



**Law
Commission**
Reforming the law

From Bills of Sale to Goods Mortgages



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(Law Com No 376)

From Bills of Sale to Goods Mortgages

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on 23 November 2017

HC 495



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ISBN 978-1-5286-0110-8

CCS1117349742 11/17

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the APS Group on behalf of the Controller of Her Majesty's Stationery Office

The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The terms of this report were agreed on 25 October 2017.

The text of this report is available on the Law Commission's website at <http://www.lawcom.gov.uk>.

All websites footnoted in this report were last visited on 30 October 2017.

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Glossary of terms

1878 Act	The Bills of Sale Act 1878.
1882 Act	The Bills of Sale Act (1878) Amendment Act 1882.
Absolute bill	A bill of sale granted for purposes other than to secure the repayment of a loan.
Bankruptcy	A process by which the assets of an insolvent person are converted into money and distributed among their creditors to satisfy debts.
Bills of Sale Acts	The Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882.
Book debts	Sums owed to a business by its customers.
CCTA code	The code of practice of the Consumer Credit Trade Association for logbook lenders who take bills of sale. The full name of the code is “Bills of sale for consumer lending regulated under the Consumer Credit Act (2017)”.
Charge	A type of security interest over goods. When a person (A) charges their goods to a lender, A retains ownership and possession of the goods, but grants the lender the right to have the proceeds of sale of the goods to repay the loan. Goods can be subject to multiple charges granted to different lenders.
Conditional sale	An agreement under which a person (A) takes possession of goods on terms that A makes payment instalments and does not become the owner of the goods until, usually, A has paid all the instalments. The legal protections available to hire-purchase transactions (voluntary termination, provisions about innocent private purchasers and the protections against repossession without a court order) also apply to conditional sales.
Constructive notice	A legal presumption that a person has knowledge of facts if that person can discover those facts by due diligence or inquiry into public records.
Exempt borrower	A borrower under an exempt mortgage.
Exempt mortgage	A goods mortgage granted by a borrower (either a business borrowing over £25,000, or a high net worth individual) who has “opted out” of some of the protections of the draft Bill.
General assignment	The transfer of a class of rights, both present and future, from one person to another, such as by way of sale.
Guarantee	A person (A) guarantees the debts of another person (B) if A makes a promise to answer for the repayment of B’s debts if B defaults.

Hire-purchase	An agreement under which goods are hired to a person (A) on terms that A makes payment instalments and does not become the owner of the goods until, usually, A has paid all the instalments and exercised an option to purchase the goods. The legal protections available to hire-purchase transactions also apply to conditional sales. See the entry for “conditional sale”.
Insolvent	A person is insolvent if they have insufficient assets with which to satisfy their debts and financial liabilities.
Invoice financing	An agreement under which a business sells its book debts to an invoice financier in return for the invoice financier making available to the business a percentage of the value of the book debts. When the customer pays the book debt, the invoice financier uses this to recoup the money that it advanced plus charges. The surplus is returned to the business.
Logbook loan	A type of subprime lending, where the borrower gives the lender a bill of sale on their vehicle. The borrower may continue to use the vehicle so long as they keep up the repayments, but risks having it seized on default.
Non-exempt borrower	A borrower under a non-exempt mortgage.
Non-exempt mortgage	A goods mortgage which is subject to the full protections of the draft Bill.
Repossession	This term is used for hire-purchase (and, slightly inaccurately, for bills of sale) to describe the process by which lenders take possession of goods from borrowers. However, for goods mortgages we refer to “taking possession” rather than “repossessing” as, technically, possession remains with the borrower until this point
Revolving credit facility	See the entry for “running-account credit”.
Running-account credit	An arrangement where the amount of the credit is not specified in advance. Instead the borrower has the facility to borrow up to a credit limit, as with an overdraft or credit card facility.
Security bill	A bill of sale granted to secure the repayment of a loan.
Subprime	Credit or loans for borrowers with a poor credit history, typically with unfavourable conditions such as high interest rates.
Trustee in bankruptcy	A person that takes control of an insolvent person’s assets in order to sell them and share the proceeds of sale among the creditors.

Table of abbreviations

CCA	Consumer Credit Act 1974
CCTA	Consumer Credit Trade Association
CLLS	City of London Law Society
CONC	FCA Consumer Credit sourcebook
DVLA	Driver and Vehicle Licensing Agency
FCA	Financial Conduct Authority
FSB	Federation of Small Businesses

List of previous publications

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| Consultation Paper (2015) | Bills of Sale (2015) Law Commission Consultation Paper No 225, available at http://www.lawcom.gov.uk/wp-content/uploads/2015/09/cp225_bills_of_sale.pdf |
| Report (2016) | Bills of Sale (2016) Law Com No 369, available at http://www.lawcom.gov.uk/wp-content/uploads/2016/09/lc369_bills_of_sale.pdf |
| Consultation on draft clauses (July 2017) | Bills of Sale (2017) Law Commission Consultation Paper, available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/09/July-2017-Consultation-on-draft-clauses.pdf |
| Response to the consultation on draft clauses (September 2017) | Response to consultation and update on draft Bill (2017), available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/09/September-2017-Response-to-consultation-and-update-on-draft-bill.pdf |

From Bills of Sale to Goods Mortgages

To the Right Honourable David Lidington MP, Lord Chancellor and Secretary of State for Justice

Chapter 1: Introduction

- 1.1 Bills of sale are a way in which individuals can use goods they already own as security for loans while retaining possession of those goods. The use of bills of sale has grown from under 3,000 in 2001 to over 30,000 in 2016. They are now mainly used for “logbook loans”, where a borrower grants security over their vehicle. The borrower may continue to use the vehicle while they keep up the repayments, but if they default the vehicle can be repossessed, without the protections that apply to hire-purchase and conditional sale transactions.
- 1.2 Bills of sale are currently governed by two Victorian statutes, the Bills of Sale Act 1878 and the Bills of Sale Amendment Act 1882.¹ We refer to the Bills of Sale Act 1878 as “the 1878 Act” and to the Bills of Sale Amendment Act 1882 as “the 1882 Act”. We refer to them together as the Bills of Sale Acts.
- 1.3 This legislation is archaic and wholly unsuited to the 21st century. We have concluded that it causes detriment to all those who use it, including logbook lenders, logbook borrowers, business borrowers and third party purchasers.
- 1.4 We recommend that the Bills of Sale Acts should be repealed in their entirety and replaced by a new Goods Mortgages Act to govern the way that individuals can use their existing goods as security. The new legislation should:
 - (1) provide appropriate protection for borrowers, so that goods cannot be taken possession of too readily;
 - (2) protect innocent purchasers who buy goods without realising that they are subject to a security interest;
 - (3) remove unnecessary restrictions on secured lending for certain borrowers, such as high net worth individuals and unincorporated businesses; and
 - (4) save costs caused by overly complex registration arrangements.
- 1.5 In this report we set out a draft Goods Mortgages Bill for introduction into Parliament and provide commentary on that draft Bill.

¹ The full name of this Act is the Bills of Sale Act (1878) Amendment Act 1882.

HISTORY OF THE PROJECT

- 1.6 In September 2014, HM Treasury asked the Law Commission to review the bills of sale legislation and to make recommendations for its reform. This followed concern from Citizens Advice that “the present regulatory framework governing logbook lending is wholly untenable”.²
- 1.7 We talked in depth to logbook lenders, consumer protection agencies and other stakeholders and published a formal consultation paper in September 2015.³ The responses showed strong support for reform.⁴
- 1.8 In September 2016, we published a report recommending that the Government should introduce a new legislative framework for how individuals could use their existing goods as security.⁵ The report made detailed recommendations for this legislation but did not include a draft bill.
- 1.9 In February 2017, the Government accepted “the overarching thrust” of our recommendations and welcomed “many of the detailed suggestions for reform”.⁶ HM Treasury agreed to support the Law Commission in drafting primary legislation. The Government said that it would seek to introduce this legislation under the special Parliamentary procedure for uncontroversial Law Commission bills, subject to the availability of Parliamentary time.
- 1.10 In July 2017, we consulted on initial draft clauses.⁷ We asked whether the drafting successfully implemented the recommendations in our 2016 report and for comments on its structure and accessibility. We also explained that we had developed our thinking on some issues in light of further discussions. Where we had modified our policy we asked specific questions about those changes.
- 1.11 We received 20 responses to this consultation, providing detailed commentary and advice.⁸ The respondents are listed in Appendix 1. We are particularly grateful to those who responded to this consultation, given the four week deadline and the length of both the draft clauses and the commentary on them. As we explain in Chapters 3 to 11, we have drawn on these responses to fine-tune the draft Bill.

² Citizens Advice Bureau, *Citizens Advice evidence on bill of sale lending* (April 2014).

³ Bills of Sale (2015) Law Commission Consultation Paper No 225, available at: http://www.lawcom.gov.uk/wp-content/uploads/2015/09/cp225_bills_of_sale.pdf.

⁴ An analysis of the 38 consultation responses we received is available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/02/cp225_bills_of_sale_analysis.pdf.

⁵ Bills of Sale (2016) Law Com No 369, available at: http://www.lawcom.gov.uk/wp-content/uploads/2016/09/lc369_bills_of_sale.pdf.

⁶ Government response to the Law Commission recommendations on Bills of Sale: Written statement (HCWS462) 7 February 2017, available at: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-02-07/HCWS462/>.

⁷ Law Commission Consultation on draft clauses (July 2017), available at: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/09/July-2017-Consultation-on-draft-clauses.pdf>.

⁸ Law Commission Goods Mortgages Bill: Response to consultation and update on current draft Bill (September 2017), available at: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/09/September-2017-Response-to-consultation-and-update-on-draft-bill.pdf>.

ISSUES OUTSIDE OUR REMIT

- 1.12 The new legislation is designed to sit alongside other borrower protections, such as those provided by the Consumer Credit Act 1974 and Financial Conduct Authority (FCA) rules. The FCA also authorises and supervises regulated credit providers, including logbook lenders. The effect of these measures is to require lenders to carry out affordability checks and to provide borrowers with information about, for example, the cost of credit. We do not address these issues in this report.
- 1.13 A price cap on payday lending came into force in January 2015.⁹ In the 2015 consultation, we said that there might be a case for the FCA to introduce a cap on default charges for logbook loans. However, this is an issue for the FCA and is outside the scope of the draft Bill.

THIS REPORT

- 1.14 Our 2016 report included a description of the current law and a discussion of options for reform. We do not repeat this material here.
- 1.15 Instead we start with an overview of the need for reform (in Chapter 2). We then provide a commentary on the draft Bill. We explain briefly how the draft Bill implements the recommendations we made in 2016. We then concentrate on any developments in our thinking since then, drawing on responses to our July 2017 consultation.
- 1.16 The draft Bill itself is set out in Appendix 2.

Extent

- 1.17 The Law Commission has a mandate to make recommendations for England and Wales and the draft Bill reflects this. The Bills of Sale Acts do not apply in Scotland or in Northern Ireland.
- 1.18 In Scotland, there is a separate regime for security interests in goods.¹⁰ We understand that HM Treasury is considering with Northern Ireland officials whether the draft Bill should be extended to Northern Ireland.¹¹

THANKS AND ACKNOWLEDGMENTS

- 1.19 We would like to thank the many people who have helped us with this project and who responded to our consultations. This report would not have been possible without the support of consumer protection agencies, lenders, registries, legal practitioners and academics.
- 1.20 This report has been prepared by Laura Burgoyne (team manager), Daria Popescu (team lawyer) and Siobhan McKeering (team lawyer). John Williams was the research assistant to the project from September 2016 to August 2017. Meanwhile three research assistants joined us in September 2017 and helped prepare the report for publication (Olivia Davies, Erica Li and Daniel Zwi). Tamara Goriely, who managed the project from 2014 to March 2017, also assisted with the report.

⁹ The cap applies to high-cost short-term credit. See Bills of Sale (2015) Law Commission Consultation Paper No 225 paras 4.84 to 4.93.

¹⁰ In July 2017, the Scottish Law Commission published a draft Moveable Transactions (Scotland) Bill for consultation. This makes provision for a new statutory form of non-possessory pledge, created by registration, over corporeal and incorporeal moveable property. See <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/security-over-corporeal-and-incorporeal-moveable-property/> for further details.

¹¹ Northern Ireland is subject to separate legislation on this matter, namely Bills of Sale (Ireland) Act 1879 and Bills of Sale (Ireland) Act (1879) Amendment Act 1883.

Chapter 2: The need for reform

2.1 Lenders and consumer groups alike agree that the law should be reformed. In 2015, the logbook lender, AutoMoney, told us that it is:

an undeniable fact that the Bills of Sale Act is out of date and should be replaced with a new body of law that more effectively facilitates the use of personal property as collateral.

2.2 The debt advice charity, StepChange, agreed:

The current law is antiquated, difficult to understand and fails consumers. The law is not providing appropriate consumer protections when a borrower falls into payment difficulties. Nor does it protect innocent private purchasers.

2.3 As we explore below, the current law creates hardship for borrowers and private purchasers, imposes unnecessary burdens on lenders and restricts access to finance for unincorporated businesses.

HARDSHIP FOR BORROWERS

Who needs protection?

2.4 The great majority of bills of sale are issued for logbook loans, taken out by “subprime” borrowers who have difficulty accessing other forms of credit. Our survey for the 2015 consultation paper found that logbook loans were typically for £100 to £3,500, for a term of between six months and three years. The most common annual or annual equivalent interest rates were 120% and 187%.¹²

2.5 Logbook loans are mostly used by consumers, but self-employed people may also borrow money in this way.¹³ Our survey found examples where market traders, builders or plumbers had used logbook loans to borrow money on the security of their vans. The Federation of Small Businesses (FSB) commented that small traders often depend on their vehicle:

FSB believes borrowers need stronger protection. For some smaller businesses, a vehicle could be integral to the business and the prospect of repossession could be disastrous.

2.6 As we explain in Chapter 3, the draft legislation distinguishes between borrowers who are generally more likely to need protection (ordinary consumers and small business borrowers) and those who are generally less likely to need it (businesses borrowing more than £25,000 and high net worth individuals).¹⁴ We refer to loans to the first

¹² See Bills of Sale (2015) Law Commission Consultation Paper No 225 paras 2.7 to 2.23. In our survey of bills of sale registered at the High Court in 2014, the lowest interest rate was 60% per year and the highest was 443% per year.

¹³ One logbook lender had estimated in 2010 that 25% of its logbook loans by number and 40% by value were for business purposes (Department for Business, Innovation and Skills, *Government response to the consultation on proposals to ban the use of bills of sale for consumer lending* (2011) p 42 para 12).

¹⁴ See para 3.14 below.

category of borrowers as “non-exempt mortgages” and to loans to the second category of borrowers as “exempt mortgages”.

Unintelligible documents

- 2.7 Research by the Financial Conduct Authority (FCA) found that many borrowers do not “really think” about the implications of a logbook loan.¹⁵ As one respondent to the FCA study put it:

He didn’t say anything about the ownership of the car. You don’t really think about it all until afterwards. I had no idea ...¹⁶

- 2.8 The standard form for a bill of sale does little to enlighten borrowers about the consequences. The Consumer Credit Trade Association (CCTA), which represents logbook lenders, said that the paperwork:

does not satisfy the modern requirement that documents should be written in plain and intelligible language that an ordinary person could easily understand.¹⁷

- 2.9 As discussed in Chapter 5,¹⁸ we recommend that where goods mortgages are granted to non-exempt borrowers, the document should carry a prominent warning that their goods may be repossessed if they do not keep up the repayments.

Lack of protection against repossession

- 2.10 FCA rules require lenders to treat borrowers in arrears with forbearance and due consideration. This might include taking token repayments for a time, or reducing or waiving interest payments.¹⁹

- 2.11 Lenders are required to have policies to deal with default, particularly where borrowers are perceived as vulnerable.²⁰ The lenders we spoke to emphasised that they would prefer to agree alternative repayment plans and treat repossession as a last resort. It appears, however, that lenders differ in their approach to repossession. While some lenders seize and sell vehicles in less than 3% of loans, others may do this in up to 10% of loans.²¹

- 2.12 There are complaints that some lenders use the threat of repossession to demand unreasonable and unaffordable sums. The FCA research commented:

A few respondents who really struggled to keep up with payments were informed that they would need to make lump payments in order to avoid repossession of the vehicle, which were often perceived to be unfair and unaffordable.²²

¹⁵ FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014) p 27, available at: <https://www.fca.org.uk/publication/research/fca-esro-final-report-2014.pdf>. We discuss this research in detail in *Bills of Sale* (2015) Law Commission Consultation Paper No 225.

¹⁶ FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014) p 27.

¹⁷ Consumer Credit Trade Association, *Response to Law Commission Call for Evidence* (2014) p 8.

¹⁸ See para 5.15 below.

¹⁹ FCA Consumer Credit sourcebook (CONC) para 7.3.

²⁰ FCA Consumer Credit sourcebook (CONC) para 7.2.

²¹ See *Bills of Sale* (2016) Law Com No 369 paras 11.17 to 11.22.

²² FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014) p 27.

2.13 In some cases, lenders may repossess vehicles from those in temporary financial difficulties, even if the loan is substantially repaid and the borrower is making efforts to meet the outstanding amount.²³ This example from Citizens Advice illustrates the problem:

A woman took out a logbook loan against her car for £1,600. Six months after the last standing order payment the company clamped the client's car saying £400 was outstanding. They asked her to pay the arrears plus a £750 clamping fee. The car has since been repossessed and the firm are asking for a further £1,600 to return the vehicle.²⁴

2.14 The Financial Ombudsman Service may provide redress after the event, but it is not able to prevent repossessions from taking place. By contrast, in hire-purchase, once the hirer has paid one-third of the total hire-purchase price, the lender must seek a court order before repossessing the goods. The court may require an alternative repayment plan or suspend an order for repossession while the hirer makes payments.

2.15 The ability to repossess vehicles is a powerful weapon. Greater protection is needed to ensure that lenders use it only as a last resort. In Chapter 9,²⁵ we recommend that non-exempt borrowers who have paid at least one-third of the loan should have the right to demand that the lender obtains a court order before taking possession of the goods.

Voluntary termination

2.16 The right to require a court order protects borrowers who could pay off the loan with additional time. However, it does little to help those with no realistic prospect of repaying the loan. Here a court order may simply end up increasing the expenses the borrower must bear.

2.17 Borrowers who find themselves with loans they cannot repay need a clear way of extricating themselves from the situation. Logbook lenders who are subscribed to the CCTA code already provide consumers with a right of "voluntary termination".²⁶ Borrowers may surrender their vehicle to the lender in full and final settlement of the loan and arrears and walk away from the debt.

2.18 We think this is a valuable way of providing borrowers with a measure of control. As we discuss in Chapter 10,²⁷ we recommend that it should be a statutory right which applies to all non-exempt mortgages.

²³ For an example of this, see Financial Ombudsman Service, *Ombudsman News* (August 2014) issue 119/11, available at: <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/119/119-short-term-credit.html#cs11>.

²⁴ Evidence from Citizens Advice made available to the Law Commission in January 2016.

²⁵ See para 9.11 below.

²⁶ CCTA Code of Practice *Bills of sale for consumer lending regulated under the Consumer Credit Act (2017)* para 4.8.1, available at: <https://www.ccta.co.uk/wp-content/uploads/2016/06/Bills-of-Sale-Code-of-Practice-2017-consumer.pdf>.

²⁷ See para 10.4 below onwards.

HARDSHIP FOR PRIVATE PURCHASERS

2.19 The law offers no protection to private purchasers who buy goods subject to a bill of sale, even if they act in good faith and know nothing about the bill of sale. Those who buy a second-hand car without realising that it is subject to a bill of sale face an unpalatable choice: pay off someone else's loan, or risk losing the car. This case from Citizens Advice illustrates the problem:

A client bought a van advertised on Autotrader. Shortly after purchasing the van, it went missing. The client contacted the police and reported it stolen. The police informed the client that the vehicle had been repossessed as it had a logbook loan taken out on it by the previous owner ... The client has now lost the money they paid for the van and is faced with either negotiating with the logbook lender or trying to track down the seller with very little information to find them.²⁸

2.20 Although the issue is small in scale,²⁹ some purchasers suffer serious hardship. The issue also generates bad publicity for logbook lenders, bringing the industry into disrepute.

2.21 Hire-purchase law provides private purchasers with more protection. A private purchaser who buys a vehicle in good faith without notice of the hire-purchase agreement becomes the owner of the vehicle.³⁰ As we explain in Chapter 7,³¹ we recommend that similar protection should apply to a private purchaser of all goods subject to a goods mortgage.

BURDENS ON LENDERS

Expensive and cumbersome registration

2.22 The Bills of Sale Acts require all bills of sale to be registered with the High Court, which uses a paper-based system. Registration is expensive. It costs between £35 and £45 to register a bill of sale³² and lenders complain that the system is cumbersome to operate with. For example, paperwork is sometimes returned to the wrong lender.³³

2.23 The register is also difficult to search. In theory it is possible to search using the borrower's name and postcode, but this costs £50. Such searches are rare.³⁴ The register cannot be searched by vehicle (for example, using the registration number or vehicle identification number) to check if it is being used as security for a loan. The CCTA told us:

²⁸ Evidence from Citizens Advice made available to the Law Commission in January 2016.

²⁹ During our 2015 consultation, one logbook lender told us that out of 1,500 to 2,000 logbook loans issued each month, between 20 and 30 would result in a dispute involving a purchaser. Another said that it had repossessed around 10 vehicles from purchasers in 2014.

³⁰ Hire Purchase Act 1964, ss 27 to 29. The same protections apply to conditional sale.

³¹ See para 7.21 below onwards.

³² For details of the costs, see *Background Paper: Registering a goods mortgage – lessons from other systems* (November 2017).

³³ For a full account of the registration system, see Bills of Sale (2015) Law Commission Consultation Paper No 225 paras 5.18 to 5.47.

³⁴ Figures provided by the High Court show that from January to August 2016, only 10 searches of the register were made without the registration number. It is possible to search for free using the registration number of the bill of sale, but only the lender would know that number.

The register is not fit for purpose and does not provide any benefits to lenders or borrowers.³⁵

- 2.24 The failings of the High Court register mean that logbook lenders also routinely register with commercially-run asset finance registries on a voluntary basis. There are three private asset finance registers in operation (Cap HPI, Experian and Cheshire Datasystems Ltd). In practice, trade buyers use these registers to find out about vehicle finance arrangements, including bills of sale. However, the cost of searching these registers makes them inaccessible to many private purchasers.³⁶
- 2.25 As discussed in Chapter 6,³⁷ we recommend a new online register (on the basis that we believe it would be easier and cheaper to operate) which can be searched by vehicle.

Unnecessary document requirements

- 2.26 Where bills of sale are granted as security for a loan, the 1882 Act requires that the bill of sale document complies with a complex standard form with no fewer than 12 separate requirements.³⁸ One logbook lender described the standard form as “horrific”.
- 2.27 Failure to comply with any of the document requirements carries a heavy sanction. Lenders not only lose any rights over the goods but are also not entitled to recover the loan amount owed to them. Accordingly, logbook lenders are understandably reluctant to change the standard form to make it more accessible for borrowers.
- 2.28 As discussed in Chapter 5,³⁹ we recommend that the document requirements should be simplified. A lender who fails to comply with the new requirements would lose their right to the goods, but would still be entitled to recover the loan from the borrower.

ACCESS TO FINANCE FOR SMALL BUSINESSES

- 2.29 There have been many complaints that the technicality of the Bills of Sale Acts restricts the ability of unincorporated businesses to access finance. As a leading banking textbook puts it:

The cumbersome provisions for registration and the need to follow the prescribed form applicable to bills of sale render the chattel mortgage an unattractive security. Furthermore, for historical reasons the granting of a bill of sale tends to cast doubts on the credit standing of the trader who effects it. The tendency in modern trade is to avoid it wherever possible.⁴⁰

- 2.30 Here we highlight two examples where the Bills of Sale Acts restrict the ability of unincorporated businesses to secure loans on goods. The first derives from the document requirements in the 1882 Act. The second is the requirement to register general assignments of book debts as if they were absolute bills.

³⁵ Consumer Credit Trade Association, *Response to Law Commission Call for Evidence* (2014) p 5.

³⁶ For an account of the problems private purchasers face in finding out about bills of sale, see *Bills of Sale* (2015) Law Commission Consultation Paper No 225 paras 12.36 to 12.40.

³⁷ See para 6.7 below onwards.

³⁸ For further details, see *Bills of Sale* (2015) Law Commission Consultation Paper No 225 para 3.39.

³⁹ See para 5.1 below onwards.

⁴⁰ E Ellinger, E Lomnicka and C Hare, *Ellinger's Modern Banking Law* (5th ed 2010) p 839.

The restrictions imposed by the document requirements

- 2.31 The 1882 Act requires a bill of sale to state the amount of the loan and the date for repayment. This means that it is not possible for unincorporated businesses to use goods to secure a revolving credit facility or overdraft.
- 2.32 The standard form also prevents, for example, a director from using their own goods to secure a guarantee of a loan made to a company. The guarantee represents a promise by the director to repay a loan owed by the company if the company defaults. However, if the company does not default, the director may not need to pay anything. It is therefore not possible to comply with the requirement to state the repayment instalments in advance.
- 2.33 As one practitioner told us during consultation, there does not appear to be any way around this requirement:
- I was recently asked to advise on a proposed tangible chattels security by way of bill of sale, to be given in support of a director's guarantee of lending to a comparatively small private company. The advice had to be that such security could not validly be created, because the lending was to be repayable and the guarantee would only be enforceable "on demand", whereas the statutory form of bill of sale requires the sum secured to be payable on a date specified in the bill.⁴¹
- 2.34 At present, little use is made of bills of sale outside the area of logbook loans. In our surveys of the High Court register, we found only 12 bills of sale over goods other than vehicles,⁴² suggesting that there may be around 260 non-vehicle bills of sale registered each year.⁴³
- 2.35 Two law firms responded to our consultation to say that with appropriate reform, they anticipated a significant expansion of loans secured on goods other than vehicles. Boodle Hatfield LLP thought, in particular, that more loans would be secured on artworks.
- 2.36 As discussed in Chapter 4,⁴⁴ we recommend that exempt borrowers should be able to use goods mortgages to secure revolving credit and overdrafts. Furthermore, high net worth individuals should be able to use goods mortgages to secure a guarantee.

General assignments of book debts by unincorporated businesses

What is a general assignment of book debts?

- 2.37 The term "book debts" means sums due to a business. Where a business provides goods or services on credit, the customer owes the business a book debt. The value of that book debt can be realised by selling it to a financier. As book debts are created by invoices, this type of arrangement is usually referred to as "invoice financing".

⁴¹ Bills of Sale (2015) Law Commission Consultation Paper No 225 para 6.12.

⁴² Six of the bills of sale were over wine and two were over hotel furniture and fittings. The others were over: a mobile home, art and antiques, a vintage steam engine and a herd of cows. The value of these bills of sale was typically much greater than for logbook loans, with several exceeding £100,000.

⁴³ The estimate is based on two samples of bills of sale registered in 2014. The first sample considered the broad nature of 2,200 bills of sale. The second looked in more detail at a further 102 bills of sale.

⁴⁴ See para 4.87 below onwards.

2.38 Over the past few decades, invoice financing has been a growing source of working capital for small and medium sized businesses, which are usually incorporated.⁴⁵ It can be structured in a variety of ways. Under a “whole turnover agreement”, the business agrees to sell and the invoice financier agrees to purchase all present and future book debts. This is referred to as a “general assignment of book debts”.

The registration process

2.39 General assignments of book debts given by sole traders or partnerships must be registered as if they were absolute bills under the 1878 Act. If they are not registered, they are invalid on bankruptcy.⁴⁶

2.40 The procedure for the registration of general assignments of book debts under the 1878 Act is even more cumbersome than the procedure applicable to logbook loans. It normally requires three solicitors’ firms: one to prepare the paperwork for the invoice financier, a second to advise the business and witness its signature and a third to administer an affidavit from the business’ solicitor. In 2015 we estimated that the registration process cost between £480 and £1,735 for each transaction.⁴⁷ Registration can take three to five working days, even when carried out promptly. For unincorporated businesses, a delay in funding, even by a matter of days, may have serious consequences. Such is the burden of registration that some invoice financiers do not register at all and instead take their chances on bankruptcy.

2.41 As discussed in Chapter 11,⁴⁸ the draft Bill will reform the process for registering general assignments of book debts made by unincorporated businesses. The aim is to reduce unnecessary costs and delay and provide invoice financiers with the security they need on bankruptcy.

⁴⁵ See Bills of Sale (2015) Law Commission Consultation Paper No 225 paras 6.23 to 6.33.

⁴⁶ Insolvency Act 1986, s 344.

⁴⁷ See Bills of Sale (2015) Law Commission Consultation Paper No 225 table 6.1.

⁴⁸ See para 11.16 below.

Chapter 3: Commentary on the draft Goods Mortgages Bill – overview

TERMINOLOGY

Mortgagor and mortgagee

- 3.1 The draft Bill uses the legal terms “mortgagor” and “mortgagee” to refer to the parties to a goods mortgage. In a secured loan agreement, the mortgagor is the borrower who grants the mortgage, while the mortgagee is the lender who receives the security and grants the loan.
- 3.2 We are aware, however, that these terms can be confusing. Many house buyers, for example, think of a bank as giving them a mortgage, when in fact it is the other way around.
- 3.3 In our 2016 report, we referred to the parties as the “borrower” and the “lender”. This is an over-simplification: for example, if a goods mortgage is granted as security for a guarantee rather than a loan, the terms “borrower” and “lender” are not strictly accurate. Furthermore, under clause 33 of the draft Bill, the term “mortgagee” is defined as including not only the original lender, but any other person to whom the rights under the goods mortgage have passed by assignment or operation of law.⁴⁹
- 3.4 In this report, we continue to refer to the mortgagor as the “borrower” and the mortgagee as the “lender” as a convenient shorthand, because we think these terms are easier to understand.

STRUCTURE OF THE DRAFT BILL

- 3.5 The structure of the draft Bill is set out in clause 1 (overview).

<p>1 Overview</p> <ol style="list-style-type: none">(1) This Act contains provision about non-possessory security over goods and repeals the Bills of Sale Acts 1878 and 1882.(2) In Part 2—<ol style="list-style-type: none">(a) sections 2 to 7 (with Schedule 1) contain provision enabling an individual who owns goods to create a goods mortgage over them as security for the discharge of an obligation;(b) section 8 relates to other non-possessory security over goods.(3) In Part 3—<ol style="list-style-type: none">(a) section 9 contains provision about the registration of goods mortgages;(b) section 10 deals with further advances by the mortgagee;
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⁴⁹ In the case of a mortgagor, it includes those to whom rights and duties have passed by operation of law but not by assignment (clause 28).

- (c) sections 11 to 14 deal with the position of third parties.
- (4) Part 4 contains provision about the rights of mortgagors and mortgagees.
- (5) Part 5 contains repeals and amendments, provisions about regulations and interpretation, and other final provisions.

3.6 In this chapter we start by looking at a crucial concept which runs throughout the draft Bill. This is the distinction between exempt and non-exempt mortgages.⁵⁰ The subsequent chapters loosely follow the structure of the draft Bill:

- (1) Chapter 4 covers the creation of a goods mortgage. It describes how individuals may use their goods as security for loans or other obligations. It looks at clauses 2 to 4, 6 and 8 of the draft Bill.
- (2) Chapter 5 focuses on the document requirements, as set out in clause 5. We compare the simpler requirements for a goods mortgage with the many formalities currently required under bills of sale legislation.
- (3) Chapter 6 considers registration and priority.
- (4) Chapter 7 deals with third parties. It describes the new duty on owners to provide information about the goods mortgage, the effect of unregistered goods mortgages and the new protections for private purchasers who act in good faith without actual notice of the mortgage. Finally, it considers the lender's power to seek a court order to take possession of the goods from third parties.
- (5) The largest part of the draft Bill concerns the rights of borrowers and lenders. We deal with these in three separate chapters:
 - (a) Chapter 8 explains the restrictions on lenders' rights to take possession, which apply to all mortgages. We look at the general grounds for possession, the restriction on entering premises to take possession of goods and the lenders' power of sale. The power of sale is subject to a restriction which requires lenders to wait five working days between seizure and sale.
 - (b) Chapter 9 explains a new restriction on lenders' rights to take possession from borrowers, which applies only to non-exempt mortgages. Where the borrower has paid at least a third of the total loan amount, the lender must give the borrower a possession notice. This allows the borrower to "opt in" to protections, by requiring the lender to seek a court order before taking possession of the goods.
 - (c) Chapter 10 explains the borrower's right of voluntary termination, which applies only to non-exempt mortgages.
- (6) Chapter 11 deals with the final provisions of the draft Bill, including contracting-out, repeals and commencement.
- (7) Chapter 12 lists the new recommendations we made in this report.

⁵⁰ See para 3.7 below onwards.

DEFINING BORROWERS WHO CAN OPT OUT OF ADDITIONAL PROTECTIONS: EXEMPT AND NON-EXEMPT MORTGAGES

- 3.7 The draft Bill is intended to provide the legal framework by which a wide range of individuals can secure loans and other obligations on goods. It also provides protection for borrowers, especially those taking out logbook loans on their vehicles. To achieve a balance between those who need protection and those who would welcome flexibility, the legislation distinguishes between goods mortgages granted by borrowers who are generally in need of more protection (“non-exempt” goods mortgages) and those granted by borrowers who are generally less in need (“exempt” goods mortgages).
- 3.8 Several provisions of the draft Bill apply only to non-exempt goods mortgages. These are:
- (1) a requirement to include warning statements in the mortgage document (clause 5(2));
 - (2) a prohibition on using a goods mortgage to secure revolving credit or guarantees (clause 6);
 - (3) a requirement on the lender to issue a possession notice before taking possession of the goods, if the borrower has paid back at least one-third of the secured sum. This enables the borrower to demand that the lender does not take possession of the goods without a court order (clause 20);
 - (4) a mandatory grace period of five days between possession and sale, which, in the case of non-exempt borrowers, cannot be removed through contractual provisions (clause 18); and
 - (5) a right of voluntary termination, allowing the borrower to hand over the goods to the lender and to walk away from any further obligations (clause 23).

Drawing on the distinction in consumer credit law

- 3.9 Consumer credit legislation also distinguishes between those consumers and small businesses who need enhanced protection and those who do not (such as businesses borrowing larger amounts and high net worth individuals). This is because those with greater resources are generally less vulnerable, in particular to inequalities of bargaining power. They are able to seek and pay for advice and have a wider range of credit options available to them.
- 3.10 In our 2016 report, we recommended that the additional protections should apply to “regulated credit agreements” under the Consumer Credit Act 1974 (CCA), but not to obligations which were not regulated under the CCA, namely:
- (1) loans of more than £25,000 taken out for business purposes; or
 - (2) loans of more than £60,260 to high net worth individuals.
- 3.11 During the drafting process for the draft Bill, it became apparent that it would be inappropriate to replicate the CCA concept of a regulated credit agreement in its entirety.
- 3.12 There are several complexities to the definition of a regulated credit agreement which would not be helpful in the context of a goods mortgage. One example is the exclusion

of credit agreements for the purpose of acquiring or retaining property rights in land.⁵¹ This would exempt a loan to purchase a plot of land which was also secured on goods, such as a caravan or mobile home. Yet the borrower in these circumstances should benefit from the protections in the draft Bill.

- 3.13 A second example of complexity is that an agreement may be partly regulated and partly unregulated.⁵² An example of a partly regulated agreement is a contract whereby an unincorporated business borrows £26,000 for business purposes (unregulated part) and also hires a car on a hire-purchase basis (regulated part). The CCA treats the two parts as separate agreements and applies only to the regulated part. Again, this would make the concept unnecessarily difficult to apply to goods mortgages.

A simplified distinction

- 3.14 We have followed the consumer credit law distinction in broad terms, though we have adapted and simplified it for the purposes of this legislation. Broadly, in the draft Bill the protections listed above⁵³ apply to all goods mortgages unless:

- (1) the “high net worth conditions” are met. We intend to replicate the definition of high net worth used in consumer credit law.⁵⁴ In broad terms this applies to individuals who have a net income totalling at least £150,000 in the preceding financial year or net assets⁵⁵ with a total value of at least £500,000; or
- (2) the “business credit conditions” are met. These apply to loans which exceed £25,000 made wholly or predominantly for the purposes of the borrower’s business.

- 3.15 In either case, the borrower would also need to “opt out” of the protections. The goods mortgage must include a declaration to this effect.

Exempting mortgages to high net worth individuals, irrespective of amount

- 3.16 In 2016, we recommended that goods mortgages granted by high net worth individuals should only be exempt if they secured loans of more than £60,260. However, in our July 2017 consultation, we suggested that *all* goods mortgages granted by high net worth individuals should be exempt, provided that the individual agrees to forgo the protections and the mortgage meets the prescribed requirements.

- 3.17 There was support for this change. We received nine responses, of whom all but one agreed. Money Advice Trust disagreed, arguing that it was too simplistic to assume that none of those who meet the definition of a high net worth individual would be vulnerable. This failed to “take into account issues such as coercive control or domestic violence”.

- 3.18 We accept that any line is arbitrary and may not cover all possible circumstances. However, we do not think that there is a case to maintain the £60,260 threshold. Unlike business credit, which may be given to sole traders or small partnerships of little means,

⁵¹ See the Directive on credit agreements for consumers relating to residential immovable property 2014/17/EU, Official Journal L 60 of 28.2.2014 p 34, art 3(1)(b).

⁵² Consumer Credit Act 1974, s 18(1).

⁵³ See para 3.8 above.

⁵⁴ The concept is defined in Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 SI 2001 No 544, art 60H.

⁵⁵ Excluding primary residence, life or endowment policies and pension arrangements.

credit to high net worth individuals will always concern wealthy borrowers who can afford legal advice. Removing the threshold provides these borrowers with greater flexibility. It also fits in with our policy of allowing high net worth individuals to secure obligations that are not readily quantifiable, such as guarantees.

New recommendation 1

- 3.19 High net worth individuals should be able to opt out of some of the protections provided to borrowers, even if the loan does not exceed £60,260.

Implementing the policy: clauses 26 and 7

- 3.20 The definition of an exempt goods mortgage is set out in clause 26.

26 Exempt goods mortgage

- (1) A goods mortgage is an “exempt goods mortgage” for the purposes of this Act in the following cases.
- (2) A goods mortgage is an exempt goods mortgage if the obligation secured by it is—
 - (a) a guarantee (see section 6(3) for the cases in which a goods mortgage may secure a guarantee), or
 - (b) the obligation of the borrower under an agreement for running-account credit as defined by Schedule 1 (see section 6(4) for the cases in which a goods mortgage may secure such an obligation).
- (3) A goods mortgage is also an exempt goods mortgage if—
 - (a) the high net worth conditions or the business credit conditions are met, and
 - (b) the instrument creating the goods mortgage includes a declaration by the mortgagor which—
 - (i) states that the mortgagor agrees to forgo the protection and remedies given by sections 19(1) and 23(2), and
 - (ii) complies with prescribed requirements.

- 3.21 As we explain in Chapter 4,⁵⁶ only high net worth individuals can use a goods mortgage to secure a guarantee. Similarly, only businesses borrowing over £25,000⁵⁷ or high net worth individuals can use a goods mortgage to secure running-account credit.

⁵⁶ See para 4.104 below.

⁵⁷ The draft Bill refers to the “prescribed amount”, which is intended to be £25,000.

- 3.22 For present purposes, the key provision is clause 26(3). Under clause 26(3)(a), a goods mortgage is exempt if either “the high net worth conditions” or “the business credit conditions” are met.
- 3.23 Under clause 26(3)(b), the mortgage document must include a declaration that the borrower agrees to forgo the protection of the opt-in procedure (in clause 19(1)) and of the right to voluntary termination (in clause 23(2)). This declaration must comply with the prescribed requirements. Exempt borrowers can also opt out of the five day postponement of the lender’s right to sell the goods⁵⁸ and would not benefit from the prominent warnings discussed below.⁵⁹
- 3.24 The high net worth and business credit conditions are set out in clause 7.

7 “The high net worth conditions” and “the business credit conditions”

(1) This section applies for the interpretation of this Act.

(2) “The high net worth conditions”, in relation to a goods mortgage, are—

(a) that a statement complying with prescribed requirements has been made in relation to the income or assets of the mortgagor,

(b) that the connection between the statement and the goods mortgage complies with prescribed requirements, and

(c) that a copy of the statement was provided to the mortgagee before the goods mortgage was created.

(3) “The business credit conditions”, in relation to a goods mortgage, are—

(a) that the obligation to which the goods mortgage relates arises from the provision of credit exceeding the prescribed amount, and

(b) that the obligation was incurred wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the mortgagor.

- 3.25 The monetary limits and prescribed requirements will be set out in secondary legislation made by HM Treasury under clause 30. The intention is that this secondary legislation will follow the limits and prescribed requirements already used in consumer credit law.⁶⁰

Calculating whether running-account credit exceeds £25,000

- 3.26 For fixed-sum credit, it is relatively easy to calculate whether the loan exceeds £25,000. However, this is more difficult for running-account credit, where the amount of the loan may vary from day to day. The CCA already has a method of valuing loans in these circumstances and we reproduce the effect of section 10 of the CCA in schedule 1 to the draft Bill.

⁵⁸ Draft Bill, clause 18(6)(b) discussed at para 8.49 below.

⁵⁹ Draft Bill, clause 5(3) discussed at para 5.6 below.

⁶⁰ For a full discussion of how the prescribed requirements will be met, see Law Commission Consultation on draft clauses (July 2017) Appendix 1.

- 3.27 Very broadly, section 10 provides that running-account credit does not exceed £25,000 if one of the following conditions is met:
- (1) the credit limit does not exceed £25,000;
 - (2) the business cannot borrow more than £25,000 at any one time;
 - (3) more onerous conditions apply for the borrower if the balance rises above a specific sum of no more than £25,000; or
 - (4) it is probable that the borrower will not borrow more than £25,000 at any one time.⁶¹

⁶¹ See Law Commission Consultation on draft clauses (July 2017) Appendix 1 para 1.12 onwards for more detail and an example of how the second condition applies in practice.

Chapter 4: Creation of goods mortgages

SCOPE

- 4.1 Bills of sale that are used as security for loans are known as “security bills”. Security bills occupy a distinct niche in the law of security interests because:
- (1) unlike company charges (which are granted by companies and limited liability partnerships), security bills can only be granted by individuals and unincorporated businesses;
 - (2) unlike mortgages on land, they are secured on goods;
 - (3) unlike hire-purchase or conditional sale, they are usually granted on goods which the borrower already owns; and
 - (4) unlike pawn-broking (where the lender takes possession of the goods), security bills allow the borrower to keep the goods while making the repayments.
- 4.2 Goods mortgages sit within this particular area of security law. The draft Bill applies where:
- (1) individuals;
 - (2) grant security;
 - (3) over qualifying goods;
 - (4) which they own;
 - (5) to secure the performance of a qualifying obligation.
- 4.3 These criteria are set out in clauses 2 to 4.

CLAUSE 2: THE MAIN CONCEPTS

- 4.4 Clause 2(1) states that an individual who owns qualifying goods may create a charge over those goods as security for the discharge of an obligation. This is referred to as a “goods mortgage”. Below we discuss the concepts of “individual”, “charge” and “goods mortgage”. We then look at “ownership” (drawing on clause 3) and “qualifying goods” (drawing on clause 4).
- 4.5 Clause 2(2)(a) highlights that for a goods mortgage to be valid, the goods must already exist.⁶² As under the Bills of Sale Acts, it is not possible to use future goods as security.⁶³ It must also be created by a document which meets the formality requirements set out in clause 5. The consequences of creating a goods mortgage which fails to meet these requirements are dealt with in clause 8.

⁶² Similarly, clause 8(1)(c) invalidates agreements which have the effect of creating a mortgage or a charge over goods “subsequently to be acquired” by an individual.

⁶³ We concluded that allowing goods mortgages over future goods had the potential to be exploitative: see Bills of Sale (2016) Law Com No 369 paras 4.68 to 4.72.

- 4.6 A goods mortgage can secure any obligation (not just a loan), as long as it is not an excluded obligation. Excluded obligations are dealt with in clause 6.

2 Goods mortgages

- (1) An individual who owns qualifying goods (see section 4) may in accordance with subsection (2) create a charge over the goods as security for the discharge of an obligation.
- (2) The following requirements must be met—
 - (a) the goods exist, and are owned by the individual concerned, at the time when the charge is created;
 - (b) the charge is created by a written instrument complying with section 5;
 - (c) the obligation is not an excluded obligation (see section 6).
- (3) A person whose only interest in goods is an equitable interest is not to be regarded for the purposes of this Act as “owning” the goods.
- (4) In this Act “goods mortgage” means a charge created in accordance with this section or section 3.

“An individual”

- 4.7 An individual is a natural person (that is, a human being) rather than a legal person (such as a company, limited liability partnership or other corporate entity). The term is commonly used in statutes, without further definition.⁶⁴
- 4.8 Under English law, an unincorporated partnership is considered to be a group of individuals rather than a corporate entity. This means that the draft Bill applies to individuals who create a charge on behalf of an unincorporated partnership over the assets of the partnership, usually as owners in common. Its scope is different to that of the Consumer Credit Act 1974 (CCA). Unlike the CCA, which excludes those in partnerships of more than three partners,⁶⁵ the draft Bill includes all individual partners irrespective of the size of the partnership. Also, unlike the CCA,⁶⁶ the draft Bill only includes natural persons. Bodies corporate can be partners in an unincorporated partnership, but they cannot grant goods mortgages. Only “human partners” can.
- 4.9 Incidentally, the term “person” (rather than “individual”) is necessary in clause 2(3). Unlike subsections (1) and (2), this applies to the draft Bill as a whole. It is for example relevant for the interpretation of clauses 11 and 12, where a body corporate could be involved.

⁶⁴ For example, “individual” is used without further definition under Consumer Rights Act 2015, s 2(3).

⁶⁵ Consumer Credit Act 1974, s 189(1).

⁶⁶ Consumer Credit Act 1974, s 189(1) defines “individual” to include unincorporated bodies even when they are formed of some corporate bodies.

“A charge”

- 4.10 Under the current law, a security bill transfers ownership of the goods from the borrower to the lender.⁶⁷ It is a “true” mortgage, similar to 19th century land mortgages, where title to the property is transferred to the lender, leaving the borrower with the right to take back the property on payment of all outstanding sums (the “equity of redemption”). Now, land mortgages are no longer characterised as transfers of title but as “charges”, which are a discrete form of security right largely regulated by statute.⁶⁸
- 4.11 In our 2016 report, we suggested that a goods mortgage may take effect either as a true mortgage or as a charge, depending on the choice of the parties.⁶⁹ On further reflection, we reached the view that this was unnecessarily complex, adding to the length of the legislation without providing benefits to either lenders or borrowers.⁷⁰ In our July 2017 consultation, we proposed that a goods mortgage should be characterised as a “charge”.
- 4.12 11 consultees responded to this question, of whom nine agreed, one agreed in part and one disagreed. The Chartered Trading Standards Institute thought that consumers might find the concept of a mortgage easier to understand than that of a charge, which is a relatively unfamiliar legal term. However, our view is that most consumers associate the term “mortgage” with land mortgages, which are also charges.
- 4.13 Therefore, the draft Bill defines a “goods mortgage” as a “charge”, rather than as a transfer of ownership. This aligns goods mortgages with mortgages of land, ships and aircraft, all of which are best characterised as charges.⁷¹ It also provides a more coherent legal framework where the borrower creates more than one security interest over the same property. Under the draft Bill, all subsequent lenders will take charges, rather than a security against the equity of redemption as they do under the current law. All charges will be of the same type and will rank in order of priority.

New recommendation 2

- 4.14 A “goods mortgage” should be a “charge”, rather than a transfer of ownership.

⁶⁷ This is the effect of Bills of Sale Amendment Act 1882, s 9 and schedule. The schedule states that the agreement takes effect by way of assignment.

⁶⁸ Land Registration Act 2002, s 51 describes the security interest on land as “a charge by deed by way of legal mortgage”. For a discussion of the history of this characterisation, see E Cooke, *Land Law* (2nd ed 2012) p 137.

⁶⁹ Bills of Sale (2016) Law Com No 369 para 4.42.

⁷⁰ We explored the differences between a charge and a true mortgage in our 2015 consultation and reached the conclusion that relatively little turned on the distinction. See Bills of Sale (2015) Law Commission Consultation Paper No 225 Appendix 2.

⁷¹ For mortgages of registered land on or after 13 October 2003, this is the effect of Land Registration Act 2002, ss 23(1) and 51. For aircraft mortgages see H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-Based Financing* (2nd ed 2012) para 14.51. It is not entirely clear whether ship mortgages are statutory charges but this is the prevailing view: see H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-Based Financing* (2nd ed 2012) para 14.40. For more details see Law Commission Consultation on draft clauses (July 2017) Appendix 2.

A legal or equitable charge?

- 4.15 The law relating to registered land distinguishes between a legal charge (which is a charge over legal title to land which has been registered with HM Land Registry) and an equitable charge (any other charge over the land). In contrast, all charges over goods are equitable, unless otherwise specified by statute.⁷² Several consultees asked whether a goods mortgage was best seen as a legal charge or as an equitable charge.
- 4.16 The answer is not straightforward, as goods mortgages share characteristics with both legal and equitable charges. Like legal charges, they bind trade purchasers even when they act in good faith without notice. Like equitable charges, they do not bind private purchasers who act in good faith without notice. In other respects, goods mortgages are unique in their consequences (such as the requirement for lenders to serve a possession notice and the sanction for wrongfully taking possession from borrowers). The most accurate description of a goods mortgage is that it is a distinct type of statutory charge which, if not registered, is valid only against the borrower. If registered, it is valid against many (but not all) third parties.⁷³
- 4.17 Goods mortgages are not unique in diverging from the standard classifications. Aircraft and ship mortgages also combine aspects of legal and equitable charges and, for the most part, have their features prescribed by statute.

The effect of a statutory charge

- 4.18 In practice, the effect of a goods mortgage is prescribed in detail in the draft Bill, so there is little room for confusion. For example, the draft Bill sets out the circumstances in which a lender can take possession of the goods and provides for a statutory power of sale.
- 4.19 Where issues arise which are not provided for specifically in the draft Bill, we expect that the courts will consider the law that applies to other types of charge. There is extensive case law about the nature and operation of charges over land, which was recently applied by the Court of Appeal when considering charges over aircraft.⁷⁴

The label of “goods mortgage”

- 4.20 We wish to remove the confusing language of “bills of sale” and replace it with a term that borrowers can understand. We consulted on a variety of labels and concluded that “goods mortgage” was the most readily understood.⁷⁵ This terminology is also familiar to lawyers, as charges on land, ships and aircraft are already referred to as “mortgages”.
- 4.21 The draft Bill therefore refers to the new form of security interest as a goods mortgage.

⁷² L Gullifer, *Goode on Legal Problems of Credit and Security* (5th ed 2014) para 1-05.

⁷³ As discussed at para 7.25 below, a goods mortgage does not bind an innocent private purchaser who buys the goods in good faith and without actual knowledge of the goods mortgage.

⁷⁴ *PK Airfinance SARL v Alpstream AG* [2015] EWCA Civ 1318, [2016] 1 CLC 135.

⁷⁵ Bills of Sale (2016) Law Com No 369 para 4.15. We discussed other possible terms, such as “charge”, “security” or “collateral”, but concluded that they all had the potential to mislead consumers.

OWNERSHIP

4.22 Like a bill of sale,⁷⁶ a goods mortgage can only be granted by the owner of the goods. The draft Bill recognises three types of ownership: sole ownership, joint ownership and ownership in common. Clause 2 deals with sole ownership and clause 3 deals with the other two. Clause 2(3) provides that individuals cannot grant goods mortgages over their equitable interests in goods (such as a beneficial interest under a trust).

Joint ownership and ownership in common

4.23 The distinction between joint ownership and ownership in common is well-established in English law. Joint ownership means that the owners share an undivided right over the whole property. On the death of one joint owner, their interest passes to the other. Owners in common each own a defined share, which is not necessarily an equal share. That share can be sold separately and passes along with the owner's estate on death.

4.24 At common law, where two or more persons purchase goods together, they are held to be joint owners, unless they show an intention to the contrary.⁷⁷ By contrast, in the case of partnerships, there is a strong presumption that goods are owned in common.⁷⁸ This means that under the current law, a single partner can grant a bill of sale on their share of goods.⁷⁹

4.25 The draft Bill draws on this existing distinction. Under clause 3, where two or more people hold property jointly, they must act jointly to create a goods mortgage. Where property is held in common, each owner may create a goods mortgage over their separate share. Clause 3(4) confirms that these principles apply to property held by unincorporated partnerships.

4.26 In response to inquiries received in the consultation, we can confirm that nothing in this clause disapplies the common law rules on whether someone's ownership is joint or in common. It is likely that a joint owner's individual grant of a goods mortgage would constitute severance of the joint ownership,⁸⁰ so as to create a valid goods mortgage over their share.

4.27 These definitions are intended to include trustees, who hold the legal title to trust property. Trustees will therefore be able to grant goods mortgages, subject to the terms of the trust.⁸¹

⁷⁶ Bills of Sale Amendment Act 1882, s 5 states that "a bill of sale shall be void, except as against the grantor, in respect of any personal chattels ... of which the grantor was not the true owner at the time of the execution of the bill of sale".

⁷⁷ As an exception to the rule, the default position for racehorses and ships is that they are owned in common. See M Bridge, L Gullifer, G McMeel and S Worthington, *The Law of Personal Property* (1st ed 2013) para 4-001.

⁷⁸ See *Bathurst v Scarborough* [2004] EWCA Civ 411, [2005] 1 P & CR 4 at [44] per Lord Justice Rix.

⁷⁹ In *Re Tamplin & Son, ex p Barnett* (1890) 59 LJQB 194, one of two partners executed a bill of sale of the partnership property purporting to convey, not only his own share, but the whole of the property. This was deemed to represent a valid bill of sale over the 50% share that the partner had.

⁸⁰ *Williams v Hensman* (1861) 1 J&H 546, 70 ER 862; *Carr v Isard* [2007] WTLR 409; see also C Harpum, S Bridge and M Dixon, *Megarry & Wade: The Law of Real Property* (8th ed 2012) para 13-036.

⁸¹ If the trustees exceed their authority or breach prohibitions on self-dealing in granting the goods mortgage, the beneficiaries may be entitled to rescind it: see C Mitchell, D Hayton and P Matthews, *Underhill and Hayton Law of Trusts and Trustees* (19th ed 2016) para 87.55.

3 Goods mortgages: co-owners

- (1) Where qualifying goods are owned jointly by two or more individuals, those individuals may in accordance with subsection (3) together create a charge over the goods as security for the discharge of an obligation.
- (2) Where qualifying goods are owned in common by two or more persons, any of those persons who is an individual may in accordance with subsection (3) create a charge over his or her undivided share in the goods as security for the discharge of an obligation.
- (3) The following requirements must be met—
 - (a) the goods exist, and are owned by the person or persons concerned, at the time when the charge is created;
 - (b) the charge is created by a written instrument complying with section 5;
 - (c) the obligation is not an excluded obligation (see section 6).
- (4) References to ownership jointly or in common with others by an individual include references to ownership jointly or in common with others by an individual as a member of a partnership (other than a limited liability partnership).

Equitable interests

- 4.28 Clause 2(3) deals with cases where the borrower has only an equitable interest in the goods. The main example of an equitable interest is that of a beneficiary under a trust, but there are others, such as equity by estoppel and “mere equity”.⁸² These sorts of interests do not amount to “ownership” for the purposes of the draft Bill.
- 4.29 We do not think that a beneficial interest can be seen as ownership of tangible, moveable goods. In legal terms, the rights of beneficiaries under a trust are normally treated as intangible rights (“things in action” or “claims”) rather than “things in possession”, such as goods.⁸³ Moreover, a beneficiary is not an “owner” in the way someone who has direct title is: beneficiaries with only subordinate rights (that do not necessarily amount to a right to take possession) should not be able to enter into a transaction which could result in the lender taking physical possession of the goods.
- 4.30 In our July 2017 consultation, we asked if consultees agreed that beneficiaries under trusts should not be able to grant goods mortgages. We had 10 responses: nine agreed and one disagreed. Of those who agreed, Boodle Hatfield LLP was keen to ensure that the draft Bill does not limit beneficiaries’ ability to grant other security interests currently

⁸² The latter is perhaps less pertinent to goods. Examples of “mere equities” include the right of a claimant to rescind a transfer of property for fraud, misrepresentation or undue influence, or possibly a claim to an equitable interest in a substituted asset into which the claimant can trace their original property: see J McGhee, *Snell’s Equity* (33rd ed 2016) para 2-006.

⁸³ See, for example, G Tolhurst, *The Assignment of Contractual Rights* (2nd ed 2016) p 11; Falcon Chambers and P Morgan (eds), *Fisher and Lightwood’s Law of Mortgage* (14th ed 2014) para 17–1.

available to them. Similarly, the Chancery Bar Association said that “it would be odd if the option of charging an interest under a trust were not open at all”.

- 4.31 Two members of the Financial Law Committee of the City of London Law Society (CLLS), Richard Calnan and Dorothy Livingston,⁸⁴ considered that beneficial owners should be treated just like legal owners and should have the benefit of the protections in the draft Bill.
- 4.32 The draft Bill does not allow individuals to grant goods mortgages over their equitable interests in goods. Nevertheless, we can confirm that nothing in the draft Bill affects the ability of equitable owners to deal with their interests in goods other than through a goods mortgage.
- 4.33 We do not think it is appropriate, or indeed necessary, to extend the protections in the draft Bill to equitable owners. Mortgaging equitable interests is done by assignment, which is subject to fully developed rules of equity, outside the scope of our reform. Someone with solely an equitable interest in goods would be able to transfer only their limited interest to the creditor. The creditor would take subject to other equities in the goods and would need to resolve its claim to the goods with the trustee (or whoever has legal title).⁸⁵ In this context, the possession notice procedure and right to voluntary termination set out in the draft Bill are wholly unsuitable for mortgages of equitable interests. Further, a purchaser would buy the goods from the trustee, not the beneficiary, and would take free of the mortgage of the equitable interest anyway if acting in good faith and without notice.⁸⁶
- 4.34 Clause 2(3) of the draft Bill provides that goods mortgages cannot be granted over any equitable interest.

New recommendation 3

- 4.35 An individual who has only an equitable interest in goods should not be considered to be an owner for the purposes of granting a goods mortgage.

WHAT GOODS CAN BE USED FOR A GOODS MORTGAGE?

The goods must exist

- 4.36 One of the purposes of the bills of sale legislation was to prevent individuals from borrowing money against goods which they did not own, but which they might own in the future (sometimes referred to as “after-acquired property”).⁸⁷

⁸⁴ Richard Calnan of Norton Rose Fulbright LLP and Dorothy Livingston of Herbert Smith Freehills LLP prepared a response on behalf of the Committee but explained that the consultation period was too short to allow the Committee to agree the full text. They did, however, discuss their response with other members of the Committee.

⁸⁵ See J McGhee, *Snell's Equity* (33rd ed 2016) para 37-020 and ch 3 generally.

⁸⁶ See L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts* (19th ed 2016) para 41-117.

⁸⁷ Bills of Sale Amendment Act 1882, s 5, states that the grantor of the bill of sale must be the true owner of the secured property “at the time of the execution of the bill of sale”. However, s 6(2) of that Act provides for an exception: where fixtures, plant and trade machinery are substituted for those named in the schedule, they become subject to the security. The draft Bill removes this exception.

- 4.37 The draft Bill preserves this prohibition on borrowing money against future goods. As we argued in our 2016 report, security over future goods has the potential to be exploitative.⁸⁸ Clause 2(2)(a) therefore states that the goods must exist and be owned by the individual concerned at the time the charge is created.⁸⁹
- 4.38 This is not intended to prevent individuals from using goods mortgages to secure a loan to buy the goods. This would be permitted, provided that title to the goods passes to the buyer before the buyer charges those goods under a goods mortgage. In 2015, we expressed concern that bills of sale could be used in this way to buy new goods and therefore avoid the protections provided by hire-purchase legislation. Under the draft Bill, this is no longer a concern, as the protections for goods mortgages are broadly comparable to those in hire-purchase and conditional sale legislation.⁹⁰

Tangible goods

- 4.39 The draft Bill applies only to tangible moveable goods – that is, things one can touch and move. It does not apply to “things in action”⁹¹ and other forms of intangible property. In particular, it does not cover securities such as company shares or bonds or intellectual property rights. It is currently possible for individuals to grant security interests over these forms of intangible property, but not under bills of sale legislation. Security on intangible property is outside the scope of this project and we are not proposing any changes to the current position.

Crops and fixtures

- 4.40 In our 2017 consultation, we considered how far it should be possible to grant a goods mortgage over items attached to land, such as crops or fixtures.

The current law: the distinction between goods and land

- 4.41 In some circumstances, crops are considered to be goods. For example, yearly crops, produced through an annual cycle of planting and reaping,⁹² have been treated as goods, provided that the owner sells them on terms that they will be severed from the land and delivered. However, other “natural” crops (including timber, fruit and grass) are considered to be land.⁹³
- 4.42 Items which are fixed to the land may also be treated as “fixtures” (and therefore part of the land), depending on the degree to which they have been attached to the land and the purpose for which they have been attached. As we explained in Appendix 3 to the

⁸⁸ Bills of Sale (2016) Law Com No 369 paras 4.68 to 4.72.

⁸⁹ See also clause 3(3)(a) for co-owned goods.

⁹⁰ The main differences relate to voluntary termination and the requirement for the lender to seek a court order before taking possession. If the hire-purchase borrower exercises their right to voluntary termination, they must also pay half of the price if they have not already done so. Under goods mortgages, borrowers have a right to voluntary termination at any time without making further payments. However, in hire-purchase and conditional sale, lenders must always obtain a court order to repossess goods, whereas goods mortgage borrowers must “opt in” to this right.

⁹¹ A “thing in action” is the right to go to court to recover money or damages. See M G Woodley, *Osborn’s Concise Law Dictionary* (12th ed 2013).

⁹² These are referred to as “industrial crops”, produced by the annual labour of sowing and reaping. See *Marshall v Green* [1874-80] All ER Rep Ext 2198 at [2202].

⁹³ These are referred to as “natural crops”, produced through the natural growth of the soil. See *Halsbury’s Laws of England* (2008) vol 1 *Agricultural Land* para 370.

July 2017 consultation, there is substantial but not altogether consistent case law about when goods become fixtures. Examples of items which have been held to be fixtures (and therefore part of the land) include:

- (1) machines bolted to the factory floor;⁹⁴
- (2) a carillon clock which rested on its own weight but was part of the design of a historic house;⁹⁵ and
- (3) kitchen units and bathroom fittings (including mirrors and towel rails).⁹⁶

4.43 Examples of items which are not fixtures include “white goods” (such as freestanding ovens and refrigerators) and fitted carpets and curtains.⁹⁷

4.44 At common law, fixtures are “land”. Therefore, a land mortgage automatically includes fixtures, even if the item is not specified in the mortgage document, and even if the fixture is attached to the land after the land mortgage has been granted.⁹⁸

4.45 The Bills of Sale Acts deemed fixtures to be goods for the purposes of granting a bill of sale over them⁹⁹ and we proposed to replicate the existing legal provisions. This gave rise to issues of priority between:

- (1) land mortgages and goods mortgages on existing fixtures; and
- (2) land mortgages and goods mortgages on goods which subsequently became fixtures.

In both these cases, the land mortgage lender would take free of the goods mortgage lender’s interest, under the existing law on fixtures.¹⁰⁰

Our tentative proposals in July 2017

4.46 In the July 2017 consultation we noted that this could have unfair consequences for goods mortgage lenders. For example, a lender could lend money against an antique mirror or a statue, without it being obvious that the item would become a fixture.¹⁰¹ When the borrower attached the mirror or statue to their mortgaged house, the land mortgage lender would get the benefit and the goods mortgage lender would lose their security.

4.47 We tentatively proposed that a goods mortgage lender should take priority over a land mortgage lender where the goods mortgage was created before the land mortgage, or

⁹⁴ *Reynolds v Ashby & Son* [1904] AC 466. In *Jordan v May* [1947] KB 427 an engine fixed by bolts was held to be a fixture but its batteries were not, as they were connected by wires.

⁹⁵ *Kennedy v Secretary of State for Wales* [1996] EGCS 17.

⁹⁶ *TSB Bank Plc v Botham* (1996) 73 P & CR D1.

⁹⁷ *TSB Bank Plc v Botham* (1996) 73 P & CR D1.

⁹⁸ See *Halsbury’s Laws of England* (2016) vol 77 *Mortgage* para 169; see also Law of Property Act 1925, ss 62(1) and 205(1)(ix).

⁹⁹ Bills of Sale Act 1878, s 4.

¹⁰⁰ In *Longbottom v Berry* (1869-70) LR 5 QB 123, the borrower granted a mortgage over his land, then bought machinery, affixed it to the land and granted a bill of sale over the machinery. The land mortgagee took the land and the fixtures. Although this case pre-dates Bills of Sale Amendment Act 1882, it was cited with approval in *Reynolds v Ashby & Son Ltd* [1904] AC 466 and appears to reflect the current law.

¹⁰¹ See *D’Eyncourt v Gregory* (1866) LR 3 Eq 382 and *Kennedy v Secretary of State for Wales* [1996] EGCS 17 for examples of art and decorative objects which were held to be fixtures.

where the goods were not affixed to the land until after the goods mortgage had been granted.

4.48 This proposal drew a mixed response, with strong voices against any interference with the law of land mortgages. UK Finance, representing mortgage lenders, flagged the extra expense for land mortgagees of checking the goods mortgage register and the risks of damage and diminution in value of the land through the removal of fixtures. They said that this would add costs to borrowing against land mortgages. On balance, both UK Finance and HM Land Registry thought that crops and fixtures should be excluded from the draft Bill.

4.49 Two members of the Financial Law Committee of the CLLS, Richard Calnan and Dorothy Livingston, argued that our tentative proposal was incompatible with land law principles:

From a land law perspective, it is crucial that a purchaser or mortgagee of registered land takes free of any interest in the land which is not noted on the register or an overriding interest ... The proposal would cut across conveyancing practice and would introduce different rules for charges created by individuals from those which apply to charges created by companies.

4.50 Dr Sean Thomas from Durham Law School agreed that the current law causes injustice to both residential land mortgage borrowers and those with security interests in goods. However, the problem went further than goods mortgages and extended to hire-purchase law. He argued that in a consumer context, it should not be possible for land mortgage lenders:

to take security over objects, merely on the basis that those objects have become affixed to the land, where such affixation is ... [not] a consequence of the goods being designed to be part of the land per se (a good distinction here may be between bricks being used to build an extension and solar-panels being attached to stop them falling off the roof).

Our current view

4.51 In light of the strength of some of the arguments in the consultation responses, the draft Bill no longer deems fixtures to be goods. Nor does it include any provisions about the priority between goods mortgages and land mortgages. This has the following consequences:

- (1) goods mortgages cannot be granted over growing crops or fixtures; and
- (2) where goods subject to a goods mortgage become fixtures, the goods mortgage is extinguished. This is the position under the current law.

4.52 We remain of the view that there is the possibility of unfairness where an item (such as a work of art) subject to a goods mortgage is attached to land so that it becomes a fixture. In this case, the goods mortgagee loses their security interest to the land mortgagee (or land owner). This risk of unfairness is aggravated by the fact that the case-by-case judicial analyses of what constitutes a “fixture” have not been entirely consistent.¹⁰²

¹⁰² For example, statues were held to be fixtures in *D'Eyncourt v Gregory* (1866) LR 3 Eq 382 but to be goods in *Berkley v Poulett* [1977] 1 EGLR 86.

4.53 However, these issues are a feature of land law and we accept that it would not be appropriate to attempt to tackle them in this draft Bill. We fear that any change to the rules of priorities between security interests on goods and land mortgages could have unexpected consequences for conveyancing and for mortgage borrowing. The Government may wish to consider a specific review of the law of fixtures and other items attached to land (such as crops) in the future.

New recommendation 4

4.54 The draft Bill should not allow goods mortgages to be granted on fixtures and growing crops. The draft Bill should not affect the common law rules on the interaction between security on goods and security on land.

4.55 In our July 2017 consultation, we mentioned that, under existing law, hire-purchase lenders appear to be able to protect their interests to some extent from the consequences of the law of fixtures.¹⁰³ They can do so by reserving a right of entry to remove the goods if they become fixtures and by placing a notice of this right on the land register. We do not think this avenue would be open to goods mortgages lenders. This is because the combined effect of clauses 16 (Entry onto premises) and 27 (Contracting-out forbidden) prevents goods mortgages lenders from reserving a right of entry.¹⁰⁴

Essential household goods

4.56 In our 2016 report, we said:

[The CLLS] was concerned about the potential for oppressive security over essential household goods for very small loans. There is little indication that lending secured on essential household goods is, or would become, commonplace. Nevertheless, we think it may be helpful to include a regulation-making power in the new legislation prohibiting borrowers from granting security over specified essential household goods should abuses arise.

4.57 However, on reflection, we do not consider that it would be appropriate to confer a power to make secondary legislation in these circumstances. We have no evidence to show that bills of sale over any goods that could be considered “essential household goods” have proven problematic and therefore it is unlikely that the power would ever be used.

4.58 We have not therefore included a regulation-making power in the draft Bill to provide for the exclusion of essential household goods.

4.59 We have also been asked about the interaction between goods mortgages on essential household goods and bankruptcy. We consider that it is very unlikely that essential household goods will be used as security, because of their low value. However, as a general remark, we do not wish to interfere with the existing bankruptcy rules, which

¹⁰³ Law Commission Consultation on draft clauses (July 2017) Appendix 3 paras 3.12 to 3.13.

¹⁰⁴ The hire-purchase lender can only reserve a right of entry in hire-purchase agreements not regulated under Consumer Credit Act 1974. Consumer Credit Act 1974, ss 92 and 173 (which the draft Bill copies) exclude the option of reserving a right of entry for regulated hire-purchase agreements. See H Beale, *Chitty on Contracts* (32nd ed 2015) para 39-419, fn 2252.

would apply in the usual way when someone with a goods mortgage becomes bankrupt.¹⁰⁵

Implementing the policy: “qualifying goods” under clause 4

4.60 Clause 4 defines qualifying goods for the purposes of the draft Bill. Clause 4(2) sets out the general principle: the draft Bill applies to tangible moveable goods. In interpreting the meaning of “tangible moveable goods”, we expect the courts to draw on the current case law on the meaning of goods, including cases which distinguish between goods and land.

4 Qualifying goods

- (1) This section applies for the interpretation of this Act.
- (2) “Goods” means tangible moveable property.
- (3) “Qualifying goods” means goods other than—
 - (a) excluded items, or
 - (b) goods that are outside England and Wales at the time when the charge is created.
- (4) In subsection (3) “excluded items” means—
 - (a) aircraft registered in the United Kingdom;
 - (b) anything that is by virtue of provision made under subsection (2)(f) of section 86 of the Civil Aviation Act 1982 included in a mortgage registered by virtue of that section;
 - (c) a ship as defined by section 313(1) of the Merchant Shipping Act 1995;
 - (d) currency notes or coins that (in either case) are legal tender in the United Kingdom or elsewhere.

4.61 Several items which would otherwise fall within the definition of “goods” in clause 4(2) are thus “excluded” from the category of “qualifying goods”. They are set out in clause 4(4). The exclusions relate to aircraft, ships and legal tender. We look at these in more detail below.

¹⁰⁵ On bankruptcy, “such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family” are exempted from the bankrupt’s estate and would not be available for distribution by the trustee in bankruptcy (Insolvency Act 1986, s 283(2)). However, s 283(5) provides that the vesting of the bankrupt’s assets in the estate is subject to the rights of the secured creditors, and s 285(4) states that a bankruptcy order does not affect a secured creditor’s right to enforce their security. We think that the effect of these sections is that a secured creditor, be it a bills of sale or goods mortgage creditor, can enforce their security in the usual way, outside the distribution of assets in the bankruptcy. For an example of bills of sale enforcement outside the distribution of assets in bankruptcy see *Evans v Finance-U-Ltd* [2013] EWCA Civ 869, [2014] RTR 8. In any case, the lender would certainly be free to take possession of the mortgaged goods (subject to the protections in the draft Bill) after the bankruptcy is discharged (s 281(2)).

Aircraft

- 4.62 Mortgages over UK-registered aircraft are registered in a specialised aircraft register held by the UK Civil Aviation Authority (CAA),¹⁰⁶ and are excluded from the Bills of Sale Acts.¹⁰⁷ Our policy is to maintain this position. Under clause 4(4)(a), UK-registered aircraft are excluded. Instead, they must be mortgaged under the Mortgaging of Aircraft Order 1972 (“the 1972 Order”) and not as goods mortgages.
- 4.63 The position over aircraft parts is more complex. Presently, aircraft engines and other spare parts could be made subject to a bill of sale – though in some circumstances they can also be mortgaged under the 1972 Order. Under article 3 of the 1972 Order, aircraft may be mortgaged together with engines and any “store of spare parts”. Subsection 4(4)(b) of the draft Bill excludes any aircraft-related items which are already subject to an aircraft mortgage. However, it allows an individual to grant a goods mortgage over aircraft parts which have not been mortgaged together with the aircraft.
- 4.64 In addition to domestic registration, security over aircraft can be registered internationally. Security interests in “aircraft objects” created under the Cape Town Convention¹⁰⁸ can be registered as “international interests” with the International Registry.¹⁰⁹ The International Registry regime is additional to domestic registers and aircraft mortgages continue to be registrable with the CAA.
- 4.65 Under the Cape Town Convention, a registered international interest has priority over any interest that was not registered as an “international interest” (including aircraft mortgages registered with the CAA and registered goods mortgages over aircraft parts). Nothing in the draft Bill affects the registration or grant of international security interests over aircraft or parts of aircraft.¹¹⁰
- 4.66 While a security bill over a non-UK registered aircraft remains possible in law,¹¹¹ in practice we have been unable to find any cases. As we are maintaining the current law, it would be possible for an individual owner to grant a goods mortgage over aircraft registered outside the UK. However, goods mortgages over foreign-registered aircraft would be subject to conflict of laws rules and may be precluded by the laws of the jurisdiction in which the aircraft was registered.

¹⁰⁶ See Mortgaging of Aircraft Order 1972 SI 1972 No 1268.

¹⁰⁷ The Bills of Sale Acts do not apply to mortgages of UK-registered aircraft made on or after 1 October 1972: see Mortgaging of Aircraft Order 1972 SI 1972 No 1268, art 16(1).

¹⁰⁸ Cape Town Convention on International Interests in Mobile Equipment 2001.

¹⁰⁹ An international interest can be created where a security agreement in respect of an aircraft object is entered into by a debtor located in a contracting state at the time the agreement is concluded, or where the aircraft is registered in a contracting state.

¹¹⁰ Draft Bill, clause 8(4)(d).

¹¹¹ D McClean, *Shawcross and Beaumont: Air Law* (June 2017) Div IV para 47.

Ships

The current law of ship mortgages

4.67 At present, all ship mortgages are excluded from the scope of the Bills of Sale Acts.¹¹² As with aircraft, a separate legal regime governs security over certain ships.¹¹³ The Merchant Shipping Act 1995 (“the 1995 Act”) together with The Merchant Shipping (Registration of Ships) Regulations 1993 provide for a single central register for ships. The UK Ship Register is divided into four parts:

- (1) Part I for ships owned by qualified persons which are neither fishing vessels nor registered as small ships.
- (2) Part II for fishing vessels. Owners have a choice between full registration and simple registration.
- (3) Part III for small ships.
- (4) Part IV for bareboat chartered ships.¹¹⁴

4.68 The 1995 Act sets out a scheme for the registration of mortgages, which applies to ships registered under Part I and to fishing vessels registered under Part II with full registration. Where these ships are mortgaged, the mortgage must be registered in the UK Ship Register against the ship. However, these provisions do not apply to small ships, to fishing vessels with only simple registration, or to unregistered ships.¹¹⁵ It is possible to create a legal mortgage over these vessels at common law, but there is no obligation to register that mortgage.

4.69 In most cases, mortgages on these types of ships are registered – either because the owners are required to register the mortgage at Companies House¹¹⁶ or because they choose to register their ship under Part I or Part II with full registration. Nevertheless, in some cases third party purchasers of the ships can fall victim to the gap in the law of ship mortgage registration. One such case was *The Shizelle*,¹¹⁷ where a mortgage was granted against an unregistered ship. The ship was subsequently acquired by third party purchasers in good faith with no notice of the mortgage. The court held that the unregistered mortgage was enforceable against the purchasers although they had no

¹¹² Bills of Sale Act 1878, s 4: “the expression ‘bill of sale’ ... shall not include ... transfers or assignments of any ship or vessel or any share thereof”.

¹¹³ See Merchant Shipping Act 1995 and Merchant Shipping (Registration of Ship) Regulations 1993 SI 1993 No 3138.

¹¹⁴ A bareboat charter is an arrangement for the chartering or hiring of a ship or boat, under which no crew or provisions are included along with the vessel.

¹¹⁵ Merchant Shipping Act 1995, s 10(4) and Merchant Shipping (Registration of Ship) Regulations 1993 SI 1993 No 3138, regs 3 and 91. Mortgages over bareboat charters are also exempt, but this does not pose problems as the ships are subject to the mortgaging rules of their country of registration. If the ships subject to a bareboat charter have their primary registration in the UK, the same rules apply to them as to any other ships registered in the UK.

¹¹⁶ Where the owners of the ship are incorporated in England and Wales or have a place of business in England and Wales, the mortgage on the ship must be registered against them at Companies House.

¹¹⁷ *The Shizelle* [1992] 2 Lloyd’s Rep 444.

means of finding out about it. The judge hoped that “the lacuna can be filled by introducing a system of registration of mortgages for all British ships”.¹¹⁸

Our tentative proposal in July 2017

- 4.70 In July 2017, we consulted on whether all ship mortgages granted by individuals which were not registered on the UK Ship Register should be registered as goods mortgages. We thought this might remove the problem of unregistered ship mortgages. Individual ship owners would have a choice: they could either use a goods mortgage, or they could register their ships under Part I or Part II of the UK Ships Register and abide by the rules of that regime.
- 4.71 We received five responses on this issue, including one from Watson Farley & Williams who provided very detailed comments. They expressed concerns about the fragmented law of ship mortgages which would result. Effectively, there would be three regimes: one for mortgages registered on the Ship Register, a second for mortgages registered at Companies House but not on the Ship Register and a third for goods mortgages. They thought that some rules in the draft Bill were inappropriate for ships, including the rule that private purchasers take free of the mortgage, even if the mortgage is registered. The possession process would also be incompatible with the right to arrest a ship and apply to the Admiralty Court for an order for sale. It was particularly important for a ship mortgage lender to take possession quickly, before the ship left the jurisdiction.
- 4.72 Watson Farley & Williams argued that the problem of unregistered ship mortgages could be resolved in other ways by, for example, extending the ship register or creating another specialist register. The issue required further consultation.

Our current view

- 4.73 Following consultation, we have concluded that it would be better not to extend goods mortgages to ships. Instead clause 4(4)(c) follows the current law by excluding all mortgages on ships from the regime. A “ship” is defined as “every description of vessel used in navigation”.¹¹⁹
- 4.74 Although there are problems created by unregistered ship mortgages, we do not think the draft Bill on goods mortgages is the appropriate place to address these issues. Instead, any reform should focus on the nature of ship mortgages and would require wider consultation with shipping stakeholders.

New recommendation 5

- 4.75 All ships should be excluded from the goods mortgages regime.

¹¹⁸ *The Shizelle* [1992] 2 Lloyd’s Rep 444 at [451] by Deputy High Court Judge Adrian Hamilton QC. For further comment see A Mandaraka-Sheppard, *Modern Maritime Law Volume 2: Managing Risks and Liabilities* (3rd ed 2013) ch 4; and H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-Based Financing* (2nd ed 2012) para 14.42.

¹¹⁹ As in Merchant Shipping Act 1995, s 313(1).

Coins and notes which are legal tender

4.76 Clause 4(4)(d) excludes notes and coins which may be used as legal tender in the UK or overseas. This exclusion is similar to that in the Sale of Goods Act 1979, which prevents “money” from being counted as “goods”.¹²⁰ This would not prevent individuals from using antique coins or banknotes as security.¹²¹

WHAT OBLIGATIONS CAN BE SECURED?

Removing the current restrictions

4.77 Effectively, bills of sale can only be used to secure fixed sum loans, where the amount of the loan and repayment schedule are set out in advance. This is because the document creating a security bill must include 12 separate pieces of information, including the loan amount, the rate of interest, the repayment instalments and the date by which repayment is to be made.¹²²

4.78 In the course of our project, we were told that this hampers the ability of unincorporated businesses to borrow money on the security of their goods. In particular, they cannot use goods as security for more flexible forms of credit, such as overdrafts or other “running-account” credit facilities, where the borrower is free to borrow varying amounts from time to time up to a maximum limit. We were also told that it causes problems where a company director is asked to guarantee the company’s loans and wishes to use their own goods to secure the guarantee. High net worth individuals may own valuable paintings or antiques, but the Bills of Sale Acts prevent them from using these objects to secure a guarantee, because the amount and repayment dates cannot be specified in advance.

4.79 We wish to remove unnecessary regulation which prevents businesses and high net worth individuals from using goods to secure a wider range of obligations – not just fixed sum loans.

4.80 However, since our 2016 report we have been persuaded that there is a need to protect potentially vulnerable borrowers from entering into imprudent goods mortgages. As discussed below, we have now reached the conclusion that it would be inappropriate to allow non-exempt borrowers to grant goods mortgages to secure guarantees and running-account credit. Furthermore, a goods mortgage should never be used to secure an employment obligation or one to perform services personally.

The need for borrower protection

Guarantees

4.81 In November 2016, Citizens Advice drew our attention to the rising number of people seeking their help with problems over “guarantor loans”. This is where “the borrower gives the name of a guarantor, normally a friend or family member, who is then pursued for payment if the borrower can’t repay”.¹²³ Consumer protection agencies told us that these loans carry a substantial risk that the guarantors will be faced with unexpected

¹²⁰ Sale of Goods Act 1979, s 61(1).

¹²¹ Cryptocurrencies such as Bitcoin, however, are intangible property and not within the scope of the draft Bill.

¹²² Under Bills of Sale Amendment Act 1882, s 9 a bill used for security is void unless it is made in accordance with the form in the schedule to that Act. The form imposes the 12 requirements.

¹²³ See press release of 19 February 2017 available at <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/citizens-advice-reports-rise-in-guarantor-loan-problems/>.

demands for payment, but that people were often unaware of this danger. These problems would be exacerbated if guarantors' goods were also at risk.

- 4.82 In July 2017, we proposed that only high net worth individuals should be able to use goods mortgages to secure guarantees. We asked consultees if they agreed: seven out of ten responses agreed and one partly agreed. The debt charity, StepChange, drew on their experience to make a powerful argument that ordinary consumers should not be able to use goods as security for guarantees:

We have evidence from our clients that indicates borrowers can feel significant pressure to prioritise repaying a guarantor loan in order to ensure their guarantor, who could be a close friend or family member, is not asked to repay. This pressure could be seriously aggravated if the guarantor also risked losing valuable goods such as a car.

- 4.83 Consumer protection agencies suggested that guarantors do not always fully understand their obligations. Combining the complexity of a goods mortgage, which some consumers can already struggle to understand, with the complexity of a guarantor loan is likely to intensify the difficulties borrowers can face in understanding the credit agreement they have taken out and the risks associated with it.
- 4.84 Several consultees asked why the right to use goods mortgages to secure guarantees should be confined to high net worth individuals, rather than also including businesses borrowing more than £25,000. Richard Calnan and Dorothy Livingston wondered why businesses could secure overdrafts but not guarantees.
- 4.85 The reason for the difference is that a business which takes out an overdraft or other running-account credit does so as part of the business and will usually secure the debt on business property. We are not convinced that there is any demand for individuals acting in the course of business to be able to secure someone else's debt against business assets. As a matter of course, guarantees are granted personally by individuals who are then at risk of losing their personal property.

New recommendation 6

- 4.86 Only high net worth individuals should be able to use goods mortgages to secure guarantees.

Running-account credit

- 4.87 Consumer protection agencies were also concerned at the prospect that consumers would be asked to give goods mortgages over vehicles as security for overdrafts or credit card debts, which could trap borrowers in a cycle of debt. They pointed out that these credit arrangements could last for years. While borrowers are in work they might give a goods mortgage with little thought, because they are not concerned about their ability to repay. These arrangements might come back to haunt them when their circumstances change and they are unable to pay their debts. They may then find their car repossessed.
- 4.88 At present, there does not appear to be any demand for consumers to secure overdrafts or credit card debts on goods. However, consumer protection agencies feared that if

the law were changed, some credit card lenders may start to ask for goods mortgages from less well-off borrowers to secure their credit card borrowing.

4.89 In July 2017, we proposed that only businesses borrowing over £25,000 and high net worth individuals should be able to use goods mortgages to secure running-account credit. We drew on the existing definition of running-account credit in section 10 of the CCA.

4.90 Of the 11 consultees who answered this question, eight fully agreed and one partly agreed. Two consultees expressed concern. Boodle Hatfield LLP argued in favour of greater flexibility in the range of applications of goods mortgages, including the ability to use goods mortgages to secure running-account credit. However, they acknowledge that:

It may not be desirable for goods mortgages to become widely used as a method of securing running-account credit such as overdrafts and vulnerable borrowers will need to be adequately protected.

4.91 There appears to be broad agreement that it would be undesirable for goods mortgages to become widely used to secure overdrafts or credit card debts.

New recommendation 7

4.92 Only businesses borrowing more than £25,000 and high net worth individuals should be able to use goods mortgages to secure running-account credit.

Obligations to perform work or services personally

4.93 Not all obligations are to pay money. In the course of this project, we were told about other obligations which could possibly be secured by a goods mortgage. Examples include obligations to return shares under a stock lending agreement, to supply stock or goods, or to abide by the terms of a licence agreement over intellectual property rights.

4.94 Our starting point is that, at least for more commercially aware borrowers, the legislation should be written in broad terms to allow flexible arrangements. However, this must be reconciled with the need to protect individuals who are generally more vulnerable against exploitative arrangements.

4.95 The draft clauses published in July 2017 defined a goods mortgage as security “for the discharge of an obligation”.¹²⁴ This followed the current statutory provisions for other types of securities over property.¹²⁵

¹²⁴ “Obligation” in legislative language, including in the draft Bill, means “legally enforceable obligation”, not, for example, agreements to marry or to follow a certain religion.

¹²⁵ Merchant Shipping Act 1995, sch 1, para 7(1): “[a ship mortgage may be used as] security for the repayment of a loan or the discharge of any other obligation”. Land mortgages may be used “for securing money or money’s worth”: Land Registration Act 2002, s 132. There is little practical difference between “money’s worth” and “any obligation”, as any obligation can be valued in terms of money. See also Mortgaging of Aircraft Order 1972 SI 1972 No 1268, art 3, which defines an aircraft mortgage as “security for a loan or other valuable consideration”.

- 4.96 However, we noted concerns expressed by the CLLS, in particular, that people might be exploited if unscrupulous persons were able to take goods mortgages to secure the personal performance of services. They suggested that compelling an individual to perform services under the threat of losing essential property might be akin to “trucking, bondage or slavery”.¹²⁶ We therefore asked whether it was necessary to have further statutory provisions to prevent goods mortgages from being used to secure the performance of services.
- 4.97 Out of six responses, four argued that there should be further protections to prevent goods mortgages from being used to exploit certain categories of people. Richard Calnan and Dorothy Livingston expanded on the previous concern of the CLLS that a “goods mortgage could be used to force a person to remain in employment they wished to leave”.¹²⁷ The Chartered Trading Standards Institute agreed:
- As this Draft Bill is replacing legislation deemed only used as an act of desperation we would share the concerns of the CLLS.
- 4.98 Similarly, Money Advice Trust feared that allowing goods mortgages to be used for any obligation “could encourage innovation by the unscrupulous lender and cause harm in the future”. They thought that, given that the legislation needs to continue to work into the future, “it is wise to take a cautious approach in this matter”. Logbook Money also supported further restrictions.
- 4.99 Boodle Hatfield LLP put the contrary argument. They warned against creating a securities regime which is inconsistent with the other regimes and gave examples of non-monetary obligations which might usefully be secured by a goods mortgage (such as the ones we mention above).
- 4.100 There are already protections in place against the most serious exploitation. Section 1 of the Modern Slavery Act 2015 prohibits “forced or compulsory labour” and “servitude”. This would also include cases of “debt bondage”. However, there remains at least a theoretical risk that, for example, a “gig economy” worker might be asked by the company they work for to grant a goods mortgage over their car or motorbike in order to “guarantee” the performance of their job.
- 4.101 We do not wish to exclude all non-monetary obligations, but have concluded that there should be an exclusion to prevent goods mortgages from being used to force people to remain in work relationships. This would not prevent goods mortgages from being used for a variety of commercial transactions, including obligations to sell goods or return stock.

New recommendation 8

- 4.102 Goods mortgages should not be used to secure obligations under a contract of employment and other obligations to perform work or services personally.

¹²⁶ Bills of Sale (2016) Law Com No 369 para 4.25.

¹²⁷ They also expressed concerns about goods mortgages being used to secure obligations relating to marriage or the practice of religion. However, these would not be legally enforceable, so could not be made subject to a goods mortgage. For example, under Law Reform (Miscellaneous Provisions) Act 1970, s 1, a contract to marry cannot give rise to legal rights.

Implementing the policy: excluded obligations under clause 6

4.103 Our policy is set out in clause 6.

6 Excluded obligations

- (1) References in this Part to an “excluded obligation” are to be read in accordance with this section.
- (2) An obligation is an excluded obligation if it—
 - (a) is an obligation of the intended mortgagor as employee under a contract of employment, or
 - (b) requires the intended mortgagor to do or perform personally any work or services.
- (3) A guarantee is an excluded obligation unless—
 - (a) the high net worth conditions (see section 7(2)) are met, and
 - (b) the instrument creating the goods mortgage includes the appropriate declaration (see subsection (5)).
- (4) The obligation of the debtor under an agreement for running-account credit is an excluded obligation unless—
 - (a) the high net worth conditions (see section 7(2)) or the business credit conditions (see section 7(3)) are met, and
 - (b) the instrument creating the goods mortgage includes the appropriate declaration (see subsection (5)).
- (5) In this section “the appropriate declaration” means a declaration by the mortgagor which—
 - (a) acknowledges that the mortgagor will not have available the protection and remedies that would be available to the mortgagor under sections 19(1) and 23(2) in the case of a goods mortgage other than an exempt goods mortgage (see section 26), and
 - (b) complies with prescribed requirements.
- (6) In this Act “guarantee” includes an indemnity given by a person in respect of the obligations of another.
- (7) Schedule 1 makes provision for the purposes of this section about the meaning of “running-account credit” and related matters.

Guarantees

4.104 The effect of clause 6(3) is that only high net worth individuals may use a goods mortgage to secure a guarantee.¹²⁸ The mortgage document must include a declaration in the prescribed format, in which the borrower acknowledges that they will not have the right to a possession notice under clause 19(1) or the right to voluntary termination under clause 23(2).

4.105 The courts have defined a “guarantee” as:

a contract whereby the surety (the guarantor) promises the creditor to be responsible for the due performance by the principal of his existing or future obligations to the creditor if the principal fails to perform them or any of them.¹²⁹

4.106 Clause 6(6) extends this definition by including indemnities given in respect of the obligations of another person.¹³⁰ In a pure guarantee, the guarantor is only liable if the principal is liable. In other words, if the principal borrower has a defence against the action, the guarantor has the same defence. However, under an indemnity, the person in the position of the guarantor is liable to pay even if the agreement with the principal borrower is unenforceable for some reason.¹³¹ Indemnities are in a class of obligations similar to guarantees and are often included alongside guarantees in statutory provisions.¹³² As only high net worth individuals can grant goods mortgages in relation to guarantees and we were told that these individuals would benefit from maximum flexibility, we considered that it was desirable to include indemnities alongside guarantees.

4.107 We were asked whether cases in which an individual secures someone else’s obligation against their own goods, without assuming personal liability for the obligation, would be caught by clause 6(3). We intend that they would. The assumption of personal liability is not a necessary element for sureties,¹³³ so giving a goods mortgage to secure someone else’s debt (whether or not you are also personally liable for the debt) would be a “guarantee” for the purposes of the draft Bill.

¹²⁸ For a discussion of the high net worth conditions, see para 4.82 above. This is explored further in Law Commission Consultation on draft clauses (July 2017) Appendix 1.

¹²⁹ *Vossloh AG v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch), [2011] 2 All ER (Comm) 307 at [23]. This was cited with approval in G Andrews and R Millett, *The Law of Guarantees* (7th ed 2015) para 1-004.

¹³⁰ This is in contrast to agreements whereby the borrower undertakes to indemnify the lender in respect of breaches by either party to the agreement. Indemnities in respect of one’s own obligations are “obligations” which can be secured under the draft Bill, clause 2(1).

¹³¹ “Indemnity” is used in the draft Bill in the sense of “a contract whereby the indemnitor undertakes a primary liability to hold the indemnitee free from designated loss, to be contrasted with a contract of guarantee whereby the guarantor undertakes a secondary liability to answer for the non-performance of the guaranteed obligation”: see D Greenberg, *Jowitt’s Dictionary of English Law* (4th ed 2015).

¹³² See the definition of “security” in Consumer Credit Act 1974, s 189; see also the definition of “financial assistance” in Banking Act 2009, s 257(1) and Financial Services Act 2012, s 67(3).

¹³³ *Re Conley* [1938] 2 All ER 127, affirmed in *Razzaq v Pala* [1997] 1 WLR 1336 and *Regina (Stevens) v Truro Magistrates’ Court* [2001] EWHC Admin 558, [2002] 1 WLR 144. See also *Halsbury’s Laws of England* (2015) vol 49 *Financial Instruments and Transactions* para 642.

Running-account credit

4.108 Under clause 6(4) a borrower may only use a goods mortgage to secure running-account credit if they meet either the high net worth conditions or the business credit conditions. Again the goods mortgage document must include the prescribed declaration.

4.109 Running-account credit is defined in section 10 of the CCA, which draws a distinction between “fixed-sum” and “running-account” credit:

- (1) Under a fixed-sum credit arrangement, a debtor is provided with a specified amount of credit (received either in one amount or by instalments).¹³⁴
- (2) Under a running-account credit facility, the debtor is enabled to receive credit from time to time, up to a fixed maximum referred to as a “credit limit”. The sum available fluctuates from time to time, to take into account repayments by the debtor.¹³⁵

4.110 Clause 6(7) refers readers to schedule 1 to the draft Bill which replicates the CCA definition of running-account credit.

Obligations to perform work or services personally

4.111 The prohibition on using goods mortgages to secure obligations to perform work or services personally is set out in clause 6(2). It draws on section 230(3) of the Employment Rights Act 1996 (“ERA”), which defines a “worker” as one who works under:

- (a) a contract of employment, or
- (b) any other contract ... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

4.112 Under the ERA, an individual performs services personally where they physically provide the service in question. Where a builder turns up to build a shed, they are providing services personally. Where they sub-contract the work to another to perform, these are not personal services.¹³⁶ This distinction between services which the individual must perform themselves and those which can be delegated will also apply to clause 6(2)(b).

4.113 The definition in clause 6(2)(b) is wider than the definition of “worker”, as the prohibition also encompasses performing work or services for “a client or customer of any profession or business undertaking carried on by the individual”. It would, for example, prevent a self-employed plumber from being asked to secure their obligation to work for a customer against their tools or van. We do not consider that anybody should be forced to work for another, on pain of losing their goods.

¹³⁴ Consumer Credit Act 1974, s 10(1)(b).

¹³⁵ Consumer Credit Act 1974, s 10(1)(a).

¹³⁶ *Pimlico Plumbers Limited v Smith* [2017] EWCA Civ 51, [2017] IRLR 323, particularly at [84]; see also *MacFarlane v Glasgow City Council* [2001] IRLR 7; *Express & Echo Publications Ltd v Tanton* [1999] ICR 693, particularly at 700.

WHAT HAPPENS TO FORMS OF SECURITY WHICH DO NOT CONFORM TO THE DRAFT BILL?

4.114 Some ways in which individuals can use goods as security under the current law are not affected by the draft Bill. In particular, the draft Bill will not affect:

- (1) **“Possessory securities” such as pledges or liens**, where the lender rather than the borrower has possession of the goods. Examples include pawn-broking and “the repairer’s lien” by which repairers have the right to retain goods until their fees have been paid.
- (2) **Agricultural charges**. The Agricultural Credits Act 1928 provides a separate statutory regime to allow farmers to grant charges over crops, stock and other agricultural assets. However, it is currently also possible for farmers to use a bill of sale to borrow money on agricultural assets. It appears that some farmers do use bills of sale, possibly because agricultural charges must be granted to a bank,¹³⁷ and they wish to borrow from other lenders. The draft Bill maintains the current choice,¹³⁸ except that, unlike bills of sale, goods mortgages cannot be granted over fixtures or growing crops.¹³⁹
- (3) **Mortgages over goods which are not “qualifying goods”**. As we have seen, clause 4 excludes mortgages over intangibles, such as shares or intellectual property, as well as mortgages on ships and most aircraft and money that is legal tender.
- (4) **Hire-purchase and conditional sale**. These are dealt with by the CCA and the Hire Purchase Act 1964.
- (5) **Security interests granted to state agencies**, such as the legal aid “statutory charge”.¹⁴⁰ This is because the draft Bill does not bind the Crown.¹⁴¹
- (6) **Security interests arising by operation of law**. We do not wish to interfere with existing statutory regimes or with security interests arising automatically, rather than by agreement.

4.115 However, some types of mortgages will not be permitted at all. This includes goods mortgages:

- (1) over future goods;¹⁴²
- (2) over jointly-held property, where the interest is not created by all owners;¹⁴³

¹³⁷ Agricultural Credits Act 1928, s 5.

¹³⁸ In our 2016 report we acknowledged that having two separate means of creating charges over agricultural assets was not ideal. However, a review of the Agricultural Credits Act 1928 to harmonise the system is outside the scope of our project. The dual system does not appear to create problems in practice. See Bills of Sale (2016) Law Com No 369 paras 4.35 to 4.38.

¹³⁹ See the discussion at para 4.51 above.

¹⁴⁰ Under Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 25(1), civil legal aid costs “constitute a first charge” on “any property recovered or preserved” in the proceedings, or in any “compromise or settlement of a dispute”. See also Civil Legal Aid (Statutory Charge) Regulations 2013 SI 2013 No 503.

¹⁴¹ A statute does not bind the Crown unless there is express provision to this effect, which the draft Bill does not contain.

¹⁴² Draft Bill, clause 2.

¹⁴³ Draft Bill, clause 3.

- (3) used to secure running-account credit where the mortgage is not exempt,¹⁴⁴ and
- (4) used to secure guarantees if made by consumers who are not high net worth individuals.¹⁴⁵

4.116 Clause 8 renders void some possessory securities which have the effect of a mortgage or a charge over goods but do not comply with the provisions of the draft Bill. This is an anti-avoidance provision, intended to prevent people from disguising goods mortgages as another type of transaction in order to avoid the requirements and protection measures under the draft Bill.

PLEDGES WHERE THE BORROWER HAS CUSTODY OF THE GOODS

4.117 The draft Bill is not intended to affect any “possessory” security (such as pledges and liens) where the lender is in possession of the goods. However, for some security arrangements, the lender takes possession of the goods and then hands back custody to the borrower. There are various ways to do this, including “trust receipts” and “pledges by attornment”. The lender who has a pledge or lien could allow the borrower to keep the goods, either as a bailee (under a “pledge by attornment”) or as a trustee (under a “trust receipt”). The borrower has custody of the goods but the lender can argue that it still has possession because it has the right to recall the goods.

4.118 We were concerned that it might be possible to use these devices to achieve the same effect as a goods mortgage but without the borrower protections required by the draft Bill. We asked if consultees agreed that, as an anti-avoidance measure, pledges and other possessory security arrangements should become void if the borrower is given custody of the goods.

4.119 We received nine responses to this question, of which seven agreed and two disagreed. Richard Calnan and Dorothy Livingston argued against attempting to invalidate trust receipts as part of this draft Bill. They said that a trust receipt is:

a well-recognised financing technique, and we do not think it is appropriate to change it in a law dealing with goods mortgages. The result would be that trust receipts would continue to be effective where the pledgor was a company, but not where the pledgor was an individual. In our view, that would make no sense.

4.120 On further reflection, we think that our July 2017 proposal was too wide. In some cases a trust receipt may be used for a legitimate short-term purpose which is not intended to occupy the same niche as a goods mortgage.

4.121 The draft Bill therefore takes a different approach to anti-avoidance. It specifies that some alternative forms of security over goods are not affected by the draft Bill. Other forms of security would be void if they had the effect of a creating a charge or mortgage over qualifying goods in order to circumvent the requirements of the draft Bill. It will be for a court to look at the overall effect of the transaction to see to see if it is in essence a disguised goods mortgage.

New recommendation 9

4.122 A security interest should be void if it would have the effect of creating a charge or mortgage over qualifying goods.

¹⁴⁴ Draft Bill, clause 6.

¹⁴⁵ Draft Bill, clause 6.

Implementing the policy: the anti-avoidance provision in clause 8

4.123 Clause 8 prevents arrangements which attempt to avoid the provisions of the draft Bill.

8 Other non-possessory security on goods

- (1) This section applies to any agreement or arrangement which—
 - (a) is entered into by an individual,
 - (b) is neither a goods mortgage (as defined by section 2(4)) nor a security excluded by subsection (4), and
 - (c) would (apart from this section) have the effect of—
 - (i) creating a mortgage or charge over qualifying goods owned by the individual, or subsequently to be acquired by the individual, as security for the discharge of an obligation, or
 - (ii) creating a mortgage or charge over an undivided share in qualifying goods owned by the individual in common with other persons, or subsequently to be acquired by the individual in common with other persons, as security for the discharge of an obligation.
- (2) If the goods remain in the possession of, or under the custody of, the individual who provides the goods as security, the agreement or arrangement is void to the extent that it would (apart from this section) have the effect mentioned in subsection (1)(c).
- (3) If, before the obligation being secured is discharged, the person to whom the obligation is owed passes custody of the goods to the individual who provided the goods as security, the agreement or arrangement becomes void to the extent that it would (apart from this section) have the effect mentioned in subsection (1)(c).
- (4) The securities excluded by this subsection are—
 - (a) a pledge, lien or other security under which the individual creating the pledge, lien or other security is not entitled to possession of the goods until the obligation is discharged;
 - (b) an agricultural charge under Part 2 of the Agricultural Credits Act 1928;
 - (c) a mortgage capable of being registered by virtue of section 86 of the Civil Aviation Act 1982;
 - (d) an international interest as defined by regulation 5 of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912).
- (5) Nothing in this section—
 - (a) affects the validity of the obligation whose discharge the agreement or arrangement purports to secure,
 - (b) affects any lien or charge arising under an enactment or otherwise by operation of law, or
 - (c) affects the validity of any hire-purchase agreement or conditional sale agreement.

Security interests void if they have “the effect of creating a mortgage or charge”

4.124 Clause 8(1) applies to an agreement entered into by an individual which is not a goods mortgage but which has the effect of creating a mortgage or charge over qualifying goods.¹⁴⁶

4.125 There are two circumstances in which a possessory security interest might be rendered void:

- (1) where the goods remain with the borrower (clause 8(2)); or
- (2) where the goods are passed back to the borrower before the security is discharged (clause 8(3)).

4.126 In these two cases, a court would have to consider whether the reality of the agreement was that the parties were creating a mortgage or a charge over the goods without complying with the requirements imposed by the draft Bill. If so, the security would be invalidated and the lender would have no right to the goods, against either the borrower or anyone else.

4.127 Under clause 8(5)(a), the underlying obligation remains valid. Any loan would still have to be repaid.

4.128 As we have discussed, the draft Bill does not permit mortgages over future or after-acquired property,¹⁴⁷ or mortgages over joint property which are not granted by all the owners.¹⁴⁸ These fall within the scope of clause 8(1) and are thereby invalidated.

4.129 Clause 8 also applies to other possible ways of circumventing the protections in the draft Bill. An example would be an attempt to circumvent the draft Bill by way of sale and lease-back. The courts have already re-characterised sale and lease-back and sale and buy-back arrangements as invalid bills of sale or hire-purchase agreements, especially if necessary to ensure consumer protection.¹⁴⁹ What matters is the substance, not the form of the agreement.¹⁵⁰ If the arrangement is in essence a loan to an individual secured against the goods of that individual, the draft Bill applies and renders any transaction not in conformity with the draft Bill’s formality requirements void.

Security interests not affected by the draft Bill

4.130 Clause 8 only affects mortgages over “qualifying goods”. It would not affect mortgages over excluded goods, such as ships and UK registered aircraft.

4.131 Clause 8(4) makes it clear that the anti-avoidance provision does not apply to other valid forms of security interest. The draft Bill does not affect:

- (1) “possessory” security interests (such as pledges or liens) where the borrower is not entitled to possess the goods until the obligation is discharged (clause 8(4)(a));

¹⁴⁶ It does not apply to excluded goods such as ships or UK registered aircraft.

¹⁴⁷ Draft Bill, clause 2.

¹⁴⁸ Draft Bill, clause 3.

¹⁴⁹ H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-Based Financing* (2nd ed 2012) paras 7.54 and 7.57.

¹⁵⁰ For the re-characterisation of sale and buy-back as a bill of sale, see *Re Watson* (1890) 25 QBD 27.

- (2) agricultural charges (clause 8(4)(b));
- (3) mortgages over aircraft parts which could be registered under the Civil Aviation Act 1982 (clause 8(4)(c)),¹⁵¹ or international interests over aircraft which are registered under the Cape Town Convention (clause 8(4)(d));
- (4) any statutory security or security arising by operation of law – examples include statutory charges under the Insolvency (England and Wales) Rules 2016, charging orders under section 73(1)(a) of the Solicitors Act 1974 and partners' charges under section 23 of the Partnership Act 1890 (clause 8(5)(b)); and
- (5) hire-purchase or conditional sale (clause 8(5)(c)).

¹⁵¹ This provision upholds aircraft mortgages which are granted over aircraft parts together with the aircraft. Aircraft parts are “qualifying goods” for the purposes of the draft Bill.

Chapter 5: Document requirements

- 5.1 To be valid, a bill of sale must comply with 12 separate formalities.¹⁵² In our 2016 report, we said these requirements were onerous, opaque and unnecessarily restrictive.¹⁵³ The language of the standard form set out in the 1882 Act is archaic and more likely to confuse borrowers than inform them.
- 5.2 It is easy for lenders to make mistakes over the documentation. If they do, the sanction is severe and disproportionate. At present, the lender not only loses any rights to the goods, but also the right to have the underlying debt repaid.
- 5.3 We recommended that the documentation should be simplified and should contain certain prominent warnings for borrowers. We also said that the penalties for failing to comply with the formality requirements should be less onerous.
- 5.4 Here we consider these recommendations and look at how they have been implemented in Clause 5 of the draft Bill.

LESS COMPLEX DOCUMENTATION

- 5.5 In our 2016 report, we argued that a goods mortgage was a significant transaction. We thought that there was still a need for a written document, signed by the borrower in the presence of a witness. However, we said there should be fewer requirements about the content. In practice, the goods mortgage document will sit alongside a credit agreement document. There is no need for the goods mortgage to replicate the information in the credit agreement. We recommended that it should be possible, but not mandatory, for the goods mortgage to be a separate document from the credit agreement.¹⁵⁴
- 5.6 We said that the goods mortgage document should contain:
- (1) the date of the goods mortgage;
 - (2) the names and addresses of the borrower and lender;
 - (3) a description of the obligation which is secured by the goods mortgage;
 - (4) the name and address of the witness;
 - (5) a specific description of the goods; and
 - (6) the relevant prominent statements (unless the goods mortgage is an “exempt” mortgage – clause 5(3) of the draft Bill.

¹⁵² See Bills of Sale (2015) Law Commission Consultation Paper No 225 ch 3.

¹⁵³ Bills of Sale (2016) Law Com No 369 paras 2.16 to 2.23.

¹⁵⁴ Bills of Sale (2016) Law Com No 369 para 5.27.

5.7 There are two points to note about these requirements:

- (1) **The need for a “specific description” of the goods.** This is similar to the requirement that goods be “specifically described” under the Bills of Sale Acts.¹⁵⁵ What counts as a specific description will be highly context-dependent: describing a car may be easier than describing an antique. However, we think that the courts can come to a sensible view on whether a description is “specific” on a given set of facts. There is case law on bills of sale which may assist.¹⁵⁶
- (2) **It is no longer necessary to include the date and amount of repayment instalments.** This will allow lenders to provide more flexible arrangements.

THE NEED FOR A WITNESS

- 5.8 In our July 2017 consultation, we asked if consultees agreed that it was unnecessary for the document to require the occupation of the witness.¹⁵⁷ In response, several logbook lenders argued strongly that it was unnecessary for the borrower’s signature to be witnessed at all. They asked us to reconsider our policy in this area.
- 5.9 We discussed this issue in our 2015 consultation paper.¹⁵⁸ We explained that most logbook loans were granted after a face-to-face meeting between the borrower and lender which took between 45 minutes and two hours. This meeting had three purposes: to examine the vehicle, to sign and witness the bill of sale and to comply with Financial Conduct Authority (FCA) requirements on affordability checks and explanations. The FCA requires lenders to provide adequate explanations of all adverse consequences of a credit agreement, including the possibility of repossession.¹⁵⁹ We noted that this did not necessarily require a face-to-face meeting.
- 5.10 In 2015, we said that we wished to preserve a face-to-face meeting. We thought that this would prevent borrowers from taking out loans without thought, “possibly late at night and while drunk, without understanding the implications of what they are doing”.¹⁶⁰ We therefore proposed to retain a requirement for a physical signature in the presence of a witness.
- 5.11 This proposal received a mixed response, with 14 out of 24 respondents agreeing. Logbook lenders have said that requiring a signature to be witnessed to prevent borrowers from taking out a goods mortgage while drunk was both paternalistic and ineffective, as the witness could be similarly inebriated.
- 5.12 Logbook lenders also argued that any legislation designed for the 21st century should allow electronic signatures. Electronic signatures are increasingly common, and are, for example, permitted for agreements regulated under the Consumer Credit Act 1974

¹⁵⁵ Bills of Sale Amendment Act 1882, ss 4 to 6.

¹⁵⁶ For example *Davidson v Carlton Bank* [1893] 1 QB 82; *Carpenter v Deen* (1889) 23 QBD 566; *Witt v Banner* (1887) 20 QBD 114.

¹⁵⁷ Law Commission Consultation on draft clauses (July 2017) para 4.19.

¹⁵⁸ Bills of Sale (2015) Law Commission Consultation Paper No 225 paras 9.10 to 9.12.

¹⁵⁹ FCA Consumer Credit sourcebook (CONC) para 4.2.5.

¹⁶⁰ Bills of Sale (2015) Law Commission Consultation Paper No 225 para 9.11.

(CCA).¹⁶¹ In our 2016 report we said that electronic signatures should be allowed.¹⁶² Although it is possible to use electronic signatures which are witnessed, the need for a witness adds complexity. While we still consider that face-to-face meetings are desirable, we do not think that this can or should be achieved through a requirement for witnessing.

- 5.13 On balance, we have decided that requiring the borrower's signature to be witnessed would not be compatible with our overall aim, which is to remove unnecessary complexity in documentation and registration. It is still important that lenders provide adequate explanations about the nature of the loan, but the FCA does not currently require a witness' signature for any of the consumer credit transactions. Borrowers will also have a 14 day "cooling off" period under the CCA in which they can cancel a credit agreement,¹⁶³ which ensures that they have had the chance to think about the gravity of the transaction.

New recommendation 10

- 5.14 It should not be a legal requirement that the borrower's signature to the goods mortgage is witnessed.

PROMINENT STATEMENTS

- 5.15 In our 2016 report,¹⁶⁴ we said that there was a need to provide non-exempt borrowers with prominent warnings that:

- (1) they may lose the goods if they do not keep up the repayments; and
- (2) they may be guilty of a criminal offence if they sell the goods before paying off the loan and without telling the purchaser about the existence of the goods mortgage.¹⁶⁵

Wording of the prominent statements

- 5.16 For vehicles we recommended statements along the following lines:

YOUR VEHICLE MAY BE REPOSSESSED IF YOU DO NOT KEEP UP REPAYMENTS ON YOUR LOAN

IF YOU SELL THE VEHICLE BEFORE YOU PAY OFF YOUR LOAN, YOU MAY BE GUILTY OF A CRIMINAL OFFENCE

- 5.17 We recommended adapted versions of the statements for other goods.

¹⁶¹ *Bassano v Toft* [2014] EWHC 377 (QB), [2014] CTLIC 117. See also the Law Society, *Execution of a document using an electronic signature*, available at: <http://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-a-document-using-an-electronic-signature/>.

¹⁶² Bills of Sale (2016) Law Com No 369 para 5.20.

¹⁶³ Consumer Credit Act 1974, s 68.

¹⁶⁴ Bills of Sale (2016) Law Com No 369 paras 5.49 and 8.54.

¹⁶⁵ Draft Bill, clause 11 contains an obligation on the borrower to tell the prospective purchaser about the goods mortgage. Failure to do so may amount to fraud, as set out in clause 5(2).

Views on the prominent statements

- 5.18 Although these statements would be in secondary legislation rather than on the face of the draft Bill, we took the opportunity to ask for views on them in our July 2017 consultation.¹⁶⁶ Most consultees (9 out of 10 who answered this question) agreed that the statements were appropriate, though some made additional comments.
- 5.19 There was general support for the first statement that “your vehicle may be repossessed if you do not keep up repayments on your loan”.
- 5.20 Logbook lenders were more concerned about the second statement that “if you sell the vehicle before you pay off your loan, you may be guilty of a criminal offence”. They felt that this was not sufficiently strong to deter fraud.
- 5.21 Two logbook lenders (Automoney and Logbook Money) asked for a warning that it *is* (rather than *may be*) a crime to sell a vehicle without the lender’s permission. We do not think this would be appropriate: it would be a misstatement of the offence of fraud, which also requires dishonesty.¹⁶⁷ However, we agree that the warning could be made stronger. In discussions post-consultation, lenders thought that the warning should mention fraud (which is a serious offence) and refer to prosecution.
- 5.22 We also asked whether we should include an additional warning that the borrower may be guilty of a criminal offence if they obtained a second loan on the vehicle without disclosing the existence of a first loan. Views were mixed on whether this further warning was necessary, with six consultees saying that it was and four saying that it was not.
- 5.23 On reflection, we think that a statement along the following lines would be sufficient to cover both types of fraud. It would also be in stronger terms and act as a greater deterrent.

YOU MAY BE PROSECUTED FOR FRAUD IF YOU SELL THE VEHICLE OR TAKE OUT ANOTHER LOAN ON IT WITHOUT DECLARING THIS MORTGAGE

Other information about rights

- 5.24 Several consultees suggested that a goods mortgage should also contain other prescribed information. In contrast, the Bar Council and the Financial Conduct Authority warned against “information overload”, pointing out that every additional prominent statement makes the other statements less prominent.
- 5.25 Money Advice Trust thought that the goods mortgage itself should be in a prescribed form. However, the experience of requiring a minutely prescribed form in the 1882 Act is discouraging. The form has become increasingly out of date and now actively confuses consumers. We are concerned about requiring lenders to use a fully prescribed form when we are not sure how goods mortgages might be used in the future.
- 5.26 However, we agree with Money Advice Trust that the form should provide borrowers with more information about rights. In particular, we think that borrowers would benefit from information about the right to voluntary termination. This would protect all

¹⁶⁶ Law Commission Consultation on draft clauses (July 2017) para 4.10.

¹⁶⁷ See para 7.11 below onwards for a discussion of the constituent elements of fraud.

non-exempt borrowers, including those who may be subject to having their goods seized without the new possession procedure. It would be unfortunate if borrowers failed to exercise this right because they did not know about it. There are also good reasons to require the goods mortgage form to provide information about sources of free debt advice.

- 5.27 The draft Bill requires that the two prominent warnings described above must be included in a non-exempt goods mortgage, although the exact wording will be specified in secondary legislation. The draft Bill also provides HM Treasury with a general ability to prescribe in secondary legislation other information that should be included – such as information about voluntary termination and about free debt advice.

A LESS ONEROUS SANCTION

- 5.28 We thought that the sanction for not complying with formality requirements should be changed. We recommended that a lender who fails to comply with the relevant requirements should lose any right to the goods – as against both the borrower and third parties.¹⁶⁸ However, unlike under the current law, the failure should not prevent the lender from enforcing the underlying obligation, such as recovering the loan.

IMPLEMENTING THE NEW DOCUMENT REQUIREMENTS: CLAUSE 5

- 5.29 Our recommendations will be implemented by clause 5 of the draft Bill and the secondary legislation made under it.

5 Requirements to be met in relation to instrument

- (1) The instrument creating a goods mortgage must—
 - (a) contain prescribed provisions, and
 - (b) be signed or otherwise authenticated by the prescribed persons and in the prescribed manner.
- (2) The Treasury must by regulations require the inclusion in the instrument of statements in such form as the Treasury consider appropriate for the purpose of warning the mortgagor—
 - (a) that the mortgagor risks losing the goods if the obligation secured by the goods mortgage is not discharged, and
 - (b) that the mortgagor may commit an offence under the Fraud Act 2006 if, while the goods remain subject to the goods mortgage, the mortgagor makes a disposition of the goods without previously disclosing to the purchaser the existence of the goods mortgage.
- (3) Subsection (2) does not apply in the case of an exempt goods mortgage (see section 26).
- (4) Nothing in the Consumer Credit Act 1974 enables a court to enforce, or allow the enforcement of, a security that purports to be a goods mortgage but is created by an instrument not complying with this section.

¹⁶⁸ Bills of Sale (2016) Law Com No 369 paras 5.55 to 5.60.

- 5.30 Clause 5(1) gives HM Treasury a wide power to prescribe both the content of the goods mortgage and the way that it is signed or authenticated. We intend that this power be used to implement the policy we have outlined.
- 5.31 For non-exempt mortgages, clause 5(2) states that the secondary legislation *must* require two prominent statements. These relate to the fact that the borrower risks losing the goods and that the borrower may commit an offence under the Fraud Act 2006.
- 5.32 If a goods mortgage fails to meet these requirements, the security would be void under clauses 2(4) and 8(1). However, clause 8(5)(a) states that “nothing ... affects the validity of the obligation whose discharge the agreement or arrangements purports to secure”. This confirms that clause 8 does not affect the validity of the underlying obligation – any loan, if otherwise due, would still have to be repaid.
- 5.33 Goods mortgages which secure regulated credit agreements will have to be “embodied” in the credit agreement.¹⁶⁹ Under section 105(7) of the CCA, a security instrument which is improperly executed may be enforced by an order of the court. Clause 5(4) confirms that a court may not use its discretion under the CCA to enforce a goods mortgage which fails to meet the requirements of the draft Bill.

¹⁶⁹ Consumer Credit Act 1974, s 105(9) states that security granted by the debtor in relation to a regulated credit agreement must be “embodied” in the regulated credit agreement (either included as part of the regulated credit agreement or referred to in the regulated credit agreement with a sufficient description of the security).

Chapter 6: Registration and priority

REGISTRATION

Our 2016 recommendations

- 6.1 In our 2016 report, we recommended that the system of registration of bills of sale should be reformed for goods mortgages. In our July 2017 consultation,¹⁷⁰ we said that such reform should be guided by two key principles:
- (1) Goods mortgages must be registered in order to have effect against third parties.¹⁷¹
 - (2) Registration should determine priority between lenders, in situations where more than one goods mortgage has been created over the same asset.¹⁷²
- 6.2 Under the current law, bills of sale must be registered at the High Court to be valid.¹⁷³ As noted in our 2016 report, there was widespread agreement among consultees that the existing regime is expensive, cumbersome and in need of modernisation.¹⁷⁴ Logbook lenders told us that they also register their interests voluntarily with commercial asset finance registers such as Cap HPI, Cheshire Datasystems Ltd and Experian. In practice, other lenders and trade purchasers tend to rely on searches of these commercial registers, rather than the High Court register, when deciding whether to grant finance to a potential borrower.
- 6.3 We acknowledged in our 2016 report that there were persuasive reasons for the development of a comprehensive electronic register of security interests. However, we considered that such a register was unlikely to be achieved as part of the reform of bills of sale alone.
- 6.4 Therefore, we proposed a pragmatic solution: a system in which goods mortgages over vehicles (“vehicle mortgages”) would be distinguished from goods mortgages over other types of asset (“general goods mortgages”). General goods mortgages would continue to be registered at the High Court, but pursuant to a simplified procedure.¹⁷⁵ Vehicle mortgages would be registered with existing asset finance registers, which would be designated by HM Treasury.¹⁷⁶

¹⁷⁰ Law Commission Consultation on draft clauses (July 2017) para 5.3.

¹⁷¹ Bills of Sale (2016) Law Com No 369 paras 6.23 and 6.47.

¹⁷² Bills of Sale (2016) Law Com No 369 para 6.23. With regard to goods mortgages other than vehicles, we proposed that priority should be determined according to the date and time at which the registration documents are submitted to the High Court: para 6.69.

¹⁷³ Bills of Sale Act 1878, s 10 and Bills of Sale Amendment Act 1882, ss 8 and 10. See also para 4.1 above for a discussion of “security bills”.

¹⁷⁴ See Consumer Credit Trade Association, *Response to Law Commission Call for Evidence* (2014) p 5: “The register is not fit for purpose and does not provide any benefits to lenders or borrowers.” See also Bills of Sale (2016) Law Com No 369 paras 6.13 to 6.16.

¹⁷⁵ Bills of Sale (2016) Law Com No 369 paras 6.57 and 6.69.

¹⁷⁶ Bills of Sale (2016) Law Com No 369 para 6.23. See also Law Commission Consultation on draft clauses (July 2017) para 5.27.

Our final view

- 6.5 In the July 2017 consultation we noted that discussions between the Ministry of Justice and HM Treasury were ongoing and that the practical implications of our recommendations were being explored.
- 6.6 Since that consultation, it has become clear that the Government's preferred approach is to establish a single central register for all goods mortgages, regardless of the asset involved. This new register will be kept by the High Court.
- 6.7 We support the creation of a central online register for goods mortgages. This register should be operated on the bases that we outlined in our 2016 report.¹⁷⁷ In particular:
- (1) the register should be electronic with no statutory time limit for registration;
 - (2) original documents should no longer be required;
 - (3) priority should be governed by the time of registration and goods mortgages should be registered in the order of receipt by the register; and
 - (4) the register should be easily searchable, with fees for registration and searching charged on a cost recovery basis.

“Notice filing” or “transaction filing”?

- 6.8 We consider that the goods mortgages register should be closer to a “notice filing”, than to a “transaction filing”, system. The current bills of sale register is a transaction filing system. This means that the signed security bill agreement must be sent to the High Court for registration.¹⁷⁸ Under a notice filing system, the lender need only provide sufficient details to the register to give third parties notice that the security interest exists. The lender does not need to file the underlying document. Notice filing has been adopted in similar registration systems in other jurisdictions.¹⁷⁹
- 6.9 However, notice filing systems usually allow for advance registration (registration before the interest is created as a matter of law).¹⁸⁰ Several notice filing systems also allow for “blanket” registration (registration of several security interests in the same notice).¹⁸¹ Neither advance registration, nor blanket registration, will be possible in the goods mortgages register.
- 6.10 A key feature of a notice filing-type system is that it simplifies the process of registration. This should enable costs for both consumers and lenders to be reduced to a modest amount. Additionally, we anticipate a reduced administrative burden on lenders, who

¹⁷⁷ Bills of Sale (2016) Law Com No 369 para 6.69.

¹⁷⁸ For a description of the registration process for bills of sale, see Bills of Sale (2016) Law Com No 369 paras 2.24 to 2.31.

¹⁷⁹ See *Background Paper: Registering a goods mortgage – lessons from other systems* (November 2017). This is a background paper which we publish alongside this report. It explores notice filing systems, document filing systems and registration, both in the United Kingdom and in other jurisdictions.

¹⁸⁰ This is the case for the Uniform Commercial Code: see art 9-502(d). The Ontario register allows for advanced registration except where the collateral is a “consumer good”: Ontario Personal Property Security Act 1990, s 45(3). In Australia, a person can apply for registration if they believe on reasonable grounds that they will become a secured party: Personal Property Securities Act 2009, s 151(1).

¹⁸¹ See Ontario Personal Property Security Act 1990, s 45(4), which provides that “one financing statement may perfect one or more security interests created or provided for in one or more security agreements between the parties”.

will only be required to submit certain information, rather than file the entire goods mortgage agreement and supporting documents.

New recommendation 11

- 6.11 A single Government register for goods mortgages should be established. The register should be electronic and easily searchable. It should operate on a “notice filing” basis, which is a simplified process with reduced costs.

Implementing the policy under clause 9

- 6.12 Clause 9 provides for a register of goods mortgages to be kept.

9 Registration of goods mortgages

- (1) A register of goods mortgages is to be kept by the Secretary of State in accordance with regulations made by the Treasury or the Secretary of State under this section (referred to in this section as “registration regulations”).
- (2) The provision that may be made by registration regulations includes (but is not limited to) provision as to—
 - (a) the making by mortgagees of applications for the registration of goods mortgages;
 - (b) steps to be taken on receipt of an application for registration;
 - (c) the persons to whom, and manner in which, notice of the registration of a goods mortgage is required to be given;
 - (d) the information to be included on the register;
 - (e) the circumstances in which, and manner in which, registration is to be discharged;
 - (f) the amendment or rectification of the register;
 - (g) the making by any persons of searches of the register;
 - (h) fees to be payable in respect of the registration of goods mortgages or searches of the register.
- (3) Registration regulations may (but need not) —
 - (a) provide for the register to be kept in the High Court;
 - (b) confer functions on officers of the High Court.
- (4) Where two or more goods mortgages are created over the same goods, those mortgages as between themselves have priority according to the times at which they were registered.
- (5) The registration under this section of a goods mortgage expires (if not previously discharged) at the end of the 10 years beginning with the day on which the goods mortgage was registered (or, as the case may be, the

registration was last renewed), but registration regulations may make provision enabling registration to be renewed on application.

- (6) Registration regulations may restrict or exclude the liability in tort, in respect of things done or omitted in relation to the registration of goods mortgages, of the Secretary of State or any other person on whom functions are conferred by registration regulations.
- (7) Registration regulations may provide for the supply (including the supply by way of sale) of relevant registration information —
 - (a) to such persons as may be determined in accordance with the regulations by a person specified in or determined in accordance with the regulations, and
 - (b) for such price (if any) and on such other terms, and subject to such restrictions, as may be determined in accordance with the regulations by a person specified in or determined in accordance with the regulations.
- (8) In subsection (7) “relevant registration information” means information which is derived from particulars contained in the register but which does not identify any individual or contain anything enabling any individual to be identified.
- (9) In this Act “registered”, in relation to a goods mortgage, means registered in the register kept under this section.

6.13 We think that it is likely that such a register will be kept by officers of the High Court and we have provided for that possibility in clause 9(3). Clause 9(6) confers a power for secondary legislation to restrict or exclude liability for mistakes made by the keeper of the register in respect of the registration of goods mortgages. This is in line with other Government registers, such as the patents and the trade marks registers, which also exclude liability in relation to interests registered.¹⁸²

6.14 Operational details such as the procedure through which registration applications are lodged, or the way that searches of the register are conducted, will be set out in more detail in secondary legislation. Clause 9(2) sets out that such secondary legislation may provide for the following:

- (1) the way in which a lender can apply for a mortgage to be entered onto the register and the steps that the keeper of the register must take upon receiving such an application;
- (2) notification of the registration of a goods mortgage;
- (3) the type of information to be included on the register;
- (4) searches of the register;
- (5) how an entry on the register may be rectified or discharged; and
- (6) fees payable in respect of registration or searches of the register.

¹⁸² See Patents Act 1977, s 116 and Trade Marks Act 1994, s 70.

6.15 We expect that this secondary legislation will be the subject of further discussions with stakeholders to ensure that the register is an effective replacement for the current outdated system of registration of bills of sale.

Priority between registered goods mortgages: clause 9(4)

6.16 We outlined above that, when considering registration of goods mortgages, a key principle is that registration should determine priority between lenders, in situations where more than one goods mortgage has been created over the same asset. Clause 9(4) sets out the priority rule.

6.17 Goods mortgages will take priority according to the time at which they were registered. We expect that secondary legislation will require that applications for registration must be registered in the order in which they were received. At this point, the lender will have done everything they can to register their interest and ensure that third parties are aware of the goods mortgage. This is consistent with our policy as outlined in our 2016 report.¹⁸³

Expiry of registration: clause 9(5)

6.18 A register is only useful to third parties if the information it contains is up to date and accurate. An important part of maintaining the accuracy of a register of goods mortgages is ensuring that an entry is removed from the register when the goods mortgage has been discharged.

6.19 In our 2016 report, we recommended two approaches – one for vehicle mortgages, registered with commercial asset finance registers, and one for general goods mortgages, registered at the High Court.

6.20 For goods mortgages over vehicles, we noted that the commercial asset finance registers had different mechanisms for deleting bills of sale from their registers. Such interests could be marked for automatic deletion upon expiry of the term of the loan. Additionally, lenders could instruct the register to delete the interest.¹⁸⁴ That system appeared to operate well. Therefore, we recommended that there should be an obligation on the lender to ensure that satisfied vehicle mortgages are removed from the register by any means available. We hoped to avoid unnecessary regulation of an area that already operated effectively.¹⁸⁵

6.21 For general goods mortgages registered at the High Court, we noted that there was no efficient means of removing satisfied mortgages from the register. Therefore we recommended that such mortgages should expire after 10 years unless they were re-registered.¹⁸⁶

6.22 The position has now changed due to the Government's decision to establish a single, central, register for all goods mortgages at the High Court. In these circumstances, we recommend that to maintain the accuracy of this register, re-registration should be required every 10 years.

¹⁸³ Bills of Sale (2016) Law Com No 369 paras 6.23(3) and 6.69(2).

¹⁸⁴ Bills of Sale (2016) Law Com No 369 paras 6.79 and 6.80.

¹⁸⁵ Bills of Sale (2016) Law Com No 369 paras 6.81 and 6.84.

¹⁸⁶ Bills of Sale (2016) Law Com No 369 paras 6.85 and 6.86.

New recommendation 12

6.23 Re-registration of all goods mortgages should be required every ten years.

6.24 Clause 9(5) implements this recommendation.

Sale of information on the register: Clause 9(7)

6.25 Clause 9(7) enables the sale or transfer of information about registered goods mortgages to third parties, such as asset finance registers.

6.26 Allowing for the sale or transfer of information will enable asset finance registers to add value to the information contained on the central register. For example, we are aware that asset finance registers currently provide reports about vehicles to consumers, for a fee. These reports may include information about a vehicle, such as the number of previous owners, outstanding finance, whether it has been reported as stolen, as well as the existence of any bill of sale. If information from the goods mortgages register could be added to these reports, consumers would benefit from the ability to purchase comprehensive information on a vehicle so as to be able to make a fully informed decision before making a purchase.

6.27 However, we are aware of the need to protect the personal data of lenders and borrowers. Therefore, we think that information sold to third parties should not identify, or enable identification of, any individual. Data which is anonymised in this way can be used without infringing the privacy or data protection rights of individuals.¹⁸⁷

TACKING

6.28 The draft Bill allows borrowers to grant multiple goods mortgages over the same goods. The general rule is that priority between mortgages is determined by the time the application for registration is received. The first mortgage to be registered takes priority over the second.

6.29 This leads to potentially complex disputes where the first mortgage lender provides further advances after a subsequent mortgage has been registered. In what circumstances should these further advances take priority over the subsequent mortgage? The issue has arisen for land mortgages, where it is referred to as “tacking”. If a further advance is “tacked” to the first loan it takes priority to any subsequent mortgage. If the loan is not “tacked”, it ranks behind the interests of the subsequent lender.

6.30 The July 2017 consultation proposed a solution based on the policy behind section 94 of the Law of Property Act 1925, which is considered by some academics to apply to personal property as well as land. In broad summary, we thought that a first goods mortgage lender should only be given priority for further advances if the lender was obliged to make those advances and did so in the absence of notice from the lender who has a subsequent mortgage. The draft Bill originally provided that the prior lender must have “actual notice” of the second lender’s interest, but on reflection we think the

¹⁸⁷ For a definition of “personal data”, see Data Protection Act 1998, s 1. Clause 9(7) is modelled on Vehicle Excise and Registration Act 1994, s 22(1A) which provides for the sale of information by the DVLA. We have also considered the Data Protection Bill 2017 in its October 2017 form. If enacted without significant changes, it will not affect the position regarding data protection under the draft Bill.

policy intention is best reflected if we place the obligation on the second lender to give notice.

- 6.31 We asked if consultees agreed with these proposals. As an alternative we suggested that the draft Bill could “forbid tacking”, by which we meant that a further advance would *never* take priority over the second mortgage. Unfortunately, however, we failed to make our meaning clear. Most of those who responded addressed the broader policy question of whether subsequent mortgages should be permitted at all.
- 6.32 The Chancery Bar Association saw merit in keeping land mortgage law and goods mortgage law harmonised as we suggested, at least in the short term.
- 6.33 We can understand why other consultees failed to engage with this question. In most cases, especially in the context of logbook loans, it is unrealistic to suppose that a lender would ever be prepared to take a second mortgage over goods. This will only occur for items which have enough value to cover multiple loans. Even then a second lender would need to exercise diligence by, for example, making inquiries of the first lender about the terms of the loan.
- 6.34 However, we are keen to provide an open and flexible regime for goods mortgages for higher value goods. As we argued in 2016, this should include the ability to grant subsequent mortgages.¹⁸⁸ If we are to allow more than one mortgage over the same goods, we think we should provide some rules on “tacking”, in line with common law and statutes in other areas. In these circumstances, we see no compelling reason to depart from the policy behind section 94 of the Law of Property Act 1925.

New recommendation 13

- 6.35 A lender under a prior mortgage should be given priority for further advances if:
- (1) the lender was obliged to make those advances; or
 - (2) the mortgage was made for the express purpose of securing further advances and the prior mortgage lender made the advance in the absence of actual knowledge that a subsequent mortgage had been registered.

Implementing our policy on tacking: clause 10

- 6.36 Clause 10 sets out the circumstances in which prior mortgagees will be permitted to tack further advances.

10 Tacking and further advances

- (1) The mortgagee under a registered goods mortgage may make a further advance on the security of the goods mortgage ranking in priority to any subsequent goods mortgage—
 - (a) if an arrangement has been made to that effect with the subsequent mortgagee,

¹⁸⁸ Bills of Sale (2016) Law Com No 369 paras 4.46 to 4.49.

- (b) if, at the time when the further advance is made, the subsequent goods mortgage is not registered, or
 - (c) if the prior goods mortgage imposes an obligation on the prior mortgagee to make further advances.
- (2) Subsection (1) applies whether or not the prior goods mortgage was made expressly for securing further advances.
- (3) If the prior goods mortgage was made expressly for securing a current account or other further advances, the prior mortgagee may also make a further advance ranking in priority to a subsequent goods mortgage if—
- (a) the subsequent mortgage was not registered at the time when the prior goods mortgage was registered or when the last search of the register by or on behalf of the prior mortgagee was made, whichever happened last, and
 - (b) at the time when the further advance is made, the subsequent mortgagee has not given notice to the prior mortgagee of the registration of the subsequent goods mortgage.
- (4) Tacking in relation to a goods mortgage is possible only as provided by this section.
- (5) “The register” means the register kept under section 9.

6.37 Although the content of this clause is based on section 94 of the Law of Property Act 1925, it is not identical. It is less compressed and, we hope, clearer. However, it is our intention that the courts will use the case law relating to section 94 to interpret clause 10, for example, when deciding the meaning of a “further advance”.¹⁸⁹

6.38 Under clause 10(1), tacking is allowed in three cases:

- (1) where the lender has come to an arrangement with subsequent mortgage lenders concerning tacking (clause 10(1)(a));
- (2) where the subsequent goods mortgage has not been registered before the making of the further advance (clause 10(1)(b)); or
- (3) where the lender is obliged by the goods mortgage to make further advances (clause 10(1)(c)).

6.39 Clause 10(3) applies where the prior goods mortgage was made expressly for securing further advances. In these circumstances, the prior lender is still granted priority over the subsequent lender provided that the subsequent lender has not given the prior lender notice of the registration of the subsequent goods mortgage before the prior lender makes the further advance.

¹⁸⁹ Usually, a “further advance” will be a top-up loan, or a drawdown under a revolving credit facility: *Re Black Ant Co Ltd* [2016] EWCA Civ 30, [2016] 2 P&CR DG2.

Chapter 7: Third parties

- 7.1 As we discuss in Chapter 2, the law offers no protection to purchasers who buy goods subject to a bill of sale, even if they act in good faith and know nothing about the lender's interest. This has generated many cases of hardship and has the potential to bring the logbook loan industry into disrepute.
- 7.2 The draft Bill includes four provisions dealing with third parties:
- (1) Clause 11 places a duty on the owners of goods subject to a mortgage to disclose the existence of that mortgage.
 - (2) Clause 12 provides for third parties who get ownership of the mortgaged goods. Where ownership is acquired by another person (either through a transfer by the borrower or through the operation of law), the goods mortgage will cease to exist:
 - (a) if the mortgage was not registered at the time of the acquisition; or
 - (b) if a disposition is made to a private purchaser who acts in good faith without actual notice of the goods mortgage (an "innocent private purchaser"). "Private purchaser" is defined in clause 13, while "disposition" is defined in clause 32.
 - (3) Clause 14 provides that an unregistered goods mortgage is void against a trustee in bankruptcy.
 - (4) Clause 25 sets out a right for the lender to apply to court to obtain possession from third parties.
- 7.3 In this chapter, we start with the new duty on owners to disclose a goods mortgage. We then examine the effect of unregistered goods mortgages, and we describe the protection for innocent private purchasers, looking in detail at each aspect of this test.
- 7.4 Where the mortgage is registered, the lender may still take possession from a third party who is not an innocent private purchaser, provided the grounds for possession have been met. At the end of this chapter, we consider how a lender may take possession from a third party in these circumstances.

CLAUSE 11: THE DUTY TO DISCLOSE

- 7.5 Clause 11 imposes a duty on the owner of goods to disclose the existence of any goods mortgage to prospective purchasers and other lenders. The effect of this duty is to engage the Fraud Act 2006 and, in particular, section 3 of that Act, which sets out the offence of "fraud by failing to disclose information". This means that an owner would commit a criminal offence if they breached the duty dishonestly with the intention to make a gain for themselves or another or to cause a loss to another or expose another to a risk of loss. As we have seen, the mortgage document will warn borrowers of this consequence.

11 Duty of owner to disclose existence of goods mortgage

- (1) This section applies where a person owns goods which are subject to a goods mortgage (“the current mortgage”).
- (2) If the owner of the goods disposes of the goods to a purchaser without discharging the obligation secured by the current mortgage, the owner is under a duty to disclose to the purchaser the existence of the current mortgage before the disposition.
- (3) If the owner of the goods creates a further goods mortgage or other security over the goods without discharging the obligation secured by the current mortgage, the owner is under a duty to disclose to the person to whom the further goods mortgage or other security is provided the existence of the current mortgage, before creating the further goods mortgage or other security.
- (4) Where an undivided share in goods is subject to a goods mortgage, references in this section to the goods are to be read as references to the undivided share.
- (5) For the meanings of “disposition” and “purchaser”, see section 32.

7.6 Clause 11 applies where goods are subject to a goods mortgage, which is referred to as the “current mortgage” (clause 11(1)).

7.7 Clauses 11(2) and (3) then require owners to disclose the existence of the current mortgage when they:

- (1) dispose of the goods to a purchaser; or
- (2) create a further goods mortgage or other security over the goods.

7.8 The duty applies to all “owners” of mortgaged goods, not just the borrower. It includes anyone who becomes the owner of the goods while they are subject to the goods mortgage. For example, a borrower may sell mortgaged goods to a dealer. The dealer will have a duty not to sell the goods on to another purchaser without disclosing the existence of the mortgage. The duty to disclose applies even if the owner (for example, a trade purchaser or recipient of gift) does not in fact know about the goods mortgage. However, where the owner lacks knowledge about the goods mortgage, they would most probably not be acting dishonestly and thus would not be liable for fraud.

7.9 The words “disposition” and “purchaser” are defined in clause 32. We look at clause 32 in more depth at paragraph 7.29 below.

Interaction with the Fraud Act 2006

7.10 Under section 1 of the Fraud Act 2006, a person is guilty of fraud if they are in breach of one of three sections of that Act, which provide for different ways of committing the offence. Fraud is a serious offence which carries a maximum sentence of 10 years’ imprisonment.

7.11 The relevant provision here is section 3 of the Fraud Act 2006. It reads:

A person is in breach of this section if he—

(a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and

(b) intends, by failing to disclose the information—

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

7.12 Clause 11 of the draft Bill places a legal duty on owners of property to disclose the existence of a goods mortgage where required. This ensures that the first limb of section 3 is fulfilled.

Dishonesty

7.13 The meaning of “dishonesty” was set out in the leading case of *R v Ghosh*.¹⁹⁰ According to *Ghosh*, there are two limbs to the test: one objective, the other subjective:

(1) The jury (or, where relevant, the magistrates) would first consider whether the accused acted dishonestly by the standards of ordinary and honest people (objective limb).

(2) If so, the jury would consider whether the accused must have realised that what they were doing was dishonest by those standards (subjective limb).

7.14 Very recently,¹⁹¹ the Supreme Court abolished the second limb of the test in *Ghosh*, making what the accused thought about how others would regard his actions irrelevant. This decision simplified the test for dishonesty and remedied the anomaly that, as the Supreme Court put it, “the more warped the defendant’s standards of honesty are, the less likely it is that he will be convicted of dishonest behaviour”.¹⁹²

Intention to make a gain or cause a loss

7.15 This is a wide test, which may be fulfilled in several ways. In most cases, an owner who sells goods subject to a non-disclosed goods mortgage will be intending to make a gain for themselves and to expose either the third party or the lender to a risk of loss.

UNREGISTERED MORTGAGES

7.16 Under the 1882 Act, an unregistered bill of sale is void. It cannot be enforced against either third parties or the borrower.

7.17 In our 2016 report, we recommended that an unregistered goods mortgage should not be enforceable against a third party or trustee in bankruptcy, but that it should be enforceable against the borrower.¹⁹³ This reflects the purpose of registration, which is

¹⁹⁰ *R v Ghosh* [1982] QB 1053, [1982] 2 All ER 689. Although *Ghosh* itself concerned theft, it has been held to apply to the Fraud Act 2006, s 3 in *R v Razoq* [2012] EWCA Crim 674.

¹⁹¹ *Ivey v Genting Casinos* [2017] UKSC 67, judgment handed down on 25 October 2017. See in particular at [54] to [64].

¹⁹² *Ivey v Genting Casinos* [2017] UKSC 67 at [57].

¹⁹³ Bills of Sale (2016) Law Com No 369 para 6.47.

to give notice to trade buyers, lenders and creditors. Registration should have no effect on borrowers, who are already aware of the existence of the mortgage.

- 7.18 This policy is implemented in clauses 12 and 14. Clause 12(2) applies whenever goods have been transferred, either by agreement or by operation of law, to a new owner. If the goods mortgage is not registered, “the goods cease to be subject to the goods mortgage”.
- 7.19 Under clause 14, an unregistered goods mortgage is also ineffective against a trustee in bankruptcy. If the individual who owns the goods becomes bankrupt in England and Wales, the goods mortgage is void against the trustee of the bankrupt’s estate unless it has been registered.¹⁹⁴
- 7.20 If the individual becomes bankrupt in a jurisdiction other than England and Wales, clause 14 would not apply. However, if that jurisdiction recognises goods mortgages, the equivalent of a trustee in bankruptcy, or of the person who takes the goods from the bankrupt, would take free of the goods mortgage if the mortgage was not registered “at the time of the change in ownership” (clause 12(2)). This time would be determined in accordance with the rules in that jurisdiction.

14 Bankruptcy of owner of goods subject to goods mortgage

- (1) This section applies if an individual who owns goods subject to a goods mortgage is made bankrupt under Part 9 of the Insolvency Act 1986.
- (2) On the vesting of the bankrupt’s estate in the trustee in bankruptcy, the goods cease to be subject to the goods mortgage unless at the relevant time the goods mortgage is registered.
- (3) The “relevant time” is the time when the bankruptcy application is made or the bankruptcy petition is presented.

PROTECTION FOR PRIVATE PURCHASERS

- 7.21 Under hire-purchase legislation, a purchaser who buys a vehicle for private purposes in good faith and without actual notice of the hire-purchase agreement becomes the owner of the vehicle.¹⁹⁵ This protection does not currently apply to bills of sale. Instead, those who buy a vehicle subject to a logbook loan may find themselves faced with unpalatable options: essentially, to repay someone else’s loan or to lose the vehicle. This has led to cases of hardship, generating much criticism of the logbook loan industry.¹⁹⁶

¹⁹⁴ This clause applies to owners who take subject to the goods mortgage in the first place, such as the borrower, trade purchasers and persons who received the goods as gifts. Any of these third parties (ie not the borrower) would have had to take the goods at a time when the goods mortgage was registered. If the registration expired in the meantime and was not renewed, it would not bind their trustee in bankruptcy.

¹⁹⁵ Hire Purchase Act 1964, ss 27 to 29. See Bills of Sale (2015) Law Commission Consultation Paper No 225 paras 12.12 to 12.25 for further details.

¹⁹⁶ Bills of Sale (2016) Law Com No 369 paras 3.19 to 3.21.

- 7.22 The draft Bill provides that private purchasers take free of a goods mortgage if they act in good faith without actual notice of the mortgage. This protection is set out in clauses 12 and 13.
- 7.23 Clauses 12 and 13 follow the policy behind sections 27 to 29 of the Hire Purchase Act 1964. However, we have not just replicated these provisions, but sought to simplify them and make them clearer for our draft Bill. Furthermore, clauses 12 and 13 apply to all goods, unlike the Hire Purchase Act 1964, which applies only to vehicles.

12 Effect of change in ownership of goods

- (1) This section applies if—
 - (a) goods are subject to a goods mortgage, and
 - (b) before the obligation secured by the goods mortgage has been discharged, ownership of the goods—
 - (i) is transferred to another person, or
 - (ii) passes by operation of law to another person, otherwise than on the owner's bankruptcy in England and Wales (as to which, see section 14).
- (2) If the goods mortgage is not registered at the time of the change of ownership, the goods cease to be subject to the goods mortgage.
- (3) If ownership is transferred by a disposition (see section 32) to a purchaser who—
 - (a) is a private purchaser as defined by section 13,
 - (b) is a purchaser of the goods in good faith, and
 - (c) at the time of the disposition made to the purchaser, has no actual notice that the goods are subject to a goods mortgage,the goods cease to be subject to the goods mortgage.
- (4) In any other case, the goods remain subject to the goods mortgage in the hands of the new owner.
- (5) Subsections (2) and (3) do not exonerate the mortgagor and if different the person making the disposition or other transfer of ownership from any liability (whether criminal or civil) to which either of them would be subject apart from this section.
- (6) Where an undivided share in goods is subject to a goods mortgage, references in this section to goods are to be read as references to the undivided share.

13 Meaning of “private purchaser” in section 12

- (1) This section makes provision about the interpretation of section 12(3)(a).
- (2) “Private purchaser”, in relation to goods of any kind, means a purchaser who, at the time of the disposition made to the purchaser, does not carry on a business which consists, wholly or partly—
 - (a) of purchasing goods of that kind for the purpose of offering or exposing them for sale, or
 - (b) of providing finance by purchasing goods of that kind for the purpose of bailing them under hire-purchase agreements or agreeing to sell them under conditional sale agreements.
- (3) For the meanings of “disposition” and “purchaser”, see section 32.

The scope of private purchaser protection

7.24 Clause 12(3) applies where:

- (1) the goods in question are subject to a goods mortgage;
- (2) before the discharge of the secured obligation, the borrower or any subsequent owner of the goods “disposes of” the goods to another person;
- (3) the person who receives the goods is a private purchaser; and
- (4) the purchaser is acting in good faith, without actual notice of the goods mortgage.

7.25 In these circumstances, “the goods cease to be subject to the goods mortgage”.

7.26 Note that the protection applies whenever ownership is transferred by a disposition, not simply when the innocent private purchaser acquires the goods directly from the borrower. For example, the protection would apply where the borrower gives a car subject to a goods mortgage to a relative, who then sells it to an innocent private purchaser. The relative would take the car subject to the mortgage, but the innocent private purchaser would not.

7.27 Instead of adopting the complex presumptions in section 29 of the Hire Purchase Act 1964, the draft Bill includes a simple rule. An innocent private purchaser always takes free of goods mortgages, wherever in the chain of transfers and dispositions they happen to be. Similarly, anyone taking the goods from or after the innocent private purchaser will take free because the goods mortgage is extinguished when the goods are transferred to the innocent private purchaser.

7.28 Below we look in more detail at four concepts: “disposition”; “private (as opposed to ‘trade’) purchaser”; “in good faith without notice”; and “cease to be subject to a goods mortgage”.

“Disposition”

7.29 A disposition is defined in clause 32.

32 Meaning of “disposition” etc

(1) In this Act “disposition” means—

- (a) a contract of sale, as defined by section 2 of the Sale of Goods Act 1979, or
- (b) a contract under which the owner of goods transfers or agrees to transfer ownership of the goods to another person and—
 - (i) the other person provides or agrees to provide consideration otherwise than by paying a price, or
 - (ii) the contract is, for any other reason, not a contract of sale or a hire-purchase agreement;

and “dispose of” is to be read accordingly.

(2) For the purposes of this Act, a person becomes a “purchaser” of goods if, and at the time when, the person enters into a disposition under which ownership of the goods is or is to be transferred to the person.

7.30 A disposition has three elements. All three elements involve a contract – in other words, the person who receives the disposition must give something valuable in return. This protection will not apply to gifts.

7.31 Clause 32(1)(a) refers to a “contract of sale” as defined by section 2 of the Sale of Goods Act 1979. Here the seller transfers or agrees to transfer ownership to the buyer for a money consideration, called the price.

7.32 Clause 32(1)(b) follows section 8 of the Consumer Rights Act 2015. It applies where the owner transfers or agrees to transfer ownership for some other consideration, as in part exchange or barter contracts. The explanatory notes to the Consumer Rights Act 2015 explain the provisions of section 8 as follows:¹⁹⁷

A contract would be a contract for transfer rather than a sales contract if either (i) there is no monetary value assigned, or (ii) the contract is a mixed contract whether for a monetary price or not and, whilst goods are supplied, the transfer of goods is not sufficiently central to the contract to be a sales contract. If no monetary value is assigned to the goods, this does not preclude money from forming part of the consideration of the contract. For example, if the trader offers goods A in exchange for goods B and a cash fee, no value has been assigned to either goods A or B so the contract would fall under section 8, despite some money changing hands.

7.33 The July 2017 consultation explained that a disposition should cover any transfer of ownership of goods for value. We wished to record this concept, drawing on other commonly used definitions. The draft Bill followed section 8 of the Consumer Rights

¹⁹⁷ Explanatory notes to the Consumer Rights Act 2015, para 58, available at: <http://www.legislation.gov.uk/ukpga/2015/15/notes/division/3/1/3/2/1>.

Act 2015 and we asked consultees whether that encapsulated the concept of a contract to transfer ownership of goods for value in a clear way. Five consultees responded on this point and all agreed that it did.

“Private” purchaser

7.34 Effectively, a private purchaser is anyone who does not trade in those particular goods or finance them through hire-purchase. Under clause 13(2), the protection applies to anyone who does not carry on a business consisting (wholly or partly) of purchasing goods of the same kind for the purpose of:

- (1) offering or exposing them for sale; or
- (2) providing finance through hire-purchase or conditional sale arrangements.

7.35 This definition is similar to section 29(2) of the Hire Purchase Act 1964 but extends to goods other than vehicles.

Good faith without notice

7.36 Under clause 12(3), in order to take free, a private purchaser must act in good faith and without actual notice of the goods mortgage.

“Good faith”

7.37 “Good faith” refers to “honesty” in a broad sense.¹⁹⁸ The good faith test excludes purchasers who do not have actual notice but act fraudulently or dishonestly.¹⁹⁹

“Actual notice”

7.38 In our 2016 report we said that a private purchaser would take free of the goods mortgage unless they had “actual notice” of it. They would not be fixed with “constructive notice”²⁰⁰ on the basis that they could have searched the register.

7.39 One of the main worries that logbook lenders had was the potential for fraud, in particular that purchasers would deliberately not search the goods mortgage register, even if they knew about it, in order not to have “actual notice”.

7.40 However, under existing law, “actual notice” includes “wilful blindness”.²⁰¹ This applies: when a man has statements made to him, or has knowledge of facts, which do not expressly tell him of something which is against him, and he abstains from making further inquiry because he knows what the result would be.²⁰²

¹⁹⁸ See *Dodds v Yorkshire Bank Finance* [1992] CCLR 92: in hire-purchase, “in good faith” means “honestly”, as in Sale of Goods Act 1979, s 61(3).

¹⁹⁹ See M Bridge, *Benjamin’s Sale of Goods* (9th ed 2014) para 7-046.

²⁰⁰ Constructive notice is where notice is presumed in the circumstances. This is used in contrast to “actual notice”.

²⁰¹ *Forsythe International (UK) Ltd v Silver Shipping Co Ltd* [1994] 1 WLR 1334; *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210; see also M Bridge, L Gullifer, G McMeel and S Worthington, *The Law of Personal Property* (1st ed 2013) para 36-006.

²⁰² *English and Scottish Mercantile Investment Company Ltd v Brunton* [1892] 2 QB 700 at 708; see also *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978 at 1000.

- 7.41 If a private purchaser “wilfully and recklessly fails to make such inquiries as an honest and reasonable man would make”,²⁰³ they might find that they cannot claim absence of actual knowledge. Unlike “constructive notice”, wilful blindness does not depend on negligence.²⁰⁴ The simple fact that the goods mortgage is registered would not be enough to fix private purchasers with actual knowledge of it, even if they were negligent in failing to search the register.
- 7.42 Thus, we do not think that a purchaser would be deemed to have notice of entries on a register that the purchaser either did not know about or could not afford to check. Nevertheless, there may be purchasers who suspect the existence of a goods mortgage but make a calculated decision not to make any inquiries (neither checking the register nor asking the seller) for fear of what they might find. In our view, these purchasers would not be able to claim that they took the goods without “actual notice”.²⁰⁵
- 7.43 Where all of the “innocent private purchaser” conditions are met, the goods cease to be subject to the goods mortgage (clause 12(3)).

Liability of the owner who makes a disposition

- 7.44 Clause 12(5) clarifies that this protection has no effect on any liability of the borrower or person making the disposition. The original borrower will continue to be liable to pay the debt to the lender.
- 7.45 It may be that the person disposing of the goods is someone other than the original mortgagor, such as a trade purchaser. In our July 2017 consultation, we explained that the lender may also have an action against the trader in conversion. “Conversion” is a tort committed when the person with an “immediate right to possess”²⁰⁶ the goods is deliberately deprived of their use or possession.²⁰⁷ This applies where the lender has an “immediate right to possession” at the time of the disposition.
- 7.46 In practice, this requirement would almost always be met. Under clause 15, if the borrower offers goods for sale without the consent of the lender, this provides the lender with an immediate right to possession. The lender also has a right to possession if the borrower defaults on payment. Even if the lender did not have an immediate right to possession, it may still be able to bring an action for “reversionary injury”.²⁰⁸

²⁰³ *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250 at 267.

²⁰⁴ G Spencer Bower and K R Handley, *Actionable Misrepresentation* (5th ed 2014) para 16-37 fn 6: “Constructive notice depends on negligence and is quite different from actual notice from wilful blindness”.

²⁰⁵ For example, courts in Australia have held that “wilful blindness involves not merely a failure to inquire, but a form of calculated or dishonest ignorance”: see E Cooke and P O'Connor, “Purchaser liability to third parties in the English land registration system: a comparative perspective” (2004) 120 *Law Quarterly Review* 640 at 649.

²⁰⁶ M Jones, A Dugdale and M Simpson, *Clerk & Lindsell on Tort* (21st ed 2016) para 17-44.

²⁰⁷ See *Halsbury's Laws of England* (2015) vol 97 *Tort* para 604.

²⁰⁸ See generally M Jones, A Dugdale and M Simpson, *Clerk & Lindsell on Tort* (21st ed 2016) paras 17-148 to 17-149 and S Green, “Understanding the wrongful interference actions” (2010) 74(1) *Conveyancer and Property Lawyer* 15.

A possible long-term solution?

- 7.47 In our 2016 report, we said that in the longer term, vehicle provenance checks may become a normal and routine part of buying a second-hand vehicle.²⁰⁹ If so, then it would no longer be necessary to protect private purchasers. Instead, the fact that a vehicle mortgage is registered with an asset finance register could be considered enough to give all purchasers sufficient notice. In these circumstances, one could argue that a purchaser who failed to check should suffer the consequences.
- 7.48 We suggested that protection for innocent private purchasers may no longer be necessary if:
- (1) consumers routinely conducted a vehicle provenance check before purchasing a second-hand vehicle;
 - (2) there was widespread knowledge of the need to check;
 - (3) vehicle provenance checks for consumers were free or almost free; and
 - (4) confusing “text checks”²¹⁰ were no longer available.
- 7.49 We recommended that the legislation should include a regulation-making power so that if this situation were achieved, the protection for private purchasers of vehicles could be repealed.
- 7.50 However, we have not included this in the draft Bill, as our discussions with stakeholders and Government suggest that, in practice, such a power is unlikely to be exercised to take away consumer protection measures.

TAKING POSSESSION FROM THIRD PARTIES

- 7.51 Following the publication of the draft clauses in July 2017, logbook lenders expressed concern about transfers which are not in good faith, for example where the borrower gives a car to a family member, or where a purchaser is well aware that the car is subject to a goods mortgage. They asked how lenders could take possession in these circumstances.
- 7.52 Clause 15(2) of the draft Bill sets out a list of circumstances in which the lender may take possession of the goods, whether from the borrower or a third party.²¹¹
- 7.53 There may be circumstances in which the lender should be entitled to take possession from a third party owner. Although innocent private purchasers take free of the mortgage, in other circumstances the goods will remain subject to the registered goods mortgage even after they have been transferred to a new owner. The draft Bill now gives lenders a right to take possession from third parties and a right to apply to court to obtain the goods from those parties.²¹²

²⁰⁹ Bills of Sale (2016) Law Com No 369 para 8.37.

²¹⁰ We discuss “text checks” in Bills of Sale (2016) Law Com No 369 para 8.35 and Bills of Sale (2015) Law Commission Consultation Paper No 225 para 12.38. On an internet search for “vehicle provenance check”, consumers are faced with a large number of “text check” providers, who provide a check for as little as £3, communicating the result by text message. Although these text checks appear attractive, they do not tell consumers about logbook loans.

²¹¹ See Chapter 8 below for a general discussion of the lender’s right to take possession.

²¹² Draft Bill, clauses 15 and 25.

- 7.54 However, when it comes to taking possession from the third party, there is no requirement for the lender to serve a possession notice on the borrower.²¹³ If the borrower has sold or otherwise transferred title to the goods to another party, it would not make sense to require the lender to serve a possession notice on the borrower and give the borrower the option of a 28-day period to take debt advice before taking possession from a third party.
- 7.55 There is also no requirement to serve a possession notice on the third party themselves. Third parties who take subject to the goods mortgages are either trade purchasers, who should have checked the register before buying, or someone who received the goods for free and has not relied on the gift to their detriment.²¹⁴
- 7.56 As is the case with mortgages and charges generally,²¹⁵ lenders will have a limited right to self-help (to take the goods without a court order). Nevertheless, we think that exercising self-help would be risky, for the following reasons:²¹⁶
- (1) It is unlikely that all the circumstances will be known to the lender, so they will not be sure of the third party's right to the goods.²¹⁷
 - (2) The lender could face civil penalties: damages for conversion, trespass, entering premises without permission etc.
 - (3) The lender would have to compensate the third party for the time they were deprived of their goods if the lender took possession wrongfully.
 - (4) The lender could be prosecuted: under section 6(1) of the Criminal Law Act 1977 if they make a violent entry or threaten violence, or for theft if the third party had taken free of the goods mortgage.²¹⁸
- 7.57 It is difficult to envisage a scenario in which a lender could safely exercise their limited right to self-help. Lenders would be well advised to go to court as a matter of precaution.

A new procedure to seek a court order to take possession from third parties

- 7.58 The lender's right to take possession of goods from a third party owner depends on at least one of the circumstances in clause 15 being satisfied (as in the case for taking possession from the borrower). Where this requirement is satisfied, the lender has a power under clause 25 of the draft Bill to seek a court order to take possession of the goods from the third party who does not fall within the innocent private purchaser protection.

²¹³ Draft Bill, clause 15(4).

²¹⁴ If the third party relied on the gift to their detriment, they may be able to claim "estoppel" to stop the lender from taking possession.

²¹⁵ M Bridge, L Gullifer, G McMeel and S Worthington, *The Law of Personal Property* (1st ed 2013) paras 18-007 to 18-008.

²¹⁶ R Goode and E McKendrick, *Goode on Commercial Law* (5th ed 2016) paras 23.32 to 23.33.

²¹⁷ For example, the goods may have got to the third party through an innocent private purchaser, in which case the goods mortgage will have been extinguished.

²¹⁸ The theft charge would also depend on proof of dishonesty: see *R v Turner (No 2)* [1971] 2 All ER 441, [1971] 1 WLR 901.

25 Order for taking of possession while goods owned by third party

- (1) The mortgagee under a registered goods mortgage may apply to the court for an order under this section in relation to goods which are in the ownership of a person other than the mortgagor but which remain subject to the goods mortgage.
- (2) The court may order the delivery up of the goods to, or the taking of possession by, the mortgagee.

7.59 We think the court would consider all the circumstances, such as the new owner's willingness to repay the debt, before exercising its discretion to grant an order under the draft Bill.²¹⁹

Taking possession of goods from third parties without a court order

7.60 If the lender were to seize the goods without a court order, the owner's remedies would depend on whether they took free of the mortgage (either because they are an innocent private purchaser or because the goods mortgage was not registered).

7.61 If a lender were to seize goods from a private purchaser who acted in good faith without actual notice, the owner would have substantial remedies. Most notably, the owner could recover damages for conversion and trespass, as set out above.²²⁰ As a matter of procedure, clause 18 would stop lenders from selling for five days after seizure.²²¹ This would give some time for innocent private purchasers or other persons who took free to challenge the lender's title to the goods. Thus, it would enable the third party to regain the goods, together with appropriate compensation.

7.62 If the lender were to seize the goods from another third party (outside the scope of these protections), clause 18 would apply.²²² The lender would need to wait five working days between seizure and sale, allowing the owner the possibility of paying off any arrears and obtaining the return of the goods.

²¹⁹ By analogy, the courts always consider whether monetary satisfaction is available before ordering specific delivery of the goods, even where the goods are used as security: see *PK Airfinance US Inc v Blue Sky Two Ltd* [2009] EWHC 3314 (Comm) at [302]-[323] (aircraft subject to financing agreement); *Dawsonrentals Coach & Bus Ltd v Geldards Coaches Ltd* [2015] EWHC 2596 (QB) at [39] (buses subject to hire-purchase).

²²⁰ See para 7.56 above for a discussion of these remedies.

²²¹ See para 8.45 below for a discussion of clause 18.

²²² See para 8.47 below.

Chapter 8: Taking possession – general provisions

INTRODUCTION

8.1 In this chapter we consider a lender's power to take possession of goods. This is subject to several restrictions which apply to all goods mortgages, whether or not the mortgage is exempt. Here we examine these general provisions:

- (1) Clause 15 limits the grounds on which the lender may take possession of the goods.
- (2) Clause 16 prevents a lender from entering premises to take possession without either consent or a court order.
- (3) Clause 17 provides the lender with a power of sale.
- (4) Clause 18 restricts the lender's power of sale by requiring the lender to wait five working days between seizing the goods and selling them. Exempt borrowers may contract out of the five day delay if they wish.

8.2 In the next chapter we consider the additional "opt-in" protection for non-exempt borrowers who need more time to pay. In certain circumstances non-exempt borrowers have the right to prevent the lender from taking possession without a court order.

GROUNDINGS FOR TAKING POSSESSION

8.3 Under section 7 of the 1882 Act, a lender may only take possession of the goods in specified circumstances. In broad terms, a lender may only seize the goods:

- (1) if the borrower:
 - (a) is in default in the repayment of the loan;
 - (b) is in default of the principal obligation, if that is not a loan;
 - (c) defaults in the performance of any agreement for the maintenance of the secured goods;
 - (d) becomes bankrupt; or
 - (e) fraudulently removes the goods from the lender's grasp (either moves them in breach of a term of the mortgage, or offers them for sale without the lender's consent); or
- (2) if another creditor has levied an execution judgment or distrained against the goods.

8.4 Clause 15 preserves the policy underlying section 7 of the 1882 Act, but updates the list in clearer, contemporary terms. Under clause 27 of the draft Bill, the terms of the agreement cannot provide for additional grounds for possession if it would reduce the protection provided by clause 15.

8.5 In most cases the lender will take possession under clause 15(2)(a) because the borrower has failed to pay a sum when it becomes due.

15 Right of mortgagee to take possession of goods

- (1) The mortgagee under a goods mortgage is entitled to take possession of the goods only if one or more of the following conditions is met.
- (2) Those conditions are—
 - (a) that any sum whose payment is secured by the goods mortgage has become due and remains unpaid;
 - (b) that the mortgagor has failed to comply with a term of the goods mortgage relating to the maintenance or insurance of the goods;
 - (c) that the mortgagor has moved the goods in breach of a term of the goods mortgage;
 - (d) that the mortgagor has offered the goods for sale without the consent of the mortgagee;
 - (e) that, in the case of a goods mortgage that secures an obligation other than an obligation to pay money, the obligation secured has not been discharged at the time when it ought to have been discharged;
 - (f) that the goods have become liable to be seized under a warrant or writ of control to satisfy a court judgment;
 - (g) that, since the goods mortgage was created, the mortgagor—
 - (i) has been made bankrupt (under Part 9 of the Insolvency Act 1986),
 - (ii) has been adjudged bankrupt by a court in Northern Ireland,
 - (iii) has had his or her estate sequestrated by a court in Scotland, or
 - (iv) has been subject to a similar order or judgment made by a court in a territory outside the United Kingdom.
- (3) Subsection (1) applies only while the goods remain subject to the goods mortgage and is subject to—
 - (a) any provision of the goods mortgage further restricting the mortgagee's right to take possession, and
 - (b) in a case where a prior goods mortgage over the goods is registered, the rights of the prior mortgagee in relation to possession and sale.
- (4) If the goods remain owned by the mortgagor, subsection (1) is also subject to—
 - (a) section 19 (possession notice required while goods owned by mortgagor), and
 - (b) subsections (3) to (6) of section 20 (which further restrict the mortgagee's right to take possession).

- 8.6 The main change between the Bills of Sale Acts and the draft Bill is that the draft Bill does not refer to “fraudulently removing goods”. In our 2016 report, we commented that this was a difficult concept to understand: it is not clear when taking goods outside the country might or might not amount to “fraud”.²²³ We thought that it was intended to capture offering the goods for sale or moving the goods in breach of the agreement. These are now specifically provided for in clauses 15(2)(c) and 15(2)(d).
- 8.7 Clause 15(2)(g) elaborates on the “bankruptcy” ground taken from the Bills of Sale Acts, by including proceedings equivalent to bankruptcy in other jurisdictions. We consider that this is the best way to encapsulate the underlying policy of allowing the lender to take possession of the goods if there are clear indicators that the borrower might default and other creditors might claim the goods.

TAKING POSSESSION FROM PREMISES

- 8.8 Hire-purchase creditors are not entitled to enter premises to take possession of goods. Section 92(1) of the Consumer Credit Act 1974 (CCA) states that:

Except under an order of the court, the creditor or owner shall not be entitled to enter any premises to take possession of goods subject to a regulated hire-purchase agreement, regulated conditional sale agreement or regulated consumer hire agreement.

- 8.9 The section does not prevent lenders from taking possession of vehicles parked on the street. However, it provides that lenders may not enter “premises” without a court order.²²⁴ It applies both to the borrower’s own premises and those owned by third parties.²²⁵ Examples of goods on third party premises might include a car parked in a supermarket car park, or a painting on loan to a gallery.
- 8.10 Consumer groups argued that the draft Bill should replicate the protection provided by section 92 of the CCA. We agree. It prevents lenders from entering premises without consent and guards against attempts to “snatch” the goods from borrowers.

Consent “to enter premises to take possession” under the CCA

- 8.11 Section 92 of the CCA must be read alongside the contracting-out provisions, set out in section 173 of the CCA. Section 173(3) of the CCA states that:

a provision of this Act under which a thing may be done in relation to any person on an order of the court ... shall not be taken to prevent its being done at any time with that person’s consent given at that time...

- 8.12 Thus the lender may enter either with a court order or with consent. The consent must be genuine and voluntary²²⁶ and given at the time of entry (not when the agreement is signed). The consent should also be “informed”, in the sense that the lender has informed the person giving consent of their statutory rights.²²⁷ However, the extent of

²²³ Bills of Sale (2016) Law Com No 369 para 4.56.

²²⁴ The lender may also enter premises with the consent of the appropriate person: see para 8.24 below.

²²⁵ R Goode, D Rosenthal and S Makin, *Goode: Consumer Credit Law and Practice* (April 2017) Div II para 5.182.

²²⁶ See, in the context of hire-purchase: *Mercantile Credit Co Ltd v Cross* [1965] 2 QB 205, [1965] 1 All ER 577.

²²⁷ *Mercantile Credit Co Ltd v Cross* [1965] 2 QB 205, [1965] 1 All ER 577 at p 582.

the information required will depend on the lender's own legal duties to inform.²²⁸ We consider that, as a minimum of information, the lender should explain their entitlement to the goods in all cases.

- 8.13 The consent must be to do the thing which would otherwise be prohibited, which, in the case of the section 92, is to enter premises "to take possession". Thus it is not sufficient for the lender to obtain consent to enter. The lender must be given specific consent to enter *for the purpose of taking possession*.
- 8.14 One can take for example, a case in which the lender visits the borrower's home and asks to speak to the borrower. The borrower invites them in. We think that this invitation would not be sufficient to allow the lender to take the goods. Section 173(3) of the CCA would only provide a defence if the lender had been given consent, not only to enter, but also to take the goods.

Who should give consent under the draft Bill?

- 8.15 The CCA does not state whether the relevant consent is that of the borrower or of the occupier of the premises from which the goods are being taken.²²⁹
- 8.16 In the July 2017 consultation we said that, for the purposes of goods mortgages, consent should be given by the occupier (that is the person who is entitled to give consent to enter premises) and gave some examples.²³⁰ The purpose of this particular protection is to prevent lenders from trespassing on or breaking into premises to recover goods, rather than to protect the borrower. There are other protections in our draft Bill to protect borrowers, notably the requirement for a possession notice.
- 8.17 We asked consultees whether the law of goods mortgages should simply replicate section 92 of the CCA, or whether we should specify whose consent was needed. If so, we asked whether consent should be given by the occupier of the premises.

Consultees' views on giving consent

- 8.18 The issue elicited divergent views. Six out of nine consultees agreed that the draft Bill should specify whose consent is needed to enter premises in order to take possession under a goods mortgage. Six consultees stated that it should be the occupier, two the borrower and two answered "other".
- 8.19 The Bar Council agreed that the CCA is not clear, "although the academic commentators seem to agree that potentially the occupier is the person whose consent is required". However, they thought that the draft Bill should simply mirror the wording of the CCA and "leave the point for a Court to determine in due course". Meanwhile, the uncertainty would "encourage a cautious approach from lenders".

²²⁸ *Chartered Trust plc v Pitcher* [1999] GCCR 1099.

²²⁹ R Goode, D Rosenthal and S Makin, *Goode: Consumer Credit Law and Practice* (April 2017) Div II para 5.182 describes the point as "obscure": "one would expect the consent of the third party to entry by the creditor or owner to be sufficient, but Consumer Credit Act 1974, s 173(3) could be construed as requiring the consent of the debtor or hirer, whether or not he has any connection with the owner of the land on which the goods are situated". See also E Lomnicka and P Dobson, *Encyclopaedia of Consumer Credit Law* (January 2017) vol 1 para 2-073.

²³⁰ Law Commission Consultation on draft clauses (July 2017) para 7.16.

- 8.20 However, we think there is a strong argument for providing certainty in the context of goods mortgages. Those affected can rarely afford expensive litigation, so the point is unlikely to reach the courts for many years.
- 8.21 StepChange agreed with us that “the occupier of the premises should be required to consent to the lender entering premises to repossess the goods”. However, they thought that further safeguards may be needed in order to ensure that people could not be persuaded to permit entry without understanding the situation.
- 8.22 In response, we should clarify that the occupier may only consent to *entry* for the purposes of taking possession. They cannot consent to possession as such. For example, the occupier cannot consent to a breach of the possession notice procedure, which exists specifically to protect the borrower. In short, the issue of the occupier’s consent applies only where the lender would be entitled to seize goods on the street but not to enter premises.

New recommendation 14

- 8.23 The draft Bill should specify that consent to enter premises to take possession of goods under clause 16 must be given by the person entitled to authorise entry onto the premises.

Implementing protection against entering premises: clause 16

- 8.24 The draft Bill implements the policy behind section 92 of the CCA and provides further clarity. Nevertheless, we intend that academic commentary and judicial decisions on the meaning of “premises” in the CCA context should apply equally to clause 16.²³¹

16 Entry onto premises

- (1) Except under an order of the court, the mortgagee under a goods mortgage is not entitled to enter any premises to take possession of the goods without the consent of the person entitled to authorise entry on the premises (“the appropriate person”).
- (2) An entry in contravention of subsection (1) is actionable as a breach of statutory duty.
- (3) A mortgagee under a goods mortgage who—
 - (a) wishes to enter any premises for the purposes of taking possession of the goods, and
 - (b) does not have the consent of the appropriate person,

²³¹ E Lomnicka and P Dobson, *Encyclopaedia of Consumer Credit Law* (January 2017) vol 1 para 2-093 states: “Premises do not necessarily require the presence of a building or structure (*Gardiner v Sevenoaks RDC* [1950] 2 All ER 84 and *John A Pike (Butchers) Ltd v Independent Insurance Co Ltd* [1998] Lloyd’s Rep IR 410 CA) but they must have ‘metes and bounds’ (*Andrews v Andrews and Mears* [1908] 2 KB 567 at 570) and some element of permanency (*West Mersea UDC v Fraser* [1950] 2 KB 119). Thus entry upon a caravan site, a building site or the driveway of a house will be entry on premises. But the taking possession of a motor vehicle parked on a public road will not infringe this section”.

may make an application to the court for an order under this subsection (“an access order”) against the appropriate person.

- (4) On an application under subsection (3), the court may make an access order only if the court is satisfied, at the time when it makes the order, that the applicant is entitled to take possession of the goods.

- 8.25 Clause 16(1) implements our policy by clarifying that any consent must be “of the person entitled to authorise entry on the premises”.
- 8.26 Clause 16(2) replicates section 92(3) of the CCA by making a contravention of the section actionable as a breach of statutory duty.
- 8.27 Clause 16(3) is new. It provides further detail about how the lender may apply for a court order. Under clause 16(4), which is also new, the court may make an “access order” if it is satisfied that the lender is entitled to take possession of the goods. As part of the court’s general discretion, the court will also consider whether, and in what circumstances, it is appropriate to permit the lender to enter the premises in question.

THE POWER OF SALE

- 8.28 At common law, a lender who is entitled to take possession of secured goods also has the power to sell them. The 1882 Act places a restriction on this right by requiring the lender to wait five clear days between seizing the goods and selling them.²³²
- 8.29 The draft Bill also provides lenders with a power of sale. Under clause 17, lenders are given a power of sale, subject to the requirement in clause 18 that they wait five working days.
- 8.30 There is substantial case law about how a power of sale is exercised and how the proceeds of sale must be accounted for. We intend that the common law rules in this area apply in the goods mortgages context. In broad terms, a lender who sells mortgaged property owes duties in equity:
- (1) to act in good faith and for proper purposes; and
 - (2) to take reasonable care to obtain a proper price.
- 8.31 These duties are owed to: the borrower, any subsequent lender, a co-borrower and a guarantor of the borrower’s debt.²³³ The lender also has to account for any surplus made on sale to any other lenders and/or the borrower.²³⁴

²³² Bills of Sale Amendment Act 1882, s 13.

²³³ *PK Airfinance SARL v Alpstream AG* [2015] EWCA Civ 1318, [2016] 1 CLC 135 at [115] to [116].

²³⁴ C Harpum, S Bridge and M Dixon, *Megarry & Wade: The Law of Real Property* (8th ed 2012) paras 25-020 and 25-021.

- 8.32 Most of the case law regarding lenders' duties concerns land mortgages, but the Court of Appeal has confirmed that the duties apply beyond the land context.²³⁵ *Halsbury's Laws* takes the view that these duties also apply to bills of sale.²³⁶
- 8.33 The duties can be excluded by agreement, but where this is attempted, the courts have interpreted such clauses very narrowly. For example, a clause which allowed the mortgagee to sell the security "on such terms and for such consideration as the mortgagee thinks fit" was interpreted to mean "... as the mortgagee thinks fit *within the limits of the duty of reasonable care imposed by the general law*".²³⁷ Furthermore, where the borrower is a consumer, unfair terms legislation will apply.²³⁸ Any term which excludes the lender's common law duties is likely to be invalid.

Implementing the policy: clause 17

17 Mortgagee's power of sale

- (1) If the mortgagee under a goods mortgage has lawfully taken possession of the goods, the mortgagee has power to sell the goods.
- (2) This is subject to the following provisions of this section and to section 18.
- (3) If the goods mortgage is not registered but another goods mortgage over the goods is registered, the mortgagee under the unregistered goods mortgage may not sell the goods.
- (4) Where two or more goods mortgages are registered in relation to the same goods, a subsequent mortgagee may not, except under an order of the court, sell the goods without the concurrence of every prior mortgagee under a registered goods mortgage.
- (5) Section 101 of the Law of Property Act 1925 (which contains provisions relating to mortgages made by deed) does not apply in relation to a goods mortgage.

- 8.34 Clause 17(1) provides lenders with a power of sale. As discussed, this will be subject to the lender's common law duties.
- 8.35 Clause 17(4) makes provision for the possibility of multiple mortgages over the same goods. If this is the case, a subsequent mortgagee may not, except by order of the court, sell the goods without the concurrence of every prior mortgagee. This provision is modelled on a similar rule in the Merchant Shipping Act 1995.²³⁹ It is designed to ensure that the position of the first mortgagee is not prejudiced in the event that a

²³⁵ *PK Airfinance SARL v Alpstream AG* [2015] EWCA Civ 1318, [2016] 1 CLC 135 at [115] to [121], where the court applied the above duties to aircraft mortgagees; *Den Norske Bank ASA v Acemex Management Co Ltd* [2003] EWCA Civ 1559, [2004] 1 All ER (Comm) 904 at [23] to [25], where the court applied the above duties to ship mortgagees.

²³⁶ *Halsbury's Laws of England* (2015) vol 49 *Financial Instruments and Transactions* para 574, citing *Mutual Finance Ltd v Cuckmere Brick Co Ltd* [1971] Ch 949 (a land mortgage case) as applying to bills of sale.

²³⁷ *Bishop v Bonham* [1988] 1 WLR 742 at 753 E to F.

²³⁸ See Consumer Rights Act 2015, ss 61 to 76.

²³⁹ Merchant Shipping Act 1995, sch 1, para 8.

subsequent mortgagee becomes entitled to sell the secured asset. Clause 17(3) also protects lenders with registered mortgages, by not allowing lenders who have not registered their mortgage to sell the goods if there is a registered mortgage on them.

- 8.36 Clause 17(5) provides that section 101 of the Law of Property Act 1925 does not apply in relation to a goods mortgage. Section 101 applies to mortgages made by deed and includes various restrictions on how sales are conducted, including a requirement that any conveyance under the statutory power of sale be made by deed.²⁴⁰ It also appears to be inconsistent with the five day time limit. As it is possible to execute a valid goods mortgage in the form of a deed, this could give rise to problems. Clause 17(5) makes the position clear.

GOODS SEIZED NOT TO BE SOLD UNTIL FIVE WORKING DAYS HAVE PASSED

- 8.37 Under the 1882 Act, a lender must leave a period of five clear days between taking possession of the secured goods and selling them. In July 2017, we consulted on a draft clause which continued this protection for all seizures which were not authorised by a court order.
- 8.38 We asked if this protection is still necessary in all such circumstances. We noted that any delay following seizure involves costs (including mounting interest and storage costs).²⁴¹
- 8.39 Views on this issue were split. Consumer protection agencies thought that the five day period was essential. The Chartered Trading Standards Institute described it as “the only real safeguard” against unlawful seizures by logbook lenders.
- 8.40 Logbook Money and Loans 2 Go thought the five days were unnecessary, given the other grace periods now provided to borrowers. However, Logbook Money pointed out that it adhered to the CCTA code, which states that members should hold the vehicle post-repossession for not less than 14 days.²⁴²

The 14-day time period can actually be useful to both lenders and borrowers as it allows further opportunity for the borrower to find the funds to have the vehicle released.

- 8.41 Logbook Money wrote that it would continue to allow at least 14 days as a standard policy regardless of the requirements of the new draft Bill.
- 8.42 The main case against the five day period was put by Boodle Hatfield LLP, on behalf of high net worth individuals and business borrowers. They highlighted the extra costs of storing, maintaining and insuring for five days, as well as the undesirability of delays in such circumstances. They argued that businesses borrowing more than £25,000 and high net worth individuals should be able to opt out of this provision. They thought that

²⁴⁰ There is case law suggesting that section 101 of the Law of Property Act 1925 does not apply to security bills of sale: see *Calvert v Thomas* (1887) 19 QBD 204 and *Re Morrill, ex p Official Receiver* (1886) 18 QBD 222, which considered the equivalent power of sale provision in Conveyancing Act 1881.

²⁴¹ We were told the lenders charge £2 per day plus VAT plus an administration charge of £20 for the storage of cars. It is likely that they would charge more for more valuable assets (such as art).

²⁴² CCTA Code of Practice *Bills of sale for consumer lending regulated under the Consumer Credit Act* (2017) para 4.8.8.

this would be consistent with land mortgages, where the mortgage deed may vary or extend the lender's powers of sale.²⁴³

- 8.43 We are convinced that the five day period is an important safeguard and should be retained for non-exempt agreements, such as logbook loans. However, businesses borrowing over £25,000 and high net worth individuals should be allowed to opt out of this protection in the mortgage document, if they wish to do so. This would reduce the cost of storing or insuring high value items.

New recommendation 15

- 8.44 The five day period should be mandatory for non-exempt goods mortgages. However, exempt borrowers should be entitled to opt out of the five day protection in the goods mortgage document.

Implementing the five day delay: clause 18

- 8.45 Our policy is set out in clause 18 of the draft Bill.

18 Goods seized not to be sold until five days have passed

- (1) If the mortgagee takes possession of the goods to which a goods mortgage relates, the mortgagee must not sell the goods before the end of the fifth working day following the day on which possession is taken.
- (2) The appropriate person may before the end of the fifth working day apply to the court and the court, if satisfied that, by reason of the payment of money or otherwise, the condition in section 15(2) has ceased to be met, may—
 - (a) restrain the mortgagee from removing or selling the goods,
 - (b) order the return of the goods to the appropriate person, or
 - (c) make such other order as the court thinks just.
- (3) If the appropriate person and any subsequent mortgagees have agreed with the mortgagee that the mortgagee may deal with the goods otherwise than by way of sale, references in subsections (1) and (2) to selling the goods include references to disposing of them in any other way.
- (4) “The appropriate person” means the mortgagor, except that, if the goods have become owned by another person, it means that other person.
- (5) “Working day” means a day other than a Saturday, a Sunday, Good Friday, Christmas Day or a bank holiday under section 1 of the Banking and Financial Dealings Act 1971 in England or Wales.
- (6) This section does not apply —

²⁴³ Law of Property Act 1925, s 101(3).

- (a) if the mortgagee takes possession under an order of the court, or
- (b) in a case where—
 - (i) the goods mortgage is an exempt goods mortgage,
 - (ii) the instrument creating the goods mortgage includes a statement that the mortgagor agrees to forgo the protection given by this section, and
 - (iii) the goods remain owned by the mortgagor.

- 8.46 Under clause 18(1), a lender who has taken possession of goods must wait five working days before selling the goods. This is a slightly longer period than under the 1882 Act, which specifies five clear days rather than working days. It responds to concerns from consumer protection agencies that it is unrealistic to apply to the court over a weekend. Clause 18(5) defines a “working day”.
- 8.47 Under clause 18(2), the borrower or a third party owner may make an application to court for the return of goods to them, provided they do so before the end of the fifth working day. If the reasons for taking possession under clause 15(2) no longer apply, the court may restrain the lender from selling the goods, order their return, or make such other order as the court thinks fit.
- 8.48 During consultation, we were asked to define what we meant by “sell”. Would it, for example, include an agreement to hire the goods, or to provide them on a hire-purchase agreement to a third party? Clause 18(3) confirms that the five day period applies to other ways in which the lender may dispose of, or otherwise deal with, the goods.
- 8.49 Clause 18(6) states that the protection does not apply where the lender has taken possession by order of the court. Nor does it apply to businesses borrowing more than £25,000 and high net worth individuals who have opted out of the provision. In the case of an opt-out, the mortgage document must include a statement that the exempt borrower agrees to forgo the protection given by this section.

Chapter 9: Additional protections for non-exempt mortgages – the opt-in procedure

PROTECTION AGAINST GOODS BEING SEIZED PREMATURELY

- 9.1 Borrowers may be able to meet their obligations if they are given more time to pay. For hire-purchase agreements, the lender is required to obtain a court order before repossessing goods where the borrower has paid at least one-third of the total loan amount. For borrowers in temporary financial difficulties, the courts have extensive powers to provide more time to pay the arrears²⁴⁴ and even to reduce future interest.²⁴⁵
- 9.2 One problem with the Bills of Sale Acts is that they do not provide a similar protection. In our 2015 consultation, we proposed that where a goods mortgage secures a “regulated credit agreement”, goods mortgages borrowers should have the same level of protection as borrowers using hire-purchase.²⁴⁶
- 9.3 The issue proved controversial. There was general agreement that where borrowers engaged with the court process, a right to put their case to a court was beneficial. However, without engagement, the court process can become an expensive rubber stamp. It was pointed out that around 80% of hire-purchase borrowers failed to respond to the court forms. In the absence of evidence from the borrower about their means, the court has no alternative but to grant the order. Court fees are several hundreds of pounds and are simply added to the arrears, compounding the borrower’s problems.

The opt-in procedure

- 9.4 In 2016, we recommended that non-exempt borrowers who have paid at least one-third of the loan amount should have the right to demand that the lender obtain a court order, but that they should specifically “opt in” to this right.²⁴⁷ Our recommendations were based on logbook lenders’ experience of a similar “opt-in” procedure in Wisconsin and in-depth discussions with consumer protection groups. Our aim was to encourage borrowers to seek advice and to make appropriate choices, as well as to provide easy access to the courts for those who need more time to pay.
- 9.5 We therefore recommended a new possession notice procedure, which would apply to non-exempt borrowers who had paid at least one-third of the loan. The possession notice would give the borrower three options: to require the lender to seek a court order, to terminate voluntarily, or to ask for more time to seek advice.
- 9.6 We thought that in practice the additional time to seek advice would be particularly important. It would encourage borrowers to obtain help from a debt adviser and allow

²⁴⁴ For regulated consumer credit agreements, the courts may make a time order under Consumer Credit Act 1974, s 129. The court may order payment to be made at such times as the court considers just and reasonable, having regard to the means of the debtor.

²⁴⁵ Consumer Credit Act 1974, s 136. In *Southern & District Finance plc v Barnes* [1996] 1 FCR 679, the Court of Appeal found that where the borrower could repay the existing arrears with more time, it may be appropriate to order that no additional interest should be added to the account.

²⁴⁶ Bills of Sale (2015) Law Commission Consultation Paper No 225 paras 11.7 to 11.45.

²⁴⁷ Bills of Sale (2016) Law Com No 369 paras 7.51 to 7.85.

problems to be resolved without recourse to the courts. It is also in line with the policy behind the new Pre-Action Protocol for Debt Claims,²⁴⁸ which came into effect on 1 October 2017.

9.7 In this chapter we consider the opt-in procedure which applies only to non-exempt mortgages. It is set out in clauses 19 to 22 and 24 of the draft Bill:

- (1) Clause 19 states when a possession notice must be given.
- (2) Clause 20 outlines the content of the notice.
- (3) Clause 21 explains the interaction between the possession notice and default notices under the Consumer Credit Act 1974 (CCA).
- (4) Clause 22 sets out the consequences of breaching clauses 19 or 20.
- (5) Clause 24 gives the courts additional powers where the lender applies for a court order.

WHEN WILL THE OPT-IN PROCEDURE APPLY?

19 Possession notice required while goods are owned by mortgagor

- (1) The giving to the mortgagor of a notice complying with section 20 (“a possession notice”) is necessary before the mortgagee can take possession of the goods while they are owned by the mortgagor.
- (2) Subsection (1) does not prevent the mortgagee taking possession without giving a possession notice if—
 - (a) the goods mortgage is an exempt goods mortgage (see section 26), or
 - (b) in the case of a goods mortgage other than exempt goods mortgage, the following conditions are met—
 - (i) the obligation secured is one that can be discharged by the payment of money,
 - (ii) at the time when the goods mortgage was created, the redemption total could be determined, and
 - (iii) at the time when the mortgagee takes possession of the goods, less than one third of the relevant amount has been paid.
- (3) “The redemption total” means the total sum that is to be payable by the mortgagor in order to discharge the obligation secured by the goods mortgage, including interest but excluding any sum payable as a penalty.
- (4) Where the obligation can be discharged either by the payment of money or by other means, it is to be assumed for the purposes of subsection (3) that the mortgagor does not discharge it by those other means.
- (5) The “relevant amount” means the redemption total, except in a case within subsection (6).

²⁴⁸ See para 9.20 below.

(6) In a case where—

- (a) the goods mortgage secures a regulated credit agreement as defined by section 8(3) of the Consumer Credit Act 1974, and
- (b) at a time when the mortgagee takes possession of the goods, part of the indebtedness has been discharged early in accordance with subsections (3) and (4) of section 94 of that Act (right to complete payments ahead of time),

“the relevant amount” means the redemption total reduced by the amount by which any rebate allowable under section 94 of that Act exceeds any amount which the creditor claims under section 95A(2) of that Act.

- 9.8 Clause 19(1) states the basic rule – that the mortgagee must give the mortgagor a possession notice before taking possession of the goods.
- 9.9 In our 2016 report, we explained that if the issue were disputed, the lender would need to prove that the notice was delivered. This could be done by a variety of means, including using registered post, an email read receipt, or telephoning the borrower to confirm receipt.²⁴⁹
- 9.10 Under clause 19(2), a possession notice need not be given in two situations:
- (1) where the goods mortgage is “exempt”; or
 - (2) where the total monies due to the lender can be determined from the start, when less than one-third of the total amount has been paid (the “one-third rule”).

The “one-third rule”

- 9.11 This mirrors the provision in hire-purchase law, whereby a lender need not obtain a court order where the borrower has paid less than one-third of the total loan amount.²⁵⁰ The rationale is that a borrower who has paid one-third or more of the loan has indicated a serious intention, and made a significant effort, to discharge the debt.
- 9.12 Clause 19(3) defines the “redemption total” as the total sum to be paid by the borrower in order to discharge the secured obligation, including interest. The redemption total is determined at the start of the agreement. However, clauses 19(5) and 19(6) make provision for cases in which the borrower made a partial early repayment and is entitled to a rebate on the total sum under section 94 of the CCA. This rebate, along with any compensation payable to the lender, would be taken into account in calculating the relevant total amount in order to determine if one-third has been paid.
- 9.13 Sometimes the total sum cannot be determined in advance: for example, a loan may have a variable interest rate. In these circumstances, the rule does not apply – the lender must provide a possession notice whatever repayments have been made (Clause 19(2)(b)(ii)).
- 9.14 Clause 19(4) clarifies that parties can agree alternative means of performance of the secured obligation without falling outside clause 19(2)(b)(i).

²⁴⁹ Bills of Sale (2016) Law Com No 369 paras 7.53 to 7.54.

²⁵⁰ Consumer Credit Act 1974, s 90(1).

WHAT MUST BE IN THE POSSESSION NOTICE?

9.15 We recommended that before taking possession, the lender should send the borrower a prescribed form. This should include a clear explanation of both the lender's and the borrower's rights.²⁵¹ It should also give the borrower information about free debt advice.

Three options

9.16 We said that the form should give the borrower three options:

- (1) require the lender to seek a court order;
- (2) terminate voluntarily, by handing the goods to the lender in full and final settlement; or
- (3) indicate a desire to seek debt advice, which would halt the possession process for a period of time.

Time limits

9.17 We suggested that the lender should have to wait 14 days for the borrower to return the form. If the borrower does nothing, the lender may take possession of the goods.

9.18 However, a borrower who indicated a desire to seek advice would be entitled to extend this waiting period. We suggested that this additional period should be a further 28 days. During this time the borrower could terminate voluntarily or require the lender to seek a court order.

9.19 We said that these time limits would need to be realistic. In particular, the period to seek advice would need to be based on evidence of how long it actually takes to see a debt adviser. We recommended that the time limits should be set out in secondary legislation rather than primary legislation, to allow greater flexibility.²⁵²

Aligning the time limits with the Pre-Action Protocol for Debt Claims

9.20 This protocol, which came into force on 1 October 2017, describes the conduct the courts will normally expect from parties before the start of proceedings. It applies to all businesses (whether or not incorporated) claiming payment of a debt from an individual, unless compliance is inconsistent with a regulatory obligation.

9.21 In broad terms, the protocol requires a lender to send a letter and wait 30 days before taking court action. If the borrower indicates that they are seeking debt advice, the lender should allow the borrower at least 30 days to obtain this advice. Lenders should also provide reasonable extra time if borrowers are unable to obtain advice within 30 days. If a borrower proposes a revised repayment schedule, the lender should consider it. If the lender rejects the offer, they should provide reasons in writing. The lender should then give the borrower at least 14 days' notice of their intention to start court proceedings unless there are exceptional circumstances.

9.22 While the interaction between the protocol and secured debts is not clear,²⁵³ we do not think that the protocol applies directly to taking possession of goods, which is distinct from enforcing a debt and is subject to a separate regime under this draft Bill. We also

²⁵¹ Bills of Sale (2016) Law Com No 369 para 7.100(5).

²⁵² Bills of Sale (2016) Law Com No 369, para 7.100(9).

²⁵³ The protocol does not address secured debts at all.

do not think it would be appropriate to require a lender to write a letter of action under the protocol after sending the possession notice but before seeking a court order. That would duplicate pre-action measures and have the potential to add two to three months' delay to the process.²⁵⁴

- 9.23 However, the possession notice procedure and the pre-action protocol are both driven by the same policy concerns, namely that creditors should provide reasonable opportunities to discuss alternative repayment schedules before taking enforcement action. Given the similarities between the two regimes, there is an argument for aligning the two procedures more closely by, for example, extending the "advice period" to 30 days, rather than the 28 days we originally suggested.
- 9.24 By the time the Goods Mortgages Act is implemented, the debt pre-action protocol will have been in operation for at least a year. Both lenders and consumer protection groups will by then have experience of how it operates and of the practical effect of the various time limits.
- 9.25 The Government should consider the desirability of aligning the length of the prescribed "notice period" and "advice period" with the protocol.

Implementing the policy: clause 20

- 9.26 Clause 20 sets out what the possession notice must contain and provides HM Treasury with the power to prescribe the contents.

20 Possession notice

- (1) A possession notice must be in the prescribed form and contain prescribed information.
- (2) Regulations made by virtue of subsection (1) must require a possession notice to—
 - (a) state that the mortgagee considers that one or more of the conditions in section 15(2) is met, specifying which condition and why the mortgagee considers that it is met,
 - (b) state that the mortgagor may exercise the right conferred by section 23 (mortgagor's right to terminate),
 - (c) state that the mortgagor may within a prescribed period ("the notice period")—
 - (i) require the mortgagee not to take possession of the goods unless authorised to do so by an order of the court, or
 - (ii) inform the mortgagee of the mortgagor's intention to seek advice,

²⁵⁴ The protocol, para 1.3 states that the protocol should "be read in conjunction with industry and Government guidance relating to good practice in the recovery of debt". If there is any doubt that the protocol applies in addition to the possession notice, we think the point could usefully be addressed in the guidance.

- (d) indicate the amount of any costs that may become payable by the mortgagor under an order of the court if the mortgagor acts under paragraph (c)(i) and the mortgagee applies for such an order, and
 - (e) state that the mortgagee intends to take possession of the goods unless within the notice period the mortgagor—
 - (i) remedies the breach to which the notice relates (if the breach is capable of remedy), or
 - (ii) acts under paragraph (c)(i) or (ii) or under section 23.
- (3) If the mortgagor informs the mortgagee under subsection (2)(c)(ii), within the notice period, of the mortgagor’s intention to seek advice, the mortgagor may within a further prescribed period (“the advice period”), require the mortgagee not to take possession of the goods unless authorised to do so by an order of the court.
- (4) Where a possession notice has been given to the mortgagor, the mortgagee is not entitled to take possession of the goods—
- (a) before the end of the notice period, and
 - (b) if the mortgagor acts under subsection (2)(c)(ii), during the advice period.
- (5) If the mortgagor so requires under subsection (2)(c)(i) or (3), the mortgagee may not take possession of the goods except under an order of the court.
- (6) If before the relevant time the mortgagor remedies the breach to which the possession notice relates, the breach is to be treated as not having occurred.
- (7) In subsection (6) “the relevant time” means the end of the notice period or, if the mortgagor acts under subsection (2)(c)(ii), the end of the advice period.

9.27 Clause 20(1) provides a general power to require the possession notice to contain an explanation of lenders’ and borrowers’ rights and to give borrowers information about where they can obtain free debt advice.

9.28 Clause 20(2) is mandatory and requires the possession notice to contain particular information. It must specify the circumstances which entitle the lender to take possession (clause 20(2)(a)), tell borrowers about the right to voluntary termination (clause 20(2)(b)) and indicate the costs of a court order (clause 20(2)(d)).

9.29 Under clause 20(2)(e), the lender must tell the borrower that it intends to take possession unless the borrower exercises one of these choices or pays the arrears.²⁵⁵ The three options are set out in clauses 20(2)(b) and (c).

9.30 Two time periods will be prescribed in secondary legislation. Clause 20(2)(c) refers to a prescribed “notice period” for the borrower to return the form. Clause 20(3) refers to a further prescribed “advice period”.

²⁵⁵ In most cases, the lender will issue a possession notice because of arrears. In the rare case where the notice is issued for other reasons, the borrower may remedy the breach specified in the notice.

INTERACTION WITH A DEFAULT NOTICE UNDER THE CCA

- 9.31 Where the underlying agreement is a “regulated credit agreement”, the CCA requires the lender to provide a borrower with a default notice before taking any action to enforce the security. Default notices are common and often result in further payment or negotiations. We said that the possession notice should only be sent following a default notice when the lender is about to commence court action.²⁵⁶
- 9.32 Clause 21 clarifies that the possession notice is in addition to the default notice under the CCA and not a substitute for it.

21 Defaults under consumer credit agreements

- (1) This section applies if the goods mortgage was given to secure the payment of money under a regulated agreement to which subsection (1) of section 87 of the Consumer Credit Act 1974 (need for default notice) applies.
- (2) A possession notice—
 - (a) may not be given until the restriction imposed by section 88(2) of that Act has ceased to apply to the goods mortgage, and
 - (b) may not be given if, by virtue of section 89 of that Act (compliance with default notice), the default is treated as not having occurred.
- (3) If because of section 19(2) no possession notice is required—
 - (a) the mortgagee is not entitled to take possession of the goods on the basis that a condition in section 15(2) is met unless the restriction imposed by section 88(2) of the Consumer Credit Act 1974 has ceased to apply to the goods mortgage, and
 - (b) section 15(2)(a) to (f) does not apply to a default that is treated by section 89 of that Act as not having occurred.

- 9.33 Section 87(1) of the CCA requires a lender to serve a default notice before recovering possession of goods or enforcing a security. Section 88(2) of the CCA then requires the lender to wait 14 days before taking action. Under section 89 of the CCA, the default is treated as not having occurred if remedial action has been taken within the time specified.
- 9.34 Clause 21(2) requires the lender to serve a default notice and wait for the 14 days prescribed in section 88(2) of the CCA to expire. They may only serve a possession notice if the default has not been remedied during this period.
- 9.35 Where the borrower has paid less than a third of the loan, no possession notice is required. Clause 21(3) specifies that the lender must still issue a default notice and wait

²⁵⁶ Bills of Sale (2016) Law Com No 369 para 7.52.

14 days before taking action. Again, possession is only permitted if the default has not been remedied.²⁵⁷

- 9.36 There are cases where the underlying agreement is regulated by the CCA but a default notice is not required. This is because the lender takes possession of the security otherwise than by reason of a breach of the regulated agreement. For instance, this could happen where the borrower breached a term of the goods mortgage which does not also constitute a breach of the underlying agreement. In all cases where the underlying agreement is regulated and there is no default notice, section 76(1) of the CCA requires the lender to give the borrower at least seven days' notice of their intention to take possession of the goods.

CONSEQUENCES OF TAKING POSSESSION UNLAWFULLY

9.37 Clause 22 deals with the situation where a lender has taken possession:

- (1) without satisfying at least one of the grounds in clause 15;
- (2) without giving the borrower the prescribed possession notice (clause 19); or
- (3) in contravention of the possession notice time limits or the borrower's demand for a court order (clause 20).

22 Wrongful taking of possession by mortgagee

- (1) If the mortgagee takes possession of the goods to which a goods mortgage relates in contravention of section 15(1), 19 or 20, the mortgagor—
 - (a) is entitled to have the goods returned, and
 - (b) is released from all further liability under the obligation secured by the goods mortgage.
- (2) This section does not apply if the goods have ceased to be owned by the mortgagor.

9.38 Clause 22 is similar but not identical to section 91 of the CCA, which deals with cases of wrongful repossession under hire-purchase and conditional sale agreements. Section 91 of the CCA provides that the underlying agreement terminates, and that the debtor is both released from future liability under the agreement and entitled to recover all sums paid under the agreement. However, it does not provide for the return of the goods.

9.39 Clause 22 of the draft Bill achieves a different balance: it allows the goods to be returned, but it does not provide for the return of the sums paid. For example, if the secured obligation is a loan, the borrower would not be liable for sums still outstanding when clause 22 is triggered. But the obligation is not rendered void from the start, so the borrower would not be entitled to a refund of the money already repaid under the loan.

²⁵⁷ Clause 15(2)(g) is excluded from the scope of this section, on the grounds that the borrower cannot "remedy" a personal insolvency in the same manner as other defaults.

9.40 We think the different approaches are justified by differences in the types of agreement. Both provisions attempt to return the parties to the position they were in before the agreement was made. In the case of hire-purchase, the borrower does not own the goods, whereas in the case of a goods mortgage, the borrower owns the goods both before and during the period of the agreement.

POWERS OF THE COURT WHERE THE LENDER SEEKS A POSSESSION ORDER

9.41 Where the borrower exercises their rights under clause 20(2)(c)(i), the lender must apply for a court order before taking possession.

Time orders

9.42 In our 2016 report, we explained “time orders” under the CCA and recommended that the court should have the same powers in relation to a goods mortgage.²⁵⁸ Where a borrower can resume payment, the court has wide powers to provide the borrower with more time, including allowing the borrower:

- (1) to pay arrears in such instalments and at such times as the court considers reasonable, having regard to the borrower’s means;²⁵⁹ or
- (2) to remedy any non-monetary defaults within any period the court deems suitable.²⁶⁰

9.43 The court may also allow the borrower time to make future payments and may even, if appropriate, reduce future interest rates, in some cases to zero. Under the CCA, the court already has the power to make a time order in any action to enforce security in relation to a regulated agreement.²⁶¹ It is not necessary for the borrower to apply for a time order. The court may make an order irrespective of whether the borrower applies for one.²⁶² This means that for regulated credit agreements, there is no need to provide the court with any additional powers in this draft Bill. The existing wide powers apply.

Clause 24: powers of the court for non CCA-regulated agreements

9.44 Larger loans granted by businesses or high net worth individuals are not covered by the CCA. Under the draft Bill, goods mortgages securing these loans are likely to be exempt mortgages, so the lender is not obliged to seek a court order. However, we think that in practice these lenders will seek an order so as to protect themselves from the many risks associated with self-help. Clause 24 provides the courts with the necessary powers in these cases and in any other cases where the goods mortgage is used to secure an obligation which is not a regulated credit agreement. Again, there is no need for the borrower to apply for this protection. The court may make an order on its own motion.

²⁵⁸ Bills of Sale (2016) Law Com No 369 para 7.28. For a longer discussion of time orders, see Bills of Sale (2015) Law Commission Consultation Paper No 225 paras 4.49 to 4.59.

²⁵⁹ Consumer Credit Act 1974, s 129(2)(a).

²⁶⁰ Consumer Credit Act 1974, s 129(2)(b).

²⁶¹ Consumer Credit Act 1974, s 129(1)(c). R Goode, D Rosenthal and S Makin, *Goode: Consumer Credit Law and Practice* (April 2017) Div I para 46.158: “the power to make time orders is not confined to actions for the recovery of protected goods but extends to almost every type of action concerned with a regulated agreement ... or security given in relation to a regulated agreement”.

²⁶² Consumer Credit Act, s 129(1) provides that “in an action brought by a creditor ... to enforce ... any security or recover possession of any goods ... the court may make an order under this section”.

- 9.45 Clause 24 is modelled on section 36 of the Administration of Justice Act 1970, which applies to land mortgages. The powers are less broad than for time orders, because the underlying agreement is not one that is regulated. For example, the court cannot restructure future loan instalments. However, the powers are wide and offer ample protection to borrowers.

24 Additional powers of court where mortgagee seeks possession of goods

- (1) This section applies where—
 - (a) in any proceedings the mortgagee under a goods mortgage seeks possession of the goods, and
 - (b) the goods mortgage does not secure a regulated agreement within the meaning of the Consumer Credit Act 1974 (see section 129 of that Act for powers available to the court in relation to such an agreement).
- (2) The court may exercise any of the powers conferred by this section if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period—
 - (a) to pay any sums due under the goods mortgage, or
 - (b) to remedy a default consisting of a breach of any other obligation arising under or by virtue of the goods mortgage.
- (3) The court—
 - (a) may adjourn the proceedings for such period or periods as the court thinks reasonable, or
 - (b) on giving judgment, or making an order, for the delivery up of, or the taking possession of, the goods that are subject to the goods mortgage, or at any time before the execution of such a judgment or order, may—
 - (i) stay or suspend execution of the judgment or order, or
 - (ii) postpone the date for the delivery of possession,for such period or periods as the court thinks reasonable.
- (4) The adjournment, stay, suspension or postponement may be made subject to such conditions with regard to the payment by the mortgagor of any sum secured by the goods mortgage or the remedying of any default as the court thinks fit.
- (5) The court may from time to time vary or revoke any condition imposed by virtue of this section.

ENFORCING THE COURT ORDER

- 9.46 In our 2016 report, we recommended that a lender who had obtained a court order should be permitted to use its own employees or debt collectors to take possession of goods.²⁶³ We were told that it was common for hire-purchase lenders to use their own employees or agents rather than court bailiffs and we wanted to replicate this system.
- 9.47 Looking at this issue again, we think that it is important to distinguish between voluntary compliance with a court order and enforcing that order. We were told that hire-purchase lenders take possession of vehicles on the basis of a return of goods order using their own employees or private debt collectors. However, where such an agent of the lender visits the debtor who hands over the goods, this is not “enforcement” – it simply provides the debtor with an opportunity to comply with the return order.²⁶⁴
- 9.48 “Enforcement”, technically speaking, involves executing the judgment against the wishes of the judgment debtor. The procedures for enforcement are heavily prescribed, both in the county courts and in the High Court.²⁶⁵ The power to enforce a warrant of delivery is exercisable only under the “taking control of goods” procedure, set out in Schedule 12 of the Tribunals, Courts and Enforcement Act 2007. This provides that enforcement powers may only be used by enforcement agents who have been certified and authorised by the court.²⁶⁶
- 9.49 The procedures for authorising and regulating court enforcement agents were the result of an extensive consultation and policy development.²⁶⁷ We do not think that we should depart from these principles for goods mortgages. This, however, would not prevent the same sort of voluntary compliance mechanisms as those commonly used for hire-purchase.

New recommendation 16

- 9.50 A possession order should be enforced through the Taking Control of Goods procedure set out in the Tribunals, Courts and Enforcement Act 2007.

- 9.51 This recommendation does not require a provision in the draft Bill. A judgment creditor who is granted power under a warrant of delivery to seize and sell goods to recover a debt must already comply with the Tribunals, Courts and Enforcement Act 2007.²⁶⁸

²⁶³ Discussed in Bills of Sale (2016) Law Com No 369 para 7.86 onwards.

²⁶⁴ *BMW Financial Services (GB) Ltd v Ahmed* [2006] CLY 484.

²⁶⁵ See Civil Procedure Rules, Parts 70, 83, 84 and the Tribunals, Courts and Enforcement Act 2007.

²⁶⁶ See P Levaggi, D Marsden and P Mooney, *Enforcement and Debt Recovery* (2nd ed 2014) para 6.2.13.

²⁶⁷ See P Levaggi, D Marsden and P Mooney, *Enforcement and Debt Recovery* (2nd ed 2014) ch 6.

²⁶⁸ Tribunals, Courts and Enforcement Act 2007, s 62.

Chapter 10: Additional protections for non-exempt mortgages – voluntary termination

- 10.1 Court hearings protect borrowers who could pay off the loan if they had additional time to do so. However, a hearing does little to help those with no realistic prospect of repaying the loan and may simply increase the expense the borrower must bear. Borrowers who have little hope of ever repaying the debt need to be able to extricate themselves from the loan by handing back the goods and walking away from the agreement.
- 10.2 In hire-purchase law, a hirer may return the goods and be released from further liability but, if they have not already paid half of the price, they are liable to the lender for the outstanding amount up to half of the purchase price.²⁶⁹ In a hire-purchase context, this has proved controversial, as the value of new goods depreciates rapidly.²⁷⁰ It is less controversial for logbook loans. Logbook lenders who are members of the Consumer Credit Trade Association (CCTA) provide a more extensive right of termination on a voluntary basis. Under the CCTA code,²⁷¹ borrowers can terminate the agreement at any point and hand over the goods in full and final settlement of all sums (including sums in arrears).
- 10.3 In 2016 we recommended that where a goods mortgage secures a regulated credit agreement, borrowers should have a legal right of voluntary termination, modelled on the CCTA code.²⁷²

CLAUSE 23: THE RIGHT TO TERMINATE

- 10.4 Clause 23 reflects this recommendation. As with the opt-in procedure, it only applies to non-exempt mortgages.

23 Mortgagor's right to terminate

- (1) This section applies to a goods mortgage that is not an exempt goods mortgage.
- (2) The mortgagor is entitled to terminate the goods mortgage by—
 - (a) informing the mortgagee of the mortgagor's intention to terminate the goods mortgage, and
 - (b) as soon as reasonably practicable after doing so, delivering the goods to the mortgagee.
- (3) If the mortgagee refuses to accept goods that the mortgagor offers or attempts to deliver to the mortgagee after informing the mortgagee of an

²⁶⁹ Consumer Credit Act 1974, ss 99 and 100.

²⁷⁰ Bills of Sale (2015) Law Commission Consultation Paper No 225 paras 11.53 to 11.54.

²⁷¹ CCTA Code of Practice *Bills of sale for consumer lending regulated under the Consumer Credit Act (2017)* para 4.8.11.

²⁷² Bills of Sale (2016) Law Com No 369 paras 7.123 to 7.124.

intention to terminate the goods mortgage, the goods are to be taken for the purposes of subsection (2) to have been delivered to the mortgagee.

- (4) The right given by subsection (2) cannot be exercised in relation to a goods mortgage if another goods mortgage over the goods has been registered and the other mortgagee (or mortgagees) have not agreed to the termination.
- (5) The mortgagee may refuse termination under subsection (2) by the mortgagor only if one or more of the following applies—
 - (a) the mortgagee has applied to the court for possession of the goods,
 - (b) the mortgagee is entitled to take possession of the goods without such an order and has incurred expenditure in attempting to take possession of them,
 - (c) the state of the goods is affected by damage deliberately caused by any person since the creation of the goods mortgage, or
 - (d) the goods have suffered damage that—
 - (i) is attributable to a failure by the mortgagor to comply with a term of the goods mortgage requiring the mortgagor to take reasonable care of the goods, and
 - (ii) has a significant adverse effect on the market value of the goods.
- (6) Any refusal under subsection (5) must be communicated to the mortgagor within a reasonable time and in any event before the end of the period of 14 days beginning with the day on which the goods were delivered to the mortgagee.
- (7) If the mortgagor terminates the goods mortgage under subsection (2) then, unless the mortgagee is entitled under subsection (5) to refuse termination and does so,—
 - (a) the mortgagor is released from all further liability under the obligation secured by the goods mortgage, and
 - (b) property in the goods is to be taken to have passed to the mortgagee when the goods were delivered to the mortgagee.
- (8) If the mortgagee refuses termination on any of the grounds in subsection (5), the mortgagee must return the goods to the mortgagor.

10.5 Under clause 23(2), the borrower must inform the lender of their intention to terminate and deliver the goods as soon as reasonably practicable. Under clause 23(7), the borrower is released from further liability under the secured obligation. The right to voluntary termination applies as soon as the goods mortgage is granted. It remains available until:

- (1) the lender has applied for a court order (clause 23(5)(a)); or

- (2) if the lender may take possession without a court order, until the lender has incurred expenditure by (for example) instructing possession agents (clause 23(5)(b)).
- 10.6 Under the CCTA code, the lender must accept ordinary wear and tear to the vehicle. However, the borrower loses the right to voluntary termination if the vehicle has been subject to malicious damage or a failure to take reasonable care which significantly affects the resale value.²⁷³
- 10.7 Clauses 23(5)(c) and (d) mirror this aspect of the CCTA code. The lender may refuse to accept the goods if they have been damaged deliberately, or if a failure to take reasonable care has had a significant adverse effect on the market value of the goods. These provisions are narrower than those under hire-purchase law, which requires the borrower to compensate the lender for a failure to take reasonable care of the goods.²⁷⁴ This right to compensation could be applied to minor scratches and has been interpreted differently by different hire-purchase lenders.²⁷⁵
- 10.8 Under clause 23(6), lenders have an obligation to tell the borrower whether they refuse termination within a “reasonable time” and in any event no later than 14 days from the day on which the lender received the goods from the borrower.
- 10.9 Clause 23(7) clarifies that the consequences of voluntary termination (namely termination of the mortgage and release from further liability) apply only if the lender has not refused termination on one of the grounds on which it was entitled to refuse it. Termination is deemed to have taken effect on delivery of the goods if the lender does not object to it within 14 days of delivery. If the lender refuses termination, it is obliged to return the goods to the borrower (clause 23(8)).
- 10.10 Clause 23(4) applies where there is more than one mortgage on the goods. Here the right to voluntary termination can only be exercised with the agreement of all the lenders. If the lenders agree, handing over the goods would extinguish the borrower’s liability towards all lenders.

²⁷³ CCTA Code of Practice *Bills of sale for consumer lending regulated under the Consumer Credit Act (2017)* para 4.8.11.

²⁷⁴ Consumer Credit Act 1974, s 100(4).

²⁷⁵ Bills of Sale (2015) Law Commission Consultation Paper No 225 paras 11.60 to 11.61.

Chapter 11: Contracting-out, interpretation, repeals and final provisions

11.1 In this chapter we discuss contracting-out (clause 27), the interpretation provisions (clauses 28, 31, 33, 36), the effect of the repeal of the Bills of Sale Acts on “absolute bills” (clause 29) and the final provisions (clauses 30, 34, 35). We also discuss the implications of the draft Bill for general assignments of book debts (set out in paragraph 10 of schedule 2 to the draft Bill).

CONTRACTING-OUT

11.2 As we have seen, the draft Bill contains several provisions to protect borrowers, including the borrower’s right of voluntary termination and restrictions on the lender’s right to take possession. Clause 27 provides that these cannot be excluded or reduced by a contractual term, whether that term is in the goods mortgage document or in a related agreement. Any term purporting to reduce protections in this way would be void.

11.3 This does not preclude contractual terms which grant borrowers additional rights, such as further restrictions on taking possession.

<p>27 Contracting-out forbidden</p> <p>(1) A term contained in a goods mortgage, or in any agreement secured by or related to a goods mortgage, is void if, and to the extent that, it is inconsistent with a provision for the protection of the mortgagor contained in this Act or in any regulations made under this Act.</p> <p>(2) Where the provision specifies the duty or liability of the mortgagor in certain circumstances, the term is inconsistent with that provision if it purports to impose, directly or indirectly, an additional duty or liability on the mortgagor in those circumstances.</p> <p>(3) Despite subsection (1), a provision of this Act under which a thing may be done in relation to any person only on an order of the court is not to be taken to prevent its being done at any time with that person’s consent given at that time.</p> <p>(4) The refusal of the consent mentioned in subsection (3) is not to give rise to any liability.</p>
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11.4 Clauses 27(1) and (2) are almost identical to sections 173(1) and (2) of the Consumer Credit Act 1974 (CCA).

11.5 Subsections (3) and (4) are based on section 173(3) of the CCA, which we have rephrased and divided up in the interests of clarity. As we discuss in Chapter 7, it is possible for the lender to take possession with consent, but this must be genuine consent given at the time. The borrower does not face any additional liability for refusing to give consent.

INTERPRETATION

- 11.6 Clause 28 offers definitions for Part 4, whereas clauses 31 and 33 list some further general definitions. Clause 36 indexes 20 terms which are defined in the draft Bill.
- 11.7 One general definition worth noting is that of “mortgagee”. “Mortgagee” is defined in clause 33 more widely to include anyone who has assumed the lender’s duties either by operation of law or assignment. This covers the situation where one lender sells a loan to another lender.

33 Further general definitions

In this Act—

“conditional sale agreement” has the meaning given by section 189 of the Consumer Credit Act 1974;

“the court” means the High Court or the county court;

“hire-purchase agreement” has the meaning given by section 189 of the Consumer Credit Act 1974;

“mortgagee”, in relation to a goods mortgage, means the person or persons to whom the security is provided in accordance with section 2 or 3 or a person to whom the original mortgagee’s rights and duties under the goods mortgage have passed by assignment or operation of law;

“mortgagor”, in relation to a goods mortgage, means the individual who creates (or individuals who create) the charge in accordance with section 2 or 3, except that in Part 4 it has the extended meaning given by section 28(2);

“prescribed” means prescribed by regulations made by the Treasury under this Act.

- 11.8 There are further definitions in clause 28, which relate only to Part 4 of the draft Bill.

28 Interpretation of Part 4

- (1) This section has effect for the interpretation of this Part.
- (2) In relation to a goods mortgage “mortgagor” includes a person to whom the original mortgagor’s rights and duties under the goods mortgage have passed by operation of law, except that it does not include a trustee in bankruptcy.

- (3) In relation to a goods mortgage over an undivided share in goods, references to goods are to be read, unless the context requires otherwise, as references to the undivided share.

11.9 Clause 28 defines two terms:

- (1) “mortgagor”: includes not only the original borrower who grants the mortgage, but also a person to whom their rights and duties “have passed by operation of law”, with the exception of a trustee in bankruptcy. This would include an executor of the borrower’s estate after the borrower’s death.
- (2) “undivided share”: clause 3(2) permits an owner in common to create a goods mortgage over their undivided share in the goods.²⁷⁶ Where this occurs, references to goods are to be read as references to an undivided share in the goods.

11.10 The draft Bill is designed to work with mortgages over undivided shares in goods (for example, a share in a racehorse). First, the lender would need to establish a right to take possession in the normal way. Once the right to possession is established, they may not need to take physical possession in order to sell the goods. They could simply sell the share or agree with the other owners in common to sell the goods in their entirety and split the proceeds of sale. Otherwise, a lender with a mortgage of a share can apply to court to be permitted to sell the goods in their entirety (in order to obtain the value of the share).²⁷⁷

11.11 In our July 2017 consultation, we asked if consultees agreed that the draft Bill worked for shares in goods. The three consultees who addressed this question agreed that it does.

REPEALING BILLS OF SALE LEGISLATION: EFFECT ON ABSOLUTE BILLS

11.12 Clause 29 implements our recommendation to repeal the Bills of Sale Acts in their entirety.

11.13 Under the Acts, the term “bill of sale” refers to a document which transfers ownership of goods from one person to another, while allowing the former owner to retain possession of the goods. Bills of sale come in two types: “security bills” and “absolute bills”. Under section 3 of the 1882 Act, a security bill is a bill of sale which is used as “security for the payment of money”. An absolute bill is a bill of sale which is used for any other purpose. At present, both security bills and absolute bills must be registered, though the procedure differs between the two types of bills of sale.²⁷⁸

²⁷⁶ See para 4.23 above for a discussion of joint ownership and ownership in common.

²⁷⁷ In *The James W Elwell* [1921] P 351, at p 368, the court held (in relation to a ship) that “there is no doubt that at common law an undivided share in a chattel can be taken in execution by seizure of the chattel and sale of the share”.

²⁷⁸ See Bills of Sale (2015) Law Commission Consultation Paper No 225 paras 3.35 to 3.41 for a full discussion of the difference,

11.14 In our 2016 report, we recommended that the requirement to register absolute bills should be abolished.²⁷⁹ It was not clear why absolute bills were ever used, or why registration was necessary. We did not find any contemporary examples of absolute bills being registered. The case law on absolute bills suggests that the main use of the legislation has been to enable creditors to seize goods even though the debtor had purported to sell the goods to another.²⁸⁰ However, creditors are now protected by the “clawback” provisions in the Insolvency Act 1986,²⁸¹ while purchasers are protected by section 24 of the Sale of Goods Act 1979.²⁸²

11.15 Under the draft Bill, security bills will be replaced by goods mortgages, while the kinds of transactions which currently fall within the definition of “absolute bills” will mostly be deregulated. The subject matter of absolute bills (with the exception of absolute bills which secure obligations other than a loan – which are possible in theory but not currently used in practice)²⁸³ will become unregulated. We expect that these transactions will no longer be called “absolute bills”: they will be sales, assignments etc.²⁸⁴

GENERAL ASSIGNMENTS OF BOOK DEBTS (SCHEDULE 2, PARAGRAPH 10)

11.16 Under insolvency law, a general assignment of book debts made by an unincorporated business must be registered “as if it were” an absolute bill. If not, it will not be valid in the event of bankruptcy.

11.17 The obligation arises under section 344(2) of the Insolvency Act 1986, which states:

The assignment is void against the trustee of the bankrupt’s estate as regards book debts which were not paid before the presentation of the bankruptcy petition, unless the assignment has been registered under the 1878 Act.

11.18 Section 344(4) continues:

For the purposes of registration under the Act of 1878 an assignment of book debts is to be treated as if it were a bill of sale given otherwise than by way of security for the payment of a sum of money; and the provisions of that Act with respect to the registration of bills of sale apply accordingly with such necessary modifications as may be made by rules under that Act.

11.19 In the 2015 consultation paper we argued that, in principle, registration of general assignments of book debts serves a useful purpose. However, we said that the current procedures for registration are unnecessarily complex, time consuming and expensive. Consultees agreed. In our 2016 report, we recommended that general assignments of

²⁷⁹ Bills of Sale (2016) Law Com No 369 para 10.27.

²⁸⁰ *Youngs v Youngs* [1940] 1 KB 760; *Koppel v Koppel* [1966] 1 WLR 802 and *Halberstam v Gladstar Ltd* [2015] EWHC 179 (QB), [2015] All ER 248. For an account of these cases, see Bills of Sale (2015) Law Commission Consultation Paper No 225 paras 14.13 to 14.20.

²⁸¹ Insolvency Act 1986, ss 339 and 340, discussed in Bills of Sale (2016) Law Com No 369 paras 10.13 to 10.18.

²⁸² Bills of Sale (2016) Law Com No 369 paras 10.19 to 10.20.

²⁸³ Absolute bills which secure obligations other than a loan are replaced by the regime in the draft Bill.

²⁸⁴ The term “absolute bill” refers to the documentary requirements that must be satisfied in order to validate a substantive transaction which already has a name. That is why the bills of sale definition is a vast list of different types of transactions: see Bills of Sale Act 1878, s 4.

book debts should continue to be registered, but using the simpler procedures which we recommended for goods mortgages on goods other than vehicles.²⁸⁵

11.20 Under the current law, the only effect of non-registration of a general assignment of book debts is to render the assignment void against the trustee of the grantor's estate as regards any book debts which were not paid before the presentation of the bankruptcy petition. None of the substance of the Bills of Sale Acts applies to general assignments of book debts. Similarly, we do not wish to apply any of the substantive provisions in the draft Bill to general assignments.

11.21 In particular, the priority rules in clause 9(4) of the draft Bill do not apply to general assignments. Section 344(4) of the Insolvency Act 1986 applies the registration provisions of the Bills of Sales Acts but does not mention the priority rule in section 10 of the 1878 Act. Thus the general law applies: namely, the rule in *Dearle v Hall* that priority of assignments of debts is determined by the date that notice is given by the assignee to the person who owes the debt.²⁸⁶ Although there may be criticism of this rule, we have not consulted on modifying the priority regime for general assignments and, in any event, the draft Bill is not the appropriate place to make substantive reform to the law of general assignments of book debts. Following the enactment of the draft Bill, section 344(4) of the Insolvency Act 1986 would read as follows:

(4) For the purposes of the registration mentioned in subsection (2) of this section, subsections (1) to (3) and (5) and (6) of section 9 of the Goods Mortgages Act 2017 (which relate to the registration of goods mortgages) apply with any necessary modifications.

11.22 As we explain in Chapter 6, we now intend that all goods mortgages will be registered in a streamlined electronic register. General assignments of book debts will also be registered in this single register.

11.23 This change is enacted in paragraph 10 of schedule 2 to the draft Bill, which amends section 344 of the Insolvency Act 1986. Following its enactment, section 344(2) of the Insolvency Act 1986 would read as follows:

The assignment is void against the trustee of the bankrupt's estate as regards book debts which were not paid before the presentation of the bankruptcy petition, unless the assignment has been registered under section 9 of the Goods Mortgages Act 2017.

11.24 The details of what information needs to be registered will be different for general assignments of book debts and for goods mortgages, as we recognise that the two are distinct types of transaction. Most importantly, general assignments of book debts are not security interests. Terms like "mortgagor" and "mortgagee" will not be suitable. Schedule 2, paragraph 10(4) allows for the requirements set out in clause 9 to be modified for general assignments of book debts.

²⁸⁵ Bills of Sale (2016) Law Com No 369 para 9.24 (but note that we no longer think that witness signatures should be required).

²⁸⁶ See L Gullifer, "Bills of Sale Acts: ripe for reform?" (2013) 11 *Journal of International Banking and Finance Law* 685.

FINAL PROVISIONS

11.25 The final provisions of the draft Bill include a regulation-making power and commencement provisions.

Regulation-making power (clause 30)

11.26 The draft Bill refers to a variety of prescribed requirements, persons, manners and periods. Examples include: the document requirements in clause 5, the possession notice requirements in clause 20, and the conditions for an exempt agreement in clause 26. Clause 30 gives a power to HM Treasury to prescribe these various details by secondary legislation.

Commencement (clause 35)

11.27 Before commencement, HM Treasury will need to make secondary legislation about the prescribed requirements. Clause 35 allows HM Treasury to make the necessary secondary legislation and then bring the Act into force “on such day as the Treasury may by regulations appoint”.

Chapter 12: List of new recommendations

New recommendation 1

High net worth individuals should be able to opt out of some of the protections provided to borrowers, even if the loan does not exceed £60,260.

New recommendation 2

A “goods mortgage” should be a “charge”, rather than a transfer of ownership.

New recommendation 3

An individual who has only an equitable interest in goods should not be considered to be an owner for the purposes of granting a goods mortgage.

New recommendation 4

The draft Bill should not allow goods mortgages to be granted on fixtures and growing crops. The draft Bill should not affect the common law rules on the interaction between security on goods and security on land.

New recommendation 5

All ships should be excluded from the goods mortgages regime.

New recommendation 6

Only high net worth individuals should be able to use goods mortgages to secure guarantees.

New recommendation 7

Only businesses borrowing more than £25,000 and high net worth individuals should be able to use goods mortgages to secure running-account credit.

New recommendation 8

Goods mortgages should not be used to secure obligations under a contract of employment and other obligations to perform work or services personally.

New recommendation 9

A security interest should be void if it would have the effect of creating a charge or mortgage over qualifying goods.

New recommendation 10

It should not be a legal requirement that the borrower’s signature to the goods mortgage is witnessed.

New recommendation 11

A single Government register for goods mortgages should be established. The register should be electronic and easily searchable. It should operate on a “notice filing” basis, which is a simplified process with reduced costs.

New recommendation 12

Re-registration of all goods mortgages should be required every ten years.

New recommendation 13

A lender under a prior mortgage should be given priority for further advances if:

- (1) the lender was obliged to make those advances; or
- (2) the mortgage was made for the express purpose of securing further advances and the prior mortgage lender made the advance in the absence of actual knowledge that a subsequent mortgage had been registered.

New recommendation 14

The draft Bill should specify that consent to enter premises to take possession of goods under clause 16 must be given by the person entitled to authorise entry onto the premises.

New recommendation 15

The five day period should be mandatory for non-exempt goods mortgages. However, exempt borrowers should be entitled to opt out of the five day protection in the goods mortgage document.

New recommendation 16

A possession order should be enforced through the Taking Control of Goods procedure set out in the Tribunals, Courts and Enforcement Act 2007.

(signed) David Bean, Chairman
Nick Hopkins
Stephen Lewis
David Ormerod
Nicholas Paines

Phil Golding, Chief Executive

25 October 2017

Appendix 1: List of respondents

Boodle Hatfield LLP

Cap HPI

Consumer Credit Trade Association Industry Working Group

Chancery Bar Association

Chartered Trading Standards Institute

Dr Sean Thomas

Experian Limited

Finance and Leasing Association

Financial Conduct Authority

HM Land Registry

Loans 2 Go

Logbook Loan Industry Working Group

Logbook Money LTD

Money Advice Trust

QuickClick Loans Limited d/b/a AutoMoney

Richard Calnan and Dorothy Livingston

StepChange Debt Charity

The Bar Council of England and Wales

Total Car Check Ltd

UK Finance

Watson Farley and Williams

Appendix 2: Goods Mortgages Bill

Goods Mortgages Bill

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Make provision for a new form of non-possessory security that may be created over goods owned by individuals; to repeal the Bills of Sale Acts 1878 and 1882; and for connected purposes.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART 1

INTRODUCTORY

1 Overview

- (1) This Act contains provision about non-possessory security over goods and repeals the Bills of Sale Acts 1878 and 1882.
- (2) In Part 2—
 - (a) sections 2 to 7 (with Schedule 1) contain provision enabling an individual who owns goods to create a goods mortgage over them as security for the discharge of an obligation;
 - (b) section 8 relates to other non-possessory security over goods.
- (3) In Part 3—
 - (a) section 9 contains provision about the registration of goods mortgages;
 - (b) section 10 deals with further advances by the mortgagee;
 - (c) sections 11 to 14 deal with the position of third parties.
- (4) Part 4 contains provision about the rights of mortgagors and mortgagees.
- (5) Part 5 contains repeals and amendments, provisions about regulations and interpretation, and other final provisions.

PART 2

CREATION OF GOODS MORTGAGES

Goods mortgages

2 Goods mortgages

- (1) An individual who owns qualifying goods (see section 4) may in accordance with subsection (2) create a charge over the goods as security for the discharge of an obligation.
- (2) The following requirements must be met—
 - (a) the goods exist, and are owned by the individual concerned, at the time when the charge is created;
 - (b) the charge is created by a written instrument complying with section 5;
 - (c) the obligation is not an excluded obligation (see section 6).
- (3) A person whose only interest in goods is an equitable interest is not to be regarded for the purposes of this Act as “owning” the goods.
- (4) In this Act “goods mortgage” means a charge created in accordance with this section or section 3.

3 Goods mortgages: co-owners

- (1) Where qualifying goods are owned jointly by two or more individuals, those individuals may in accordance with subsection (3) together create a charge over the goods as security for the discharge of an obligation.
- (2) Where qualifying goods are owned in common by two or more persons, any of those persons who is an individual may in accordance with subsection (3) create a charge over his or her undivided share in the goods as security for the discharge of an obligation.
- (3) The following requirements must be met—
 - (a) the goods exist, and are owned by the person or persons concerned, at the time when the charge is created;
 - (b) the charge is created by a written instrument complying with section 5;
 - (c) the obligation is not an excluded obligation (see section 6).
- (4) References to ownership jointly or in common with others by an individual include references to ownership jointly or in common with others by an individual as a member of a partnership (other than a limited liability partnership).

4 Qualifying goods

- (1) This section applies for the interpretation of this Act.
- (2) “Goods” means tangible moveable property.
- (3) “Qualifying goods” means goods other than—
 - (a) excluded items, or

- (b) goods that are outside England and Wales at the time when the charge is created.
- (4) In subsection (3) “excluded items” means –
- (a) aircraft registered in the United Kingdom;
 - (b) anything that is by virtue of provision made under subsection (2)(f) of section 86 of the Civil Aviation Act 1982 included in a mortgage registered by virtue of that section;
 - (c) a ship as defined by section 313(1) of the Merchant Shipping Act 1995;
 - (d) currency notes or coins that (in either case) are legal tender in the United Kingdom or elsewhere.

5 Requirements to be met in relation to instrument

- (1) The instrument creating a goods mortgage must –
- (a) contain prescribed provisions, and
 - (b) be signed or otherwise authenticated by the prescribed persons and in the prescribed manner.
- (2) The Treasury must by regulations require the inclusion in the instrument of statements in such form as the Treasury consider appropriate for the purpose of warning the mortgagor –
- (a) that the mortgagor risks losing the goods if the obligation secured by the goods mortgage is not discharged, and
 - (b) that the mortgagor may commit an offence under the Fraud Act 2006 if, while the goods remain subject to the goods mortgage, the mortgagor makes a disposition of the goods without previously disclosing to the purchaser the existence of the goods mortgage.
- (3) Subsection (2) does not apply in the case of an exempt goods mortgage (see section 26).
- (4) Nothing in the Consumer Credit Act 1974 enables a court to enforce, or allow the enforcement of, a security that purports to be a goods mortgage but is created by an instrument not complying with this section.

6 Excluded obligations

- (1) References in this Part to an “excluded obligation” are to be read in accordance with this section.
- (2) An obligation is an excluded obligation if it –
- (a) is an obligation of the intended mortgagor as employee under a contract of employment, or
 - (b) requires the intended mortgagor to do or perform personally any work or services.
- (3) A guarantee is an excluded obligation unless –
- (a) the high net worth conditions (see section 7(2)) are met, and
 - (b) the instrument creating the goods mortgage includes the appropriate declaration (see subsection (5)).
- (4) The obligation of the debtor under an agreement for running-account credit is an excluded obligation unless –

- (a) the high net worth conditions (see section 7(2)) or the business credit conditions (see section 7(3)) are met, and
 - (b) the instrument creating the goods mortgage includes the appropriate declaration (see subsection (5)).
- (5) In this section “the appropriate declaration” means a declaration by the mortgagor which—
- (a) acknowledges that the mortgagor will not have available the protection and remedies that would be available to the mortgagor under sections 19(1) and 23(2) in the case of a goods mortgage other than an exempt goods mortgage (see section 26), and
 - (b) complies with prescribed requirements.
- (6) In this Act “guarantee” includes an indemnity given by a person in respect of the obligations of another.
- (7) Schedule 1 makes provision for the purposes of this section about the meaning of “running-account credit” and related matters.

7 “The high net worth conditions” and “the business credit conditions”

- (1) This section applies for the interpretation of this Act.
- (2) “The high net worth conditions”, in relation to a goods mortgage, are—
- (a) that a statement complying with prescribed requirements has been made in relation to the income or assets of the mortgagor,
 - (b) that the connection between the statement and the goods mortgage complies with prescribed requirements, and
 - (c) that a copy of the statement was provided to the mortgagee before the goods mortgage was created.
- (3) “The business credit conditions”, in relation to a goods mortgage, are—
- (a) that the obligation to which the goods mortgage relates arises from the provision of credit exceeding the prescribed amount, and
 - (b) that the obligation was incurred wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the mortgagor.

Other non-possessory security on goods

8 Other non-possessory security on goods

- (1) This section applies to any agreement or arrangement which—
- (a) is entered into by an individual,
 - (b) is neither a goods mortgage (as defined by section 2(4)) nor a security excluded by subsection (4), and
 - (c) would (apart from this section) have the effect of—
 - (i) creating a mortgage or charge over qualifying goods owned by the individual, or subsequently to be acquired by the individual, as security for the discharge of an obligation, or
 - (ii) creating a mortgage or charge over an undivided share in qualifying goods owned by the individual in common with other persons, or subsequently to be acquired by the individual

in common with other persons, as security for the discharge of an obligation.

- (2) If the goods remain in the possession of, or under the custody of, the individual who provides the goods as security, the agreement or arrangement is void to the extent that it would (apart from this section) have the effect mentioned in subsection (1)(c).
- (3) If, before the obligation being secured is discharged, the person to whom the obligation is owed passes custody of the goods to the individual who provided the goods as security, the agreement or arrangement becomes void to the extent that it would (apart from this section) have the effect mentioned in subsection (1)(c).
- (4) The securities excluded by this subsection are –
 - (a) a pledge, lien or other security under which the individual creating the pledge, lien or other security is not entitled to possession of the goods until the obligation is discharged;
 - (b) an agricultural charge under Part 2 of the Agricultural Credits Act 1928;
 - (c) a mortgage capable of being registered by virtue of section 86 of the Civil Aviation Act 1982;
 - (d) an international interest as defined by regulation 5 of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912).
- (5) Nothing in this section –
 - (a) affects the validity of the obligation whose discharge the agreement or arrangement purports to secure,
 - (b) affects any lien or charge arising under an enactment or otherwise by operation of law, or
 - (c) affects the validity of any hire-purchase agreement or conditional sale agreement.

PART 3

REGISTRATION AND RIGHTS OF THIRD PARTIES

Registration

9 Registration of goods mortgages

- (1) A register of goods mortgages is to be kept by the Secretary of State in accordance with regulations made by the Treasury or the Secretary of State under this section (referred to in this section as “registration regulations”).
- (2) The provision that may be made by registration regulations includes (but is not limited to) provision as to –
 - (a) the making by mortgagees of applications for the registration of goods mortgages;
 - (b) steps to be taken on receipt of an application for registration;
 - (c) the persons to whom, and manner in which, notice of the registration of a goods mortgage is required to be given;
 - (d) the information to be included on the register;

- (e) the circumstances in which, and manner in which, registration is to be discharged;
 - (f) the amendment or rectification of the register;
 - (g) the making by any persons of searches of the register;
 - (h) fees to be payable in respect of the registration of goods mortgages or searches of the register.
- (3) Registration regulations may (but need not) –
- (a) provide for the register to be kept in the High Court;
 - (b) confer functions on officers of the High Court.
- (4) Where two or more goods mortgages are created over the same goods, those mortgages as between themselves have priority according to the times at which they were registered.
- (5) The registration under this section of a goods mortgage expires (if not previously discharged) at the end of the 10 years beginning with the day on which the goods mortgage was registered (or, as the case may be, the registration was last renewed), but registration regulations may make provision enabling registration to be renewed on application.
- (6) Registration regulations may restrict or exclude the liability in tort, in respect of things done or omitted in relation to the registration of goods mortgages, of the Secretary of State or any other person on whom functions are conferred by registration regulations.
- (7) Registration regulations may provide for the supply (including the supply by way of sale) of relevant registration information –
- (a) to such persons as may be determined in accordance with the regulations by a person specified in or determined in accordance with the regulations, and
 - (b) for such price (if any) and on such other terms, and subject to such restrictions, as may be determined in accordance with the regulations by a person specified in or determined in accordance with the regulations.
- (8) In subsection (7) “relevant registration information” means information which is derived from particulars contained in the register but which does not identify any individual or contain anything enabling any individual to be identified.
- (9) In this Act “registered”, in relation to a goods mortgage, means registered in the register kept under this section.

Further advances

10 Tacking and further advances

- (1) The mortgagee under a registered goods mortgage may make a further advance on the security of the goods mortgage ranking in priority to any subsequent goods mortgage –
- (a) if an arrangement has been made to that effect with the subsequent mortgagee,
 - (b) if, at the time when the further advance is made, the subsequent goods mortgage is not registered, or

- (c) if the prior goods mortgage imposes an obligation on the prior mortgagee to make further advances.
- (2) Subsection (1) applies whether or not the prior goods mortgage was made expressly for securing further advances.
- (3) If the prior goods mortgage was made expressly for securing a current account or other further advances, the prior mortgagee may also make a further advance ranking in priority to a subsequent goods mortgage if –
 - (a) the subsequent mortgage was not registered at the time when the prior goods mortgage was registered or when the last search of the register by or on behalf of the prior mortgagee was made, whichever happened last, and
 - (b) at the time when the further advance is made, the subsequent mortgagee has not given notice to the prior mortgagee of the registration of the subsequent goods mortgage.
- (4) Tacking in relation to a goods mortgage is possible only as provided by this section.
- (5) “The register” means the register kept under section 9.

Position of third parties

11 Duty of owner to disclose existence of goods mortgage

- (1) This section applies where a person owns goods which are subject to a goods mortgage (“the current mortgage”).
- (2) If the owner of the goods disposes of the goods to a purchaser without discharging the obligation secured by the current mortgage, the owner is under a duty to disclose to the purchaser the existence of the current mortgage before the disposition.
- (3) If the owner of the goods creates a further goods mortgage or other security over the goods without discharging the obligation secured by the current mortgage, the owner is under a duty to disclose to the person to whom the further goods mortgage or other security is provided the existence of the current mortgage, before creating the further goods mortgage or other security.
- (4) Where an undivided share in goods is subject to a goods mortgage, references in this section to the goods are to be read as references to the undivided share.
- (5) For the meanings of “disposition” and “purchaser”, see section 32.

12 Effect of change in ownership of goods

- (1) This section applies if –
 - (a) goods are subject to a goods mortgage, and
 - (b) before the obligation secured by the goods mortgage has been discharged, ownership of the goods –
 - (i) is transferred to another person, or
 - (ii) passes by operation of law to another person, otherwise than on the owner’s bankruptcy in England and Wales (as to which, see section 14).

- (2) If the goods mortgage is not registered at the time of the change of ownership, the goods cease to be subject to the goods mortgage.
- (3) If ownership is transferred by a disposition (see section 32) to a purchaser who—
 - (a) is a private purchaser as defined by section 13,
 - (b) is a purchaser of the goods in good faith, and
 - (c) at the time of the disposition made to the purchaser, has no actual notice that the goods are subject to a goods mortgage,the goods cease to be subject to the goods mortgage.
- (4) In any other case, the goods remain subject to the goods mortgage in the hands of the new owner.
- (5) Subsections (2) and (3) do not exonerate the mortgagor and if different the person making the disposition or other transfer of ownership from any liability (whether criminal or civil) to which either of them would be subject apart from this section.
- (6) Where an undivided share in goods is subject to a goods mortgage, references in this section to goods are to be read as references to the undivided share.

13 Meaning of “private purchaser” in section 12

- (1) This section makes provision about the interpretation of section 12(3)(a).
- (2) “Private purchaser”, in relation to goods of any kind, means a purchaser who, at the time of the disposition made to the purchaser, does not carry on a business which consists, wholly or partly—
 - (a) of purchasing goods of that kind for the purpose of offering or exposing them for sale, or
 - (b) of providing finance by purchasing goods of that kind for the purpose of bailing them under hire-purchase agreements or agreeing to sell them under conditional sale agreements.
- (3) For the meanings of “disposition” and “purchaser”, see section 32.

14 Bankruptcy of owner of goods subject to goods mortgage

- (1) This section applies if an individual who owns goods subject to a goods mortgage is made bankrupt under Part 9 of the Insolvency Act 1986.
- (2) On the vesting of the bankrupt’s estate in the trustee in bankruptcy, the goods cease to be subject to the goods mortgage unless at the relevant time the goods mortgage is registered.
- (3) The “relevant time” is the time when the bankruptcy application is made or the bankruptcy petition is presented.

PART 4

RIGHTS OF MORTGAGORS AND MORTGAGEES

General provisions about taking of possession by mortgagees

15 Right of mortgagee to take possession of goods

- (1) The mortgagee under a goods mortgage is entitled to take possession of the goods only if one or more of the following conditions is met.
- (2) Those conditions are—
 - (a) that any sum whose payment is secured by the goods mortgage has become due and remains unpaid;
 - (b) that the mortgagor has failed to comply with a term of the goods mortgage relating to the maintenance or insurance of the goods;
 - (c) that the mortgagor has moved the goods in breach of a term of the goods mortgage;
 - (d) that the mortgagor has offered the goods for sale without the consent of the mortgagee;
 - (e) that, in the case of a goods mortgage that secures an obligation other than an obligation to pay money, the obligation secured has not been discharged at the time when it ought to have been discharged;
 - (f) that the goods have become liable to be seized under a warrant or writ of control to satisfy a court judgment;
 - (g) that, since the goods mortgage was created, the mortgagor—
 - (i) has been made bankrupt (under Part 9 of the Insolvency Act 1986),
 - (ii) has been adjudged bankrupt by a court in Northern Ireland,
 - (iii) has had his or her estate sequestrated by a court in Scotland, or
 - (iv) has been subject to a similar order or judgment made by a court in a territory outside the United Kingdom.
- (3) Subsection (1) applies only while the goods remain subject to the goods mortgage and is subject to—
 - (a) any provision of the goods mortgage further restricting the mortgagee's right to take possession, and
 - (b) in a case where a prior goods mortgage over the goods is registered, the rights of the prior mortgagee in relation to possession and sale.
- (4) If the goods remain owned by the mortgagor, subsection (1) is also subject to—
 - (a) section 19 (possession notice required while goods owned by mortgagor), and
 - (b) subsections (3) to (6) of section 20 (which further restrict the mortgagee's right to take possession).

16 Entry onto premises

- (1) Except under an order of the court, the mortgagee under a goods mortgage is not entitled to enter any premises to take possession of the goods without the consent of the person entitled to authorise entry on the premises ("the appropriate person").

- (2) An entry in contravention of subsection (1) is actionable as a breach of statutory duty.
- (3) A mortgagee under a goods mortgage who –
 - (a) wishes to enter any premises for the purposes of taking possession of the goods, and
 - (b) does not have the consent of the appropriate person,may make an application to the court for an order under this subsection (“an access order”) against the appropriate person.
- (4) On an application under subsection (3), the court may make an access order only if the court is satisfied, at the time when it makes the order, that the applicant is entitled to take possession of the goods.

17 Mortgagee’s power of sale

- (1) If the mortgagee under a goods mortgage has lawfully taken possession of the goods, the mortgagee has power to sell the goods.
- (2) This is subject to the following provisions of this section and to section 18.
- (3) If the goods mortgage is not registered but another goods mortgage over the goods is registered, the mortgagee under the unregistered goods mortgage may not sell the goods.
- (4) Where two or more goods mortgages are registered in relation to the same goods, a subsequent mortgagee may not, except under an order of the court, sell the goods without the concurrence of every prior mortgagee under a registered goods mortgage.
- (5) Section 101 of the Law of Property Act 1925 (which contains provisions relating to mortgages made by deed) does not apply in relation to a goods mortgage.

18 Goods seized not to be sold until five days have passed

- (1) If the mortgagee takes possession of the goods to which a goods mortgage relates, the mortgagee must not sell the goods before the end of the fifth working day following the day on which possession is taken.
- (2) The appropriate person may before the end of the fifth working day apply to the court and the court, if satisfied that, by reason of the payment of money or otherwise, the condition in section 15(2) has ceased to be met, may –
 - (a) restrain the mortgagee from removing or selling the goods,
 - (b) order the return of the goods to the appropriate person, or
 - (c) make such other order as the court thinks just.
- (3) If the appropriate person and any subsequent mortgagees have agreed with the mortgagee that the mortgagee may deal with the goods otherwise than by way of sale, references in subsections (1) and (2) to selling the goods include references to disposing of them in any other way.
- (4) “The appropriate person” means the mortgagor, except that, if the goods have become owned by another person, it means that other person.
- (5) “Working day” means a day other than a Saturday, a Sunday, Good Friday, Christmas Day or a bank holiday under section 1 of the Banking and Financial Dealings Act 1971 in England or Wales.

- (6) This section does not apply –
- (a) if the mortgagee takes possession under an order of the court, or
 - (b) in a case where –
 - (i) the goods mortgage is an exempt goods mortgage,
 - (ii) the instrument creating the goods mortgage includes a statement that the mortgagor agrees to forgo the protection given by this section, and
 - (iii) the goods remain owned by the mortgagor.

Protection of mortgagors

19 Possession notice required while goods are owned by mortgagor

- (1) The giving to the mortgagor of a notice complying with section 20 (“a possession notice”) is necessary before the mortgagee can take possession of the goods while they are owned by the mortgagor.
- (2) Subsection (1) does not prevent the mortgagee taking possession without giving a possession notice if –
 - (a) the goods mortgage is an exempt goods mortgage (see section 26), or
 - (b) in the case of a goods mortgage other than an exempt goods mortgage, the following conditions are met –
 - (i) the obligation secured is one that can be discharged by the payment of money,
 - (ii) at the time when the goods mortgage was created, the redemption total could be determined, and
 - (iii) at the time when the mortgagee takes possession of the goods, less than one third of the relevant amount has been paid.
- (3) “The redemption total” means the total sum that is to be payable by the mortgagor in order to discharge the obligation secured by the goods mortgage, including interest but excluding any sum payable as a penalty.
- (4) Where the obligation can be discharged either by the payment of money or by other means, it is to be assumed for the purposes of subsection (3) that the mortgagor does not discharge it by those other means.
- (5) The “relevant amount” means the redemption total, except in a case within subsection (6).
- (6) In a case where –
 - (a) the goods mortgage secures a regulated credit agreement as defined by section 8(3) of the Consumer Credit Act 1974, and
 - (b) at the time when the mortgagee takes possession of the goods, part of the indebtedness has been discharged early in accordance with subsections (3) and (4) of section 94 of that Act (right to complete payments ahead of time),“the relevant amount” means the redemption total reduced by the amount by which any rebate allowable under section 94 of that Act exceeds any amount which the creditor claims under section 95A(2) of that Act.

20 Possession notice

- (1) A possession notice must be in the prescribed form and contain prescribed information.
- (2) Regulations made by virtue of subsection (1) must require a possession notice to—
 - (a) state that the mortgagee considers that one or more of the conditions in section 15(2) is met, specifying which condition and why the mortgagee considers that it is met,
 - (b) state that the mortgagor may exercise the right conferred by section 23 (mortgagor’s right to terminate),
 - (c) state that the mortgagor may within a prescribed period (“the notice period”)—
 - (i) require the mortgagee not to take possession of the goods unless authorised to do so by an order of the court, or
 - (ii) inform the mortgagee of the mortgagor’s intention to seek advice,
 - (d) indicate the amount of any costs that may become payable by the mortgagor under an order of the court if the mortgagor acts under paragraph (c)(i) and the mortgagee applies for such an order, and
 - (e) state that the mortgagee intends to take possession of the goods unless within the notice period the mortgagor—
 - (i) remedies the breach to which the notice relates (if the breach is capable of remedy), or
 - (ii) acts under paragraph (c)(i) or (ii) or under section 23.
- (3) If the mortgagor informs the mortgagee under subsection (2)(c)(ii), within the notice period, of the mortgagor’s intention to seek advice, the mortgagor may within a further prescribed period (“the advice period”), require the mortgagee not to take possession of the goods unless authorised to do so by an order of the court.
- (4) Where a possession notice has been given to the mortgagor, the mortgagee is not entitled to take possession of the goods—
 - (a) before the end of the notice period, and
 - (b) if the mortgagor acts under subsection (2)(c)(ii), during the advice period.
- (5) If the mortgagor so requires under subsection (2)(c)(i) or (3), the mortgagee may not take possession of the goods except under an order of the court.
- (6) If before the relevant time the mortgagor remedies the breach to which the possession notice relates, the breach is to be treated as not having occurred.
- (7) In subsection (6) “the relevant time” means the end of the notice period or, if the mortgagor acts under subsection (2)(c)(ii), the end of the advice period.

21 Defaults under consumer credit agreements

- (1) This section applies if the goods mortgage was given to secure the payment of money under a regulated agreement to which subsection (1) of section 87 of the Consumer Credit Act 1974 (need for default notice) applies.
- (2) A possession notice—

- (a) may not be given until the restriction imposed by section 88(2) of that Act has ceased to apply to the goods mortgage, and
 - (b) may not be given if, by virtue of section 89 of that Act (compliance with default notice), the default is treated as not having occurred.
- (3) If because of section 19(2) no possession notice is required –
- (a) the mortgagee is not entitled to take possession of the goods on the basis that a condition in section 15(2) is met unless the restriction imposed by section 88(2) of the Consumer Credit Act 1974 has ceased to apply to the goods mortgage, and
 - (b) section 15(2)(a) to (f) does not apply to a default that is treated by section 89 of that Act as not having occurred.

22 Wrongful taking of possession by mortgagee

- (1) If the mortgagee takes possession of the goods to which a goods mortgage relates in contravention of section 15(1), 19 or 20, the mortgagor –
- (a) is entitled to have the goods returned, and
 - (b) is released from all further liability under the obligation secured by the goods mortgage.
- (2) This section does not apply if the goods have ceased to be owned by the mortgagor.

23 Mortgagor's right to terminate

- (1) This section applies to a goods mortgage that is not an exempt goods mortgage.
- (2) The mortgagor is entitled to terminate the goods mortgage by –
- (a) informing the mortgagee of the mortgagor's intention to terminate the goods mortgage, and
 - (b) as soon as reasonably practicable after doing so, delivering the goods to the mortgagee.
- (3) If the mortgagee refuses to accept goods that the mortgagor offers or attempts to deliver to the mortgagee after informing the mortgagee of an intention to terminate the goods mortgage, the goods are to be taken for the purposes of subsection (2) to have been delivered to the mortgagee.
- (4) The right given by subsection (2) cannot be exercised in relation to a goods mortgage if another goods mortgage over the goods has been registered and the other mortgagee (or mortgagees) have not agreed to the termination.
- (5) The mortgagee may refuse termination under subsection (2) by the mortgagor only if one or more of the following applies –
- (a) the mortgagee has applied to the court for possession of the goods,
 - (b) the mortgagee is entitled to take possession of the goods without such an order and has incurred expenditure in attempting to take possession of them,
 - (c) the state of the goods is affected by damage deliberately caused by any person since the creation of the goods mortgage, or
 - (d) the goods have suffered damage that –
 - (i) is attributable to a failure by the mortgagor to comply with a term of the goods mortgage requiring the mortgagor to take reasonable care of the goods, and

- (ii) has a significant adverse effect on the market value of the goods.
- (6) Any refusal under subsection (5) must be communicated to the mortgagor within a reasonable time and in any event before the end of the period of 14 days beginning with the day on which the goods were delivered to the mortgagee.
- (7) If the mortgagor terminates the goods mortgage under subsection (2) then, unless the mortgagee is entitled under subsection (5) to refuse termination and does so, —
 - (a) the mortgagor is released from all further liability under the obligation secured by the goods mortgage, and
 - (b) property in the goods is to be taken to have passed to the mortgagee when the goods were delivered to the mortgagee.
- (8) If the mortgagee refuses termination on any of the grounds in subsection (5), the mortgagee must return the goods to the mortgagor.

24 Additional powers of court where mortgagee seeks possession of goods

- (1) This section applies where —
 - (a) in any proceedings the mortgagee under a goods mortgage seeks possession of the goods, and
 - (b) the goods mortgage does not secure a regulated agreement within the meaning of the Consumer Credit Act 1974 (see section 129 of that Act for powers available to the court in relation to such an agreement).
- (2) The court may exercise any of the powers conferred by this section if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period —
 - (a) to pay any sums due under the goods mortgage, or
 - (b) to remedy a default consisting of a breach of any other obligation arising under or by virtue of the goods mortgage.
- (3) The court —
 - (a) may adjourn the proceedings for such period or periods as the court thinks reasonable, or
 - (b) on giving judgment, or making an order, for the delivery up of, or the taking possession of, the goods that are subject to the goods mortgage, or at any time before the execution of such a judgment or order, may —
 - (i) stay or suspend execution of the judgment or order, or
 - (ii) postpone the date for the delivery of possession, for such period or periods as the court thinks reasonable.
- (4) The adjournment, stay, suspension or postponement may be made subject to such conditions with regard to the payment by the mortgagor of any sum secured by the goods mortgage or the remedying of any default as the court thinks fit.
- (5) The court may from time to time vary or revoke any condition imposed by virtue of this section.

Taking of possession by mortgagee after change of ownership

25 Order for taking of possession while goods owned by third party

- (1) The mortgagee under a registered goods mortgage may apply to the court for an order under this section in relation to goods which are in the ownership of a person other than the mortgagor but which remain subject to the goods mortgage.
- (2) The court may order the delivery up of the goods to, or the taking of possession by, the mortgagee.

Supplementary

26 Exempt goods mortgage

- (1) A goods mortgage is an “exempt goods mortgage” for the purposes of this Act in the following cases.
- (2) A goods mortgage is an exempt goods mortgage if the obligation secured by it is—
 - (a) a guarantee (see section 6(3) for the cases in which a goods mortgage may secure a guarantee), or
 - (b) the obligation of the borrower under an agreement for running-account credit as defined by Schedule 1 (see section 6(4) for the cases in which a goods mortgage may secure such an obligation).
- (3) A goods mortgage is also an exempt goods mortgage if—
 - (a) the high net worth conditions or the business credit conditions are met, and
 - (b) the instrument creating the goods mortgage includes a declaration by the mortgagor which—
 - (i) states that the mortgagor agrees to forgo the protection and remedies given by sections 19(1) and 23(2), and
 - (ii) complies with prescribed requirements.

27 Contracting-out forbidden

- (1) A term contained in a goods mortgage, or in any agreement secured by or related to a goods mortgage, is void if, and to the extent that, it is inconsistent with a provision for the protection of the mortgagor contained in this Act or in any regulations made under this Act.
- (2) Where the provision specifies the duty or liability of the mortgagor in certain circumstances, the term is inconsistent with that provision if it purports to impose, directly or indirectly, an additional duty or liability on the mortgagor in those circumstances.
- (3) Despite subsection (1), a provision of this Act under which a thing may be done in relation to any person only on an order of the court is not to be taken to prevent its being done at any time with that person’s consent given at that time.
- (4) The refusal of the consent mentioned in subsection (3) is not to give rise to any liability.

28 Interpretation of Part 4

- (1) This section has effect for the interpretation of this Part.
- (2) In relation to a goods mortgage “mortgagor” includes a person to whom the original mortgagor’s rights and duties under the goods mortgage have passed by operation of law, except that it does not include a trustee in bankruptcy.
- (3) In relation to a goods mortgage over an undivided share in goods, references to goods are to be read, unless the context requires otherwise, as references to the undivided share.

PART 5

REPEALS AND FINAL PROVISIONS

Repeals

29 Repeal of Bills of Sale Acts 1878 and 1882

- (1) The Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882 are repealed.
- (2) In consequence of the repeals made by subsection (1), the following are also repealed—
 - (a) the Bills of Sale Act 1890;
 - (b) the Bills of Sale Act 1891;
 - (c) section 23 of the Administration of Justice Act 1925;
 - (d) in Schedule 11 to the Constitutional Reform Act 2005, in paragraph 4(3), the entry relating to the Bills of Sale Act 1878;
 - (e) in Schedule 13 to the Tribunals, Courts and Enforcement Act 2007, paragraphs 17 to 19;
 - (f) in Schedule 9 to the Crime and Courts Act 2013, paragraph 15.

Final provisions

30 Regulations

- (1) Any power of the Treasury or the Secretary of State to make regulations under this Act is exercisable by statutory instrument.
- (2) Any such power includes—
 - (a) power to make different provision for different purposes, and
 - (b) power to make transitional, transitory or saving provision.
- (3) Subsection (2) does not apply in relation to the power conferred by section 35 (but see subsections (3) and (4) of that section).
- (4) A statutory instrument containing regulations under any provision of this Act other than section 35 is subject to annulment in pursuance of a resolution of either House of Parliament.

31 Meaning of “credit” and “credit agreement”

- (1) In this Act “credit” includes a cash loan, and any other form of financial accommodation.
- (2) In this Act “credit agreement” means an agreement between one or more persons (“the debtor”) and any other person (“the creditor”) by which the creditor provides the debtor with credit of any amount.
- (3) Where credit is provided otherwise than in sterling, it is to be treated for the purposes of this Act as provided in sterling of an equivalent amount.
- (4) For the purposes of this Act, an item entering into the total charge for credit is not to be treated as credit even though time is allowed for its payment.
- (5) In subsection (4) “the total charge for credit” has the meaning given by rules made by the Financial Conduct Authority under Article 60M of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544), but as if any reference in the rules to a regulated credit agreement were to a credit agreement as defined by subsection (2).

32 Meaning of “disposition” etc

- (1) In this Act “disposition” means –
 - (a) a contract of sale, as defined by section 2 of the Sale of Goods Act 1979, or
 - (b) a contract under which the owner of goods transfers or agrees to transfer ownership of the goods to another person and –
 - (i) the other person provides or agrees to provide consideration otherwise than by paying a price, or
 - (ii) the contract is, for any other reason, not a contract of sale or a hire-purchase agreement;and “dispose of” is to be read accordingly.
- (2) For the purposes of this Act, a person becomes a “purchaser” of goods if, and at the time when, the person enters into a disposition under which ownership of the goods is or is to be transferred to the person.

33 Further general definitions

In this Act –

- “conditional sale agreement” has the meaning given by section 189 of the Consumer Credit Act 1974;
- “the court” means the High Court or the county court;
- “hire-purchase agreement” has the meaning given by section 189 of the Consumer Credit Act 1974;
- “mortgagee”, in relation to a goods mortgage, means the person or persons to whom the security is provided in accordance with section 2 or 3 or a person to whom the original mortgagee’s rights and duties under the goods mortgage have passed by assignment or operation of law;
- “mortgagor”, in relation to a goods mortgage, means the individual who creates (or individuals who create) the charge in accordance with section 2 or 3, except that in Part 4 it has the extended meaning given by section 28(2);

“prescribed” means prescribed by regulations made by the Treasury under this Act.

34 Consequential amendments

Schedule 2 (which contains amendments related to the provisions of this Act, including repeals of spent provisions) has effect.

35 Commencement

- (1) The following provisions come into force on the day on which this Act is passed –
 - (a) sections 30 to 33;
 - (b) this section and sections 36 and 37.
- (2) The remaining provisions of this Act come into force –
 - (a) for the purposes of making regulations, on the day on which this Act is passed;
 - (b) for remaining purposes, on such day or days as the Treasury may by regulations appoint.
- (3) The Treasury may by regulations make saving, transitional or transitory provision in connection with the coming into force of any provision of this Act.
- (4) Regulations under this section may make different provision for different purposes.

36 Index of defined terms

The following Table sets out expressions defined in this Act for general purposes.

<i>Expression</i>	<i>Provision</i>
business credit conditions	section 7(3)
conditional sale agreement	section 33
the court	section 33
credit, credit agreement	section 31
disposition, dispose of	section 32
excluded obligation (in Part 2)	section 6
exempt goods mortgage	section 26
goods	section 4(2) (see also sections 11(4), 12(6) and 28(3))
goods mortgage	section 2(4)
guarantee	section 6(6)
high net worth conditions	section 7(2)

<i>Expression</i>	<i>Provision</i>
hire-purchase agreement	section 33
mortgagee	section 33
mortgagor	section 33
to own (and related expressions)	section 2(3)
possession notice	section 19(1)
prescribed	section 33
purchaser	section 32
qualifying goods	section 4(3)
registered (in relation to a goods mortgage)	section 9(9)

37 Short title and extent

- (1) This Act may be cited as the Goods Mortgages Act 2017.
- (2) Except as provided by subsection (3), this Act extends to England and Wales only.
- (3) Any repeal or amendment made by this Act has the same extent as the enactment repealed or amended.

SCHEDULES

SCHEDULE 1

RUNNING-ACCOUNT CREDIT: SUPPLEMENTARY PROVISIONS

Introductory

- 1 This Schedule has effect for the interpretation of—
 - (a) subsection (4) of section 6 (excluded obligations), and
 - (b) section 7(3)(a) (the business credit conditions) in its application to section 6(4)(a).

Running-account credit

- 2 Running-account credit is a facility under a credit agreement under which the debtor is enabled to receive from time to time (whether for the debtor or for another person) from the creditor or a third party cash, goods and services (or any of them) to an amount or value such that, taking into account payments made by or to the credit of the debtor, the credit limit (if any) is not at any time exceeded.
- 3 In relation to running-account credit, “credit limit” means, as respects any period, the maximum debit balance which, under the credit agreement, is allowed to stand on the account during that period, disregarding any term of the agreement allowing that maximum to be exceeded merely temporarily.

Determining amount of running-account credit

- 4 (1) Running-account credit is to be taken not to exceed the amount prescribed for the purposes of section 7(3)(a) (“the specified amount”) if—
 - (a) the credit limit does not exceed the specified amount, or
 - (b) whether or not there is a credit limit, and if there is, despite the fact that it exceeds the specified amount—
 - (i) the debtor is not enabled to draw at any one time an amount which, so far as (having regard to section 31(4)) it represents credit, exceeds the specified amount,
 - (ii) the agreement provides that, if the debit balance rises above a given amount (not exceeding the specified amount), any condition favouring the creditor or the creditor’s associate comes into operation, or
 - (iii) at the time the agreement is made it is probable, having regard to the terms of the agreement and any other relevant considerations, that the debit balance will not at any time rise above the specified amount.

- (2) In sub-paragraph (1)(b)(ii) “associate” is to be read in accordance with section 184 of the Consumer Credit Act 1974.

SCHEDULE 2

CONSEQUENTIAL AMENDMENTS

Stamp Act 1891 (c. 39)

- 1 In the Stamp Act 1891, omit section 41 (bills of sale).

Perjury Act 1911 (c. 6)

- 2 In section 2 of the Perjury Act 1911 (false statements on oath made otherwise than in a judicial proceeding), omit –
- (a) the “or” at the end of paragraph (1), and
 - (b) paragraph (2).

Law of Property Act 1925 (c. 20)

- 3 In section 114 of the Law of Property Act 1925 (transfers of mortgages), in subsection (5) for “bill of sale of chattels by way of security” substitute “goods mortgage as defined by section 2 of the Goods Mortgages Act 2017”.

Agricultural Credits Act 1928 (c. 43)

- 4 The Agricultural Credits Act 1928 is amended as follows.
- 5 (1) Section 8 (supplemental provisions as to agricultural charges) is amended as follows.
- (2) Omit subsection (1).
 - (3) In subsection (3), for “a bill of sale” substitute “a goods mortgage (as defined by section 2 of the Goods Mortgages Act 2017)”.
- 6 In section 14 (provisions as to agricultural societies), in subsection (1), omit the words from “, and the charge if so registered” to “those Acts”.

Agricultural Marketing Act 1958 (c. 47)

- 7 In section 15 of the Agricultural Marketing Act 1958 (borrowing powers of boards and provisions as to loans and grants made to boards), in subsection (5), omit the words from “, and the charge, if so registered” to “those Acts”.

Consumer Credit Act 1974 (c. 39)

- 8 In section 189(1) of the Consumer Credit Act 1974 (definitions), omit the definition of “bill of sale”.

Sale of Goods Act 1979 (c. 54)

- 9 In section 62 of the Sale of Goods Act 1979 (savings, rules of law etc), in subsection (3), omit “the enactments relating to bills of sale, or”.

Insolvency Act 1986 (c. 45)

- 10 (1) Section 344 of the Insolvency Act 1986 (avoidance of general assignment of book debts) is amended as follows.
- (2) In subsection (2), for “the Bills of Sale Act 1878” substitute “section 9 of the Goods Mortgages Act 2017”.
- (3) For subsection (4) substitute—
- “(4) For the purposes of the registration mentioned in subsection (2) of this section, subsections (1) to (3) and (5) and (6) of section 9 of the Goods Mortgages Act 2017 (which relate to the registration of goods mortgages) apply with any necessary modifications.”

Co-operative and Community Benefit Societies Act 2014 (c. 14)

- 11 In section 59 of the Co-operative and Community Benefit Societies Act 2014 (charges on assets of English and Welsh societies), omit subsection (2).

CCS1117349742
978-1-5286-0110-8