

Real Property Law and Procedure in the European Union

Annotated Draft Questionnaire

Report from England and Wales by Professor Peter Sparkes, Professor of Property Law, University of Southampton, Subject Sections Secretary of the Society of Legal Scholars.

1. Real Property Law – Introduction

1.1 General Features and Short History

When were the main rules of your national real property law introduced? What have been the main reforms up to the present date? What are the relevant sources of the law as it stands now (civil code, special statutes, case law)?

Terminology

“Real property” is commonly used as a translation for the civilian concept of immoveable property, and this is the term that has become entrenched in the USA for example, but in England modern property lawyers generally consider that the correct concept is “land”. “Real property” has a technical meaning derived from the old law of succession, which became obsolete in England (as opposed to Ireland) in 1925. Real property included freehold land but excluded leasehold land so that the two forms of ownership were formerly treated differently on death but, since 1925, all property (moveable and immoveable) has been subject to a single assimilated law of succession. It is almost never correct to analyse modern law in terms of real and personal property, so “land” is the closest concept to immoveable property.

The United Kingdom

The United Kingdom has a wide diversity of property laws. When this report refers to “English” law it means the law in force in England and Wales, the land law in force in Wales being more or less identical to that in England – apart from the possibility of using the Welsh language for forms and documents – since the competence of the Welsh Assembly has not been exercised except in peripheral areas.

Scots law is quite different in structure and terminology, as the Scots reporter will explain, not least because of its distinctive mix of common law and civil law concepts convergence being prevented by the terms of the Union which guaranteed the continuation of Scots traditions.¹ Land law has assumed a very high priority in Scotland because of the need to receive the feudal legacy and the availability of legislative time in the Scottish Parliament, and indeed for the time being the intellectual initiative has shifted firmly north of the border. By comparison English law remains old fashioned and in need to spring cleaning. Distinctive feudal remnants remain in the Isle of Man and in the Channel Islands (three distinct systems for Jersey, Guernsey and Alderney); indeed the island of Sark is the purest remaining example of a feudal fief and until recently male primogeniture applied irrespective of the wishes of the deceased previous owner.

¹ Treaty of Union 1707 art XVIII.

Irish land law is in the common law tradition, but Ireland did not receive the 1925 reforms (explained below) and as such is an old fashioned variant of English law –for us a curiosum of legal history - closer in spirit to the remainder of the common law world such as the United States of America, Canada and Australia.

The 1925 property legislation

If one was to search for an English equivalent of the continental codes it would be the property legislation of 1925² (named the Birkenhead legislation after their Parliamentary promoter the Earl of Birkenhead, then Lord Chancellor). This laid down the key conceptual framework which remains the backbone of the modern law, in particular the rearrangement of legal and equitable interests in land, the creation of an “absolute” ownership interest and the requirement that a division of ownership by time should be by way of a trust.³ These fundamentals are explained below. This reform post-dates the political secession of Ireland so that the reforms apply neither in the Republic of Ireland nor in Northern Ireland, leaving Irish law like an historical version of English law. Hence the schism in the common law world.

This legislation cannot be equated to the continental codes, since it does not purport to be a comprehensive statement of land law, but rather it builds on case law principles and leaves some fields exclusively to case law - in particular the question “what is ownership?” Land law is much more statute based than other fields as equity and the law of obligations such as contract or tort (our form of delict). Parliament consolidated virtually all the earlier statute law on the subject in 1925, in some case consolidating straight, in some making amendments before consolidation, and in others introducing amendments to or statements of case law principles.

The Law of Property Act 1925 is the most enduring element of the Birkenhead legislation of 1925. It deals with estates, trusts, co-ownership of land, contracts and conveyances, formalities, leases and tenancies in outline, and burdens such as mortgages, easements and covenants, and also important definitions. The Administration of Estates Act 1925 lays down the system of intestate succession and the procedure for handling deceaseds’ estates explained below. The Trustee Act 1925 (heavily amended in 2000) regulates the powers and duties of trustees, though really a thin layer of statute on a large encrustation of cases. The Settled Land Act 1925 which dealt with landed estates is largely obsolete. Registration was placed on a firmer footing in 1925 with the Land Charges Act 1925 (now as re-enacted in 1972) regulating the registration of burdens against titles which are unregistered and the Land Registration Act 1925 providing for registration of titles to land itself;⁴ this last has recently been comprehensively restated in the Land Registration Act 2002.⁵ There has been much piecemeal amendment of the statute book – the book we use with students lists 61 Acts in pure land law, ignoring that is the numerous statutes on landlord and tenant, and these are supplemented by innumerable statutory instruments. The two key texts are the Law of Property Act 1925 and the Land Registration Act 2002.⁶

² It consisted of six Acts, in particular the Law of Property Act 1925 (“LPA”), all operating from January 1st 1926; hence “before 1926” and “after 1925”.

³ LPA 1925 ss 1-2.

⁴ See below heading 2.

⁵ “LRA 2002”.

⁶ Respectively “LPA” and “LRA”.

Case law

A potent source of confusion is the dual use of the phrase “common law” meaning both the common law system in contradistinction to the civilian systems and also the law recognised at common law when contrasted with equitable principles. This dual layering is the most distinctive feature of English property law, a source both of flexibility and of unnecessarily complexity.

The common law was formed from the reign of King Henry II (1154-1189) onwards by the decisions of the Royal courts which were common to the entire country, the strong Plantagenet kings asserting central Royal control and limiting the scope for local custom. In the earliest and most creative period of the common law courts, almost all decisions concerned land since this was the major asset and major source of medieval litigation, the courts furnishing the basic rules for estate in land but, in the way of argued case law, introducing many minute distinctions. Other areas rooted in the common law were formalities, contracts, limitation and prescription,⁷ some aspects of mortgage law, and easements (servitudes giving thee right to use land). The common law thus established may not have been all that difference from the customary law of say France before the Code Napoléon, but was characterised by greater uniformity across the Kingdom. Hence the description “common” law.

English property law is distinctive primarily because of the intervention of equity, a discretionary system of jurisprudence which supplemented and corrected the common law. This was developed from say C16th onwards by successive Lord Chancellors sitting in the Court of Chancery, the golden age being the C18th and early C19th. Early Lord Chancellors were often clerics such as Cardinal Wolsey, leaving a wider scope for the influence of civilian traditions, particularly canon law but to a lesser extent Roman law, and indeed the Romanist origin of the trust is quite clear, though its modern form is unrecognisable to a civilian lawyer. Elsewhere the most important contributions of equity were in the recognition of informal interests, respect for the rights of borrowers under mortgages and restrictive covenants. It was a paradox that a system committed to good conscience was associated with the most scandalous delays, a situation parodied by Charles Dickens in *Bleak House*, but the worst excesses were removed even before the administration of the common law and equity was fused into a single set of courts in 1876. This fusion did not, on the orthodox view, affect the result of cases but merely altered the procedure adopted to achieve a decision. Where the two systems conflict the rules of equity prevail.

Equity has enjoyed a renaissance. It is administered now in the Chancery Division of the High Court and retains a flexibility which makes it the vehicle for modern case-law developments in property law, notably proprietary estoppel (a means of recognising informal interests in land) and constructive trusts (a means of recognising informal contributions to the acquisition of land eg by paying mortgage instalments). .

Legal and equitable principles

An excursus is required which does not fit comfortably into the civilian structure of the questionnaire in order to explain the distinction between legal and equitable interests. This

⁷ Limitation provides for acquisition of estate ownership by long possession whereas prescription creates easements (servitudes) through long use, the former being negative and the latter being positive...This questionnaire does not concern itself with limitation which is central to unregistered conveyancing and which would call for some qualification of some of the statements made here.

permeates our land law, and is the cause of much quite unnecessary complication. In essence for every interest in land there are two sets, a legal and an equitable, for example the legal mortgage is mirrored by the equitable mortgage, and there are legal and equitable easements, rentcharges, leases etc. This dichotomy originated in the existence of two sets of courts, competing for business, but the equilibrium eventually established is the basis of modern land law.

A legal interest must (a) comply with the rules for legal interests and (b) be created using the correct formalities. I will take the example of an easement. Legal easements must exist in perpetuity or for a term of years (say 10 or 999 years). An easement for A's life must be equitable. If it is for a permissible duration eg for 99 years it will be legal if created by the correct formality that is by deed, though prescriptive easements are also legal. An equitable easement is created by the use of lesser formalities, generally signed writing. This duopoly permeates all property law. Three rights discussed elsewhere in the questionnaire can only be equitable, these are beneficial interests under trusts, the benefit of estate contracts and restrictive covenants. Formal conveyancing is mainly based on legal rights (and these are the ones that are substantively registered), but equitable rights are just as important and in some ways just as safe (at least after a protective registration). The fundamental difference between them is the priority rule now explained.

Now for the crucial question: are equitable rights proprietary? The structure of civilian systems would compel an answer to this question, but English law does not need to bother and as a result the classification is a matter of contention. If the question is posed of legal estates and interests there is no difficulty: a legal right binds the world, so it is clearly real. Equitable interests operate in a shadowy hinterland that the civilian systems would not accept in which the interest displays most characteristics of a property rights but stop short of being fully real. Many features of proprietary status are clearly present since equitable interests are assignable, survive insolvency, are inheritable and bind the inheritance of the land. But it will not bind all future owners.

I will introduce the fundamental priority rule, which however is heavily modified in individual circumstances, particularly by registration schemes. These rules are:

legal rights bind the world;

equitable rights bind the world except the bona fide purchaser for value of a legal estate without notice of the equitable right.

Suppose that T (a trustee) holds land on trust for B a beneficiary. If T⁸ gives the land to X, X is bound by the trust. If he sells the land to X telling the purchaser of the trust, again X is bound. If T sells to X and X does not bother to inspect the land he will be bound by B if B is discoverable, his occupation giving notice of the existence of his interest.⁹ But if X buys the land for money, acts diligently and honestly, ultimately he can acquire the land free of an undiscoverable equitable interest. To that extent the beneficial interest is non-proprietary.

Common lawyers are not agreed about how to classify beneficial interests. Professor Maitland, probably the greatest academic Chancery lawyer, told Cambridge students at the turn of the C19th/20th unequivocally that the interest was personal.¹⁰ Equity "acts in personam" that is it asserts jurisdiction against someone who is in bad conscience, either

⁸ Since there is a single trustee so that there is no question of overreaching; see below point 1.2.

⁹ Where the land is unregistered notice may come in any way; if title is registered it is only occupation of the land that matters: LRA 2002 sch 3 para 2, formerly LRA 1925 s 70(1)(g).

¹⁰ Maitland's *Equity* 117.

because he is claiming to defeat interests without paying for the land, or to defeat an interest he knows of or to rely on slipshod conveyancing. So it seems that the right is personal. That view was taken up by the ECJ in *Webb v. Webb*¹¹ when they held that the enforcement of a trust of an apartment in Antibes was outside the exclusive jurisdiction of the French courts, that is they considered the action to enforce the trust to be the enforcement of a personal obligation and not a real action. Whatever the merits of that decision, and most English Chancery lawyers have castigated it, it cannot be correct to broaden that out into the wider question of classification and to treat all equitable interests as personal. They are proprietary and display all characteristics of proprietary interests, falling short only in that they can be defeated by a protected purchaser. An equitable action in personam is used to enforce a proprietary interest.

English land law embraces property rights, that is all legal and equitable interests in land. Beyond that lies the personal, obligations in contract, tort, and unjust enrichment.

Is real property regulation uniform for the whole country or are there special rules applicable only in a certain region or to certain groups of the population? (if yes: what is the division of competencies?)

As explained above the law is common to, and unique to, England and Wales.

On which constitutional foundations and/or legal and political traditions (or philosophies) are these rules based? Have there been basic policy or regime changes affecting private property (e.g. privatisation policies) in the last decades? Were they inspired by another legal system? Have the European Convention on Human Rights and/or European Community Law played a role?

English property law has always been firmly in the liberal market tradition, established intellectually in the C18th and early C19th and forming a consensus during the great case law era of the later part of C19th, when it drove the movement to secure saleability at the expense of landed estates. The 1925 legislation after the end of the First World War saw the abolition of primogeniture and the move to equality of distribution within families. Rigorous planning control has been introduced in the latter half of C20th, but with no regulation of the market itself and consumerism having a very small role in land law. A reduction in public sector housing has resulted from twin policy of sales of local authority owned homes and a shift to social housing (that is the provision of homes through charitable housing associations).

The market in land is quite different from that in most European countries, an area of non-convergence seized upon by Treasury when deciding to defer consideration of the decision to join the single currency. Land hunger has arisen from the tightness of planning control. Instability in mortgage interest rates has arisen from the prevalence of variable rate mortgages which tend to create a stop-go market with a disastrous fall in the early 1990s followed by an equally dangerous and unsustainable rise in the early 2000s. The value of UK houses is now £1 trillion. Our population is being divided into owners and non-owners, a division which depends both upon class and age. At the time of writing (September 2004) there is the probability of a radical downwards correction in the market.

¹¹ C-294/92 *Webb v. Webb* [1994] ECR I-1717, ECJ.

English public law is characterised by the absence of a written constitution. Many rights guaranteed by constitutional safeguards have been respected without specific thought, for example the principle that compulsory acquisition of land should be based on public need, with an open procedure and fair compensation, these principle informing private statutes and also general public acts, but always subject to the overriding theory of Parliamentary supremacy. The right to judicial process in litigation dates back to Magna Carta 1215. Since the House of Commons was dominated by land owners until the reforms of the franchise in C19th, there was a long tradition of respect for rights of property.

The European Convention on Human Rights was incorporated directly into domestic law by the Human Rights Act 1998. Although the UK has suffered a significant number of hits by human rights jurisprudence, this has been less true of property law, which suggests that the legislature did formerly respect human rights principles without articulating them as such. The most significant case in Strasbourg – *James v. UK*¹² – concerned overtly Socialist leasehold enfranchisement legislation which survived scrutiny in a case superficially suitable for intervention. Direct incorporation has had relative little impact because an initial flush of successful cases has merely led to a series of adverse decisions in the highest court, the House of Lords, particularly the leading case *Aston Cantlow*.¹³ In this case the Wallbanks inherited a house that had formerly belonged to the rector of a parish. This was subject to a liability to repair the chancel (that is the apse) of the parish church, in fact the church in which Shakespeare’s parents married. The imposition of this liability by the Parochial Church Council, held not to be a public authority, and in a way that was arguably arbitrary, was held to be a pure matter of property law and to involve no human rights issue. There remains the potentiality for a second coming.

EU law has provided almost no cross fertilisation. EU law tends to be based on alien civilian conceptions and it applies autonomous concepts when establishing areas for EU intervention – such as for example the definition of immovable property that falls within the exclusive jurisdiction of the courts of the locus of land – meaning that it has scarcely been necessary to adapt English law to the jurisprudence emanating from Luxembourg. Cases such as *Webb v. Webb*¹⁴ appear obviously wrong. EU law is having an impact in the second homes debate.¹⁵

1.2 Property and Estates

1.2.1. Estate versus Property

What role, if any, do feudal rights play?

It is absolutely necessary to differentiate theory and practical effect, and also the law of England and Wales from that of other parts of the British Isles.

¹² HR 8795/79 *James v. UK* (1986) 8 EHRR 123, Ct.

¹³ *Aston Cantlow etc PCC v. Wallbank* [2003] UKHL 37, [2004] 1 AC 546; this reversed [2001] EWCA Civ 713, [2002] Ch 59.

¹⁴ C-294/92 *Webb v. Webb* [1994] ECR I-1717, ECJ.

¹⁵ C-302/97 *Konle v. Austria* [1999] ECR I-3099, ECJ.

The theory

Traditional jurisprudential thinking places the feudal system at the heart of the common law. Maitland began his course by emphasising how is it necessary to go to great lengths to drum into students the idea that there is no such thing as an “owner” –initial weeks followed by further long weeks devoted to the painful reacquisition of that same concept of ownership. According to the historical tradition, the key date in English land law remains 1066 when William the Conqueror secured victory at the battle of Hastings, supplanting the Saxon kings and replacing them with Norman governance. The very moment at which William was able to impose a new system of law was also a high-water mark of feudalism in Western Europe, with the result that the feudal system was imposed in England with a completeness typical of William but atypical of our Continental neighbours. We shared with them the idea of a fee – a holding from a lord - but differ in the universality of the feudal system and the prohibition of allodial land. Still today, the basic rule is that the ultimate holder of all the land, the only “absolute” owner, is the Crown.

How then to explain the almost total irrelevance of the feudal system? As a means of military organisation it collapsed within a century and disappeared within two. It survived much longer as a means of village organisation, but the manorial system fell to the enclosure movement of C17th-C19th. Indirect effects are important mainly in the form of obstacles which property law gradually evolved to overcome but most were removed in 1925. Abolition took place in 6 stages

- the prohibition of new feudal grants in 1290
- the freedom to make a will in 1540,
- the abolition of non-money payments in 1660,
- the gradual obsolescence of money payments,
- the removal of the personal allegiance of the tenant to the Crown during C19th, and
- the abolition of variant forms of tenure in 1925.

This leaves the following position:

- the Crown is the ultimate owner of all land;
- the Crown occupiers a distinctive position with absolute ownership (though subject to special statutory regimes);
- ordinary landowners hold from the Crown;
- this involves a tenure called freehold socage tenure;
- there are no practical services; and
- land owners do not own land direct but rather an interest in the land called an estate.

In very limited and exceptional circumstances (say 1 in a million) feudal theory may make an enormous difference, typically in cases involving foreshore, commons, or Crown land, but in most cases it is completely irrelevant.

Doctrine of estate

This is the most distinctive feature of the common law and calls for detailed exposition. English land owners hold of the Crown on terms defined by its tenure and for a duration defined by the estate held. The former attribute is so attenuated as to be irrelevant so duration is crucial. An estate is an ownership interest in land for a particular duration of time.

New feudal grants¹⁶ can only be made where land is sold by the Crown if, for example the Crown acts as a developer for a new estate. Ordinary land owners effect a sale by substitution, that is the new owner (the buyer) is substituted for the previous owner (the seller) as feudal tenant of that land.¹⁷ Even the heir to the throne, Prince Charles, acts as a subject and makes a substitution when he sells a house on his Poundbury estate at Dorchester!

The basic type of estate in modern English law is the estate in fee simple, commonly called a freehold estate or “freehold”, which is simply an interest in land for ever, that is in perpetuity. The ownership concept in English law is the estate in fee simple absolute in possession. A fee is an interest which passes by inheritance on the death of the owner. A fee simple is one which may pass by will or to the next of kin of an intestate ie the devolution of which is unrestricted.¹⁸ A fee simple is in possession if the interest arises now and not in the future – on a death or attainment of a given age. This means that to transfer land in “fee simple” is practically an equivalent of giving it “in perpetuity” or “for ever”.¹⁹ A fee simple is absolute if there are no circumstances in which it can be cut short – for example a condition or a determining event such as, to give the traditional if fanciful example, when St Paul’s Cathedral falls down. Thus the fee simple starts now, continues until sold, passes by succession on death and continues indefinitely without the possibility of termination. Why not say “for ever”? This interest is practically equivalent to the absolute ownership interest of Continental systems - *propriété* or *Eigentum* - with the exception of the purely notional holding from the Crown.

Coexistent estates

Under your legal system, is it possible for several persons to be „owners“ of the same real property (or to hold property rights relating to the same piece of land) other than in the form of joint ownership?

English law allows the possibility of estates existing side by side in the same land. A landowner owns an interest in the land, the estate rather than the land itself. If A grants a lease to B, A holds the freehold estate alongside the leasehold estate of B, B’s estate is sufficient to support the grant of a sublease to C, leaving three estates side by side. In the past the possibility of division of the land by time was the most characteristic feature of the common

¹⁶ It is also possible for a new estate to arise by limitation, an important theoretical consequence of estate ownership not explored here.

¹⁷ The alternative was subinfeudation where the buyer becomes sub-tenant of the tenant who is selling, but this form of grant was prohibited by statute *Quia Emptiores* 1290.

¹⁸ It was formerly contrasted with a fee tail which passed land only to direct descendants down the line of the eldest male, but this is not abolished.

¹⁹ There are rare cases of termination where the land “escheats” to the Crown eg if a company is wound up while it still owns land or if a trustee in bankruptcy disclaims onerous land. I would guess that land would always revert to the state in these cases.

law, as it still is in Ireland any many other common law jurisdictions, but in English law the doctrine of estates was severely curtailed in 1925. Division of land by years can occur under a lease but division by lives is no longer allowed, or rather it involves the use of a trust or settlement. However, after 1925 the freehold estate cannot be split and that is the most fundamental interest.

The possibility of widespread creation of leases is atypical of civilian systems and does not find a convenient position in this questionnaire. I have chosen to discuss the leasehold system in the context of building leases,²⁰ though the leasehold vehicle is actually much more general than this. It could apply to quasi-ownership of a house or to a rental agreement for a house or office, the extent to which ownership is divided being determined by the terms of the lease.

Trusts

The questionnaire based on German law does not make adequate provision for trusts, a concept which must now be explained. It is central to modern land law since most houses are held on trust. A trust takes the basic form

A to T1 and T2 on trust for B1 for life, remainder to B2 absolutely.²¹

Here A is the settlor, T1 and T2 are the trustees, and B1 and B2 is each the holder of a beneficial (equitable interest) and is in older terminology a cestui que trust or in modern terms a “beneficiary”. It is perfectly possible for a single individual to be both trustee and beneficiary, and this is normal in a co-ownership (eg to husband and wife as trustee for husband and wife). The totality of the ownership is divided between the trustees who hold the legal estate and the beneficiaries who hold the equitable interests. In classical doctrine the trustees basically held management control – they could decided to sell or let the land without much intervention of the beneficiaries - whereas the beneficiaries were entitled to enjoyment of the land – either to occupy it or to receive rent or, after sale, to receive interest from investment of the proceeds. Duties are imposed on trustees which prevent abuse of their powers. If for example the trustee occupied the land himself, the beneficiary could take an action for breach of trust, and fiduciary duties are imposed to ensure that the trustee acts in the interests of the beneficiary and not from personal self interest. Modern law has shifted the balance of power within the trust towards the beneficiary who, for example, must be consulted before the trustees exercise their powers²² and has occupation rights²³ and the right to challenge a decision to sell in court.²⁴

Settlements

A settlement is an arrangement by which a landowner can divide ownership of land by time between successive limited owners, the object usually being to pass land to successive generations of a single family. Because each successive owner had only a limited interest he could not sell the underlying inheritance, the freehold, which would be pre-destined to pass

²⁰ See below point 1.5.

²¹ Express trusts require writing signed by the person declaring the trust: LPA 1925 s 53(1)(b), but it is usual to employ a deed. Resulting and constructive trusts arise without formality.

²² Trusts of Land and Appointment of Trustees Act (“TLATA”) 1996 s 11.

²³ TLATA 1996 ss 12-13.

²⁴ TLATA 1996 s 14.

to future generations. Great flexibility could be achieved in the organisation of family affairs, but the price was often a bankrupt generation unable to maintain their estates clinging on grimly until another generation took over, and the whole system left insufficient land in commerce for the development of efficient farming. Today the flexibility of family organisation is coupled with a solution to the problem of unsaleable heavily mortgaged estates, but the settlor has lost the guarantee that the intended future recipients will in fact inherit the estate. The law always imposes a trust vehicle to ensure saleability. As it happens this form of settlement had in any event gone out of vogue, as a result of inheritance taxation, as well as the move to equal division between children and the redundancy of large family houses.

Most former “estates” in land now take effect as beneficial interests under trusts, that is they are interests recognised in equity only (and so called “interests” rather than “estates”). The main examples are

life interest	to B for life
fee tail	to B in tail (to the eldest son and then the eldest son’s eldest son and so on down the senior male line; they were often limited to male lines) ²⁵
future fee simple	to B in fee simple at 21
conditional fee simple	to B on condition that an event does not occur
determinable fee simple	to B until an event occurs
remainder	A to X for life remainder to B in fee simple
reversion	B to X for life (reversion to B in fee simple implied).

The rule that these should be equitable is distinctive to English law and is not found in Irish land law.

Every settlement requires the use of a trust vehicle to ensure the saleability of the land.

Strict settlements

Settlements were broken by the Settled Land Acts, in Ireland the 1882 Act, though this was updated in 1925 in England and Wales. This has broken the system of family settlement and few strict settlements exist in England and Wales, new ones being prohibited in 1997,²⁶ though until that date it was all too easy to create a settlement by mistake. The basic idea was that the life tenant was treated as a quasi trustee (or “tenant for life”) who had the power to sell the land and convert the trust into a trust of money derived from the proceeds of sale, the beneficial interests being satisfied out of the trust fund.

Trusts of land

The Trusts of Land and Appointment of Trustees Act 1996 created a single simple vehicle for holding land in trust. It replaces the system of trusts for sale used between 1925 and

²⁵ Entails can no longer be created after Trusts of Land and Appointment of Trustees Act (TLATA) 1996.

²⁶ TLATA 1996.

1996. In essence trusts are now simple trusts, that is without any special conveyancing device other than a power of sale. Thus:

a bare trust - to T1 and T2 on trust for;

a former strict settlement – to B1 for life, B2 in fee simple – operates as a trust

a trust for sale – to T1 and T2 on trust to sell the land and to hold the proceeds of sale on trust for ..

All three now operate in the same way, the bare trust being usual. This vehicle is used in three main ways:

a settlement on successive generations - to T1 and T2 on trust for B1 for life, remainder to B2 (B1's son) for life, ...; these trusts are express;

co-ownership – to T1 and T2 on trust for B1 and B2 as beneficial joint tenants; this trust is statutory.²⁷

management trusts eg trusts following death, minority, or for managing charitable land; these trusts are usually statutory and subject to special regimes.

Overreaching

This key doctrine explains why trusts provide such a flexible management tool. If a French proprietor dies, a reserved share passes to the heirs and unless divided by agreement or by judicial apportionment it simply rots. In England legal title passes to personal representatives who have the powers of trustees of land and therefore the duty to manage and the power to sell any land. People named in the will or entitled under the rules of intestacy or dependants left unprovided for may have a claim to the value of the estate, but in order to manage the land it is not necessary to resolve precisely the beneficial entitlements, and certainly not necessary to obtain the permission of the beneficiaries, though they should now be consulted. All that is needed to sell is to identify the correct trustees and to ensure that the sale complies with the overreaching machinery.

Overreaching is the process by which interests are detached from the land on a sale and become instead a corresponding interest in the proceeds of sale. It applies mainly to beneficial interests on a sale by the trustees²⁸ but also when a secured lender exercises his power of sale and arguably under any other sale for example by an attorney. English law recognises a proprietary claim in the fund created by the sale, the claim against the trustee for breach of trust being both personal and proprietary. Thus a house worth £100K is transferred by a settlor A

to T1 and T2 on trust for B1 for life, remainder B2 absolutely.

T1 and T2 exercise the power of sale to P, giving P title clear of the trust and making T1 and T2 trustees of a fund of £100K. This they invest creating an net income of (say) £5K a year. This is paid to B representing his life interest and when B dies C becomes entitled to the invested capital.

In *City of London BS v. Flegg*²⁹ the House of Lords made clear that overreaching occurs even if beneficiaries are in occupation of the land, with or without their consent. Knowledge of the existence of the trust does not in any way affect overreaching.

²⁷ LPA 1925 ss 34-36.

²⁸ LPA 1925 s 2.

²⁹ [1988] AC 54, HL.

Overreaching fully realises the potentiality of the trust by providing reasonable safeguards for beneficiaries in combination with an almost foolproof method of establishing title. The requirements are simple. Purchase money must be paid to the trustees, to all of them, and to a sufficient number. Generally two trustees are required³⁰ but a single receipt suffices from a trust corporation or a sole executor. If T1 sells alone overreaching fails, and a whole series of C20th decisions covers the problems that arise; essentially if the title is unregistered the doctrine of notice applies (should the purchaser have known of the trust?) and if registered the question is whether the beneficiary has an overriding interest by occupation of the land.³¹

Co-ownership of legal title and number of trustees

Trusteeship is subject to these rules. A trust is valid if there is a single trustee, but that single trustee will not be able to sell. If sale is carried out by two or more trustees (who must act jointly in relation to land) there will be a valid sale which overreaches the interests of the beneficiaries. This means that the purchaser gets a good title free of the trust and the beneficiaries are compensated by a corresponding interest in the proceeds of sale held by the trustees. It is vitally important therefore that if land is held in trust that a purchaser receives a receipt signed by at least two trustees. Land can be held by a maximum of four legal estate owners, so if a co-ownership involves more than four some of them will have to be left off the legal title. Joint holders of a legal estate are necessarily joint tenants, that is they must act jointly and are subject to survivorship (*ius accrescendi*) on death – the office of trusteeship descending on death to the survivors.

Co-ownership trusts

The form of the questionnaire does not make adequate provision for a discussion of co-ownership. No doubt this is not a great issue in civilian systems, but it is central to English land law since the 1925 legislation imposes a statutory trust in all cases of co-ownership, formerly a trust for sale and now a trust of land.³² Beneficial interests can be held in two forms, joint tenancy or tenancy in common. Joint tenancy is used for equal ownership where survivorship is required – normal for a home held by a couple who are happy. Tenancy in common is used for unequal shares or where separate shares are intended to pass on death – for example a couple who separate or partners in a professional practice. A trust of land is imposed in all cases even where it seems crazy to do so, thus

to A & B as joint tenants

operates as

to A & B as legal joint tenants on trust for A & B as beneficial joint tenants.³³

This last example – the most common form of ownership – shows why most homes in England are held in trust

1.2.2. Superficies solo cedit

³⁰ LPA 1925 s 27.

³¹ LRA 2002 sch 3 para 2; LRA 1925 s 70(1)(g); *Williams & Glyn's Bank v. Boland* [1981] AC 487, HL; and many later cases.

³² LPA 1925 ss 34-36; as amended by TLATA 1996.

³³ LPA 1925 s 36.

Does the ownership of a piece of land generally comprise also the ownership of all buildings erected on the land? What are the exceptions? Are these exceptions common? Can you indicate the approximate percentage of isolated ownership of buildings, i.e. without the land on which they are built (under 5% - 5-10% - 10-25% - 25-50% - more than 50%)?

Ownership of land generally carries the ownership of all the soil beneath and all buildings erected on it, as well as limited control of the airspace above. In *Berstein v. Skyviews*³⁴ it was held that a landowner could not prevent his house being photographed from a plane so control of airspace is limited. It is perfectly possible to sever titles horizontally. Occasionally freehold ownership is separated by horizontal division in which case there is said to be a “flying freehold”, but these are very rare and there can be severe problems of management and saleability because it is commonly thought that repairing obligations cannot be enforced properly.

There are two sound ways of creating a horizontal division – a leasehold flat scheme or (a very recent introduction) the commonhold scheme – both described below.³⁵ It was once common to grant building leases by which the site was retained freehold by the owner of an estate with a lease of limited duration of the building – a method widely used in London for example by the Westminster and Cadogan estates, but these have been whittled down by enfranchisement legislation, fully described in the human rights case *James v. United Kingdom*.³⁶ This legislation enables a 21 year + lease of a house (as opposed to a flat³⁷) to be converted to freehold ownership, paying the former owner the value of the site but not the value of the building, a very favourable scheme which it is always economically appropriate to exercise.

There are roughly 22 million titles in England and Wales, with 900K leasehold houses and 1m leasehold flats (i.e. held on long leases).

³⁴ [1978] QB 479, Griffiths J.

³⁵ See below point 1.4.

³⁶ Leasehold Reform Act 1967.

³⁷ Leasehold Reform Housing and Urban Development Act 1993 creates a scheme for extending leases of flats, but only at market value.

1.3 Interests in Land

1.3.1. Numerus clausus

Is there a numerus clausus of interests in land? Which interests are exclusively defined by law, and which can – and to which extent - be defined by contract?

Note: We assume that all European legal systems recognize only certain types of interests in land as defined by law. Thus, whereas the parties may freely agree on contractual terms, they are limited to the interests in land as defined by law.

1.3.1. Numerus clausus

This is a fundamental point of departure between the common law and civilian systems because the common law has not capped the total number of property interests. For a start there is no hard and fast rule about what constitutes a property right – is it what binds a purchaser of land, an interest that is compensatable if it is removed, or is assignability of the benefit sufficient? It is generally taken that the first, the in rem effect is the most important indicator.

Although a statutory cap was imposed in 1925,³⁸ it has been ignored by the courts, most notably by Lord Denning MR, the most influential judge of the 1960s and 1970s. This is not to suggest that new interests are readily created, but rather that there is a potentiality for the recognition of new rights with in rem status. In the early days it was the common law which developed new interests, particularly in C15th the leasehold estate, but afterwards the task of development passed to equity, the more flexible system, with trusts dating from C17th-18th building on older principles, the restrictive covenant created by a decision in Chancery in 1848 (*Tulk v. Moxhay*³⁹), and all C20th developments have been equitable.

During the twentieth century there were three main bones of contention. The first ultimately failed. When a husband deserted his wife leaving her in occupation of the matrimonial home she was held to have a personal right of occupation enforceable against her husband but not a proprietary right enforceable against lenders and the rest of the world,⁴⁰ despite Lord Denning's best efforts. His second effort did succeed – the creation of a new proprietary interest called a proprietary estoppel. If a landowner (A) creates an expectation in someone else (B) and that someone (B) relies on the expectation thus informally created to his detriment, it becomes inequitable for A to deny the existence of the right which B expects. A third right now well established is the right of rectification of a document to make it conform to the preceding agreement – thus if a lease says it is for 9 years but the parties actually agreed 99 years, the tenant can force the rectification of the term both against the landlord and against third parties. There is also a hazy category of “quasi-property” such as the licence to occupy land, right to security of tenure, and milk quotas, which display some characteristics of property, that is they may be in the course of case law development into proprietary rights.

Parties are not free to create new proprietary burdens by contract.⁴¹

³⁸ LPA 1925 s 4(1).

³⁹ (1848) 2 Ph 774, 41 ER 1143, Lord Cottenham LC.

⁴⁰ *National Provincial BS v. Ainsworth* [1965] AC 1175, HL.

⁴¹ *Hill v. Tupper* (1863) 2 H & C 121, 127-128, 159 ER 51, Pollock CB.

1.3.2. System of Interests in Land and Numerus Clausus

Which are the different types of interests in land?

Note: In the enclosed draft synopsis, we distinguish:

rights to use (easement) (Nutzungsrechte)

security interests (Verwertungsrechte), i.e. mortgage and rent charge,

pre-emption rights (Vorkaufsrechte)

The common law systems also distinguish legal and equitable rights – a distinction unknown to the civil law systems.

English law does not have any formal classification system for interest in land and different writers therefore use their own analyses. My own preferred scheme is as follows:

(1) Rights giving exclusive possession (“ownership rights”)

Estates – rights to exclusive possession recognised at law

freeholds – absolute ownership

commonholds – absolute ownership in flats

leaseholds – time limited ownership

Beneficial interests - rights to exclusive possession (or more limited rights e.g. to income) recognised only in equity); these rights are overreachable so they are really rights to share in the value of a fund and in any event are not fully in rem.

(2) Rights giving less than exclusive possession (Incumbrances or burdens)

Rights to secure an estate: Contracts (called estate contracts when they affect a legal estate in land) including options and pre-emptions (this last case is marginally proprietary and subject to conflicting authorities) with a proprietary effect recognised by equity. There is also a category of “mere equity” which is the right to rectify documents to make them comply with an earlier contract or arrangement. Proprietary estoppels are the right to have an expectation carried out after it has been acted on – a way of enforcing an informal arrangement.

Security interests: Mortgages, charges, liens and rentcharges.⁴² These are all recognised at law and in equity.

Incorporeal hereditaments – rights in land which are abstract in nature. Most are appurtenant (in the civilian terminology servitudes in appurtenance), that is affecting freehold land. Neighbour interests easements (legal and equitable) and restrictive covenants (equitable, but not positive covenants affecting freehold land, and also most profits and commons. A few incorporeal rights in gross can exist, most notably profits in gross eg peerages, franchises,

⁴² See below 1.4.

advowsons, profits in gross.

There is also a possible category of quasi-property.

1.3.3. Servitudes (usus)

Which are the different types of rights to use real property?

Note: Astonishingly, in most systems, there seems to be no statutory default regulation which comprises all proprietary rights to use real property. Most systems distinguish as to who is entitled to use the land:

There are **easements in appurtenance**, i.e. to the benefit of the owner or possessor of other, especially neighbouring land (Grunddienstbarkeit, §§ 1018 ss. BGB). In this sense, one may speak of a dominant tenement (herrschendes Grundstück) and a servient tenement (dienendes Grundstück).

There are **easements in gross**, i.e. to the personal benefit of another person (beschränkte persönliche Dienstbarkeiten, §§ 1091 ss. BGB).

The civil law systems also distinguish as to the extent of the use allowed:

The extensive right to use is called usufruct or Nießbrauch.

Limited rights to use are called **servitudes** (art. 578, 637 ss. CC) or Dienstbarkeiten (§§ 1018, 1090 BGB).

It is not easy to align the civilian category of servitudes with the corresponding common law categories, and this is an area in which the simplicity of civilian jurisprudence scores highly.

The questionnaire distinguishes extensive use rights (usufructs) from limited rights (servitudes). English law handles this distinction with the concept of exclusive possession; a right to exclusive use creates an estate according to the time allowed – a freehold or a lease or (more likely today) a beneficial interest under a trust. For example a right of exclusive use for life is a life interest. Alternatively if the right granted does not qualify as an estate (eg because it is informal) there may be a licence, which is personal and non proprietary. Non exclusive rights created easements. A limited right to park is an easement which can be created by prescription after 20 years use, but parking all over land so as to exclude the owner could lead to the acquisition of freehold ownership by limitation after 12 years.⁴³

The single civilian category of servitudes is covered in English law by a multitude of rights categorised according to whether they are legal or equitable and whether the right can or cannot be acquired by prescription. Before discussing them it is necessary to draw attention to one right which *cannot* be enforced against a future owner, that is a positive obligation – one which requires the expenditure of money – for example the right to have land repaired. Such rights are not recognised as easements, and as covenants (formalised agreements) they do not run so as to bind future *freehold* owners of the land – a

⁴³ *Copeland v. Greenhalf* [1952] Ch 488, Upjohn J.

rule recently reconfirmed by the House of Lords.⁴⁴ They may bind inter partes as contracts but do not create in rem obligations. This rule is designed to prevent land from being saddled with onerous obligations, but it is frequently very inconvenient. It explains why *leaseholds* are generally used for the sale of flats, at least until the new commonhold scheme comes on tap. Statute has provided a partial solution in the form of the estate rentcharge – a money charge on the land to cover the cost of works such as, for example, the cost of repairing a private street.⁴⁵ The mortgage lenders lobby opposes general reform in this area.

Now to the categories of proprietary burdens that *are* recognised: Any burden requires land which is affected by it, called in English terminology the servient land (easements) or servient land (covenants). Almost all of these also follow the neighbour principle, that is the rule which requires that the person benefitted should own land that is actually benefitted (usually by being increased in value), that is in the terms of the questionnaire these are appurtenant. They are:

(1) Positive (=affirmative) easements

These confer the right to use neighbouring land to a limited extent. Most common are access rights called rights of way, which may be limited (eg on foot) or general – there is a lot of case law on different varieties. Others are the right to run pipes and cables under neighbour's land and parking rights, but case law has developed very many examples of specific rights, an unusual example being the right to use a garden for recreation.⁴⁶ Methods of creation are express grant, implied grant at the time that land is divided and prescription (long use).

(2) Negative easements

A very limited category, comprising limited restrictions on a neighbour's land, the only restrictions that can be created by prescription (long enjoyment) - the usual method - as well as expressly and impliedly on division of the land. There are two well recognised examples, first the right to light which protects light to a particular window by blocking development in front of it and second the right of support for a neighbouring building. Case law is edging towards recognition of a right to protection from the weather by a neighbouring building,⁴⁷ but long rejected are wider restrictions like the right to a view or the right to a current of air for drying.⁴⁸

(3) Profits à prendre

These are rights to take part of the land or its produce, for example the right to extract gravel or the right to have cows graze the grass, rights which are usually appurtenant to benefitted land, though unlike easements they may also exist in gross. They may be enjoyed singly or collectively, in which case they are said to be rights of common (commons); all common rights are registered.⁴⁹

⁴⁴ *Rhone v. Stephens* [1994] 2 AC 310, HL.

⁴⁵ Rentcharges Act 1977 s 2.

⁴⁶ *Re Ellenborough Park* [1956] Ch 131, CA.

⁴⁷ *Phipps v. Pears* [1965] 1 QB 76, CA; *Rees v. Skerrett* [2001] EWCA Civ 760, [2001] 1 WLR 1541.

⁴⁸ *Webb v. Bird* (1862) 13 CB (NS) 841, 143 ER 332.

⁴⁹ Commons Registration Act 1965.

(4) Restrictive covenants

This is a method of restricting the use of neighbouring land which enables much wider restrictions than be created as easements, but they can only be created expressly, by a deed of covenant, and can never arise on division or by long enjoyment of the undeveloped land. Usually when a developer lots land and sells off individual plots, similar restrictive covenants are imposed over the whole development. It is still common to find Victorian restrictive covenants affecting suburbs of towns developed in the second half of the C19th, and it is general practice to create a scheme of covenants for smaller scale developments today, and restrictive covenants will also appear in flat schemes and commonholds. Covenants may be mutual in the sense that each neighbour can enforce similar covenants against each other, or it may only be the developer who controls enforcement – there is a lot of arcane principle and many poorly worded covenants. In particular older covenants may have created valid restrictions but not made them appurtenant to the benefitted land (the process called annexation) in which case the benefit of the covenant had to be assigned separately from the land, though annexation is now statutory.⁵⁰ Restrictive covenants were only recognised by equity and the burden generally requires registration against the title affected. Obsolete covenants can be varied by the Lands Tribunal.⁵¹

It will be seen that most rights that would be useful can be created, but there are complex rules about the methods to be used and special conveyancing techniques are needed to make positive obligations run.

1.3.4. Mortgages and Rent Charges

Which are the different types of mortgages? In particular: Does your system know

accessory mortgages, i.e. mortgages whose legal existence depends on the existence of the debt to be secured?

non-accessory mortgages, i.e. mortgages whose legal existence do not depend on the existence of the debt to be secured?

rent charges?

Note: There is a separate chapter on mortgages (chapter 6), so please indicate only the basics here. Most countries have only one (or only one important) security interest in real estate. So in England, you would just talk about the **mortgage**, in France about the **hypothèque**. Other systems, however, distinguish different security interests. Thus, **German law** divides the *Grundpfandrechte* (security interests in real estate) into the **Hypothek** (§§ 1113 ss. BGB) (the accessory type) and the **Grundschild** (§§ 1191 ss. BGB) (the non-accessory type).

Security interests are an important and complex part of English land law. There are three basic types:

mortgages used to secure a debt,

liens imposed by law as a result of a particular fact situation, for example where

⁵⁰ LPA 1925 s 78; *Federated Homes v. Mill Lodge* [1980] 1 WLR 594, CA.

⁵¹ LPA 1925 s 84 as amended.

the seller of land is unpaid, and

charging orders imposed by a court as a means of enforcement of a judgment debt.

This report will concentrate on mortgages which are most numerous.

The parties to a mortgage are the mortgagor (borrower) and mortgagee (lender). A traditional mortgage transferred an estate to the lender by way of security, which in the case of freehold land before 1926 was the freehold estate itself, but in modern times has been a long lease (3000 years) granted to the lender. In practical use this classical form of mortgage is all but redundant, even though mortgage law continues to be formulated on the assumption that this form is used, so that in practice most so-called mortgages are actually charges by deed by way of legal mortgage (“legal charges”), the form now compulsory for registered land.⁵² Under a legal charge the freehold estate is retained by the borrower, who merely charges the obligation to pay the debt on the land; the charge binds in rem and can be enforced in various ways but usually by repossession and sale of the land, which can be done out of court under a statutory power.

English law differentiates legal mortgages created by deed and registered, from equitable mortgages created by written contract and protected on the register since the remedies of equitable lenders are inferior – this latter form is generally used for short term borrowing or where the lender is very well secured and is unlikely to have to enforce the mortgage. Until reforms in 1989 it was possible to create an equitable security merely by depositing the title deeds with a lender in return for a loan, but written contract formalities are now required and *both* parties must sign the contract.⁵³

A rentcharge is a means of securing a periodical payment on freehold land and is to be contrasted with a rent service which is the rent a tenant pays to a landlord under a lease. At one time rentcharges were very commonly created on the sale of land, part of the price being paid as a capital payment and part as a continuing rentcharge. This system was widely adopted in the Manchester region and South Wales and to a lesser extent around Bristol. They could be legal or equitable. However, rentcharges can be redeemed compulsorily, the creation of new rentcharges was prohibited, and statute provides for the extinction of existing rentcharges after 60 years, ie in 2037.⁵⁴ Most have lost their value and are scarcely worth collecting, so pure rentcharges are becoming scarce and (estate) rentcharges should today appear as a form of servitude, that is as a means of enforcing positive repairing obligations.

1.3.5. Rights in Rem to Acquire Real Property

Which rights in rem to acquire real property exist in your legal system?

Here the common law is fundamentally different from the civilian systems because of the overlay of equity which provided variant remedies for breach of contract to the common law. If A agrees to sell his land to B, and then fails to do so, B can sue A for damages at common law for breach of the personal obligation but can also (in the case of land but not otherwise) obtain specific performance against A, an order forcing A to carry out the contract to transfer ownership to B. This is not seen as a personal obligation but a real obligation enforceable against any future owner of the land, and it is supplemented by the rule

⁵² LRA 2002 s 23.

⁵³ *United Bank of Kuwait v. Sahib* [1997] Ch 107, CA.

⁵⁴ Rentcharges Act 1977.

that a right to specific enforcement is seen as conferring immediate rights in the land itself, a prospectivity which means that in many ways having equitable rights is as good as having legal ones.⁵⁵ These rights are almost always created by contract and depend upon the existence of a valid contract which is specifically enforceable. This principle applies to a contract to transfer the freehold, an option to sell, a contract to grant or sell a lease, an option for renewal of a lease, and more generally – for example a contract to grant a mortgage creates an equitable mortgage.

There is considerable case law about whether this principle applies to a right of pre-emption, some case suggesting that a pre-emption is not proprietary until the vendor has indicated his intention to sell, but more recent cases accepting full proprietary status.⁵⁶

All these rights are equitable and require protective registration to be secure against future owners of the land.

1.3.6. Other Interests in Land

Are there any other interests in land not yet mentioned which are rights in rem?

As indicated above English law does not have an exhaustive classification of property rights.

⁵⁵ *Walsh v. Lonsdale* (1882) 21 Ch D 9, CA.

⁵⁶ *Pritchard v. Briggs* [1980] Ch 338, CA; *Dear v. Reeves* [2001] EWCA Civ 273, [2002] Ch 1; LRA 2002 s 115

1.4 Apartment Ownership (Condominiums)

Is there a statutory regulation on apartment ownership (condominiums)? When was it introduced? Did or do other forms of ownership of apartments or even rooms in an apartment exist?

What is the legal construction of apartment ownership?

May the owners set up some agreements/rules governing their relations which are also applicable against a future owner (buyer) in case of transfer of ownership of an apartment? Are these rules registered in the land register? Are there statutory limitations on rules set up by the community of owners? In particular: May the apartment owners decide the following questions (by majority vote)?

An apartment owner wants to use his apartment for a restaurant.

The apartment owners want to change the distribution of the shared costs (e.g. from a per capita distribution to a distribution per square meter).

The apartment owners want to forbid pets in the apartments.

Can the apartment ownership right be freely mortgaged by its holder, or does he need the consent of the owners of the other apartments? How is the relation of mortgages or other interests on the apartment ownership right to mortgages and other interests in the land? What is the destiny of the apartment ownership right (or interests on it such as mortgages) in case the building is destroyed, e.g. by fire? Are there any substitute rights, e.g. on compensation payments from insurances or other sources?

Half of the total of one million flats are concentrated in London and the South East. A flat is a part of a building constructed so that it lies above or below other flats in the block. No one flat has any value in isolation and to secure proper repairing obligations it is essential to use either a leasehold flat management scheme or a commonhold, a collective form of freehold ownership.⁵⁷

(1) Leasehold schemes

Leasehold tenure is not markedly inferior to freehold ownership provided that the lease is very long and the ground rent is low, but a serious problem of wastage of value affects shorter leasehold terms, where the outstanding term is less than about 100 years. This difficulty is addressed by the individual enfranchisement scheme which allows a leaseholder to obtain a 90 year extension of his existing term.⁵⁸

The management scheme is set up the developer when the first flat is sold and many schemes are defective. In some blocks of flats freehold estate may be retained by the original developer or vested in an outside investor, but a ground landlord of this type may become a nuisance if he exploits his ownership by demanding excessive interest on arrears of ground rent or by extracting large commission payments on the premiums to insure the block. Properly organised blocks avoid these problems by ensuring that the free-

⁵⁷ Clarke on *Commonhold – Law Practice and Precedents* (Jordans, 2002).

⁵⁸ P Sparkes *A New Landlord and Tenant* ch 15.

hold in the block, the grounds and other common parts are vested in a management company controlled by the flat owners collectively, as soon as development is complete. There are a number of compulsory mechanisms for leaseholders to take over collective ownership and management. A company is used to hold the freehold since the corporate vehicle has perpetual succession which avoids the need for repeated vestings of the freehold. Ownership of the flats has to be kept in step with the ownership of the corresponding shares in the management company, so share transfers are required as part and parcel of every sale of every flat.

Management. Leases are used for flats because the positive covenants needed to cope with repair and the payment of service charges are not enforceable between freeholders but only between leaseholders. The value of each flat in a block depends upon all other parts of the block being properly maintained with mutuality of obligation and each tenant being liable to contribute to the cost through a service charge. The scheme will also include easements for access and restrictive covenants regulating the use of the flats.

(2) Commonhold

The Commonhold and Leasehold Reform Act 2002 enacts a scheme of commonholds, which came into force in September 2004. Commonhold provides freehold ownership of units within a development which has common arrangements for the management of the whole. It is based on strata titles in Australasia, the condominium laws in North America and the copropriété of France and the continent. It can be used for blocks of flats and any other multi-unit properties. The main advance is the tenurial reform which allows the creation of freehold units. Common parts will be owned and managed collectively helped by the scheme of reciprocal positive covenants and a more cohesive corporate management vehicle in the form of a commonhold association.

The constitution of the commonhold will consist of a commonhold community statement which defines the units and the common parts and lays down the reciprocal scheme of obligations and provisions for collective management of the development along with the certificate of incorporation of the commonhold association, and its memorandum and articles of association. After registration, buyers will be able to get access to the constitution from the land registry. Once set up and registered the constitution can only be challenged by an application for rectification so proprietary interests are protected.

The person registered as proprietor of an individual flat is described as a unit-holder. Commonhold will facilitate the freehold ownership of units, since the whole point is that the ownership of the unit-holder will be perpetual. There will be no risk of the loss of a unit because of non-payment of service charge as there is with a leasehold flat, though the threat of sale will ensure that service charge contributions are paid. A commonhold is a special variant of the common law freehold estate, with only a few trivial amendments to the existing property legislation are required to accommodate commonholds. Free transferability will be inherent in the nature of a commonhold unit and it will not be permissible for the commonhold constitution to impose any restriction on sales, gifts, dealings, or transmission by law. A residential commonhold scheme will not be allowed to degenerate into a quasi-leasehold scheme because there will be an outright ban on the grant of long leases. Dealings, mortgages and sales by lenders must relate to the whole unit and so that the atomic unit is not sub-divided. Transfer of a unit will automatically pass the burdens and liabilities to the buyer and will have immediate implications for the membership of the commonhold association.

Common parts: every part of commonhold land which is not a commonhold unit will

be the common parts, which might include the structure of the block, communal services, and parts used in common, such as hallways, staircases, communal gardens and shared parking areas. They will be owned by the commonhold association and hence by the unit holders collectively and registered in its name.

The corporate vehicle to run a commonhold will be a commonhold association which will hold communal ownership, run the block according to the corporate procedures for decision-making. It will be a conventional private company limited by a members' guarantee of £1 and registered at Companies House in the usual way with a distinctive form of name. Membership of the commonhold association will be coincident with the ownership of units: only unit-holders will be allowed to be members and conversely membership will be imposed automatically after acquisition of the ownership of a unit. Share certificates and share transfers will not be required.

The commonhold community statement (CCS) will lay down the mutual scheme of regulation between the unit-holders, making provision for the rights and duties of a commonhold association and the unit-holders. A form for it will be prescribed and so will many of the contents. It will regulate the property law aspects of the development — in particular the inter-relationship of all the unit-holders. Variations will be limited. The CCS will create reciprocal obligations, the revolutionary feature of commonholds being the facility with which positive covenants may be imposed and passed on. The association will prepare a commonhold assessment taking into account the global sums spent on repairs and these will be allocated to individual units in accordance with a scheme contained in the commonhold community statement. The remedy of forfeiture will not be available, but arrears could be charged on units, so that sale is available as an ultimate weapon.

Conversions from leasehold schemes to commonhold. In theory it will be possible to apply to convert a leasehold scheme to a commonhold, but the requirement for unanimous consent of all parties (the leaseholders, all secured lenders and the ground landlord or flat management company) will make this conversion very difficult to achieve in practice. The 100% rule is much criticised.

1.5 Building Lease (emphytéose – bail à construction/ Erbbaurecht)

Is there a statutory regulation on building leases?

What is the legal concept? In particular: Is it a *ius in rem*?

Who owns the house built under a building lease?

Is the building lease usually limited to a certain time?

1.5.1. Leases in general

It is scarcely possible to set out within the confines of this report the English law of leases – your reporter author took more than 800 pages to cover the subject at a relatively superficial level.⁵⁹ Leases are vitally important in practice and with the trust the most important distinction between civilian systems and common law systems. It is always possible for the landowner to divide the totality of his ownership by creating a lease. As landlord he will part with exclusive possession for the duration of the term, being compensated by a capital

⁵⁹ P Sparkes *A New Landlord and Tenant* (Hart, 2001).

payment for the grant of the lease (a premium) and/or continuing rent payments. Thereafter two ownerships sit side by side, the freehold estate or reversion representing the landlord's interest and the leasehold estate conferring exclusive possession on the tenant. A complex web of covenants sets out the legal basis of the division of responsibilities, the terms naturally varying with the term of the lease, and in many cases with statutory intervention. This division works in the case of a legal lease in rem in the sense that a leasehold estate is an ownership interest which binds future owners of the freehold.⁶⁰

Leases are very widely used. There are 900,000 leasehold houses, 1 million flats all leasehold, and leases are also used for a majority of business premises and for much agricultural land. Flexibility arises from the wide variety of terms and duration of leases used in these situations. Residential lettings are generally granted for a short initial term and this is then allowed to run on indefinitely, with social and public sector tenants protected by statutory security of tenure. Security of tenure only applies to private sector tenancies granted before 1989. Business leases of offices and shops are generally granted for shortish terms - 7-21 years - but tenants have statutory rights to apply for renewal, the procedure involving a court application.⁶¹ There are complex provisions about the extent to which leasehold covenants are enforceable after a sale (properly called an assignment) of a lease. The current parties are generally bound and so too may earlier tenants who act as guarantors; for older leases it was generally the original tenant who was under this obligation, whereas for newer ones it will be the immediately preceding tenant who is required to enter into an Authorised Guarantee Agreement.⁶² Agricultural leases are now largely left to the market.⁶³ English law allows leases of any length, however great and however small.

Residential ownership via leaseholds depends upon a grant of a long lease - statutory categorisation depending upon an initial grant for 21 years or more. Leasehold suffers from the inherent flaw that it is a wasting tenure, meaning that the value leaks out of the property interest, slowly at first but with increasing rapidity as the term shortens. In many parts of England and Wales outside London standard leasehold terms are 999 years, so that there is no problem of wastage, but in London terms of 99 years are not uncommon. These are saleable and mortgageable, but a problem of wastage is noticeable when say 70 years remain and becomes acute when terms fall under 50 years. The problem of wastage is addressed by several statutes which provide for compulsory enfranchisement - that is forced acquisition of the freehold in the case of a house and compulsory grant of an extended lease in the case of a flat. Some cases of houses can occur at site value, but most enfranchisement schemes provide for the acquisition to be at market value. There are complex residential and other conditions. There is also a scheme allowing tenants of a block of flats to acquire the freehold of the block collectively. Flat management schemes are discussed elsewhere.

1.5.2. Building leases

This is a lease in which the freehold owner granted a lease of a site for a fixed period of a time at a low rent (a ground rent) on the basis that the leaseholder will erect a house on the plot and enjoy it for the duration of the term. Superficially therefore the freeholder should recover at the end of the term a house for which he has not paid but: first, the term is usually very long, second, residential security of tenure will accrue at the end, though the rent will rise to a market level for a short term rental, and third, the leaseholder will be entitled to enfranchise ie to

⁶⁰ An equitable lease is just as good provided it is protected by registration.

⁶¹ Landlord and Tenant Act 1954 part II.

⁶² Landlord and Tenant (Covenants) Act 1995.

⁶³ Agricultural Tenancies Act 1995.

acquire the freehold. The most generous scheme under the Leasehold Reform Act 1967 applies to houses and enables the leaseholder to acquire ownership at site value, a scheme which survived attack in Strasbourg in *James v. UK*.⁶⁴ Building leases are now very rarely granted in the residential context.

1.6 The Public Law Context of Real Property Transactions

Are there significant public law restrictions on certain real property transactions including mortgages?

Are there public subsidies and/or tax benefits aimed at promoting certain kinds of transactions? (e.g. benefits for family homes, for buildings to be rented etc.)

English law does not have the rigid divide between public and private law that exists in civil law. Texts tend to treat all aspects of land law as a single subject, including statutory regimes for tenancies, enfranchisement and planning in a single continuum. This tends to give a much more coherent exposition than in continental texts. Judicial review can be used to control the activities of public authorities in a similar way to on the Continent, though outside the human rights field traditional grounds for judicial review are more limited than on the continent since perversity must be shown in decision making and there is no test of proportionality.

1.7 Brief Summary on "Real Property Law in Action"

- *What is the general situation in regard to real property markets? (i.e. is there a shortage of offer? what is the role of real property as compared with other forms of housing (tenancies in particular?) are there strong local market divergences? is building (and renting or selling) houses an attractive business for landlords-investors?*

- *What is the economic importance of mortgages and other limited rights in land?*

Note: For example in Great Britain, it is estimated that 37% of all households are subject to some current mortgage liability.

- *What is the role played by legal and other professions (notary publics, registrars, estate agents, mortgage banks etc.)? Are these professions subjected to professional rules and controls and a professional jurisdiction?*
- *Is real property law often enforced before courts? do - voluntary or compulsory - mechanisms of alternative dispute resolution exist and are they used in practice? are there peculiarities for the execution of judgements?*
- *To what extent does a fair and effective access to courts exist? (what is the situation concerning legal fees, legal access, legal aid, the average length of procedures; is*

⁶⁴ Applic 8795/79 (1986) 8 EHRR 123, ECHR.

there a special jurisdiction for real property law or are the ordinary courts competent? what are the possibilities of appeal?)

- *How about legal certainty in real property law (are there significant gaps in the law or contradicting statutes; is there secondary literature usually accessible to all lawyers)?*

When the Treasury reviewed the state of the economy with a view to deciding whether to recommend UK entry to the single currency the evidence collected suggested a total lack of convergence in the property markets in the UK and elsewhere in the EU. The UK has a high percentage of owner occupiers (70%) and it is estimated that this has reached a saturation level so that most non-owners will probably never buy. Britons are more ready borrowers than most Europeans with a higher per capita level of debt both on credit cards and in mortgage lending.

England and Wales display a high degree of land shortage, which is the primary factor behind the inexorable rise in the level of prices. There has been considerable turbulence in the market. The late 1980s saw a massive boom in prices, which then ran into a free fall descent in the early 1990s. At this time there was a high level of negative equity ie where mortgage debt exceeded the capital value of the house, leading to many repossessions and a rapid development in the English law of debt. Since then markets have recovered strongly and the later 1990s and early 2000s have seen continued sharp rises in values based on cheap affordability of mortgages because of historically very low levels of interest rates. In 2004 the value of UK properties exceed £1 trillion for the first time, but interest rate rises have cooled the market and in the autumn of 2004 there is evidence that the market has peaked, though it is difficult to know whether there will be a slowdown or a crash in values.

Traditionally the professional parties involved house sales are estate agents who market properties, solicitors who conduct conveyancing, surveyors who carry out structural surveys of properties for buyers and lenders, and banks and building societies which lend funds. From the 1980s there have been some moves towards assimilation of some of these roles eg solicitors running property shops and lenders acting as estate agents, but more recently the trend has been for these roles to diverge once more.

Litigation. Some areas of property law are widely litigated, notably mortgage repossessions and repossessions by landlords against residential tenants. These cases rarely raise substantive issues of law as such. Litigation about ownership, priority and so on tends to be conducted in the county courts, though major cases are started in the Chancery Division of the High Court. Once relatively static, property has become more dynamic and therefore more litigated. Disputes very often crystallise when an application is made to register a title and this is generally resolved by the Adjudicator to the land registry, though recourse can then be had to the courts. Costs apart, procedure fully complies with the article 6 of the European Convention on Human Rights especially since the introduction of the Civil Procedure Rules in 1998 which requires the court to manage litigation timetables.

Certainty is traditionally stated to be of greater importance in property law than in other field but in practice plenty of scope for judicial dynamism eg protection of unmarried cohabiters, protection of contributors against mortgage lenders, protection of co-owners against lenders etc. English law allows for case law development and so there is no cast iron guarantee of title. A good example of the problems this can create is shown by vehicular access to common land. This was always thought to be prescriptive after 20 years but in 1994 the Court of Appeal decided that, since it was a criminal offence to drive on a common, no access could be obtained by use. Many house owners were then held to ransom or forced to

use a statutory scheme which provided for access at an exorbitant price of 6 of the capital value of the house. But recently the House of Lords has reversed the earlier decision and held that this particular illegality does not preclude the acquisition of prescriptive rights.⁶⁵

⁶⁵ *Bakewell Management v. Brandwood* [2004] UKHL 14.

2. Land Registration

2.1 Organisation

2.1.1. Statutory basis

What is the statutory basis for land registration? Is there a different system in a part of your country?

Land registration was introduced in 1862, but gathered pace after 1897 when registration on sale became compulsory in central London. The main legislation was for long the Land Registration Act 1925, and under this compulsion was gradually extended so that by 1990 the entire country (that is the whole of England and Wales) was a compulsory area. In late 2003 this was replaced by the Land Registration Act 2002.⁶⁶ It is a matter of some controversy to what extent the registration Acts are procedural and to what extent they state separate principles for registered titles, but it is clear that in this regard the 2002 Act represents a more independent approach.

There is a separate scheme for land charges registration which is a means of registering individual burdens such as for example mortgages, estate contracts and restrictive covenants. The volume of new registrations is declining because most transactions with land require substantive registration, but a land charges search remains a vital component of unregistered conveyancing.

2.1.2. Relevant institutions

Which institutions deal with the registration of land in your country? What are their basic competences?

Land registration is conducted by the Land Registry, an independent body set up under the LRA 2002. This includes the title and mapping angles. Its HQ is in Lincoln's Inn Fields in London – curiously still held on an unregistered title- but the main work is organised through District Land Registries and it is absolutely essential to deal with the correct office, which can be located from the land registry web-site. The district land registrars are legally qualified – generally solicitors – and each office has a number of legally qualified staff as well as mapping staff and other technical back up.

Most conveyancing is done by solicitors or professional conveyancers, who have an advantage in terms of electronic access to the facilities of the registry, but the legislation provides for facilities to be made available to DIY conveyancers.⁶⁷

2.1.3. Land register/registre foncier/Grundbuch

How is the register structured? What (legal) training have the people working at the register authority?

⁶⁶ “LRA 2002”.

⁶⁷ LRA 2002 sched 5 para 7.

See 2.1.2. above.

2.1.4. Is all real property registered?

Is all real property registered? Please indicate the percentage of registered land.

It is estimated that there are 22 million titles in England and Wales of which some 19 million are now registered. Registration has almost always occurred under compulsion, though there is scope for voluntary registration after, for example, title deeds have been lost. The process involved designation of administrative areas where compulsion was introduced, but the whole country became compulsory in 1990. Actual registration follows after a trigger, that is a transaction which brings into play the compulsory provisions, originally basically sales, but extended in 1997⁶⁸ to include for example gifts, devolutions on death and first mortgages. Land that is never transmitted will never become registrable under existing law.

2.2 Contents of Registration

2.2.1. Which data are registered?

The fundamental of registration in England and Wales is that it is a register of title (that is legal title) and is only directed towards conveyancing. It shows the proprietorship of a parcel of land, or more accurately of an estate in land, as well as its physical extent and benefiting and burdening rights, showing above all the current state of play.

The name of the “Land Registration Act 2002” suggests that there is a system of registration of *land*, and “registered land” is a convenient shorthand. Were land registered directly, a single register would record details of each particular physical piece of land, but it would be very difficult to decide whether to register the landlord or the tenant of leasehold land. The whole problem is avoided because, in fact, it is title to an *estate in land* which is registered.⁶⁹ Registration applies to each estate independently of any others in the same physical land, so one estate may be registered while others remain unregistered.

The freehold estate represents ownership of the land in perpetuity, that is for ever. A leasehold estate is registrable if there is more than seven years of the term outstanding at the time of registration, so after a freeholder grants a lease to a tenant for 99 years, two registers run side by side in the same land, and this process of division can be continued by creating a sub-lease, a sub-under-lease, and so on without limit. Hence any physical piece of land could be represented by any number of titles, any number of which may be registered.

The global register of 19 million plus individual registers each identified by a unique title number and each subdivided into three parts — the property, proprietorship, and charges registers.

2.2.2. Sample of Registration

Please include (if possible as an annex to the answers to this questionnaire) a **sample copy** of a registration (rsp. an abstract of title) and explain how to read it!

⁶⁸ LRA 1997; LRA 2002 s 4.

⁶⁹ LRA 2002 s 2.

Somewhat simplified, a register of the title of an individual piece of land might look like this⁷⁰:

LAND REGISTRY	TITLE NUMBER WX87654
<p>A. PROPERTY REGISTER</p> <p>COUNTY: WESSEX DISTRICT: UPPER WESSEX</p> <p>The freehold land shown and edged with red on the plan of the above Title filed at the registry registered on 10th January 1990 known as no 10 Egdon Heath Road, Casterbridge together with the rights granted by a conveyance of 5th May 1890 referred to in Entry no 1 of the Charges Register.</p>	
<p>B. PROPRIETORSHIP REGISTER</p> <p>TITLE ABSOLUTE</p> <p>Proprietor: Thomas Hardy of 10 Egdon Heath Road, Casterbridge.</p>	
<p>C. CHARGES REGISTER</p> <ol style="list-style-type: none"> 1. 10th January 1990. A conveyance of the land in this title dated 5th May 1899 by Diggory Venn to Gabriel Oak contains restrictive covenants. 2. 10th January 1990. Charge dated 2nd January 1990 to secure the money therein mentioned. 3. Proprietor: Woodlands Building Society registered on 10th January 1990. 	

Registry jargon refers to the A, B and C registers. Registration collects together all details relevant to the ownership of the land, found in unregistered land from the title deeds and land charges register, and presents them as a coherent snapshot, the history of the title becoming irrelevant.

The property register: The property register first defines which estate is registered, using the words "freehold" or "leasehold" and includes in the latter case be a brief description of the main terms of the lease – the parties, its date and its length. A second aspect of the property register is its description of the land, using an up to date description and plan is provided. Descriptions of urban land are brief and often consist of no more than the postal address, supplemented by a title plan drawn from the large scale Ordnance Survey plan, but on a scale which is too small to fix precise boundaries. Benefitting rights such as the benefit of a right of way to gain access to the land, are also recorded as an appurtenance to the land benefitted.

The proprietorship register: The owner of a registered estate is named in the proprietorship register and described as the "registered proprietor". Ownership coincides with proprietorship when the person recorded on the register is entitled to the land for his own benefit, but

⁷⁰ *Encyclopaedia FP* (5th ed, 1999 reissue) vol 25(1), [3001–3012]. LR website www.landregistry.gov.uk.

proprietors might also be eg trustees or personal representatives, in which case the register shows the legal title but not the beneficiaries. These do not need to be shown on the register since they are overreached.⁷¹ The person on the register is always presumed to have full powers of ownership unless a limitation exists (for example the inability of a single trustee to sell the land) which is demonstrated to the outside world by entry of a restriction on the register. Other matters included are a pending bankruptcy notice, positive covenants affecting the land and any modification of the covenants for title. The price paid for the land is also recorded.

The charges register: The charges register lists the burdens or adverse interests affecting the land, such as mortgages or restrictive covenants. Complexity in the ownership of land makes it likely that any particular parcel of land will be subject to a number of adverse interests. The registrar collects together the adverse interests and lists them in order of entitlement so that the register determines priority as well as validity.

2.3 Registration Procedure

2.3.1. Application for Registration

Please describe the application procedure:

Is there any form required for the application for registration?

Is it usually a lawyer or a notary who applies for the registration on behalf of the parties?

One needs to distinguish first registration, transfer under existing procedure and proposals for electronic transfer and registration.

Registration is usually carried out by the conveyancer acting for the purchaser.

2.3.1 (A) Transfer of a registered title

I consider only a straightforward case in which couple sell a mortgaged property to another couple who take out a fresh mortgage to fund the purchase. Before completion the transfer will have been executed as a deed by the buyers, in order for them to declare that they hold the land jointly, and then by the sellers in escrow pending completion (that is conditional upon payment of the price). At completion the conveyancers acting for the buyers will hand over to the conveyancers acting for the seller the purchase price; this could be done by bankers draft but otherwise usually by electronic transfer. The seller's conveyancer then hands over the transfer to the buyer:

The transfer deed in the correct LR form;

The charge certificate (these were always issued to lenders in the past but will no longer be issued under the LRA 2002)

Any other documents such as pre-registration deeds or land charges searches

⁷¹ See above point 1.2 heading "overreaching".

An undertaking to discharge the mortgage

Usually the buyer's conveyancer is not present at completion in which case an undertaking is accepted from the seller's certificate to post the documents on the day of completion. The transfer will require stamping.⁷²

The buyer's conveyancer is responsible for registration within the priority period of the search carried out before completion. Many applications are late or defective, but these risk loss of priority

Documents are submitted to the land registry and this must be the correct district registry. They are:

An application form;

The transfer;

Sometimes a certified copy of the transfer;

A Stamp Duty Land Tax certificate;

The charge certificate (if any);

A copy of the undertaking for discharge of pre-existing mortgages (replaced by the form of discharge when executed by the lender);

The legal charge executed by the buyers and a certified copy; and

The fee.

In due course the registry will issue a certificate indicating that the registration is completed.

(B) Electronic conveyancing

The Land Registration Act 2002 contains a framework⁷³ for the introduction of electronic conveyancing. This means that simple transactions such as the transfer of the whole title will be implemented electronically. The price paid by electronic transfer and the seller's conveyancer will then carry out an electronic transfer and the seller's conveyancer will then carry out an electronic transfer and the seller's conveyancer will then carry out an electronic transfer which will instantaneously discharge the existing mortgage, transfer the land, implement the registration of the buyer, and effect any mortgages used to finance the land. Software models to achieve this are currently under development and can be seen at the land registry website.⁷⁴ Use of this system will eventually become compulsory.

(C) First registration

This occur after the sale of unregistered land, the application for first registration being required within two months of completion of the unregistered conveyance, Legal title but will be divested if the period of registration is exceeded. First registration requires:

An application form;

⁷² See below para 3.7.2.

⁷³ LRA 2002 ss 91-95.

⁷⁴ www.landregistry.gov.uk

The conveyance – there is no official precedent,⁷⁵ but it is possible and common to use a LR transfer provided this is amended to include a description of the parcels conveyed;

Sometimes a certified copy of the transfer;

A Stamp Duty Land Tax Certificate;

An undertaking to discharge any existing mortgage, which is replaced by the discharged mortgage when available;

The unregistered title deeds;

A land charges search against the vendor and other estate owners since the root of title;⁷⁶

Any mortgage executed by the buyer and a certified copy; and

The fee

2.3.2. Duties of the Registrar

What does the registrar control?

How are the applicants informed about the registration?

The registrar is obliged to ensure there is a good title to the property, though trivial defects can be overlooked if a good holding title is shown. In straightforward cases of transfer registration is usually automatic but more problems can arise on a sale of part when the title has to be divided or on first registration and, indeed, in the latter case it is not uncommon for the registry to raise a long list of requisitions before accepting the title for registration.

The registry is concerned to check the title because once the title is registered it is subject to a guarantee. In some so called “Torrens” system title is indefeasible apart from fraud, but in our system the guarantee is of either the land or an indemnity for its value, but the value of this guarantee is reduced by strict rules about its availability which precludes reliance on the guarantee in the case of any fault on the part of the applicant including, for example, negligent conveyancing.

In the past registration was complete by the issue of a land certificate to the proprietor, the certificate being an official copy of the register. However, many houses were mortgaged in which case the proprietor never received a certificate but instead a charge certificate was issued to the lender. The certificate was an important key to the register since future purchasers could not be registered without production of the certificate. Lenders were unhappy about have custody of large numbers of certificates and instead proprietors now receive a document certifying the completion of registration which does not have a copy of the register and which does not have to be produced on dealings.

⁷⁵ Most commonly used are Butterworths’ *Encyclopaedia of Forms and Precedents*.

⁷⁶ See below point 3.4.1.(B).

2.4 Access to information

Is the registration done on paper or electronically?

How can you get access to land registration information? Is it in the public domain or is the access restricted?

- *In particular: Can you get access to the register :*

if you have a *ius in rem* in the real property,

if you are negotiating with the owner about the purchase of the property - or if you want to find out who owns a property in order to make him an offer for purchasing or renting the property,

if you have an enforceable title against a debtor and are inquiring about the existence of real property to be seized in an execution procedure,

if a bank wants to check whether an applicant for a loan owns real property,

if the press wants to inquire on how much real property a politician owns.-

Can you search for information by address, by registration number of land and/or by holders of rights on it?

Registration was originally done on paper cards, but a process of “dematerialisation” has converted all titles and plans to electronic format. This has facilitated the introduction of electronic access to the register. A conveyancer can obtain a copy of the register entries and plans instantaneously via a PC, having first signed up to the LR Direct scheme.

Land registration has operated since 1988 on the basis of an “Open Register”. In the past it was closed and a purchaser had to produce an authority to inspect the register signed by the registered proprietor, but this is no longer the case. Access does require the payment of a fee.⁷⁷ It is quicker to find information if the title number is known, but this is not essential. It is also possible to search by name of proprietor, though it is easy to avoid public scrutiny by creating a trust so that the name on the register is not necessarily that of the true (beneficial) owner. Members of the Public investigative authorities have wider power to inspect documents eg transfers leading to registration.

Additional information

The land register shows only the legal title to land, but beneficial interests are overreached or overridden on sale. . Numerous other matters need to be investigated, the most important methods being:

A local search this shows up money charges held by public authorities eg for road building costs, the planning history, and other matters such as compulsory purchase procedures.

A commons search to show whether the land is registered as a common

Mining searches – to show former coal workings

A structural survey – in contrast to some continental countries this is invariable practice on a purchase of a building in England and Wales, and is absolutely in-

⁷⁷ Fees for access to information are low, generally in the range £2-£4 for official copies of registers and plans.

sisted upon by mortgage lenders.

Etc.

The National Land Information Service⁷⁸ is developing a system for on-line access to this information.

2.5 Substantive Effects of the Registration

- What are the substantive effects of the registration?

Is the registration necessary for the creation or the transfer of the right (constitutive effect) or for its opposability against third parties - or is it merely declarative?

Does the registration confer a presumption or proof for the existence of the right? (if this is different for different rights and interests, please give the information for each interest.

- *Is the reliance in good faith on the registered rights protected?*

Note: If your system requires the registration merely to render a real property right opposable to third parties, please explain this concept in detail. E.g. in France, if the owner sells the same property twice, whoever registers first becomes the new owner. Please note that further below there is also a case on the acquisition of property in good faith (4.2.2).

Is it necessary to search for additional information apart from the content of the registration to get a full picture?

How are parties that have relied on the information from the register (abstract of title) protected if this information proves to have been wrong?

This is a very difficult question because of the interplay of common law and equity. Is registration necessary for the creation of a right.

(A) Transfer

At present the principle is that a transfer of land will operate in equity on completion: it passes beneficial ownership to the buyers but legal title passes only on registration, or more accurately from the time of an application that is subsequently completed by a registration. The period between completion and registration is the registration gap.⁷⁹ The lack of legal title is not a great problem provided that a LR search is made before completion and the application for registration is made within the priority period of the search, but there are problems with overriding (ie off register) interests.

(B) Electronic conveyancing

Transfer and registration will be simultaneous, and it will not be possible to create registrable rights except by registration.

⁷⁸ www.nlis.org.uk

⁷⁹ *Brown & Root Technology v. Sun Alliance* [2001] Ch 733, CA (the “tenant” who can serve notice to break a lease is the proprietor of the lease shown on the register).

(C) First registration

Legal title is passed by an unregistered conveyance but it is divested after two months unless an application is made for registration within that period.⁸⁰ Late applications are accepted when an excuse is proffered.

The substantive effect of registration is controversial. First registration vests title in the first proprietor,⁸¹ but this is generally thought to refer to the legal title and not necessarily including the equitable title. Equitable interests will often be defeated if the first proprietor has bought the land but not necessarily if a gift occurs or if there is a voluntary first registration. However, a proprietor in possession may be protected against alteration of the register.⁸² Also and particularly every registered title is subject to the possibility that it will turn out to be invalid because of an adverse possession completed before the implementation of the LRA 2002. The new Act removes adverse possession as a ground for divesting a registered title⁸³ since registration can only occur with the consent of the proprietor who has been ousted, where the 12 year limitation period is completed after the commencement of the 2002 Act.

2.6 Rank and Priority Notice

2.6.1. Rank (rang/Rang)

How is the rank of registrations determined?

Please quote the applicable article verbatim (and translate it into English)!

Case: Owner grants first a mortgage to A, afterwards another mortgage to B. After that, creditor C has a third mortgage registered on the same property in an execution procedure. The time of registration is as follows: First B, then C, then A. What is the respective rank of the mortgages?

Here the report will concentrate on land registration affecting registered titles, the commonest case. There is a separate system of land charges registration for registering mortgages and other interests against unregistered titles.

Protective registration of burdens (as opposed to substantive registration of estates and legal charges) is by way of notice. A distinction is drawn between notices entered with the consent of the registered proprietor and registrations without. If registration is made with consent, the entry of an agreed (or mutual) notice on the charges register of the title will guarantee both priority and validity of the right. If it is without consent the notice is unilateral and this is essentially notice of a claim to a right which guarantees priority but leaving the validity of the claim to be determined in future. This system is relatively new.⁸⁴ Previously a disputed right was protected by a caution which did not confer any priority at

⁸⁰ LRA 2002 s 7.

⁸¹ LRA 2002 s 11(3).

⁸² LRA 2002 s 65, sched 4.

⁸³ LRA 2002 ss 96-98, sched 6.

⁸⁴ LRA 2002 ss 32-39.

all but which merely blocked access to the register until the disputed claim was resolved; if the decision was in favour of validity it would be converted into a notice and hence have its priority protected before any further step was taken, but the registry were notoriously poor in checking on cautions and cases arose where later registrations occurred despite the presence of a caution which should have prevented them. Unilateral notices and any remaining cautions are subject to (separate) warning off procedures which enable the registered proprietor to remove a disputed registration.

Priority between interests protected on the register depends upon whether the interest is substantively registered (mainly legal mortgages) or merely protected on the register (equitable mortgages and most other adverse rights). Substantive registration of a mortgage confers the legal estate and therefore priority over prior and subsequent interests, assuming that there is no protective registration for the earlier interest and that the earlier interest is not overriding (eg the rights of occupiers) So the charges register shows the sequence of priorities in order to registration, in the example given in the questionnaire that is B, C, and A. The position is different if interests are not substantively registered, for example a string of equitable mortgages, which the lender leaves unregistered to save land registry fees. As between a string of equitable interests, here two mortgages and a charging order, the rule is first in time of creation, so the order would be A, B, C.⁸⁵

As stated before the rules for protecting of land charges affecting unregistered land are different and depend upon the particular class of land charge.

2.6.2. Priority Notice

Is there any possibility to secure a future registration (or at least its rank)?

Please quote the applicable article verbatim or include a copy in the original language and in an English translation (if there is no Internet source).

Is the effect of this priority notice limited to a certain period of time?

Note: *In some countries, a provisional priority notice (e.g. the anotación preventiva in Spain) exists which is limited to a certain period of time (e.g. 60-180 days). In other countries, a priority notice is not subject to any temporal limitation (e.g. the Vormerkung in Germany, § 883 BGB). In a third group of countries, there is just a block to the register for a certain period ("freeze" in England, Wales and Scotland). Please explain how your system works.*

There are procedures for priority notices but in practice these are little used and priority is adequately secured by an official search. If we confine attention to an already registered title the search needs to be carried out a few days before completion and the overall priority period is 28 days.⁸⁶ Electronic conveyancing will work differently, with the need to notify the land registry in advance to secure a window within which to complete the transaction, and indeed the whole chain of transactions of which it forms part.

⁸⁵ LRA 2002 ss 28-30.

⁸⁶ LRR 2003 r 149; check ***

3. Sale of Real Estate among Private Persons (consumers)

3.1 Procedure in general

Please describe first the procedure for a standard sales contract relating to real estate: Private owners (e.g. a married couple) sell their residential home to other private owners. Follow the steps of the questionnaire, if possible, but also mention if there are any peculiarities in your country, which we did not consider in any of the subquestions.

Note: Please state in particular if a preliminary contract is usually concluded.

Preliminary note

If, as suggested, a couple sell a house to another couple, both sale and purchase involve a co-ownership in English law which involves a trust, and it will therefore be necessary for the sellers to sell as trustees and for the buyers to set out the terms of the trust on which they will hold usually as beneficial joint tenants – equal beneficial entitlement and subject to survivorship on death (whoever lives longest becomes sole owner). This is not necessary in the case of a sole owner.

3.1.1. Main steps of a real estate sale

The basic system is “contract and conveyance” ie two sequential steps.

There is increasing fragmentation in the estate agency market, advertisement of property occurring via independent estate agents, financial institutions with estate agency arms, and some solicitors or conveyancers operating property shops. The seller will at the same time as instructing an agent also instruct a conveyancer – either a solicitor or licensed conveyancers, the two groups who currently hold a monopoly of conveyancing for profit, collectively described as “conveyancers”. Conveyancing takes place within the framework of the Law Society TransAction scheme on the basis of the National Conveyancing Protocol.⁸⁷ When a buyer has been found and the price etc agreed, the buyer will instruct his own solicitor/conveyancer, who will put in hand a local search with the local authority and will arrange his finance. The seller’s conveyancer will draft a contract in duplicate, based on a computer generated copy of the register entries, which has to be approved by the buyer’s solicitor. When all is agreed contracts are exchanged, usually these days by post or electronically, a deposit of 10% is usual. A time is agreed for completion, commonly 2-4 weeks after exchange. At this time the price is paid using any mortgage advance, the seller vacates, the keys are handed over and the purchaser takes possession. The buyer’s conveyancer then applies for registration of the title.

Two changes are underway. Legislation under discussion at present⁸⁸ will require the seller to prepare a seller’s pack which contains a copy of the registered title, a local search and a survey report. This is controversial. The aim is to speed up conveyancing but it will increase the up front costs and these documents may well go out of date when the housing market is slow. Within the next 4-5 years it is intended to introduce electronic conveyancing, in which completion of the transaction and registration of the transfer will

⁸⁷ Encyclopaedia of Forms and Precedents service to vol 36.

⁸⁸ Housing Bill 2003.

occur instantaneously.

3.1.2. Time frame

How long do these steps normally take in your country?

England is said to have the fastest and cheapest conveyancing in Europe, though it does not always feel as if this is true. The basic constraints are two fold. First, the local search can take time, and this varies from authority to authority. Second, almost all sales occur in chains of related transactions, and the whole cannot proceed until all links are ready. Indeed most of the professional conveyancer's time is taken up with chain management. In an extreme it is possible to complete a contract and transfer within a day, but two months may be more typical in a reasonably active market.

3.2 Real Estate Sales Contract

Is there any form required by law – either for the sales contract or for the transfer of ownership (e.g. writing, deed, notarial act or any other authentic instrument)? Must it be done in an oral hearing with both parties present?

What are the consequences if the contract does not meet the formal requirements?

3.2.1. Form

English law is not based on notarisisation, but rather on the use of formal documents. The two stages are:

(1) Contract

Contract formalities are laid down by s 2 of Law of Property (Miscellaneous Provisions) Act 1989. Contracts are invariably exchanged, meaning that (in the usual bilateral contract) two identical parts are drawn up, usually printed or photocopied so as to be identical. These may be printed onto a printed form setting out the Standard Conditions of Sale or these may be incorporated by reference.⁸⁹ Each part is signed by one of the parties and the contract is formed when these signed parts are exchanged, so that the seller's conveyancer holds the part signed by the buyer and vice versa. Often the exchange is notional eg by telephone or e-mail. The Act requires that the written statement of the contract must contain all terms expressly agreed between the parties. It is perfectly possible for DIY conveyancers to use these procedures, but this is only done in a tiny number of cases. Where contracts are not exchanged in this way, the 1989 Act prevents any contract arising unless the terms are stated on a single document that containing the signatures of both sides eg an informal mortgage must be signed by the lender as well as the borrower. Pre-1989 formalities required writing, but they allowed unilateral enforcement where only one party had signed.

If these formalities are not observed the doctrine of proprietary estoppel often allows

⁸⁹ Encyclopaedia of Forms and Precedents service to vol 36.

enforcement of informal contracts after they have been acted on, that is after detrimental reliance by one party .

(2) Deed

A deed is required for any transfer or dealing with a legal estate,⁹⁰ apart from very minor exceptions, the most important being a lease for up to three years which can be oral. A deed was formerly sealed but under s 1 of Law of Property (Miscellaneous Provisions) Act 1989 this is no longer required. Rather a document must describe itself as a deed (“This deed of grant”) or be executed as a deed (“The seller has set his hand to this transfer as his deed”). The document must be signed and witnessed. It comes into effect not on signature but rather on delivery –when the seller’s conveyancer hands over the document having received the price. Clients generally sign a few days before completion in escrow, ie a conditional execution. A deed has to be executed by the seller but (unlike a contract) not necessarily by the buyer. Buyers will only sign if there is some feature of the transaction requiring it eg they are entering into covenants or they are joint purchasers who have to declare how they hold the property between themselves.

In addition, where title is registered it is necessary to use the appropriate LR form according to the type of transaction, the most commonly used being for a transfer of a whole title.⁹¹ It is possible to make use of the LR forms where title is currently unregistered but the transfer will itself attract first registration.

3.2.2. Who drafts the contract for a real estate sale normally?

Who drafts the contract for a real estate sale normally?

Documents are generally drawn by a conveyancer, the contract by that acting for the seller and the transfer and mortgage deed for the buyer. Although, the parties themselves may draw up the contract and transfer, lenders will insist upon professional representation.

3.2.3. Preliminary contract

Is there a preliminary contract?

What legal effects does it have?

It is invariable practice to have a preliminary contract, a practice adopted above all else to enable chains of transactions to be lined up – no contract is exchanged until everyone in the chain is ready to proceed. Bridging finance is rarely used. The legal effect of a contract is to pass an equitable interest in the property to the buyer. A buyer is protected against a resale since he has a proprietary interest in the land, but protection of a contract is very rare unless there is a known risk of non-completion. An inconvenient practical effect is that it is necessary for the buyer to insure from the time of exchanging contracts because the risk of fire etc damage passes with the equitable interest in the property.⁹²

⁹⁰ LPA 1925 s 52.

⁹¹ LR form TR1; LRR 2003 sch 1.

⁹² Standard Conditions of Sale (4th ed) condition 5.1.3..

3.7.1. Typical Real Estate Sales Contract (3.2.4?)

Is there any standard form for a sales contract? Or is there any other form used quite often or published e.g. in a commonly used manual?

The use of the Standard Conditions of Sale is pretty well universal but they are copyright.⁹³ If these conditions are not adopted, the default law is based on Victorian case law and is not well suited to modern conditions.

3.3 Transfer of Ownership and Payment

3.3.1. Requirements for Transfer of Ownership

What are the requirements for the transfer of ownership?

valid obligation contract (causa),
payment of the purchase price,
consent on the transfer of ownership,
registration with the land register.

Note: Here, we try to elaborate on the distinction between „causal“ systems requiring a valid causa (as under the Code Napoléon) and „abstract“ systems (as in Germany), where the transfer of ownership is valid irrespective of the validity of the sales contract (however, if the sales contract was invalid, the seller may reclaim the property on grounds of unjust enrichment).

English law is complicated by the fact that ownership here may be legal or equitable. Transfer of legal ownership is quite straightforward: with a registered title a transfer requires a deed and registration of it. The transfer operates in equity immediately and at law after registration and when completed supersedes the preceding contract according to the doctrine of merger. In a limited range of circumstances a deed may be avoided; it may be void or voidable ie avoided only when the seller elects to avoid it. Examples are duress (physical threat), undue influence (emotional pressure), non est factum (eg a blind person to whom a document is read over incorrectly), misrepresentation or forgery. A transfer may also be rectified to make it comply with the preceding contract. With a registered title there will be a constructive trust imposed so that the right to recover the land exists in equity and in these circumstances the register can be rectified after the invalidity of the transfer has been established. English law provides for a proprietary claim for recovery of the land.

The underlying contract may also be avoided in a wider range of circumstances eg total failure of consideration and a wider range of misrepresentation, non payment, non-delivery of possession, delay after a notice to complete has expired. However, the doctrine of merger provides that invalidity of the contract is irrelevant once the transaction has been completed, so many grounds for opposing completion are only available if exercised before execution of the transfer deed.

⁹³ 4th edition, 2003, Law Society; Encyclopaedia Forms and Precedents service to vol 36.

3.3.2. Payment due

How do you manage to make the payment and the transfer of ownership happen at the same time – or at least to minimize risks for both seller and buyer?

When is the payment due under a typical contractual agreement?

Is the payment effectuated via an escrow account or directly among the parties?

Is an insurance for risks inherent to the payment and the transfer of the property possible, usual or even obligatory?

Note: *If the property is transferred with the conclusion of the sales contract, then the payment has to be made before or at least during the conclusion of the contract itself. If, however, the transfer of the property takes place only after the registration, then the seller does not run any risks if the payment is made only after the conclusion of the contract (provided that the payment is made before the registration).*

The deposit of the purchase price on an escrow account (in particular a notarial escrow account, Notaranderkonto) can be another method to synchronize the payment and the transfer of the property.

The system of contracts preceding completion largely eliminates problems of chain management, since when contracts are exchanged a date is fixed for completion of the transaction, which will be the same date throughout the chain. The lowest sale is completed first and the money from this is then used for the next purchase and so on. Payment is due on the completion date, always by banker's draft or by electronic transfer of funds. Payment is therefore made well before registration (until electronic conveyancing makes completion and registration instantaneous), usually electronically and always into the client account of the conveyancer acting for the seller. Insurance against any risks is in the form of the professional indemnity policies of the firms involved.

3.3.3. Ways of the seller to enforce the payment

How can the seller enforce the payment (e.g. by execution)?

Payment is enforced by refusing completion until payment is made. If the price is to be left outstanding it would be usual to require the buyer to execute a mortgage to cover the amount, but if this was not done (eg for a mistake in calculation of the completion funds) a lien (the unpaid seller's lien) will be imposed by law and this can be enforced as an equitable charge, that is by obtaining an order for sale.

3.3.4. Transfer of possession to the buyer

How, on the other hand, may the buyer be sure to get possession when he pays the purchase price?

This is haphazard in English practice. On receipt of the price the seller's conveyancer telephones the seller's agent to release the keys to the buyer. There do not appear to be recorded (or at least reported) instances of buyers who have paid for land and then not received possession.

3.4 Seller's Title

For English law it is necessary to answer this in duplicate, one answer reporting the position where title is already registered and the other where it is unregistered (but will become liable to first registration after the transaction).

(A) Registered land

3.4.1. Title Search: Ascertaining the seller's title

Which facts does the buyer (or the buyer's lawyer, the notary or the agent) have to ascertain before he can be sure that the seller has a valid title?

***Note:** Here, we try to elaborate on the distinction between „causal“ systems requiring a valid causa (as under the Code Napoleon) and „abstract“ systems (as in Germany) under which the transfer of ownership is valid irrespective of the validity of the sales contract. Under a causal system, the notary must usually check all prior transfers up to the period of prescription/adverse possession (regularly for 30 years) - whereas, under an abstract system, the seller's registration as the owner provides absolute certainty for a buyer acting in good faith.*

The register shows the current state of the legal title and registration vests title in the proprietor. Between 1925 and 2003 statute⁹⁴ provided that the buyer was obliged to rely on the title and could not contract for a more extensive title or seek to investigate the pre-registration title and even after this provision has, most curiously, been dropped, there is no doubt that the old practice will continue. Although the title is defeasible if it is shown to be based on fraud etc, this will not unduly concern a purchaser who is paying for the land, because provided he acts in good faith he will be a protected purchaser and earlier claims will not be able to upset his title. What does need to be investigated is the existence of overriding interests – interests valid off the register - as described immediately below.

3.4.2. Title Search: Absence of Encumbrances

How does the buyer ascertain that he will acquire the property without encumbrances?

***Note:** This question encompasses two steps: First, the existence of encumbrances will be scrutinized. Second, payment will be made dependent on the deletion of existing encumbrances. If a system protects good faith in the registration, the research for existing encumbrances is facilitated. If, conversely, a system provides for the transfer of the property at the conclusion of the sales contract, the buyer will have to pay the purchase price during the conclusion of the contract; therefore, the deletion of existing encumbrances will need to be assured even before the conclusion of the contract (and vice versa).*

Most encumbrances will be apparent from the charges register of the title, in particular any money charges have to be registered. Beneficial interests under trusts will be overreached provided the sale is by two trustees. It is also possible however for there to be encumbrances which override the register. These are set out in the LRA 2002 sch 3 as follows:

short leases (maximum 7 years, but with much detail);

⁹⁴ LRA 1925 s 110.

interests of those in actual occupation;
discoverable legal easements;
customary and public rights;
local land charges;
mines and minerals; and
miscellaneous manorial and public rights for a transitional period.

Of these, the rights of occupiers are by far the greatest concern: if a person is occupying as say a licensee but has an option to purchase that option can be overriding because the occupation need not be under the interest being protected. A series of cases has recognised that a cohabitee who has contributed to the acquisition of a house (eg by paying mortgaging instalments) can have an overriding interest in the house and that contribution right will bind a purchaser.⁹⁵ A conveyancer acting for a purchaser asks the vendor what rights exist and what occupiers there are and by asking his own client who is buying what he or she saw when inspecting the property.

Most properties sold will be subject to a mortgage which has to be redeemed on completion. The practice here is to rely on an undertaking by the seller's conveyancer to redeem the mortgage out of the sale proceeds. When the lender receives the redemption monies, it executes a form of discharge which is sent to the seller's solicitor and forwarded to the buyer's solicitor, who in turn forwards it on to the land registry to enable the former mortgage to be deleted from the register. Larger lenders are now able to discharge mortgages electronically.

Special mention is required of the position of lenders. When lending as well as the validity of the title to the property acting as security, the solvency of the borrower is a vital consideration. Stages in the bankruptcy procedure should be recorded in the land charges register – the pending actions section for initial stages and the register of writs and judgments for final order. This is a names register so that a bankruptcy of John Smith will reveal all people with that name adjudicated or subject to an adjudication of bankruptcy. Irrelevant entries are eliminated by conveyancer's certificate. The land registry should transcribe these entries to the register of individual titles owned by bankrupts but it was very common for this transcription to be inaccurate, either land was shown as being subject to a bankruptcy which did not affect the proprietor or for relevant entries to be missed. Lenders therefore insisted upon a land charges search (called a bankruptcy only search) even though the title itself was registered. It remains to be seen whether recent changes of procedure will eliminate the need for this search.

3.4.3. Title Insurance or Liability

Why did your system develop title insurance (or why is title insurance not necessary in your system)? In which cases is it used?

If title insurance exists: How much does it cost in a typical real estate sale?

Note: *Title insurance is typical for common law countries. Our hypothesis is that title insurance is unnecessary in all those countries which have an efficient registration system (enabling bona fide acquisitions) and/or sufficient liability of the notary (draftsperson) who researches the seller's title.*

⁹⁵ *Williams & Glyn's Bank v. Boland* [1981] AC 487, HL; and many others.

Title insurance is not general in England and Wales, in contradistinction say to the United States, but limited insurance is provided by land registry. If an honest claimant does lose title and indemnity will be paid, but this is very rare since those in possession are protected against rectification of the register. Thus if a registered proprietor who is not in occupation is defrauded by a crook who transfers his house to an innocent buyer who takes possession, the buyer will generally be left with the house and the original owner will receive its value from the indemnity fund.

3.4.4. Leases

How does the buyer make sure that there are no leases on the sold property?

What are the consequences for the buyer if such contractsexist?

How may problems related to leases be dealt with in the drafting of the contract?

Note: *In many countries, the buyer is bound to a lease if the tenant has already occupied the premises prior to the transfer of the property. Existing leases, therefore, are a defect in the seller's title. Apart from that, a tenant might have a statutory pre-emption right under certain conditions.*

Unless a lease contract is registered (which is compulsory in some countries and facultative, though not usual, in others), there seems to be no other way for the buyer but to ask the seller whether there are leases and to check the situation personally when visiting the premises.

A lease of registered land will generally require registration or protective entry on the register. If granted while the land remained unregistered it should have been granted by deed and this should be lodged with the title deeds to the land. However, leases may override the register if short – until recently any lease up to 21 years overrode the register, but this is now reduced to 7 years⁹⁶ – and any lease of which the tenant is in occupation will also override the register. Until the recent reforms receipt of rents was also protected.⁹⁷ Basically therefore inspection of the land should reveal the presence of a tenant, but it is possible for a lease to exist which does not confer occupation eg because it is in the future or the term is discontinuous like a timeshare and in such cases the buyer may be overridden by a virtually undiscoverable interest. The LRA 2002 has attempted to refine the definition of those leases that override to make a closer correlation between what is discoverable and what overrides. Despite the difficulties alluded to here it seems to be unusual for an honest and diligent buyer to become bound by a lease of which he is unaware.

The vendor is asked to disclose incumbrances and consequences of non-disclosure are outlined below.⁹⁸

(B) Unregistered land

3.4.5. Title Search: Ascertaining the seller's title

Which facts does the buyer (or the buyer's lawyer, the notary or the agent) have to ascertain before he can be sure that the seller has a valid title?

⁹⁶ LRA 1925 s 70(1)9f); LRA 2002 sched 3 para 1.

⁹⁷ LRA 1925 s 70(1)(g); not LRA 2002 sch 3 para 2.

⁹⁸ See above point 3.4.2(A).

Note: Here, we try to elaborate on the distinction between „causal“ systems requiring a valid causa (as under the Code Napoleon) and „abstract“ systems (as in Germany) under which the transfer of ownership is valid irrespective of the validity of the sales contract. Under a causal system, the notary must usually check all prior transfers up to the period of prescription/adverse possession (regularly for 30 years) - whereas, under an abstract system, the seller’s registration as the owner provides absolute certainty for a buyer acting in good faith

Unregistered titles were derivative in character on the principle *nemo dat quod non habet*. So to prove title to the fee simple it is necessary to trace its devolution back through earlier owners, but this process is assisted by two factors. First, the principle of limitation operates to bar adverse claims to title after adverse possession of the land for 12 years⁹⁹ – though this is not absolute and will not necessarily protect where a minor is entitled or there is a rent free lease outstanding. Although similar to the civil concept of prescription, limitation acts negatively to bar adverse titles rather than to confer a positive title,¹⁰⁰ and there is no “Parliamentary conveyance.” Second, the obligation to prove title is limited to a “root of title” a document describing the land, dealing with the entire legal and equitable ownership of it, and at least 15 years old.¹⁰¹ Thus if land is being sold in 2004, a conveyance in 1998 may be the only document produced in an epitome of title (a photocopy of the crucial documents of title). Title also has to be produced to interests referred to in the root of title but created by earlier documents.

3.4.6. Title Search: Absence of Encumbrances

How does the buyer ascertain that he will acquire the property without encumbrances?

Note: This question encompasses two steps: First, the existence of encumbrances will be scrutinized. Second, payment will be made dependent on the deletion of existing encumbrances. If a system protects good faith in the registration, the research for existing encumbrances is facilitated. If, conversely, a system provides for the transfer of the property at the conclusion of the sales contract, the buyer will have to pay the purchase price during the conclusion of the contract; therefore, the deletion of existing encumbrances will need to be assured even before the conclusion of the contract (and vice versa).

The seller must disclose adverse interests (incumbrances or burdens) affecting the land in the contract for sale. The obligation is then to prove title free of any undisclosed rights. The buyer’s solicitor must effect three checks:

- the epitome of title to look for incumbrances;
- a land charges search (explained below); and
- occupation of the land since this gives notice of equitable incumbrances.

The land charges register is not a register of land itself but rather of isolated burdens against land – for example mortgages, estate contracts and equitable easements.¹⁰² Registration is conducted, bizarrely, against the name of the estate owner shown on the title deed and not

⁹⁹ Adverse possession formerly also destroyed a registered title, but this principle has been removed for registered titles: LRA 2002 sched 6.

¹⁰⁰ A title is conferred by possession, but this is generally useless unless the earlier title is barred by limitation.

¹⁰¹ LPA 1925 s 44.

¹⁰² LCA 1972.

against the land directly. As a system it is seriously defective because, to give just one example, an interest registered against someone who owned the land in 1926 remains binding even though the epitome of title may now start as late as 1999, meaning that the name to be searched against is not discoverable from the statutory title.¹⁰³ This system is being replaced by registration of the title itself.

3.4.7. Title Insurance or Liability

Why did your system develop title insurance (or why is title insurance not necessary in your system)? In which cases is it used?

If title insurance exists: How much does it cost in a typical real estate sale?

Note: *Title insurance is typical for common law countries. Our hypothesis is that title insurance is unnecessary in all those countries which have an efficient registration system (enabling bona fide acquisitions) and/or sufficient liability of the notary (draftsperson) who searches the seller's title.*

In contrast to the USA, title registration has never been common in England apart from specific limited circumstances such as possessory titles (where a full 15 year documentary title is missing) or where the validity of a specific rights such as an easement is dubious. Reliance is placed on the seller's covenant for title.¹⁰⁴

3.4.8. Leases

How does the buyer make sure that there are no leases on the sold property?

What are the consequences for the buyer if such contracts exist?

How may problems related to leases be dealt with in the drafting of the contract?

Note: *In many countries, the buyer is bound to a lease if the tenant has already occupied the premises prior to the transfer of the property. Existing leases, therefore, are a defect in the seller's title. Apart from that, a tenant might have a statutory pre-emption right under certain conditions.*

Leases are generally by deed unless short (up to 3 years).¹⁰⁵ Hence the existence of a lease should be apparent from the title deeds. Short leases can be oral and (at least in the past) could then once granted attract security of tenure so as to become virtually indefinite interests. Reliance was placed on disclosure by the seller, the title deeds and inspection of the land, but these procedures were not watertight. In particular it could be difficult to discover a lease commencing in the future, which was nevertheless a legal incumbrance on the land.

3.5 Defects and Warranties

3.6.1. Legal rules 3.5.1.

¹⁰³ Compensation is available under LPA 1969.

¹⁰⁴ LPA 1925 s 77.

¹⁰⁵ LPA 1925 s 54.

What are the buyer's legal rights against the seller, intermediaries (estate agents) and/ or notaries,

concerning a defect of title,

concerning defects affecting the quality of the property,

concerning restrictions by zoning law, environmental law and other administrative regulations, which have not been considered in the contract?

Defects in title must be disclosed by the vendor and if material can lead to the rescission of the sale contract. If the contract is completed, reliance can be placed on the covenants for title contained in an unregistered conveyance or registered transfer which require further assurance where possible and otherwise gave rise to damages.¹⁰⁶ If title is registered, there is a registry guarantee provided the proprietor has been honest and diligent. Physical defects are generally covered by the principle caveat emptor which explains why surveys are universal. However, there may be an action for misrepresentation against the seller if her inaccurately completes the Seller's Property Information Form which asks about:

Boundaries,

Disputes,

Notices,

Guarantees,

Services,

Shared facilities,

Arrangements and rights,

Occupiers,

Changes to the property

Planning and building control

Expenses

Mechanics of sale

Indemnity policies.

Misrepresentation may also be used if estate agents particulars are inaccurate and there is also criminal liability for any property misdescriptions. Conveyancers are liable for and must be insured against the risk of negligent conveyancing.

Restriction by planning and environmental law are a matter for the purchaser under the caveat emptor principle again subject to misrepresentation on the Seller's Property Information Form. .

3.4.2. Typical contractual clauses: the scope of *caveat emptor* 3.5.2

What kind of contractual clauses on warranties are typically agreed upon in a real estate sale

¹⁰⁶ LRA 1925 s 77; but limitation is a serious problem.

among private persons?

Is it possible to exclude the remedies of the buyer? Does it make a difference if the seller or the buyer acts in the course of his trade, business or profession?

To what degree do courts exercise control over the fairness of such clauses?

Note: Typically, the legislator has in mind the sale of new goods when regulating the buyer's statutory rights in case of defects. However, in a real estate sale concerning an existing house between two private persons, normally all warranties are excluded. The caveat emptor rule applies. However, in the case of a professional seller, national implementation legislation of Directive 93/13/EEC on unfair contract terms might become applicable, which provides for protection of the buyer.

Use of the Standard Conditions of sale is universal and parties are always professionally advised.

3.4.3. Liability of the Buyer for Debts of the Seller 3.5.3.

Is the buyer liable for arrears of the seller, regarding in particular real estate taxes

other taxes, e.g. related to buildings on the property or the business of the seller conducted on the property

charges for garbage collection, water and gas delivery,

charges for the administration of condominium apartments

How are these problems treated in typical contractual clauses?

A buyer could acquire liability for some defects eg rates on commercial properties. Some need to be registered as land charges or local land charges. Sales under the Standard Conditions of Sale provide for the seller to discharge liabilities and for an apportionment on completion if this has not been done.

3.6 Administrative Permits and Restrictions

Note: In this chapter, we try to explore the influence of administrative law measures on real estate transactions. However, you are not asked to mention all permits that might be required for a sales contract, but only those usually checked in the course of the conclusion of a contract.

In particular, this section covers:

administrative permits required for the validity or for the performance of the contract,

zoning ordinances, building permits and restrictions affecting the real property sold,

pre-emption rights granted by statute to public authorities, which might be exercised when the real property is sold.

3.6.1. Standard Requirements

In a typical conveyance of a residential estate:

Which permits are required?

Does the draftsman (notary) check the building permit, zoning ordinances and/or environmental issues (e.g. in France asbestos contamination)?

Are there any statutory pre-emption rights for public authorities?

No administrative authorisation is required for the acquisition of land.

There are two main systems of controls on building, carried out by the London borough council, district council (not county council) or unitary authority for the area.

Planning control¹⁰⁷ covers the erection and alteration of buildings and changes of use; planning permission is required for almost all exterior changes, though there are categories of permitted development; there is also a system for listing buildings and specialised regimes such as conservation areas and green belts round cities where planning controls are tighter. The other important system of control is building regulations approval¹⁰⁸ which covers the materials used for building and matters such as layout and the sanitation and which will apply to building work even if it is exempt from planning control. It is therefore vital to ensure that approvals are available – it is usual to keep the originals with the title deeds. There are periods of limitation – 4 years for planning breaches consisting of building, 10 years for changes of use and 12 months for breaches of building regulations - so a purchaser will only investigate recent physical changes. Planning permissions may have conditions attached to them and these bind in rem and are discovered by a local search. One important and controversial condition is an agricultural occupancy condition which is often imposed when new houses are built in rural districts and which limits occupancy to those employed full time in agriculture and significantly reduces the market value of the house.

Pre-emption rights are unusual. Recovery of discount is possible after a local authority has sold a dwelling to the sitting tenant at a discount; giving the authority a claw back of part of the discount if the house is sold on quickly.¹⁰⁹ This can be discovered from the local search and is a charge rather than a pre-emption.

3.6.2. Requirements for certain types of real estate sales only

Please state briefly the additional administrative permits and restrictions for other typical cases, e.g. the sale of agricultural or industrial land.

These are numerous and can be found from the Law Society's Conveyancing Handbook.¹¹⁰

3.6.3. Control of administrative permits and restrictions

Is the control of administrative permits and restrictions left to the buyer's own responsibility, or is it carried out by the notary or another lawyer?

¹⁰⁷ Town and Country Planning Act 1990 and many other Acts and statutory instruments.

¹⁰⁸ Building Act 1974; Building Regulations 2000, SI 2000/2531.

¹⁰⁹ Housing Act 1985 s 155.

¹¹⁰ See bibliography.

It is the professional responsibility of a conveyancer to check necessary authorisations.

3.7 Transfer Costs

Please indicate the approximate costs for the sale of a real estate in your country (in general and for a property of (a) 100.000 and (b) 300.000 Euros). Please specify the costs for:

drafting and executing the contract (e.g. the fees of an attorneys or notary),

title insurance (if usual in your country),

registration in the land register.

I take the values at current exchange rates, so (a) €100K = £70K and (b) €300K = £215K. Coincidentally the average house price in the UK is roughly £140K.

3.7.1. Contract and Registration

Price	£70K	£215K
Legal fees	**	***
First registration or Registration of transfer	£60	£220

3.7.2. Transfer Taxes

How high are taxes on the transfer of real property?

On what is the tax based (on the real value, on the purchase price etc.)?

Is the due payment of the taxes a requirement for the registration of the transfer of a property?

Does the notary/lawyer collaborate in the collection of the tax?

I confine my attention here to taxes on the transfer itself. Many other taxes may become payable as a result of a sale of land, notably income tax if land is traded, capital gains tax if building land is sold at a profit, or inheritance tax on a transfer of a house on death. The main tax on land transfer itself is Stamp Duty Land Tax (SDLT), a recent replacement for stamp duty.¹¹¹ Stamp duty was a tax on documents but the new tax is a tax on transactions, and embraces for example documentary transfer, contracts, and oral declarations of trust. The tax applies to any acquisition/surrender etc of a chargeable interest whatever the form: act of parties, order court, statute, operation of law, whether documentary/non-documentary. It is irrelevant whether the transaction is completed in or out of UK and whether the parties are resident or present in the UK or not, but if it affects land it must be within the UK; land outside the UK is not a chargeable asset. SDLT covers most interests in land but not a security interest, and there are exemptions eg for transfers following divorce and for gifts by will. The tax will be charged on substantial completion of a contract and again on documentary completion, but the tax on one is offset against the other so that the

¹¹¹ Finance Act 2003 part 4 (s 42ff); from December 2003.

total consideration is only charged once. The object is to abolish practice of resting on contract – saving stamp duty by not completing transactions. Special rules apply to sub-sales and options and exchanges and the taxation of leases is especially complex.

Amount of tax - rate of tax on chargeable consideration

Rate	Value of transaction (£)	
	Residential	Non residential
0%	Up to 60K	Up to 150K
1%	60-250K	150-250K
3%	250-500K	250-500K
4%	500K and over	500K

Disadvantaged area relief¹¹² is available in some administrative areas of the country¹¹³ with residential property exempt up to £150K and non-residential now wholly exempt. Liability for tax is on purchaser with special rules for eg joint parties and trustees. He or she must deliver a land tax return within 30 days of the chargeable transaction including details of the transaction, a self assessment and payment of the tax, which results in the issue of a SDLT Certificate. This is an essential part of the registration process since the land registry is not allowed to make any entry in register without a SDLT certificate or a self certificate that no return is required (ie that the transaction is exempt). In future payments may be administered through the land registry.

3.7.3. Real Estate Agents

How often is a real estate agent involved in the sale of residential property among private persons?

Note: Please indicate the range (less than 5% - 5-25% - 25-50% - 50-75% - 75-95% - more than 95%)

How much is the agent's fee?

Who usually pays the agent – the seller or the buyer?

The vast majority of the market say 95% involves some professional agency, which may be

¹¹² Finance Act 2003 s 57, sch 6.

¹¹³ www.inlandrevenue.gov.uk or www.neighbourhood.statistics.gov.uk

an estate agent, a financial institution acting as agent or a solicitor's property shop.

Estate agents fees *****¹¹⁴ Fees are charged to the seller out of the sale price.

3.8 Buyer's Mortgage

In order to finance the purchase price, buyers usually have to mortgage the house. Under which conditions and modalities is this possible?

Note: Granting a mortgage to the buyer requires the reconciliation of contradicting interests: The bank wants to have the mortgage registered before it pays out the loan for the purchase price. The seller, however, wants to receive the purchase price before he transfers ownership and (thereby) enables the buyer to set up a mortgage. In addition, other banks may have financed the seller and want their loan repaid before agreeing to delete the old mortgage (or assign it to the new bank, if it is a non-accessory mortgage), so as to enable the buyers' mortgage to occupy the first rank.

Transfer of existing mortgages is very unusual, so a sale involves the discharge of any earlier mortgage and the grant of a new mortgage. The seller's lender usually instructs the seller's lender to act in the discharge of the existing mortgage, the procedure involving giving an undertaking to the buyer to deal with the redemption. It is also usual for lenders to instruct the conveyancer employed by a buyer to act for them, which reduces the overall cost of the transaction; many lenders hold panels of conveyancers who they will instruct in this way. The Council for Mortgage Lenders issues a detailed handbook which sets out the terms on which conveyancers act for lenders,¹¹⁵ for example requiring the conveyancer to ensure that valid legal title has been acquired and a proper mortgage security before the advance cheque is released. There are very many cases in which these terms have been breached when the lenders will take action for breach of trust against the conveyancer.¹¹⁶

¹¹⁴ *****

¹¹⁵ www.cml.org.uk

¹¹⁶ *Target Holdings v. Redferns* [1996] 1 AC 421, HL.

4. Special Problems concerning the Sale of Real Estate (Cases)

4.1 The Conclusion of the Contract

After inspection, the buyer tells the seller that he wants to buy the house. Thereafter, both of them sign a written contract, which states that the seller will sell and the buyer will buy the house under usual conditions. The purchase price is also indicated in the written document. What, if any, legal effect does this document have?

Note: With this question, we want to discuss in further detail the formal requirements of a sales contract and the effects of a preliminary contract.

Reference is made to the earlier exposition of the formalities for the contract for the sale of land.¹¹⁷ In the situation described there would in the normal course of events be a valid contract provided that (1) both signatures were on the same piece of paper (or if on two that the two parts meet the requirements to be parts of a contract – an agreement in advance to treat them as such) (2) the contract indicates the property, parties and price, and (3) it also sets out all other terms agreed between the parties. However, this situation rarely occurs because properties are dealt with through agents, buyers are warned not to sign anything without legal advice, and this advice is repeated when people seek a mortgage. In practice people do not sign a contract in advance of having finance. There is no cooling off period in English law. The contract passes and equitbale interest as already explained.

4.2 Seller's title

4.2.1. Consequences of an invalid Sales Contract

A has sold real property to B. Now, B wants to sell it to C. However, before entering into the contract, C finds out that the sales contract concluded between A and B was invalid,

- a) because it lacked the required form;*
- b) because A did not possess legal capacity;*
- c) because an administrative permit required for the contract has never been applied for.*

May C go ahead with the contract and acquire the property validly?

Note: This question discusses in further detail the consequences of causal and abstract systems.

As between A and B, once A has established his right to rescind the transfer to B, A also has the right to have the register rectified to delete B's title. This was formerly discretionary but is now virtually a right in a technical case like this.¹¹⁸ Before A applies for rectification, there is the possibility that B will sell to C. If C is innocent he can acquire a good title, being based on registration of B and C's protection as a purchaser but this assumes that A is not in occupation in which case his interests would override the register. If C is aware of the invalidity of the transfer his title could be removed because he would have no protection

¹¹⁷ See above point 3.2.1.

¹¹⁸ LRA 2002 s 65, sched 4; *Norwich & Peterborough BS v. Steed* [1993] Ch 116, CA.

against alteration of the register.

4.2.2. The Seller is not the owner

A sells his property to B, who pays the purchase price and has the transfer registered with the land register. Only afterwards, it turns out that A was not the owner, with B having however relied in good faith on A's title. (This may happen e.g. when the seller was believed to have inherited the property from his uncle by a will, but a subsequent will is found in which the uncle leaves his entire assets to a charity. To make it a case, let us suppose further that the seller has become insolvent and cannot repay the money.)

How is B protected?

May he retain the property?

How is the buyer protected if, already during the transaction, it turns out that the seller is not the owner?

Note: This question discusses in further detail the problems of reliance in good faith on the land register.

This depends primarily on whether the true owner is in occupation of the land because if so his equitable right to the land will override the register,¹¹⁹ but if so B would not have bought the land. So I assume that the true owner is not in occupation. In that case B is protected from subsequent alteration of the register if he acquires the land for value on the basis of B's registration and acts in good faith. This is dependent upon registration since only then does he acquire the legal estate though presumably (the point is not decided) he had completed and applied for registration. During the contract stage, there would be a competition between two equities, with the first in time (the true owner's equity) taking priority over the buyer's estate contract.¹²⁰

4.2.3. Execution against the Seller

After the parties have signed the sales contract, but before its registration, a creditor of the seller distrains upon the property in order to enforce a judgement against the latter.

Are there risks for the buyer (e.g. to lose his payment)?

How may the buyer be protected (e.g. in drafting the sales contract)?

The word "distrain" is not used here in its technical legal sense in English law, that is when a landlord distrains for rent in arrears by seizing the tenant's goods on the property or when taxation authorities enforce debts by seizing goods, since there is no procedure for a creditor to seize the debtor's land directly. An unsecured debt can only be enforced against land of the debtor by first obtaining judgment for the debt and then seeking a charging order which will create a property right in the land (a charge) corresponding to the amount of the judgment debt.¹²¹ The application for the charging order is a pending action and the order when made is a writ or order affecting land, both of which can be protected against future buyers of the land by registration. For example if title to the land is registered a unilateral notice should be placed on the charges register of the title. The buyer will be protected if he effects a land registry search before the charging order reaches the register – provided he goes

¹¹⁹ LRA 2002 sch 1 para 2, sch 3 para 2.

¹²⁰ LRA 2002 s 28.

¹²¹ Charging Orders Act 1979.

on to complete and register within the priority period of the search. As between a contracting buyer or unregistered transfer and a creditor, the rule will be that the first in time prevails,¹²² since the order of registrations is not relevant under current English law. The time of creation of the interests is the date of the contract or transfer as against the time of application for the charging order.

4.3 Payment

4.2.1. Delay in payment 4.3.1.

The buyer pays late. What are the seller's remedies?

May the seller rescind the contract?

Does the buyer have to pay a (statutory) penalty or is he liable for damages?

Time is not usually of the essence of a contract so a delay in completion will not immediately give rise to the right to rescind, a rule in some ways inconvenient since failure to complete a contract in the middle of a chain will disrupt a whole chain of transactions. The Standard Contracts of Sale usually apply and if so they provide for service of a completion notice of 10 working days duration after which the contract can be rescinded and the deposit forfeited.¹²³ Seller's do not pay a deposit so the sanction on a seller may be less in practice, but failure to complete is a breach of contract at common law immediately and damages can be claimed for the breach.

4.4 Defects and Warranties

4.4.1. Misrepresentation

Half a year after the buyer has moved in, a water pipe breaks and floods parts of the house. The water pipe was put in when the house was built some decades ago.

In spring, the basement is flooded. Neighbours tell the buyer that the seller complained to them that the flooding happened every other year in spring.

An extension of the house has been built without the necessary permit of the building authority. Now, the authority asks the buyer to tear down the extension. The seller claims that he did not know that the permit was missing, since the extension had been built years ago by the previous owner.

For which of these defects is the owner liable if the contract contains a clause which excludes the seller's liability, i.e. by stating that the buyer accepts the property in the state in which it is at the date of the conclusion of the contract? What are the buyer's remedies?

The physical state of the property is a matter for the buyer, and in the situations described may well consider action against his surveyor for negligence. He should also consider whether the vendor has made an inaccurate answer to the Sellers Property Information

¹²² LRA 2002 s 28.

¹²³ Standard Conditions of Sale (4th ed) conditions 6.8, 7.6. ***

Form. The applied to the pipe and basement flooding.

Building registrations; the limitation period for breaches of control is 4 years.¹²⁴

4.4.2. Destruction of the house

After the parties have signed the sales contract, the house burns down. What are the consequences for the contract?

May the buyer rescind the contract or does he have to pay the purchase price?

May the seller rescind the contract? Is he liable for damages? Is there a voluntary or mandatory insurance for these cases?

Risk passes under the contract and so the buyer is liable to pay the purchase price, so it is not in the interests of the seller to rescind in these cases.

¹²⁴ Building act 1984 s 36.

5. Sale of a house or apartment by the building company **(vente d'immeuble à construire/Bauträgervertrag)**

5.1 Statutory Basis

5.1.1. National Law

Do any special rules (e.g. on consumer protection) apply if the seller also constructs the house which he is selling? When do these rules apply?

Newly constructed properties are governed by the same laws as ordinary conveyancing. The main practical difference is the intervention of a company which provides a guarantee of building quality, the best known being the National House Building Council which provides a BuildMark guarantee for 10 years.

5.1.2. Influences of EU law

What, if any, are the influences of existing EU law, in particular the consumer protection directives, on the national law of the vente d'immeuble à construire?

***Note:** In case C-237/02, *Freiburger Kommunalbauten*,¹²⁵ the European Court of Justice (ECJ) refused to scrutinize the compatibility of a clause in a building contract (stipulating that the buyer had to pay the purchase price even before the building works started, the buyer's rights being however protected to a large extent by a bank guarantee covering violations of the contract as well as the insolvency of the builder) with Art. 3 of the Unfair Terms Directive. So the control of unfair terms in this field seems to remain largely national.*

The Unfair Contract Terms Act 1977 does not apply, but regulations based on Art. 3 of the Unfair Terms Directive might in theory do so.

5.2 Procedure in general

5.2.1. Single houses

Please describe the procedure for a standard contract: A construction company (the „builder“) buys a large piece of land and splits it up into several small parcels. On these small parcels, it plans to build town houses. Now, the builder sells the small parcels with the houses (which have not yet been built) to several buyers. Let us assume that all the buyers are consumers, and that the builder uses his own standard contract terms.

- *Is the contract governed by any special regulation?*
- *When does the buyer have to pay the purchase price (e.g. after termination of the building or according to the state of the building)?*
- *Are there statutory warranties for material defects?*

¹²⁵ Available online at <http://www.curia.eu>.

Builders invariably adopt their own conditions which need approval by the Land Registry in relation to lotting and mapping. Reference is made to a LR approved plan and there is a procedure for searching by plot number. The buyer needs to check

- The specification of works,
- Planning permissions,
- Building regulations certification,
- The Buildmark (or equivalent) guarantee,
- That the standard terms comply with lenders' requirements.

It is most common to pay a deposit (perhaps more than the usual 10%) and then the balance on completion, but it is perfectly possible to contract for stage payments. If so, a mortgage needs to be negotiated on that basis and the buyer should insist on an equitable charge on the property to secure the payments. As already explained building quality is guaranteed by the BuildMark scheme and its equivalents.

5.2.2. Condominiums

Let us assume that the builder does not sell a single house, but an apartment in a condominium which he is planning to build. Are there any differences as compared with the previous case?

The developed will now need to consider whether to set up a leasehold scheme or a commonhold. In addition to all other factors it is necessary to check details of the corporate constitution eg estimates of service charges, and it is important to check that the scheme meets lenders' requirements. Conveyancing is complicated in the case of flat schemes by the need to keep the register of members of the management company in line with the owners of the flats. In a commonhold share certificate will not be required. Builders retain control of the management company during the development process and hand it over when the last flat is sold.

5.2.3. Renovation

Another variation: Let us assume that the builder has bought an old house which he wants to renovate and split up into separate apartments. He sells the apartments before completing the renovation. What, if any, are the differences as compared with the first and second case?

This can be done by leasehold flat scheme or commonhold and a BuildMark type guarantee should be made available.

5.3 Conclusion of the Contract

*Is there any **formal requirement** for the conclusion of the contract?*

Is there any preliminary contract?

*Is there any mandatory **waiting period** before the contract can be concluded?*

*Has the buyer a **right to withdraw from the contract** (in particular, if the buyer acts as a consumer)?*

Formalities are as for any other sale of land. As usual there is a contract, which governs the

building phase and a conveyance usually completed when the work is finished. There is no cooling off period. Withdrawal rights may be stipulated for in case there are significant delays in the work.

5.4 Payment

5.4.1. Payment date and 5.4.2. Securities

Payment date

When is the payment due under usual contractual arrangements?

Is the payment made directly by the buyer to the builder or is deposited on an escrow account?

Is it usual or possible to make the contract directly enforceable without the intervention of a court? (E.g. may the buyer submit to immediate enforceability in the sales contract?)

Securities

Are there any securities for the buyer, such as guarantees or insurances?

Note: In **France**, if the buyer pays before the building is finished, the builder has to provide a surety (*garantie d'achèvement* or *garantie de remboursement*). In **Germany**, a guarantee (normally from a bank) is required only if the parties agree upon payment to be made before the buyer's priority notice is registered in the *Grundbuch* or if the buyer has to pay more or earlier than under the usual instalment plan fixed by statute (which foresees certain instalments payable according to the state of progress of the construction, § 7 MaBV).

See above 5.2.1.

5.4.2. Acquisition of Ownership

How is it ensured that the buyer only has to pay if it is certain that he will become the new owner?

How is it ensured that the buyer is granted ownership free of existing liens (in particular free of a mortgage which has been granted by a bank to the construction company to finance the building)?

A sale of a new house or flat is completed as for any other conveyancing transaction and the lender will only release funds when legal title is acquired. A search is made before completion which should reveal the mortgage used to secure the financing of the construction project; buyers must obtain a discharge (if legal) or informal release (if equitable).

5.4.3. Building

Under usual contractual arrangements, does the buyer have to pay before or only after the building is finished, or does he have to pay instalments according to the state of progress of the construction?

See above 5.2.1.

5.4.5. Financing of the Buyer

How can the buyer finance his purchase? (e.g. Can he set up a mortgage on his future property? From what moment on? How is his mortgage related to a prior mortgage granted to the construction company? Do the banks have special duties of care when granting loans secured by a mortgage to the construction companies (because a future buyer may thus be prevented from taking up a loan on the parcel bought from the company?)

Stage payments should be secured by an equitable charge ranking after the financing arrangements of the builder.

5.5 Builder's Duties - Protection of Buyer

5.5.1. Description of the Building

How does the contract usually describe the building if it has not yet been completed (e.g. floor plan and written specifications)? Is this description sufficient in practice (in ordinary cases)?

Estates are registered and the plot transferred is that shown in the approved estate layout plan. However, drift is common.

5.5.2. Late Termination of the Building

Does the contract usually provide for an exact delay for the termination of the building?

Which claims does the buyer have in the event that the delay is not respected?

It is unusual for builders to commit themselves to a firm completion date. The buyer should seek to negotiate a long stop date for completion after which they could rescind the contract.

5.5.3. Material Defects

Which claims does the buyer have if there are material defects of the building? What is the limitation period for these claims?

Does the buyer have any claims against third parties other than the builder (e.g. against the companies commissioned by the builder or against a guarantor)?

There is generally a short period during which the builder must remedy defects and a longer 10 year guarantee period.

5.6 Builder's Insolvency

5.6.1. Unfinished Building

Let us suppose that the buyer buys an apartment on the third floor of a building yet to be built and that the builder goes insolvent after completing the basement. Is there any protection for the buyer?

The contract should give a charge for any payments made and the contract will give an equitable interest valid against the creditors in the insolvency.

5.6.2. Repayment

Let us suppose that the buyer rescinds the contract because the builder is late in finishing the

building and that there are many material defects in the already completed parts of the building. However, after the buyer has terminated the contract, the builder goes insolvent. May the buyer expect repayment if he has already paid some instalments?

Again if the contract payments are protected by a charge the buyer should have adequate security against the risk of insolvency.

6. Private International Law

6.1 Contract Law

The answers below are derived mainly from the leading text Dicey and Morris.¹²⁶

6.1.1. Conflict of Law Rule

Does your legal system allow the choice of the applicable law also for contracts on real property?

In the absence of a choice of the applicable law by the parties: Is the lex rei sitae applicable also to contractual obligations concerning real property (e.g. to the obligation to transfer real property or to set up a mortgage on it)?

Note: Art. 3 paragr. 1 and 4 paragr. 3 of the Rome Convention and the draft of the Rome I-regulation stipulate these rules.

If the lex rei sitae governs the real property rights, can the parties choose a different lex contractus which is however related to other parts of the transaction (e.g. for a loan contract if the mortgage securing it follows the lex rei sitae, or a construction contract for a property to be sold – “dépeçage”)

English law basically observes the lex situs. As Dicey’s rule 115 states

All rights over or in relation to an immoveable are governed by the law of the country where the immovable is situate (lex situs).

The exception they state is that the rule does not apply to the formal and material validity, interpretation and effect of a contract and capacity to contract with regard to an immovable.

Law to apply to a *contract* affecting an immovable can be chosen, but to the extent that it is not Dicey’s rule 188 is that such a contract is in general governed by the law of the country with which it is most closely connected.¹²⁷ It is presumed to be most closely connected with the country where the land is sited, but this can be overcome if all the circumstances suggest closest connection with some other country.

Dicey and Morris observe¹²⁸ the problems in maintaining the distinction between transfer and contract because of the English rule that a specifically performable contract creates an immediate equitable right in the land.¹²⁹

The common law did not necessarily take regard only of the lex situs in terms of jurisdictional capability; for example in *Penn v. Baltimore*¹³⁰ the English courts settled the boundaries between two American states because the agreement relating to it was made in England.

¹²⁶ Dicey & Morris *The Conflict of Laws* (13th ed by Mr Justice Lawrence Collins, 2000, Sweet & Maxwell); ch 23 discusses immovables.

¹²⁷ Rome Convention article 4(1); Contracts (Applicable Law) Act 1990 sched 1.

¹²⁸ At para [33-215].

¹²⁹ See above point 3.2.3.

¹³⁰ (1750) 1 Ves Sen 444, 27 ER 1132.

English Chancery also asserted jurisdiction to enforce a mortgage made in England of the island of Sark, part of the Channel islands and outside the jurisdiction of the English courts. It was unclear whether a contract (such as a loan secured by a mortgage) could be severed into real parts governed by the *lex situs* and personal parts governed by English law, a solution that appears both logical and unattractive in its results.

6.1.2. Formal Requirements

If, in your legal system, any formal requirements for the obligation to transfer real property exist: Is the obligation valid if the form prescribed by domestic law has not been respected, but only that prescribed by the law of the place where the contract has been celebrated? Is this so even when the law of the place where the contract has been celebrated allows the contract to be done in writing without any other formal requirements?

Note: See on this question Art. 9 of the Rome Convention.

Dicey and Morris take the view¹³¹ that the *contract* formality for land in England¹³² applies to any contract wherever concluded. This is because the contract “shall only be made in writing” and only by incorporation” of all terms expressly agreed between the parties. So far as the formality for a *transfer* is concerned English law follows the *lex situs* and applies whatever formality the *lex situs* would apply.¹³³

6.2 Real Property Law

6.2.1. Conflict of Law Rule

*Does your legal system apply the *lex rei sitae* rule to immovable property?*

Please quote the applicable article verbatim if it is not available on the Internet and translate it into English!

*Note: We assume that in all old and new EU Member States, the *lex rei sitae* applies to immovable property. It is also the rule proposed by the draft of the Rome II-regulation.*

English law applies this rule, but Dicey’s rule 115¹³⁴ but contracts again provide an exception.¹³⁵ Capacity and form is open to academic argument but it is unlikely the English courts would be prepared to apply any law other than English if the land was in England.¹³⁶

6.2.2. Formal Requirements

Is it possible to register the transfer of real property in your land register if the act of transfer has been celebrated in another State? If not: What are the reasons given for the exclusive jurisdiction of the national system?

¹³¹ At para [33-231].

¹³² Law of Property (Miscellaneous Provisions) Act 1989 s 2; see above para 3.2.1.

¹³³ Dicey & Morris rule 115; *Adams v. Clutterbuck* (1883) 10 QBD 403.

¹³⁴ See above point 6.1.1.

¹³⁵ See also *Re Duke of Wellington* [1948] Ch 118, CA the problem of the estates in Spain granted to Wellington after the Peninsular War.

¹³⁶ Dicey & Morris at para [23-062].

Note: In some states, only acts of transfers celebrated by a national notary are considered valid (e.g. Germany, § 925 BGB, the Netherlands, BW 3:89). In other countries, only acts made or deposited by local notaries may be registered (e.g. Italy).

There is absolutely no requirement that documents should be executed within the jurisdiction. English law lacks the concept of notarisation but instead relies on signed writing for contracts and a deed for the conveyance/transfer. A deed must be described as a deed or executed as a deed and also requires signature by the executing party and attestation by a witness,¹³⁷ the 1989 reforms rendering redundant the old process of impressing the seal of the executing party into molten wax. Where land is registered it is also vital to use the correct land registry form. There is nothing in any of these formalities to require the parties to be within England nor to have any legal advice, though it is unlikely that the parties would stumble upon the correct wording by accident.

6.3 Restrictions for Foreigners to acquire Land

6.3.1. Restrictions limited to Foreigners

Are there any restrictions for foreigners to acquire real property?

If so: Do these restrictions also apply to nationals of other EU Member States? Have these restrictions been challenged under EU law? If relevant: When will the restrictions for EU-nationals end?

Note: Some of the new Member States still have restrictions for foreigners to acquire real property, which also apply to nationals of other EU Member States. These restrictions will be phased out during the next years. In other Member States such as Austria, similar restrictions have already expired.

English law displays the progression of most mature systems from the reservation of land ownership to nationals towards the free market in which nationals and non-nationals compete on equal terms. Medieval tenure involved fealty, the obligation of the tenant to pledge allegiance to the lord King, which restricted tenure to subjects. A foreigner was considered an “alien” and any land acquired by an alien was forfeit to the Crown. Restrictions were removed in 1870.¹³⁸ Private restrictions on the transfer of land are invalid if attached to the freehold and in leaseholds they would be likely to fail as contrary to domestic discrimination legislation or EU law.

6.3.2. Other Restrictions

Are any other permits required which play a role particularly for foreigners acquiring real property (or about which foreigners complain more than nationals)?

Note: The European Court of Justice has recently decided some cases concerning restrictions on the sale of farm land in Austria.¹³⁹

¹³⁷ Law of Property (Miscellaneous Provisions) Act 1989 s 1.

¹³⁸ Naturalisation Act 1870, re-enacted as the British Nationality and Status of Aliens Act 1914.

¹³⁹ ECJ Case C-302/97 (Konle – GrdStVG Tirol); 15.5.2003 – Case C-300/01 (Salzmann); Case C-515/99 (Reisch – GrdStVG Salzburg); 30.9.2003 - Case C-224/01 (Köbler – GrdStVG Vorarlberg); Case C-452/01 (Ospelt GrdStVG Vorarlberg).

In Greece, there have been complaints that the public administration does not treat EU nationals equal to Greek citizens when granting permits to acquire real property in border areas.¹⁴⁰

Until relatively recently exchange controls imposed practical limits on the ability to buy land, but these have been removed both within the EU and more generally. Large parts of central London are foreign owned. Current concerns are with second homes in rural areas, where various schemes are being considered to impose controls eg the requirement that people buying properties should be Welsh speakers, but these restrictions are targeted at the English and not at continental Europe! To date it does not appear that any schemes have actually been adopted.

6.4 Practical Case: Transfer of Real Estate among Foreigners

Let us suppose that a couple of nationals of another EU Member State own a vacation home in your country. They consider to transfer the ownership either to their children (as a gift) or to another couple, who are nationals of the same Member State as them. If possible, the parties want to conclude all necessary contracts in their state of origin. They ask a local lawyer/notary there to prepare the transaction. This lawyer/notary asks you about the easiest way for the parties. What way do you recommend – or what is considered to be the best practice?

***Note:** Even if it may be possible to conclude the contract abroad, it might be better to advise the parties to conclude it with the help of a local notary or lawyer. Alternatively, it might be advisable that the parties conclude the contract abroad, but have the registration done by a local notary or lawyer (and that the parties grant power of attorney to the buyer to conclude the necessary steps in the country where the real estate is situated).*

In contradistinction to civilian systems, this example presents absolutely no problems in English law. Our guiding principle is freedom of testation. Relatives are only entitled to the estate left at the time of death and to the extent that the testator has not made a will leaving his land elsewhere. There is no concept of a reserved share. It is necessary to qualify this statement slightly by saying that statute¹⁴¹ allows a claim by surviving dependants who, if they are left unprovided for, can claw back part of the estate of the deceased but only to the extent of their need, claims that are relatively uncommon. Assuming that the remaining estate has sufficient assets to support dependents, the owners of a second home could execute a gift or indeed could wait until the last of them dies and make a gift by will. The major considerations would be the taxation consequences of this action since inheritance tax is payable on gifts on death or within the few years preceding death (except to the spouse) and capital gains tax would be payable on a gift of a house that was not the principal residence. Any gift would need to comply with formalities and be registered.

¹⁴⁰ PAPANICOLAOU/LINTZ, *Immobilien in Griechenland*, MittBayNot 2003, 464, 471.

¹⁴¹ Inheritance (Provision for Family and Dependents) Act 1975 as amended.

7. Encumbrances/Mortgages (and Land Charges)

7.1 Types of mortgages/land charges

Terminology:

- *In this study, the usual English term “mortgage” is used in a double meaning. Usually, it is understood in a wide sense and refers to all kinds of securities in real estate. However, when it comes to the distinction between accessory and non-accessory securities, the term “mortgage” is used for the accessory type where the expression “land charge” is used for non-accessory securities.*
- *In many examples, the mortgagee has been called „bank“, because she normally is a bank. If special regulation on consumer credits is applicable, please indicate if the answer is different for a consumer or a professional creditor.*
- *The debtor is also the land owner unless explicitly stated otherwise.*
- *If it matters for your answer, you may assume that the secured claim is a bank loan. However, if you make this assumption, please explain if other claims may be treated differently (Otherwise, we would suppose that your answers apply to all types of money claims secured).*

7.1.1. Types of mortgages

Which types of mortgages (or land charges) exist in your legal system?

Which is the most common type of mortgage?

Please indicate also the respective statutory bases!

Terminology calls for a little exposition beyond the preamble to the questionnaire. The usual English term for a security to secure a loan on land is a mortgage, the parties being mortgagor (borrower) and mortgagee (lender). However almost all legal mortgages are created by means of a charge by deed by way of legal mortgage, a charge being a means of securing a loan on land (parties chargor and chargee) and the charge by deed by way of legal mortgage being a special form following a statutory precedent which is now compulsory for registered land.¹⁴² The technical difference is that a mortgage transfers an estate to the lender whereas a charge does not. There are various other ways in which money can become charged on land for example as an aspect of another transaction, when the charge is imposed by law (a lien) or where statute imposes a charge – for example a charge for unpaid inheritance tax on the property inherited. The term “land charge” has a very specific meaning – it is a right which requires registration in the Land Charges register while the title to the land remains unregistered.¹⁴³ This includes some real charges eg a charge imposed by statute such as a charge for the cost of making up a road carried out by a local authority and equitable mortgages, but it also includes some burdens that civilian law would interpret as servitudes such as equitable easements and restrictive covenant and also the spouse’s right to occupy the matrimonial home (class F). These same rights are protected on the charges register after title has been registered.

¹⁴² LPA 1925 s 87; LRA 2002 s 23.

¹⁴³ Land Charges Act 1972.

For every legal security there is an equitable counterpart. Legal mortgages are usual but there are savings in land registry fees for a less formal security so that equitable security is used for small scale or very short term lending or where the lender is very fully secured so that the risk is small and the need for enforcement remote. It used to be possible to mortgage land by depositing the title deeds or land certificate with the lender but this is no longer possible; equitable securities must comply with contract formalities.

In general therefore the following answers focus on a charge by deed by way of legal mortgage over a registered title and properly registered on the charges register of the title, the best form of security available.

7.1.2. Legal nature

What is the legal nature of mortgages (or land charges)? (Ius in rem or in personam; title or lien etc.)

***Note:** Under old common law-theories, liens are considered equal to ownership under the conditio subsequens; however, these theories do not seem to have practical effects any longer.*

A legal charge creates rights in rem as well as personal obligations.

7.2 Setting up a mortgage

The bank grants a loan to the debtor. What steps does the bank have to follow in order to establish a security right over real property owned by the debtor?

7.2.1. Example

It is not usual to enter into a contract before a mortgage, but rather the lender issues an offer of advance which sets out unilaterally the terms on which they are prepared to make an advance. The lender supplies a standard form of mortgage (many of them approved by the land registry) which the buyer's solicitor prepares, but acting in this for the lender. This is executed by the borrowers; it is not necessary for the lender to execute a mortgage as it is a form of deed poll (a unilateral document). It is completed when the house is acquired by the buyer's conveyancer who uses the funds and dates the mortgage deed.

If title is registered the mortgage has to be registered, a task generally handled by the buyer's conveyancer acting for the lender at the same time as registration of the transfer to the buyer. If the title is unregistered the sale or indeed a mortgage alone will make first registration of the title compulsory. It is no longer the case that the lender will receive a charge certificate containing a copy of the register but instead it will receive a certificate of completion of the registration.

7.2.2. Legal requirements for the loan contract affecting the mortgage

Which legal requirements does the bank have to respect when granting a mortgage loan? In particular: Must the bank give some minimum information to the customer before a valid loan contract can be signed? Are there minimum periods between the release of the information, the signature of the contract and the setting up of the mortgage? Can the mortgage be erased within certain periods if the customer wants to cancel it?

The Consumer Credit Act 1974 applies to all lending, though mortgages of land by mainstream lenders are exempt from full regulation if used for the purchase of land. “Regulated agreements” arise if the loan is used eg for double glazing or for equity release, and controls then apply to information, the form of documents, withdrawal rights, enforcement etc.

7.2.3 Formal requirements

Is there any formal requirement for the setting up of a mortgage? Sample Answer for Germany:

A legal mortgage must be by deed,¹⁴⁴ which must be signed and witnessed. Lenders always insist on legal securities which allow immediate enforcement out of court as explained below.

7.2.4 Registration

Is the registration of the security in the land register (or any other register) necessary? If so, which indications does the registration need to contain?

Legal charges must be registered on the charges register of the registered title which is charged, and if title is unregistered at the time of the mortgage, a first mortgage will call for compulsory first registration of the title. The register refers to the mortgage and a copy is lodged at the registry.

7.2.5. Time and Costs

- *How long does the registration of a mortgage normally take?*
- *What can be done to speed up the process? (e.g. In Germany, the notary can give an opinion to the effect that the registration of the mortgage in the foreseen ranking position is secured. This opinion is usually accepted by banks. In other countries, lawyers' opinions about the validity of the mortgage are used.)*
- *Is it possible to use priority notices or similar devices? How effective are they to secure the mortgage and its rank? (see 2.6)*
- *Is it possible to speed up the process with the use of the internet?*
- *What are the costs for establishing a typical security for (a) 100.000.- and (b) 300.000.- Euros?*
- *lawyer/notary fees,*
- *registration fee (Grundbuchamt),*
- *are these fees fixed by law?*
- *taxes (who collects the taxes?)*

Registration of a mortgage at the time of a transfer will only take a few days from the submission of the application, though first registrations take longer. This is of no import because as explained above banks are happy to act on the basis of a mortgage deed provided the conveyancer undertakes to register it afterwards. Before completion an official search

¹⁴⁴ LPA 1925 s 52.

of the register is obtained and this confers priority for 28 days. If a mortgage occurs at the time of a transfer there are few costs because the lawyer acts for buyer and lender, the only additional cost being the preparation of the mortgage deed and complying with lender's instructions. Registration fees for transfers cover any associated mortgages, but if it is a stand alone mortgage the fees are

€100K	€300K
£40	£70

Stamp duty land tax does not apply to securities.

7.3 Causality and Accessoriness

7.3.1. Invalid loan contract

Let us assume that the loan contract is invalid. How does this affect the mortgage - assuming that all other requirements for creating a mortgage have been complied with?

Note: In Germany, the answer depends on whether it is a Hypothek or a Grundschuld:

- *The Hypothek comes into existence, but it belongs to the land owner, not to the mortgagee (even though it is registered for the mortgagee) (§ 1163 BGB).*
- *A Grundschuld comes into existence irrespective of whether or not the underlying claim exists. However, if there is no claim to be secured, the land owner may claim that the mortgagee transfers the mortgage to him or that he consents to erasing the mortgage from the Grundbuch.*

There is not usually any prior contract, though there is a mortgage offer which is non contractual. This question is interpreted in relation to invalidity of the mortgage deed itself. Grounds for invalidity of the debt or obligation secured by a mortgage would enable the mortgage itself to be avoided. A very large stream of case law recently has considered the situation in which a spouse (B) guarantees the business debts of the other spouse (A) after misrepresentation or pressure amounting to undue influence, A executing a mortgage over the jointly owned matrimonial home to secure the debt. The House of Lords held in *Barclays Bank v. O'Brien*¹⁴⁵ that the bank's mortgage was voidable, even though the misrepresentation was made by A to B, since the bank had notice of the risk of equitable misconduct occurring. English law differentiates transactions which are void (eg after a forgery) from those that are voidable (eg misrepresentation, undue influence), the latter being more common, and in that case avoidance must occur before third party acquisition of an interest in the property and whilst it remains possible to restore the parties to their original positions.

7.3.2. Right of withdrawal

Let us assume that the debtor-consumer has a statutory right to withdraw from the loan contract. The debtor exercises this right only after the mortgage on the real estate has already been established. (This might be possible if the bank did not inform the debtor properly about his right to withdraw and, as a consequence, the deadline for the withdrawal has not yet ex-

¹⁴⁵ [1994] 1 AC 180, HL.

pired.)

- Can the bank still use the mortgage to secure her right for repayment of the loan?

Note: In case C-481/99, Heininger (ECR 2001, I-234), the ECJ decided that loan contracts were covered by the doorstep sale directive when concluded under „doorstep conditions“ - with the effect that the debtor may invoke the withdrawal right foreseen in that Directive against the bank. However, according to the ECJ, the consequences of a withdrawal from the loan agreement for the purchase of real property and the setting up of a mortgage were still to be determined by national law.¹⁴⁶ This finding has however been challenged in a follow up-reference by the Landgericht Bochum under the principle of effective consumer protection.¹⁴⁷ It is likely that the ECJ will revise the Heininger judgement accordingly. As a consequence, one may expect that the ECJ will establish European law minimum conditions as regards the legal consequences of the withdrawal from a consumer contract, which include the effects on security rights such as mortgages.

The Consumer Credit Act 1974¹⁴⁸ allows withdrawal from some mortgages, though it does not apply to most building society mortgages. It will apply to secondary lending eg for double glazing or equity release. Where the debtor can withdraw, any security is cancelled:

7.3.3. Changing the secured debt

The debtor has repaid the loan for which the mortgage was granted. Now, he applies for another loan. Can the old mortgage be used to secure also the new loan (and if so, under which conditions)? Or is it necessary to set up a new mortgage?

Let us assume that 30% of the mortgage loan have been repaid. Now, the mortgagee wants to take up another loan for his business, amounting to 25% of the old loan, but with a much higher annual amortisation and a different interest rate. Can the “free” part of the old mortgage be used to secure this loan? What has to be done for this?

Let us assume that the debtor has agreed on a loan secured by a mortgage. However, the house to be financed is not yet build, but its completion has been agreed upon as a condition for the disbursal of the loan. Therefore, the debtors wants to take up an interim loan from another bank. Can the mortgage be used to secure this interim loan until it is replaced by the final mortgage? How can this happen?

The bank and the mortgagor have agreed on a mortgage loan for a five year term at a fixed interest rate. Now, this period is over, and both sides want to agree on a new loan for another five years, but at a different interest rate. Can the old mortgage secure the new loan?

What if in the last example the mortgagee wants the new loan from another bank? Could the old mortgage be used for the new loan? If yes, what steps need to be taken? Is the consent of the old bank necessary?

What if the new loan is not designed to finance a property but a car or the mortgagee’s company and is subject to different conditions, e.g. a higher interest rate and a higher amortisation?

The mortgagee runs a business and is in permanent need for credit. He agrees with his bank on a maximum credit line, which is used for different loans. Can this credit line be secured by a mortgage? Are there special forms of mortgages for it?

¹⁴⁶ Heininger Case, op. cit., No. 35.

¹⁴⁷ See *Neue Juristische Wochenschrift*, 2003, 2613.

¹⁴⁸ CCA 1974 ss 66-73.

There are two types of mortgage, fixed and overdraft or all monies. In a fixed loan for say £50K, if £20K is repaid, the mortgage now secures £30K, and not future lending. A new loan can be arranged or the terms of the existing mortgage can be varied, but it will only carry priority from the date of the variation and not from the original date. Alternatively the mortgage may secure a running account— for example it secures a specific overdraft account or it secures all monies owed by a debtor to a bank – or it may provide for further advances to be made. The lender can in such cases increase the lending with the original priority. Priority is subject to complex tacking rules, but in essence if the land is registered,¹⁴⁹ the register should state that tacking is possible under the first charge and any subsequent mortgage will then take subject to the priority of the first; depending on the initial terms it may be possible to cap the total of the first loan by giving notice of the second loan.

In the second example it would not be possible for two different lenders to use the same mortgage; so different securities would be executed perhaps with a variation or waiver of terms.

In the third example English practice appears (judging from the terms of the example) to be different from continental practice. A mortgage usually has two different structures, the general rules of equity and the contractual terms agreed between the parties – usually the form of standard lending conditions incorporated into the mortgage offer. The formal structure provides for indefinite or open ended mortgage – a mortgage on freehold land is not time limited but continues until the debt secured by it is discharged. It is common practice for a mortgage to be taken out over 20 or 25 years, but if the loan is not fully discharged at the end of that time it is still a valid mortgage. Fixed rate mortgages are less common in England than elsewhere partly because they are more expensive, and this leads to considerable instability in the housing market, since increases in interest rates impact on many lenders immediately. Where loans are fixed it is often over a relatively short period, say 2 or 5 years, and when the fix ends the mortgage reverts to a normal repayment mortgage.

Fourth example: It is unusual for mortgages to be transferred and instead a new loan will be negotiated.

Fifth example: There is no basic distinction between acquisition of land and other uses for a loan, though in the latter case the borrower may be protected by the Consumer Credit Act 1974.

Business with permanent credit need. In this case one would employ an all monies charge as explained above. Another very important form of security to mention is a floating charge which floats over all the assets of a business – buildings, machines and stock - but enables the business to deal with individual items until the loan crystallises (eg non payment of instalment when due or appointment of a receiver) in which case it becomes a fixed charge (a fixed security) on the assets owned at the moment of crystallisation.

7.3.4 Independent/abstract promise of payment

In your legal system, is there anything like an independent/abstract promise of payment (garantie personnelle autonome/cédule abstraite)? If so, can it be secured by a mortgage? 7.3.6. Mortgage for the land owner himself

Can a mortgage be set up also for the land owner (Eigentümergrundschuld)? without a loan contract? Could he set up the mortgage “on stock” when negotiating with several banks?

¹⁴⁹ LRA 2002 s 49.

How is the pre-existing mortgage assigned to a later loan?

May the owner reserve priority to himself for a future mortgage?

A guarantee is recognised and commonly secured by a mortgage, though validity is subject to compliance with the rules laid out in O'Brien and Etridge (No 2).¹⁵⁰ It is very unusual for mortgages to be assigned; instead the existing debt is redeemed and a new loan created.

7.4 Enforcement and other rights of the bank

The debtor did not pay the interest or did not repay the loan. Therefore, the bank wants to enforce the mortgage/land charge.

- *Please describe the main steps of the enforcement procedure!*
- *Is a court decision necessary to render the mortgage enforceable?*
- *How long does the enforcement procedure regularly take before the bank receives the proceeds of the mortgage? Can the debtor slow down the procedure, especially if the mortgage is on his residential home? Can the bank act in receivership in the meantime (Zwangsverwaltung)?*
- *Can the bank sell the real estate without foreclosure, i.e. without a court decision and a compulsory auction? Can the owner grant the bank the right to purchase or the power to sell the property by means of a normal real estate sales contract (in the event that the loan is not repaid)?*
- *Are there any instruments for public administration or courts to stop or suspend foreclosure for social or economic reasons?*
- *What happens in the event that insolvency procedures over the debtor's estate are initiated? Will the foreclosure procedure be stopped? How are the mortgagee's rights protected in an insolvency procedure?*

English law provides a wide range of remedies and the first decision is which remedy to adopt. Conceptually important is foreclosure, in which the bank calls in the loan, takes proceedings and the effect is to remove the borrower's interest from the land, so that the bank becomes owner. (The word foreclosure is not used in the questionnaire in its technical sense). This is very little used in practice because the borrower can force a sale instead. At the other end of the scale is the decision to receive income directly. This can be done by taking possession, but usually the bank appoint a receiver, whose function is to collect rent and pay it over to the lender. However, the most usual remedy is possession and sale.

The first step then is to take possession. The right to do this is often regulated by the contract eg the lender agrees only to take possession if interest is in arrears, but, in the absence of any contractual provision, possession is a right, independent of fault.

There are important controls where the property repossessed is a dwelling. (This can apply even to an entire factory if it contains a caretakers cottage). A court order is not needed to repossess commercial property though it is usual and safe practice to take proceedings. If the dwelling is occupied court proceedings are required for possession and there are significant protections. The Administration of Justice Acts 1970/1973 (and corresponding provisions of the Consumer Credit Act 1974) give the court power to stay or suspend possession proceedings. Technically and curiously these apply only if the borrower is in

¹⁵⁰ See above point 7.3.1.

default but give no protection to a truly conscientious borrower. The court will balance the amount of the default against the means of the borrower and will generally stay possession proceedings if the borrower will be able to keep up with current instalments and clear the arrears within a reasonable time – initially taken to mean six months, but extended by court decision to two years and beyond.

Once the lender is in possession of the property it can be sold by exercise of the statutory power of sale out of court and without further intervention from the court. The power of sale arises in a (legal) mortgage by deed when the contractual redemption date has passed – this is a purely notional date conventionally six months after the date of the mortgage, inserted as the date on which remedies arise and not when repayment is expected. The power usually becomes exercisable when an instalment of interest is two months in arrears; other grounds are three months failure to comply with notice to repay capital and breach of other covenant.¹⁵¹ It is very unusual for a mortgage lender with first priority to allow a second to sell. Sale is conducted by the lender out of court and the bank can overreach the interest of the borrower. Equitable rules protect borrowers by requiring lenders to secure the market price for the land with reasonable exposure to the market and proper advertisement and to a purchaser who is independent of the lender, but the timing of the enforcement is up to the lender.

Special conveyancing provisions are needed in an equitable mortgage, usually a power of attorney granted to the lender. There is a provision for a judicial order for sale,¹⁵² which may even be invoked by the borrower to force the lender to sell – but this is only used in residual cases where the right to sell out of court is unclear.

Enforcement against a dwelling is likely to take at least six months and could become impossible if the court suspends possession.

The onset of insolvency will make no difference to a fixed charge, since the land is excluded from the insolvent's estate to the extent to the loan and the lender can sell without involving the trustee in bankruptcy or liquidator. Some corporate regimes may involve a moratorium on enforcement procedures, but this will not prevent enforcement of a fixed charge.

7.5 Overriding interests and priority

7.5.1. Distribution of proceeds

How are the proceeds from the enforcement procedure distributed among the creditors? Is the distribution different in case of legal foreclosure or insolvency of the owner or the debtor?

I assume as usual that the first lender in priority sells. Once the house is sold and converted to its value in money, there is a statutory order for payment,¹⁵³ costs, redemption of the mortgage and payment of the balance to the next secured lender, discovered by a land registry or land charges search. After this process is completed, the borrower should receive the balance – the so called equity (shorthand for the borrower's interest, the equity of redemption). If the borrower is insolvent this would be paid into his estate held by the trustee in bankruptcy. Lenders often pursue any shortfall by personal action for debt.

¹⁵¹ LPA 1925 ss 101-103.

¹⁵² LPA 1925 s 91.

¹⁵³ LPA 1925 s 105.

7.5.2. Overriding interests

Are there any fiscal or other charges – imposed by statute in favour of privileged creditors such as the state or local authorities – that take preference over the mortgage without being registered?

Can you indicate a percentage of how much of the value of the real estate these charges usually amount to?

Note: *Such charges might comprise of:*

the costs of the foreclosure procedure,

taxes levied on real estate (or other taxes owed by the owner),

fees for electricity, heating, garbage collection or other utilities,

the salary of workers if an enterprise is established on the land.

The term “overriding interest” is not here used in its technical sense in English land law (interests that override a registered title), but rather the concept here referred to is preferred creditors. There are limited preferences for eg taxation authorities which are not usually in play in domestic mortgages, but could be very substantial with commercial premises.

7.6 Scope of the mortgage

7.6.1. Buildings

If there is a mortgage on a real estate, does the mortgage necessarily also encompass a house built on it? Are there separate mortgages on buildings without the land?

Mortgages affect estates in land, and these could be any geographical division of the physical land, but usually any building erected on land is part of the land. It is quite possible to mortgage leaseholds eg a flat in a block or a commonhold unit.

7.6.2. Machinery

If there is a business on the mortgaged premises, does the mortgage also extend to its assets such as machinery, cars, raw material etc.?

A mortgage of land will include fixtures unless specifically excluded. If it is intended to mortgage all the assets of a business a floating charge is used – probably a fixed charge on the buildings and fixtures and a floating charge over all other assets.

7.6.3. Insurance

If the house is destroyed e.g by fire, does the insurer have to pay to the owner or to the mortgagee (or only jointly to both of them)?

A secured lender has an insurable interest which should be notified to the insurers and endorsed on the policy. In the event of an insurance payout the mortgage will be discharged and the borrower receives any balance.

7.7.4. Right to redeem

May the mortgagor redeem the mortgage at any time at will or only under certain conditions?

Is it possible to restrict the mortgagor's statutory right of redemption?

The borrower has two rights of redemption. The contractual right occurs on the date stated in the mortgage – usually a conventional six months after the date of the mortgage deed – on which date repayment can occur without interest penalty. After that he relies on an equitable right of redemption and can do so at any time but it is assumed that he gives notice to repay and has to pay interest to cover the period of that notice. These prima facie rules are generally varied by contract. In normal repayment mortgages lenders will generally accept repayment or partial repayment at any time but in fixed rate mortgages, there will be a redemption penalty during the period of the fix. Some mortgages may be on the terms that the money is lent over a long fixed period eg an endowment mortgage that may provide for redemption only after 25 years, and in this case early repayment may not be possible at all. English law accepts long postponements of contractual redemption¹⁵⁴ – usually to secure collateral advantages such as a tied house clause in a public house, but these are subject to domestic and European competition law principles.¹⁵⁵

7.7.5. Redemption after foreclosure

May the mortgagor redeem the mortgage even after foreclosure?

If “foreclosure” is used in its loose informal sense of enforcement of the mortgage, the answer is that redemption is possible up to the moment that the lender contracts to sell the mortgage, but after that the borrower is overreached and the buyer has the right to the land. There is no point in redeeming at that stage since the sale process gives the equity back to the borrower. If “foreclosure” is used in its technical sense of a judicial procedure barring the borrower’s equity of redemption and so transferring the estate to the lender then throughout the procedure the borrower has the chance to redeem or to ask for sale, and if there is any equity in the property is bound to do one or the other; this, with the delay involved, explains the unpopularity of foreclosure as a remedy.

7.8 Security granted by a third party

Let us assume that the debtor is not able to offer any kind of security for the loan. However, his wife is willing to mortgage her real estate.

- *Are there any limitations on the liability of a third party according to statutory or case law, e.g. if the mortgage is to secure the debts of the husband's enterprise, including also all future debts?*

In England it is more common for the security to be in the joint names of husband and wife, the husband borrowing to secure business debts and the wife charging her share of the matrimonial home as a support. (Contrast the situation where the sole legal owners is the husband who proceeds to mortgage ignoring the fact that his wife has contributed so that he is ignoring her contribution right¹⁵⁶). This situation is covered by *Barclays Bank v O'Brien*, *CIBC v. Pitt* and *Royal Bank of Scotland v. Etridge (No 2)*¹⁵⁷ as well as hundreds of other cases. The mortgage is perfectly valid in the vast majority of cases, the House of Lords rejecting the sexist assumption that wives were inherently in need of protection from their

¹⁵⁴ *Knightsbridge Estates v. Byrne* [1939] Ch 441, CA.

¹⁵⁵ *Star Rider v. Innpreneur Pub Co* [1998] 1 EGLR 53.

¹⁵⁶ *Williams & Glyn's Bank v. Boland* [1981] AC 487, HL.

¹⁵⁷ Respectively [1994] 1 AC 180, [1994] 1 AC 200, [2001] UKHL 44, [2002] 2 AC 773, all HL.

husbands. But a security (or indeed an unsecured guarantee) may be invalid if (1) the mortgage is secured by equitable misconduct such as a misrepresentation by husband to wife, (2) the bank is put on notice of the risk of that misconduct and (3) the wife does not receive independent advice from a solicitor or at least adequate warning from the bank of the need for independent advice. *Etridge* suggests that normally if a solicitor provides advice the bank will be in the clear, even if it is the husband's (or even the bank's!) solicitor. But seriously defective advice may not protect the bank if an English speaking solicitor gives advice to an Urdu speaking couple.¹⁵⁸

7.9 Plurality of mortgages

If the owner has already set up (and registered) a mortgage and then wants to set up a second mortgage for another bank, can he do so without the consent of the first bank? Would the holder of the second mortgage have a direct claim against the owner? What would happen if he wanted to execute the mortgage? Could he do so without the consent of the holder of the first mortgage? What would be the consequences for the first mortgage? Would it become due – or would the property be foreclosed – auctioned with the first mortgage on it?

What happens to the second ranking mortgage, if the loan of the first mortgage has been repaid completely or partially? Does the second mortgage get a better position or even the first rank? (Or does the owner get the right on the position for the refunded parts of the first mortgage, and the second mortgage remains at its position?)

Can mortgages be of equal ranking? How can this be effected? (Only by applying for registration on the same day or even in the same minute or by a later change of the ranking?)

Can the ranks of mortgages be exchanged or altered by agreement of the parties involved? Please describe the necessary steps.

In general the right to mortgage is unaffected by the existence of a prior mortgage, but mortgages can, and commonly do, require consent to subsequent lending, a restriction which should also appear on the register. It would not then be possible to register a second mortgage in breach of that restriction.

If the first mortgage is redeemed or repaid by the original borrower it is discharged or reduced pro tanto, and the second lender moves up in priority. But if it is repaid by some other party, the priority of the first security is transferred to the person making the repayment. (Building society mortgages are always discharged). If title is unregistered, the receipt should name the person making the payment and it is important to check that this is the correct person to discharge it.¹⁵⁹ If title is registered distinctive forms should be used for discharge and transfer. Mortgage priority can always be varied by agreement between the parties. However, it is not clear that two separate mortgages could have equal ranking, an idea not contemplated by the LRA 2002, though no doubt this could be done by careful drafting of a single mortgage document.

Priority can be agreed by agreement. If this is to affect legal priority a deed of variation or waiver would be needed and this would have to be submitted to the registry for effect to be given to it on the register.

¹⁵⁸ *National Westminster Bank v. Main* [2002] UKHL 9, [2002] 1 FLR 735.

¹⁵⁹ LPA 1925 s 115.

7.10 Several properties

Can one and the same mortgage cover several properties? Can a mortgage on one property be extended to another property of the same or another owner? In foreclosure, how far does the liability of each property go?

A single mortgage can affect several properties – they are simply listed in a schedule to the document, though this does increase the complexity of the registration process. Existing mortgages can be varied by deed, the variation requiring registration. Enforcement can generally be against any part of the security.

7.11 Transfer of the mortgage

7.11.1. Transfer of the mortgage in general

The debtor has set up a mortgage/land charge to the benefit of bank 1 to secure a loan granted to him. Now, bank 1 wants to refinance the loan with bank 2. How can bank 1 transfer the mortgage to bank 2? Please describe the necessary steps!

- *Can bank 1 transfer the mortgage without transferring also the secured claim (i.e. the claim arising out of the loan contract)? If not, are there any other options for bank 1 to use the mortgage as collateral for its debt with bank 2?*
- *Does the transfer have to be registered? (Is the registration necessary for the transfer to be valid or to be opposable against third parties? This question applies particularly in the insolvency of the transferring bank (bank 1).) What other ways exist to make the transfer insolvency-proof?*
- *May the debtor or the land owner object to the transfer of the mortgage? Does the debtor or the land owner have to be informed about the transfer?*
- *What are the approximate costs for the transfer of a mortgage – and the time required?*
- *Let us assume that bank 1 does not have a valid claim (as in question 7.3.1). If it transfers the mortgage to bank 2, can the latter still acquire the mortgage in good faith?*
- *Let us assume that there is a valid claim, but the setting up of the mortgage is invalid. Can bank 2 still acquire the mortgage in good faith?*
- *If bank 1 has transferred the mortgage to bank 2, but bank 1 is still registered, how can bank 2 enforce the mortgage? (Or does bank 1 have to enforce the mortgage?)*
- *If bank 1 has transferred the mortgage to bank 2, but bank 1 is still registered, whose consent is necessary for any changes in the registration (the consent of bank 1 or of bank 2)?*

Although it is not uncommon for an entire portfolio of mortgages to be transferred i.e. all bank 1's business transferred to bank 2, it is relatively rare for individual mortgages to be transferred and it is extremely unusual for property to be sold subject to an existing mortgage. The reason is the doctrine of consolidation which enables a lender to treat a mortgage on property A as linked to a mortgage on property B if at any time the lenders and borrowers were the same (but not necessarily originally so). The right of consolidation only needs to be reserved in one of the mortgages. So you may be dealing with property A and

be totally unaware of the fact that a mortgage on property B also has to be redeemed. The possibility of consolidation has killed the trade in mortgaged property.

7.11.2. Transfer to more than one creditor

Typically the bank may want to split up and syndicate the loan. Can the loan and the mortgage be split up and only a portion be transferred to bank 2? Can portions be transferred to different banks? Could those banks transfer the loans and the mortgage(s) to other banks later?

It would be possible to divide a mortgage or to create a sub-mortgage of part.

7.11.3. Administration of the mortgage by a trustee or fiduciary

May the mortgage be administered by a trustee or fiduciary? In case of insolvency of the trustee, would the mortgage fall in the insolvency estate?

Yes this is possible; the beneficial estate on insolvency passes but subject to all existing property rights; so if a trustee becomes insolvent the beneficial interests are unaffected.

7.12 Conflict of Laws Issues

The real estate is situated on national territory whereas the debtor (who is also the owner of the real estate) resides in another EU-country.

7.12.1. Bank loan taken by a foreign debtor in the host country

Which law is applicable when the debtor takes a loan with a bank in the host country where the real estate is situated (to the loan contract, the security contract and the mortgage)? Could a law different from the law governing the the property be chosen for the loan contract?

7.12.2. Bank loan taken in the debtor's country of residence

Which law is applicable when the debtor takes a loan with a bank in his country of residence (to the loan contract, the security contract and the mortgage)?

7.12.3. Bank loan taken in a third EU-country

Which law is applicable when the debtor takes a loan with a bank in a third EU-country (to the loan contract, the security contract and the mortgage)? Could a law different from the law governing the property be chosen for the loan contract?

Answer to 7.12.1-7.12.3

It appears that English law does not sever a mortgage into the real security and the personal obligation. Dicey & Morris¹⁶⁰ state that

In the conflict of law the distinction between the interest in the land and the personal obligation is not normally made for the purposes of situs, and the asset is regarded

¹⁶⁰ Dicey & Morris *The Conflict of Laws* (13th ed by Mr Justice Lawrence Collins, 2000, Sweet & Maxwell), para [22-035]

as a unity which is situate in the country where the land lies.

They cite *Re Hoyles*.¹⁶¹ Thus the interest of the lender is seen as realty for conflicts purpose even though English law sees it as personal property. There are conflicting cases in many common law jurisdictions but it seems that this law is settled in England. Subject of course to Brussels I.

7.12.4 National Restrictions on the Right of a Debtor to Secure Debt with a Mortgage assessed under EU Law

Does your national law contain other restrictions or de facto disadvantages for foreign debtors which might negatively affect cross border transactions involving real property and therefore fall foul of EU law?

There are not believed to be any restrictions. It is not usual to have loan agreement, but rather a non binding offer of a loan followed by a formal mortgage document and if there is a contract in the strict sense the effect is to create an equitable mortgage. At one time English law only recognised obligations denominated in sterling, but this restriction was removed by case law and in modern law the debt could be linked to the Swiss franc¹⁶² or any other currency, and there is therefore no need for adaption of English law as a result of *Trümmer's* case.¹⁶³

¹⁶¹ [1911] 1 Ch 179, CA.

¹⁶² *Multiservice Bookbinding v. Marden* [1979] Ch 84.

¹⁶³ C-222/97 *Trümmer & Mayer* [1999] ECR I-1661, ECJ.

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8.2 General Literature

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<i>Land Registration For The Twenty-First Century</i> Law Com 271 (2001)

These are academic books and exclude the numerous shorter student texts. Conveyancing books to add.

8.3 Manuals and Formbooks

8.4 Real Property Law and Land Registration

8.5 Sales Contract

8.6 Sale of a building by the building company (vente d'immeuble à construire/Bauträgervertrag)

8.7 Mortgages

8.8 Private International Law

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