgagee is to the Money, and his right to the Land is only as

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69 As E Sykes argues in *The Law of Securities* (Sweet & Maxwell, 1986), at p. 53, 'Foreclosure is not an essential to the security concept. The typical remedy under the hypothec type of security is the decree of judicial sale by which the court puts an end to the right of the debtor to pay off the debt and receive back his property in an unencumbered state'.

70 (1676) 1 Ch Ca 283.
Security for the Money; wherefore when the Security descends to the Heir of the Mortgagee, attended with an Equity of Redemption, as soon as the Mortgagor pays the Money, the Lands belong to him, and only the Money to the Mortgagee, which is merely personal, and so accrués to the Executors or Administrators of the Mortgagee.\footnote{Ibid. at 285.}

In the same decade, \textit{AG v Pawlett}\footnote{(1679) Hard 465.} considered the nature of the mortgagor's interest, particularly whether the mortgagor's right to redeem was exercisable by an assignee or devisee claiming through the mortgagor or available against the mortgagee's successors in title. With the recognition that the equitable right to redeem is alienable, devisable and enforceable against third parties, there must inevitably follow the acceptance that the mortgagor holds rights of proprietary character.\footnote{This led ultimately to the principle established by Lord Hardwicke, that, '...an Equity of Redemption is considered as an estate in the land' (\textit{Casbourne v Scarfe} (1787) 2 W & T 6).}

\section*{Devices and Devises}

The establishment of an equitable right to redeem after the date agreed in the contract was, not surprisingly, to provoke a variety of attempts by lenders to curb its impact. The inclusion of covenants requiring a surrender of the equity of redemption or its exercise on onerous terms became commonplace. In response, the Chancellor developed a body of rules for the protection of borrowers who found themselves prey to such devices. These rules worked on the basic premise that, 'once a mortgage always a mortgage, and nothing
but a mortgage'.\textsuperscript{74} The essence of this principle was that any contractual stipulation which would prevent the mortgagor from recovering the mortgaged property on discharge of the mortgage obligations should be invalid. With the idea that the mortgagee holds only a security interest, comes the realisation that the equitable right to redeem is an integral, albeit implied, element of the mortgage contract. Consequently, any clog or fetter on the right to redeem is wholly inconsistent with the intention of providing a security.\textsuperscript{75} The scrutiny of the court was to fall upon a variety of restrictions, including unfair collateral advantages\textsuperscript{76} and options to purchase built into the mortgage agreement.\textsuperscript{77}

By the end of the seventeenth century, borrowers had become routinely subject to attempts to curtail redemption or to vest the mortgaged property absolutely in the lender on the occurrence of a specified event. In \textit{Howard v Harris},\textsuperscript{78} for example, a clause was inserted in the mortgage agreement that allowed for redemption by the mortgagor or his male heirs. This was interpreted as an attempt to confine the capacity to redeem to specific individuals. It failed when the 'heir general' was permitted to redeem. Similarly, in \textit{Sir Robert Jason v Eyres}\textsuperscript{79} an attempt to tie redemption to the happening of particular events was denied. This decision was cited in \textit{Newcombe v Bonham} as a case, '... where all the negative words imaginable

\textsuperscript{74} \textit{Seton v Slade} (1802) 7 Ves 265 at 273 per Lord Eldon L.C.

\textsuperscript{75} For a helpful discussion on the development of clogs and fetters see the judgment of Lord Parker in \textit{Kreglinger v New Patagonia Meat and Cold Storage Co Ltd} [1914] AC 25.

\textsuperscript{76} See, for example, \textit{Noakes v Rice} [1902] AC 24 where it was held to be a clog on the equity of redemption that the mortgagor of a free house agreed to purchase only the mortgagee's beer for the full duration of the lease and notwithstanding redemption of the mortgage.

\textsuperscript{77} See, for example, the critical discussion of the House of Lords in \textit{Samuel v Jarrah Timber and Wood Paving Corp. Ltd} [1904] AC 323.

\textsuperscript{78} (1683) 2 Freeman 86. Also reported at (1683) 2 Freeman 84 under the title of \textit{Hammond v Harris}.

\textsuperscript{79} (1681) 2 Freeman 70.
were inserted into the deed, to bar the equity of redemption, and all manner of circumstances sworn, that might conduce to the hindering of the redemption.\(^8\)

In addition, equity would not allow a bargain between lender and borrower to be formulated as a conditional sale where the bargain was, in essence, a contract of loan. Such enquiry into the substance of the transaction extended to the admission of parol evidence to ascertain the true intentions of the parties.\(^8\) Indeed, in the later decision of *Vernon v Bethel*, Lord Henley L.C. best explained equity's distaste for such bargains:

'This court, as a court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule, that the mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute.'\(^8\)

It is from such authorities that the nature and, importantly, the limitation of equitable intervention can be distilled. Not only do they illustrate equity looking to substance rather than form, but also they demonstrate a perceived need to protect borrowers from unscrupulous lenders at the point at which they agree terms. In *Newcombe v Bonham*, for example, the mortgagee attempted to render the mortgage irredeemable. Lord Nottingham held that no clause in the

\(^8\) Per Lord Nottingham (1681) 2 Freeman 68 at 68.

\(^8\) See, for example, *Alderson v White* (1858) 2 De G & J 97 where a statement that land had been granted 'as a security' was admissible to demonstrate that, what seemed like an outright conveyance of land, was intended to be a mortgage.

\(^8\) (1762) 2 Eden 110.
mortgage agreement could succeed to this effect, '... for once being redeemable and once a mortgage, the negative words shall not make it otherwise...'. The rationale is situated firmly in the scope for exploitation of the borrower at the point of contract. Referring again to attempts to prevent redemption, the Lord Chancellor added that '... if this should be suffered, the scriveners should quickly get this way, and cozen mortgagors out of their estates'.

It is further evident that equity would jealously guard the interests of the mortgagor prior to the mortgage agreement, but no such protection was offered thereafter. In the detection of clogs and fetters, for example, equity's supervision was over the mortgage agreement alone. In relation to a term providing the mortgagee with an option to purchase, the rationale was simply that any exercise of the option would prevent the mortgagor's redemption. The grant of an option in a separate, subsequent agreement, however, would fail to activate equity's protective shield. Such was the position in Reeve v Lisle where the option to purchase a mortgaged ship was permitted. As the option was granted subsequent to the mortgage agreement, it was not construed as part of the original mortgage transaction and, thereby, evaded the interest of equity.

Put broadly, after execution of the mortgage the mortgagor was free to divest himself of the equity of redemption without the supervision of equity and the mortgagee was free to contract on any terms for the release of the mortgagor's equity. It is clear, therefore, that the interference of equity in the

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83 Above.
84 [1902] AC 461.
85 See, for example, Melbourne Banking Co v Brougham (1882) 7 AC 307.
mortgage agreement is premised upon the perceived inequality of bargaining power of the parties at the point of contract.\footnote{Not every case of equitable intervention can, however, be explained in terms of the need to shield the mortgagor from exploitation. The doctrine of consolidation represents a rare seventeenth century example of equitable rules developed for the protection of the lender.} There is, by comparison, scant consideration of the needs of the vulnerable borrower beyond that point. It is notable that the unconscionable exercise of rights and remedies based on conscionable terms of the agreement was never the focus of this developing jurisdiction. This was an area left to Parliamentary reform.

Admittedly, a combination of doctrinal and socio-economic development has witnessed the erosion of large parts of the clogs and fetters doctrine. The concern as to unfair collateral advantages obtained by virtue of the mortgage is effectively accommodated within the doctrine of restraint of trade and lies outside the residential market. The test for unfair terms, moreover, is one of unconscionability. Additionally, it is not in dispute that the modern day institutional lender has no desire to 'cozen' the borrower out of his estate. More likely is the imposition of excessive charges or penalties for early redemption. In response, some borrower protection is to be found in the piecemeal statutory regulation provided by the Consumer Credit Act 1974 or under the Financial Services and Markets Act 2000.\footnote{See Chapter 6.} Nevertheless, equity's historical distaste for clogs and fetters continues to resonate. In Jones v Morgan,\footnote{(2001) EWCA (Civ) 995.} for example, an agreement bestowing a right on the mortgagee to purchase the mortgaged property was construed as a variation of the original mortgage agreement and, therefore, a clog on the equity of redemption. As Thompson remarks, 'Because such a clause is, technically, a clog, it will be
struck out regardless of the lack of any oppression and it is an unfortunate relic of a doctrine of equity which has now a propensity to upset unexceptional contracts.  

The Right to Possession

It remains to consider the contribution of equity in undermining the mortgagee's possession. The mortgagee's right to possession has always been a marked characteristic of the English law of mortgages. By virtue of the conveyance of legal title, it is a right that arises upon execution of the mortgage and does not require default on the part of the borrower. As discussed, the custom of taking possession dates back to the earliest forms of pledge. Even in the fifteenth century there was a transfer of possession on feoffment by way of mortgage, which operated to secure the feoffee ownership upon the borrower's default. Indeed, prior to the seventeenth century, there is no evidence of a developing trend of allowing the mortgagor to remain in possession until default. The early cases that begin to demonstrate the shift towards the mortgagor retaining possession are oft-cited. In *Stone v Grubham*, upon facts which are unclear, the court was asked to consider whether it was fraudulent for a mortgagor to remain in possession under Stat. Eliz. c. 5. In answer, it was concluded that, ' ... continuance in possession after this shall not, in the judgment of the law be said to be fraudulent'. By 1620, there is evidence of a proviso that, ' ... the

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90 The most notable exception is the particular form of pledge employed by the Jews; see Holdsworth, H.E.L. vol. III, p. 131.
91 (1615) 2 Bulst 225.
mortgagee, his heirs and assigns shall not intermeddle with the actual possession of the premises or perception of the rents until default of payment'. In addition to the proviso allowing the mortgagor to remain in possession, there are cases of mortgagors claiming to have been in possession throughout the mortgage term. In *Hales v Hales*, for example, the mortgagor claimed to have, ' ... enjoyed the Premises for 60 years last passed'. Whilst there is evidence to demonstrate the emergence of this seventeenth century practice, it is much less clear what brought it about. It was not until 1854 that the usury laws were finally repealed by the Usury Laws Repeal Act. Nevertheless, the process began in 1545 when, for the first time, statute delimited the level of interest permitted by law to mortgagees. There no longer existed such an incentive for a mortgagee, holding the fee simple, to go into possession and exact advantage. Consequently, the mortgage was gradually being regarded as an investment in itself without the need for a source of profit in addition. The Chancery was at the same time enjoying a period of jurisdictional expansion and readily availed itself of the opportunity to oversee this development. Lord Nottingham's decision in *Thornborough v Baker* had a significant impact on the approach of equity to the question of possession in the law of mortgages. It led to the inevitable conclusion that the enjoyment of possession, which stemmed from the conveyance of legal title, was at odds with the holding of a mere security interest. Although equity could do nothing regarding the legal entitlement to

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92 *Powsely v Blackman* (1620) Cro Jac 659.
93 (1636) 1 Ch R 105. See also *Sibson v Fletcher* (1632) 1 Ch R 59 where the mortgagor claimed to have been in possession 'ever since the making'.
94 See generally H.E.L. vol. VIII, p. 100.
95 (1676) 1 Ch Cas 283.
take possession, a strict supervision of the exercise of this right ensued.\textsuperscript{96} Whilst the mortgagor retained an equitable right to redeem, the mortgagee was prevented from profiting from the mortgaged property, save for the advantages for which he had contracted.

**An Ethos of Discouragement**

Liability on the footing of wilful default is the most obvious manifestation of equity's supervisory interference.\textsuperscript{97} Where the mortgagee took possession, equity required that account must be had not only of those rents and profits actually received, but also of that income that would have been received had the property been managed with due diligence.\textsuperscript{98} This had the effect of rendering possession prior to default an extremely unattractive option. In charting the reluctance of the mortgagee to avail itself of its strict legal entitlement, liability on the footing of wilful default and the duty to account assume a major importance. In addition, equity determined the method of calculation of liability to discourage further any unnecessary move into possession. If the mortgagee took possession when the interest was not in arrears (or the profits exceeded the interest), the account of rents and profits no longer ran from beginning to end, but instead operated with annual rests. This different form of account entailed that, if at the point of the rest the receipt of profits exceeded the required interest, the surplus would be

\textsuperscript{96} As B Rudden, in a discussion of equitable intervention, notes '... the very strictness of her attitude in this regard is only explicable by her appreciation that she should not - could not - act directly to prevent the mortgagee from taking possession'. (Mortgagee's Right to Possession [1961] Conv 278, p. 284).

\textsuperscript{97} In *Berney v Sewell* 1 Jac & Walk 650, the mortgagee was asked for an account, '... of what he has received, or what he might have received without his own wilful default'.

\textsuperscript{98} See *Chaplin v Young* (No. 1) (1864) 33 Beav 330 at 337; *Noyes v Pollock* (1885) 32 Ch D 53 at 61.
employed to reduce the capital debt. The rationale appears to be that if the mortgagee enters into possession in a remedial capacity, that is to protect his security, he should not be punished by the removal of his entitlement to have the account taken as a whole. Conversely, entry into possession where the security is not jeopardised is inconsistent with holding a mere security interest. In those circumstances equity dictated that the mortgagee must account with rests.

The threshold of care required of the mortgagee in possession appears to stem from the premise that the mortgagee should not treat the mortgaged property as his own. It does not set out to punish the mortgagee who makes an honest mistake, but rather aims to eliminate recklessness, mismanagement and fraud. There is nothing to require the mortgagee actively to make the most of the property and no positive obligations of that nature are placed on the lender's shoulders. As Wragg v Denham demonstrates, there is no compulsion to maximise profit. In consequence, and as Waldock pointed out, there is nothing that would, 'unduly alarm a prudent man of business'. Similarly, in the context of maintenance, the mortgagee is not judged by the standard of care with which an owner should look after his own property. Hence in Moore v Painter, the mortgagee was not required to rebuild ruined premises. Similarly, there was no liability incurred for any deterioration of the premises. Where expenditure on renovation and repairs

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99 The lender no longer has the character of a mere mortgagee, but behaves as owner of the mortgaged property; see Eyre v Hughes 2 Ch D 148 at 162.
100 See Wrigley v Gill (1905) 1 Ch 241.
101 See, for example, Hughes v Williams (1806) 12 Ves 493.
102 (1836) 2 Y & C Ex 117.
103 C H M Waldock, The Law of Mortgages (Stevens, 1950), p. 239.
104 (1842) 6 Jur 903.
was necessary, it could be recouped from the mortgagor according to what is reasonable in the circumstances of the case. The threshold of care is one of gross negligence.

As a consequence of the view that the mortgage was not, in essence, a transfer of ownership, equity strove to facilitate the protection of the mortgagee’s rights without the need to take possession. One illustrative example is the use of the injunction. Where the borrower, through the commission of an act of waste, threatened to imperil the mortgagee’s security, equity could, on receipt of the lender’s application, stop the mortgagor from continuing (or even commencing) such an act. Although the right to prevent waste was recognised at common law, the only remedy afforded to the lender was the taking of possession. Consequently, equitable intervention made for an improvement of the lender’s position because it supplied a remedy that did not require the mortgagee to take possession of the mortgaged property. It was, however, necessary for the adequacy of the security to be threatened. Where an act of waste did not prejudice the security interest, equity would not interfere with the ownership rights of the borrower.

In this manner equity strove to discourage the mortgagee from exercising its legal right to take possession. Nevertheless, given the adopted form of mortgage at common law, intervention stopped short of any direct challenge to the continued existence of such a right. Should the mortgagor seek to

105 In Harper v Alpin (1886) 54 LT 383 the mortgagor was wasting the security by cutting timber. Other prominent cases have involved acts such as the removal of fixtures: see, for example, Ackroyd v Mitchell (1860) 3 LT 236.
107 See King v Smith (1843) 2 Ha 239; Gough & Co v Wood [1894] 1 QB 713.
prevent the mortgagee in the exercise of its legal right to take possession, the mortgagee had an action for ejectment. Unless the mortgagor was able to pay principal, interest and costs, equity was not prepared to interfere with the mortgagee's common law action. Sir William Grant M.R. summed up the perilous nature of the mortgagor's possession by comparison with the cestui que trust:

'It will not be disputed that an Equity of Redemption is an Equitable right. For it is only in Equity that, after forfeiture, it has an existence; and although the Equitable Ownership be in the Mortgagor, yet his possession is of a more precarious nature than that of any other cestui que trust. In general a Trustee is not allowed to deprive his cestui que trust of the possession, but a Mortgagee may assume the possession whenever he pleases, and therefore a Mortgagor is called Tenant at Will to the mortgagee and in point of Possession he is so even in Equity; For a Court in Equity never interferes to prevent a Mortgagee from assuming the possession'.

It was the construction of the covenant to enjoy until default that produced much case law destined to examine the nature of the relationship between the parties. There is no question that the rules regarding the mortgagor's possession and, indeed, the mortgagee's liability in possession were formulated by the end of the seventeenth century. This did not, however, help address the problem of how legal ownership could be vested in the

108 See Maitland, Equity p. 186, where the ability of equity to stay a mortgagee's action, provided the mortgagor paid in full, is described as a 'mock equity'.
109 Cholmondeley v Clinton (1817) 2 Mer 171 at 359.
mortgagee while physical occupation remained with the mortgagor. The nature of this occupation would, inevitably, require scrutiny. As the mortgagor was in possession for his own purposes, and did not receive rents and profits on behalf of the mortgagee, the conclusion of the common law courts was that the possession must be described as a form of tenancy. As the mortgage was effected by the conveyance of the freehold estate to the mortgagee, the mortgagor in possession could only be a tenant for a term of years, a tenant at will or a tenant at sufferance to the mortgagee. It was with these options that the common law judges grappled. Ironically, as demonstrated in Chapter 4, such notions continue to underlie the current judicial approach to the mortgagee's inherent right to take possession where the statutory discretion to postpone possession is inapplicable.

The Mortgagor in Possession

At the heart of the debate, the wording of the decision in *Powsely v Blackman*\textsuperscript{111} appears to be an authoritative statement that a covenant that the mortgagee would not take possession did not place the mortgagor in the position of lessee, 'It is not a covenant or agreement with the bargainee, that he should enjoy it during those years, for then it would have amounted to a lease for years'.\textsuperscript{112} Undoubtedly, an express agreement to the effect that there should be possession for a term certain would have made the mortgagor a tenant for that term. Most frequently, however, there was simply a clause

\textsuperscript{110} The view that the mortgagor in actual occupation might be construed as a tenant at will appears to stem from an analogy with the trust estate: see Turner, *op. cit.* p. 91.

\textsuperscript{111} (1620) Cro Jac 659.

\textsuperscript{112} *Ibid.* at 659.
postponing the power of the mortgagee to take possession until default. In
that such clauses failed to specify the length of the term, insufficient certainty
of term appears to preclude the leasehold estate.1
In the years that followed,
a tenancy at will proved to be in favour. In Keech v Hall, for example, Lord
Mansfield considered that, '... when the mortgagor is left in possession, the
ture inference to be drawn, is an agreement that he shall possess the
premises at will in the strictest sense...'.1 He felt obliged, nevertheless, to
revisit his comment barely one year later. In Moss v Gallimore, there came the
further refinement that, 'A mortgagor, is not properly tenant at will to the
mortgagee, for he is not to pay him rent. He is only so quodam modo ... when
the court, or counsel, call the mortgagor a tenant at will, it is barely a
comparison'.1 The resemblance of the mortgagor in possession to a tenant
at will met with considerable critical comment in Birch v Wright.1 At the
centre of the objections voiced by Buller J. were the difficulties that the
mortgagor had no entitlement to the growing crops after the will was
determined and also that the mortgagor could simply be ejected should the
mortgagee seek to recover the lands. The mortgagee, as Buller J. elaborated,
'... is virtually and in the eye of the law in possession. The mortgagee has the
right to the actual possession whenever he pleases; he may bring his action
for ejectment at any moment that he will'.1 This did little to quieten a

1 See, for example, Doe d. Parsley v Day (1842) 2 QB 147. In Wilkinson v Hall (1837) 132
ER 506, however, a covenant for quiet enjoyment until default in payment was sufficient to
create a certain term, because although the mortgage money was payable in 1834, the
mortgagee covenanted not to call it in until 1840. The clause was held to operate as a re-
demise until 1840.
14 (1778) 1 Doug KB 21 at 22.
15 (1779) 1 Doug KB 279 at 282.
16 (1786) 1 Term Rep 378.
17 Ibid. at 383.
heightened debate. In *Christophers v Sparke*, Sir Thomas Plumer M.R. claimed that, 'The argument from there being a tenancy at will, arises from a mere fiction; for there is no actual tenancy, no demise, either express or implied ... We cannot push it to that extent, reasoning on the supposed relation of landlord and tenant, which is not founded on fact'. Other authorities speak of the mortgagor's possession as a tenancy at sufferance. In *Thunder v Belcher*, for example, Lord Ellenborough described a mortgagor as, ' ... no more than a tenant at sufferance, not entitled to notice to quit'. Moreover, other observers appear content to describe the relationship as one peculiar to the parties of mortgagee and mortgagor. In *Hickman v Machin*, the ' ... many loose expressions' to be found in previous decisions failed to accurately convey the reality, ' ... that the mortgagor is not a tenant at all; he has no interest'. Other judges accepted some scope for overlap. As Tenterden C.J. explained, 'The mortgagor is not in the situation of tenant at all, or at all events, he is not more than a tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or as trespasser at the option of the mortgagee'.

Regardless of the descriptive label attached to the relationship of mortgagor and mortgagee when the mortgagor is in possession, it is clear that this possession was of a permissive nature. The form of the mortgage was sufficient to vest the legal estate in the lender. The borrower, having disposed of the estate, remains in possession at the lender's largesse. Moreover, the

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118 (1820) 2 J & W 234 at 234.
119 See also the views expressed by Sir Thomas Plumer M.R. in *Cholmondeley v Clinton* above where additional criticisms of the mortgagor as tenant at will are detailed.
120 (1803) 3 East 449 at 451.
121 (1859) 4 H & N 716 at 722 per Watson B.
122 *Doe d. Roby v Maisey* (1828) 8 B & C 767 at 768.
specific range of entitlements of the mortgagor in possession serves to support the view that the nature of his possession is distinctive to the relationship between mortgagee and mortgagor. It is, therefore, of little value to consider it in terms of the developing doctrine of estates. This debate was generated by the manner in which mortgages were effected, that is, by manipulation of existing interests in land. The mortgage by conveyance of the legal estate secures a right to possession of the property that in no way depends on default of the borrower and allows the mortgagee to obtain extensive legal rights in respect of the mortgaged property. Some of these arise from holding title to the land, while others arise from possession. The lender, therefore, holds some true rights of ownership. Equity could not restrain actions based on rights of ownership, but only sought to limit the attractiveness of such actions by the incidence of liability. This was achieved in the eighteenth century, by which time a mortgagee who entered into possession exercised that right as a means of remedy or redress. Entry was for the purpose of recovery of principal and interest, and rents and profits received were used in the reduction of the debt.\footnote{See Lord Kensington v Bouverie (1855) 7 De GM & G 134.}

Modern mortgage law is not, however, simply a product of equitable principle and common law practice. With the inevitable decline of equity as an agent of law reform, Parliament was to provide an additional framework. Legislative reform was designed to introduce new legal structures and to build upon existing rules.
CHAPTER 3

The Early Law of Mortgages: Statute and the Common Law

It is to the raft of legislation enacted in 1925 that one looks for a clear statement of the principles of modern land law. Nevertheless, the opportunity has never been taken to subject the law of mortgages to comprehensive statutory reform.¹ Instead, piecemeal regulation is still to be found within the Law of Property Act 1925. Undoubtedly, the historic preoccupation with the machinery of land registration stifled the mood for major change to the substantive law of mortgages. In the pursuit of assimilation and consolidation, law reformers have consistently failed to address fundamental principles. Hence, in comparison to the influence exerted by the common law and equity, Parliament has made only a limited contribution to the development of the law.² This legislative inaction entails that the essential features of modern mortgage law are those which were evolved at a time when the intervention of equity was at its height and when the mortgage was utilised in a very different manner than today.

Chancery Reform

As discussed in the previous chapter, with regard to both the trust and the mortgage equity made a significant contribution in the form of wide-ranging and established principles and precedents. This was achieved at a time when

² See, for example, the Administration of Justice Acts 1970 and 1973; the Consumer Credit Act 1974.
equity, in contrast to the common law, was a responsive, flexible jurisdiction. As this jurisdiction became increasingly settled, it was inevitable that the tide of equitable development could not continue unabated. The seventeenth century saw equity slowly shift from a conscience based system into a hardened body of rules. The explanation for this change concerns the growth of law reporting which had a pronounced effect upon the manner in which judgments were given. The knowledge that a judgment would be reported required the judge to provide explanations and reasons which, in turn, hastened the reduction of equity to a series of settled principles. The binding effect of judicial precedent prompted Baker to note, '... even the Chancery would sooner suffer a hardship than a departure from known rules'.

The contribution of two individual Chancellors, namely Hardwicke (1737-1756) and Eldon (1801-1806, 1807-1827), characterised the eighteenth and early nineteenth century development of equity. Both stamped their influence upon the exercise of equitable principles of their time, just as Nottingham had done before them. Hardwicke gave existing principles clarity, explanation and application. With regard to mortgages, he argued concisely and articulately the underlying rationale of the doctrine of clogs and fetters, the duties of the mortgagee in possession and the nature of the equity of redemption as an estate in land. Although his decisions do not appear to have added much to the existing mortgage law, they are to be admired as

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3 As Blackstone recognised, 'The system of courts of equity is a laboured connected system, governed by established rules and bound down by precedents' (3 Commentaries on the Laws of England 432).


5 See the views expressed in Toomes v Conset (1745) 3 Atk 261.

6 See Godfrey v Watson (1747) 3 Atk 517.

7 See Casborne v Scarfe (1737) 1 Atk 603 at 605.
classic expositions of principle.\(^8\) It is to be admitted, however, that equity's contribution to the development of substantive mortgage law had already been made by this stage and that its influence was on the wane. As principles became settled, procedural technicality, delay, expense and corruption increasingly dogged the Chancery.\(^9\) A significant increase in matters coming before the Court of Chancery served to intensify the problem. As Harding comments, ' ... the principles and business of equity developed, so the scandal of its interminable procedure grew worse'.\(^10\) The emergent irony was that the rules of equity became as inflexible as those at common law. As Woodward observes, 'The court of Chancery was supposed to correct the rigidity of the common law, and to provide remedies where the common law did not apply, but the "equity" of the court had long since disappeared under a mass of cumbersome rules and practices'.\(^11\)

These obstacles beset the chancellery of Lord Eldon in particular. Nevertheless, the charge of instilling greater certainty in the law appears to have weighed more heavily in his mind than the, arguably more compelling, need for the immediate reform of the Chancery. As he admitted in Gee v Prichard, 'Nothing would inflict on me greater pain in quitting this place than the recollection that I have done anything to justify the reproach that the

\(^8\) See, generally, Holdsworth, H.E.L. vol. XII, pp. 277-279.
\(^9\) As F W Maitland notes, 'Freed from contact with the plain man in the jury-box, the Chancellors were tempted to forget how plain and rough good law should be, and to screw up the standard of reasonable conduct to a height hardly attainable except by those whose purses could command the constant advise of a family solicitor. A court which started with the idea of doing summary justice for the poor became a court which did a highly refined, but tardy justice, suitable only to the rich' (Historical Essays, Cambridge University Press, 1957, p. 116).
equity of this Court varies like the Chancellor's foot'.\textsuperscript{12} In his quest for certainty, Eldon maintained a system which offered inexpedient justice. The strain on the Chancery caused by interminable delays was, moreover, exacerbated by Eldon's personality. This prompted Horwitz to observe that '...his notorious "cunctative habit" in pursuit of the absolutely correct decision meant that not even the institution by statute in 1813 of a Vice Chancellor to help cases to a conclusion could compensate for his very deliberate pace'.\textsuperscript{13}

What had once been a vibrant and responsive jurisdiction was now suffering from stagnation. It was inevitable that the Chancery would itself require reform and that future reform of mortgage law would necessarily come from another direction, namely Parliament.

Assimilation

The focus of Parliamentary reform was upon the assimilation of the rules of the common law and equity. Prior to the Judicature Act 1873, the administration of law through two different sets of courts was apt to produce inefficiency. This was the most important deficiency that statute law sought to address. As many of the rules of mortgage law were equitable, it followed that there would be legislation which was of both direct and indirect relevance to mortgages. Some early legislative interference with the law of mortgages, therefore, can be explained in terms of enabling the courts to carry out existing processes more competently. In 1734, for example, an 'Act for the

\textsuperscript{12} (1818) 2 Swan 402 at 414.

\textsuperscript{13} H Horwitz, \textit{A Guide to Chancery Equity records and Proceedings 1600-1800} (Public records Office, 1998), p. 49. W S Holdsworth, however, emphasises his hard work, and challenged the 'grotesque untruth', that 'the delays that made the court of Chancery a byword in his day, were wholly due to him' (\textit{Sources and literature of English Law}, Clarendon Press, Oxford, 1962, p. 197).
more easy redemption and foreclosure of mortgages' aided those borrowers
sued in ejectment to claim redemption in the common law courts. Prior to this
legislative development, such relief was unavailable at common law, and only
the Chancery could compel a lender to re-convey the mortgaged property on
tender of principal, interest and costs. The rationale was that the mortgage
was viewed as no more than a security for a debt. Equity construed the taking
of possession as a demand for repayment. It operated to trigger the
entitlement of the borrower to redeem the mortgage. The effect of the 1734
Act was to enable the mortgagor to exercise the right to redeem without
recourse to the Court of Chancery.14 Other legislative provisions did not focus
upon mortgage law specifically, but impacted in an indirect fashion. The
Trustee Act 1850, for example, enabled the court by its own decree to transfer
the legal title of property to any person declared to be entitled to it. This was
achieved either through a vesting order or by the appointment of a person to
convey the legal estate. The effect of such statutory provisions was not to
alter the principles of the law of mortgages, but to enable the courts to deliver
more efficient and expedient justice.

In the late seventeenth and eighteenth centuries, judges and
Chancellors alike had, as Holdsworth explains, 'skilfully worked out the terms
of the partnership between law and equity'.15 Nevertheless, it is apparent that
difficulties arising from the administration of law through dual systems
ensured that substantive law reform was sidelined. The assimilation of the
functions of the courts of equity and the courts of law continued to be the

14 Similarly, it afforded the common law courts the jurisdiction to grant equitable relief
against penalties in bonds: see J A Strahan, The Principles of the General Law of Mortgages
15 W S Holdsworth "Equity" (1935) 51 LQR 142, p. 144.
underlying policy of the statutory reform of equity in the nineteenth century. This goal, in a like vein to that of title registration within mainstream land law, was pursued to the detriment of substantive reform. The enactment of the Chancery Procedure Amendment Act 1852 and the Common Law Procedure Act 1854 were important legislative developments because their objective was to rid the law of the inconveniences that arose from the operation of two separate systems. The latter afforded the Chancery the power to make an award of damages and, as a corollary, the courts of common law were enabled to grant injunctions and hear equitable defences.

The effect of such legislative developments was to promote increased enquiry into the possible fusion of jurisdictions. It came as no surprise, therefore, when in 1869 the Judicature Commission recommended some form of procedural fusion. With the Judicature Act of 1873, judges of the newly formed Supreme Court were empowered to administer both the rules of common law and equity concurrently. It was clear, furthermore, that the Act represented an administrative as opposed to a substantive fusion. The object of the legislation was, as Sir George Jessel emphasised, more limited in scope, having '... been sometimes inaccurately called "the fusion of Law and Equity"; but it is not any fusion, or anything of the kind, it was the vesting in one tribunal the administration of Law and Equity in every cause, action or dispute which should come before that tribunal'. The changes brought about by the Judicature Acts were groundbreaking and important. In the shaping of the future inter-relationship between law and equity, and in developing a new,

16 See also the Chancery Amendment Act 1858 (Lord Cairns Act), which allowed for the award of equitable damages in addition to or in lieu of specific performance.
17 Salt v Cooper (1880) 16 Ch D 544 at 549.
overarching, procedural framework, the Acts had as Holdsworth claims, '... recast the whole judicial system'.

During the course of the eighteenth century, and in order that the mortgage could be employed in the most effective manner, conveyancing practice had adapted to accommodate the established body of equitable rules. It became common, for example, for express powers of leasing to be inserted in the mortgage agreement at the behest of the mortgagee. This eliminated any uncertainty that arose from the competing claims of a mortgagor with his equity of redemption and the third party lessee. Two additional remedies, moreover, began to appear in the contract between the parties to a mortgage. The express inclusion of a power of sale and a power to appoint a receiver became increasingly commonplace. The eighteenth century also witnessed the frequent employment of the equitable mortgage. Such mortgages arose in a number of situations. A mortgagor who had already created a legal mortgage could, for example, opt to mortgage his equity of redemption. Prior to 1926, it was not possible to create a second legal mortgage, the form of the initial mortgage requiring conveyance of the legal estate to the first mortgagee. In addition, with the impact of equity on the development of the trust, it was quite usual for the mortgagor to hold only an equitable interest. Where a mortgagor opted to mortgage the beneficial interest under a trust, the mortgage of an equitable interest could create only an equitable mortgage. It was also possible to create merely an equitable charge over property. More usually a deposit of the title deeds accompanied the charge. Such mortgages were employed in a variety of ways as a means

18 "Equity" op.cit. p. 142.
of unlocking capital for the benefit of landed families. Whilst the intervention of equity was at its height, concepts of possession and familial stability were synonymous with landholding. Equitable mortgagors took advantage of the severity of approach by the Chancery towards any agreement restricting the right of redemption. Harding notes, 'This attitude suited the dynastic schemes of the eighteenth-century gentry only to well. They enthusiastically piled mortgage after mortgage on the same properties and left Chancery to sort out the conflicting rights of various incumbrancers'. As the opportunities for secured borrowing flourished with the rise of the equity of redemption, it was the emergence of two additional remedies that strengthened the mortgagee's hand: the power of sale and the ability to appoint a receiver.

The Express Power of Sale

As demonstrated in the previous chapter, the intervention of equity added the remedy of foreclosure to the mortgagee's rights to sue for his contract debt and to enter into possession of the mortgaged property. At common law, however, where the borrower failed to pay the principal, interest and costs on the agreed date, the mortgagee has always had the ability to sell the mortgaged property. This is because, once the date for payment had passed, the common law regarded the mortgagee as the absolute owner of the property. It comes as no surprise, therefore, that there was little development of mortgagees' remedies prior to the intervention of equity. There was simply no need to develop rules regarding sale. Hence, as Maitland aptly states, 'It

has not been said that he can sell, but there is no good in saying that an absolute owner can sell.\textsuperscript{20}

The practice of including an express power of sale dates from the nineteenth century.\textsuperscript{21} Equitable interference with the substance of the mortgage had precipitated the need for a development of the mortgagee's armoury of remedies. This is clear in a number of respects. First, the mortgagee now held his legal title to the mortgaged property subject to the equity of redemption. This entailed that even though the mortgagee was the owner of a legal estate he could not sell free from the equity without the concurrence of the mortgagor. In consequence, any sale of the property could not provide a purchaser with an unencumbered title. The acquiescence of the mortgagor in removing this obstacle could be achieved by the inclusion of an express power of sale in the mortgage agreement delimiting the circumstances when the mortgagee could sell. The operation of the power was, as Holdsworth notes, '... to release this equitable bar upon his legal rights, and thus enables him to give a title good both at law and in equity'.\textsuperscript{22}

Secondly, equity introduced the remedy of foreclosure with the consequence that an unforeclosed mortgage placed a procedural hurdle in the path of any eventual sale. A mortgagee attempting to sell could be prevented from doing so by injunction. In this manner the mortgagee was subject further to the strictures of both the courts of law and of equity. He required, therefore, what Maitland describes as, ' ... a power of sale exercisable in equity as well as at

\textsuperscript{21} As R H Coote points out in 1850, 'It is now usual practice to give the mortgagee a power of sale over the estate in case default is made in payment of the mortgage-money beyond a time limited' (\textit{A Treatise on the Law of Mortgages}, Benning & Co, 3rd ed, p. 124).
law, a power which he can exercise without doing anything condemnable by a
court of equity'.

Thirdly, Pollock explains how the development of express
powers of sale may have sprung from the inconvenience of seeking a decree
of foreclosure.

It was because the process was costly and protracted that
the mortgagee sought a more efficient remedy. This was reinforced by the
less than favourable comparison that could be drawn with regard to the
position of the equitable mortgagee who was entitled to get a decree from the
court ordering a judicial sale and, in the immediate term, have a receiver
appointed by the court to take possession or receipt of rents and profits. The
result was that, as Pollock explains, '... it became an almost universal practice
to insert in the deed special provisions enabling the mortgagee to sell the land
and repay himself out of the proceeds, if the debt were not paid off on notice,
or if the interest fell into arrear for more than a certain time'.

Fourthly, equitable intervention diminished the scope for the mortgagee to rely on
estate rights and brought about a novel focus on rights, obligations and
remedies. Historically, the common law mortgage involved a conveyance of
legal title, and had given the lender considerable freedom to exercise the legal
rights he acquired accordingly. As discussed, equity sought to discourage the
exercise of a mortgagee's strict legal rights. Most notably, for example, the
onorous duties placed on the shoulders of the mortgagee in possession
ensured that taking possession was only when remedial and necessary. Such
equitable intervention produced the tendency, as Simpson notes, '... for the

23 Equity and the Forms of Action, op.cit. p. 276.
25 It is, however, to be noted that after s.48 of the Court of Chancery Act 1852, the Court had,
in all cases, the power to order a sale as an alternative to the grant of a decree of foreclosure.
26 The Land Laws op.cit. p. 131.
mortgagee to rely upon his rights over the land, which Equity treated as land of another, than upon his legal estate in the land'. 27 It was inevitable that those rights would require clarification and certainty. In consequence, it became increasingly important that they be the subjects of express provision in the mortgage deed.

In early mortgages with a power of sale, there was much dispute as to the most appropriate form to employ. As Powell explains, 'Some gentlemen recommend the omission of the proviso for redemption; that by so converting the instrument into a deed for the payment of debts, the strict rules respecting the equity of redemption will have been evaded. Others limit the estate to the mortgagee for years, with remainder to a trustee in fee, on trust to sell in case of default'. 28 By the nineteenth century, any concern regarding the validity of such powers utilised without the concurrence of the mortgagor or the sanction of the court of equity had virtually been dispelled. As Coote comments:

'... a slight consideration will show they are not within any of the mischiefs intended to be guarded against by the Court of Equity, for they give nothing to the creditor beyond his principal, interests and costs; they bestow on him no collateral or ulterior advantage; and they only enable him with promptitude to obtain payment of his mortgage debt'. 29

Hence, by 1850 the right to sell was conferred by means of either a trust for sale in default of payment or through the inclusion of a remedy, which was attached to the mortgage agreement, which was not dependant on any application to the court. It was not uncommon for such express powers to be made exercisable following notice to the mortgagor. In *Hawkins v Ramsbottom*\(^{30}\) for example, a power of sale was given to Hawkins in the event of money due to him not being paid, upon giving six months notice in writing to pay the mortgage debt. It was usual for the form of the power to include the proviso for redemption and a declaration that, if default be made in payment, it should be lawful for the mortgagee, his executors, administrators or assigns to sell the property. As the inclusion of the power of sale became common practice, it was inevitable that its contribution to the evolution of the modern mortgage would receive much scrutiny. In *Re Harwood*\(^{31}\) Cotton L.J. was faced with a person of unsound mind holding a power of sale, and considered the jurisdiction of the court to authorise sale and a conveyance of the legal estate to a purchaser. His judgment turned on the meaning of the power of sale. Declining to exercise the court’s jurisdiction, Cotton L.J. explained: ‘What is called a power of sale in a mortgage is nothing but an authority to defeat the equity of redemption, and when the mortgagee sells he transfers the legal estate not by means of a power but by virtue of his legal ownership’\(^{32}\).

**The Statutory Power of Sale**

\(^{30}\) (1814) 1 Prices 138.  
\(^{31}\) (1887) 35 Ch D 470.  
\(^{32}\) *Ibid.* at 472.
The first attempt to provide a statutory power of sale was Lord Cranworth's Act 1860.\textsuperscript{33} Far from ambitious, its aim was to provide a power that was similar to that commonly employed by conveyancers of that time. The power was conferred on all mortgages created by deed unless expressly excluded in the mortgage deed itself. A mortgagee became entitled to exercise the statutory power after the expiration of one year from the time that the principal money became payable under the terms of the deed. In addition, the remedy could be invoked where any interest on the principal money was in arrears for six months or after any omission to pay any premium on any insurance which, by the terms of the deed, ought to be paid by the mortgagor.\textsuperscript{34} This legislation appears to have been unsuccessful for the compelling reason that it was less advantageous to make use of the statutory power than to rely on the carefully and intricately drafted express powers then in use. With the Conveyancing Act 1881,\textsuperscript{35} there was no repetition of this error.\textsuperscript{36} Its statutory power was more beneficial than the express powers in use and was contained in an understandable and accessible form. Indeed, it was recognised explicitly when the Conveyancing Bill was debated that the new legislation would require some consideration of the strengths and weaknesses of the 1860 Act. As the Lord Chancellor admitted, 'An attempt has been made in the former

\textsuperscript{33} 23 & 24 Vic. c. 145. The Act also created a statutory power to appoint or obtain the appointment of a receiver and to insure from loss or damage by fire and to add the premiums paid for this to the principal debt at the same rate of interest.

\textsuperscript{34} Section 11.

\textsuperscript{35} As its long title declares, it is 'An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills and other Instruments; and for amending in various particulars the Law of Property; and for other purposes'.

\textsuperscript{36} Under section 21(1), the power of sale conferred by the Act is, '... by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests and rights which have priority to the mortgage …'.
Act to obviate the repetition of words which occur in deeds. The idea is a good one; but it has not been successfully carried out. After the best advice that can be obtained, this Bill adopts a new set of forms, which will be found useful in this point of view.\textsuperscript{37}

It is necessary to consider the main provisions. When the mortgage money became due, section 19(1)(i) provided that a mortgagee has a power, '

... to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit ...'. The power was designed to maximise the advantages for the mortgagee. In order to achieve this, the power was drafted to resemble more closely the forms that conveyancers of that time were using. One such advantage was the clarity it achieved with regard to when the power could be exercised. Making the power of sale attractive to lenders and exercisable on the occurrence of certain specific events attained this. Section 20 required a breach in any one of three respects. First, a notice requiring payment has been served\textsuperscript{38} and default has been made in payment of the mortgage money or part of the mortgaged money for three months after such service.\textsuperscript{39} This was more advantageous to mortgagees for whom the usual time frame was six months from service of the notice. Secondly, the power

\textsuperscript{37} Hansard, February 23, 1880, col. 1174.
\textsuperscript{38} Service of notice could be effected by leaving the notice at the mortgagor's last known place of residence or business, by leaving it on any land comprised in the mortgage, or by registered letter addressed to the mortgagor at his last known place of abode or business: Conveyancing Act, 1881 s.67.
\textsuperscript{39} It was not uncommon for the parties to alter the length of this period in the deed: see, for example, \textit{Life Interest v Hand-in-Hand} [1898] 2 Ch 230.
may be exercised where interest under the mortgage is in arrears and is unpaid for two months after becoming due. Under a private power, the usual period for which interest was required to be unpaid was three months. The third was on occasion where there has been a '... breach of condition in the mortgage deed or in the Act, and on the part of the mortgagor, or of some person concurring in making of mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon'. Robbins notes that the extension of the statutory power to include such a breach of condition was of a, '... somewhat stringent character'. It is clear, for example, that no such clause was usually inserted in express powers of sale at the time. It was stringent, moreover, in terms of the types of breach that would render the power of sale exercisable. Such breaches included an omission by the mortgagor to insure against fire pursuant to a clause in the mortgage deed or a failure to maintain the policy once purchased. A further example was, in the case of lease by the mortgagor, the failure to deliver a counterpart of the lease within one month of making.

In addition, the Act absolved the purchaser from a mortgagee from the need to make any inquiry as to whether there had been a valid case for the exercise of the power. Section 21(2) ensured that a purchaser from the mortgagee under the power of sale was not concerned, either before or on conveyance, to enquire as to whether a case had arisen to authorise the sale, or that due notice was not given, or that the power was improperly exercised. In guarding against every irregularity, it comprised a more complete protection

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41 Conveyancing Act 1881, s.18 (11).
of the purchaser than that afforded by Lord Cranworth's Act. The appropriate remedy for any person disadvantaged by an unauthorised, improper or irregular exercise was an action for damages against the person exercising the power of sale. The form of the power had been devised, as Maitland notes, '... in order to give the mortgagee the utmost freedom in dealing with purchasers, and a purchaser the utmost freedom in dealing with mortgagees'.\footnote{Equity and the Forms of Action, \textit{op.cit.} p. 275.} So complete was the protection afforded to the purchaser that it extended even to cases where the mortgage debt had been satisfied before the sale, but the purchaser had no notice of that fact.\footnote{See \textit{Dicker v Angerstein} 3 Ch D 600.}

\textbf{Judicial Sale}

The right to apply for judicial sale, as opposed to a judgment for foreclosure or for redemption,\footnote{The power of the court to order sale under section 48 of the Chancery Amendment Act 1852 was limited to foreclosure actions.} was afforded by the Conveyancing Act 1881.\footnote{Section 25(1) provides that, 'Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative'.} It was not a right conferred on the parties as mortgagor and mortgagee, but it was at the option of the court in an action for redemption or foreclosure. Where a mortgagor sought a sale of the property, it was open to the court, on the application of the mortgagee, to direct the mortgagor to give such security for costs as the court thought fit. The effect of such a direction was, of course, to discourage the mortgagor from pursuing a sale that would not achieve a price sufficient to discharge the mortgage debt. In addition, the court reserved the discretion to give the conduct of the sale to the mortgagee and to give any

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\begin{itemize}
  \item \footnote{Equity and the Forms of Action, \textit{op.cit.} p. 275.}
  \item \footnote{See \textit{Dicker v Angerstein} 3 Ch D 600.}
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\end{itemize}
direction it felt fit in respect of the mortgagee's costs. In this manner, the
court could place the conduct of the sale in the person with the most incentive
to obtain the best price for the mortgaged property. As Strahan explains, 'This
is the person, whether mortgagor, or first or subsequent mortgagee, who, if
the full value is not obtained, will be the one who shall have to bear the loss'.
Historically, judicial sale operated to the advantage of the mortgagee, or at
least not to his detriment. Ironically, the broad terms of the judicial
discretion, have catered for its modern day invocation as a safeguard for the
residential borrower against the wishes of the mortgagee.

Appointing a Receiver

Albeit with only limited relevance to contemporary residential mortgages, the
remedy of appointing a receiver was a key historical development. The
informal equitable mortgagee had (and still has) no entitlement to take
possession of the mortgaged property. Instead, it was open to such a lender
to ask the court to appoint a receiver. The receiver took possession and was
obliged to apply the rents and profits in the same manner in which a legal
mortgagee in possession should do. The appointee was an officer of the court
and deemed not to be the agent of either the mortgagor or the mortgagee.
This had the drawback for the mortgagor that, should the receiver fail to
perform administrative tasks, the mortgagee could not be debited with more
than he had actually received from the receiver. Nevertheless, the

46 Section 25(3).
48 Now replicated in s.91 of the Law of Property Act 1925.
49 See further Chapter 7.
availability of this remedy was very advantageous. As Strahan argues, 'The appointment of a receiver is the remedy invented for equitable mortgagees who, not being entitled to the legal estate, could not take possession'. As a consequence of the availability of a receiver for the equitable mortgagee who could not take possession, the Court of Chancery placed the equitable mortgagee in a strong position in relation to his legal counterpart. This was because, as discussed, equity had imposed stringent regulation of the mortgagee's possession in the form of the liability to account. It followed that the legal mortgagee began to insert a clause in the mortgage deed, under which he was entitled to appoint a receiver. The clause ensured that the receiver would be deemed to be the agent of the mortgagor, thereby burdening the mortgagor with the consequent loss from any fault in his administration.

The statutory power to appoint a receiver is a statutory remedy afforded to the mortgagee to facilitate the recovery of income from the mortgaged property. Like the statutory power of sale, the power arises where the mortgage is created by deed and the mortgage money has become due. It is exercisable on the occurrence of one of the three events that also allow for an exercise of the statutory power of sale. The earliest statutory authority, Lord Cranworth's Act 1860, gave a limited power of appointment, but the relevant provisions of the Act were repealed and replaced by the

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52 This is unlike any conventional agency as the borrower does not appoint the receiver; cannot give instructions or discharge the receiver; there is no contractual relationship between them; and the duties of the receiver are owed in equity to both the borrower and the lender: Silven Properties Ltd v Royal Bank of Scotland [2004] 1 WLR 997.
53 See Manchester and Milford Rly Co (1880) 14 Ch D 645 at 653.
54 Law of Property Act, 1925, s.101(iii).
55 Law of Property Act, 1925, s.109(1).
Conveyancing Act 1881.\textsuperscript{56} From the enactment of the 1881 legislation, therefore, the power to appoint a receiver was permitted in the same circumstances as the power of sale.\textsuperscript{57} The Act envisages that the role of the receiver is to '... demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise ... and to give effectual receipts ...'.\textsuperscript{58} Unlike sale, therefore, it is designed as a remedy for interest, rather than for recovery of interest and capital.

The 1881 Act prescribed the manner in which any money received ought to be applied. Section 24(8) listed the priorities.\textsuperscript{59} First in priority was the discharge of all rents, taxes, rates and outgoings affecting the property. Secondly, the money was to be applied to all annual charges and interest, having priority to the mortgage debt of his appointee. Thirdly, the receiver was entitled to his commission.\textsuperscript{60} Finally the money was to be employed in payment of the interest accruing due in respect of the principal. Any residue was to be paid to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property.

Whether express or implied, the power to appoint a receiver attained popularity for the mortgagee who did not wish to pursue sale. This might be, for example, where the value of the mortgaged property was stable and there was no need for an immediate realisation of capital or where other circumstances prevented sale and it would not be fruitful to sue on the

\textsuperscript{56} Section 19(i), (iii) and s.24.
\textsuperscript{57} Conveyancing Act, 1881, s.24 (1).
\textsuperscript{58} Conveyancing Act, 1881, s.24(3).
\textsuperscript{59} This is in marked distinction to the position where the mortgagee goes into possession. Although he must account strictly, the mortgagee takes all rents and profits until he recovers his principal, interests and costs: see generally C H S Stephenson, The Law of Mortgages (Effingham, 2nd ed, 1912), p. 61.
\textsuperscript{60} The ceiling for such commission was set at five percent of the gross amount or, on application by the receiver, at a higher rate set as the court thinks fit: s.24(6).
borrower's personal covenant to repay. For the legal mortgagee, it represented an attractive alternative to taking possession. This is because, although appointed by the lender, section 24(2) of the 1881 Act deemed the receiver to be the agent of the mortgagor and, unless the mortgage deed otherwise provided, it is the mortgagor who must accept sole responsibility for the acts or defaults of the receiver.61

The history of the power of the court to appoint a receiver offers an interesting insight into the development of remedies in mortgage law. In light of the frequent employment of the statutory power or the inclusion of express powers, it is a jurisdiction that is seldom exercised today. Historically, however, on the application of a party interested in the mortgaged property, the court would appoint a receiver to collect outstanding rents and profits, perform general management duties in respect of the property and apply any money received in line with the directions of the court. It is, however, surprising that it was a remedy not then afforded to the legal mortgagee. As Lord Eldon L.C. acknowledged: 'If a man has a legal estate, he cannot have a receiver appointed; he has nothing to do but take possession ... the rule about receivers is very clear...'.62 This rule had the propensity to produce difficulty for the legal mortgagee. In Sturch v Young,63 for example, the grounds upon which the court was asked to appoint a receiver were that the tenants were too numerous in number and that difficulties were experienced in the collection of rents. In response, the judge reiterated the established rule that the mortgagee holding the legal estate is not entitled to have a receiver

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61 This is in contrast to the liability incurred in equity by the mortgagee who entered into possession, which as discussed in the preceding chapter, is on the footing of wilful default.
62 Berney v Sewell (1820) 1 Jac & W 647 at 648.
63 (1842) 5 Beav 557.
appointed by the court. Although there is evidence of some judicial sympathy for the plight of mortgagees for whom this rule caused difficulty,\(^{64}\) it was always open to the lender to make the power a stipulation of the mortgage agreement. Nevertheless, from the perspective of the mortgagee, any harshness of this rule was alleviated with the enactment of section 25(8) of the Judicature Act 1873. This enabled the court to appoint a receiver in circumstances where it was just and convenient. As early as 1875, it was clear that the provisions would be of benefit to both legal and equitable mortgagees. In *Pease v Fletcher*,\(^{65}\) an order was extended to the whole property comprised in the plaintiff's security, as to part of which he was legal and as to part equitable mortgagee. It was also apparent that the court would regard a judicial appointment as appropriate where an action was pending. As Pearson J. explained, '... when an action for foreclosure is pending, and the parties are at arms length, it is much more desirable that the receiver be appointed by the Court'.\(^{66}\)

In *Mason v Westoby*,\(^{67}\) it appeared that the wording of section 25(8) would be construed very liberally indeed. There it was argued that it would not be just and convenient to saddle the mortgaged property with the expense of a receiver because the mortgagee, who was in possession, had been paid all his interest and costs out of the rents received by him and currently held surplus rents. Bacon V.C. rejected this argument with the explanation that the

\(^{64}\) See, for example, *Tillett v Nixon* (1883) 25 Ch D 258, where Pearson J. commented at 259, 'I have always thought it a very hard case that a legal mortgagee under the old law had no right to come to the court and ask for a receiver of the mortgaged property'.

\(^{65}\) (1875) 1 Ch D 273.

\(^{66}\) *Tillett v Nixon* above at 260.

\(^{67}\) (1886) 32 Ch D 206.
great expense to the mortgagor, '... cannot be helped'. In doing so, Bacon V.C. proffered his view of the purpose of the legislation, 'It appears to me that one object of the Judicature Act, 1873, was to enable the Court, by the appointment of a receiver, to relieve the mortgagee from the great burden imported upon him by his entering into possession of the mortgaged property'. Other judges did not feel as free from the shackles of the old approach. In Prytherch v Williams, North J. was of the opinion that a mortgagee, who had been in possession for a long period, unfairly sought at the last moment to burden the mortgagor with the expense of a receiver. Refusing to appoint, North J. would not follow the approach of Bacon V.C. in Mason v Westoby. Instead he placed his judgment in historical context, lamenting that, '... under the old law a legal mortgagee could never obtain the assistance of the court. His duty was to take possession himself if he wants it, and he was not entitled to have another person put in to act for him, when he could take possession for himself.'

There is no doubt that, prior to the Judicature Act, the court regarded the right of the equitable mortgagee to ask the court to appoint a receiver as equivalent to the right of the legal mortgagee to enter into possession. The practice of inserting an express power of appointment in the mortgage agreement developed to allow the mortgagee to sidestep the stringent equitable rules that he would encounter if in possession. In general, however,

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68 Ibid. at 208.
69 Ibid.
70 (1889) 42 Ch D 590.
71 '... I do not regard that case as an authority for saying that the word "may" in sub-section 8 is to be read "must", and that the words just and reasonable are to be ignored altogether' (ibid. at 601).
72 Ibid. at 600.
the legal mortgagee who failed to avail himself of this opportunity did not engage the sympathy of the court. In a similar vein to the power of sale, the statutory powers afforded by Lord Cranworth's Act and, more particularly, the Conveyancing Act 1881 effected little more than a simplification of existing processes. It is, in contrast, noteworthy that the greater legislative shift came from the Judicature Act which bestowed on judges a wider discretion to enlarge the availability of the remedy of receivership by bringing into line the provision of legal and equitable remedies.

The Conveyancing Act 1881

No effective statutory reform of land law was to take place until the nineteenth century. Until that time, and as described in Chapter 2, the law represented a fusion mainly of common law and equitable jurisdictions. It was a law moulded from its medieval origins and, by the end of the eighteenth century, it had grown into an over elaborate structure, straining to serve the needs of the different classes of landowners. The 1881 Act was, in essence, designed as a word saving mechanism. Its general objective was to '... shorten very much the present cumbersome system of conveyancing, reducing it into a narrower compass, and so lessening the expense'. The opportunity to impose substantive change from above was, however, not seized. Instead, the Act was intended simply to tackle what Harnett describes as, '... the preference of conveyancers for precedent'. This preference entailed that

74 See generally W M Harris, T Clarkson, The Conveyancing and Law of Property Act 1881 (Stevens & Sons, 1882).
75 Hansard, February 23, 1880, col. 1173.
76 E Harnett, Law of Mortgages (Stevens & Sons, 1909), p. 18
detailed and convoluted clauses, dealing with all aspects from leasing to insurance, were meticulously written into every mortgage deed. As discussed, the clauses included the statutory power of sale and the right to appoint a receiver. The 1881 Act promoted simplicity by imposing the presumption that, in the absence of an express contrary intention, a mortgage deed is deemed to contain certain clauses.

The Act also gave the mortgagee the right to insure, with special rights over the application of the insurance money,\(^7\) and to give receipts for sale and other moneys received under the mortgage.\(^7\) Should the mortgagee enter into possession, he had the right to cut and sell timber,\(^7\) the right to grant agricultural leases for twenty-one years, building leases for ninety-nine years or otherwise to let.\(^7\) Where property was leasehold, the mortgagee was assured as to the validity of the lease, the payment of rent and performance of the covenants of the lease.\(^7\) For the mortgagor, section 16(1) implied a power for the mortgagor to inspect and make copies of the title deeds. Amendments were made to the rules on consolidation allowing the mortgagor to redeem one mortgage without redeeming others held by the same mortgagor on different properties. The mortgagor had the right to have the property sold in an action brought by him\(^7\) and, with regard to leasing, the right to grant leases for twenty-one years, building leases for ninety-nine years and to enter into agreements for such leases. One additional and noteworthy simplification was provided in the circumstances of the death of the mortgagee. Prior to

\(^7\) Conveyancing Act, 1881, ss.19, 23.
\(^7\) Section 22.
\(^7\) Section 19.
\(^7\) Section 18.
\(^7\) Also imported into the mortgage agreement were the mortgagor's covenants for title.
\(^7\) Conveyancing Act, 1881, s.25
1881, when the mortgagee died inconvenience resulted from the fact that the mortgage debt became payable to the mortgagee's personal representatives, but the legal estate in the mortgaged property descended to the mortgagee's heir at law. This position was remedied by section 30(1) of the 1881 Act which ensured that, on the death of the mortgagee, his legal estate would devolve upon his personal representatives.\(^{83}\)

As mentioned, the 1881 Act cannot be regarded as an enactment that aimed to alter existing practice in any significant fashion.\(^{84}\) In retrospect, the legislation, as a whole, has been much criticised. In the wake of the undeniable achievements of 1925, it is not surprising that Underhill was one of its notable critics. He argues:

'The Conveyancing and Law of Property Act 1881, although considered somewhat sensational at its date, was really nothing more than an amendment of a few rules of law coupled ostensibly with an attempt to make the transfer of land cheaper and documents shorter, by implying all sorts of statutory conditions of sale, covenants for title and for production and care of title deeds. While relieving practitioners of the drudgery of writing lengthy documents, it did little in the way of cheapness or simplicity.'\(^{85}\)

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\(^{83}\) Section 30(1) has now been replaced by s.3(1)(ii) of the Administration of Estates Act 1925.

\(^{84}\) Rather, it was to '... supersede in ordinary cases the necessity of expressly repeating the provisions which had become well settled by usage': (F Pollock, *The Land Laws, op.cit.* p. 132).

\(^{85}\) A Underhill, "Property" (1935) 51 LQR 221, p.222.
The inclusion of the express power to sell or to appoint a receiver was, therefore, a response by conveyancers to equitable interference with the mortgage agreement, which developed into established practice. The contribution of statute law to the development of mortgagees' remedies was little more than placing existing practices into an attractive statutory form. At best, it eliminated the need to rely on express terms of the mortgage contract. The explanation for the limited nature and content of the 1881 Act is discernible only from its historical context and reflects the political, social and economic tensions of the period. Nevertheless, the underlying ethos of these reforms continues to pervade more recent legislation. As Chapter 7 illustrates, the statutory regulation of sale remains to date substantially unchanged.

Land and the Aristocratic State

In stark contrast to the pervading principles of nineteenth and twentieth century reform, land law of the eighteenth century was shaped to meet the concerns of the landed aristocracy. As Radcliffe observes, 'So long as the big landowner was able to meet all the contingencies, alike economic and social, which presented themselves in the effort to tie up his estate in his family, little regard was paid to the risks and the expense which the complexity of the law threw upon the purchaser'.86 A dislike for any measure that might inhibit their ability to keep land within future generations of the family was at the heart of the concerns of the English land-owning classes.87 The device of the strict

86 Real Property Law, op.cit. p. 245.
87 As E H Burn explains, 'It was the desire of the aristocracy to order the future destiny of their land and to prevent its sale out of the family which has decisively affected the form and substance of real property law' (Cheshire and Burn's Modern Law of Real Property, Butterworths, 16th ed, 2000, p. 69).
settlement in conjunction with the mortgage was utilised effectively to meet those concerns. In its evolution, the strict settlement did much to circumvent the establishment of rules against tying up real property for long periods.\textsuperscript{88} Although various forms of settlement had been in use for centuries, the strict settlement achieved prominence around the time of the Restoration and it continued to operate as a mechanism for the tying up of inter-generational wealth.\textsuperscript{89} It allowed, for example, the owner in fee simple to use land for the benefit of an only son who was about to marry and for the benefit of any children the couple may have. As Cheshire and Burn explain, '... the practice for several centuries was for A to execute a deed of settlement by which he limits the land to himself for life; then to B for life and then, after making provision for B's widow and younger children, to the first and every other son of B successively in tail'.\textsuperscript{90} Primogeniture was an integral concept which provided that, should the owner of land die intestate, his eldest son would take ownership of that land to the exclusion of any other siblings. Freedom of testamentary disposition was also ingrained and ensured that, as Dicey argues, '... the right of every man to determine at his own choice what shall be the succession to his own property after his death, has become a part not only of the law, but, so to speak, of the social morality of England'.\textsuperscript{91} In

\textsuperscript{88} As W S Holdsworth recognises, 'One of the indirect results of this greatly increased freedom of disposition was to give landowners the power to create 'perpetuities' -the power, in other words, to use their new form of disposition in such a way as to destroy that freedom of alienation which judges had always favoured' ("The Reform of the Land Law: An Historical Retrospect" (1926) 42 LQR 158, p. 165).

\textsuperscript{89} As Harding notes, in \textit{A Social History of English Law} op.cit. p. 278, 'From the interregnum almost to the twentieth century, it was extremely difficult for the rich merchant to find land to buy. This was because the mortgages which were an essential concomitant of the strict settlement had become easier and longer'.

\textsuperscript{90} Cheshire and Burn's Modern Law of Real Property, op.cit. p70.

\textsuperscript{91} A V Dicey, "The Paradox of the Land Law" (1905) 21 LQR 221, p. 221.
addition, conveyances of land were viewed as private enterprises and of concern only to the parties to the transaction.

Within a settlement, the power to mortgage was frequently employed as a means of generating sums of money for a variety of purposes. Powers appeared to have developed at around the sixteenth century and were used with considerable ingenuity in settlements to provide for wives and young children in addition to allowing for the more efficient management of the estate. A settlement may have contained a power of mortgage for the purpose of renovation, either in order to effect improvements to the property or financing building extensions. In settlements made by will, it was not uncommon for a power of mortgage to be included to allow trustees to raise money by mortgage in order to pay legacies or even debts. Powers were also included in settlements to allow a trustee who had obtained the permission of the life tenant to mortgage parts of the settled estate. The money might be used for the purposes of reinvestment or redeeming incumbrances. The power to mortgage sat alongside wide ranging powers of sale, exchange and of leasing which had the capacity to allow a life tenant a welcome degree of flexibility within the general parameters of the settlement. The level of indebtedness of the landed aristocracy is a noteworthy feature of eighteenth and nineteenth century landholding. Although there was the potential to run up personal debts and bond debts, the mortgage presented an attractive method of borrowing. English and Saville describe how many of the estates carried mortgages for decades, the mortgagees being friends, relatives,

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92 A significant defect in the common law powers of a life tenant under a settlement had been that that they were not sufficient to allow for the most advantageous use of the property: see Holdsworth, H.E.L. vol. VII, p. 151.
lawyers and insurance companies.\textsuperscript{93} When a mortgagee wished to recover the money, the mortgage would be easily transferred from one mortgagee to another. They cite examples, furthermore, of mortgagees who were anxious to avoid having the debt repaid, owing to the advantage of a high rate of interest.\textsuperscript{94}

**Real Property Reform in the Nineteenth Century**

Although England was developing its manufacturing industry, landowners of the early nineteenth century continued to exert economic, political, social and parliamentary influence on the direction of the law of real property.\textsuperscript{95} From a political perspective, therefore, any radical reform of land law was a patently difficult task. This task was not eased by the complexity of the subject matter.\textsuperscript{96} Indeed, its technical nature rendered it a truly specialist preserve. It so defied ready understanding that, even for Underhill, it could not be mastered without lifelong study.\textsuperscript{97} In addition, reform required not only expertise, but also motivation. The impetus for change had to spring from the demands of a changing social, economic and political society. With industrialisation and the resulting shifts in population and social needs, a clamour for reform emerged in the early years of the nineteenth century.\textsuperscript{98} The


\textsuperscript{94} Ibid. p. 93.

\textsuperscript{95} 'Where rich men delight in the ownership of large estates and the poor do not keenly hunger after the possession of landed property, the land law is likely to represent the ideas and to meet the wishes of the rich' (A V Dicey, "The Paradox of the Land Law" \textit{op. cit.} p. 226).

\textsuperscript{96} As Simpson notes 'To some extent this complexity was a general feature of all branches of the law, but in the law of the land, which harboured many ghosts of a remote past, the disease was particularly gross' (*An Introduction to the History of the Land Law*, \textit{op. cit.} p. 252).

\textsuperscript{97} "Property" \textit{op. cit.} p. 221.

\textsuperscript{98} As F F Russell notes, 'The apathy in which projects of reform were received in the eighteenth century disappeared' (*Outline of Legal History*, New York, 1930, p. 69).
basic demand was for a land law suited to a vibrant commercial world. For this to occur, transactions involving land had to be made easier and more straightforward.

Throughout the period of 1830 to the 1925 legislation, therefore, reformers engaged with the need to simplify and facilitate land transfer. To achieve this it was, of course, necessary to remove many of the archaic features of the law. The method employed was a 'piecemeal removal of particular abuses' and, by the end of the century, there were various statutes that aimed to simplify the law. The Conveyancing Act 1881 was but one such example. As described, the reform effort focused also on the need for assimilation of the rules of law and equity and assimilation of the law of real and personal property. These twin goals of the Benthamite reformers of the mid-nineteenth century were summed up by Dicey, 'Their immediate object was the repeal of every law and the abolition of every institution which impeded the easy transfer of land. They wished that for the men of each generation land should be marketable, and that, as it is sometimes expressed, a field should be as easily saleable as a watch'. Nevertheless, rather than effecting changes to the substantive law, it was the establishment of a system of registration of title that was to become of paramount concern. The form that a system of registration of titles would take was a matter for rigorous debate over the latter half of the nineteenth century, but the central principles upon which land reform should stand were never in doubt. A scheme of registration was to be the centrepiece of statutory reform to facilitate and simplify land

transactions. It was into this arena that the legislation governing mortgages emerged.

The Commissioners on the Law of Real Property were entrusted with the process of reform and they duly produced four reports in the space of five years. In 1829, the first report gave little by way of criticism of the substantive law. The Commissioners were pleased to report that '... the law of real property seems to us to require very few essential alterations; and that those which we shall feel it our duty to suggest are chiefly modal'. \(^\text{101}\) Where some scope for reform was identified, the report suggested cosmetic tinkering, as opposed to radical alteration. Indeed, the Commissioners were impressed with the high quality of the current land law. The Report added, 'When the object of transactions respecting land is accomplished, and the estates and interests in it which are recognised are actually created and secured, the law of England, except in a few comparatively unimportant particulars, appears to have become almost as near to perfection as can be expected in any human institution'. \(^\text{102}\) From the outset, therefore, it was clear that the Commissioners would not take a critical perspective. It came as no surprise, therefore, that the tenor of the Commissioners' Reports reflected the prevailing politics of the landed classes. With regard to primogeniture, which was a cornerstone of the strict settlement, the first report stated that the law, '... appears far better adapted to the constitution and habits of this kingdom than the opposite law of equal partibility, which, in a few generations, would break down the aristocracy of the country, and, by the endless subdivision of the soil, must

\(^{101}\) First Report made to His Majesty by the Commissioners appointed to inquire into the Law of England respecting Real Property no. 263 (1829), p. 6.

\(^{102}\) Ibid.
ultimately be unfavourable to agriculture, and injurious to the best interests of the State’. 103

A positive recommendation of the second report was that there should be modernisation of the existing system of conveyancing. 104 The Commissioners laid considerable emphasis on the expense of the existing system of land transfer and the insecurity of titles. It was argued in the Report that such ills could be remedied through the establishment of a general register of conveyances. 105 The Commissioners again declined the opportunity to launch themselves into the specifics of substantive reform. It was a course of inaction that has prompted much comment. In particular, the failure to identify a need for radical change, coupled with the notion that a register of titles would act as a cure all, has been attacked. Holdsworth contends that this was to have a restraining impact on the future shape of law reform. He notes that it, ‘... has led reformers to concentrate on schemes of registration rather than on direct changes in the substantive rules of the land law; and, consequently, it has blinded them to the fact that changes to those substantive rules are a condition precedent to the establishment of a successful scheme of registration’. 106

A broad range of specific legislative enactments followed the publication of the reports, including the Fines and Recoveries Act, 1833, the Inheritance Act 1833 and the Real Property Act 1845. The Real Property

103 Ibid. p. 7.
104 Second Report, no. 575 (1830). This built on a criticism of the first report that the '... cumbrous and circuitous forms of conveyancing now in use are founded on antiquated doctrines' and are, '...exceedingly defective' (ibid. p. 7).
105 This was not a novel or innovative proposal. Such suggestions for a compulsory register dated from the reign of Henry VII and had been discussed on numerous occasions subsequently; see generally Holdsworth, "Reform of the Land Law" op.cit. pp. 165-7.
Limitation Act 1833, for example, impacted upon the law of mortgages only in that it imposed a twenty-one year limitation for all actions relating to real property. Hence, when applied to the mortgagor or the mortgagee in possession it entailed that possession by either for requisite period, without acknowledging the title of the other, would bar the other's action and extinguish his title.\(^\text{107}\) This was typical of the legislation that followed the publication of the Reports. Such statutes may have helped rid the law of apparent anachronisms, but they represented a series of disconnected and unorchestrated measures. It was the beginning of a 'patchwork legislation',\(^\text{108}\) of which changes to specific areas of land law were sufficient only to pursue simplification and to facilitate a system of land registration.\(^\text{109}\)

The Commissioners on the Registration of Title reported in 1857 and highlighted that an insecurity of title, together with problems of delay, expense and uncertainty, undermined aspects of the conveyancing process. In particular, this engendered lack of market confidence in the granting of second mortgages and remortgages.\(^\text{110}\) This report served to renew interest in the remedy proposed, in 1830, by the Property Commissioners which was to establish a general register of titles.\(^\text{111}\) Two noteworthy, albeit unsuccessful, attempts to implement such a system came in the form of Lord Westbury's Act

\(^{107}\) Real Property Limitation Act, 1833, s.28.


\(^{109}\) Indeed, as is evident form the Land Registration Act 2002, this is a tendency that has continued into the 21\(^{st}\) Century.

\(^{110}\) See, for example, the words of Joshua Williams in 1862, cited and considered in W S Holdsworth "The Reform of the Land Law: An Historical Retrospect" op.cit. p. 173.

\(^{111}\) Over the following decades the Commissioners supported a system of registration of titles rather than conveyances because the former had the advantage that an intending purchaser or mortgagee was presented with the net result of any dealings with the property and was not left to investigate the dealings himself. 'In one case he finds, so to speak, the sum worked out for him; in the other he has the figures given him, and has to work out the sum for himself': Parliamentary Papers, 1878-9, vol xi, ix.
1862 and Lord Cairns' Land Transfer Act 1875. The former put in place a voluntary system of registered titles, entry to which required an overly strict examination of title. It failed to take off because, as Simpson notes, 'The standard required of registered title was in fact set too high, particularly as registration was not compulsory'.\textsuperscript{112} The latter also imposed a voluntary system catering for the registration of possessory titles, but was not considered to be of much help to conveyancers of that time.

By the later part of the nineteenth century there is no doubt that the political landscape was changing and that this was to facilitate more far-reaching reform. A number of pressure groups formed in the wake of the anti-Corn Law campaign and highlighted the defects of the existing system of land transfer.\textsuperscript{113} In general, they pursued the free transfer of land and a shared desire to abolish primogeniture. They wished to challenge the system of settlements and repeal the laws of entail, which allowed vast areas of the land to be tied up for the benefit of only a few. The Settled Land Act 1882\textsuperscript{114} was the culmination of this drive to enable opportunities for land development. Although preceded by the Settled Estates Acts of 1856 and 1877, the 1882 Act was, '... to render land a marketable article',\textsuperscript{115} giving the life tenant wide powers of selling, leasing, mortgaging and managing the property without the need for the permission of the court or the trustees of the settlement. At the same time, it sought to preserve the rights of claimants under the settlement by ensuring the safeguard of capital arising out of sale of settled land. The

\textsuperscript{112} An Introduction to the History of the Land Law, op.cit. p. 254.
\textsuperscript{114} The 1882 Act has been repealed and replaced by the Settled Land Act 1925, but its principles continued to pervade the more recent legislation; see Burn, op.cit. p. 76.
\textsuperscript{115} Re Mundy and Roper's Contract [1899] 1 Ch 275 at 288 per Chitty LJ.
legislation effected an undoubted success in facilitating land transactions, but it did nothing to simplify such transactions. Neither did it assimilate the law of real and personal property or improve certainty and cost effectiveness. This produced, as Underhill put it, '... a collateral and hostile agitation ... in favour of compulsory registration of title'.\(1^{16}\) By 1897, the Land Transfer Act had set the wheels in motion for the gradual compulsory registration of title to land in England.\(1^{17}\)

The goal of simplification and facilitation of land transactions was one that obtained for over one hundred years prior to the enactment of the 1925 legislation. For Dicey, it would produce only a paradox that, '... the constitution of England has, whilst preserving monarchical forms, become a democracy, but the land law of England remains the land law appropriate to an aristocratic state'.\(1^{18}\) Indeed, as Simpson notes, '... the most striking feature of the nineteenth-century legislation on the law of real property is the way in which it was designed to leave the fundamentals of the law unchanged'.\(1^{19}\) As with many other spheres of development, Simpson's comment rings true with mortgage law. There was little in the statute law of the nineteenth century to address the growing complexity within mortgage law, a complexity which had resulted from the meshing of common law forms, equitable principles and conveyancing practice. Nonetheless, the economics of the nineteenth century brought an end to the paternalism which

\(1^{16}\) Underhill, "Property" op. cit. p. 226.


\(1^{18}\) A V Dicey, "The Paradox of the Land Law" op. cit.p.222.

\(1^{19}\) An Introduction to the History of the Land Law, op. cit. p.260.
characterised equitable intervention and this, in itself, necessitated statutory change.

**Usury and Moneylending**

The repeal of the usury laws in 1854 was a notable Benthamite success. The law's regard of usury had for centuries driven the form that the mortgage would adopt. The Middle Ages had witnessed the growth of different ways to borrow money at interest, the common ground between them being, as Holdsworth notes, '... those who wished to evade the law made use of various devices to cloak their real intentions'.\(^{120}\) The perceived need to protect the poor and vulnerable was the premise on which settled equitable principles developed in the seventeenth and early eighteenth centuries. The doctrine of clogs and fetters, for example, developed because the mortgagors of the seventeenth century were necessitous persons who required protection from entry into foolish bargains. As Holdsworth emphasises, 'This rule originated at a time when mortgages were usually made by needy landowners, upon whom pressure could easily be put to contract themselves out of their equities of redemption'.\(^{121}\) By the nineteenth century, laissez-faire economics demanded that people be able to enter into any freely contracted bargain they so wished. The reality had dawned that, as Holdsworth explains further, '... doctrines designed to protect the peasant or craftsman were not applicable to clothiers, ironmasters or other capitalists who could protect themselves'.\(^{122}\) At some point thereafter the function of the mortgage extended to allow for the

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\(^{121}\) *Historical Introduction to the Land Law* op.cit. p.258

acquisition of property. This is attributable to the rapid expansion of both the population and housing and is evidenced in the growth of the building society in the mid-nineteenth century.

Statutory control was not re-imposed until the Moneylending Act 1900. By virtue of this statute, the equitable rules relating to harsh and unconscionable bargains were imported and applied in a novel manner. If the court was satisfied that an excessive amount had been charged in relation to the recovery of money lent or the enforcement of a security, or that the case was otherwise harsh and unconscionable, it could order a fresh account between the moneylender and the borrower. This legislative provision illustrates the complexity which results from the interposition of statute law. As Birrell argues, the Act was a, '... remarkable instance of the Legislature adopting - no doubt on very imperfect information - an equitable doctrine and giving it a statutory application to a host of transactions to which otherwise it would have had no reference.'\textsuperscript{123} Other commentators consider it symptomatic of the difficulties faced by Parliamentary reformers. As Pollock notes, 'It is one of those well-meant enactments that raise almost insoluble difficulties when one tries to make out whether or not Parliament understood either what it wanted to do or what it was doing'.\textsuperscript{124} Adopting either viewpoint, this legislation shows that, as a result of changing economic times, many equitable doctrines that had grown out of the equitable protective jurisdiction now required re-examination. In the case of the Moneylending legislation, there was a need to reaffirm equitable principle. Outside that sphere,

\textsuperscript{124} (1901) 17 LQR 9, p.9.
however, the opposite was true. Doctrines such as that relating to the
clogging of the equity of redemption were patently unsuitable to the type of
commercial transaction which appeared with much regularity towards the end
of the nineteenth century. The substantive law of mortgages was, therefore,
wholly out of touch with the needs of industrialised Britain. It is a compelling
criticism of statutory reform that no attempt was made to bring the law into
touch with a much changed society.

**The 1925 Legislation**

There is no doubt that the goals of assimilation, consolidation and
simplification dominated the 1925 legislation. This raft of legislation was
aimed to build upon the collaborative efforts of those individuals and agencies
actively engaged in the reform process. This was acknowledged by Lord
Birkenhead who, in relation to a Law of Property Bill presented before
Parliament in 1920, described it as an, '... attempt to collect and give effect to
the recommendations of commissions and committees of experts who have
been labouring in this particular field now for many years...'. Although the
Bill passed through Parliament in 1922, it was destined never to come into
force. It was repealed in 1925 and re-enacted in a different guise. The seven
Acts of 1925 were of a consolidating nature and incorporated the law as
previously set out in statutes such as, for example, the Conveyancing and
Law of Property Act 1881, the Settled Land Act 1892, the Trustee Act 1893
and the ill-fated Law of Property Act 1922. By January 1926, Parliament had

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125 The Law of Property Act, the Land Charges Act, the Land Registration Act, the Settled
Land Act, the Trustee Act, the Administration of Estates Act and the Universities and College
Estates Act comprise the 1925 legislation.
put in place a series of important mechanisms that were intended to achieve the aspirations that had by then been pursued for a century. The simplification inherent in the reduction in the number of legal estates and in the number of potential owners of the legal estate afforded considerable convenience to the purchaser of legal title. Similarly, the purchaser had increasingly limited liability to pre-existing interests by virtue of land registration, overreaching and the virtual sidelining of the doctrine of notice.

Key changes were required within mortgage law to bring it within this general framework. As considered in the previous chapter, until the 1925 legislation the prevailing method by which a mortgage of freehold land was created was a conveyance of the fee simple to the mortgagee with a proviso for reconveyance. Despite the outward appearance of the transaction, equity regarded the mortgagor to be the true or real owner of the property. The Law of Property Act 1925 had the effect of prohibiting the mortgage by way of conveyance of the fee simple. It expressly caters for any future attempt to create a mortgage in the old fashion, providing under section 85(2) that the conveyance shall operate as a lease for the duration of 3000 years, subject to cesser on redemption. Instead a legal mortgage of an estate in fee simple can now be created only in one of two ways. The first is by demise for a term of years absolute, subject to a provision that the term shall cease if repayment is made on a fixed day. The second method is a charge by deed expressed to be by way of legal mortgage.¹²⁷ The effect of the charge is not to vest a term of years in the mortgagee. Rather the Act adopts the fiction that the chargee

¹²⁷ Section 85(1). In the context of leaseholds, the Law of Property Act restricts the possible methods of legal mortgage creation to a sub-demise for a term of years absolute or by virtue of a deed expressed to be by way of mortgage: s.86(1).
shall have the 'same protection, powers and remedies' as though he had taken a lease of the fee simple or a sub-lease of the demised premises.\textsuperscript{128} It is to be regarded as a missed opportunity that this provision failed to exclude from the mortgagee's bundle of rights, the right to take possession of the mortgaged property. Although the mortgagee requires this fictional estate in order to be regarded as a \textit{bona fide} purchaser of a legal estate and, hence, to assert priority over third party claims, it is possible to maintain the semblance of an estate owner without an entitlement to possession.

The changes to the form or structure of the mortgage were sufficient to bring the law in line with the so-called curtain principle that underpins registration of title. As this principle ensured that equities were to be kept off the register, it became necessary to alter the form of the mortgage to reflect the mortgagor's legal estate. This retention of legal title had, of course, the additional effect of enabling the creation of subsequent legal mortgages over the same piece of land. With regard to this multiplicity of interests, the legislation went as far as to cater for the protection of both first and subsequent legal and equitable mortgages. It stopped short of proposing any standardisation of mortgage agreements, rights or remedies.

By maintaining the mortgage by demise, the Law of Property Act 1925 failed to sever the link to a medieval past and has preserved the difficulties arising from this method of creation.\textsuperscript{129} Even the more modern form of a charge by deed is tied, seemingly inextricably, to the notion of a mortgage by demise. By virtue of section 87, estate rights (such as the right to immediate

\textsuperscript{128} Section 87(1).
\textsuperscript{129} Although a mortgage by demise is no longer possible in registered land (s.23(1)(a) Land Registration Act 2002), it retains some vitality as regards unregistered land.
possession) continue to pervade the modern mortgagee's bundle of entitlements and remedies.
The preceding chapters have charted the development of mortgage law from the time of Glanvill up to the enactment of the property legislation of 1925. As demonstrated, the right to possession has throughout assumed centre stage. The aim of this chapter is to examine the impact of more recent statutory intervention upon the continuing capacity of the mortgagee to assert and to exercise a right it has held since the medieval period. A principal contention is that, perhaps more than any other feature of mortgage law, the right to possession securely tethers the present enforcement structure to its past foundations. In doing so, this relic of the common law promotes outdated and artificial notions regarding the mortgage relationship. Put simply, it is incredible that the modern mortgagee retains an unqualified right to take possession of the mortgaged property without the need for any default on the part of the borrower. As Clarke L.J. observed, ‘... [mortgagors] would be astonished to find that a bank which had lent them money to buy a property to let them live in could take possession of it the next day’.¹

arena of landlord and tenant law. The second aspect focuses upon the ability of the parties to delimit the rights and remedies of the mortgagee, whether expressly or through implication, within the mortgage agreement. Again a comparison may be made with the more balanced protection of the interests of the parties to a residential lease. The Chapter will then examine the formulation and structure of section 36 of the Administration of Justice Act 1970 (as amended). It is argued that the imperfect drafting of this important safeguard for borrowers has, ironically, worked to impede any further legislative intervention and any re-examination of policy issues. While the judiciary strives hard to give a sensible interpretation to section 36, it is apparent that the statutory powers to inhibit the recovery of possession are not comprehensive and, at times, incomprehensible. The legislative technique through which the balance between the competing interests of the mortgagee (financial security) and the mortgagor (residential security) is achieved leaves the common law right to possession sacrosanct. The legislature has merely put in place a procedural hurdle for the mortgagee to clear before its right can be translated into reality. Not surprisingly, this tension between the existence of the right and the circumstances in which it can be lawfully exercised is apt to produce difficulties. It is also defiant of logic as it hinges upon somewhat artificial distinctions between different types of mortgage and, moreover, different types of mortgagee.

2 This has been achieved by fashioning an approach based upon a ready and lenient exercise of judicial discretion in favour of the borrower: see Chapter 5.
3 Although the right to possession pervades both residential and non-residential mortgages, the policy underlying the Administration of Justice Acts is to protect only the occupier of a dwelling house.
4 For an analysis of the entitlements of equitable mortgages see H W R Wade, "An Equitable Mortgagee’s Right to Possession" (1955) 71 LQR 204.
The final section of this chapter appraises the impact of the Human Rights Act 1998 and its potential to reshape aspects of the law of property in accordance with the protection of rights and freedoms under the European Convention of Human Rights. The immediately apparent sources of possible challenge to property law are the respect for the home enshrined in Article 8; the Article 6 guarantee of a fair and public hearing; and the protection against interference with the peaceful enjoyment of possessions laid down in Article 1 of the First Protocol. The 1998 Act marks an interesting statutory development for, as Howell points out, 'Historically, property lawyers have tended to ignore any possible human rights aspects to their work'. Times have, however, changed and it has now become a standard ploy for counsel to raise arguments invoking some aspect of the Convention. Although many of these arguments are spurious, the possibility of this interplay between property law and the overarching concept of human rights can no longer be ignored. Indeed, the human rights paradigm gives rise to novel and interesting questions within mortgage law and, indeed, housing law as to whether established rights and remedies are vulnerable to fundamental re-evaluation. Naturally, the protection of the home has been afforded high priority as a Convention right because, as Lord Bingham remarked, '... few things are more central to the enjoyment of human life than having somewhere to live'. Nonetheless, it would be naive to expect a groundswell

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6 By way of illustration, see the unsuccessful challenge to the statutory mechanism of overreaching in National Westminster Bank plc v Malhan [2004] EWCH 847 (Ch).
7 For a recent reflection on the impact of human rights law on housing law generally, see Renting Homes 1: Status and Security (Law Commission Consultation Paper No. 162), Part V.
8 London Borough of Harrow v Qazi [2003] UKHL 43 at [8].
of sympathy in favour of borrowers in circumstances when the interests of lenders are in jeopardy. There are several factors that underlie this reticence. The adoption of a balanced approach has always been a feature of the judicial attitude to mortgage disputes. As Peter Gibson L.J. emphasised, 'Even large institutions like banks in litigation with impoverished individuals are entitled to be treated fairly'. Some members of the judiciary are, moreover, clearly uncomfortable with this emergent jurisdiction and make pronouncements that betray a lack of familiarity with the new terrain. There is also sometimes discernible an ideological intransigence on the part of those who are wary of a haphazard erosion of Parliamentary sovereignty and property law principle. Pumfrey J., for example, voiced the concern that the prioritisation of human rights might, '... fundamentally transform our law as to enforcement of property rights into one where such rights could only be enforced when a court thinks it justifiable to seek possession and proportionate to make an order'. It is undeniable that this combination of ignorance, suspicion and fear has, to date, operated as a brake on the application of Convention rights in the sphere of private property law.

The Historical Perspective

Developments in the method of creating security interests have always had an impact on the formulation of the rights and remedies of the parties thereto. Although the mortgage has adopted various forms throughout its

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9 Alliance & Leicester plc v Slayford [2001] 1 All ER (Comm) 1 at [14].
10 See, for example, the dissenting speech of Lord Millett in Ghaidan v Godin-Mendoza [2004] UKHL 30 at [57].
evolution, the primacy of the right to possession is traceable from medieval times and has throughout remained the centrepiece of whichever framework for enforcement is in vogue. Under the classical common law mortgage, for example, the legal mortgagee obtained a legal estate in the property as security for the loan. The right to possession was, thereby, an incident of the mortgagee's estate in land.\(^{12}\) Despite the re-rooting of key remedies from a contractual to a statutory basis, the right to possession has remained a constant feature, fortified by the prescribed methods through which legal mortgages may be created. When in 1925, the Law of Property Act made amendments to the permitted forms of mortgage (prohibiting the mortgage by conveyance and re-conveyance),\(^{13}\) Parliament spurned the opportunity to entirely erase the notion of the mortgagee having an estate in the mortgaged land. The Act preserved the methods of creating a mortgage by demise and sub-demise,\(^{14}\) which necessarily vest an estate in the lender and, with it, the right to possession. The innovation of an additional method of mortgage creation, that is, the charge by deed expressed to be by way of legal mortgage does not, of course, confer any estate on the lender. In order to ensure that this development did not undermine the common law right, section 87(1) expressly affords the chargee the same right to possession as would arise had the mortgage been created by demise or sub-demise. This is a remarkable and highly artificial basis upon which the entitlements of the

\(^{12}\) The most popular mortgage of freehold land involved the conveyance of the fee simple to the mortgagee subject to a proviso for re-conveyance on redemption. In the case of leasehold, there was an assignment of the remainder of the mortgagor’s lease subject to a proviso for re-assignment on redemption: see Chapter 2.

\(^{13}\) After 1925 any mortgage by purported conveyance of the fee simple operated as a demise to the mortgagee for a term of 3,000 years: s.85(2)(a).

\(^{14}\) Sections 85, 86. Note that such modes of creation no longer apply to mortgages of registered land: Land Registration Act 2002, s.23(1)(a).
parties are set in modern times. The property law reforms of 1925 presented an ideal opportunity to rid the law of aged notions and tired concepts, particularly the continuing need for the mortgagee to hold a stand alone right to possession, independent of default by the borrower. As explored in Chapter 3, however, the neglect of the substantive law of mortgages occurred because the overriding ambition was to re-style the conveyancing process and to pave the way for a system based upon registration of title. Such changes as were made to mortgage law were designed, sometimes crudely, to make it fit within this new framework. As the right to possession was sustained (albeit in part by statutory fiction), and was for the next 45 years to remain essentially unfettered, the only effective rein upon a mortgagee took the form of the traditional disincentives to the unnecessary taking of possession.

**Historical Disincentives**

At no time in the development of the equitable protective jurisdiction did equity interfere directly with the mortgagee's right to possession of the mortgaged property. Instead, there was a fusion of specific elements that operated to encourage a mortgagee to take possession only when a remedy was required. This legacy is enduring because, in the absence of contractual or statutory stipulation, the right to possession remains absolute. The mortgagor can only hope that the institutional lender will seek vacant possession for the

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15 As Maitland famously claimed, the mortgage is, '... one long suppressio veri and suggestio falsi. It does not in the least explain the rights of the parties; it suggests they are other than they really are' (Equity and The Forms of Action, (Cambridge University Press, 1909), p.269).
purpose of sale and only in cases of serious default. It is remarkable that the strict entitlement is, of course, dependent upon neither.\textsuperscript{16} All that guards against the misuse of the right is a group of anomalous disincentives, the influence of which is prone to fluctuate through periods of social and economic change.

Liability on the footing of wilful default represents the most robust demonstration of equity's supervisory role. This acts as a strong discouragement of physical entry, save when it is necessary to preserve the value of the security. It entails that the mortgagee must account not only for sums actually received, but also what it ought to have received had the property been managed with due diligence.\textsuperscript{17} Of course, where there is an income to receive, the modern mortgagee will favour the appointment of a receiver. Accordingly, the availability of this more proficient remedy itself acts as a disincentive to the taking of possession.

Where serious default is manifest, there are two options for the recovery of possession, that is, by court proceedings or by physical re-entry. As regards the latter, it is the criminal law that provides the disincentive. Historically, the prospect of committing a criminal offence under the Forcible Entry Acts 1381-1623 rendered unpopular the notion that possession could be taken without an order of the court. The Criminal Law Act 1977, section 6 has replaced the offence of forcible entry with the more tailored offence of using or threatening to use violence to secure entry. As this offence is comparatively narrow in scope, Clarke argues that it is '... no longer safe to assume that the

\textsuperscript{16} This position is in contrast with a landlord who seeks to re-enter in the absence of any breach of covenant and is subject to a tenant's claim for damages for trespass.

\textsuperscript{17} Chaplin v Young (No. I) (1864) 33 Beav 330.
risk of committing a criminal offence will always deter a mortgagee from taking possession without the aid of the court'. As discussed below, those fears have gained credence in light of recent case law. It is also noticeable that the law relating to the recovery of demised property by a landlord is much more effective and stringent. In the absence of the tenant's consent, section 2 of the Protection from Eviction Act 1977 (as amended) provides that it is a criminal offence for a landlord to enforce his right to recover property let as a dwelling by any other means than court proceedings. The 1977 Act creates a further offence of harassment and imposes tortious liability on those who improperly evict or harass a tenant. The consequences flowing from unlawful eviction operate as a major deterrent in that the landlord can expose himself to punitive damages. Within mortgage law, such additional protections have never been deemed appropriate or necessary.

Express and Implied Restrictions

Although at common law the mortgagee may take possession as soon as the mortgage is created, it remains possible for the mortgagee to dispense with the right altogether, or to limit the circumstances when it can be exercised, in the mortgage contract. This can be done expressly or arise through implication. For example, it is not unknown for the mortgage agreement to specify that there is no entitlement to take possession until default. If the

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19 See Ropaigealach v Barclays Bank plc above.
20 This due process protection extends also to most residential licences.
21 In Haniff v Robinson (1992) 26 HLR 386, for example, damages of £28,000 were awarded to tenants who had been threatened by their landlords.
mortgagee then seeks possession without there having been default, injunctive relief will be available to the mortgagor.\textsuperscript{23}

As mentioned, it is also possible that a restriction on the right to possession might be implied into the agreement. It might be thought that cases where the mortgage debt is made payable on demand lend themselves readily to such a construction because the mortgagee appears to accept a postponement of its right. Nevertheless, this has not proved to be so because, as evident from \textit{National Westminster Bank plc v Skelton},\textsuperscript{24} the court adheres to the view that the mortgagee's right accrues automatically on the execution of the mortgage. It is hardly surprising, therefore, that the courts are loath to imply a contractual term that restricts the right to possession. It is, as Buckley L.J. cautioned, '... [a] common law right ... which should not be lightly treated as abrogated or restricted'.\textsuperscript{25} In \textit{Credit and Mercantile Plc v Marks},\textsuperscript{26} it was argued before the Court of Appeal that the effect of a sub-charge, given by the respondent to the Bank of Scotland, was that the respondent had ceded its right to possession. There was, however, nothing within the provisions of the sub-charge that purported to transfer to the Bank of Scotland all the respondent's rights against Mr Marks under the charge. The respondent was not the agent of the Bank and was, moreover, required by the terms of the sub-charge to enforce its own rights under the principal charge. It could, of course, only do this if it retained such rights. Clarke L.J. refused to accept any general proposition that the rights were transferred

\textsuperscript{23} \textit{Doe d Parsley v Day} (1842) 2 QB 147.
\textsuperscript{24} [1993] 1 All ER 242.
\textsuperscript{25} \textit{Western Bank v Schindler} [1976] 2 All ER 393 at 396.
\textsuperscript{26} [2004] EWCA (Civ) 568.
regardless of the terms of the sub-charge.\textsuperscript{27} He emphasised that all turns upon the true construction of the sub-mortgage and added that there was no reason why both the principal chargee and the sub-chargee could not enjoy a coexistent right to possession.

In many ways, the contrast of the mortgagee's right to possession with a landlord's right to forfeiture is vivid. Albeit the most important and valuable remedy of the lessor, the entitlement to re-enter for breach of covenant must be expressly reserved within a forfeiture clause in the lease itself. It is not possible to imply the right of re-entry where an express right has been omitted.\textsuperscript{28} Even where a landlord has reserved the right to re-enter for breach of covenant, action must be taken expeditiously to enforce forfeiture. A failure by the landlord to initiate proceedings or to physically take possession may be taken to be a waiver of the breach.\textsuperscript{29} In contrast, the mortgagee's right to possession arises independently of any contractual provision and is, in principle, unconnected to a particular or, indeed, any breach of the mortgage agreement. In \textit{Bradford & Bingley plc v Harris},\textsuperscript{30} for example, a possession order granted in 1996 was not initially enforced because the borrower paid off the arrears that had been outstanding. When the borrower subsequently fell into financial difficulties over six years later, the mortgagee was still entitled to rely on the previous order to enforce the security.

\textsuperscript{27} In \textit{Owen v Cornell} (1967) 203 EG 29, it had already been held, albeit by the High Court, that the mere fact of sub-mortgage did not prevent the principal mortgagee from exercising its rights under the principal charge.

\textsuperscript{28} \textit{Re Anderton and Milner's Contract} (1890) 45 Ch D 476.

\textsuperscript{29} Waiver occurs on any act that recognises the continued existence of the lease, for example, the acceptance of rent after the landlord is aware of the breach of covenant. Waiver is, however, a '... minefield in which it is necessary to tread with diffidence and warily' (\textit{Segal Securities v Thoseby} [1963] 1 QB 887 at 897 per Sachs J.).

\textsuperscript{30} November 6, 2003 (CC). Unreported.
The Attornment Clause

Historically, the use of an attornment clause had the effect of restricting the mortgagee’s right to possession. The inclusion of such a clause in the mortgage deed created a nominal relationship of landlord and tenant between the parties by virtue of the payment of a peppercorn rent. Prior to the 1930s, such a clause was utilised to the advantage of a mortgagee. It entailed, for example, that the remedy of distress for rent was available and provided the lender with a more desirable procedure for the recovery of possession. The downside was that, as a consequence of the creation of a tenancy, the mortgagee was required to terminate by serving a timely notice to quit preceding the commencement of possession proceedings.31 The effect of the attornment clause, therefore, was to impose a procedural hurdle in the way of the mortgagee’s otherwise unrestricted legal right to take possession.

In the context of the modern residential mortgage, the use of attornment clauses is now unfashionable. The forced and artificial creation of the relationship of landlord and tenant no longer serves the interests of the contemporary mortgagee.32 There is also no discernible advantage for the mortgagor. The courts have made clear that developments in landlord and tenant law, geared to protecting the residential tenant from exploitation by the landlord, do not generally extend to the attorned tenant of a mortgagee. In Alliance Building Society v Pinwall, the attorned tenant was not allowed to benefit from statutorily prescribed rules governing the validity of notices to quit

32 In Steyning and Littlehampton Building Society v Wilson [1951] Ch 1018 at 1020, Danckwerts J. spoke of the ‘... undesirability of retaining in mortgages an attornment clause, which is entirely obsolete and at the present time performs no useful purpose.’
because such rules applied only to ‘real tenants’ in a ‘real residential letting’.33 As Vaisey J. explained, the Rent Act 1957, ‘... is not intended to, and does not, benefit a mortgagor to the detriment of a mortgagee’.34 To determine otherwise would be, as Danckwerts J. commented in Steyning and Littlehampton Building Society v Wilson, ‘... disregarding the nature of the transaction, and applying the provisions of a statute passed for a very different purpose in a highly artificial manner’.35

Prior to the enactment of the Law of Property Act 1925, a mortgage was commonly created by conveyance of the freehold and operated largely in the context of commercial property. In this context, the use of the attornment clause had some charm. At the least, it overcame jurisprudential unease as to the legal basis underpinning the borrower’s continued occupation of property to which the legal title was vested in the lender. As the borrower’s continued possession is permissive, a mortgagor who unlawfully refuses to give up possession becomes trespasser.36 Of course, in the post-1925 world where mortgages are mainly created by charge, the mortgagee does not bargain for a legal estate in the mortgaged land. This nineteenth century understanding of the nature of the mortgagor’s possession, however, continues to be of relevance. The legacy of the precariousness of a mortgagor’s possession implicitly pervades the modern legal framework. The mortgagee remains able to assert an inherent right to possession except where contract or statute

33 [1958] Ch 788 at 792.
34 Ibid. The attorned tenant unsuccessfully argued that he was entitled to four weeks’ notice to quit under s.16.
35 Above at 1026.
36 Birch v Wright (1786) 1 Term Rep 378.
provides otherwise. In view of the massive shift in social function of the mortgage, it is an unnatural and untenable manifestation from a bygone age.37

Statutory Restrictions

The statutory restrictions that have been placed upon the exercise of the mortgagee's right to possession need now to be considered. Once more, the regulation of possession stands in sharp contrast with the ability of a landlord to forfeit a lease. In landlord and tenant law, there is an assortment of preliminary obstacles to forfeiture38 and numerous provisions governing the capacity of the court to grant relief to the lessee. Relief may be granted by the High Court under an inherent, equitable jurisdiction39 or, as is most common, by either the High Court or the county court under a detailed statutory jurisdiction. As regards breaches of rental covenant, this statutory jurisdiction varies according to which court hears the application. The High Court derives its ability to relieve against forfeiture under the now jaded provisions of the Common Law Procedure Act 1852. The county court obtains its powers under the County Courts Act 1984 (as amended). To complicate matters further, in prescribed circumstances relief may be automatic. In the High Court, this occurs when the tenant owes more than six months' arrears of rent and

37 As P Fairest explains, ' ... to regard a mortgagor as a tenant at sufferance of his own home is, to put it mildly, incongruous, and it may be that the law should be amended to require a period of notice to quit ... as is done with tenants of dwelling-houses... '(Mortgages (Sweet & Maxwell, 1980), p.88).

38 The Commonhold and Leasehold Reform Act 2002, for example, protects long residential leaseholders by requiring the landlord to issue a written demand for payment of ground rent; restricting any administrative charges to a reasonable sum; and preventing forfeiture for rent arrears below £350. Similarly, the Act permits forfeiture for non-payment of service charges only when the amount has been agreed or ascertained by a Leasehold Valuation Tribunal.

39 See Shiloh Spinners v Harding [1973] AC 691. For example, this could be invoked where the landlord has forfeited by peaceable re-entry.
discharges those arrears and pays costs before the case is heard. In the county court, an automatic stay will operate when the tenant pays all arrears (regardless of their duration) and costs at least five days before the return date in the action. In other circumstances, relief may be at the discretion of the court. This would be relevant where the payment of rent is made after the judgment of the court or, only of relevance to the High Court, where the arrears were discharged pre-trial, but did not exceed six months. The tenant, moreover, must apply for discretionary relief within set time limits. The general rule is that the tenant must apply within six months from the execution of the judgment. Beyond that period, the tenant is barred from relief.

As regards a breach of a non-rental covenant, either the High Court or the county court may grant relief under section 146 of the Law of Property Act 1925. In determining whether relief should be afforded to the tenant, section 146(2) directs the court to have regard to the proceedings and conduct of the parties and to all other circumstances. In particular, the court will consider the value of the lease, issues of proportionality, whether the breach has been (or is to be) remedied, whether the breach was wilful, the tenant's financial state and the tenant's demeanour in the proceedings. Relief will be sought during the currency of the forfeiture proceedings and is not available once the

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40 Common Law Procedure Act 1852, s.212.
41 County Courts Act 1984, s.138.
42 Supreme Court Act 1981, s.38 (High Court); County Courts Act 1984, ss.139(9A) (county court). This discretion persists after the grant of possession, but only when the property remains in the hands of the landlord and has not been re-let: Common Law Procedure Act 1852, s.210; County Courts Act 1984, s.138.
43 There is a distinct jurisdiction given to the county court under s.147 to grant relief from breach of covenant to keep the property in internal repair.
landlord has re-entered following proceedings.\textsuperscript{44} It is, however, possible that
the breach is deemed incapable of remedy and, hence, no relief made
available to the tenant.\textsuperscript{45} It is, of course, open to the court to depart from this
rule of thumb. As Millet J. made clear, however, it will be, ‘... only in the
rarest and most exceptional circumstances that the court will grant relief ...
particularly where the breach of covenant has been both wilful and serious.’\textsuperscript{46}

In striking contrast, the only substantive statutory regulation within the
general law of mortgages occurred through the enactment of the
Administration of Justice Act 1970 (as amended).\textsuperscript{47} It was enacted on the
recommendations of the Payne Committee\textsuperscript{48} and was designed to rekindle the
practice of adjourning possession proceedings.\textsuperscript{49} The legislation applies
specifically to actions by mortgagees for possession. The intended policy was
to allow, where reasonable, borrowers in temporary financial difficulties an
opportunity to pay off arrears and get back on track with their current
mortgage repayments. Sympathy towards such borrowers was expressed by
the Committee, 'Any man's income or earnings can fall suddenly, through no
fault of his own, and he should be able to look to the court for any protection

\textsuperscript{44} See Billson v Residential Apartments Ltd [1992] 1 AC 494. This case also makes clear that
if forfeiture is by peaceable re-entry, the s.146 discretion subsists until the tenant's case
becomes stale. This is thought to occur once six months has elapsed from the re-entry.
\textsuperscript{45} See Borthwick-Norton v Romney [1950] 1 All ER 362. Such cases are usually concerned
with the breach of a negative covenant such as illegal and immoral user that attaches a
permanent stigma to the premises.
\textsuperscript{46} Ropemaker Properties Ltd v Noonhaven Ltd [1989] 34 EG 39 at 68. Such circumstances
arose in Van Haarlam v Krasner [1992] 2 EGLR 59, where relief was provided to a tenant in
breach of a covenant not to use the property for illegal purposes who had been convicted of
spying, imprisoned and faced deportation. To refuse relief would have been to deny him an
eighty year lease he had only recently acquired.
\textsuperscript{47} This claim disregards the changes introduced to mortgages under the Consumer Credit Act
1974, which are considered in detail in Chapter 6.
is considered in detail in Chapter 5.
\textsuperscript{49} This jurisdiction in equity to postpone possession was cut back drastically in Birmingham
Citizens Building Society v Caunt [1962] Ch 883 to provide only a limited opportunity to pay
off the mortgage debt.
he may need against onerous claims arising out of the change in his means and circumstances. The mechanism chosen to achieve this design was section 36(1). This provides:

'Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property ... the court may exercise any of the powers conferred on it by subsection (2) if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage'.

Accordingly, section 36 offers to the court a discretionary power to restrict the exercise of the right to possession. This Chapter is concerned with when this discretion arises. The exercise of this discretion once it has arisen is the subject of Chapter 5. As a result of poor draftsmanship, problems of statutory interpretation have been (and remain) plentiful. In particular, the courts have grappled with the meanings of 'dwelling-house', 'brings an action' and 'any sums due'.

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51 Under subsection (2) the court may adjourn the proceedings, or, on giving judgment or making an order for delivery of possession, may stay or suspend execution of the judgment or order, or postpone the date for delivery of possession, for such period or periods as the court thinks reasonable.
A Dwelling-House

The jurisdiction afforded to the court extends only to a 'dwelling-house' and the term is given a seemingly wide definition. Under section 39(1), which guides as to the interpretation of Part IV of the Act, a dwelling-house includes 'any building or part thereof which is used as a dwelling'. Further clarification is offered in section 39(2) where it is provided that use of part of the premises for commercial purposes shall not prevent the premises being classified as a dwelling-house. Smith envisages a potential problem where there is a large office block within which there is located a caretaker’s flat. He argues that the entire block may, in such circumstances, be protected by section 36. He contends that it matters not that it is the caretaker and not the mortgagor who is in occupation. There is nothing contentious surrounding this suggestion as vicarious occupation is a well-established phenomenon of property law. Smith's submission that section 36 must necessarily extend to the entirety of the block, because it remains land 'which consists of or includes a dwelling-house', is more controversial. While it may follow logically from a literal interpretation of the statutory provision, it can hardly be regarded as representing the mischief at which it was aimed, that is, to protect people borrowing money secured on a mortgage on the family home. Understandably, therefore, Smith laments that, 'the width of section 36 seems too great'.

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52 The House of Lords in *Uratemp Ventures Ltd v Collins* [2002] 1 AC 301 emphasised that a 'dwelling' simply meant a person’s home and was not a term of art.
54 It is to be appreciated that s.39(1) expressly caters for persons deriving title from the mortgagor (for example, a tenant or sub-tenant) to take advantage of s.36.
If an analogy were to be drawn with the law of landlord and tenant, Smith's conclusion appears open to challenge. For the purposes of Part II of the Landlord and Tenant Act 1954, for example, a degree of mixed user is permissible. In working out whether the mixed tenancy falls inside this legislative code, the court adopts a broad-brush approach. The court is concerned with whether the business use is merely incidental (and outside the 1954 Act) or is, instead, significant (and within the 1954 Act). The determination is, therefore, one of fact and degree and, as Waite L.J. acknowledged in *Wright v Mortimer*, '... may depend in the last analysis upon the general impression created in the mind of the judge by the evidence.' It is, therefore, arguable that a similar approach should be adopted in relation to the operation of section 36. It is noteworthy that the Financial Services and Markets Act 2000 expressly caters for mixed user by employing a percentage user test. To constitute a regulated contract, the Act requires that, '... at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling by the borrower or (in case of credit provided to trustees) by an individual who is the beneficiary of the trust, or by a related person.' Accordingly, the process is made more transparent and certain than under section 36 or, indeed, the 1954 Act.

Fortunately, the width of section 36 has posed few difficulties. The principal question resolved by the courts has focussed upon the time at which it is to be ascertained whether or not the land consists of, or includes, a

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56 See *Cheryl Investments Ltd v Saldanha* [1979] 1 All ER 5. Section 23(1) of the 1954 Act speaks of the occupation being in whole or in part for the purposes of a business.
57 See *Lewis v Weldcrest Ltd* [1978] 3 All ER 1226.
dwelling-house. In *Royal Bank of Scotland v Miller*, the Court of Appeal identified three possibilities, namely, the time the charge was granted, the time when the mortgagee brought an action for possession or the date on which the order for possession was issued. Dyson L.J. preferred, '... the most natural interpretation of the subsection' and concluded that the key date is when the mortgagee brings an action for possession. This conclusion is attractive and, moreover, in keeping with the underlying policy and practical operation of section 36. If the court had elected for the date that the charge was granted, it would be possible for a mortgagor to enjoy the protection of the section in circumstances where the property was no longer used as a dwelling-house. In contrast, the determination of whether the contract is a regulated contract under the Financial Services and Markets Act 2000 is made initially at the time the agreement is entered. Subsequent changes in the mode of occupation can, however, take the transaction outside or, indeed, bring it within the scope of the 2000 Act.

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60 [2001] EWCA Civ 344.
61 Ibid. at [25].
62 As Dyson L.J. explained, 'Mortgagors of dwelling-houses are therefore given more favourable treatment than other mortgagors, no doubt because Parliament thought that it was socially desirable that mortgagors of dwelling-houses should have some degree of protection from being evicted from their homes' (ibid. at [27]).
63 See also *Rogerson v Wigan MBC* [2004] EWHC 1677 (QB) where, in the context of the Protection from Eviction Act 1977, Elias J. held that the time for judging whether the accommodation was a dwelling was at the time the notice to quit was served. He acknowledged that matters might change and that, over the years, premises might move in and out of the classification of a dwelling.
Bringing an Action

This aspect of section 36 has also produced some uncertainty. In *Ropaigealach v Barclays Bank Plc*, the Court of Appeal concluded that section 36 did not require a mortgagee of residential property to seek a possession order prior to every exercise of the right to take possession. Accordingly, the decision highlights a gap in the protection for borrowers that had been long anticipated by both the Law Commission and academic commentators.

The somewhat unusual circumstances in *Ropaigealach* warrant brief consideration. The Ropaigealachs were joint registered proprietors of a property in Wales. In 1988, they mortgaged their property by way of legal charge to Barclays Bank Plc. By 1995, almost £64,000 remained outstanding and, when demand for repayment was not met, the Bank informed the debtors that it was taking action to realise its security. In 1996, the property was sold at auction at a price of £77,000. As they were not in physical occupation at the time, the Bank did not see the need to obtain a possession order. The case has some unusual features. First, the Ropaigealachs contend that they had not abandoned the property. Instead, they had temporarily moved out while the property was being refurbished. Due to this absence, they claimed not to have received the Bank’s written communications and did not even know about the sale until after it had occurred. Secondly, the charge contained a covenant that the couple would, on demand in writing, pay all moneys that

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65 Above.

66 'The court can exercise its discretion only if the mortgagee applies to it for a possession order ...' (*Land Mortgages* (Law Com Working Paper No. 99, 1986), para. 3. 69(a)).

67 See A Clarke, “Further Implications of Section 36 of the Administration of Justice Act 1970” *op. cit.*
should from time to time be owing to the Bank. Thirdly, the provisions of section 103 of the Law of Property Act 1925 were expressly excluded in the mortgage contract. This entailed that the statutory power of sale was not available, but the agreement went on to reserve a contractual power of sale which was to arise and to be exercisable at any time after execution of the legal charge. The Bank, therefore, claimed that it had been entitled to exercise its power of sale as soon as payment of the moneys secured by the legal charge had been demanded. The Bank argued further that section 36 could have no application to cases where the lender did not commence an action for possession. The borrowers countered that such an approach ran contrary to the policy of the provision. They submitted that it would defeat the purpose of the legislation if a mortgagee could resort to self-help and, thereby, avoid bringing proceedings for possession.

Chadwick L.J. was cognisant of the origins of section 36 and could find nothing there to show an intention to deal with problems that appertained to entry without order of the court. Declining to adopt a purposive interpretation, he found it to be, ' ... impossible to be satisfied that Parliament must have intended, when enacting section 36 of the Act of 1970, that the mortgagee's common law right to take possession by virtue of his estate should only be exercisable with the assistance of the court'.\footnote{68 Above at 282.}

There can be little dispute as to the correctness of the decision. The mortgagee is entitled at common law to take possession of the mortgaged property via order of the court or peaceable entry. Of course, the latter may take a borrower outside the protection otherwise afforded by section 36. It is a
lacuna in the present provisions that, as Clarke L.J. makes clear, 'If the mortgagor needs that financial relief he needs it whether the mortgagee chooses to exercise his right to possession by entering into possession with or without an order of the court'. In striking contrast, the provision of relief against forfeiture under section 146(2) of the Law of Property Act remains available after the landlord has forfeited the lease by physical re-entry of the premises. The tenant is able to apply to the court for relief where the landlord is 'proceeding, by action or otherwise' to enforce forfeiture. As Lord Templeman recognised those words showed the Parliamentary intention that a tenant should be able to obtain relief against a landlord whether the landlord has asserted his rights 'by a writ or by re-entering'.

There is, admittedly, no need for possession proceedings in the vast majority of cases where a mortgagor simply gives up hope and returns the keys. To require proceedings where the mortgagor has willingly surrendered the property would impose an unnecessary procedural hurdle for the mortgagee to overcome. The consequence would amount to wastage of time and money and the costs would, of course, be added to the mortgage debt. Nevertheless, this does not entail that a mortgagor should be denied all recourse to relief because the mortgagee has effected peaceable re-entry. As Clarke argues, 'The mortgagor’s estate in the mortgaged property is not dependent on occupation, so why should he be forced to accept a forced sale of it simply because he does not choose to occupy'.

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69 Ibid. at 286.
70 Billson v Residential Appartments Ltd [1992] 1 All ER 141 at 145; see P F Smith, “Peaceable Re-entry and Relief against Forfeiture” [1992] Conv 32.
71 Op. cit. at p.301.
If section 36 was widened to encompass the taking of peaceable possession, this would not afford total protection for the borrower. The court's jurisdiction would remain concerned only with possession and would not prevent a mortgagee selling without vacant possession. The Law Commission Working Paper highlighted this potential difficulty and explained:

'The discretion is to delay or withhold the possession order only, not any other remedy. In practice this usually prevents enforcement, but in theory it is still open to the mortgagee to proceed to exercise its power of sale notwithstanding the court's refusal to make a possession order. Since such a sale terminates the mortgagor's interest in the property, the purchaser presumably would have no difficulty in obtaining a possession order against the mortgagor after completion'.

In *Ropaigealach*, the Bank denied that it had ever entered into possession prior to sale. This raises an interesting issue concerning the scenario where a mortgagee proceeds to sell the property to a purchaser, but leaves it to the purchaser to recover possession. If the power of sale has arisen, the purchaser obtains a good title under section 104 of the Law of Property Act 1925. It appears that section 36 cannot then be invoked against the purchaser. As Dixon points out, '... the attractions for the mortgagee are obvious ... it is certainly a tenable view of the authorities and would, if correct,

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72 *Op. cit.* para. 3.69(b).
73 As regards sale under a contractual power, the exercise of that sale is deemed to have been made under the statutory power with the attendant protection for a purchaser: s.104(3). As regards registered land, purchaser protection is afforded by s.52 of the Land Registration Act 2002.
signpost an easy remedy for mortgagees with no balm for mortgagors'.74
Without the need to settle the matter, Clarke L.J. highlighted this situation as
a 'potential problem'.75 It is trite law that that, on completion of a lawful sale by
the mortgagee, the mortgagor loses any right to redeem. It is the traditional
wisdom, however, that the effect of a mere contract for the sale of land is the
same, that is, it extinguishes the mortgagor's equitable right to redeem.76

Any Sums Due
The most significant structural problem with section 36 became quickly
exposed. It became apparent that a serious error threatened to make the
legislation redundant in many cases. This was because the wording ignored a
common feature of most mortgages that, upon default, the entire mortgage
money falls due. This realisation occurred in Halifax Building Society v
Clark,77 where the mortgagor had arrears of £100, but by virtue of an
acceleration clause (which made the entire loan repayable upon default in the
payment of instalments) the sums due amounted to over £1,400. It proved to
be a sum that could not be paid within a reasonable period. This placed an
effective brake upon the section 36 discretion. As Oliver L.J. put it in Habib
Bank Ltd v Taylor, '... if the mortgagor was already in difficulties with his
instalments, the chances of his being able to pay off the whole principal as
well in a reasonable time must be considered fairly slim'.78 The enactment of
section 8 of the Administration of Justice Act 1973 was to counter the

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74 M Dixon, "Sorry We've Sold Your Home: Mortgagees and their Possessory Rights" [1999]
CLJ 281, p.282.
75 Above at 284.
76 Full consideration is given to this matter in Chapter 7.
78 [1982] 1 WLR 1218 at 1222.
difficulties identified in Clark.\textsuperscript{79} Section 8 permits (but does not oblige) the court to treat as due, '... only such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier repayment'. As Lord Hailsham L.C. explained in an extra-judicial capacity, 'The method adopted is by providing under subsection (1) that only amounts which the mortgagor would normally have had to pay if the mortgage had continued to run in the ordinary way are to be treated as due under the mortgage for the purpose of the court's order'.\textsuperscript{80}

The expressed aim of section 8 is to 'extend' the powers of the court to capture the types of mortgages that had been excluded by the inadequate framing of section 36. It is, moreover, an enactment expressed in non-technical language with the simply stated goal of giving section 36 the effect that had originally been envisaged.\textsuperscript{81} Despite the clarity of purpose and modesty of aim, the combined effect of the sections has been to generate further problems of application and interpretation. While some problems arise purely in relation to the interpretation of section 8, others result from the failure of both the 1970 and the 1973 Acts to provide adequate protection to homeowners in all cases. This result, it is argued, is the product of the general distaste of the Legislature for the introduction of wholesale reform. Rather than tackle the appropriateness of the mortgagee holding an inherent right to possession in the modern day, Parliament has preferred to adopt the approach of piecemeal removal of particular abuses. Speaking of the

\textsuperscript{79} As Scarman L.J. recognised in First Middlesborough Trading Co Ltd. v Cunningham (1974) 28 P & CR 69 at 73, the impact of the decision in Clark had been '... debilitating'.

\textsuperscript{80} HL Debates, vol. 338, col. 398.

\textsuperscript{81} The legislation is, as the Attorney General, Sir Peter Rawlinson QC made clear, '... designed to ensure that a mortgagor who has defaulted in making repayment shall not lose his home if he can pay off the arrears within a reasonable time' (HC Deb. Vol. 851, col. 1721).
Administration of Justice Bills in general, Sir Elwyn Jones recognised that, in the case of such enactments, there is always criticism of '... rag-bag legislation'. He preferred, however, to think in terms of 'lucky dips' explaining the uncertainty that, '... sometimes one finds useful things in them and sometimes they contribute little to the reform of the law'.

There is no doubt that the Administration of Justice Acts have contributed much to the reform of the law of mortgages. Nonetheless, in the construction of both sections, the statutory wording is inadequate to confer an acceptable level of protection to mortgagors and has required much judicial embellishment in order to achieve its perceived purpose.

**No Sums Due?**

The Payne Committee was solely concerned with the defaulting mortgagor. This is evident in the powers conferred on the court to adjourn, suspend or postpone, which are only appropriate to cases where there are some arrears to be met or other default to be remedied. It was never envisaged that there might be circumstances where the court would be asked to invoke the discretion in the absence of any default whatsoever on the part of the debtor.

In *Western Bank v Schindler*, however, such an issue tested the limits of purposive construction and exposed 'further infelicities' in the drafting of section 36. In *Schindler*, it was argued that, as there had been no default on the part of the mortgagor, the court lacked the statutory power to grant relief and the mortgagee was entitled to obtain an immediate order for possession.

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83 Ibid.
84 Above.
This is because, on a literal reading, section 36 appears not to apply where there is no money due under the mortgage. Not surprisingly, both Buckley and Scarman L.JJ. rejected this reasoning. It would otherwise produce the illogical outcome that, as Scarman L.J. explained, '... a mortgagee could be prevented from taking possession when there was a default or arrears, but could not be so prevented if there were neither default nor arrears. Parliament cannot have intended such a foolish result'.

This approach to the task of statutory interpretation in Schindler has, however, been criticised as being too cavalier. In order to reach the desired conclusion the appellate court in Schindler found it necessary to construe the conditional part of section 36(1) as applying only in cases of default or arrears. It was not viewed as limiting the role of discretion only to such cases. Although Scarman L.J. explicitly recognised that ' ... judicial legislation is not an option open to an English judge', he was driven to add a gloss to section 36 that was simply not apparent on any straightforward textual reading. In a dissenting judgment, Goff L.J. took a literal interpretation and was prepared to accept any anomalies and absurdities that followed. His approach is based upon the foundation that, if Parliament had intended so considerable an interference with the mortgagee's right to possession, it would have done so expressly. He commented, 'I am satisfied that section 36 of the Act of 1970, cannot be held, as it were by a side wind, to have wholly abrogated the mortgagee's proprietary right to take possession, even when

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86 Above at 403.
88 Above at 400 per Buckley L.J.
89 Ibid. at 403.
there is no default'. Goff L.J. could not see how the section could be held to give the court a power to adjourn where there is no money that ought to be paid, or other default to be remedied. In addition, he could not see by what criterion a reasonable period could be determined in these circumstances. His judgment, furthermore, displays an awareness of the historical limitations on the modern mortgagee's right to possession. He recognised that there are disincentives, which render the actual taking of possession for its own sake an outmoded practice. Liability of the footing of wilful default has long discouraged a mortgagee from taking possession save where such actions were necessary to preserve the value of the security. Owing to the disincentive of accountability, the anomalies and absurdities said to flow from a literal construction of the section are in the words of Goff L.J., ' ... more apparent than real.' Although the majority view produces an attractive and commonsense interpretation that allows section 36 to apply in all cases regardless of default, it is within the judgment of Goff L.J. that the true intention of Parliament is perhaps to be discerned.

Sums Due, Section 8 and Permission to Defer

Considerable judicial focus has also fallen upon the application of section 8 of the Administration of Justice Act 1973. As discussed above, this enactment was necessary to ensure that 'any sums due' concerned only those sums that would be required to be paid in cases where there was no acceleration clause. As evident in Centrax Trustees Ltd v Ross, however, the provision is

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90 Ibid. at 409.
91 Ibid. at 410.
92 [1979] 2 All ER 952.
not entirely free from difficulty. There the key features of the transaction concerned the legal date for the repayment of the loan after six months, an agreement as to quarterly payments of interest and the presence of a clause which rendered the principal due on default. The issue before Goulding J. was whether section 8 was applicable in circumstances where the instalments comprised of interest payments alone and the principal was to be repaid in a single sum at a future, indeterminate date. The central difficulty was whether, in light of the legal date for redemption, the mortgagor was permitted to defer payment of the principal sum as is required under section 8. Goulding J. felt that, in order to bring such a mortgage within the remit of section 8, it was necessary to consider the provisions of the mortgage as they operated at law and their practical effect in equity. In Centrax, a date was fixed for the repayment of the principal sum, but the common intention of the parties was that the payment of the principal sum should be deferred beyond that time. Goulding J. felt that this was evident in the provision for the payment of interest that extended beyond the legal date for redemption. The mortgage also provided that, if default occurred in the payment of interest, the whole sum would become due. On a true construction of the mortgage, therefore, he found that the parties contemplated an indefinite loan and the mortgagor was permitted to defer repayment of the principal sum.

In Habib v Taylor,\(^3\) this flexible approach to statutory interpretation was reconsidered. In a like vein to Goff L.J. in Schindler, Oliver L.J. preferred to adopt a literal and technical approach to the construction of the statutory wording. In Habib, a bank arranged a mortgage for a customer by way of

\(^3\) [1982] 1 WLR 1218.
security for an overdraft facility. The mortgagor covenanted that, on demand in writing, he would pay all moneys due. When the overdraft limit was exceeded, the lender made a demand for payment of the whole sum due in the form of principal, interest and charges. When the demand was met with non-compliance, the lender instituted proceedings for possession. The Court of Appeal was asked the deceptively simple question as to whether section 8 applied to the case of an all moneys mortgage securing an overdraft. The answer would determine whether the court could exercise its discretion and postpone possession. Oliver L.J. held that there could be no application of section 8 to the facts. He was of the view that the section could only apply where '... the mortgagor is entitled or is to be permitted to pay the principal sum secured by instalments or otherwise to defer payment of it in whole or in part...'. On the facts, there was no agreement whereby the mortgagor was '... permitted otherwise to defer payment...'. This conclusion emerged because, in relation to the type of mortgage concerned, the principal did not become due (and could not be sued for) until a written demand for payment had been made. Similarly, it was only reasonable to think in terms of deferment of payment after the payment itself had become due. Oliver L.J. could, therefore, find nothing in the agreement between the parties that, on any realistic construction, permitted the mortgagor to defer his payments. It is, however, noteworthy that he alluded to the purposive interpretation adopted in earlier decisions. He accepted the argument that section 8 should not be subjected to unduly technical scrutiny. He approved the views of Goulding J. as expressed in Centrax Trustees Ltd v Ross that:

94 Ibid. at 1224.
95 Ibid. at 1225.
Section 8 is not drawn in formal conveyancer's language. I do not find it easy to see exactly what is meant by the phrase "is to be permitted to pay" as an alternative to "is entitled to pay"; nor is the term "earlier payment" altogether apt in relation to an indefinite and merely permissive deferment of payment. However, it is clear from the words "or otherwise", twice repeated, that Parliament has attempted to give legislative shelter to a wide class of owner-occupiers, and it is unlikely in what may be called social legislation of this sort Parliament intended an occupier's situation to depend on distinctions of conveyancing. Therefore, in my opinion ...the language used must receive a reasonably liberal interpretation'.

Although Oliver L.J. did not challenge the operation of section 8 in Centrax, he did, '... rather question whether it was intended by the legislature to do so'.  
This unwillingness to adopt an expansive interpretation of Parliamentary intention is further underlined by the approach of Cumming-Bruce L.J. who expressed relief that, as a result of the unanimous decision of the Court of Appeal, there was no call for a '...revolution in banking practice'. He felt that, had a wider construction been given to the wording of the section, the consequence would be to deprive bankers of a right of enforcement for as long as the debtor continued to pay interest on the capital sum advanced.

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96 Above at 955.
97 Above at 1224.
98 Ibid. at 1226.
A Fixed Sum for a Fixed Term?

As a consequence of the restrictive approach adopted in Habib, fresh concerns were raised regarding the applicability of section 8. For example, it was unclear whether the provision would cover endowment mortgages where the principal is not repayable until the end of the mortgage term and there is no provision for deferment of payment after that date. In relation to this uncertainty, Habib was revisited by the Court of Appeal in Bank of Scotland v Grimes.99 There, a distinction was drawn between a charge to secure an ordinary banking overdraft, where the debt was one that was due immediately on demand, and mortgages of fixed sums for fixed terms. The Court of Appeal acknowledged that, ‘Section 8 ... is couched in language from which it is not immediately easy to extract the meaning’.100 Albeit with little confidence in their interpretation of section 8, both Sir John Arnold and Griffiths L.J. held that the provision must cover both the conventional instalment and the endowment type mortgages. The essence of their reasoning was that a charge to secure an ordinary banking overdraft should be treated differently from the conventional methods by which people buy houses. Accordingly, with regard to instalment or endowment type mortgages, a less literal construction could be placed on the wording of the section and this entailed that the court need not be driven by the logic of Habib. This would appear a sensible outcome, but it does overlook the modern reality that borrowers, other than those with conventional instalment or endowment mortgages, also remain

99 [1985] 2 All ER 254.
100 Per Sir John Arnold ibid. at 257
vulnerable to financial difficulties that could result in repossession of the family home.

Permission Revisited

In Rees Investments Ltd v Groves, further light was shed upon the difficulties of construction posed by the wording of section 8 when the nature of the debt is an overdraft. The Groves were the registered proprietors of a residential property purchased with a loan from National Home Loans, secured by way of a first charge on the property. The couple proceeded to borrow money on a current account with the Allied Irish Finance Company, secured by way of a second charge. The benefit of both the loan and the mortgage were transferred to Rees Investments Ltd and the Groves duly received notice of the assignment. Prior to the assignment, the borrowers had fallen into arrears on the current account and had received a letter detailing the repayment schedule that the company was prepared to accept. The Groves failed to comply with these terms. Rees Investments Ltd, which at this stage had acquired the rights of the first mortgagee, responded with a more favourable payment plan. When the defendants once again failed to make the required payments, it issued possession proceedings. At first instance, possession was suspended for four months. On appeal, it was argued by the claimant that, on a true construction of section 8, the court had no power to suspend the order. This was because the nature of the debt was an overdraft which had not become payable by the date of either of the two letters. Instead, it was a debt that did not become payable until it was effectively

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101 June 27, 2001 (Ch D). Unreported.
called in. Citing Oliver L.J. in *Habib v Taylor*, Neuberger J. felt he could do nothing. The section requires that provision must be made for earlier payment and, in the instant case, payment was not due until demand was made. There was no provision for payment earlier than that time.

Neuberger J. was conscious that his judgment might appear harsh, especially in light of the policy aims of the legislation. Nevertheless, he justified its fairness by explaining that Allied Irish Finance had enjoyed the option to simply call the loan and to seek possession at the outset. Instead, it had indulged the borrowers with a more flexible payment plan, which in due course had been relaxed further. As Neuberger J. put it, "It could be said to be unfair to the claimant if, by indulging customers who would have no rights under section 8 of the 1973 Act, it finds itself in a position where the customers have such rights to the Bank's prejudice". Such an outcome would be to the long-term disadvantage of borrowers in general because it would serve as a disincentive to lenders to offer their customers indulgences of that sort. It is instructive that Neuberger J. reached his conclusion simply by applying *Habib* to the very different facts before him, which involved two separate alterations to the borrower's repayment schedule. This, however, raises the novel proposition that, by virtue of the relaxed repayment schedules, the borrowers could be said to have been permitted to pay principal by instalments or otherwise to defer payment. Unfortunately, this argument was not put before the court.

**Entitlement and Agreement**

102 As he explained, 'Provisions such as s. 8 of the 1973 Act are included to protect people in their homes and, should be construed by the court with that purpose in mind'.

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Section 8 will apply where the mortgagor is, ‘... entitled or is to be permitted to pay the principal by instalments or otherwise to defer payment thereof’. This entitlement or permission must be in relation to payment by instalments or the deferment of payment. Evidence of entitlement or permission to defer payment of the principal must be discerned either from the mortgage deed itself, or by ‘any agreement ... under such a mortgage’. As to the meaning of ‘or is to be permitted’, there is little guidance to be gleaned from case law. Indeed, the Court of Appeal in *Bank of Scotland v Grimes* appeared baffled. As Sir John Arnold admitted, ‘We have attempted, and have been assisted by counsel in the task to give some meaning to the words ... but we have been wholly unable to come to any conclusion as to any possible meaning of that phrase ... it is the presence of so impenetrable a phrase which makes one think that one has to be very careful in construing the section ...’.103 In the context of *Rees Investments*, the meaning of ‘is to be permitted’ assumes relevance because the borrower is provided with two separate proposals for the payment of principal by monthly instalments. The possibility is raised that the case may be brought within section 8 to the extent that the borrower has been permitted to pay the principal debt by instalments. It is arguable that the borrower has been permitted to pay by instalments at the point at which the repayment methods are varied. This, in turn, raises two further and distinct concerns. First, if section 8 is inapplicable to the mortgage at its outset whether it can be activated to protect a borrower who subsequently falls within its scope. Secondly, if the entitlement or permission is not discernible from the

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103 Above at 257.
mortgage deed itself what exactly will constitute an agreement from which permission is to be construed.

In *Rees Investments*, Neuberger J. doubted whether an 'agreement' could extend to an arrangement that is not contractually or legally enforceable. This logic appears attractive on two fronts. The traditional view that the acceptance of less than that to which the lender is entitled will not amount to consideration, means the agreement resulting from such communications has no contractual force. In addition, section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 imposes further formal requirements for the lawful variation of the terms of a land contract. Despite the force underlying such arguments, section 8 does offer some clarification as to what is sufficient to amount to 'agreement'. The inclusion of the word 'any' seems to suggest that the agreement should be construed more widely than simply 'an' agreement under the mortgage. It is easier to conceive of 'any' agreement as including agreements both inside and outside the bounds of legal enforceability.

Section 8 also covers cases where the mortgagor 'is to be permitted'. Permission is revocable and falls short of the entitlement afforded to the borrower by virtue of a legally binding agreement. The concept of permission further supports the view that 'any agreement' must be construed as being wider than a merely legally binding agreement. This would also be consistent with underlying policy aims. As Kenny argues in relation to agreement as to deferment, '... given the perceived intention of Parliament ... the necessary "agreement" to defer payment could be found in the conduct of the overdrawn

104 The possibility that this might raise an estoppel in favour of the borrower was admitted in *Rees Investments*, but not considered crucial to the outcome of the case.
account during the currency of the mortgage'.\textsuperscript{105} For that commentator at least, the notion of agreement for the purpose of section 8 extends even beyond agreement in writing to include inferences drawn from the conduct of the parties.

**Deferment**

With regard to the concept of 'deferment', there is considerable uncertainty as to statutory meaning. As Tromans notes, 'Section 8 is not a well-drafted section, and the word “defer” is capable of more than one meaning'.\textsuperscript{106} One possible interpretation is to think of deferment in all cases where the principal is not payable immediately on execution of the mortgage. Alternatively, it could mean deferment of payment after payment itself has become due. Whatever the meaning ascribed, it makes sense to speak of deferment from a particular point in time. A sensible construction for Tromans appears to be to fix that point of time to the date of the execution of the mortgage. The section, however, caters for the borrower who 'is to be permitted' to defer. This expression in the future tense can be understood only if considered distinct from cases where the entitlement is evident from the mortgage agreement itself. Apparently, it is applied to cases where, at some future date, the borrower becomes entitled or permitted to defer. It is an option for the court to look beyond the mortgage agreement and to consider any agreement between the parties. As in *Rees Investments*, if the borrower agrees to a plan for the repayment of principal and, subsequently, accepts an alteration of that agreement so as to relax the repayment schedule further, it is arguable that

\textsuperscript{105} P H Kenny, [1983] Conv 80 at p.81.

he is not 'entitled', but has, instead, been 'permitted' to defer payment of principal. This would amount to a plain, non-technical reading of section 8.

It was the most restrictive understanding of 'deferment' that was adopted in Habib. There it was deemed necessary to involve, '... an existing legal liability to pay which is deferred'.\textsuperscript{107} On this view, therefore, deferment must involve deferment of payment after the date that payment has become due. Carried to its logical conclusion, this restrictive definition entails that the mortgage in Rees Investments could not be caught by section 8. Similarly, in a strict sense neither should an endowment mortgage because the capital is not repayable until the end of the mortgage term and there is no scope for deferment of payment after that date. In this light, it is with some relief that the Court of Appeal in Bank of Scotland v Grimes promoted the common-sense view that, without doing violence to the language of the section, a provision for deferred payment could be found in that agreement. As mentioned above, in doing so the Court of Appeal appears to have drawn an arbitrary distinction between mortgages of a fixed sum for a fixed term (which include both conventional types of housing finance) and the banking overdraft that is repayable on demand. It might be a welcome clarification as to the width of application of the section, but it masks a range of problems of interpretation that arise from poor expression.

\textbf{Provision for Earlier Payment}

A more difficult hurdle to be cleared in respect of the type of mortgage in Habib and Rees Investments is the second element to section 8, namely, that

\textsuperscript{107} Above at 1226 per Dunn L.J.
provision must be made for earlier payment in the event of default or demand by the mortgagee. Unlike the case of deferment, which appears to accept the scope for alteration or variation outside the mortgage agreement, the requirement that 'provision must be made' ties the court to construction of the mortgage instrument itself. It is inevitable that, in cases such as Habib and Rees Investments, where payment is not due until a written demand has been made, the court will be unable to find any provision for earlier payment. This appears to exclude one particular class of borrowers who are potentially at risk of losing their homes should they fall into temporary financial difficulties. The deliberations of the Payne Committee, Parliamentary debate and the nature of the wording employed in both sections, all point to a liberal construction of the legislation. It is an inclusive and protective spirit that pervades both provisions. As was tellingly emphasised by the Payne Committee, the aim was '... to recommend a procedure which will ensure that justice is done in every class of case.'

In the implementation of this recommendation, the legislation patently fails to achieve its goal. In the drafting of section 36 and the remedial section 8, it is unfortunate that the language of the sections has produced major problems of construction. It is regrettable that provisions designed to assist the mortgagor have been interpreted in such a technical and narrow fashion.

**Possession and Human Rights**

The European Convention on Human Rights identifies a number of rights and freedoms so important that they merit a high degree of protection amongst

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member states. The aim of the Human Rights Act 1998 is to apply the articles of the Convention to public authorities in domestic law. Under section 3(1), 'so far as it is possible to do so', domestic legislation must now be construed in a manner compatible with the Convention rights. In addition, under section 6(1) it is unlawful for a public authority to act in a way that is incompatible with a Convention right. The combined effect of these sections is to open up statute and common law to a new regime of scrutiny. Accordingly, there may be scope for challenge to the statutory framework governing the enforcement of residential mortgages. Across a broad spectrum, judges feel that their judgments should be imbued with the spirit of human rights discourse. In the enactment of section 3(1) there is a 'strong adjuration' to find accord with the Convention. Admittedly, it remains to be seen whether the drive towards compatibility will engender a new approach to the resolution of disputes between private individuals. Support for such an approach has already been voiced in Parliament by Lord Irving L.C., that, '... the courts have a duty of acting compatibly with the Convention not only in cases involving other public authorities, but also in developing the common

110 The intention of Parliament was formulated by Jack Straw prior to the enactment of the 1998 Act: 'We want the courts to strive to find an interpretation of the legislation that is consistent with Convention rights, so far as the plain words of the legislation allow, and only in the last resort to conclude that the legislation is simply incompatible with them' (Hansard HC, June 3, 1998, col. 421).
111 It is open to the higher courts to make a declaration of incompatibility where a statutory provision is incompatible with a Convention right: Human Rights Act 1998, s.4. The Lord Chancellor anticipated that, '... in 99% of the cases that will arise, there will be no need...' for such a declaration (Hansard (HL Deb.) 5 Feb. 1998, col 840).
112 Interestingly, courts fall within the definition in section 6(3) that a public authority includes, 'any persons certain of whose functions are functions of a public nature'.
114 R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326 at 373 per Lord Cooke.
law in deciding cases between individuals. And why should they not'. Although a number of possible routes emerge for future exploration, it is, as yet, unclear as to where they will lead.

**Article 8: Privacy or Property?**

Article 8(1) of the European Convention of Human Rights provides that everyone has the right to respect for his private and family life, his home and his correspondence. No public authority can interfere with the exercise of this right except in accordance with domestic law. Even then, such interference must be justified under Article 8(2), '... in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others'.

The applicability of Article 8 to mortgage law depends on whether the property constitutes a home. The question of when a house becomes a home has fallen to be considered by the courts and it has been made clear that 'home' is not a technical term. A home is the place where a person, '... lives and to which he returns and which forms the centre of his existence'. The test to be applied is one of whether there are ‘sufficient continuing links’ between the applicant and the property. The approach of the courts is factual and straightforward, based on the circumstances of each case. It should follow, therefore, that an abandonment of the property will preclude the applicability of Article 8. In contrast, temporary absences will be

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115 Hansard (HL Deb.). November 24, 1997 Vol. 583, col 783.
116 Per Lord Millett in *Uratemp Ventures Ltd v Collins* above at [31].
117 *Gillow v United Kingdom* (1986) 11 EHRR 335 at [46].
consistent with the maintenance of a home. As shown, the sale in Ropaigealach was facilitated because of a lack of occupation of the property. There was, however, little mention in court of the factual circumstances surrounding that absence. The invocation of Article 8 could, perhaps, provide scope for re-evaluation on the basis that the self-help remedy of peaceable recovery by a mortgagee pays scant regard to the need for respect of the home. Unfortunately, decided cases are unsupportive of this assertion. In Wood v United Kingdom\(^{118}\) the European Court considered whether the repossession of the mortgagor’s home in the case of default could constitute an unjustifiable interference with the applicant’s home under Article 8. The answer was resoundingly in the negative. The Court concluded that repossession in such cases was, ‘... in accordance with the terms of the loan and the domestic law and necessary for the protection of the rights and freedoms of others, namely the lender’.\(^{119}\) Although the lender in Wood was not a public authority, the Court relied explicitly upon Article 8(2) and readily applied it to the instant facts. Domestic courts have, however, taken a different tack. In Birmingham Midshires Mortgage Services Ltd v Sabherwal,\(^{120}\) for example, Robert Walker L.J. based his judgment upon the fact that, as the lender was not a public authority, the Article was of no application. Hence, uncertainty prevails as to the interrelationship of Article 8(1) and Article 8(2).

\(^{118}\) (1997) 24 EHRR CD 69.
\(^{119}\) Ibid. at 70.
\(^{120}\) (2000) 80 P & CR 256.
The House of Lords in *London Borough of Harrow v Qazi*\(^{121}\) has recently provided the most detailed scrutiny on the impact of Article 8 upon traditional property law. There the issue was whether a tenant, whose tenancy had come to an end by operation of law, maintained a right to a home. This led to a serious divergence of opinion as to whether Convention rights could undermine the enforcement of existing proprietary rights under municipal law. Lord Hope emphasised that a proper understanding, '... lies in the appreciation of the fact that article 8 regards a person's home as an aspect of his right to privacy'.\(^{122}\) Accordingly, he claimed that the, '... contractual and proprietary right to possession cannot be defeated by a defence based on article 8'.\(^{123}\) Lord Scott was the only one to make these comments specifically relevant to mortgage law and he explained that, '... a mortgagor cannot invoke Article 8 in order to diminish the contractual and proprietary right of the mortgagee under the mortgage'.\(^{124}\) In doing so he categorically denied that there could be, on the basis of Article 8, any, '... weighing up of the applicant’s interest in retaining her home against the mortgagee’s interest in enforcing its security'.\(^{125}\) In circumstances where section 36 is inapplicable, the majority view expressed in *Qazi* is that Article 8 cannot undermine the lender’s entitlement to possession. The majority

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\(^{122}\) *Ibid.* at [82]. Lords Millett and Scott concurred.

\(^{123}\) *Ibid.* at [84]. Lord Bingham, with whom Lord Steyn dissented, argued at [23] that the domestic law should be closely scrutinised for conformity with the European standards of Article 8(2).

\(^{124}\) *Ibid.* at [135].

\(^{125}\) *Ibid.*. Note that this approach completely undermines the view espoused by D Rook that, ‘... the complete absence of any procedural safeguards to protect the mortgagor’s rights is disproportionate to the legitimate aim being pursued with the result that the action could be held to infringe Article 8’ (Property Law and Human Rights (Blackstone Press, 2001), p.201).
reasoning unfolded on two fronts. First, the Convention was held not to apply with horizontal effect (i.e. it does not apply to private individuals). Secondly, the inherent right of a mortgagee to take possession was entirely consistent with principles of domestic law that had stood unchanged for centuries.

Article 6

Elsewhere in the Convention, there are requirements of due process that may aid a mortgagor when read in conjunction with Article 8. Article 6(1) provides that ‘In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. Repossession of mortgaged property counts as a determination of a civil right and, hence, the absence of court proceedings might violate a mortgagor’s Convention right to a fair hearing. Article 6 cannot, however, be hijacked in order to obtain a second hearing. As Kennedy L.J. explained in Southwark London Borough Council v St Brice, ‘... it is clear from the use of the indefinite article in Article 6 that all that is envisaged by the Article is one hearing’. For a mortgagor who seeks to remain in occupation, there is no ability under domestic law to commence proceedings to achieve this ambition. Instead, section 36 only offers the borrower a voice in possession proceedings instigated by the lender. It could be argued that this lack of standing infringes Article 6. The closest decision in point is James v UK. There the applicants complained,

126 See, for example, the comments at [42] per Lord Scott that the views expressed would not apply between tenant and private landlord.
127 See generally D Rook op.cit. pp. 199-203.
128 [2001] EWCA Civ 1138. at [16]
129 (1986) 8 EHRR 123.
unsuccessfully, that the enfranchisement legislation did not provide the landlord with the opportunity to challenge the tenant's acquisition of property once there was compliance with the statutory criteria. It was held that there was no contravention of Article 6. The Leasehold Reform Act 1967 was deemed to provide the criteria by which a landlord could legitimately base any challenge. Where the state law did not bestow a remedy, Article 6 should not provide one. This is because its role is to require procedure. As Rook argues generally, 'If the court can discern a legitimate policy aim behind the offending statutory provision, then it is likely that the interference with the claimant's Convention rights will be justifiable.'

For the mortgagor, however, the problem is quite different. The policy behind section 36 fulfils a valuable social function upon which the mortgagor would seek to rely. Unlike *James v UK*, the terms of the legislation do not provide the basis upon which the mortgagor is to challenge. On the basis of Article 6, therefore, the decision in *Ropaigealach* is open to criticism. This is because it allows a mortgagee to take peaceable re-entry of the borrower's home and, despite section 36, there is nothing the court or the mortgagor can do about it.

*Article 1, Protocol 1*

By contrast to Article 8, a right to property is bestowed by Article 1, Protocol 1. This offers the entitlement to the peaceful enjoyment of possessions and provides that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. This does not, however, impair the right of a

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State to enforce laws to control the use of property in accordance with the general interest and to secure the payment of taxes or other contributions or penalties.

Much of the case law on Article 1 Protocol 1 has been built around, '... acts whereby the state lays hands on, or authorises a third party to lay hands on, a particular piece of property for a purpose which is to serve the public interest'.\textsuperscript{131} Although the boundaries have by no means been exhaustively tested, the customary involvement of the State appears to negate the prospect of the Protocol being used in disputes between private individuals. If, however, the state has assumed responsibility for the protection of 'possessions' through the enactment of social legislation, an omission such as want of due process may provide better grounds for legitimate challenge of such legislation.

It is arguable that the public interest also demands equivalence of access to justice. This is reinforced by Article 14, which guarantees that Convention rights must be secured without discrimination. Indeed, as Lord Nicholls asserted, '... if the State makes legislative provision it must not be discriminatory'.\textsuperscript{132} On the basis of Article 14 (when read in conjunction with Article 8 and/or Article 1 Protocol 1), Rook argues that mortgagors in occupation of their home are placed in a better position than those that are not. She concludes that, 'All mortgagors of residential property, whether in occupation or not ... ought to be given the same opportunity to request more time to pay their mortgage arrears'.\textsuperscript{133}

\textsuperscript{131} Bramelid and Malmstrom v Sweden (1982) 5 EHRR 249 at 255.
\textsuperscript{132} Ghaidan v Godin-Mendoza [2004] UKHL 30 at [6].
\textsuperscript{133} Property Law and Human Rights supra, fn.125, p.203.
The right to peaceful enjoyment will, of course, give way where the public interest or the law demands. In *Wood v UK*, the problems for a defaulting mortgagor seeking protection of this right are demonstrated. There the Commission reasoned that, 'To the extent that the applicant is deprived of her possessions by the repossession ... this deprivation is in the public interest, that is the public interest in ensuring payment of contractual debts, and is also in accordance with the rules provided for by law'. In *Di Palma v United Kingdom*, a challenge made against a forfeiture clause was similarly rebuffed. The Commission acknowledged that this proviso was a common feature of tenancy agreements across Europe. A distinguishing feature of forfeiture clauses, however, is that they must be inserted into the tenancy agreement in order to be operative. The opposite obtains in the mortgage agreement where, in the absence of contractual stipulation, the mortgagee retains the inherent right to take possession of the mortgaged property. Whether this is a distinction without a difference remains to be tested by the courts. It would be somewhat remarkable, however, if the 'educative effect' of human rights was to leave wholly untouched the most unarguably outdated features of our domestic law of property. Even Lord Millett, a most ardent defender of property law principle, regards section 3(1) of the Human Rights Act 1998 as '... dangerously seductive, for there is bound to be temptation to apply the section beyond its proper scope and trespass upon the prerogative

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134 Above.
135 Ibid. at [71].
138 This has lead the Grays to argue of the mortgagee’s right to possession that it is, ‘... doubtful whether a right of such draconian rigour can be sustained much longer as a cornerstone of the modern law of mortgage’ (*Land Law* (Butterworths, 3rd ed, 2003), p. 567).
of Parliament in what will almost invariably be a good cause'. As regards mortgage law, however, the judiciary has yet to succumb to this particular temptation.

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139 Ghaidan v Ghodin-Mendoza above at [61].
CHAPTER 5
Arrears, Repossession and Judicial Discretion

The preceding chapter focused upon the common law right of possession and explored the capacity for the modern mortgagee to assert a right of estate that has existed since medieval times. This Chapter, however, examines the role and operation of judicial discretion as a vehicle through which borrowers facing possession proceedings may be safeguarded. The discretion afforded by section 36 of the Administration of Justice Act 1970 (as amended) enables the court to temper the otherwise absolute right of the lender to take possession of the mortgaged property. Although such discretion may be viewed as giving a statutory jurisdiction to interfere with the contractual terms of the mortgage agreement, it does not challenge the validity of the right to possession. Indeed, section 36 is posited upon the paramountcy of this common law right. The legislative design is to enable the borrower literally to buy time before facing eviction by the lender. This postponement of the evil day is achieved by allowing the borrower a reasonable period within which to make good any arrears. If arrears and future payments are discharged, therefore, the possession order remains dormant. If not, the lender can apply for the possession order to take immediate effect. Hence, the discretion strikes at the exercise of the right rather than at the right itself. As such it reflects both the inability of equity to adapt to modern exigencies and the preference of Parliament to go for a quick fix rather than questioning the underlying rationale for persisting with such an antiquated right.
The Chapter opens with consideration of the traditional inability of the court to modify or to diminish the mortgagee’s rights by exercise of its inherent equitable jurisdiction. The limitations of equity are to be viewed from two further standpoints, first, through the failure to fashion a general equitable discretion to restrain the improper or unjust assertion of the right to possession. Secondly, there will be made a comparative reference to the nature of the discretion to relieve against forfeiture within the law of landlord and tenant. It remains a tenet of equitable intervention that, ‘… a court of equity never interferes to prevent the mortgagee from assuming possession’.\(^1\) It is out of this traditional reticence that the section 36 discretion is fashioned.

The Chapter continues by both analysing and evaluating the extent to which the courts have utilised their statutory discretion to promote social policy. As Lord Denning M.R. famously remarked, ‘Social justice requires that personal rights should, in a proper case, be given priority over rights of property’.\(^2\) The Court of Appeal decision in *Cheltenham & Gloucester Plc v Norgan* lies at the heart of this modern day prioritisation.\(^3\) The guidance to be distilled therefrom marks an admirably creative interpretation of inadequately drafted legislation. As indicated above, section 36 represents a missed opportunity to challenge the legitimacy of according to the lender, and not to the estate owner, the right to possession. Nevertheless, liberated for the fetters of the common law, the courts have shown ambition and determination in their interpretative function to advance the protection of borrowers.

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\(^1\) Marquis Cholmondeley v Lord Clinton (1817) 2 Mer 171 at 359.
\(^2\) Davis v Johnson [1979] AC 264 at 274.
\(^3\) [1996] 1 All ER 449.
Finally, this Chapter will consider the potential for reform and argue that a right of possession that is absolute, stands alone and is, remarkably, independent of borrower default runs contrary to the ethos of the contemporary mortgage. The need for major reform has too long been ignored. It is simply insufficient to tack on added protection for a borrower by imposing extra regulation upon the activities of lenders. Nevertheless, this legislative tendency continues undaunted as, from October 31, 2004, the mortgage specific provisions of the Financial Services and Markets Act 2000 will be in full force. The Act imposes new procedural requirements on institutional lenders and these will include, for example, specific rules and guidance on dealing with cases of arrears and repossession. The objectives of this new regulatory framework will, of course, be appraised. There will also be discussion of whether the underlying notions of consumer protection are likely to pervade the exercise of judicial discretion under section 36 of the Administration of Justice Act 1970.

It might be thought that the judicial treatment of borrowers in temporary financial difficulties is already a well-charted area. Such a conclusion would, however, be premature. This Chapter offers a reappraisal of the operation of the section 36 discretion eight years on from *Norgan*. Accordingly, it takes account of the surprising negativity with which Norgan has been received in some quarters and considers its legacy with emphasis on recent and unreported case law. Analysis of the imminent financial services regulation is of considerable current interest and facilitates a novel comparison to the limits of equity's historical intervention.
The Limits of Equity

Prior to 1936, the usual process by which a mortgagee obtained possession involved the issue of a writ in the King's Bench Division. Provided there was nothing in the mortgage deed that inhibited his common law right, the mortgagee would get a judgment for possession granted swiftly and without equity's supervision. Alternatively, but only where the claim to possession was joined with a claim to an equitable remedy such as foreclosure, the mortgagor could obtain relief from the Chancery. Unlike the common law court, recourse to the Chancery entailed that discretion might be exercised to adjourn the summons, as the court of equity felt fit. In addition, the mortgagor would be notified of the proceedings against him. The same did not occur in the King's Bench Division where the writ of possession could be enforced immediately without service of notice. Indeed, avoiding the Chancery process gave much scope for exploitation by the lender. It was open to the mortgagee to obtain immediate possession through the King's Bench Division, eject the borrower, sell with vacant possession and also enter judgment for the debt on the borrower's covenant. As the Payne Committee notes, this practice occurred, '... in spite of the fact that nothing could be clearer than that he was not entitled both to the land and to the money ...'. The Committee went as far as to question whether mortgagors of that day, '... were aware that they were entitled to any surplus realised on a sale, or, in some cases, whether the

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4 As Rigby L.J. noted in Gaskell v Gosling [1896] 1 QB 669 at 691, 'This entry into possession was always considered a strong assertion of his legal rights, since he did not come under any obligation to account to the mortgagor except in a suit for redemption'.
5 It was not open to the mortgagee to apply for possession only in the Chancery: Wallis v Griffiths [1921] 2 Ch 301.
mortgagees appreciated that they were not entitled to make a profit on the transaction'.

It was this confusion and potential for abuse that, in 1935, led the Supreme Court Rules Committee to conclude that there should be uniformity in the process of obtaining possession. It intended to achieve this through the assignment of all mortgage possession cases to the Chancery. It was not immediately clear how the lender's enforcement rights would be affected. Uncertainty was heightened by the wording of the 1936 Practice Direction which explicitly afforded the Chancery discretion to adjourn a summons. The discretion applied where possession was sought because the borrower was in arrears with instalments. It extended to cases where the master was of the opinion that the mortgagor ought to be given an opportunity to pay off the arrears. The creation of this discretion was reflective of social change and based upon the realisation that buying with the aid of a building society advance could expose homeowners to the risk of temporary financial difficulties. Nevertheless, this innovation failed to take cognisance of the shifting role of possession in the modern armoury of mortgagees' remedies. Insufficient regard was paid to the contemporary needs of the institutional lender who, in the face of default by the borrower, was now primarily interested in vacant possession and sale. The Practice Direction was, therefore, founded upon outmoded assumptions as to the purpose underlying a mortgagee's entry into possession. It was wedded to the quaint notion that a

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7 Ibid.
8 The Report was duly implemented and its improvements refined by practice directions in 1936 and 1937 and R S C Ord.55, r. 5A.
mortgagee would seek possession only as a means of preserving the value of the security.9

Megarry felt that the alteration in the Rules of Court would bring about fundamental change, re-igniting the capacity of equity to challenge common law principle. Somewhat optimistically, he argues that '... the days of the mortgagee's absolute right to speedy possession were at an end: the interposition of a judicial discretion produced a result coinciding with the difference between the common law's view of a mortgage, and equity's view'.10 Likened to the role of a social worker,11 the Chancery Masters endeavoured initially to embed the protection of homeowners against the threat of repossession.12 This favouritism was, however, short lived. The supremacy of the inherent right to possession was to be reasserted by the courts. In Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman,13 judgment in favour of the mortgagor was on the narrow ground of the court's inherent power to adjourn matters before it.14 Farwell J., however, made clear that, if the money owed remained unpaid after the adjournment, the mortgagee would then be entitled to possession. The use of

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9 The Direction was as B Rudden comments, '... appropriate to an age in which the right to possession exists merely to protect income payments ...' ("Mortgagee's Right to Possession" [1961] Conv 278, p. 286).

10 R E Megarry "Notes" [1957] 73 LQR 17, p.17

11 See Master Ball, "The Chancery Master", (1961) 77 LQR 331 at 351.

12 The development of a liberal judicial practice was, as Nourse J. commented in Mobil Oil Co Ltd v Rawlinson (1982) 43 P & C R 221 at 224, '... no doubt assisted by the benevolent attitude which the Legislature had by then assumed towards tenants faced with eviction by their landlords'.

13 [1941] Ch 32.

14 As Farwell J. emphasised, 'It is a novel proposition to me that this court has not power to adjourn any matter on any proper ground ... to say that the court has not inherent power to direct that any matter which comes before it should stand over for a period if the court thinks that this is the proper way to deal with the matter is an entirely novel proposition to me' (ibid. at 38).
discretion was to be tested further as the court encountered a variety of contractual agreements. For example, it was unclear what would occur when a mortgagor had discharged the arrears by the time of the hearing, but was unable to pay off the capital sum that had become due. This problem was eventually faced in *Robertson v Cilla.*\(^{15}\) There the court held that, where the mortgagee was entitled to repayment of the entire mortgage debt, it had no power whatsoever to compel repayment by instalments. Any other conclusion would be '... forcing the parties to an agreement that they never made'.\(^{16}\) This theme was developed further in *Fourmaids Ltd v Dudley Marshall Properties Ltd,*\(^{17}\) where Harman J. limited the scope of the 1936 Practice Direction to mortgages, '... whereby the principal as well as the interest is repaid by the mortgagor by commuted weekly or quarterly sums and whereby the mortgagee precludes himself, so long as those weekly or periodical sums are paid, from going into possession'.\(^{18}\) In *Birmingham Citizens Permanent Building Society v Caunt,*\(^{19}\) a firm stop was placed on the, '...wind of change in favour of the benevolent treatment of mortgagors in possession...'.\(^{20}\)

Sheathing the 'sword' that had been used to attack the right to possession, Russell J. gave the most considered and decisive judgment concerning the discretion of the court. He held that the court had no jurisdiction either to deny possession or to adjourn a hearing merely so as to allow a mortgagor to keep up payments or discharge arrears. The 'sole exception' claimed by Russell J. was an adjournment to allow the mortgagor the opportunity to pay off the debt

\(^{15}\) [1956] 3 All ER 651.  
\(^{16}\) *Ibid.* at 655 per Upjohn J.  
\(^{17}\) [1957] Ch 317.  
\(^{19}\) [1962] Ch 883 noted at (1962) 78 LQR 171 (R E Megarry)  
\(^{20}\) See the comments of Russell J. *Ibid.* at 897.
The hand of the mortgagee was, thereby, strengthened in that the mortgagor now had to demonstrate a reasonable prospect of paying off the mortgage in full. In such cases, moreover, only a short period of postponement, say 28 days, would be appropriate. In this way, Russell J. ensured that the exercise of a liberal equitable discretion had come to an end.

The Claim to General Discretion

In *Quennell v Maltby*, Lord Denning M.R. claimed in bold terms the existence of a general discretion to restrain an improper or unjust assertion of the right to possession:

'Equity can step in so as to prevent a mortgagee, or a transferee from him, from getting possession of a house contrary to the justice of a case. A mortgagee will be restrained from getting possession except when it is sought bona fide and reasonably for the purpose of enforcing the security, and then only subject to such conditions as the court thinks fit to impose'.

Lord Denning was there wary of the lender's motives in seeking possession. It was clear that, instead of achieving the repayment of the mortgage money, the primary ambition of the lender was to deprive a tenant of occupation and

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21 As R E Megarry (1957) 73 LQR 17, p.18 explains, 'The court can use its power of adjournment to give the mortgagor the reasonable opportunity of repaying the capital and so of destroying the mortgagee's right of possession: but the power will not be used to enable the mortgagor to keep the mortgage afoot and yet resist the mortgagee's right of possession under it'.

22 An unlikely event unless the mortgagor has entered or is soon to enter a contract for sale: see *Cheltenham & Gloucester Building Society v Booker* (1997) 73 P & CR 412.

23 [1979] 1 All ER 568; see Pearce, “Keeping a Mortgagee out of Possession” (1979) 38 CLJ 257.

24 Ibid. at 571.
with it security of tenure under the Rent Act 1977. It was to avoid this perceived injustice that he formulated the discretion in such wide terms. Although both Templeman and Bridge L.JJ. agreed that there should be no entitlement to possession, they adopted a markedly different approach than that taken by Lord Denning. Instead of deciding the appeal on the basis of an inherent discretion, the majority felt able to decide the appeal under the law of agency. Hence, Lord Denning's announcement of a sweeping residual discretion is not as convincing as it may, at first glance, appear. Not only is his approach contrary to established authority, but also it has never subsequently been followed.\textsuperscript{25} Indeed, it is widely recognised that, if such broad discretion ever existed, Parliament would not have found it necessary to enact section 36 of the Administration of Justice Act 1970.\textsuperscript{26} Despite this dubious pedigree, Lord Denning's exposition of principle is sometimes still invoked, albeit unsuccessfully, by counsel.\textsuperscript{27}

\textbf{Forfeiture of Leases: A Comparator?}

As shown, equity has consistently failed to offer a protective shield against hasty or improper claims to possession by a mortgagee. Although this was, perhaps, forgivable in the days when entry into possession was necessary to preserve the value of the security,\textsuperscript{28} this is a remarkable omission in a market

\textsuperscript{25} See Chapter 4 for a discussion of the potential for arbitrary repossession of residential property to contravene the right to respect for private life and home enshrined in the European Convention of Human Rights, Article 8.

\textsuperscript{26} See, for example, K Gray, S F Gray \textit{Elements of Land Law} (Butterworths, 3rd ed, 2001, p. 1415); E H Burn, Cheshire and Burn's \textit{Modern Law of Real Property} (Butterworths, 16th ed, 2000, p. 760).

\textsuperscript{27} See, for example, \textit{Ashley Guarantee Plc v Zacaria} [1993] 1 WLR 62 at 69 where it was argued that possession was sought for an ulterior and improper purpose.

\textsuperscript{28} See the detailed discussion in Chapter 2.
where lenders seek vacant possession routinely as part of the enforcement process. This ineffectiveness of equity to protect mortgagors in temporary financial difficulties stands in marked contrast to the ability of the court to grant relief against forfeiture of a lease for non-payment of rent.\textsuperscript{29} This comparison is of interest as a tenant, unlike a mortgagor, may benefit from a much more generous protection of both equity and statute in order to remain in the demised property. This inequality of treatment prompted the Payne Committee to advocate that the courts should, ‘... extend to the mortgagor the same protection in relation to the continued occupation of the house as would be given to a tenant of a property of a similar rateable value’.\textsuperscript{30} Even with the enactment of the Administration of Justice Acts, such parity was never to be achieved.

Both areas share obvious parallels in the history of their development. Like the law of mortgages, relief against forfeiture for non-payment of rent finds its origins in the development of the Chancery. As demonstrated in Chapter 2, at common law the mortgage agreement was construed with the utmost strictness. This severity of approach was, not surprisingly, mirrored in the construction of leases. In \textit{Browning v Beston}, for example, it was held that, ‘... if the rent ... be in arrear, although it be not demanded, the lease shall be void, and the lessor may re-enter’.\textsuperscript{31} In the case of both mortgages and leases, the initial jurisdiction of equity to intervene was developed to prevent unconscionability arising by reliance upon strict legal rights. For

\textsuperscript{29} As demonstrated in the previous chapter, the right to re-enter and terminate a lease by forfeiture offers a landlord the most effective remedy against the long residential leaseholder.\textsuperscript{30} Payne Report, \textit{op.cit.} at para. 1386.
\textsuperscript{31} (1553) 1 Plowden 131. These consequences could not be avoided because, as Holdsworth notes, ‘If the lease was for years, the word “void” was construed in its literal sense. On the non-performance of the condition, the lease ceased to exist’ (H.E.L. vol. VII, p. 292).
example, there was a general equitable jurisdiction to grant relief against forfeiture where a tenant was prevented from compliance with a covenant by reason of mistake, fraud or accident.\textsuperscript{32}

As the law in both areas developed, the direction of equitable intervention began to vary between them. Whereas with mortgages, equity would not interfere with the mortgagee's legitimate rights of estate, under the law of landlord and tenant equity strove to support the tenant who, in contrast with the mortgagor, enjoyed both an estate and the right to possession. Accordingly, where just and equitable to do so a tenant became permitted to keep his tenancy, provided that any rent arrears were paid along with any expenses incurred by the landlord. A further justification for this more tender approach to tenants arises from the right to forfeit the tenancy being considered merely as a means of ensuring the payment of rent. As Lord Wilberforce put it:

'... we should reaffirm the right of courts of equity in appropriate cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be obtained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result'.\textsuperscript{33}

\textsuperscript{32} As Sir Richard Arden M.R. argued in \textit{Eaton v Lyon} (1798) 3 Ves Jun 689 at 692, 'At law a covenant must be strictly and literally performed: in equity it must be really and substantially performed according to the true intent and meaning of the parties, so far as circumstances will admit: but if by unavoidable accident, if by fraud, by surprise, or ignorance not wilful, parties may have been prevented from exercising it literally, a court of equity will interfere'.

\textsuperscript{33} \textit{Shiloh Spinners Ltd v Harding} [1973] AC 691 at 723.
The ability to grant relief against forfeiture is, therefore, grounded in a broad based, equitable jurisdiction that operated prior to any legislative modification. As Parker L.J. recognised, 'Although the right to relief against forfeiture is now statutory, it is in origin an equitable defence. It was a means by which equity stepped in to prevent enforcement of a legal right. It is inextricably mixed with the claim for forfeiture, and it is, in my judgment, a true equitable defence to the legal claim for forfeiture'.

Under mortgage law, however, there is no equivalent defence. Instead, there exists the comparatively paltry equitable jurisdiction to postpone an order for possession for a short period in order to allow the borrower to repay the mortgage debt in its entirety. Unlike with a forfeiture claim, equity offers scant protection to a borrower against the harsh exercise of the lender's remedial powers. This inadequacy of approach arises because of the paramount nature of the mortgagee's historic right to possession and the strict delimitation by statute of the circumstances in which it can be deferred. Although the jurisdiction to postpone possession has been heightened by the Administration of Justice Acts, there is no automatic stay to a possession action upon the remedy of the default by the borrower. Instead, the mortgagor has to be deemed worthy of relief. It is a privilege and, most certainly, not as of right.

Statutory Intervention

Although the decision in *Birmingham Citizens Permanent Building Society v Caunt* promoted much needed clarity, it accentuated the need for statutory

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34 *Liverpool Properties Ltd v Oldbridge Investments Ltd* (1985) 276 EG 1352 at 1353.

intervention. The decision reduced the capacity for equitable intervention to a bare minimum. Equity could now only ensure that a mortgagor was not to be turned out of possession immediately without having the opportunity to repay the debt. Consequently, the Payne Committee was invited to consider '... whether the courts should have power otherwise to postpone the operation of an order for possession of the mortgaged property'.\textsuperscript{36} In doing so, it was necessary to determine whether '... the practice which was frequently adopted by the masters for some years after 1936 should be restored and, if so, whether it should be enlarged, restricted or otherwise modified'.\textsuperscript{37} The remit of the Committee was to ensure that any judicial interference with the exercise of the right of possession was to be placed upon a statutory and contemporary footing.

It is a telling feature of the reform process that the bodies consulted by the Payne Committee viewed an extension of judicial discretion with little enthusiasm. Vested self-interest prevailed. The Building Societies Association opposed any change to the status quo, arguing that a defaulting borrower had ample protection through the due process of Building Society possession proceedings. Under this process, the mortgagor would receive two or three warnings of the threat of proceedings. The borrower would then be interviewed and, where possible, the payments rescheduled in order to cater for temporary financial difficulties.\textsuperscript{38} It was contended that such borrowers had considerable opportunity to approach the Building Society with a view to

\textsuperscript{36} Payne Report \textit{op.cit.} at para. 1345.
\textsuperscript{37} \textit{Ibid.} at para. 1378.
\textsuperscript{38} If, for example, the mortgagor was in arrears due to fecklessness in money matters, or financial hardship due to trade fluctuations, sickness or hardship: \textit{Ibid.} at para. 1379.
suspending or modifying the repayments. Further time to remedy the default remained available throughout the enforcement process and continued beyond the making of a possession order. Accordingly, the Building Societies Association concluded that any further liberality, '... is not worth extending because then the case is usually hopeless'.\textsuperscript{39} The Council of the Law Society also expressed the view that, as a general rule, there was need for possession to be postponed. In cases of hardship, however, it felt that the rule might give way and the borrower permitted to remedy the default, if possible, within a reasonable and specified period. This period, it suggested, should not exceed three months and the power, '... used sparingly and with caution'.\textsuperscript{40}

It is hardly surprising that the Chancery Masters commented upon the balancing function performed by judges in weighing up the competing needs of the parties and voiced the need for wider judicial discretion to be afforded. In relation to the private investment mortgage, the Masters felt that some caution in deferring possession orders was necessary, '... lest investors should be deterred generally from lending their capital'.\textsuperscript{41} Furthermore, they envisaged circumstances where a hardship might be inflicted upon the mortgagee greater than that incurred by mortgagor, especially where the lender is a trustee or a person of modest means dependent on payments of interest. Of more mainstream relevance, in relation to the instalment

\textsuperscript{39} Ibid. at para. 1380. For discussion of the inconsistency with which lenders deal with instances of arrears see L Whitehouse, "The Right to Possession: The Need for Substantive Reform" in P Jackson, D C Wilde, \textit{The Reform of Property Law} (Ashgate, 1997).

\textsuperscript{40} Payne Report, \textit{op.cit.} at para. 1385. The General Council of the Bar, however, argued that the normal period of postponement should be around three months, but that it was appropriate to draw a limit of between one to six months.

\textsuperscript{41} Ibid. at para. 1384.
mortgage the concern of the Masters was that the court would be interfering with the right of the mortgagee to realise its security. Toeing the traditional line, precedence was accorded to the mortgagee's contractual and proprietary rights over the need of the borrower to maintain a home.

The Payne Committee was influenced particularly by the complaint of the Chancery Masters that, '... for many years they were unable to perform a useful public service in mitigating any undue hardship'. The Committee acknowledged that judges sought neither unfettered discretion nor powers to alter the terms and conditions of mortgage agreements. Although it was felt that a wide discretion would be helpful in exceptional circumstances, the Masters envisaged that a period of six months would, in most cases, suffice. In the face of vehement resistance by the Building Societies Association, the Committee recommended reform. This change was geared to mitigate any undue hardship experienced by a mortgagor in transient financial difficulties. Accordingly, the Committee devised a discretion that would allow the courts, in appropriate cases, to adjourn a summons for possession for a reasonable period so as to allow the borrower to remedy the default. Although the Report envisaged that in the majority of cases a period of six months would be sufficient to protect the mortgagor, it declined to place a limit to the period of suspension or postponement.

The emergent section 36 of the Administration of Justice Act 1970 was, therefore, designed to confer only a modest measure of discretion. As

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42 This is a mortgage in which the parties contemplate and provide for repayment by instalments over a period of years.
44 As the Payne Report concluded, 'Any man's income or earnings can fall suddenly through no fault of his own, and he should be able to look to the court for any protection he may need against onerous claims arising out of the change of his means and circumstances' (ibid. at para. 1386(b)).
discussed in the previous chapter, section 36 provides that, where the mortgagee seeks possession, the court may either adjourn proceedings, stay or suspend the execution of the judgment or delay the date for delivery of possession. It can do so, however, only in the event that '… the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage'.\textsuperscript{45} Beyond this, the Legislature offers no guidelines as to how the court is to approach its task.

**A Reasonable Period?**

In the absence of Parliamentary guidance as to the exercise of discretion, the most compelling threat to certainty and reliability is inconsistency in the judicial treatment of borrowers. This was to prove particularly problematic in relation to the period of postponement allowed. Despite the Payne Committee's view that a six-month period would usually offer the borrower sufficient time within which to remedy the default, the courts were to take a different tack. Although it was quickly established that the court had no jurisdiction to postpone possession proceedings for an indefinite period,\textsuperscript{46} the court did not share the Committee's sense of restraint. As early as 1971, for example, a period of five years was suggested as being an appropriate period of suspension.\textsuperscript{47}

\textsuperscript{45} Section 36 (2).
\textsuperscript{46} Royal Trust Co of Canada v Markham [1975] 1 WLR 1416 at 1423; but see the obiter of Buckley L.J. in Western Bank v Schindler [1976] 2 All ER 393 at 400 to the effect that, where a mortgagor is not in default under the mortgage, it may be appropriate to postpone possession for an indefinite period.
\textsuperscript{47} See Wareham (1971) 69 LS Gaz 268.
The reasonableness of the selected time frame, moreover, was intended to depend upon the circumstances of each individual case. Accordingly, the discretion pivots upon the evidence that the court accepts and the weight to be given to it. It is, therefore, ironic that the court traditionally did not insist upon formal evidence of the borrower's ability to discharge the arrears and, moreover, had no need to give reasons for its decision.\textsuperscript{48} This judicial tendency was criticised by Haley as, '... broad brush and conveniently impressionistic'.\textsuperscript{49} A brace of cases serve well to illustrate this observation. First, in \textit{Cheltenham & Gloucester Building Society v Grant}\textsuperscript{50} an order for possession was suspended to be reviewed in twelve months on mortgage payments being made by the Department of Social Security. This was so even though the benefit payments left a monthly shortfall of £135 and ensured that arrears would continue to accrue. The borrower had sought to convince the court of his prospects for employment, but it was argued on appeal that the evidence placed before the judge had been flimsy in the extreme. The Court of Appeal made clear, however, that it would only interfere with the exercise of discretion in circumstances where it was unquestionably wrong. Although Nourse L.J. expressed grave doubts as to whether the same decision would have been reached by the appellate court, he refused to stigmatise it as being plainly wrong.\textsuperscript{51}

\textsuperscript{49} M Haley, "Mortgage Default: Possession, Relief and Judicial Discretion" (1997) 17 LS 483, p. 492.
\textsuperscript{50} (1994) 26 HLR 703.
\textsuperscript{51} Nourse L.J. explained, 'It may well be that another judge would have taken the opposite view. But the discretion in this case was entrusted to this judge' (ibid. at 708).
Secondly, in *Bristol & West Plc v Dace*\(^{52}\) the borrower had built up arrears of £37,000, having made no repayments for almost three years. A total of four adjournments were granted before a possession order was issued. Thereafter a total of ten adjournments were granted, including four orders for suspension, each one of which had been specifically breached. Analysing the history of the case, Simon Brown L.J. felt that relief had been afforded to the borrower even though the preconditions to the exercise of the section 36 discretion could not have been properly satisfied. There was simply no evidence that the borrower could meet his monthly instalments, never mind making any repayment of the arrears. Although welfare benefits covered almost half of the current instalments, the borrower was not in a financial position to meet the shortfall. The incautious use of discretion in the lower court had the consequence of protracted litigation and an increase in indebtedness. In such circumstances, the provision of any relief to the borrower was entirely unjustified and unmerited.

It was apparent, therefore, that specific guidance from the higher courts was required to rein in what Thompson calls '... the wide degree of latitude'\(^{53}\) given to the trial judge. Such guidance emerged from the Court of Appeal decision in *Cheltenham & Gloucester Building Society v Norgan*.\(^{54}\) There the appellate court sought to displace complacency concerning the exercise of discretion and attempted to make the investigative procedure principled, formalised and thorough. It also attacked the tendency of the county court to standardise the period of postponement as falling somewhere between two

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\(^{52}\) October 2, 1998 (CA) Unreported.


\(^{54}\) Above.
and four years. Instead, a reasonable period was presumed to be the remaining period of the mortgage term.

With the decision of the Court of Appeal in *Cheltenham & Gloucester v Norgan*\(^5\) the tide has turned fully in favour of maximising the relief available to the defaulting mortgagor within a considered modern framework. The *Norgan* approach applies to cases where the security is not in jeopardy and the mortgagor can demonstrate an ability to discharge arrears by periodic payments. It is achieved by allowing postponement for the lifetime of the mortgage, and entails that substantial arrears can be managed by increased monthly payments over the remainder of the mortgage term. Waite L.J. accepted that the court, in exercise of its section 36 discretion, was called upon to perform a balancing act, '... matching a desire on the one hand that the mortgagor should be allowed a proper opportunity of making good his default, with a concern that a mortgagee who has contracted for a steady flow of interest punctually paid by instalments as they fall due should not be compelled to wait for payment through an enforced capitalisation of interest'.\(^5\) Accordingly, Waite L.J. felt it imperative that the limits of the court's generosity should be charted clearly.

In the post-*Norgan* world, the mortgagor must provide a detailed budget, enabling the court to enter into an in-depth analysis of figures and future projections. This will involve an examination of what the borrower can reasonably afford to pay, the reason for the build up of arrears and an

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\(^5\) Above, noted by M P Thompson [1996] Conv 118.

assessment of the nature and seriousness of the financial difficulties. If necessary, the court can adjourn proceedings to manufacture an initial period of wait and see as to whether a prospect will emerge that the mortgagor can, within a reasonable period, pay the sums due. This was felt to be a proportionate response in the case of a student working to obtain qualifications, which in turn would create an employment opportunity and an ability to pay off mortgage arrears. In *Bristol & West Building Society v Ellis*, however, an immediate order for possession was granted even though the borrower argued that she should remain in possession for the remaining years of her sons' university education.

*Ellis* illustrates that different considerations arise where the only chance of discharging the arrears is through the sale of the property. The *Norgan* approach has no relevance to this scenario. If sale is inevitable, understandably, the court is more guarded and the general rule is that a mortgagee should not be unduly delayed in the capitalisation of its security. Although much again depends upon the evidence adduced by the borrower, the courts do not here always act uniformly. The translation of discretion into practice remains somewhat unpredictable as the court may decline to defer realisation of the security, give the borrower a short period of grace or

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57 Waite L.J. *ibid.* at 458, 459, emphasised that analysis of such budgets would not present an increased burden on the shoulders of the district judge who, owing to the depressed state of the housing market and the caseload for the county courts, had an expertise or a "feel" for such cases.

58 *Skandia Financial Services Ltd. v Greenfield* [1997] CLY 4248.


60 See also *Town & Country Building Society v Julien* (1991) 24 HLR 312 where the borrower's claims that he would obtain good employment were rejected emphatically.

61 *Mortgage Service Funding plc v Steele* April 10, 1996 (CA) Unreported.

62 In *Cheltenham & Gloucester Plc v Krausz* [1997] 1 WLR 1558, for example, the borrower was allowed a period of 28 days.
delay possession for over one year.\textsuperscript{63} As Auld L.J. explained, 'It all depends on the individual circumstances of each case, though the important factors in most are likely to be the extent to which the mortgage debt and arrears are secured by the value of the property and the effect of time on that security'.\textsuperscript{64} In reality, it also turns upon the subjective sympathies of the trial judge.\textsuperscript{65}

Where \textit{Norgan} applies, the court will consider the full term of the mortgage and pose the question of whether it would be possible for the borrower to pay off the arrears by instalments over that period. Waite L.J. was further persuaded that to adopt the full term of the mortgage as the starting point for calculation of a reasonable period would stem multiple applications under section 36 and save court time. Of the case before him, he remarked that the parties had been before the court with depressing frequency with the costs incurred in relation to those attendances being borne by the borrower. If, however, the court was to adopt at the outset the period of time most favourable to the borrower, section 36 '... should not be employed repeatedly to compel a lending institution which has already suffered interruption of the regular flow of interest to which it was entitled under the express terms of the mortgage, to accept assurances of future payment from a borrower in whom it has lost confidence'.\textsuperscript{66} This statement has led to the realisation that the borrower has a single opportunity to get back on track with mortgage

\textsuperscript{63} See \textit{National & Provincial Building Society v Lloyd} [1996] 1 All ER 630.

\textsuperscript{64} \textit{Bristol & West Building Society v Ellis} above at 162. Insufficient evidence includes, for example, a mere statement in an affidavit (\textit{Royal Trust Co of Canada v Markham} above); the instruction of a conveyancer (\textit{Mortgage Service Funding plc v Steele} above); and the market prognosis of an estate agent (\textit{Target Home Loan Ltd v Clothier} [1994] 1 All ER 254).

\textsuperscript{65} In \textit{Steele ibid.}, Nourse L.J. had little sympathy for the borrower, 'Unless there is firm evidence that a particular sale is about to be completed, it is not the practice of the court to prevent the mortgagee from enforcing his remedy of obtaining possession and exercising his own power of sale over the property'.

\textsuperscript{66} Above at 460.
repayments, and that on any subsequent failure to make payments, the sympathy of the court will have been lost.\textsuperscript{67} Hence, it will limit the escalation of indebtedness arising from multiple applications under section 36 and the corresponding charges and interest levied by lenders in such circumstances.

In a dense summary, Evans L.J. took pains to isolate the key issues to be addressed by the court in the exercise of its discretion under section 36.\textsuperscript{68} First, it must consider how much the borrower can reasonably afford to repay, both now and in the future. Secondly, if the borrower has a temporary difficulty in meeting his obligations, it must investigate how long that difficulty is likely to last. Thirdly, the court must acknowledge the reasons for the arrears that have accumulated. Fourthly, it must consider how long remains of the original mortgage term. Fifthly, the court must examine the relevant contractual terms and identify what type of mortgage is it. In particular, it must deduce when the principal due is to be repaid. Sixthly, the court must decide whether the case is one where the court should exercise its power to disregard accelerated payment provisions under section 8 of the Administration of Justice Act 1973. Seventhly, it must decide whether it is reasonable to expect the lender, in the present circumstances, to recoup the arrears of interest either over the whole of the mortgage term, or within a shorter or longer period. Eighthly, the court must consider whether it is reasonable for the lender to capitalise the interest or not. Finally, regard must be had to any reasons affecting the security that should influence the length of the period for payment.

\textsuperscript{67} This is of course in marked contrast to the provision of relief against forfeiture where a remedied breach is treated as though it had never occurred. \\
\textsuperscript{68} Above, at 463.
The Use of Precedent

The presumption in *Norgan* that a reasonable period will be the remaining term of the mortgage may be criticised as overly favouring the borrower. Adopting such a starting point necessarily involves an incursion into the freely negotiated contractual rights held by the mortgagee. These are rights with which no court of equity historically interfered. Accordingly, it runs counter to traditional legal thinking to afford such generosity to a mortgagor in breach of contract. This is, of course, precisely why the Court of Appeal adopted a liberal stance. It represents a tacit recognition that the law of mortgages is out of step with the exigencies of modern life and that, in this area at least, judicial reform is an appropriate way forward.69

The appellate court, however, had to justify its actions. In the striking absence of authoritative precedent for the adoption of such liberal guidelines, Waite L.J. dredged the depths of case law for support of the proposition that a reasonable period should be the remaining years of the mortgage. First, he cited Buckley L.J. in *Western Bank v Schindler* who had conceded that '... in a suitable case the specified period might even be the whole remaining prospective life of the mortgage'.70 Secondly, he invoked the views of Scarman L.J. in *First Middlesborough Trading & Mortgage Co Ltd v Cunningham*.71 Scarman L.J. reasoned that, 'Since the object of the instalment mortgage was, with the consent of the mortgagee, to give the

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69 The Court of Appeal had been waiting patiently for the proper opportunity to recast the exercise of discretion. Two years earlier, Nourse L.J. in *Cheltenham & Gloucester Building Society v Grant* above had acknowledged that the appellate court was biding its time until a suitable case arose in which the discretion could be spelled out in it broadest terms.
70 [1977] Ch 1 at 14.
mortgagor the period of the mortgage to repay the capital sum and interest, one begins with the powerful presumption of fact in favour of the period of the mortgage being the "reasonable period". 72

At face value, these views appear both sensible and progressive. Nevertheless, it has been argued with some force that the reliance upon Schindler and Cunningham, as support for the postponement of possession for the remainder of the mortgage term, is mistaken and misguided.73 The problem identified focuses upon the factual peculiarities of both that makes them readily distinguishable. In Schindler, there was no default by the mortgagor and yet the mortgagee sought to rely on its estate rights to recover possession. Although the appellate court refused to lay down any rule which prevented the lender from exercising its common law right in such circumstances, Buckley L.J. could not countenance the possibility that, 'A defaulting mortgagor would ... be in a better position than one not in default.'74 Hence, it was necessary to harness section 36 in order to produce a rational and just outcome. As Scarman L.J. acknowledged, Parliament could not have intended such a foolish result.75 The emphasis was, therefore, upon the ability to grant relief to a non-defaulting mortgagor. It is, indeed, a tortuous logic that can apply the statutory concept of a reasonable period, within which default must be remedied, to circumstances where there has been no breach.

72 Ibid. at 74. It was important that, '... the mortgagor would be able to maintain her agreed instalments and to pay a specified sum per week off the arrears ... well within the stipulated period for the repayment of the mortgage by agreed instalments' (ibid. at 75).
73 See, for example, Girvan J. in National & Provincial Building Society v Lynd [1996] NI 47 at 59.
74 Above, at 398.
75 Ibid. at 403.
whosoever of the mortgage agreement. Accordingly, the opinions expressed in *Shindler* should be viewed with some scepticism.

In *Cunningham*, Scarman L.J. was faced with what he considered to be an unjustified and unrealistic limitation upon his section 36 discretion. It had already been decided in *Halifax Building Society v Clark* that the borrower would, in mortgages where there was an accelerated payment clause operative on default, be required to redeem the entire mortgage within the reasonable period set by the court. This had the effect of driving the proverbial coach and horses through section 36. Scarman L.J. rejected this interpretation and concluded that the reference 'to any sums due' was limited to the sums in arrears. The correctness or otherwise of this gloss upon the wording of section 36 was never to be tested. Ironically, the day after his judgment, the law was reformed by the enactment of section 8 of the Administration of Justice Act 1973. The need for a statutory curative suggests, however, that Scarman L.J.'s understanding of the pre-existing law was erroneous. Hence, it is not the safest authority to invoke in support of the radical departure taken by the appellate court in *Cheltenham & Gloucester Building Society v Norgan*.

**The Northern Ireland Approach**

It is interesting that the approach of the Court of Appeal in *Norgan* has been subject to criticism emanating from Northern Ireland. There the presumption

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76 This strained interpretation of s.36 obliged Buckley L.J. to conclude also that, in non-default cases, the period of suspension can (and, indeed, must be) open ended and indefinite.

77 [1973] 2 All ER 33. This was viewed by Pennycuick V.C. as being the only possible construction of the words 'any sums due' as employed in s.36.

78 See full discussion in Chapter 4.
of a reasonable period being the term of the mortgage was a thorny issue in *National & Provincial Building Society v Lynd*. As Girvan J. explained, 'The inference of a presumption in favour of the length of the term of the mortgage being prima facie the relevant period is not in my respectful view a logical or justifiable inference to be drawn from the inherent context of the legislation.'

He pointed out that, until the decision in *Norgan*, the Northern Ireland approach had been to follow the restrictive practices of the English courts. Accordingly, in *National & Provincial Building Society v Williamson and Humphrey*, a reasonable period was regarded as a 'relevantly limited' period with an outer limit of around four to five years. Girvan J. appreciated the checklist drawn up by Evans L.J. in *Norgan* and accepted that the lifetime of the mortgage may well be a reasonable period in the circumstances of a given case. Nevertheless, he argued that the Court of Appeal had overstepped the mark in promoting a general presumption in favour of the full term of the mortgage. It has been suggested that the decision in *Lynd* represents a more, '...pragmatic and balanced approach'. The inference of such arguments is that *Norgan* is too borrower-friendly and is founded in the notion that most borrowers are honourable in their intentions to meet their mortgage repayments. It is contended that, without this presumption, the court would be more able to consider what is fair and just to both parties. This approach is, however, questionable. Given the social importance attached to the preservation of the family home, and the compelling argument that the

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79 Above. See H Wallace (1986) 37 NILQ 336 for a general discussion of mortgagees and possession as they relate to Northern Ireland.
mortgagee receives ‘... substantially what he bargained for, albeit at a later date’, surely it is not inappropriate to cater, where possible, for the repayment of arrears over the lifetime of the mortgage. Furthermore, the lesson from post-Norgan case law is that the presumption is readily displaced when there is a real threat to the lender’s security. The case of Realkredit Danmark v Brookfield House, for example, shows that where the debt has got out of control, there is nothing that the court can or will do for the borrower. There the defendant was unable to provide evidence of an income sufficient to meet the mortgage repayments. Against a property valued at £1.5 million, moreover, the amount due under the mortgage was £2,175,000. The Court of Appeal was eager to remark that, in such circumstances, it would not be reasonable to take the remainder of the mortgage as an appropriate period in which arrears should be repaid.

The judgment in Norgan is, moreover, underpinned by the explicit policy of the Council of Mortgage Lenders that mortgagees, ‘... seek to take possession only as a last resort’. It is for this reason that Waite L.J. was able to draw upon the perceived logic and spirit of the legislation so as to justify the interference with the sanctity of the contractual agreement and to achieve a realignment of their competing claims. It is, in addition, clear that the lender in the majority of repossession cases will seldom be as well protected as on the facts of Norgan. There the mortgage term had thirteen years remaining, the outstanding arrears amounted only to £7,000 on a loan of £90,000 and the equity in the property was estimated at around £225,000. Put simply, there

84 January 21, 1999 (CA). Unreported.
85 See Evans L.J. above, at 462.
can be no more convincing case for the adoption of the lifetime of the mortgage as the reasonable period in which to discharge the arrears. There is no doubting that the decision in Norgan represents, what the Grays describe as, '... a new willingness to re-write the repayment terms of a mortgage'. 86 Nevertheless, the policy parameters of the discretion are established to the extent that, '... the mortgagor should be given as much protection against eviction as possible, but only if, and for as long as, the mortgagee's investment is safeguarded'. 87

Discretion Evaluated

Eight years forward, the usefulness of the Norgan guidance can be evaluated by reference to subsequent case law and academic commentary. There is no doubt that, by enlarging the boundaries of what can comprise a reasonable period, the section 36 discretion has come to form the most important statutory safeguard for those hoping to retain possession of the family home. The acid test, of course, is whether consistency and fairness has become a more commonplace feature of possession cases. Despite the specificity of the checklist of considerations provided by Evans L.J. in Norgan, many judges still find shelter behind sweeping generalisations, impressionistic declarations and pronouncements of judicial commonsense. This is illustrated by the oft-quoted view expressed by Dillon L.J. in First National Bank v Syed:

'It cannot be proper, with a view ostensibly to clearing the arrears within a reasonable period, to make an order for

86 Elements of Land Law, op. cit. p. 1424.
87 Haley op. cit. p. 494.
payments which the Defendants cannot afford and have no foreseeable prospects of being able to afford within a reasonable time. Equally it cannot be proper, under these sections, to make an order for payments which the Defendants can afford if those will not be enough to pay off the arrears within a reasonable period and also to cover the current instalments'.

The guidance provided in Norgan is itself open to the criticism that it fails to prioritise the relevant considerations and gives the impression of being merely a random list of loosely associated factors. This lack of effective structure and coherence entails that the mere consideration of any of the highlighted issues will result in a seemingly unchallengeable exercise of judicial discretion. The marked reluctance of the Court of Appeal to interfere with the exercise of discretion in the lower courts, save in cases where the exercise is plainly wrong, caters for a diversity of approach on similar sets of facts. Some district judges, mindful of the burden of costs and accrued interest, will still suspend possession only for limited periods. Others are prepared to adopt a more flexible approach. For example, the use of stepped orders, whereby the level of monthly payments is gradually increased, can be of considerable help to borrowers, but it is by no means a universal practice. Despite this detailed catalogue of relevant considerations, the quality of justice dispensed to a borrower in default may vary greatly between the county courts. It is ironic

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88 [1991] 2 All ER 250 at 255.
that the discredited practices operating pre-Norgan appear to offer more certainty and uniformity than is currently available.

The liberality promoted in Norgan, at least in principle, opens the way for maximum leniency within the confined parameters of section 36. Not surprisingly, the decision has been generally welcomed as favourable to the borrower in temporary financial difficulties. Nevertheless, some commentators have sounded a note of negativity. Smith, for example, continues to highlight the danger that lenders will tend towards earlier possession actions, in the knowledge that subsequent default will trigger immediate possession. This is not, however, wholly convincing as it is equally possible that the mortgagee could delay proceedings so as to allow the indebtedness to grow beyond that which can be discharged by periodic payments.

The inconsistent, unclear and unfair manner in which lenders draft their contracts has also recently come to the fore. In Governor & Co of the Bank of Scotland v Ladjadj and Haya Tal, for example, Laws L.J. bemoaned that, ‘... the respondents’ documentation is disgracefully sloppy and well capable of creating confusion’. In his eyes, the contract constituted an ‘arithmetical maze’, causing disagreement between lender and borrowers as to the arrears deficit. Remarkably, the divide between their respective calculations was

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89 See, for example, Haley, op. cit. p. 496.
90 P Sparkes is overtly critical and accuses the Court of Appeal of, ‘... deliberately flouting existing county court practice ... making one feel sorry for the lender’ (A New Land Law, Hart, 2nd ed, 2003, p.671). This reasoning entirely overlooks the point that Norgan applies only when there is equity in the property and disregards the financial reality that the mortgagee will charge interest on the arrears and enforcement costs and generate even more profits from the transaction.
around £40,000. Laws L.J. regarded it as, '... nothing short of scandalous that a major lending institution should foist this jigsaw puzzle of a contract on the borrowing public'. Robert Walker L.J. agreed and felt it ‘... deplorable that the defendants’ right to their home should depend on the interpretation and combined effect of no fewer than four contractual documents, which do not use, as they should, a clear and consistent terminology’.

The reality is dawning also that there has been scant uniformity in the policies of lenders towards enforcement and that this in itself has caused unnecessary problems for the courts. As Whitehouse observes:

'Some lenders will seek a court order immediately upon default. Others will wait for up to 18 months after default before initiating court action. This leads to inconsistency in the treatment of mortgagors in default, with some borrowers being allowed the opportunity to clear their arrears without court action and additional court costs, and others being subject to court proceedings immediately upon default'.

In the light of both the varied exercise of judicial discretion and the disparate and often unhelpful policies of lenders, it is clear that consistency and cost saving might be improved. There is no doubt that the present system is erratic, confusing and in need of statutory reform.

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93 It is of note that mediation was put forward as a recommended means by which the parties should sort out their differences. Laws L.J. described the alleged refusal of the lender to take part as being, if substantiated, 'wholly lamentable'.

The Law Commission

Being published in 1991, the recommendations for reform made by the Law Commission\(^\text{95}\) obviously pre-date the *Norgan* developments. Nevertheless, they offer an interesting yardstick by which case law developments and the forthcoming reforms to financial services might be measured. The Commission noted that, subject to two exceptions, the court has no jurisdiction to withhold a remedy where the lender had established rights and had applied to court for an order to enforce the security.\(^\text{96}\) The two exceptions referred too are Part IV of the Administration of Justice Act 1970 (as amended) and mortgages subject to the Consumer Credit Act 1974.\(^\text{97}\) It was felt that there should be a single jurisdiction applicable to all mortgages in order to replace the dual schemes currently running. The new model proposed was to comprise of an extension to the existing jurisdiction under Administration of Justice Acts and, importantly, would allow the court to re-schedule mortgage payments. The court would have discretion as to how arrears would be paid, that is, the level of the instalments as well as the period over which they should be paid. As the court would enjoy the power to alter the contractual payment schedule, the lender might have to accept, ‘...the payment of sums as they became due by reduced and/or differently timed instalments’.\(^\text{98}\) In addition, the revamped discretion would be exercisable in cases where the borrower was unlikely to be able to repay any existing

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\(^{96}\) *Ibid.* at para. 7.48
\(^{97}\) The divergence of judicial approach under these two regulatory frameworks is considered explicitly in Chapter 6.
\(^{98}\) *Op.cit.* at para. 7.50.
arrears and to revert back to the originally agreed schedule within a reasonable period. The Commission acknowledged the risk that, while the imposition of new repayment plans upon unwilling mortgagees may encourage better lending practices, an overly sympathetic order might hold back enforcement and, thereby, damage the value of the security. Accordingly, it was recommended that the court should have no power to alter the total amount due under the mortgage or the rate of interest payable or to levy interest on outstanding amounts.\(^9\)

The Report argued that a mortgagee should not be entitled to take possession without first serving an enforcement notice and obtaining a court order. This development would, obviously, have an impact upon judicial discretion, '... whereas under the present law a mortgagee applying for a possession order merely has to establish the existence of a mortgage, under the new scheme the mortgagee would have to satisfy the court that it had followed the enforcement notice procedure and that it was reasonably necessary for it to have possession to enable it to sell'.\(^1\) Undoubtedly, this proposal affords the most attractive and effective option for reform yet to be tabled. As Haley claims, '... it would resolve the tension between the common law and equity which has traditionally dogged and still inhibits the granting of relief ... [and] ... promote the notion of social justice as advocated originally by the Courts of Equity'.\(^2\)

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\(^9\) It is, however, clear from Part VIII of the Report that the court would be able to effect such changes under the proposed general jurisdiction to set aside or vary the terms of the mortgage agreement. One of the four grounds upon which the court would be able to re-open a mortgage with a view to doing justice between the parties is where, '... the effect of the terms of the mortgage is that the mortgagee now has rights substantially greater than or different from those necessary to make the property adequate security' (ibid. at para 8.5).

\(^1\) *Ibid.* at para. 7.32.

The Financial Services and Markets Act 2000

Although the recommendations of the Law Commission remain shelved, from October 31, 2004 the acquisition mortgage market will fall under the regulatory supervision of the Financial Services Authority. As described in Chapter 1, the regulation of the mortgage as a consumer contract has been planned for a number of years. In July 1999, the Government issued Regulating Mortgages, a preliminary consultation document, which sought comments on the extent to which mortgages should be regulated. The Government proceeded in January 2000 to announce its intention to pursue a policy of statutory regulation of mortgage lending. Two consultation papers were produced. In December 2001, the Government set in train plans to extend the scope of regulation to include mortgage arranging and advice, entailing that those aspects of the draft rules laid out in CP98 required re-evaluation. Following extensive further consultation and policy statements, the Financial Services Authority published its final conduct of business rules, now in the form of the ‘Mortgages: Conduct of Business Sourcebook’ (MCOB). Two aspects of

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102 Mortgage Regulation: The FSA’s high level approach (CP70) was published in November 2000 and preceded CP98 The Draft Mortgage Sourcebook, including policy statement on CP70, published in June 2001.

103 CP 146 The FSA’s Approach to Regulation Mortgage Sales (August 2001); CP186 Mortgage Regulation: Draft Conduct of Business Rules and Feedback on CP 146 (May 2003).

104 Feedback on CP 98 (The Draft Mortgage Sourcebook) (August 2002); Regulating Mortgage Sales: Final Conduct of Business Rules – Feedback on CP186 and Made Text, vol 1, (October 2003)


these mortgage specific rules are of relevance: first, the provision of arrears information and, secondly, the policy and procedure for dealing with arrears.

**Provision of Arrears Information**

The Financial Services Authority ascribes a particular meaning to the concept of 'arrears'.\(^{107}\) Where the mortgage involves a payment plan, a consumer is considered to be in arrears when two regular payments have been missed. On a mortgage that does not involve a payment plan (for example, an overdraft), a consumer will be in arrears where the agreed overdraft limit has been exceeded for longer than one month. Where a customer is in arrears, new requirements are imposed in relation to the provision of information to that customer.\(^{108}\) The obligation is to act as soon as possible or, in any event, within fifteen working days of becoming aware that a customer is in arrears.\(^{109}\)

By way of initial response, the customer should be provided with the FSA information sheet on mortgage arrears and a list of the due payments that have been missed. Information should cover the total sum of arrears outstanding, any charges incurred and the charges that the customer is likely to incur as a result of remaining in arrears. If a customer's account has previously fallen into arrears within the past twelve months, the lender must either issue a further disclosure or a statement of the payments due, the shortfall, any charges incurred and the total outstanding debt. The customer should in the latter case be warned that repossession is amongst the possible consequences of remaining in arrears.

\(^{107}\) *Feedback on CP 98 (The Draft Mortgage Sourcebook) op. cit. para., 4.28.*

\(^{108}\) *MCOB 13.4.1.R.*

\(^{109}\) The original timeframe of five working days was increased following the consultation process.
Where the arrears are attracting charges, the lender must send the customer a regular written statement of payments due, the actual arrears, the charges incurred and the total debt.\textsuperscript{110} The requirement of a written statement will still apply if the payment shortfall is attracting charges to cases where a repayment plan has been agreed between the parties and the borrower is acting in accordance with it.\textsuperscript{111} Before commencing an action for repossession a lender must provide a written update of arrears information and a clear statement of the action the lender intends to take regarding repossession.\textsuperscript{112}

The early detection and treatment of arrears should produce clarity and reliability, in addition to quick resolution of minor cases of default. Undoubtedly, these are aspects of the mortgage enforcement process that will benefit from regulation by the Financial Services Authority. More specifically, the new requirements might help to eradicate the woeful inadequacies of lenders' policy and practices spotlighted by the courts in recent times.\textsuperscript{113}

\textbf{Arrears: Policy and Procedure}

It is considered a pivotal requirement that lenders have in place, and operate in accordance with, a written policy and procedures for dealing fairly with customers in arrears.\textsuperscript{114} The policy and procedures\textsuperscript{115} should include, first, using reasonable efforts to reach an agreement with a customer over the

\textsuperscript{110} MCOB 13.5.1.R. Although provision was made for a monthly statement in the \textit{Draft Mortgage Sourcebook, op. cit.} this requirement has been relaxed to a minimum of '... at least once a quarter'.

\textsuperscript{111} MCOB 13.5.2G(3).

\textsuperscript{112} MCOB 13.4.5R. A lender must also ensure that a customer is informed of the need to register for housing with the local authority.

\textsuperscript{113} See, for example, \textit{Governor & Co of the Bank of Scotland v Ladjadj and Haya Tal} above, fn.92.

\textsuperscript{114} MCOB. 13.3.1.R(2).

\textsuperscript{115} See generally MCOB.13.3.2E(1)
method of repaying any payment shortfall, having regard to the desirability to agreeing with the customer an alternative to taking possession of the property.\textsuperscript{116} Secondly, and if arranged by the customer, liaison with a recognised third party source of advice regarding the payment shortfall.\textsuperscript{117} Thirdly, the lender should adopt a reasonable approach to the time span over which arrears should be repaid, having particular regard to the need to establish a repayment plan that is practical in terms of the circumstances of the customer. In the \textit{Draft Mortgage Sourcebook}, specific reference was made to \textit{Cheltenham & Gloucester Building Society v Norgan} and it is the expectation of the Financial Services Authority that the principle in that case would be followed in the determination of what might be a reasonable repayment period.\textsuperscript{118} This ethos is reflected in MCOB where the FSA make clear that, 'In appropriate cases this will mean that repayments are arranged over the remaining term of the regulated mortgage contract'. In addition, unless it has good reason not to do so, a lender should grant a customer's request to a change to the date on which or the method by which payment is due. If it refuses this request, the lender must give the customer a written explanation of its reasons. Finally, repossession of the property should occur only where all other reasonable attempts to resolve the problem of arrears have failed.

The overriding concern is, therefore, that a lender should give proper consideration to arrears issues, follow a documented approach and ensure

\textsuperscript{116} This entails that customers should be given a reasonable period of time to consider any proposal for payment: MCOB 13.3.4(1).

\textsuperscript{117} The formulation of this sub-paragraph has been altered from that proposed in the Draft Mortgage Sourcebook, which obliged the customer merely to 'request' rather than arrange, and specified, moreover, that the third party source of advice should be free to the customer: CP98, June 2001, Annex B, MORT 12.3.2E(1)(b).

\textsuperscript{118} See CP 98 at para. 15.7.
that proper internal systems are put in place for the fair treatment of customers.\textsuperscript{119} Such limited goals are at the heart of a merely procedural form of regulation. As to the substantive rules, there is nothing that is innovative in the expectation that firms should have regard to the practicality of any repayment plan or that, in appropriate cases, repayments might be rescheduled over the remaining term of the loan. This is of course the tack adopted by the judiciary over the last eight years to maximise the protection of borrowers in temporary difficulty. It may be that, in consequence, judges will be better disposed towards lenders who evidence the alteration of the terms of the mortgage contract in these ways. Effectively, a borrower may already have benefited from a \textit{Norgan} repayment plan before the case is heard. When there is little evidence of a desire on the lender's part to adhere to the spirit of the regulation, judicial sympathy might shift towards the borrower. Lenders caught within the remit of MCOB impliedly accept that such courses of action are valid methods of dealing with mortgage arrears.

There is no question that MCOB will lead to increased transparency. More questionable is whether the rules will produce an equivalence of treatment for different borrowers in regulated contracts with different lenders following different enforcement policies. It is to be regretted that there is scope for the adoption of alternative approaches and the standard expected cannot, in any sense, be regarded as exacting. There is already a range of voluntary industry standards that have been published\textsuperscript{120} and the Conduct of Business

\textsuperscript{119} MCOB 13.3.3G.

\textsuperscript{120} For example, the Council of Mortgage Lenders adopt a statement of practice on the handling of arrears and repossessions and employ a voluntary agreement on the recovery of mortgage shortfall: see http://www.cml.org.uk.
rules appear to draw very heavily upon such precedents.\textsuperscript{121} While statutory as opposed to voluntary regulation must mark a general improvement to the way in which lenders deal with consumers, unfortunately there is broad industry support for the proposition that it should not dictate the credit management policies which individual lenders must adopt. The Consultation Paper, which sets out to explain the policy underlying the rules, makes abundantly clear that its aim is to set minimum standards on the treatment of customers and not to intervene substantially in management issues.\textsuperscript{122} As such, there is no intention to dictate the enforcement policies of lenders. A telling example is to be found in the MCOB suggestions as to alternatives to repossession that might be considered under MCOB 13.3.2E(1). The espoused options remain the same as those already embraced by the Council of Mortgage Lenders, that is, to extend the term or change the type of regulated mortgage contract; to defer payment of interest due or to treat the payment shortfall as if it was part of the original amount borrowed. The wording, moreover, is wholly bereft of obligation. The guidance reads that, ‘... depending on the individual circumstances, a firm may wish to do one or more of the following …’.\textsuperscript{123} Much like the historical intervention of equity, therefore, the forthcoming consumer protections fail to adequately safeguard the borrower in that they do not strike at the existence and exercise of the substantive rights and remedies of a mortgagee. The conduct of business sourcebook may be an excellent vehicle to achieve a minimum threshold of procedural requirements, but it is

\textsuperscript{121} The repossession of property ‘only where all other reasonable attempts to resolve the position have failed’ (MCOB 13.3.2.E(1)(f)) is a simple reformulation of the Council of Mortgage Lender’s established policy to take possession only as a last resort.

\textsuperscript{122} CP98, para. 15.2. The rules are drafted, ‘ ... in such a way that firms are able to adopt alternative approaches’ (Feedback on CP 98 (The Draft Mortgage Sourcebook) op. cit. para.4.31.

\textsuperscript{123} MCOB 13.3.4G(1).
sure to have only a negligible impact on the exercise of judicial discretion as

This chapter has considered the exercise of judicial discretion to
safeguard borrowers in temporary financial difficulties. It has done so by
reference to the historical and continuing failure of equity to interfere with
possession, the strict statutory parameters within which judges must operate
and the potential impact of the imminent financial services regulation of the
residential mortgage market. It paves the way for examination of the separate
concerns that prevail in the context of the Consumer Credit Act 1974. As the
following chapter will demonstrate, the 1974 Act places different tools at the
disposal of judges when a lender seeks possession under its regulatory
framework.
CHAPTER 6

Mortgages and the Consumer Credit Act 1974

If the mortgage is a 'regulated credit agreement' under the Consumer Credit Act 1974, the court does not enjoy its discretion under section 36 of the Administration of Justice Act 1970 (as amended). Instead, the ability of the court to protect the borrower, and to facilitate the enforcement of a 'regulated credit agreement', is prescribed within a markedly different legislative code. This alternative framework is rooted generally in notions of consumer protection, inequality of bargaining power and social justice. The attendant disparity in the approach of the courts to these different types of mortgages has, not surprisingly, been the subject of some criticism. In both its Working Paper and its subsequent Report, the Law Commission questioned the desirability of such dual governance. The opportunity to achieve uniformity has, however, recently been spurned. Although the Financial Services and Markets Act 2000 will take the newly styled 'regulated mortgages' outside the scope of the 1974 Act, it has affirmed, and even rendered more complex, the plurality of regimes geared to the regulation of mortgages.

This chapter is designed to identify and to evaluate the issues of policy and practicality that arise where mortgage enforcement and borrower rights are subject to the Consumer Credit Act. It will spotlight the role of the judiciary in this process and examine the marked divergence of approach that is

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1 Section 38A of the 1970 Act.
3 Transfer of Land – Land Mortgages, (Law Com No. 204, 1991) at paras. 4.9, 9.6.
adopted under the respective codes in relation to possession proceedings. Of particular note is the discretion to impose a so-called 'time order' or to reschedule mortgage agreements under the 1974 Act. On a straightforward reading of the relevant provisions, the discretion extends to lengthening the time for repayment and altering the interest rate applicable to the bargain. Although Lord Nottingham pronounced that the Chancery might mend no man's bargain, this is exactly what may now occur when the Consumer Credit Act is in operation. Indeed, the court is afforded a generous discretion to rewrite terms of a freely negotiated bargain. As will be demonstrated, however, this discretion is ungenerously exercised. In comparison to the strenuous efforts of judges to achieve fairness within the comparatively tight constraints of section 36, it is remarkable that the broader discretion under the Consumer Credit Act has failed to signal a more liberal and creative role for judicial intervention.\textsuperscript{4} This Chapter will, therefore, consider why these broad statutory powers are exercised restrictively and whether their reach should be extended beyond the limited parameters of a regulated agreement.

This Chapter will concentrate also upon the rules regarding extortionate credit bargains that are found within the Consumer Credit Act 1974.\textsuperscript{5} These provisions mark a statutory extension of equity's inherent jurisdiction to combat unfair terms and are reflective of an ethos of consumer protection. Unlike with the time order, this ability to interfere with the terms of

\textsuperscript{4} This led A Dunn [1996] Conv 209 at p.209 to suggest that, '... with mortgage repossessions remaining at a premium, one would have expected the waters flowing from sections 129 and 136 CCA to have been as well chartered [sic] as those of the Administration of Justice Acts which contain similar postponement of possession provisions'.

\textsuperscript{5} Sections 137-140. Although at the time of writing these provisions apply to all mortgages, this will cease to be so on 'Mortgage Day' (31\textsuperscript{st} October 2004). On that date, the different provisions as to extortionate credit bargains contained within Financial Services and Markets...
a regulated agreement is not framed as a direct affront to the mortgagee's common law right to possession. Nevertheless, the presence of such unfair terms may be employed as a barrier to mortgage enforcement. It is for this reason that the spectre of an extortionate credit bargain is commonly encountered as a counterclaim in possession proceedings. This tendency offers scope for a further evaluation of the judicial capacity and willingness to restrict the exercise of mortgagees' remedies. The present chapter will, moreover, demonstrate that the formulation of the rules on extortionate credit bargains is far from ideal and has, hitherto, failed to provide efficient and effective protection for the borrower. In the light that further reform is likely, the guise that it might adopt is to be explored.

A Tale of Two Committees?
As with its forerunners the Administration of Justice Acts 1970 and 1973, the Consumer Credit Act 1974 emerged from a committee scrutiny process. As regards the reforms that were mortgage related, the relevant committees' recommendations were, in the main, implemented. The Payne Committee gave hurried, albeit specific, consideration to orders for possession in mortgage actions. As such, it could be viewed as a quick fix to the localised problem of a residential mortgagor experiencing temporary financial difficulties and faced with an unsympathetic mortgagee. The remit of the Crowther Act 2000 will apply to regulated mortgages. Other borrowers will continue to seek the protection of the 1974 Act.

6 As S Bright (1999) 115 LQR 360 at p.360 explains, '... a borrower will seldom challenge a mortgage that is working satisfactorily and the majority of cases arise only when the borrower is seeking to defend a possession action'.

7 See, for example, the criticisms contained in the recent White Paper, Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century, (Cm 6040, 2003, DTI).

Committee\(^9\) was, however, very different. This committee was charged with taking a comprehensive overview of existing law and practice governing the provision of consumer credit and the making of recommendations as to the general reform of an entire area of the law. Until this point the regulation of credit transactions had been determined piecemeal by the application of a variety of unrelated statutes.\(^10\) Accordingly, the range of inquiry of the Crowther Committee was potentially far reaching. Indeed, the replacement of this motley collection of statutes with a comprehensive and overarching code was to prove one of the most ambitious and complex legislative initiatives ever undertaken in commercial law.\(^11\) Testament to this is the fact that it took some 11 years following Royal Assent for the 1974 Act to come fully into force.

The conclusions of the Crowther Committee were framed to ensure consumer protection in a wide range of credit transactions and were not, in any sense, mortgage specific. As Goode commented of the resulting legislation, ‘The Act contains no provisions dealing specifically with the approach to be adopted by the court in dealing with actions for the recovery of protected goods or the enforcement of a land mortgage’\(^12\). Although acquisition mortgages were expressly excluded from the Committee’s remit, the government had become concerned by high-pressure salesmanship

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\(^9\) Consumer Credit (1971) Cmnd. 4596, at para. 3.
\(^10\) For example, the Hire-Purchase Act 1965, the Pawnbrokers Acts, the Moneylenders Acts and the Bills of Sale Acts.
\(^12\) R Goode, The Consumer Credit Act (Butterworths, 1979), p.324.
targeted at existing homeowners to borrow against the equity in their homes.\textsuperscript{13} The perceived danger was that, as the Crowther Committee pointed out:

'... there is no necessary tie, in most cases, between the loan and the purpose for which it is used – indeed, many of the advertisements emphasise the borrower’s freedom to spend it on anything he chooses. Undoubtedly, there are people who have been led by this sort of advertising to endanger the security of their homes for the sake of some unnecessary extravagance'.\textsuperscript{14}

This concern was heightened by the fact that such lenders often fell outside the then extant money lending legislation. It was, therefore, inevitable that this development in financial lending would fall subject to statutory control. It was viewed merely as one of a range of credit transactions from which the consumer required enhanced statutory protection.

As mentioned, the mischief at which the Crowther Committee was directed entailed the drawing of a distinction between first mortgages to buy a home and non-acquisition mortgages where the use of the money was purely for consumption purposes. The purpose of such mortgages, coupled with their relative novelty, was sufficient to bring those transactions into the centre of the Committee’s line of vision. In contrast, the Crowther Committee accepted that there was no such compelling need for the rationalisation and reform of the first mortgage market. This area was already governed by a complex and developed body of law, '... where the main institutions providing credit –

\textsuperscript{13} See “Reform of the Law on Consumer Credit” (1973) Cmnd. 5427, at para. 9.
\textsuperscript{14} Crowther Report, \textit{op. cit.} at para 2.4.52.
building societies, local authorities and life assurance offices – are already subject to a special and quite detailed control legislation'.\(^\text{15}\) This is in marked contrast to the view expressed by the Payne Committee that the mortgage market was appropriate for consumer protection measures because the government had, ‘... for some years encouraged the purchase, instead of renting, of houses by persons of modest means’.\(^\text{16}\) Although the distinction between the two types of transaction was to be factored into the 1974 Act, it adopted a somewhat arbitrary and awkward form. Instead of making a qualitative differentiation due to the purpose of the loan, the legislature tackled the issue by focusing upon the amount of the advance. With a ceiling of £5,000, it was purposefully set to exclude the majority of acquisition mortgages.

Due to the restricted vision of the Crowther inquiry, the greatest impact on substantive mortgage law in the post-1925 era arose from the deliberations of the Payne Committee. It is, therefore, ironic that the focus of the Payne Committee had been both conservative and limited. Despite the changes to the way mortgage finance was being employed and the preferment of the mortgage in the government’s social and housing policy, the Payne Committee flatly refused to consider the potential role of judicial discretion in claims of exorbitant interest and harsh or unconscionable terms. To do so was thought to be outside its terms of reference and, in any event, an unwanted development.\(^\text{17}\) This notion of undesirability did not, however, deter the Crowther Committee from establishing such issues at the core of its

\(^{15}\) Ibid. at para. 1.1.5.  
\(^{16}\) Payne Report op.cit. at para. 1386.  
\(^{17}\) Ibid. at para. 1389.
recommendations. In this way, it was left to the consumer credit controls to facilitate an important and radical source of statutory regulation for mortgages. The fact that this regulation emerged in the slipstream of a package of general consumer reforms, and was not achieved following a systematic and through review of mortgage law, has since proved problematic. Consequently, the 1974 Act embraces a different ethos, procedure and protective mechanism for borrowers than the more specialised jurisdiction offered under section 36 of the Administration of Justice Act 1970 (as amended). The 1974 Act also imports a distinctive and technical terminology so as to convey meaning across the whole range of transactions that it covers. It was devised with the aim of, '... ignoring existing legal categories ... re-classifying transactions using criteria of relevance to the purpose at hand'.\(^{18}\) The 1974 Act embodied a new conceptualisation and required a new language in which to express it. Unfortunately, this is not a language that is readily understandable by property lawyers.

**The Catchment of the 1974 Act**

As a result of the Crowther Committee recommendations, the majority of second (i.e. non-acquisition) mortgages became governed by the Consumer Credit Act 1974. This currently regulates the provision of credit to individuals on amounts not exceeding £25,000.\(^ {19}\) The mortgage must, moreover, fall within the category of 'regulated consumer agreement',\(^ {20}\) that is, a credit

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\(^{18}\) K Lindgren (1977) 40 MLR 159 at p.162.
\(^{19}\) See the Consumer Credit (Increase of Monetary Limits) Amendment Order SI 1998/996. The original limit of £5,000 lasted until 1985 when it was raised to £15,000 by the Consumer Credit (Increase of Monetary Limits) Order 1983, SI 1983/1878.
\(^{20}\) Consumer Credit Act 1974, s. 189 (1).
agreement for a sum not exceeding the applicable statutory limit. It is the low financial ceiling that is determinative of the application of the legislation. This is apparent in the light of the fact that the overwhelming number of house purchase loans will exceed £25,000. In addition, certain agreements are expressly taken outside the scope of regulation, for example, a loan by a building society or local authority to be used for the purchase of a home.21 Loans from banks do not, however, fall within the categories of exemption. Hence, the provisions of the Act are posited upon on dubious and unhelpful distinctions according to the sum that is borrowed and the status of the lending institution that is making the advance. Even if these distinctions held some merit in 1974, they are simply untenable in the contemporary mortgage marketplace. It should surely be the type of financial product that triggers protection and not its amount or, indeed, its source.

The adequacy and scope of the legislation requires to be evaluated in light of changing circumstances. Some thirty years later, the frequency and purposes for which such loans are sought and provided have extended and, in a culture of increased indebtedness, the significance of this expansion of the mortgage market cannot be ignored. Traditionally regarded as a fringe area where high-risk borrowers seek loans from less respectable lenders, the second mortgage market is now a rapidly expanding and awkwardly regulated area. This expansion is nowhere better illustrated than by the targeted bombardment of consumers, with the advertising campaigns of number of high profile ‘fringe’ lenders, that has become a standard feature of the

21 Consumer Credit Act 1974, s. 16; Consumer Credit (Exempt Agreements) Order 1989 (SI 1989/896).
commercial media. Some lenders now offer loans of up to £100,000, exceeding by four times the 1974 Act ceiling. It is ironic that the borrowing of such large sums, coupled with the unpredictable movements of the housing market, now places such borrowers in the high-risk bracket. Of course, as is clear from the Crowther Report, the unlocking of the equity in one's home or, alternatively, the consolidation of one's debts by taking a homeowner loan, is no new phenomenon. Nevertheless, the increase in the amounts borrowed, the availability of such mortgages taken and the lenders willing to make such advances, make the problem most acute. As will be discussed below, there is also a discernible tendency of the judiciary to interpret as narrowly as possible the provisions of the 1974 Act. This serves emphatically to underline the inadequacies of the current controls.

The Enforcement Process

In the eyes of the Crowther Committee, the success of the Consumer Credit Act 1974 was to hinge upon its ability to perform three primary functions: the redress of bargaining inequality, the control of trading malpractices and the regulation of remedies for default.\textsuperscript{22} It is this third goal of consumer law reform that, for present purposes, is of particular interest. As the Report details:

‘... the third, and very important function of the law in the protection of the consumer is to regulate the rights which a creditor would ordinarily be able to enforce under general law. This may be done by restricting or prohibiting certain types of extra-judicial remedy – e.g. the enforcement of the right to repossess goods – and by

\textsuperscript{22} Op.cit. at para. 6.1.15.
giving the court a discretion to order payment by instalments and to allow the debtor to remain in possession of the goods, despite his default, upon certain terms.23

Accordingly, it becomes necessary to appraise the adequacy of the protection afforded to the borrower through the process of enforcement and the judicial treatment of arrears. By way of initial observation, it can be said that the Consumer Credit Act 1974 provides for limitations and procedural hurdles that are distinctive to those transactions within its remit. In its restriction of extra-judicial remedies, the Act avoids the drawback associated with section 36 in that the latter has no application to disputes that are not the subject of proceedings.24 It is significant, therefore, that the 1974 Act imposes limitations on the rights of mortgagees when there has been a breach simpliciter of a regulated agreement. First, by virtue of section 126, such mortgages are enforceable only by order of the court.25 This entails that the mortgagee cannot terminate a regulated agreement without such order. Under the general law of mortgages, the mortgagee needs only the consent of the court either to take possession of residential property without the consent of an occupier or to effect foreclosure.

Secondly, under section 87(1), where the borrower is in breach of a regulated agreement, a default notice must be served before the lender can enforce the security. Such advance and formal notification is not required

23 Ibid.
24 See Ropaigealach \textit{v} Barclays Bank Plc [2000] 1 QB 263 where it was held that the court had no s.36 jurisdiction when the common law right to possession is exercised outside the court room.
25 Under s.141(1) it is the county court which has exclusive jurisdiction over any action by the creditor or owner to enforce a regulated agreement or any security relating to it.
under the general law of mortgages. The statutory default notice must specify
the breach and the type of remedial action required or, in the alternative, the
compensation required for non-remediable breach. As such, it bears a striking
resemblance to the enforcement notice to be served by a landlord under
section 146 of the Law of Property Act 1925 in order for forfeiture of a lease to
take place. Indeed, this similarity admits case law decided under the 1925
legislation as a guide as to what amounts to a valid notice under section 87.26

Thirdly, by virtue of section 89 compliance by the borrower with the
requirements of the default notice, within the prescribed time frame, acts as a
curative. It entails that the breach is treated as though it had never occurred.
Again there is marked similarity to the position of the tenant who remedies a
breach of leasehold covenant, but there is no equivalent absolution under
general mortgage law. Put simply, the making good of a breach of mortgage
covenant offers no guarantee that a possession order will be suspended
under the provisions of the Administration of Justice Acts. Under section 36,
the court is also to take on board possible future conduct of the borrower.
There can be little justification, however, for treating mortgages in general so
differently from regulated credit agreements or, indeed, leases. It would be a
simple legislative task to introduce a proviso into the Administration of Justice Acts that would prevent the court granting a possession order in
circumstances where no breach was extant at the time of the hearing.

The Consumer Credit Act does not operate simply to restrict the

26 As J E Adams observes, ‘The wording is so obviously modelled on section 146 of the Law
of Property Act 1925 that there can be no doubt that the cases under that section will be
authority for example on whether or not a breach is capable of remedy’ (“Mortgages and the
enforcement powers of the lender. There are further provisions that are in-built to protect the direct interests of the borrower. Section 94, for example, provides that the debtor may repay early on the giving of notice to the creditor. It is, moreover, made explicit in section 113 that a creditor shall not derive from the enforcement of the security any greater benefit than he would obtain from enforcement of a regulated agreement if the security were not provided. A possible lacuna appears, however, where a mortgagee sells or tries to sell without an enforcement order. If the mortgagee seeks to enforce without a court order, it is only open to the debtor to claim an injunction against the creditor alongside a section 142 declaration that the creditor is not entitled to enforce the mortgage. Despite the ethos of borrower protection that pervades the 1974 Act, it is expressly provided that the operation of section 104(2) of the Law of Property Act 1925 is to remain unaffected. The latter provision caters for a selling mortgagee to give a good title to a purchaser. This reference entails that a sale in breach of section 126 of the Consumer Credit Act will still give good title to the good faith purchaser who is without notice of the breach. This saving also raises fundamental issues regarding the availability of the injunction where a creditor has entered into a contract for sale. If the effect of the contract is, as is considered fully in Chapter 7, to extinguish the mortgagor’s equitable right to redeem then there appears nothing that can be maintained by injunctive relief.

27 Note that, as a probable consequence, the lender is denied the full advantages of bringing foreclosure.
28 Section 142(1) enables the court where it is considered just to do so to declare that the creditor is not entitled to do something that can, under the Act, be done under an enforcement order only.
29 Section 177(2) of the 1974 Act. As regards registered land see s.52 of the Land Registration Act 2002.
The circumstances in which the courts may make adjustments to, or interfere with, agreements are prescribed within Part IX of the 1974 Act. Section 127(1), for example, details the wide discretionary powers of the court to dismiss an application for an enforcement order where the lender has contravened any of the key provisions of the Act.\textsuperscript{30} Before dismissing an application, however, the court must consider it just to do so in the light of further factors. First, the court must look to any prejudice caused to any person by the contravention and the degree of culpability involved. Secondly, it must determine whether it is instead an appropriate case for the exercise of the court's powers afforded under sections 127(2), 135 and 136 of the 1974 Act. As an alternative to dismissal, under section 127(2) the court can adjust the liabilities of the parties through the compensation by discharge or reduction of sums payable by the debtor. Section 135 allows for the imposition of conditions on an enforcement order or, indeed, its suspension at the direction of the court. Section 129 enables the court to grant a time order that, in turn, offers wide scope for the variation or amendment of any term of the agreement. It is the operation of section 136\textsuperscript{31} in conjunction with section 129 that has sparked the most controversy. The role and employment of the time order must now be considered.

\textsuperscript{30} For example, where there has been a contravention of s.65(1) relating to the execution of the credit agreement.

\textsuperscript{31} Section 136 provides that, 'The Court may in an order made by it under this Act include such provision as it considers just for amending any agreement or security in consequence of a term of the order'.
Time Orders: Past, Present and Potential Use

As with the section 36 discretion, the availability of the time order extends to a mortgagor in financial difficulties an opportunity to remedy any default. Under section 129, it is open to the court to make a time order allowing either time for the arrears to be discharged or, in the case of non-monetary breach, time for the remedy of that breach. This jurisdiction is triggered where possession is sought by the lender or, alternatively, on the express application of a borrower. The latter option is, however, available to the borrower only if the lender has previously served either a default notice or a section 76 notice or seeks enforcement of the mortgage. Otherwise, the 1974 Act allows a time order to be granted when it is just to do so. Hence, before possession is ordered the court can, under section 129(2)(a), consider the appropriateness of a time order allowing the borrower the opportunity to repay the debt by instalments on terms that the court divines to be reasonable. In applying to non-monetary breaches, the operation of section 129(2)(b) affords the debtor a period within which to remedy the breach without threat of enforcement. In a like vein to the law of forfeiture of leases, section 130(5) provides that a remedied breach is to be treated as though it never occurred.

Although a parallel between the time order and the discretion afforded under Administration of Justice Acts is easy to draw, there exist key differences. In particular, the court may make a time order where it considers

32 This relates to the enforcement of the security for non-breach events.
33 As mentioned, this inhibits injunctive relief as a restraint on enforcement without a court order because it must be ancillary to other relief claimed in an action over which the county court has jurisdiction: *Kenny v Preen* [1962] 3 All ER 814.
34 Under paragraph (a), the court should have regard not only to the means of the debtor, but also to those of any surety.
it just to do so and, unlike section 36, is not concerned with whether the borrower is likely to repay within a reasonable period. The possibility of overlap between these provisions is, however, apt to cause uncertainty. Such is demonstrated in First National Bank v Syed where an order of the lower court was mistakenly made under section 36 of the Administration of Justice Acts and required reclassification by the Court of Appeal as a time order under the Consumer Credit Act.35

The appellate court in Syed emphasised that, whichever statutory code was applicable, the discretion should not be exercised to facilitate the repayment of arrears by instalments where such repayments are beyond the financial means of the borrower. Dillon L.J. also gave an initial indication that time orders could be, ‘ ... directed at rescheduling the whole of the indebtedness ...' under a regulated agreement.36 This point was pursued further in the conjoined proceedings in Southern & District Finance v Barnes37 where three successful applicants attained a rescheduled timetable for repayment. This decision represents the latest Court of Appeal consideration as to the powers of the county court to apply time orders under sections 129 and 136 of the 1974 Act. The deliberations of the appellate court pivoted upon two issues.

The first consideration was whether the expression ‘any sum owed’ bestowed upon the county court the discretion to reschedule the whole of the loan agreement or merely the money due and unpaid at the date of the action. The lender argued that there was no power to alter future instalments or the

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36 Ibid. at 256.
accompanying rate of interest because future payments are not yet 'any sum owed'. The borrower countered by alluding to the underlying ethos of the 1974 Act. The opinion of Judge Grenfall in *Premier Portfolio v Morris*[^38] was dredged from obscurity and cited. He was of the view that '... the power to make a time order under section 129 is essentially a social provision to assist the debtors who find themselves unable to repay loans through no fault of their own'. Judge Grenfall adopted a broad brush approach to the interpretation of the statutory language, 'Where the "sum owed" is in the context of a loan agreement, in plain language that refers to the whole sum owing under the agreement ... I see no reason to construe such a provision narrowly.' The approach of Legatt L.J. in *Barnes* was, however, more cautionary. He concluded that the term 'any sum owed' must be a reference to any sum that the lender is entitled to recover by action. This entails that, where the full loan had not been called in, it is only the outstanding arrears that constitute 'the sums owed'.[^39] In order to side step this obstacle, the borrower conjured up a principle of property law that, when a lender brings an action for possession, it is demanding payment of the entire debt.[^40] Although the lender argued that the 1974 Act comprised a self-contained code, Legatt L.J. agreed with the borrower that the Act, ' ... does not prevent a claim for possession from constituting a demand for repayment of the outstanding indebtedness'.[^41] As the Encyclopaedia of Consumer Law suggests, ' ... whether the principal has in fact become presently payable will depend ... on the terms of the

[^38]: June 11, 1983 (Unreported).
[^39]: In *Cedar Holdings Ltd v Thompson* [1993] CCLR 7, the creditor had issued a final demand for the payment of the entire sums due and, accordingly, the entire balance was a 'sum owed'.
[^40]: See Romer J. in *Smith v Smith* [1891] 3 Ch 550 at 552.
[^41]: Above, at 697.
agreement, which may or may not require some further action on the part of
the creditor, e.g. a demand, to render the principal due'.

The second issue in *Barnes* concerned the alteration of interest rates
and, in particular, whether the court enjoyed this power by virtue of section
136. The approach of Judge Grenfell was again invoked, 'If the rescheduling
of the instalments required an adjustment to the interest rate then in my view
such an adjustment is a consequence within the meaning of section 136'.

This view is, however, susceptible to the criticism that, if agreements can be
re-written generally under section 136, the particular jurisdiction to re-write
extortionate credit bargains, as afforded by section 137, will be rendered
redundant. Accordingly, the lender contended that the rate of interest could be
re-set only in circumstances where the bargain was demonstrated to be
extortionate. Legatt L.J. considered both arguments and placed emphasis
upon the words, 'in consequence of a term'. He concluded that they were of
limiting effect, 'Unless the contemplated amendment is truly a consequence of
a term of the time order, and the making of it is also just, there is no power to
make it.'

A further opportunity to clarify the circumstances in which an
amendment will be truly 'in consequence of a term' of the time order emerged
in *Equity Home Loans v Lewis*. There £4,000 was borrowed at a rate of
44.1% which entailed that, over the fifteen year term, the total sum repayable
was £19,000. At first instance, a time order was granted that rescheduled the
whole debt over a period extended by three years with the rate of interest

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42 A G Guest, M G Lloyd, *Encyclopaedia of Consumer Credit Law* (Sweet & Maxwell,
43 *Premier Portfolio v Morris* above.
44 Above, at 698.
45 (1995) 27 HLR 691 (the third of the conjoined appeals in the *Barnes* proceedings).
applicable to arrears reduced to nil. The Court of Appeal supported this use of section 136, '... since otherwise throughout the extended period of the loan interest would have been payable on the arrears at the exorbitant rate prescribed, and that would have defeated the purpose of giving time'.\textsuperscript{46}

The decision in \textit{Equity Home Loans} provides welcome clarification as to the scope and operation of the key sections of the 1974 Act. Although undoubtedly reaching the correct outcome, it is somewhat surprising that such fundamental interpretational issues were addressed only some twenty years after the provisions came into force. As this case evidences, only very tentative steps have yet been taken by the Court of Appeal to unleash the full force of the provisions.\textsuperscript{47} The appellate court has remained reticent and careful. Where the choice is between a narrow or expansive interpretation, the narrow has consistently prevailed. Of the admittedly few cases in which the courts have used the availability of the time order to relieve a borrower in financial difficulties, three features are evident. The first relates to severity of approach. Given the overtly borrower friendly ethos of the Act, it is surprising that the boundaries of judicial discretion have not been pushed outwards and that the courts have declined the opportunity to express the distaste for unequal bargains by granting time orders. The second feature relates to the characterisation of the bargain struck between lender and borrower. As shown in cases such as \textit{Equity Home Loans v Lewis}, the overt reluctance of the courts to classify a transaction as an extortionate credit bargain begs the

\begin{footnotes}
\footnotemark[46] \textit{Ibid.} at 701.
\footnotemark[47] This stands in stark contrast with the approach of the Court of Appeal towards the application of its section 36 jurisdiction which has been stretched to its limits: see \textit{Cheltenham & Gloucester Building Society v Norgan} [1996] 1 WLR 343.
\end{footnotes}
question whether the bar is currently set too high to achieve the avowed policy goals, represent commercial good sense and promote ready understanding. The third feature, as highlighted by the House of Lords in *Director General of Fair Trading v First National Bank*, 48 concerns the general ignorance that surrounds this area of the law. This is, moreover, in sharp contrast to the operation and utilisation of the section 36 discretion under the Administration of Justice Act 1970. As Lord Bingham acknowledged: ‘Where problems arise in practice, it appears to be because borrowers do not know of the effect of sections 129 and 136; neither the procedure for giving notice of default to the borrower nor the prescribed county court forms draw attention to them; and judgments will routinely be entered in the county court without the court considering whether to exercise its power under the sections.’ 49

Lord Bingham’s comments arose in relation to the application of the Unfair Terms in Consumer Contracts Regulations 1999. 50 The focus of the court was upon Condition 8 of the First National Bank’s standard form loan agreement. This condition specified that, on default by the borrower, the Bank could charge the contractual rate of interest on principal and interest outstanding at the date of judgment. The condition was devised so as to prevent the obligation to pay interest merging with the judgment and producing the lower

48 [2001] UKHL 52.
49 *Ibid.* at [23].
rate normally applicable to judgment debts. A number of cases had previously arisen whereby the county court had made an order for repayments to help borrowers in temporary difficulties. In effect, however, the condition led to cases where borrowers, who managed to meet the repayments under the court order, discovered that they still faced additional sums owing because the contractual rate of interest continued to accrue outside the payment schedule ordered by the courts. On entry into the contract, moreover, borrowers had not been warned about the effect of the condition. Accordingly, the Director General sought an injunction to prevent the continued use of the term on the grounds that it was unfair under the Regulations. Although the House of Lords concluded that the term was not prohibited by the 1974 Act and was not unfair under the 1994 Regulations, it approved the approach adopted by the Court of Appeal in Southern and District Finance v Barnes. There the court had effectively utilised its existing powers under sections 129 and 136 to hold that no additional interest should be payable beyond that which had already accrued. As Lord Bingham commented, 'It was right to do so: provided the amendment is a consequence of a term of the time order, the court should be ready to include in a time order any provision amending the agreement which it considers just to both parties'.

It is perhaps of some surprise that the Government has long planned to encourage the increased use of time orders as part of its wider strategy of tackling over-indebtedness. In its White Paper, there was the unquestioning

51 Director General of Fair Trading v First National Bank above at [29].
52 The Task Force on over indebtedness, established in October 2000 to address issues relating to the level of consumer debt in British Society, has called on the Lord Chancellor’s Department to consider what more can be done to improve consumer awareness of the operation of time orders: see Task Force on Tackling Overindebtedness, 2nd Report, January 2003.
acceptance that section 136 allows the court, in making a time order, to amend the terms of the agreement where it is just to do so, by extending the term of the agreement or altering the rate of interest to be paid. Specifically in relation to time orders, however, a process of consultation exposed a lack of use and awareness of the provisions and the way in which they operate. As reflected in the Tackling Over-indebtedness Action Plan 2004, legislation is anticipated. The most important improvement relates to allowing a debtor to apply for a time order before notice of default has been served. Although this will signal a marked improvement, as with the reform of the law on extortionate credit (discussed below) the promotion of the use of the time order provisions requires primary legislation that will, of course, be implemented long after 'mortgage day' in October 2004. As this is to be included in the forthcoming Consumer Credit Bill, progress will be dependent on Parliamentary time.

**Unconscionable and Oppressive Terms**

Arguably, the second most important aspect of statutory regulation afforded by the Consumer Credit Act 1974 Act concerns those provisions that strike at extortionate credit bargains. In the context of unconscionability and oppression generally, the statutory jurisdiction is a specific jurisdiction and, accordingly, it must be viewed as distinct from the court's inherent powers.

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53 *Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century*, op. cit. at para. 5.73.
56 There was no discussion as to the use of the fast track reform procedure offered by the Regulatory Reform Act 2001.
Traditionally, the capacity to relieve against such terms emerged under the general protective jurisdiction of equity. As a result of the change in the function of the mortgage towards a mechanism that facilitates home ownership, modern decisions tend to focus upon the issue of oppressive interest rates. It is unfortunate, however, that such intervention has been confined to only the most extreme of circumstances. In *Multiservice Bookbinding Ltd v Marden*, Browne-Wilkinson J. fended off a challenge to the conscionability of a mortgage based on both public policy and general equitable objections. There was found to be no justification on public policy grounds to invalidate an index-linked loan of £36,000 that generated a total return of £132,000 in payments of capital and interest. The clear implication is that there is nothing inherently objectionable in the index-linking of loans, even if this practice manufactures a massively disproportionate percentage increase in the repayable sum when compared to the appreciation in value of the mortgaged property. In relation to general equitable objections, Browne-Wilkinson J. felt that the boundary between unreasonableness and unconscionability had been blurred somewhat by the decision of Goff J. in *Cityland and Property (Holdings) Ltd v Dabrah*. Browne-Wilkinson J. explained:

'... in order to be freed from the necessity to comply with all the terms of the mortgage, the plaintiffs must show that the bargain, or some of its terms, was unfair and unconscionable; it is not

57 [1978] 2 WLR 535.
58 [1968] Ch 166.
enough to show that, in the eyes of the court, it was unreasonable ...
... a bargain cannot be unfair and unconscionable unless one of
the parties to it has imposed the objectionable terms in a morally
reprehensible manner, that is to say, in a way which affects his
conscience'.

As to the bargain before him, Browne-Wilkinson J. could not conclude it was
either morally reprehensible or conscience affecting. Perhaps of influence was
the perceived equality of bargaining power that existed between the parties.
Browne-Wilkinson J. remarked upon the professional advice that both parties
had availed themselves of and the fact that it was open for the borrower to
have gone elsewhere for finance.

**Extortionate Credit Bargains**

It is only since the Consumer Credit Act 1974 that protection for the borrower
against extortionate credit bargains has been placed upon a statutory footing.
The link to equity's past is, thereby, all but severed. The future of the law is,
moreover, wedded to the promotion of an Europeanised law of consumer
protection. Currently, sections 137-140 of the 1974 Act empower the court to
re-open a credit agreement on the ground that it constitutes an extortionate
credit bargain. The scope of the jurisdiction is broad and extends to all credit
agreements. This is so whether or not the bargain is one regulated by the Act

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59 Above at 549.
60 Section 137(1) allows the court to re-open or alter the terms of the agreement in order to do justice between the parties. R Goode [1975] CLJ 79 at p.118 describes the powers of the court to re-open extortionate bargains as being the most radical sections of the Act.
or above the general financial ceiling of £25,000. On the borrower's claim that a credit bargain is extortionate, section 171(7) shifts the onus to the creditor to show that the bargain is not extortionate. If the lender is unable to do so, the court has jurisdiction to alter or to set aside, in whole or in part, any offending obligation imposed by the agreement on the debtor.\(^\text{61}\) In addition, the court can direct that accounts be taken and require a creditor to repay sums paid under the bargain by the borrower or surety to the creditor or other person under a related contract. Even where a bargain is designated as extortionate, the court may still decline to re-open it. This refusal will, usually, be founded upon straightforward equitable principles. The courts have not been prepared to re-open transactions where a borrower is, for example, unduly late in an application for relief,\(^\text{62}\) fails to disclose fully the nature of his financial position\(^\text{63}\) or obtains credit through fraudulent misrepresentation.\(^\text{64}\)

Much difficulty surrounds the question of exactly how the inherent and statutory jurisdictions coexist. In the exercise of discretion under the inherent jurisdiction, the perception of what will amount to oppression or unconscionability is inextricably tied to the comparative bargaining strength of the parties. Within the statutory jurisdiction, the court is tied to the wording of the 1974 Act, and the question addressed is whether a bargain is to be stigmatised as 'extortionate'. Under section 138(1), a credit bargain is deemed to be extortionate where the payments to be made under it are 'grossly exorbitant' or where the agreement 'otherwise grossly contravenes ordinary

\(^{61}\) Consumer Credit Act 1974, s.139.  
\(^{62}\) The general doctrine of laches is, of course, applicable.  
\(^{63}\) See, for example A Ketley Ltd v Scott (1980) CCLR 37.  
\(^{64}\) See First National Securities v Bertrand (1980) CCLR 1.
principles of fair dealing'. In the exercise of the discretion whether to re-open the transaction, the courts have paid close heed to the statutory wording. As Deputy Judge Edward Nugee Q.C. explained:

'Under the Act the test is not whether the creditor has acted in a morally reprehensible manner, but whether one or other of the conditions of section 138(1) is fulfilled, and although it may be thought that if either condition is fulfilled there is likely to be something morally reprehensible about the creditor's conduct, the starting and ending point in determining whether a credit bargain is extortionate must be the words of the section 138(1).'

Under section 138(2), the court must have regard to numerous considerations as the evidence dictates. First, it may look at the interest rate levied when the bargain was entered into. This was so in Castle Phillips Finance Co Ltd v Williams where the Court of Appeal considered an interest rate of 67.7% to be excessive. Although the court would not re-open the credit agreement, Dillon L.J. felt that the conduct of the finance company was dishonest and warranted referral for further action to the Director General of Fair Trading. Secondly, it may take into account the personal circumstances of the borrower. The range of relevant indicators may extend to age, experience, business capacity, health and the financial pressure to which the borrower was subject when

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65 Davies v Directloans Ltd [1986] 1 WLR 823 at 831.
66 In Fallon v Calvert [1960] 1 All ER 281 at 282, it was emphasised that the function of the court in a civil action was not inquisitorial, but merely to, '... decide cases on the evidence that the parties think fit to bring before it'.

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entering into the bargain. In *A Kettle Ltd v Scott*, the court refused to re-open a credit agreement where a secured loan of £24,500 was borrowed at an interest rate of 12% over three months.\(^\text{68}\) In the light of the borrower's earnings and business experience, the court was satisfied that the borrower knew what he was doing when taking on the bargain. Thirdly, the court may consider the creditor's relationship with the borrower and, having regard to the value of the security provided, the risk that was accepted by the lender. In *Woodstead Finance Ltd v Petrou*, a secured loan was agreed at an interest rate of 42%, but the court was still unable to conclude that it was extortionate.\(^\text{69}\) Taking on board the borrower's poor record in relation to past payments and the financial risk involved for the lender, the rate of interest was felt to be normal for a transaction of this type. Finally, any other relevant considerations may be brought to the fore, for example, the practices of other lenders.\(^\text{70}\)

Freed from the fetters of equity's inherent jurisdiction, some commentators hoped that the statutory provisions would not be narrowly interpreted.\(^\text{71}\) The courts, however, have been apt to disappoint. Instead, a judicial intransigence is discernible when the court is faced with a borrower seeking to defend an enforcement action. Caution appears a typical response in claims involving section 137 applications. Such claims, however, uniformly involve borrowers in the most precarious of financial positions who have been forced into the sub-prime market as a last resort.\(^\text{72}\) Invariably, such borrowers

\(^{68}\) Above.

\(^{69}\) [1986] FLR 158.

\(^{70}\) See *Paragon Finance v Nash* [2001] EWCA Civ 1466.

\(^{71}\) See, for example, A Rogerson, “The Consumer Credit Act 1974” (1975) 38 MLR 435 at p.437.

\(^{72}\) See *Vulnerable Consumers and Financial Services*, January 1999, OFT 255.
over-stretch themselves financially and it is the attendant risk to the lender that precipitates such high rates. This produces the irony that, as the Grays comment, ‘... the more desperate and vulnerable the borrower, the more justified is the imposition of a high interest rate, and the less able are the courts to intervene in terms of supposedly protectionist legislation’.73 This demonstrates the patent inadequacy of the existing provisions.

**The Total Charge for Credit**

The drawbacks associated with the current extortionate credit provisions extend also to the restrictive means by which a rate is calculated so as to be exorbitant. This is because, within the meaning of section 138, the question of whether an interest rate is extortionate must be on the basis of the ‘total charge for credit’, which is a charge to be determined at the outset of the mortgage agreement.74 Although complicated, the calculation appears to disregard from the computation of what is extortionate any subsequent changes in interest rates. As many mortgages leave to the discretion of the lender any subsequent variations of the rate of interest, a significant gap in the protection of borrowers is exposed. In *Paragon Finance v Nash*,75 Dyson L.J. sought to refute the suggestion that there was such a glaring gap in the protection afforded by the 1974 Act. While he accepted that variations in interest rates were irrelevant to the question of whether a bargain was extortionate, he held that the bargain implied an obligation that rates would

74 The 'total charge for credit' is a sum calculable in accordance with the regulations produced under s.20 in order to generate an estimate of the entire cost of borrowing.
75 Above.
not be set dishonestly, for an improper purpose, capriciously, arbitrarily or
Wednesbury unreasonably. On the facts before him, Dyson L.J. found there
to exist sound commercial reasons to justify the lender’s departure from
following the Bank of England’s base rate. The marked difference between
Paragon’s rates and those of other lenders did not, therefore, suggest a
grossly exorbitant interest rate. He also drew support from the language of
section 138 itself, in that the list of factors to which the attention of the court
was confined precluded any consideration of subsequent changes. In
Broadwick Financial Services Ltd v Spencer, Dyson L.J. was invited to
revisit his views as expressed in Nash. Primarily, it was argued that the
phrase 'any other relevant considerations' in section 138(2)(c) should not be
confined to factors existing when the agreement was entered. Not
surprisingly, Dyson L.J. reiterated his restrictive stance that, ‘... the way in
which a discretionary variation of rate clause is operated in fact is not a factor
to be taken into account in determining whether a credit bargain is
extortionate’. As a consequence of this approach, in assessing exorbitance
the court is severely hampered by an inability to look beyond factors in
existence when the bargain was formed. This myopia creates the problem.

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76 This has been said to represent an ‘... interesting transfusion of public law principles into
the supposedly private law area of loan finance’ (K Gray & S F Gray, Land Law, op. cit. at
p.550).
77 Note that the Court of Appeal’s decision, ‘... does not open the door to a positive implied
term that a lender may have a positive obligation to reduce the rates’ (per Park J. in Sterling
Credit Ltd v Rahman [2002] EWHC 3008 (Ch)).
78 As Dyson L.J. above at [66] explained, ‘It is also the natural reading of s.138(3)(a) (age,
experience, business capacity and state of health), s.184(a) (degree of risk), s.138(4)(b)
.relationship to the debtor), s138 (4)(c) (quote of a colourable cash price for goods or services
included in the credit bargain) that all of these matters are to be considered as at the date
when the credit bargain is made and at no other time’.
80 Ibid. at [56].
that, as Dyson L.J. readily admitted, 'Such a clause has the potential to make the bargain extremely burdensome for the borrower if a wide gap opens up between the interest rate payable under the bargain and market rates prevailing from time to time'. But notwithstanding this narrow interpretation, however, the court accepted that it remains possible that a failure to provide adequate information to a customer as to the operation of a lender's policy might contravene the ordinary principles of fair dealing. It will be recalled that this is the second statutory ground upon which a bargain may be deemed extortionate.

Ordinary Principles of Fair Dealing

The operation of the sections in this respect is further elucidated by reference to penal interest rates. It has always been the case that where a mortgagee seeks to impose a higher rate of interest in the event of default by the debtor, the court reserves the inherent right to invalidate the higher rate as a penalty. There is, however, an arguable distinction based on the imposition of a 'penalty' and the grant of a 'concession'. There is a discernible reluctance of the courts to interfere with an agreement whereby the mortgagor is awarded a discount (a concession) from the normal rate of interest where prompt payment is made. In *Strode v Parker*, however, the validity of such a distinction was cast into doubt, '... for the agreement of the parties seems to be the same in either case, and whether interest is to be reduced upon compliance with the times of payment, or to be advanced in default thereof,

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81 Ibid.
82 See, for example, *Holles v Wyse* (1693) 2 Vern 289.
83 See *Sterne v Beck* (1863) 32 LJ Ch 682 at 684.
seems only to be a difference in expressing one and the same thing.\textsuperscript{84} It appears, therefore, that this distinction, if at all tenable, will turn simply upon whether the clause is construed as comprising a reduction of the contractual rate (a reward or concession) or an addition to that which would otherwise be payable (a punishment or penalty).

For mortgages falling within the Consumer Credit Act, however, enhanced protection is offered by section 93 which prohibits any term that increases the rate of interest accruing on default. Indeed, non-status lenders have recently been placed in little doubt as to the seriousness with which the Director General of the Office of Fair Trading views the practice of charging a dual rate of interest. In guidelines of July 1997, it was complained that ‘... the dual interest rate system operated by many non-status lenders is unfair and oppressive, and should be discontinued’.\textsuperscript{85} As subsequent case law affirms, it is possible that a rate of interest, which would not normally attract the stigma of being exorbitant, may yet be extortionate because it grossly contravenes ordinary principles of fair dealing. This point was demonstrated in \textit{Falco Finance Ltd v Gough}.\textsuperscript{86} There the court considered a counterclaim to the lender’s action for possession to the effect that a concessionary rate of interest, which led to a higher rate of interest when the concession was broken, was extortionate under section 138. In comparison with some of the decisions mentioned above, the rate of interest levied here appears reasonable: the concessionary rate was set at 8.99%; the higher rate was set

\textsuperscript{84} (1694) 2 Vern 316.
\textsuperscript{85} Non-status Lending, Guidelines for Lenders and Brokers, Office of Fair Trading 192, (revised November 1997), para 45.
\textsuperscript{86} October 28, 1998. (Unreported).
at 13.99%. Nevertheless, Elystan Morgan J. felt that the proviso was, ‘... three-pronged in the evil that it represented’. First, there had been no attempt to calculate, in any genuine way, the loss to the company that would be occasioned by late payment.\textsuperscript{87} Secondly, he argued that the circumstances in which the borrower could take advantage of the concessionary rate were restricted so as to make it very difficult for him to retain the advantage.\textsuperscript{88} Thirdly, any loss of the concession rendered it irrevocable.\textsuperscript{89} Accordingly, it was felt to be a clear consequence of the Consumer Credit Act that the rate of interest in a regulated consumer agreement should not be varied on account of default. As Elystan Morgan J. added, ‘... it shows that the idea of punishing a borrower on account of a breach by making him pay a higher rate of interest is something that is frowned upon by the law in regard to that particular area in which it operates.’\textsuperscript{90}

It is worthy of comment that, in \textit{Falco Finance}, the judge endorsed statements made by the Office of Fair Trading that supported his position. It is probable that the courts will hear more arguments on the basis of the pronouncements of regulators and be increasingly swayed by them as a guide

\textsuperscript{87} This echoes the concern of the Office of Fair Trading that in the provision of dual interest rate schemes, ‘... the move from the concessionary to the standard rate could not generally be justified in terms of the administrative costs incurred by the lender on default, and was likely to accentuate the borrower’s financial difficulties and thereby increase the risk of repossession’ (Non-status Lending, Guidelines for Lenders and Brokers \textit{supra}, fn.85, at para. 49).

\textsuperscript{88} The ameliorated rate applied unless the mortgage account went into arrears, which entailed that if, ‘... the smallest imaginable fraction of that payment was not paid on the due date – then that concession was lost’ (\textit{Falco Finance Ltd v Gough}, above, \textit{per} Elystan Morgan J.).

\textsuperscript{89} As Elystan Morgan J. explained, ‘... if the person in the first year by a few pence was late for a day the concession would be lost for the remainder of that twenty-five year term ... and assuming that the concession had been lost in the first month, as was the case, then that Mr Gough would have paid an extra £37,325 by the end of that term’.

\textsuperscript{90} It is noteworthy that Dyson L.J. has since made clear in the \textit{Broadwick} case, that there is nothing unfair or oppressive in a ‘... comparatively modest incentive not to default’ (above at para. 60).
to the exercise of discretion. In addition, the statements of practice emanating from the regulatory bodies have also influenced the courts. One obvious example is that advanced by the Council of Mortgage Lenders regarding the need to take possession as a last resort.\(^9\) While this signals increased protection for certain borrowers, the operation of such voluntary codes and regulatory pronouncements reveals the potential for overlap and over complication. This is particularly apparent in light of the scope of the new Financial Services Authority regulations. It is, seemingly, inevitable that certainty and simplicity will be sacrificed, producing an unwarranted complexity for both the borrower and the court.

The judge in *Falco Finance* held, albeit with scant evaluation, that the unfair penalty was unenforceable also under the Unfair Terms in Consumer Contracts Regulations 1994. These regulations were drawn up to give effect in the United Kingdom to Council Directive 93/13/EEC on unfair terms in consumer contracts.\(^9\) Although the structure of the Regulations and their application to land law is largely unfamiliar territory,\(^9\) there is little doubt that they will make a significant impact. Regulation 5, in giving effect to article 6 of the Directive provides that, "... an unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on a consumer".\(^9\) Under Regulation 4, an unfair term means any term which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment to the consumer. While the

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\(^9\) See, for example, *Cheltenham & Gloucester Building Society v Norgan* [1996] 1 WLR 343.

\(^9\) They have now been superseded by the Unfair Terms in Consumer Contracts Regulations 1999 SI 1999/2083.

\(^9\) Note that the Unfair Contract Terms Act 1977 has no application to mortgages.

\(^9\) Note that the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.
question of good faith is addressed under Schedule 2, Schedule 3 provides numerous examples or illustrations of terms that are regarded as being 'unfair'. In *Falco Finance*, Elystan Morgan J. found within section 138(2)(e) a fitting model of unfairness to guide his judgment and that related to, ‘... terms which have the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation’. Notably, the judge did not give adequate consideration to Regulation 3(2), which deals with the applicability of the Regulations and exempts core terms. Regulation 3(2) states that, ‘In so far as it is in plain, intelligible language, no assessment shall be made of the fairness of any term which – (a) defines the main subject matter of the contract, or (b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied’. Accordingly, it appears that an unfairness of the level of interest rates is precluded from consideration. Following the decision in *Director General of Fair Trading v First National Bank*, however, a narrow interpretation of Regulation 3(2) seems to suggest that the idea of core terms will be, ‘... given a sensible meaning which does not neuter the protection which the Regulations would otherwise give to consumers’. The decision entails that any term dealing with the situation after default cannot be construed as a core term and is as such subject to the fairness test.

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95 Above.
96 *Per* Lord Bingham *ibid.* See M Attew “Teleological Interpretation and Land Law” [1995] 58 MLR 696 at p.701 for discussion of a range of questions faced by the courts. 97 As Lord Bingham *ibid.* at para. 12 made clear, ‘The object of the regulations and the directive is to protect consumers against the inclusion of unfair or prejudicial terms in standard-form contracts into which they enter, and that object would plainly be frustrated if regulation 3(2)(b) were so broadly interpreted as to cover any terms other than those falling squarely within it'.

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The guarded enthusiasm of the courts to discern the impact of European consumer protection and more fully to take on board the pronouncements of regulators is both novel and generally to be welcomed. In this respect, there is a clear indication that the face of domestic law is rapidly changing. The future of judicial scrutiny will, perhaps, embrace new definitions and nuances of approach and interpretation that are currently distinctive to other European nations. The need for reform of domestic law is reflected in the Financial Services and Markets Act 2000 and the Government White Paper on Reform of Consumer Credit. Unfortunately, in the absence of a single, statutory statement this era of fragmentary, regulatory reform will bring corresponding uncertainty as to how different provisions will interrelate. The remainder of this chapter is designed to identify the scope of, and problems posed by, proposed law reform.

Financial Services Reform

In the new regime about to be imposed by the Financial Services Authority, there are two principal incursions upon Consumer Credit Act territory. First, it has been considered necessary to produce a new rule relating to excessive credit charges. It was initially proposed that from October 2004, 'A mortgage lender must ensure that any regulated mortgage contract that it enters into does not impose, and cannot be used to impose, exorbitant charges upon a customer.' The wording has since been amended, dropping 'exorbitant'

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98 MORT 12.5.1
charges in favour of 'excessive' charges. In determining whether a charge is 'excessive', a mortgage lender should consider both the amount of its charges for the services in question compared with charges of similar services on the market, the degree to which the charges are an abuse of trust that the customer has placed in the firm and the nature and extent of the disclosure of the charges to the customer. Accordingly, the rules and guidance as to excessive charges appear to lower the threshold in favour of the consumer. In addition, the language and ethos differ clearly from the Consumer Credit Act and, in the guidance accompanying the Rules, there is a more limited range of factors to which the lender should take account. In that remedial action can be pursued via the Financial Ombudsman Service, a consumer has a viable option other than the bringing of a civil action.

Secondly, under the new Financial Services Authority regime a lender must ensure that the mortgage contract does not impose, and cannot be used to impose, a charge for arrears on a customer. The exception to this is where the charge represents a reasonable estimate of the cost of any additional administration required as a result of the customer being in arrears. This rule aims to prevent the imposition of a penalty charge that is unrelated to the costs that are incurred because the customer is in arrears. It should also be sufficient to prevent the dual interest rates that effectively penalise a borrower through the imposition of charges. There is no further detail

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99 MCOB 12.5.1. In addition, MCOB 12.5.2 requires that, 'A firm must ensure that its charges to a customer in connection with the firm entering into or making a further advance on a regulated mortgage contract ... or a variation to the terms of a regulated mortgage contract are not excessive'.

100 This element has been added since the proposals in The Draft Mortgage Sourcebook.

101 MCOB 12.5.3G.

102 MCOB 12.4.1.

103 See CP98, para.13.9
offered as to how this new rule will relate to the parallel regulation under the 1974 Act or compare with the court's inherent jurisdiction.

It is open to question as to how the courts will interpret the new regulations. The court remains as the ultimate arbiter of whether the inclusion of a term is generally unfair and whether an individual borrower has been subject to an unfair bargain. In determining whether to grant an immediate order for possession, this has traditionally been the obvious and most convenient stage to evaluate any counterclaim by the mortgagor. More particularly, the spectre of the extortionate credit bargain has frequently been raised as a defence to an action for possession. Its invocation shows that, during the last century, the historical concerns regarding unconscionable terms have given way to the more modern pre-occupation with interest rates and charges. There is no reason to doubt that the courts will now be troubled by claims of excessive charges in response to possession actions. It is not possible to say to what extent previous case law or the impact of parallel legislation will be considered. It is clear, nonetheless, that in its equitable jurisdiction and statutory discretion, a stern stance has traditionally been adopted. It is to be regretted that the court will not enjoy the same power as is contained under section 139 to re-write the terms of an extortionate bargain. As to those mortgages caught by the new Financial Services Authority regulations, the statutory jurisdiction is lost. A logical step forward would have been to revamp the existing provisions and encourage the courts to invoke them more readily, rather than carving out completely the majority of the mortgage market. The impact of the Financial Services Authority regime

104 The court can, of course, continue to do this under its inherent jurisdiction.
will, moreover, be to sub-divide mortgages according to their legal or equitable quality and, more importantly by whether they are first or subsequent mortgages. Previously one definition applied to all cases. The Consumer Credit Act will apply only to those mortgages that fall outside the new regime.

Reforming the Consumer Credit Act?

The proposed reforms in consumer credit law embrace a general widening of existing provisions. This change reflects the explicit admission in the Government White Paper that the current provisions have not operated effectively. Accordingly, in relation to extortionate credit bargains a new definition will be formulated to capture credit transactions that are deemed unfair. The widening of the definition ensures that account will be taken of a range of unfair practices in addition to the cost of credit. However, the determination of exactly what is fair in a credit transaction awaits legislative guidance and advice from the Office of Fair Trading, following informal consultation with the Department of Trade and Industry’s stakeholder group. It is accepted that reform must maintain an overall balance between the duty of responsible lending and the encouragement of responsible borrowing. What is clear, even at this early stage, is that the definition will embrace subsequent events to the conclusion of the agreement that themselves lead to unfairness.

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107 The Office of Fair Trading had recommended, as early as September 1991, that the concept of an extortionate credit bargain be replaced by the "unjust credit transaction: Unjust
A specific concern raised by the White Paper arose from the difficulties encountered by potential claimants. Under sections 137-140 of the 1974 Act, a mere 30 cases have so far reached court and, of those, only one-third have been successfully argued. This is attributed not simply to the qualifying hurdles imposed by the current law, but also to the imprecise wording of the Act and the restrictive judicial interpretation that this facilitates. The low success rate reflects also the court's preoccupation with the interest rates charged under the agreement and the comparatively minor concern with other terms that might cause detriment to the consumer. Such disadvantages may adopt the guise of, for example, default charges, lack of transparency or high pressure selling. Furthermore, the tendency of the court to examine only the terms of the credit agreement as at the time that it was entered reduces the claimant's chances of success. Consequently, the White Paper makes the somewhat obvious and non-controversial point that subsequent conduct by the lender may render the agreement unfair, perhaps through a change to the rate of interest or the manner in which a default charge can be applied. In addition, two reports have explicitly suggested that borrowers in the consumer credit context may face a range of practical, psychological and cultural barriers to a process of litigation that this process is itself complex,
unpredictable and often inordinately expensive. A system of alternative dispute resolution should, however, make recourse to justice more accessible.

The White Paper advances a possible categorisation of factors that the court might draw upon. Unlike under the Financial Services and Markets Act 2000, these are extremely broad and extend far beyond the terms that might be considered unfair under the 1999 Regulations. The list contains unfair practices such as misleading, harassing, coercing or otherwise unduly influencing the borrower regarding the transaction. Unfair credit costs are also in issue, and will be designated as unfair where, having regard to the total sum which becomes due when the borrower falls into arrears, credit payments substantially exceed market levels. The issue of whether a cost is high is not, however, to be considered in the abstract. The reasonableness of the lender’s charges must be evaluated in the context of its own costs and losses. It is apparent also that the definition of unfairness will include the notion of ‘responsible lending’. The White Paper explains, ‘... creditors should be expected to undertake enquiries that are proportionate, having regard to the type of agreement, their relationship with the customer, and the costs and risks involved’. This will be in some way balanced by the requirement that the borrower provides a true and accurate picture of his financial circumstances. Other relevant considerations to the issue of unfairness will include the circumstances of the borrower, such as the nature of the pressure he is under and the degree of risk accepted by the lender.

111 Ibid. at para. 3.37.
112 Ibid.
An enlarged judicial capacity to detect unfairness should heighten the courts' preparedness to intervene. It offers the court a new challenge to develop its protective jurisdiction, spurred on by the pro-active Office of Fair Trading. The infrequency of successful challenge to unfair mortgage terms has marked a striking deficiency of the Consumer Credit Act. The implementation of the directive on unfair terms in consumer contracts into domestic law has engendered a new approach. Under the 1994 and the 1999 Regulations, the task of the Director General of the Office of Fair Trading to investigate complaints and bring actions provides a key illustration of a change in stance over the last ten years. In the First National Bank litigation, Lord Steyn gave judicial recognition to the impact of this extension of the system of enforcement, 'The system of pre-emptive challenges is a more effective way of preventing the continuing use of unfair terms and changing contracting practice than ex casu actions.'\textsuperscript{113}

It is anticipated, further, that through the provision of access to a viable alternative dispute resolution mechanism, consumers should more easily seek redress outside the court process. In relation to enforcement, however, it is emphasised that the statutory powers available to the court will be maintained. The Government is currently of the view that that the Financial Ombudsman Service, created as an independent dispute resolution service under the Financial Services and Markets Act 2000, would make a good arbiter for disputes concerning consumer credit. Although consultation will be necessary to determine whether consumer credit disputes require a separate 'stand alone' mechanism, the ombudsman scheme is the favoured option. The

\textsuperscript{113} Director General of Fair Trading \textit{v} First National Bank above at [33].
Government cites, for example, the experience that the Financial Ombudsman Service has already acquired in its dealings with mortgages and other loans between consumers and firms. Significant questions remain, however, regarding the relationship between the Alternative Disputes Resolution system and the courts. In the summary of responses to the consultation document on making the extortionate credit provisions more effective, there was wide ranging opinion expressed as to whether the system should replace the court process, act as a stage in the court process or act merely as a precursor to court action.\textsuperscript{114} If a system of alternative dispute resolution were to be operated by the Financial Ombudsman Service, this can only strengthen the case for a single system of mortgage regulation. As Oldham suggests, 'It is unfortunate that while devising the new FSA regime the opportunity was not taken to rationalise and unify mortgage regulation into a single, coherent and consolidated package'.\textsuperscript{115}

**Interest Rates**

Having proved hopelessly restrictive and inadequate, there is little doubt that the rules on extortionate credit require substantial re-evaluation. A possible method of achieving enhanced protection for borrowers might be to place a statutory cap on interest rates.\textsuperscript{116} The Crowther Committee rejected the need for a ceiling on interest rates and cited the 'largely ineffective' protection

\textsuperscript{114} CCP 007/03 p.11.


\textsuperscript{116} Although a commonplace feature of the usury laws, there has been no introduction of a ceiling on the rate of interest since the Increase of Rent and Mortgage Interest (War Restriction) Act 1915.
afforded to borrowers under the Moneylending legislation.\textsuperscript{117} As the Crowther Committee admitted, and contrary to a commonplace assumption, the Moneylenders Acts did not technically provide a percentage capping. Instead, the provisions specified a rate of interest over which there was a prima facie assumption that the rate was excessive. On rates that fell short of the adopted percentage, the borrower was required to establish that the rate was excessive. In cases with a rate over 48\%, the burden of proof would shift to the lender to show that the rate was not harsh and unconscionable. The lender was not, therefore, prohibited from charging a higher rate. In suitable cases, the court enjoyed the discretion to re-open the transaction ordering repayment to the borrower or an alteration in the security given.\textsuperscript{118}

The Government continue to reject the strong arguments in favour of providing an interest rate ceiling. This is to be regretted. The Crowther Committee may have condemned such protection as being largely ineffective, but credit bargains subsequent to the 1974 Act have carried interest rates in excess of 40\% and have still not been regarded as extortionate. Nevertheless, the prevailing view remains, as it was when the Crowther Committee explained, ‘The maximum, which must inevitably be set at a rather high figure, has a tendency to become the standard, the impression being given that it is a figure which has received the blessing of the legislature’.\textsuperscript{119} This view does not rest easily with the ethos of a twenty-first century approach that envisages a competitive marketplace where less attractive products fall from the mix.

\textsuperscript{117} Crowther Report, \textit{op.cit.} at para. 6.6.4.
\textsuperscript{118} \textit{Ibid.} at para. 6.6.3.
\textsuperscript{119} \textit{Ibid.} at para 6.6.7.
Instead, the Government's White Paper contemplates a number of reforms that will exert an impact on the regulation of mortgages. Notably, it is envisaged that the current financial ceiling of £25,000 will be removed entirely.\textsuperscript{120} Although the original financial limit has been raised on two occasions to reflect inflation, its abandonment will signal an important enhancement of the protection of borrowers. The new provisions will catch the increasing number of secured loans over £25,000 and ensure parity with the Financial Services Authority regulation of first mortgages for which there is no financial ceiling. This reform recognises and responds to the current practice of encouraging homeowners to use secured loans for the consolidation of existing unsecured debt. In the light that many expect a fall in house prices, this encouragement carries with it the obvious and severe penalty of possible repossession. The reform will ensure, moreover, that it becomes impossible for lenders to sidestep the protections afforded by the legislation simply by providing loans at just over the financial limit.

Faults and Flaws
A considerable defect of the Consumer Credit Act approach to mortgages is that it makes distinctions according to the status of the borrower and of the lender, bringing some bodies within its purview and rendering others exempt. This is out of step with the general tenet of the Act that prizes a uniformity of treatment of lenders and is aimed to subject all credit providing institutions to

\textsuperscript{120} 99\% of those consulted supported an increase or removal of the limit with 55\% backing its removal: \textit{A Summary of the Responses to the DTT's Consultation on Financial Limits and Exempt Agreements of the Consumer Credit Act 1974}, November 2002, at para 3.2.
a similar level of control.\textsuperscript{121} Admittedly, this defect does not occur within the provisions relating to extortionate bargains as the court has jurisdiction to re-open offending bargains regardless of the status of the parties or the amount of the loan. Nevertheless, on account of the inadequate operation of sections 137-140, the Financial Services and Markets Act 2000 introduces its own concept of excessive charges and, for those agreements to which the new legislation applies, its forerunner will cease to be relevant. This by no means marks a simplification. Instead a further layer of regulation has been superimposed upon an already unwieldy, regulatory mishmash. An allied criticism is that in its terminology, procedure, remedies and ethos, the Act sits uneasily beside section 36 of the Administration of Justice Act 1970. Couched in the language of consumer protection, the phraseology of the 1974 Act contributes to the fragmentary approach to legislative reform that has plagued the development of mortgage law. There is no compelling reason to avoid a single set of rules determining the discretion of the court to postpone an order for possession and award time to the borrower in temporary financial difficulties.

It is difficult, on these grounds, to justify the maintenance of different regulatory regimes. This criticism was levied in response to the general enforcement of debt provisions in the Administration of Justice Act 1970 by Glasser who condemned, '... the failure to link the proposals of the Payne Committee with the reform of consumer credit arrangements and ...' felt that

\textsuperscript{121} See A Rogerson (1975) 38 MLR 435 at p.437, where it is explained that the committee had condemned the, 'piecemeal and inconsistent' approach to the provision of credit and '... recommended a functional approach to the matter, looking to the essential nature of transactions rather than to the legal forms in which, by choice or accident, they happened to be cast'.
this omission would ‘... lead to further inquiry within a short time’. His concerns maintain a contemporary resonance. In marked similarity to the White Paper of 1971, the impending reforms to Consumer Credit law will continue to embrace the need to differentiate between first and second mortgages based on the particular characteristics of many second mortgages. Not only is it claimed that they tend to adopt a wide range of interest rates, but of the dozen specialist second charge mortgage lenders highlighted, the White Paper raises the concern that a number concentrate on making loans available to consumers with debt problems or who have difficulty proving their income. It is submitted that with the proliferation of mortgage products, mortgage lenders and increasingly diverse consumer needs, such distinctions require more fundamental review than the White Paper provides. It is not conducive to clarity or simplicity that one must look to so many diverse sources to understand such an important area of law. On this basis, utilisation of the Law Commission appears a sensible way forward. It is not, however the likely way forward. In light of the existing law reforms introduced by the Financial Services and Markets Act and the Government’s imminent reform of the consumer credit framework, the Law Commission’s role as a body of review and reform appears usurped. Almost twenty years ago, the Law Commission made compelling criticisms of the law of mortgages and outlined a number of possibilities for statutory reform. At least some of these criticisms retain validity. The Working Paper, for example, posed the question of whether it was still desirable to single out particular mortgages for special

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122 (1971) 34 MLR 61 at p.61.
protection within the consumer credit framework. It advanced the view that this was an unnecessary over-complication. It remains a valid argument that, '... if the over-all protection for land mortgages were to be changed ... it might be feasible to remove land mortgages from the Consumer Credit Act 1974 altogether. This would achieve a significant simplification in the law'.¹²⁴

CHAPTER 7
Sale and the Law of Property Act 1925

It is beyond dispute that the most important remedy for the modern mortgagee is the ability to sell the mortgaged property, with or without vacant possession. Unlike the inherent rights to possession and to foreclose, neither equity nor the common law regards the remedy of sale as a natural incident of the security relationship. The entitlement of the mortgagee to realise the security in this way depends, therefore, on the remedy being either expressly reserved in the mortgage agreement or afforded by Parliament. The power of sale has been on a statutory footing since the mid-nineteenth century,¹ and its structure and content have since remained largely unaltered.² Consequent to this lack of legislative initiative, the law is said to, ‘... reflect the capitalist emphasis of the 1925 legislation that, except in relation to the application of the proceeds of sale, this statute does not expressly impose any specific ethical standard or code of conduct on the selling mortgagee’.³ Nonetheless, many of the attendant obligations placed upon the mortgagee on sale are owed in equity and continue to fall beyond the remit of statutory regulation. The nature and extent of these duties are, moreover, the subjects of enduring judicial scrutiny. As a result, such duties have not remained static and have been tailored to meet the changing social and economic demands of recent years. The courts have adopted a protective attitude towards the borrower and, as Nicholls V.C.

¹ Lord Cranworth’s Act 1860 as expanded by Conveyancing Act 1881.
² The power is now contained in sections 101-103 of the Law of Property Act 1925.
acknowledged, ‘... common law and equity alike have set bounds to the extent that he can look after himself and ignore the mortgagor’s interests’.4

The aim of this chapter is to investigate the formulation of the statutory power of sale and to evaluate its effectiveness as a means of enforcement of the residential mortgage. Accordingly, the relevant provisions of the Law of Property Act 1925 will be considered from the perspectives of their current functionality, the interpretative gloss that has been applied by the courts and the potential for future reform. The range of this inquiry includes both the mortgagee’s general remedy of sale as well as sale by judicial process under section 91 of the Law of Property Act 1925. Although section 91 offers an alternative means by which sale might be achieved, it was principally available to a narrow group of lenders who could not rely upon the general power.5 Such applications were also commonly encountered in actions for foreclosure or for redemption where sale was granted in lieu of either.6 It is now accepted that the jurisdiction of the court is much more expansive than first envisaged. A flurry of case law in the 1990s, and associated academic commentary, has charted the capacity of the court to utilise section 91 in unprecedented circumstances and often for the protection of the borrower. For the mortgagee, the potential for such an invasive use of judicial discretion exerts an inevitable influence upon the structure and timing of its enforcement strategy. The impact of section 91 will be examined in detail in the latter part of this chapter.

4 Palk v Mortgage Services Funding Plc [1993] 2 WLR 415 at 420.
5 For example, informal equitable mortgagees and those lenders who had expressly contracted out of the statutory power in the mortgage agreement. Note that under s.90, it is open for the court to make a vesting order conveying the land, appoint a designated person to convey the land or vest in the mortgagee a term of years absolute to enable a sale as though the mortgage had been created by deed.
Sections 101-103

A two-stage process governs the availability and exercise of the statutory power of sale. Section 101 lays down certain conditions that must be met before the power of sale arises. This requires that the mortgage must be created by deed, the mortgage money must have become due (that is, the contractual date for redemption must have passed) and there must be no evidence of a contrary intention in the mortgage deed. Once these conditions are satisfied, any exercise of the power of sale must be in accordance with section 103(i)-(iii). This entails that at least one of the following features be present. First, that notice has been served requiring payment of the mortgage money and default has continued for a period of three months subsequent to the service of the notice.\(^7\) Secondly, that some interest under the mortgage has been unpaid for two months after becoming due. Thirdly, that there has been a breach of provision in the mortgage deed other than for payment of the mortgage money or interest.\(^8\) The structure of the statutory power entails that, once it has arisen, an effective sale can occur without the need of sanction by the court.

Not surprisingly, the formulation of the statutory power owes much to its historical development. As demonstrated in Chapter 3, it has been subject to three principal instances of statutory regulation.\(^9\) Nonetheless, the power still maintains a marked similarity to that available in the late nineteenth century.

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\(^7\) Cf s.101(1) which refers only to the ‘mortgage money’; see H Potter (1932) 48 LQR 158.

\(^8\) See, for example, *Ladsky v TSB Bank* (1997) 74 P & CR 372 where there was a breach of covenant to keep the property in good repair.

\(^9\) Lord Cranworth’s Act 1860; the Conveyancing Act 1881 and the Law of Property Act 1925.
For example, section 19 of the Conveyancing Act 1881 provided that the power of sale would arise where there was an absence of any contrary intention in the mortgage deed, the mortgage was made by deed and the mortgage money had become due. In a like vein, section 20 of the 1881 Act set out almost identical conditions attached to the exercise of the power of sale as now appear in the 1925 Act. Both the logic and the operation of the two-stage procedure are, however, susceptible to criticism. In particular, it is difficult to identify any justification underlying the need for the power to have arisen. The date at which the mortgage money becomes due is acknowledged to be of no 'practical significance'. Absent any contractual provision to the contrary, the money becomes due under an endowment mortgage at the end of the mortgage term. In relation to repayment mortgages, however, the sum becomes due as soon as any instalment is unpaid. Understandably, the legal date for redemption is usually the subject of some express provision. As regards residential mortgages, the contractual date is commonly set at six months after execution of the mortgage. This date in no way reflects the intention of the parties as to the real timeframe for repayment. As the Law Commission recognised, '... the mortgagor is artificially put technically in default as early as possible for the sole purpose of making the powers arise. This not only contributes towards making the mortgage deed incomprehensible, it defeats the object of having a two-stage procedure'.

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10 See Transfer of Land – Land Mortgages, Law Commission No. 204, (1991), at para. 7.7, where the Law Commission went as far as to recommend the abandonment of this distinction.


Few would argue that there is any practical value whatsoever in maintaining a requirement that the statutory power must arise. As between the parties, the real concern is rather when the power becomes exercisable. The retention of a two-tier procedure is old fashioned and its continued existence is at odds with the overarching design which is to simplify and facilitate land transactions. Nevertheless, under the 1925 structure the date at which the money becomes due is the vital consideration for the purchaser from a mortgagee. As a consequence of section 104(2), such a purchaser requires to know simply that the power of sale has arisen and is unconcerned as to whether it is lawfully exercisable. Where a mortgagee purports to exercise the power before it has arisen, the legal estate cannot vest in the purchaser. Instead, there will be an effective assignment of the mortgage debt under which the purchaser will be vested only with the rights of mortgagee. In contrast, if the power of sale has arisen, but is not yet exercisable, the purchaser will receive good title. The remedy available to a mortgagor would then lie only in an action against the mortgagee for damages for unlawful exercise of its power.

The Working Paper contains further and deserved criticism of the content and structure of section 103. Particular attention is devoted to the frequency with which the section is excluded or amended. Indeed, there is currently nothing to prevent the inclusion of an express contractual power that bears no resemblance to the wording of section 103. This absence of overriding prescription is somewhat alarming when the end result is that the family home might be sold under some private power without the knowledge of the borrower and, it should not be forgotten, without the supervision of the court. As such

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14 *Ibid.* at para.3.60.
terms are usually beyond the negotiating reach of the typical borrower, this type of consumer contract would, in any other context, attract the provision of greater controls.

In relation to the drafting of section 103, there are some concerns. The issue of the persons on whom notice should be served under section 103(i) is unclear and has generated some speculation. Furthermore, the form and content of the notice is not prescribed. In order to instil certainty, mortgagees might be well advised to specify in the contract the type of notice required and the rules that will operate in relation to its service. Understandably, little case law has arisen on this aspect of section 103. This is because enforcement under the second limb of section 103 has proved to be the more attractive option. This requires only that some interest is in arrears and remains unpaid for two months after becoming due. In reliance on this ground, therefore, no notice need be served at all. A further concern relates to the curious difference in the expression of the second and third limbs of the section. Section 103(ii) requires that interest 'is' in arrears, whereas section 103(iii) is expressed in the past tense and requires that there 'has been' some other breach. This uncomfortable juxtaposition of the present and past tenses, prompted the Law Commission to conclude that, ‘... it does not seem sensible to authorise the mortgagee to enforce a breach of any non-monetary obligation, however minor and even if fully remedied, but not on late payment of interest, however persistent’.

Arguably, neither should give rise to an automatic right to exercise

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15 See Fisher & Lightwood, *Law of Mortgage* (Butterworths, 11th ed, 2003) pp. 558-559. For example, it is unclear whether or not the notice must also be served upon all subsequent mortgagees.
the statutory power of sale. In its Report, the Law Commission articulated the paramount principle upon which it thought that reform should be based:

'... the primary requisite of an enforcement system is that the security should not be enforced unless the mortgagor fails to keep to the repayment bargain originally agreed or for some other reason (not necessarily the fault of the mortgagor) the mortgaged property is or threatens to be no longer adequate security for the obligations secured'. 17

The solution suggested by the Law Commission was to particularise the events that would trigger the power of sale, require the mortgagee to follow an enforcement notice procedure and allow enforcement only with the approval of the court. 18

The Enforceable Events

The Law Commission recommendations as to the events that should allow for the exercise of the power of sale are styled 'enforceable events'. The catalogue of these events includes, first, any failure to comply with a financial obligation at the time when it was originally intended that the obligation would be met. The object is to include different types of payment default and to exclude merely a technical default. Crucially, the event would cease to be enforceable where the financial default has been remedied. This qualification would bring the general law of mortgages into line with the

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17 Law Com No. 204, op. cit. at para. 7.7.
18 This jurisdiction extends to any application by a mortgagee to protect or enforce the security: see Law Com No. 204 at paras. 7.48-7.53.
existing provisions of the Consumer Credit Act 1974 and the principles of relief against forfeiture of a tenancy. As will be recalled, both treat any remedied breach of rental covenant as though it had never occurred.\textsuperscript{19}

Secondly, in the event of non-financial default, where there is a failure to comply with a non-financial obligation that creates a substantial risk to the availability or value of the security. The requirement of substantial risk is, of course, aimed to prevent enforcement where the breach is trivial or remediable. Enforceability will remain an option only for as long as the breach is subsisting.

Thirdly, and arguably the most controversial in the list, when, ‘...some other event has occurred which creates a substantial risk to the mortgagor’s ability to comply with a financial obligation or to the value or availability of the security, and the risk has not been removed’.\textsuperscript{20} This event might be unconnected to any actual default on the part of the debtor. It would offer the mortgagee the opportunity to make a pre-emptive strike when there is a perceived risk of future default. This could occur where there is an impending insolvency or redundancy or there is a dramatic fall in the value of the mortgaged property. Despite obvious cause for concern expressed in response by consumers’ associations, the Law Commission felt that the recommended extension jurisdiction of the court, pertaining to matters of enforcement, would be sufficient to allay fears regarding the improper exercise of the power of sale.

\textsuperscript{19} See Chapters 6 and 4 respectively.
\textsuperscript{20} Law Com No. 204, \textit{op. cit.} at para. 7.8.
The Enforcement Notice

A key recommendation of the Report sought the implementation of an enforcement notice procedure whereby a mortgagee seeking to exercise its power of sale would be required to serve a preliminary notice on the mortgagor. The form of the notice would be prescribed and the process would require that, at the point of service, an enforceable event had occurred and, moreover, continued to be operative. As described in Chapter 6, a similar system already operates under the Consumer Credit Act 1974. There the service of a default notice, which specifies the breach and the type of remedial activity expected, is required. By virtue of section 89, compliance with the default notice within prescribed time-limits entails that the breach is treated as never having occurred.

Unfortunately, only a trace of the Law Commission's proposals is evident in the requirements, governing institutional lenders' dealings with customers in arrears, imposed under the Financial Services and Markets Act 2000 and operative from October 31, 2004. The Law Commission's enforcement notice was to share some similar features, for example, details of the effect of service of the notice, the possible consequences of a failure to remedy the situation and details of where help and advice can be obtained. The expressed purpose of the proposed enforcement notice is also similar, both to act as a preliminary action in the process of enforcement and to facilitate early contact between the lender and borrower. Nevertheless, there exist considerable differences between the two schemes. For example, a failure to comply with the procedural requirements of the Mortgages Conduct of Business Sourcebook may expose a lender to
sanction as a regulated service provider by the Financial Services Authority. There is within this framework no intention to hamper the lender's capacity to enforce the security. Under the Law Commission proposal, however, a similar failure would be fatal to the mortgagee's entitlement to exercise the power of sale.

The Involvement of the Court

Undoubtedly, many defaulting borrowers give up hope and simply return the keys of their properties without further dispute. Where the mortgagor seeks to remain in the property, however, court proceedings for vacant possession will usually precede the exercise of the power of sale. This ability of the mortgagee to effect a sale of the property in an extra-judicial manner has always been vaunted as a helpful and desirable feature of the law of mortgages. It has the distinct advantage of saving time, money and court resources. The responses to the Law Commission's Working Paper, however, strongly favoured the further involvement of the court in the enforcement of a residential mortgage. In its Report, the Commission concluded that, '... the arguments for making all protected mortgages enforceable on an order of the court only are overwhelming'. The recommendation that any action to protect or enforce the security must be by an order of the court would bring the protection of residential mortgages in line with safeguards currently available under the Consumer Credit Act 1974.

\[21 \text{ Op.cit. at para. 7.15.}\]
The Protection of Purchasers

As described, the exercise of the statutory power of sale does not require leave of the court. When the power is exercisable, statute enables the conveyance of good legal title to the purchaser.\textsuperscript{22} Under section 104(1), on sale of the mortgaged property the fee simple will be acquired free from any rights to which the selling mortgagee has priority. Of course, the purchaser will take subject to interests that rank higher in priority to the mortgage. Where the power of sale has arisen, but it is not yet exercisable, the application of section 104(2) is twofold. First, it provides the remedy available on a wrongful or improper exercise of the power of sale. Although the purchaser's title is unimpeachable, it is open to an aggrieved mortgagor to bring an action in damages against the selling mortgagee.

Secondly, it details the requirements of the purchaser regarding the investigation of title prior to conveyance.\textsuperscript{23} Under section 104(2), the purchaser is not, '... either before or on conveyance, concerned to see or enquire whether the case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly regularly exercised'. The ambit of protection extended to a purchaser appears comprehensive and clear. A purchaser must be satisfied only that the power of sale has arisen. As he is not concerned to 'see or inquire' about the exercise of the power, it might be assumed that a purchaser with knowledge of some irregularity

\textsuperscript{22} The Legislative priority to protect the purchaser is at the expense of the borrower entailing that, as the Grays argue, 'In a rather brutal way the exercise of this ultimate power involves a compulsory divesting of the mortgagor's title at the direction of the mortgagee' (Elements of Land Law, op. cit. p.576).

\textsuperscript{23} The impact of this section, of course, falls to be re-evaluated in view of section 52 of the Land Registration Act 2002
would remain unaffected by the mortgagee’s conduct of sale. It is, however, apparent that such a purchaser is not necessarily shielded by section 104(2). In *Jenkins v Jones*, for example, the purchaser was aware that an offer of repayment of the mortgage money had been made prior to the sale and, accordingly, the sale was set aside. There the equitable right to redeem was left intact and only the rights of the seller qua mortgagee were transferred to the purchaser. In *Selwyn v Garfit*, the purchaser did not gain good title where the property was sold in advance of the earliest possible date for sale. In *Bailey v Barnes*, Stirling J. commented of the similar provisions of the 1881 Act that, ‘I think to uphold the title of a purchaser who has notice of impropriety or irregularity in the exercise of the power of sale would be to convert the provisions of the statute into an instrument of fraud’. Stirling J. went on to suggest that this knowledge might also arise in the form of constructive notice should the purchaser, ‘... wilfully shut his eyes and abstain from making enquiries which might have led to a knowledge of impropriety or irregularity’.

Admittedly, to argue that the purchaser with notice will not take a good title involves reliance upon dicta that precede the modern statutory provisions. Nevertheless, the apparent logic of such judicial authority has led some to view notice of impropriety as a qualification to section 104(2). The Law Commission, for example, advances the view that section 104

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24 (1860) 29 L T Ch 493.
25 (1888) 38 Ch D 273.
26 Presumably, however, this could be construed as a case where the power of sale had not arisen.
27 [1894] 1 Ch 25 at 30. This is an invocation of the equitable maxim, ‘equity will not permit a statute to be used as an instrument of fraud’: see *Lyus v Prowsa Developments Ltd [1982] 1 WLR 1044.
28 Ibid. at 30.
must be read, ‘... to the effect that a purchaser with notice that the power is not exercisable, or of some other irregularity cannot rely on the section’.29 Fisher & Lightwood agree with this view and conclude that, ‘... it now appears to be generally accepted that the conveyance may be set aside if the purchaser takes with knowledge of any impropriety in the sale’.30 This approach has also found favour in Australia and this is discernible from the judgment of Walsh J. in Forsyth v Blundell.31 There the protection of the mortgagor was viewed as a paramount concern and, accordingly, a prospective purchaser with notice of any irregularity must take subject to the mortgagor’s rights. Walsh J. did, however, admit some qualification, ‘... if a person who agrees to purchase has no notice of any impropriety at the date of contract and contrives to have no notice at the time when it is completed, he will obtain a title which cannot be challenged by the mortgagor’.32 In contrast, the New Zealand courts have lent support to the countervailing proposition that notice of some irregularity will not automatically defeat the purchase. In Pasquarella v National Australian Finance Ltd,33 notice of irregularity in the exercise of the power of sale was viewed in the context of other aspects within the security relationship. This approach, however, fails to promote an effective balance between the purchaser’s entitlement to the benefit of his bargain and fairness towards those who, as a result, will lose

29 Law Com No. 204, op. cit. at para. 7.20. The Commission was impressed with the obiter of Crossman J., ‘Of course if the purchaser becomes aware … of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then in my judgment, he gets no good title on taking the conveyance’ (Waring v London and Manchester Assurance Co [1935] 1 Ch 310 at 318).
31 (1973) 129 CLR 477.
32 Ibid. at 501.
their property rights. It also entails that surrounding circumstances can neutralise the purchaser's actual notice of irregularity. As Wilkinson comments:

'Even where a purchaser might have a degree of notice of some irregularity, courts in the common law equity tradition might exercise a discretion to uphold the purchaser's title where, for example, the mortgagor has a bad record of default and might not be able to keep up the payments if he is allowed to pay off the arrears and try to relieve the financial position'.34

With regard to section 104(2), the judiciary has the task of determining the level of protection that ought to be afforded to the purchaser. A liberal interpretation of the provision opens the door to the doctrine of notice and offers less shelter to purchasers. Acceptance of the role of notice engenders the uncertainty as to whether 'notice of an irregularity' extends to constructive notice as advanced in Bailey v Barnes. The clear wording of section 104(2) must militate against the adoption of this standpoint. As Fairest admits, '... there is no obligation upon a purchaser from a mortgagee to make the enquiries which a suspicious purchaser would make, and that a purchaser will not have constructive notice of any impropriety in the exercise of the power of sale which would have been revealed by such enquiries'.35 It would appear, therefore, that only actual notice on the part of the purchaser (or his agent) should suffice to avoid the

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35 P Fairest, Mortgages (Sweet & Maxwell, 1980), p. 91.
literal application of section 104(2). As to the maxim that equity will not allow
a statute to be an engine of fraud, the obvious difficulty is identifying any
'fraud' on the part of the mortgagee or purchaser. The concept of fraud has,
indeed, proved elusive to exact definition.\textsuperscript{36} It is clear, however, that notice
alone is not fraud.

\textbf{The Land Registration Act 2002}

Most recently, section 52 of the Land Registration Act 2002 appears to
provide for the enhancement of 'protection of disponees' where title to the
land is registered.\textsuperscript{37} This provides that, if nothing appears in the register to
the contrary, the registered chargee is taken to have the powers of
disposition 'conferred by law' on the owner of a legal mortgage. Section
52(2) underscores this protection by preventing any challenge to the rights
and interests afforded by the disposition. The provision is aimed at meeting
a key goal of the system of registered conveyancing, that is, the conclusive
effect of registration. If the registered proprietor's powers of disposition are
to be limited in any way, this must be made apparent on the register by
entry of a restriction. Accordingly, section 52 (in conjunction with section
26\textsuperscript{38}) is intended to offer a guarantee of legal title to a purchaser.

The Law Commission championed the general rule that a disponee's
legal title should not be questioned because of some off-register
entitlement. The enhancement of protection for a purchaser from a

\textsuperscript{36} See generally MP Thompson, "Registration, Fraud and Notice" [1985] CLJ 280.
\textsuperscript{37} The Law Commission claimed that it, ‘... confers (and is intended to confer) greater
protection on disponees than does the Law of Property Act 1925, (\textit{Land Registration for the
\textsuperscript{38} Which states that a person’s right to exercise owner’s powers in relation to an estate or
charge is to be taken free from any limitation affecting the validity of a disposition.
mortgagee was intended to be twofold.\textsuperscript{39} First, it would be irrelevant that the purchaser had awareness of the fact that the power of sale was not exercisable or that there was some impropriety in the sale. The effect would be to discount judicial statements to the contrary that will continue only to pervade sales of unregistered land. Secondly, where the power of sale has not arisen, a purchaser would still obtain good legal title. This rule would give way only when the register indicated a limitation of the chargee’s powers of disposition. The Commission believed, therefore, that section 52 would, from a purchaser’s perspective, sweep away the distinction between the power arising and it becoming exercisable. Whether this ambition has been achieved is, however, open to question.\textsuperscript{40}

Not surprisingly, the impact of section 52 has yet to be considered by the courts. It is clear that, if sale occurs without the power having arisen, the mortgagor will retain remedies against both the chargee and, possibly, the purchaser for any loss incurred. The provision cannot affect the consequent financial liability that either party may incur. Unless overreached, the purchaser will, moreover, take subject to the interests of a person in actual occupation. In addition, it seems arguable that fraud or other impropriety might give rise to a constructive trust or an estoppel interest in favour of the mortgagor. Section 52 is concerned solely with preserving outward appearances following registration of the transfer.\textsuperscript{41} It leaves unaffected any potential equitable claim over the property.

\textsuperscript{39} Law Com No 271, \textit{op. cit.} para 7.8.
\textsuperscript{40} P Sparkes, for example, reads into the wording a much more restrictive effect, where the section is cited only in relation to the requirement of registration [28.06]; [28.07] and transfers of mortgages [28.10] (\textit{A New Land Law} (Hart, 2\textsuperscript{nd} ed, 2003)).
\textsuperscript{41} As E Cooke recognises, ‘A direct consequence of this must be that where a transfer takes place in the absence of a restriction that should have prevented it, there can be no question
It is arguable that the wording of section 52 does not lend itself well to the Law Commission's stated ambitions. A potential difficulty concerns the reference to powers 'conferred by law'. The meaning to be given to this expression will hold the key as to the scope of the provision. Several possibilities emerge. First, section 52 does not operate in relation to a contractual power of sale. This type of power cannot be said to be conferred by law. Secondly, the statutory power of sale is not conferred automatically by law. Sections 101-103 of the Law of Property Act 1925 are premised upon the power emerging from an interaction of express provisions in the mortgage agreement and the satisfaction of certain statutory conditions. Hence, it can be argued that a power is facilitated rather than conferred by law. In contrast, the mortgagee's powers to lease and to accept surrenders are, truly, conferred by law. On this reading, therefore, it is possible to see section 52 as operating entirely outside the context of sale. It would also be curious if a registered transfer under a contractual power of sale was not conclusive in favour of a purchaser, whereas one under the statutory power offered such a guarantee. Thirdly, and even if the statutory power of sale is one conferred by law, a restricted reading of section 52 might still be available. It is possible that the provision means no more than that, regardless of any variation by contract, the purchaser can safely assume that the proprietor of a legal charge holds the powers of disposition conferred by section 101. Such a reading would operate to sustain the

of alteration/rectification of the register to correct the situation' (The New Law of Land Registration (Hart, 2003), p.57, fn 26).

42 A problem with this argument is that s.101(6) speaks of, 'The power of sale conferred by this section ...'.

43 These powers are conferred by ss. 99, 100, respectively.
distinction between the two-stage process that has characterised the law since the nineteenth century.

Post-Contract Redemption?

There is no doubt that a lawful sale precludes redemption by the mortgagor, that is, the conveyance vests the full legal estate in the mortgagee. More contentious is the effect of a contract for the sale of mortgaged property. This debate assumes relevance where the contract has not yet been followed by completion and the purchaser seeks to assert rights over those of the mortgagor. In practice, however, difficulties of this nature are rarely encountered as vacant possession will usually be obtained prior to the sale. The mortgagor is likely also, by the time of sale, to have exhausted all potential avenues in an attempt to stave off the loss of the family home. Consequently, it is in only the most exceptional circumstances that a mortgagor will be in a position to redeem the mortgage following a contract between mortgagee and purchaser, but prior to completion. Nonetheless, the question of how the rights of the relative parties are prioritised is of interest. A trilogy of cases has considered the legal position of a mortgagor seeking to redeem in the face of a completed contract between mortgagee and purchaser.

In Lord Waring v London and Manchester Assurance, the court refused to grant an injunction restraining the mortgagee from completing a contract to sell in exercise of its power of sale. The mortgagor had tendered the moneys due and the contract had been entered into in good faith.

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44 Above.
Crossman J. was emphatic that a valid contract was sufficient to protect the purchaser as against a mortgagor. He explained:

'In my judgment, s.101 of the Act which gives to a mortgagee a power to sell the mortgaged property, is perfectly clear and means that the mortgagee has a power to sell out and out, by private contract or by auction, and subsequently to complete by conveyance; and the power to sell is, I think, a power by selling to bind the mortgagor ... It seems to me impossible to seriously to suggest that the mortgagor's equity of redemption remains in force pending completion of the sale by conveyance'.\(^4\)\(^5\)

In *Property and Bloodstock Ltd v Emerton*,\(^4\)\(^6\) the Court of Appeal lent unequivocal support to the approach adopted by Crossman J. in the *Waring* case. Although the facts were complicated by a contract argued to be conditional, Dankwerts L.J. was not prepared to depart from previous authority. He claimed, 'In my opinion Crossman J.'s decision ... was plainly correct and cannot be successfully assailed'.\(^4\)\(^7\)

Finally, in *National Provincial Building Society v Ahmed*\(^4\)\(^8\) the Court of Appeal offered a similarly emphatic endorsement of the traditional wisdom. There, the plaintiff advanced the sum of £40,000 to assist the defendant in the purchase of a flat. The defendant defaulted on the repayments and subsequently failed to adhere to an agreed schedule for

\(^{45}\) *Ibid.* at 318.  
\(^{46}\) [1968] 1 Ch 94.  
\(^{48}\) [1995] 2 EGLR 127.
monthly instalments under a suspended order for possession. He then vacated the flat and the warrant for possession was executed. The defendant responded with an application to the county court to set aside the warrant for possession. The plaintiff, however, proceeded to contract to sell with vacant possession. A transfer was duly executed, but the proceedings were commenced before the transfer was registered at the Land Registry. In the county court, the judge set aside the order for possession, granted a suspended order for payment of arrears, ordered the defendant's readmission into possession and issued an injunction preventing registration of the plaintiff's sale. This was overturned by the Court of Appeal where Millett L.J. concluded:

'The relevant transaction is the exchange of contracts for the sale of the flat to the purchaser ... A mortgagor's equity of redemption is extinguished when the mortgagee, in exercise of his statutory power of sale, enters into a contract for the sale of the mortgaged property, not when he later completes the sale by conveyance'.

As authority for this proposition, Millett L.J. relied upon the Waring case and Property & Bloodstock Ltd v Emerton. He was, however, prepared to advance further than Crossman J. and would not acknowledge any circumstances in which the equitable right to redeem would revive. Millett L.J. admitted, 'Even if completion had not taken place, therefore, the defendant had no longer any equity of redemption in the flat at the date of

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49 Ibid. at 128.
the hearing before the judge. The full beneficial interest in the property had already vested in the purchaser free and discharged from the defendant’s equity of redemption.\textsuperscript{50} Not surprisingly, seldom will it be argued that the mortgagor should succeed against an honest purchaser where the power of sale is exercisable on account of default.

Both Court of Appeal judgments were founded upon an acceptance of the analysis of Crossman J. in \textit{Waring}. Upon closer examination, however, it is arguable that this represents a too casual acceptance of the principles advanced. First, the effect of a contract upon the mortgagor’s equitable right to redeem is historically unclear. Judicial argument on this matter is consistently lacking in coherence and logic. Counsel for the plaintiff in \textit{Waring} submitted that the mortgagor’s equitable interest could not have been extinguished as there had been no conveyance. It followed that it must still be open to the mortgagor to redeem prior to completion. Crossman J. rejected that submission outright. Tellingly, when asked what would happen if the contract was never completed, he struggled for a convincing response, ‘I suppose it excludes it subject to completion’.\textsuperscript{51} This statement implies a differentiation between what occurs on contract (suspension) and what occurs on conveyance (extinction). The existence of this twilight zone does not, however, rest comfortably with other aspects of his reasoning. Crossman J. concluded, for example, that, ‘... the sale effected by the contract ... binds the plaintiff, and that it is too late after the sale for him to tender the mortgage money and become entitled to have the

\textsuperscript{50} \textit{Ibid.}

\textsuperscript{51} Above at 318.
property reconveyed to him'.\textsuperscript{52} This second statement obscures the distinction between contract and conveyance. At the point of contract, there has been no conveyance in response to which the mortgagor, on tender of the moneys due, can take a reconveyance. Logically, if the contract is the crucial stage there is no need for mere suspension of the equitable right to redeem. It should be destroyed at the point of contract. Explicit in Crossman J.'s initial statement is the commonsense realisation that this cannot be the correct outcome.

Secondly, the approach of Crossman J. lies at odds with equity's historical sensitivity towards the vulnerable mortgagor. It should not be forgotten that the right to redeem in equity is a treasured right given in direct contradiction to the declared terms of the contract.\textsuperscript{53} It was equity, moreover, that laid down the rules as to extinction of the right in times when foreclosure was the mortgagee's preferred weapon of enforcement. A comparison with foreclosure is instructive because the discretion to re-open foreclosure involves a similar balancing act between the competing interests of mortgagor and purchaser. Such inquiry demonstrates that equity affords scant respect to the pre-completion claims of a purchaser from a mortgagee. Following a foreclosure order absolute, a buyer from the mortgagee must, in the words of Lord Jessel M.R.:

'... be taken to know the general law that an order for foreclosure may be opened under proper circumstances, and under a proper exercise of discretion by the court; and if a

\textsuperscript{52} Ibid. at 316.
\textsuperscript{53} See Salt v Marquis of Northampton [1892] AC 1 at 18 per Lord Bramwell.
mortgagor in that case came a week after, is it to be supposed a court of equity would so stultify itself as to say that a title so acquired would stand in the way? I am of the opinion it would not'.

It appears, therefore, that even on foreclosure absolute, '... the court's tenderness towards a mortgagor is so extreme that it is prepared in special circumstances to treat his property as still essentially security ... to give him a last chance of redeeming'. No such sentiment is shown to a mortgagor pending completion of a contract of sale between mortgagee and purchaser. It is, therefore, incongruous that a contract to sell should preclude redemption prior to completion. This outcome pays little regard to historical context.

Thirdly, there is no statutory authority that caters for the freezing out of the equitable right to redeem prior to completion. Indeed, the general legislative tenor supports maintaining the mortgagor's interest until that point. Nevertheless, both Crossman J. and Dankwerts L.J. sought solace in section 101(1) of the Law of Property Act 1925 which gives the mortgagee a statutory power of sale and, by implication, the right to enter into a contract. Nowhere, however, does it state that the contract subsumes the equitable right to redeem. In a like vein, sections 88(1), 89(1) of the 1925 Act emphasise the significance of the conveyance in the sale process, but pay

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54 *Campbell v Holyland* (1877) 7 Ch D 166 at 173.
56 These sections deal with the effect of conveyance on freehold and leasehold property respectively.
no heed to the contract that precedes it. Section 104(2) also makes it explicit that it is the conveyance that is to be treated as significant. It is, therefore, on conveyance (and not contract) that the power of sale has been exercised with certitude. This is reiterated in section 52 of the Land Registration Act 2002 which offers protection to a 'disponee' of the land. A disponee, however, is defined in section 205(1)(ii) of the Law of Property Act 1925 so as to exclude a party to a contract for sale. The provision explains that '… disposition includes a conveyance and also a devise, bequest, or an appointment of property contained in a will'. Under section 58 of the 2002 Act, moreover, the conclusiveness of protection for the purchaser occurs on registration of the transfer. This entails that until that time, the purchaser’s interest is liable to be compromised or defeated by off-register third party rights. These provisions lend themselves well to the argument that the mortgagor should still be able to redeem at any time until completion.

Fourthly, Crossman J. indicated that where a purchaser discovers impropriety after the contract for sale, but prior to conveyance, he is prevented from taking good title under section 104(2) of the Law of Property Act 1925.\footnote{In relation to registered land, s.52 of the 2002 Act seeks to render the disponee’s title unimpeachable in such circumstances.} This is hard to reconcile with the argument that sale is effected on contract. In addition, a variety of other factors, such as frustration, illegality or mistake, may prevent either party from completing. It seems arbitrary, therefore, that such difficulties might prevent completion, but not the sudden ability of the mortgagor to tender all moneys due under the
mortgage. Admittedly, the inability to proceed with a sale potentially exposes the mortgagee to damages for breach of contract. It may also, in a chain of transactions, impact on third parties who have relied on the mortgagee's contract. Crossman J. was of the view that the mortgagee's power should not be unacceptably limited. He felt that, if it were to be otherwise, the purchaser from a mortgagee would get only '... a conditional contract liable at any time to be set aside by the mortgagor's coming in and paying principal, interest and costs'.\textsuperscript{58} This reasoning is unconvincing because to regard the mortgagee's power as provisional or contingent in such circumstances would be no more than a fiction. The view of Crossman J. ignores the reality that contracts are liable to be defeated by unforeseen, vitiating circumstances. The nature of the contract and the infrequency with which such circumstances arise are also highly relevant matters. The threat that the mortgagor might redeem at the last moment is much less probable than a failure of the purchaser to complete. In addition, as was contended in \textit{Property & Bloodstock v Emerton}, ' ... the commercial risk for the mortgagees' purchasers would be measured and translated into a discount of the purchase price'.\textsuperscript{59} Thus the purchaser from a mortgagee should be aware of the obvious, albeit minimal, risk of redemption and proceed accordingly.

Finally, the issue of where the mortgagee and contractual purchaser stand between contract and conveyance is a matter of some conceptual difficulty. In particular, the discontinuation of the equitable right to redeem has been attributed to the operation of the doctrine of conversion. Under  

\textsuperscript{58} [1935] 1 Ch 310 at 318.  \textsuperscript{59} [1968] 1Ch 94 at 104.
this doctrine, on the entry into a binding contract, and while specific performance remains available, the purchaser is viewed in equity as being the true owner of the property. The doctrine is rooted in the maxim, 'Equity looks on that as done, that which ought to be done'. As Pettit comments, 'It is one of the most familiar propositions of property law that from the moment a contract for the sale of land is entered into, the vendor becomes a trustee for the purchaser as a result of the doctrine of conversion'. Nonetheless, the nature of the trusteeship is heavily qualified. If specific performance ceases to be available, the trust must necessarily be discharged. The attempt to utilise this equitable principle so as to justify the defeat of an earlier equity is somewhat spurious. Nowhere is it properly considered whether on the basis of equity, the specifically enforceable contract between mortgagee and purchaser is sufficient to defeat the equity of redemption. As Lord Parker explained in *Howard v Miller*, ‘... it is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser ... it is only true if and so far as a Court of Equity would under all circumstances of the case grant specific performance of the contract'.

Academic commentary, moreover, exhibits little or no analysis of the principles at play and merely reinforces the questionable logic that pervades the above case law. Some commentators allude to the doctrine of

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60 *Oughtred v IRC* [1960] AC 206 at 240 per Lord Jenkins; *Shaw v Foster* (1872) LR 5 HL 321 at 328 per Lord Cairns.
63 [1915] AC 318 at 326.
conversion, without elaboration, as sufficient evidence of the mortgagor's incapacity when faced with a contract for sale to a third party purchaser.\textsuperscript{64} Rarely is the question of the unavailability of specific performance or the contractual exclusion of the doctrine of conversion considered. Other views differ as to whether the equitable right to redeem is extinguished or merely suspended. Cousins, for example, argues that, 'Under the equitable doctrine of conversion the destruction of the equity of redemption takes places as soon as there is a binding contract for sale (even if it is conditional) not upon conveyance'.\textsuperscript{65} In the light that the doctrine of conversion can be excluded or defeated, this interpretation cannot stand. Sykes, however, highlights the suspensory effect of a contract for sale upon the equitable right to redeem, 'It is clear that the effectuation of an unconditional sale precludes a right of redemption pending completion although the redemption right will become operative again if the sale goes off'.\textsuperscript{66} Although the decisions make clear that there is no right to redeem in post-contract period, the underlying justifications for this conclusion are obscure, insubstantial and illogical.

**Defeating the Mortgagor's Contract**

A mortgagee's contract for sale will prevail over an earlier contract entered into by the mortgagor, even when the earlier contract is protected by

\textsuperscript{64} See, for example P Fairest, *Mortgages op.cit.* p.97.

\textsuperscript{65} E Cousins, *op. cit.* p.300.

\textsuperscript{66} E Sykes, *The Law of Securities* (Sweet & Maxwell, 4\textsuperscript{th} ed, 1986) p.121. H Potter agrees, 'It seems impossible to maintain any other view or else an abortive contract for sale would operate as a foreclosure by the mortgagee without resort to the Court' ("Notes" (1935) 51 LQR 434 at 435).
registration. *Duke v Robson* provides a classic, if familiar, illustration of this rule where title to land is unregistered. The mortgagor contracted to sell to a purchaser for the sum of £25,000. The contract was duly protected by entry of a C(iv) land charge on the Land Charges Register. Subsequently, but prior to completion of the existing contract, the mortgagee also entered into a contract for sale of the property. At first instance, Plowman J. considered the implications of section 104(1):

'The effect of these provisions ... is that a sale by a mortgagee under a charge by way of legal mortgage overreaches the equity of redemption and all rights subsisting in the equity including the right of the purchaser from a mortgagor, and notwithstanding that he may have registered an estate contract in respect of his contract for sale'.

This interpretation found favour in the Court of Appeal where Russell L.J. dealt somewhat briefly with the arguments canvassed before him. He concluded, 'A contract for sale by the mortgagor of the equity of redemption has no possible effect on the rights and powers of a mortgagee, and in particular the rights and powers of a mortgagee to exercise his power to sell'. Similarly, *Lyus v Prowsa Developments* demonstrates the applicability of this approach in the context of registered land and in

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69 Above at 275.
70 Above.
circumstances where the mortgagee gave consent to the mortgagor's contractual undertaking. Dillon J. emphasised that the security provided by registration of the initial contract became redundant in the face of a mortgagee's contract in exercise of his power of sale. As he explained, 'The plaintiff's solicitors had very properly registered a caution against the title to protect the contract, but the bank by virtue of its prior charge was in a position to override the caution and transfer ... to a purchaser free from all interests of the plaintiff'.

The line of reasoning adopted in Duke v Robson is further testament to the sweeping protection afforded to a mortgagee in the exercise of the power of sale. Admittedly, there are convincing reasons why the rights of the mortgagor should be subjugated to those of the mortgagee. It is on default that the power of sale will become exercisable and this must signal the point at which the mortgagee can seek to enforce the security. Any statutory power of sale must be effectively geared towards achieving this goal. If the power were to be hampered when it is lawfully exercisable, this would be an unacceptable obstacle to the recovery of capital outlay. As Dillon L.J. explained, 'It cannot possibly be said that a mortgagee is deprived of his power to sell by the fact that there is a contract which may be specifically enforceable, may be enough to pay off all encumbrances, but which is still in the field of contract and may not come to the stage of completion'. Nevertheless, to argue that a mortgagor's protected contract cannot bind a purchaser from a mortgagee flies in the face of the ethos of

71 Ibid. at 1047.
72 Duke v Robson above at 274.
registration. It should not be overlooked that, because of registration, both the mortgagee and the purchaser will have advance notice of the earlier transaction. As the sale by the mortgagor cannot go ahead without the acquiescence of the mortgagee, it is possible that an estoppel claim could debar the mortgagee's entry into a subsequent contract and bind a future purchaser. Albeit arising in only a very few cases, the implications are far-reaching and potentially unfair for both the mortgagor and his prospective buyer. Unless the earlier contract is viewed as being frustrated by the later, the mortgagor will be exposed to a claim in damages for breach of contract. The initial buyer, who was previously entitled to claim specific performance, loses the property. Not surprisingly, the Law Commission recognised the potential for unfairness arising from the avoidance of the mortgagor's bargain and proposed a solution.\(^{73}\) The recommendation simply stated is that, where a mortgagor has given notice of an intention to sell and the mortgagee proceeds to enter into a separate contract for sale, the mortgagee must be liable to compensate the mortgagor for any loss incurred as a consequence of being placed in breach. While adhering to traditional reasoning, this proposal effectively places responsibility upon the shoulders of the mortgagee. As the mortgagee will, because of registration, know (or be deemed to know) of the earlier bargain few would argue against this recommendation.

**Sale by Mortgagee**

As demonstrated, the peculiarity of the mortgage relationship gives rise to

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\(^{73}\) See Law Com No. 204, *op. cit.* at para 7.16.
difficult questions about the nature of the rights and obligations of the parties in the context of enforcement. The nature of the duties imposed upon the selling mortgagee offers an apt illustration. Largely unregulated by Parliament, the historical influence of equity and the common law survives, subject to incremental reform and modernisation initiated by the judiciary. As Sir Richard Scott V-C acknowledged, 'One of the great virtues of the common law duty of care is its inherent flexibility, and its scope for development and adjustment in order to meet the changing requirements of society'.

For others, this degree of complacency is misguided. The cases are littered with trite observations about the nature, extent and character of mortgagees' duties and these serve only to render the law impenetrable and confused. As Rutherford J. observed, '... such ritualistic repetition of unexamined formulae obscures the true nature and purpose of the contract'. Although many of the mortgagee's duties may be simply stated, beyond the outward expression lies a range of problems relating to the language employed, the doctrinal origin of the duty claimed and the scope of the duty given. This is complicated further by the possible involvement of parties such as receivers and agents or associates. It is the design of this Chapter to consider the duties of the selling mortgagee only in so far as they

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74 Medforth v Blake [2000] Ch 86 at 101.
75 The observation that the mortgagee is not a trustee of the power of sale for the mortgagor is one such example that dates back to Sir George Jessel M.R. in Nash v Eads (1880) 25 Sol J 95.
76 Sterne v Victoria & Grey Trust Co (1985) 14 DLR (4th) 193 at 203.
77 See for example, Silven Properties Ltd v Royal Bank of Scotland Plc [2004] 1 WLR 997 where the Court of Appeal decided that, with regard to the timing of the sale, a receiver is not under a duty of care to ensure that steps are taken to realise the full potential of the property.
78 A recent illustration is provided by Corbett v Halifax Building Society (2003) 1 WLR 964 where the Court of Appeal considered the propriety of a mortgagee’s sale to an employee at an undervalue.
are subject to statutory regulation. Principally these relate to the sale price to be achieved and, by virtue of the section 91 discretion of the court to order sale, the mortgagee’s timing of the sale.

As to sale price, the Law Commission identified two areas of uncertainty, which motivated the recommendation that there be statutory intervention. It was perceived as difficult to identify the source of the mortgagee’s duty. As to whether a duty lies in contract, tort or equity, the answer probably depends upon the remedy sought by the mortgagor. In addition, the extent to which the duty could be limited by express provision in the mortgage agreement was unclear. Accordingly, the recommendation was for implementation of a statutory duty that, notwithstanding any contrary agreement, the mortgagee take reasonable care to ensure that on a sale the price is the best price that can reasonably be obtained. The Law Commission anticipated little difficulty with the actual content of the duty, which it described as ‘relatively straightforward’.

Inarguably, the mortgagee labours under a general common law duty to act in good faith and to take reasonable care to obtain the best price reasonably obtainable. This formulation is ‘synonymous’ with obtaining a ‘proper price’ or the obtaining the ‘true market value of the mortgaged property’. Unfortunately, the minimum threshold is not particularly stringent

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79 Sterne v Victoria & Grey Trust Co, above at 202 per Rutherford J.
80 The duty would be owed to a mortgagor, any guarantor of the mortgagor and to any subsequent mortgagee: Law Com No. 204, op. cit. at para 7.23.
82 Per Jonathan Parker L.J. in Michael v Miller [2004] EWCA Civ 282 at [132].
83 Downsview Nominees Ltd v First City Corporation [1993] AC 295 at 315 per Lord Templeman.
84 Cuckmere Brick Co Ltd v Mutual Finance Ltd above at 966 per Salmon L.J.
as a mortgagee, '... will not be adjudged to be in default unless he is plainly on the wrong side of that line'. In the determination of the market value of the property, a mortgagee will not be in breach of the duty to obtain the best price reasonably obtainable where the price achieved is within an acceptable bracket of estimates. As Jonathan Parker L.J. has recently confirmed, '... whether as to market conditions, or as to market value, or as to some other matter affecting the sale, the use of a bracket – or a margin of error – must in my judgment be available to the court as a means of assessing whether the mortgagee has failed to exercise that judgment reasonably'. The possibility of obtaining a higher price is, of course, a wholly separate matter. An interesting question arises in relation to the antigazumping policies pursued by some institutional lenders and the compatibility of such policies with the duty of the mortgagee on sale. It is highly questionable whether a mortgagee will have obtained the best price reasonably obtainable where it is unable to accept a higher offer simply on this basis.

Interestingly, the Law Commission was anxious that the duty of all lenders be 'enshrined by statute' just as those of building societies were at the date of publication of the Report. Ironically, section 12(2) of the Building Societies Act 1997 has since replaced the previous statutory duty with the common law duty of care that applies generally across the board.

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85 Ibid. at 968.
87 It was formerly a statutory requirement for building societies that sale achieve the best price reasonably obtainable: Building Societies Act 1986, s.13(7), Sch 4 para 1.
88 The Treasury and the Financial Services Authority have taken over the functions of the Building Societies Commission to bring Building Society lending in line with the regulation of the majority of mortgage lending.
The significance of this change, however, appears to be short lived. The Financial Services and Markets Act 2000 marks the introduction of statutory regulation for all mortgages within its remit. First, a firm must ensure that when a property is repossessed, it takes steps to market the property for sale as soon as possible.\textsuperscript{89} Secondly, it will be a requirement that a selling mortgagee obtain the best price that might reasonably be paid taking account of market conditions and the continuing increase in the amount owed by the customer under the regulated mortgage contract.\textsuperscript{90} This appears to go further than to re-introduce the statutory duty as repealed in 1997. Arguably, however, it will achieve very little. Although there is the express requirement to consider the increasing indebtedness of the customer, the common law already restrains the mortgagee from the selfish pursuit of its own interests. In addition, the requirement that the property is marketed as soon as possible seems easily circumvented. In MCOB 13.6.2.G there is an acknowledgement that outside factors such as market conditions may prompt a delay in the sale. It remains for the mortgagee to adjudge how its duty is to be discharged. Subject to restriction in the mortgage agreement, the mortgagee will decide on the mode of sale, for example, whether by private arrangement or public auction. Similarly, the mortgagee must decide on how the sale is advertised and the length of time the property should remain on the market. It is questionable, therefore, that any increased protection for borrowers is cemented by these regulations.

\textsuperscript{89} MCOB 13.6.1R(1).
\textsuperscript{90} MCOB 13.6.1R(2).
The Impact of Section 91

Where a mortgagee seeks legitimately to enforce the security, case law demonstrates that it is the prerogative of the mortgagee to determine the date and timing of sale. In *China and South Sea Bank Ltd v Tan Soon Gin,* for example, Lord Templeman emphasised that a mortgagee should decide, ‘... in his own interest if and when he should sell’. 91 On the basis of such statements, traditional thinking entailed that a mortgagee was not obliged to exercise the power of sale at any particular time at all. It has always been the case, however, that the court enjoys a very wide discretion to order sale under section 91. The provision makes clear that the court can order sale regardless of whether any other person dissents or that the mortgagee or any other interested person does not appear in the action. 92 It offers a party the opportunity to wrest control away from the mortgagee and to overcome the refusal of a mortgagee to join in a proposed sale. The wording of section 91(2) is, therefore, broad and inclusive:

> 'In an action whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money, or in the right of redemption ... may direct a sale of the mortgaged property, on such terms as it thinks fit'.

Where sale of the mortgaged property is effected in court, such action impinges necessarily upon the circumstances of the exercise of the

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91 [1990] 1 AC 536 at 545.
mortgagee's remedies. In origin, the legislation can be traced back to section 48 of the Chancery Amendment Act 1852, under which the power of the court to order sale was limited to foreclosure actions. Its utility lay in countering problems of delay and expense that arose where property was subject to large numbers of successive mortgages. Section 48 was replaced by section 25(2) of the Conveyancing Act 1881 which afforded the judicial discretion to order sale at any time. Exercise of this discretion commonly occurred in lieu of foreclosure where, at any stage until order of the decree absolute, a mortgagor could make out a case for judicial sale. Judicial sale, however, provided the mortgagee with, '... a benefit which a foreclosure would not give him, that of obtaining the proceeds of sale, and recovering the rest from the estate – this he would not otherwise do without incurring the risk of opening the foreclosure.' A similar risk for the mortgagee emerged in cases where the security was defective as, '... if they should afterwards sue the defendant on his bond for the performance of covenants, that would open the decree of foreclosure.' In the case of an equitable chargee judicial sale was the principal remedy available. In this instance, an order of the court was regarded originally as a right and not merely a matter of statutory discretion.

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92 See, for example Wade v Wilson (1882) 22 Ch D 235.
93 See Hurst v Hurst (1852) 16 Beav 372 at 374 per Sir John Romilly M.R.
94 See Union Bank of London v Ingram (1882) 22 Ch D 169.
95 Sale in lieu of foreclosure was in no sense automatic as the courts awaited a strong case to be made out for the exercise of discretion: see Provident Clerks' Life Assurance Association v Lewis (1892) 62 L J Ch 89.
96 Tipping v Power (1842) 1 Hare 405 at 409 per Sir James Wigram.
97 Dashwood v Bithazey (1729) Mos 196.
98 Grissell v Money 38 L J Ch 312.
It is now well documented\(^9\) that the decision in *Palk v Mortgages Services Funding Ptd*\(^{100}\) forced a reappraisal of the scope for judicial intervention in the matter of the timing of sale. It emerged that a modern day court was prepared to exercise its discretion where the security is deficient and wholly against the wishes of the mortgagee that had chosen not to exercise its statutory or contractual rights. Owing to the negative equity in the property, the mortgagee in *Palk* obtained an order for possession, but did not wish to sell immediately. Instead it was envisaged that the property would be let on short-term lease whilst the mortgagee awaited an improvement in the housing market. Crucially, the rent obtainable was insufficient to meet the interest accruing under the mortgage, resulting in an income shortfall and a steady increase in the overall debt. The mortgagor, who was placed in a situation of '... financial haemorrhage for an indefinite period',\(^{101}\) applied for an order for sale under section 91.

Sir Michael Kerr acknowledged that, if sale were ordered, the court would deny the mortgagee the negative right not to sell the property and of the positive right to take possession for the purpose of leasing. On the facts, however, a refusal to order sale would be manifestly unfair, exposing the mortgagor to open-ended liability. It was clear, for example, that the mortgagor was being forced to act as an unwilling risk taker for the mortgagee. As Nicholls V-C emphasised, the mortgagee '... ought not to be able to saddle Mrs Palk with that risk and a rising debt against her


\(^{100}\) [1993] WLR 415.

\(^{101}\) *Ibid.* at 427 *per* Sir Michael Kerr.
wishes. In addition, as the rule that a mortgagee may not purchase does not apply where sale is at the direction of the court, the objectives of the mortgagee could be achieved by itself purchasing and then selling on when market conditions were more favourable. Accordingly, *Palk* countenanced the judicial capacity to order sale of the mortgaged property against the wishes of the mortgagee and in the absence of full security for the debt. As such, it comprised a novel and socially responsive utilisation of a statutory provision that had operated, historically, in a very different context.

The decision is unquestionably correct. It is arguable, moreover, that the Court of Appeal overplays the interference with the mortgagee’s rights. First, the mortgagee does not enjoy a negative right not to sell, precisely because the mortgagee is not the only party with a capacity to sell. The mortgagee’s right to sell is consonant with the exercise of discretion of the court. As history demonstrates, there is nothing in this approach for a mortgagee to fear. The courts are loath to interfere with any legitimate exercise of mortgagees’ remedies. There is, moreover, nothing controversial about invoking section 91(2) where the mortgagee is electing not to pursue a remedy and the status quo is to the detriment of the mortgagor. It is irrefutable that the court enjoys a discretionary jurisdiction as to sale that is stated in the broadest terms.

Secondly, much of the case law relied upon to dispute the invocation of section 91(2) relates to the jurisdiction of the court in an action for

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102 Ibid. at 422.
103 As Brett L.J. described section 25(2) of the 1881 Act, ‘This is an enabling and remedial statute intended to give the court a very beneficial power, and I do not see any reason to cut down the words of the enactment... ’ (*Union Bank of London v Ingram*, above at 464).
foreclosure, i.e. in an action by the mortgagee to enforce the security. The positive right to take possession in order to lease the property is not an act of enforcement.\textsuperscript{104} It must, therefore, fall subject to the overriding powers of the court conferred by statute to order sale where appropriate. The historical role of the section is manifestly different to its operation in \textit{Palk}. The facts were not only exceptional, but presented before the court a novel mix of competing claims set in a markedly different social context. Nonetheless, even on the basis of the 1881 Act, it was not unknown for the court to look for a clear indication that the mortgagee would proceed to enforcement. If it could not be found, the way would be opened to support a mortgagor’s application for sale. In \textit{Brewer v Square}, for example, Kekewich J. did not regard the provision as being an interference with the mortgagee’s legal right where the mortgagee showed no immediate intention to proceed to sale.\textsuperscript{105} He claimed of the instant mortgagee, ‘I doubt whether, according to the language of the old Court of Chancery, he has “threatened or intended” to exercise the power.’\textsuperscript{106} Accordingly, it was appropriate for the court to interpose a moderate delay between the mortgagee and the exercise of his power of sale in order to allow the mortgagor a three-month period in which to sell the property.\textsuperscript{107}

\textsuperscript{104} This action would have been prohibited under the Law Commission proposals because possession would only have been granted to enable the property to be sold: Law Com No 204, \textit{op. cit.} at para. 7.29.
\textsuperscript{105} [1892] 2 Ch 111.
\textsuperscript{106} \textit{Ibid.} at 113.
\textsuperscript{107} The court also imposed a reserve price and required the deposit of a sum to meet any costs.
Conduct of the Sale

Where both parties anticipate sale, the most controversial question is that of who should conduct the sale. Historically, in an action for redemption or foreclosure the conduct of a sale by order of the court was a discretionary matter. In an action for redemption, the usual policy was to give conduct to the mortgagor as the person in whose interest it is to achieve the best price.\textsuperscript{108} In an action for foreclosure, where the mortgagee required a remedy, a different approach was adopted. Where desired, and especially in cases where the security was deficient,\textsuperscript{109} conduct was granted to the first mortgagee, legal or equitable. Equally, some cases show that it was not uncommon for conduct of the sale to be awarded to the mortgagor. It seems possible that this could occur in the absence of objection, where sufficient sums were deposited to meet the costs of sale\textsuperscript{110} and the security was sufficient.\textsuperscript{111} The paramount concern of the court appears to be that there should be no interference with the exercise of a mortgagee of his legal rights of enforcement. In such circumstances, even where argued that the mortgagor could obtain a better price, the court was unsympathetic towards the mortgagor. As was made clear in \textit{Re Longdendale Cotton Co},\textsuperscript{112} the mortgagor enjoys no equity to interfere with the mortgagee's right to sell. Control of the mortgaged property could be regained only through redemption.

\textsuperscript{108} \textit{Davies v Wright} 32 Ch D 220.
\textsuperscript{109} \textit{Hewitt v Nanson} 28 L J Ch 49; \textit{Christy v Van Tromp} (1886) W N 111.
\textsuperscript{110} \textit{Brewer v Square} above.
\textsuperscript{111} \textit{Woolley v Colman} 21 Ch D 169.
\textsuperscript{112} 8 Ch D 150.
The availability of section 91(2) in cases of negative equity was to test such traditional understandings. In *Barrett v Halifax Building Society*\(^{113}\) the distinguishing feature from *Palk* concerned the intentions of the parties. There, both mortgagee and mortgagor agreed that a sale was the best course of action. The mortgagees obtained a possession order, which was suspended in the expectation that the mortgagor would discharge the arrears. During the period of the suspension, the mortgagors found a buyer and applied to the court for sale under section 91. The mortgagees refused to agree to the negotiated sale price, which was insufficient to cover the outstanding moneys owed, and argued that it was not conventional to allow borrowers in negative equity to conduct the sale with no provision for the shortfall. Evans Lombe J. was unimpressed by the failure of the mortgagee to point to any advantages should it be awarded conduct of the sale.\(^{114}\) Accordingly, he concluded on the evidence that, ‘... there is no discernible advantage to the building society in refusing to allow this sale to complete, whereas there is an obvious advantage to the mortgagors to complete their proposed sale at what is accepted as the best price that is likely to be obtained in the current market’.\(^{115}\)

It fell to Phillips L.J. in *Cheltenham and Gloucester v Krausz*\(^{116}\) to attack the naivety shown in *Barrett* and to make the obvious point that not every act of resistance to an order for possession will be motivated by a desire to achieve a better price. He explained, ‘Often the mortgagor will be

\(^{113}\) (1995) 28 HLR 634.

\(^{114}\) He recognised, for example, that the discretion of the court will, ‘... almost always be exercised in the mortgagee’s favour where the mortgagee can demonstrate some tangible benefit of which it will be deprived if the court orders sale’ (*ibid*. at 639).

\(^{115}\) *Ibid*. at 640.

\(^{116}\) [1997] 1 All ER 21.
anxious to postpone for as long as possible the evil day when he has to leave his home'.\footnote{Ibid. at 27.} Accordingly, to allow the mortgagor to remain in possession and to have conduct of the sale would encourage deliberate delay, practical difficulties in assessing developments and unnecessary procedural complexity for a mortgagee.

**Modern Statutory Alignment**

*Cheltenham and Gloucester v Krausz* is, as yet, the only Court of Appeal decision to probe at the interrelationship between the jurisdiction to suspend possession under the Administration of Justice Acts and the section 91(2) discretion to order sale. As to the former, Phillips L.J. acknowledged that there was no power to suspend possession so as to permit the mortgagor to sell the mortgaged property in circumstances where there is a negative equity and no other funds will be available to the mortgagor to make up the shortfall.\footnote{Ibid. at 29.} He claimed, 'The very delimitation of the power given by section 36 makes it clear that the legislature did not intend that the court should have any wider jurisdiction to curtail the mortgagee's right to possession'.\footnote{Ibid. at 30.} His interpretation of the section 91(2) discretion was that it only could take effect where the borrower's application for sale precedes the mortgagee's application for possession. This outcome is certainly correct. Despite the clear differences between *Palk* and *Krausz*, there is an acceptance that where the mortgagee, '... is actively pursuing its statutory or contractual...
power of sale then the court does not usually exercise its discretion to order judicial sale'.

Admittedly, this approach is to police the enforcement strategy of the lender. Section 36, however, provides only for the narrow circumstances in which the mortgagee's right to possession will be postponed. The court is not required to enquire as to the purpose for which possession is sought. Its invocation is alone determined by the demonstrated ability of the borrower to repay arrears or remedy a temporary default. In those rare circumstances where the mortgagee does not proceed directly to sale, but chooses to safeguard rather than enforce its security, there must be scope for the mortgagor to rely upon section 91(2). This is consistent with the distinction drawn between enforcing the security by possession leading to a sale (as in *Krausz*) and possession not leading to an immediate sale (as in *Palk*). This distinction, moreover, is a tenable one.

It has always been the case that whilst the mortgagee is taking active steps to enforce the security whether it be by foreclosure or in proceedings for possession, the court will not interfere with the mortgagee's action to order sale at the behest of a defaulting borrower. It is wholly consistent with historical principle, rationality and fairness that the right of the borrower to seek sale under section 91(2) be suspended during the mortgagee's proceedings for possession. If, for example, proceedings are discontinued or the mortgagee subsequently decides not to sell, the capacity of the mortgagor to pursue judicial sale will revive. In this manner, it does not matter that section 36 does not take on

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120 See the Australian authority of *Yarrangah v National Australia Bank Ltd*, February 11, 1999. (Unreported).
121 C/f Dixon, *op. cit.* at 285, fn. 36.
board the intentions of the mortgagee. As sale with vacant possession comprises the conventional means of enforcement of residential mortgages, proceedings for possession clearly constitute an active step. Although the section 91(2) discretion is general and, exercisable contrary to the wishes of any person, it must be exercised judicially. On the basis of both Palk and Krausz it appears that this has been achieved.

**Judicial Subjectivity**

As detailed in Chapter 5, there is a marked contrast in the approach of the court to the claim of a borrower in temporary manageable difficulties to remain in possession, and the much more serious matter of a borrower in irreparable financial difficulty. With regard to the latter, the commercial interests of the lender clearly rank in priority and the mortgagee will not be unduly delayed in the enforcement of its security. In relation to the former, particularly in the lower courts, there is scope for much subjectivity in the exercise of discretion under section 36. The modern application of section 91(2) has given rise to similar scope for the expression of judicial subjectivity. This is demonstrated on facts where borrower with negative equity sought to move, but the lender preferred to await an up-turn in the housing market. In *Polonski v Lloyds Bank Mortgages Ltd*\(^{122}\) there is the most striking and clearly expressed sympathy for the mortgagor. The two paragraphs dedicated to a descriptive account of her deprivation are emotive and candid. Jacob J. saw before him an unemployed graphic designer who was a single mother with two children living in a rough area of

\(^{122}\) [1998] 1 FLR 896.
problem families, drug dealing and violence. He noted there were poor prospects for schooling and employment. Jacob J. could find no evidence of financial irresponsibility, even though her professed intention was to move regardless of the mortgage terms or the ruling of the court. The problem was that she wished to sell in circumstances where sale would not pay off the mortgage debt and where she was unable to agree to provisions for the delayed payment of the shortfall. In view of the 'good and strong social reasons' put forward by the plaintiff, the lender's concerns were swept aside.

This judicial approach is open to much criticism. First there was an absence of legal analysis. Jacob J. confined himself to a brief, selective and questionable treatment of Palk. Secondly, it reflected a casual disregard for serious indebtedness and the dangers of an unfettered judicial discretion. As Thompson argues, 'While it is true as the judge recognised, that people in Ms Polonski's position could simply return the keys and vacate the property, it is surprising to see this approach being effectively judicially sanctioned'. Thirdly, it is also evident that the judge's preoccupation with the borrower's social circumstances extended further than a mere consideration of a range of relevant factors. Unavoidably, therefore, any principled application of the statutory provisions would thereby be obscured. As Nourse L.J. has pointed out, albeit in the different context,

'It is not uncommon for a wife and young children to be faced with eviction where the realisation of her beneficial interest will

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124 That is sale petitioned under section 30 of the Law of Property Act 1925.
not produce enough to buy a comparable home ... there may be problems over schooling and so forth. Such circumstances, while engendering a natural sympathy in all those who hear them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society is familiar.\textsuperscript{125}

The decision in \textit{Polonski} signals some movement away from the hard-lined stance in \textit{Re Citro} where family hardship is almost always secondary to the needs of creditors.\textsuperscript{126} This is also the tenor of recent legislation dealing with sale of co-owned property by secured creditors. Section 15 of the Trusts of Land and Appointment of Trustees Act 1996,\textsuperscript{127} for example, lists with no indication as to priority, the relevant issues for the court in the exercise of discretion in that area of the law. Under section 30, the usual outcome was a prioritisation of the interests of the lender despite the typical hardship endured by loss of the family home. Recent case law has emphasised that the new legislation has delivered a departure from such former practice. As is clear from \textit{Mortgage Corporation v Shaire}\textsuperscript{128} the interests of a secured creditor are merely one factor to be considered and are by no means the decisive.

Once more, it may be concluded that only as a by-product of wider statutory reform is the law of mortgages subject to the attention of

\textsuperscript{125} \textit{Re Citro} [1990] 3 All ER 952 at 962.
\textsuperscript{126} Indeed, it has recently been doubted whether the narrow approach to exceptional circumstances adopted in \textit{Re Citro} is consistent with the European Convention on Human Rights: see \textit{Barca v Mears} [2004] All ER D 153 (Sep) per Nicholas Strauss QC.
\textsuperscript{127} Which has replaced section 30 of the Law of Property Act 1925.
\textsuperscript{128} [2000] 2 FLR 222.
Parliament. In the arena of co-ownership, a revamped statutory discretion caters for the enhanced protection of homeowners required in modern times. By contrast there has been limited further discussion of the capacity of the courts to interfere with the mortgagee's power of sale by supporting a borrower's section 91 application. No doubt it is a jurisdiction that will fall due for future scrutiny. Its apparently unfettered nature, the absence of settled case law and the unlikelihood of wholesale statutory reform will leave the judiciary to grapple with the rights and wrongs of its invocation during the next down-turn in the housing market.
Chapter 8
Conclusions

The ambition of this thesis is to provide a critical evaluation of the statutory framework for enforcement in the law of residential mortgages. It is posited upon the argument that the absence of substantive law reform ensures that current mortgage law remains shackled to its past, excessively influenced by precepts and principles developed in a markedly different social context. This entails that the extant law is outmoded, unnecessarily complex and highly artificial. It is particularly so in relation to the motley assortment of rights and remedies associated with the mortgage transaction, acquired in a haphazard evolution and awkwardly maintained in contemporary times. This is nowhere better portrayed than with the undue reverence paid to the mortgagee's inherent right to possession. It is apparent also that the limitations of equity and the sanctity of common law principle continue to exert an unnatural and limiting influence upon judicial thinking.

Characterised by piecemeal legislative intervention, the modern law has, admittedly, seen some welcome developments in borrower protection. The overall picture, however, is one of incoherence and inefficiency across the different regulatory frameworks. Accordingly, the law relating to the enforcement process fails to meet the needs of the twenty-first century mortgage market. It does not provide a modern, consistent and fair framework for mortgage enforcement and has structures in place for the protection of borrowers that are insubstantial in their provision and defective in their operation.
Past Solutions and Present Problems

Holdsworth argues that, throughout its history, the importance of land law has caused it to be shaped by those social, political and economic ideas that are prevalent at a given time. As a consequence, its rules of law are derived from many different periods and are designed under the influence of ideas attributable to distinct stages of history.\(^1\) Both Chapter 2 and Chapter 3 demonstrate the effect of this tendency upon the law of mortgages. Not only can the fundamental concepts and characteristics of mortgage law be traced back through history, but also this investigative process offers the only means by which the current law can truly be understood. For example, it provides the only way through which the contribution of equity to contemporary jurisprudence may be accurately appraised. Any effective analysis must, therefore, necessarily be underpinned by detailed historical narrative. Unfortunately, this is an area of the law's past that has, to now, been neglected by commentators.

The focus of Chapter 2 is directed at equitable reform of the common law mortgage. It charts the mortgage from its early origins to the advent of statutory regulation, explaining the nature, object and legacy of equitable intervention. The seventeenth century, in particular, was characterised by the growth of equity, and although later centuries saw the development and refinement of these rules, the equitable jurisdiction, and the principles upon which it was based, had been concretely established. A convergence of three

\(^1\) W S Holdsworth, *Historical Introduction to the Land Law*, (Clarendon, 1927) p. 3.
elements explains the intervention of equity and charts the move from a conscience-based dispensation of justice to the formulation of general grounds for relief. First, equitable intervention was justified on the ground that the common law provoked injustice. Mortgagors of the fifteenth and sixteenth centuries were persons in financial difficulty and susceptible to the exploitation of moneylenders. The vulnerability of such borrowers is summed up in the classic decision of *Vernon v Bethell*, where Henley L.C. regrettably observed that, '... necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose on them'.\(^2\) Accordingly, the perceived inequality of bargaining power drove the development of the equitable protective jurisdiction and explains the focus of equity on the parties at the point of contract as opposed to default.

Secondly, the law of mortgages provided a suitable vehicle for the gradual expansion of Chancery influence. Successive Chancellors, of course, took full advantage. Turner, for example, acknowledges the lack of conclusive evidence, but favours the view that the Chancellor was spurred by the desire to extend his jurisdiction. He comments, 'Why he suddenly decided to grant relief to all mortgagors who asked for it is not known, save that the effect upon his pocket and his position must have been a strong inducement to do so'.\(^3\) Once it was accepted that the mortgagor had an equitable right to redeem, it was inevitable that there be a further development of the nature of the rights and entitlements of the parties in equity. For the most part, this had the effect of strengthening the position of the borrower, but lenders benefited also from

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\(^2\) (1761) 2 Ed 110 at 113.
\(^3\) R Turner *The Equity of Redemption* (Cambridge University Press, 1931) p. 42.
doctrines such as tacking and consolidation. Such fervent intervention ensured, moreover, that equity would add to the mortgagee's armoury of remedies for the enforcement of the security. Statute had not yet intervened to create additional weapons in the form of the power of sale or the right to appoint a receiver. Ironically, the most draconian remedy, that of foreclosure, was afforded by equity to allow for the destruction of the right to redeem it had itself created.

Thirdly, the conception of the mortgage as being, in substance, a security is felt to have influenced a broadening of relief. Holdsworth, for example, argues that the mortgage, when viewed as only security for a debt, entails that title to equitable relief should not depend on the nature of the contract or the reason for failure to pay on the agreed date. This is apparent in the creation of the equitable right to redeem after the legal date for redemption has passed and in the discouragement of the mortgagee from exercising his right to possession prior to default. It explains also instances where equity restrains the mortgagor from jeopardising the security, for example, in the prevention of waste. Nevertheless, it is in the pursuit of this principle that the limitation of equity as a reforming agent is most acutely demonstrated. Equity looked to the substance rather than the form. Nonetheless, it could do nothing regarding the retention of common law forms of mortgage, the effect of which has always been to bestow rights over the mortgaged property which were incompatible with a mere security interest. Most notably, it could do nothing regarding the mortgagee's inherent right to take possession of the mortgaged property. Unlike statute, which has the

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capacity for more radical alteration, equity could only build layers on top of the common law foundations of the modern mortgage. Its aim was to fulfil not destroy. There lies its principal limitation.

As to the development of statute law, the modern matrix of rights and remedies owes infinitely more to the evolution of conveyancing practice than Legislative will. One striking modern day illustration is the current (and almost completely unchanged) formulation of the mortgagee’s statutory power of sale, which has survived both of the most comprehensive legislative reforms of property law and the convincing proposals of the Law Commission. Such apathy for statutory interference dates from the nineteenth century, which saw the paternalism of equitable intervention jettisoned in favour of freedom of contract. Accordingly, the remedies of sale and receivership, which grew from those times, marked only a marginal improvement upon the prevailing conveyancing practices. These developments cannot be said to reflect the considered needs of the modern day parties to a mortgage. Building upon the improvements effected in 1881, the alterations to the law in 1925 were made with a view to making mortgage law fit with the overarching goals of consolidation, facilitation and simplification of conveyancing. Where land law and, more specifically, mortgage law was subject to substantive law reform, it embraced traditional principles of property law such as the sanctity of contract and proprietary freedom, the protection of the purchaser and registration of title. Much hampered by the focus on land registration, the scope for general statutory intervention was, thereby, limited. The twentieth and early twenty-first centuries have still been characterised by piecemeal intervention in mortgage law. In relation to specific reform, Parliament has responded where
necessary with important provision for the protection of borrowers, for example, with the enactment of the Administration of Justice Acts 1970 and 1973. More frequently, however, it is a wider reforming ambition that has brought about development in the law as to enforcement. At no point, however, has Parliament addressed the need for major overhaul of the general law of mortgages.

The Right to Possession

In the absence of systematic, statutory reform, antiquated notions regarding the right to possession and the freedom of the contract between the parties will continue to bar real progress towards an effective framework for mortgage enforcement. Most regrettably, the inherent right to take possession remains a central feature of the modern law. Accordingly, despite the changes in the Law of Property Act 1925 whereby the mortgagor retains the legal estate in the mortgaged property, historical notions regarding the primacy of the mortgagee’s inherent right to possession continue to pervade judicial thinking. Typical examples include the contrasting willingness to inhibit a landlord’s forfeiture of a tenancy, or the reluctance to imply a restriction to the right to possession from the terms of the mortgage agreement.

At the heart of the Law Commission’s recommendations for the reform of mortgage law lies the dismantling of the mortgagee’s inherent right to possession. It was viewed as unacceptable that, ‘Unless the mortgage deed expressly restricts the exercise of the right it is exercisable at any time and for any (or no) reason: its exercise is not dependent on any default by the

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5 Transfer of Land – Land Mortgages Law Com No. 204, 1991 at para. 7.28.
mortgagor, nor on any threat to the security'.\textsuperscript{6} Accordingly, it was proposed that the mortgagee would be entitled to take possession in specified circumstances and only for the protection or enforcement of the security. The Commission recommended that:

"... whereas under the present law the mortgagee applying for a possession order merely has to establish the existence of a mortgage, under the new scheme the mortgagee would have to satisfy the court that it had followed the enforcement notice procedure and that it was reasonably necessary for it to have possession to enable it to sell"\textsuperscript{7}

Unfortunately, these eminently sensible recommendations have yet to be implemented. Statutory reform affecting mortgage law has in the thirteen years since the publication of the Report been minimal,\textsuperscript{8} regulatory\textsuperscript{9} or inspired by change on a European level.\textsuperscript{10} It is not easy to justify this apathy to change. It also stands in marked contrast with the law of residential landlord and tenant which has regularly been the subject of reform and substantive re-evaluation.\textsuperscript{11} Legislative emphasis has, in particular, been placed upon termination of tenancies. Hence, the law of forfeiture of tenancies has proved to be a prime candidate for major overhaul,\textsuperscript{12} while the framework for mortgage enforcement is destined to remain rooted in the past. It is also

\textsuperscript{6} Ibid. at para. 6.16.
\textsuperscript{7} Ibid. at para. 7.32.
\textsuperscript{8} For example, under the Land Registration Act 2002.
\textsuperscript{9} See, for example, Financial Services and Markets Act 2000.
\textsuperscript{10} See, for example, the Unfair Terms in Consumer Contracts Regulations 1999.
\textsuperscript{11} See, for example, the Commonhold and Leasehold Reform Act 2002.
\textsuperscript{12} See Termination of Tenancies for Tenant Default (Law Com Consultation Paper No 174, 2003).
unlikely that the advent of human rights legislation will, in the short term, have any significant impact upon mortgage law.

The Section 36 Discretion

Section 36 assumes a singularly important role in the framework for the enforcement of residential mortgages. This is because, within the general law, it provides the only statutory safeguard to what is otherwise essentially an absolute right to possession. An unrealistic dependency on traditional disincentives to the taking of possession is hardly an effective counterweight to a stand-alone right that is both unnecessary and undesirable in the modern marketplace. Nevertheless, the courts must, of course, work within the confines of the legislation. Those confines are, however, far from clear. As Chapter 4 illustrates, the defects of the Administration of Justice Acts are structural and numerous. They provide obstacles that cannot be cleared simply by a greater consistency in the courts or the tightening up of lenders’ policies. Although section 36 was enacted with the clearest of policy goals, its chosen expression fails to convey these in an inclusive and unambiguous manner. The initial errors in draftmanship were hurriedly and awkwardly ‘rectified’ by the enactment of section 8, a provision that continues to test the most refined judicial skills of statutory interpretation. For example, it is most curious that, whether the protection afforded by section 36 operates where there is no default by the mortgagor, remains a subject of debate. More alarmingly, there is no obligation upon today’s institutional lender always to seek possession via court proceedings. Such proceedings are unnecessary if possession is voluntarily surrendered or the mortgagee is content to sell.
without obtaining vacant possession. In such instances, the borrower is denied access to the protective shield of section 36 and the opportunity for legal redress. Such denial defeats the purpose of the legislation and, seemingly, contradicts the spirit, if not the letter, of the Human Rights Act 1998.

Chapter 5 focuses upon the judiciary's tendency to exercise this statutory discretion liberally. This demonstrates that, when provided with the means to escape the legacy of historical constraints, judges are prepared to develop a responsive and balanced jurisdiction. The role of the Court of Appeal in setting out guidelines for the benefit of the lower courts has been an important and necessary feature in the establishment of an increasingly settled jurisdiction for borrower protection.

**The Consumer Credit Act 1974**

Separate concerns prevail in the very different regulatory context of the Consumer Credit Act 1974. The 1974 Act places different tools at the disposal of judges when a lender seeks possession under its regulatory framework. Within this different approach, more flexible rules govern the provision of borrower protection. As demonstrated by recent case law, time orders can be employed effectively to reschedule the whole of the indebtedness under an agreement and, where appropriate, to alter the interest rate levied. Nevertheless, judges have preferred to take a restrictive interpretation of the 1974 Act. This is in stark contrast to the judicial approach to section 36 that has promoted the maximum protection for mortgagors that can sensibly be

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13 See, for example, *Southern & District Finance v Barnes* (1995) 27 HLR 691.
given. Judicial reticence is explicable on a number of levels such as a lack of comfort with the provisions and the uncertainty generated from the comparatively few cases that have tested the jurisdiction.

The failure to develop a more effective protective shield for borrowers supports the proposition that wholesale reform is necessary. The 1974 Act embraces a different ethos, language and procedure for the protection of borrowers than the specialised, but familiar jurisdiction, under section 36. Perhaps its safeguards are to be preferred. Admittedly, many of its provisions have been barely tested. It is, however, unduly cumbersome and potentially unfair that differing schemes offer varied levels of protection with distinct safeguards and their own separate defects. Neither the dual governance of mortgage enforcement, nor the divergence of judicial approach thereunder, is supportable in theory or in practice. Despite its ability to make such sweeping recommendations, the Crowther Committee denied any need for radical mortgage reform. It is somewhat ironic, therefore, that the Payne Committee, with its much more limited remit, believed that greater mortgage reform was desirable, but outside its terms of reference.

In an area of law renowned for the sparseness of statutory interference, the three most important counts of legislative intervention all arrived within the span of four years. The enactment of the Administration of Justice Acts was unavoidable. The Consumer Credit Act 1974, by contrast, was to be welcomed as a first foray into consumer protection for mortgages. It is unfortunate that this advance was achieved through a distinct regulatory framework standing apart from the general law. Nevertheless, it opened the door to the forces of change and continues to act as a favourable comparator.
to the limited protections available under the Administration of Justice Acts. A feasible step forward would be to adopt a proposal along the lines of the Law Commission, that is, to create a single jurisdiction of the court operating on enforcement. It would aid simplicity to remove mortgages from the ambit of the 1974 Act and bolster protection for borrowers by incorporating notions of justice and fairness that are redolent in the provision of consumer credit and noticeably absent in the general law. The regulation of mortgages under the Financial Services and Markets Act has again offered an opportunity for incorporation of protections into a single regulatory regime. It is to be lamented that this opportunity has been spurned and that, inevitably, the law will suffer at the hands of further complication and needless bureaucracy.

**Wider Reforming Ambition**

Unfortunately, many of the Law Commission's proposals for reform never reach the statute book. Despite effort, expertise, consultation and refinement, its recommendations are often disregarded and may quickly cease to be relevant as times change. Increasingly, the Commission concentrates its focus it upon wide-ranging projects. Such grandiose reforms have recently focused upon commonhold and land registration as well as the assimilation of European Community law with existing domestic legislation. The latter course will exert some influence upon mortgage law. As described in Chapter 6, mortgage law is now accepted as being subject to the Unfair Terms in Consumer Contracts Regulations 1999 and, therefore, to a European contract law based form of consumer protection. Change will occur, of course, without
any considered or detailed evaluation of the needs of the domestic and substantive law of mortgages.

A recurring theme of mortgage law reform is the manner in which it is subsumed in a tide of wider reform projects and ends up being swept along in its wake. The 1925 legislation, for example, was progressive, principled and fundamental but, as discussed in Chapter 3, it involved minimal reform of the law of mortgages. It introduced change merely to bring the law into line with the new scheme of registration of title and wider conveyancing goals. Similarly, the applicable provisions of the Land Registration Act 2002 impact upon mortgage enforcement only to the extent that, (should the sections have their desired effect), the purchaser from a mortgagee is better protected than ever before. It is remarkable today that the ethos of purchaser protection and the primacy of the land contract should continue to assume such legislative priority. Further examples, as demonstrated, include the extortionate credit provisions. These were conceived by the Crowther Committee's wide-ranging examination of the dangers inherent in the provision of consumer credit in society. Even, the forthcoming regulation of mortgages under the Financial Services and Markets Act 2000 will see statutory regulation of the mortgage market as part of the more general concern to promote consumer understanding and confidence in the financial system. Admittedly, some this regulation will undoubtedly temper the approach of lenders to aspects of enforcement, such as their treatment of customers in arrears and repossessions. This code of behaviour will see a new threshold against which the conduct of lenders will be measured in possession actions. It cannot be denied, however, that the interests of the Financial Services Authority are in
the maintenance of service standards and not the structural developments of mortgage law.

**Final Observations**

This thesis argues that for the law of mortgages to be successfully revamped, effective and wholesale statutory reform is necessary. This is especially clear in the failure of both consumer contract law and equity to address the availability and exercise of mortgagees' rights and remedies, which themselves lie open to probable future challenge on a European front. It is testament to the apathy of Parliament that the European Convention of Human Rights might be viewed as the most promising avenue for reflection and modernisation of existing protection for borrowers. There is, however, scant ground for optimism. The domestic courts are reluctant to jettison old thinking and to allow an enveloping contemporary jurisprudence to enhance its interpretative function.

As to the absence of legislative intervention generally, this is not a feature of the law of residential landlord and tenant. In that branch of the law, at least, the past 40 years have witnessed a plethora of innovative legislative initiatives. The safeguarding of the tenanted home has long assumed a political priority over the protection the mortgaged home. This tendency is, moreover, unlikely to change. It is simply insufficient to strengthen procedural protections for mortgagors through the streamlining of the provision of financial services. In like vein to the equitable intervention of several centuries past, the prevailing trends in borrower protection focus on the fairness of the mortgage contract and the effective policing of entry into it. This is patently
insufficient. It is only with a comprehensive and holistic vision of the mortgage relationship that it will be possible to establish a simplicity, structure and fairness that match the needs of a diverse, modern European market. As such, nothing short of an all-inclusive re-codification of mortgage law is required to cover both the fairness of the mortgage contract and the assertion and exercise of rights and remedies. No statutory reform to the law of mortgages has yet to provide this and, moreover, no such reform appears forthcoming. Although there now exists what Lord Diplock described as, '... a real-property-mortgaged-to-a-building-society-owning, democracy', the democratist mortgagor has yet to exert the political will to drive forward a modernising program of law reform.

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