1 *Introduction*

A AN INTRODUCTION TO CONVEYANCING

1.1 OUR APPROACH IN THIS BOOK

This book has been written by two legal academics who between them have some 45 years' experience of conveyancing practice. Consequently we believe we have written a book that truly highlights a practical approach to the process of conveyancing. But it is not a book that just looks backwards. We believe that the future for conveyancing practitioners lies in greater efficiency and in a deeper understanding of the conveyancing process including the system of land registration. With these two aims in mind we have produced a book that we believe addresses these objectives as well as offering an understanding to practitioners and law students of the process as a whole.

We have adopted the signpost heading method for all the chapters. You, the reader, will find at the start of each chapter a list of contents for that particular chapter and the topics within it. This method has been adopted to help the busy practitioner (or student) find the relevant area of interest as quickly as possible. We appreciate from our own experience of practice that there is nothing worse than spending hours of wasted time, fruitlessly searching through untitled sub-chapter sections trying to locate the desired subject.

Within each chapter there are also two further elements designed to assist the busy reader. First, where appropriate, we have included key points summaries highlighting important elements within a particular topic. These are provided as reminders of key points that should never be overlooked even in the hurly-burly of the busy modern legal office. Secondly we have included, at the end of most chapters, checklists for the busy practitioner who may be seeking a quick overview of the important elements or the procedures in any particular topic. Our overall aim is to provide a clear, useful and, in particular, practical approach to conveyancing that will help all those who use the book. In this way we hope to assist in the pursuit of an understanding of how conveyancing can be a stimulating and, at times, even an exciting legal skill.

1.2 AN INTRODUCTION TO CONVEYANCING

Conveyancing is the process by which legal title to property is transferred. As a consequence, over time, a conveyance has become the description for the document effecting such a transfer. In many ways conveyancing is like Shakespeare's character, Autolycus in *The Winter's Tale*, a 'snapper-up of unconsidered trifles'. Like this amiable rogue, conveyancing takes from here, there and everywhere, from within the full gamut of the law. Conveyancing rests and has been built upon the three foundations of land law, contract law, and equity and trusts. Because of this, a confident appreciation of land law is crucial for success in conveyancing. Land law details the estates and interests that will form the subject matter of all conveyancing transactions, and without an understanding of these details no practitioner will cope. You will also need to have a prior knowledge and understanding of the details concerning the formation of contracts, the formalities of written contracts, misrepresentation and remedies for breach of contract. When you consider that conveyancing is about the transfer of title and these transfers are in the main made by contract, you will readily appreciate why contract law plays such an important part. Each conveyance on sale will involve preparing a written contract. Moreover, your land law will tell you that without a written contract containing all the terms of the agreement there is no deal (see the Law of Property (Miscellaneous Provisions) Act 1989).

A detailed understanding of the influence of equity as well as trust law will always be a prerequisite for a successful conveyancer. This important foundation to conveyancing is not so obviously relevant as land law and contract law, but it is nevertheless a pervasive element in conveyancing. You need to know, for example, all about third-party rights and co-ownership. You will need to understand the differences between tenants in common and joint tenants and their relevance to joint ownership in conveyancing. You will need to be absolutely clear on the law relating to trusts. You will need to remind yourself about the equitable remedies that are available. It is one thing to understand their availability in theory but it is another to apply them to a practical situation (see chapter 9).

So, the key to understanding the nature of conveyancing is to appreciate how it calls upon various disparate areas of the law. It means that you must abandon a discrete approach to applying the separate elements of the law. Conveyancing requires you to blend your knowledge. Conveyancing does not relate just to the transfer of ownership of residential properties. It covers the transfer of title to both houses and flats, new and second-hand properties and commercial property of all kinds. (We look at leaseholds, which will include flats, in chapter 10, new properties in chapter 11, and commercial property basics in chapter 12.)

History has dictated two parallel conveyancing systems. The system of unregistered conveyancing has for centuries been the method by which the transfer of title has been effected. It worked satisfactorily when land ownership was limited to a privileged few, but with the growth of home ownership in the nineteenth century (along with the population) it started to exhibit major pitfalls. Moves to reform the system grew in the direction of the registration of land. Accordingly, the traditional system is considered first, but in outline only, and a more detailed consideration of the reforming registration system follows.

1.3 CONVEYANCING OF UNREGISTERED LAND

The traditional system of conveyancing, of unregistered land, has been in existence for centuries, although it was overhauled by the Law of Property Act 1925. (This was accompanied by the Land Registration Act 1925, which fully put in place the new reforming system of land registration. It also signposted the way towards the gradual but inevitable dominance of registered land.) The whole unregistered system relies upon the existence of written documents, of deeds, to show to a buyer a period of unchallenged ownership which will substantiate the seller's ownership. At present, statute stipulates a minimum period of unchallenged ownership of 15 years (The Law of Property Act 1969, s. 23). This will be considered in detail in chapter 5. It is mentioned here to highlight the different approach taken in registered land. The major problem of the unregistered system is that there is an almost total reliance on the integrity of the title deeds. If they are, either in part or in whole, lost, damaged or forged, severe problems will inevitably arise for the owner seeking to prove title. The mere existence of deeds does not guarantee any title, though buyers may take comfort from the existence of deeds stretching back over time along with the actual occupation of the property by the seller. However, these mounting difficulties added momentum to the nineteenth-century calls for reform.

Many of the different elements of the traditional system are considered at several relevant points throughout the book. In particular, readers are referred to chapter 3 concerning the draft contract and chapter 5 regarding deducing and investigating title.

B CONVEYANCING OF REGISTERED LAND

1.4 CONVEYANCING OF REGISTERED LAND

The preamble to the Land Registry Act 1862 states that '... it is expedient to give certainty to the title to real estates and to facilitate the proof thereof and also to render the dealing with land more simple and economical'. More than 135 years later, it remains true that the aims of the system for the conveyancing of registered land should be reliability, simplicity and that the process be economic. These are the aims that underpin the drive for the complete registration of land throughout England and Wales. However, above all else the major difference between the traditional system and registered land is that registered land is accompanied by a State guarantee of title, that is to say, guaranteed by and through the Land Registry. The Land Registry now have data on 16 million titles in England and Wales and 14 million of those are held on computer records. It is anticipated that in the year 2000, when the Land Registry computerisation programme is expected to be complete, there will be 20 million titles held on computer.

1.4.1 First registration

Until recently, s. 123 of the Land Registration Act 1925 stipulated that first registration must take place within two months of the completion of:

(a) a conveyance on sale of a freehold, or
(b) a grant of a new lease of a term of more than 21 years, or
(c) the assignment on sale of an existing lease where the term left to run exceeds 21 years at completion.

Sales involve an element of monetary consideration and so transactions that were gifts, assents, mortgages or exchanges that do not include any equality moneys did not bring s. 123 into operation. However, the Land Registration Act 1997 which came into force on 1 April 1998 considerably extends the scope of first registration. Under the 1997 Act first registration will arise out of conveyances by way of gift, assents, vesting assents, vesting deeds, conveyances arising from court orders and first legal mortgages of freeholds or leaseholds with more than 21 years to run. This will also include re-mortgages where a first legal mortgage is involved.

The new 'triggers' for first registration are:

(a) Deeds of gift,
(b) Conveyances and assignments not on sale but for a consideration,
(c) First mortgages secured by deposit of title deeds,
(d) Assents,
(e) Vesting assents and vesting deeds affecting settled land,
(f) Exchanges with no payment of equality money including properties taken in exchange by developers,
(g) Conveyances and assignments of onerous property e.g., polluted land, and
(h) Conveyances and assignments in pursuance of Orders of the Court.

The Land Registry have issued a practice advice leaflet (No. 14) which contains detailed guidance on the new triggers.

The only estates capable of registration are legal fee simples and legal terms of years absolute where the term exceeds 21 years. (Rentcharges are also registrable if granted out of a registered estate, but statute has greatly limited the possibility of the creation of new rentcharges and so they will not be considered in any detail.) Apart from a legal mortgage (which will be protected by an entry in the charges register), any other interest in registered land will amount to either an overriding interest or a minor interest. Since 1 December 1990 all of England and Wales is an area of compulsory registration so that if any of the registrable events mentioned above take place, the title concerned must be submitted for compulsory first registration within the statutory two-month period. While not actively promoted it is possible to apply for voluntary first registration and there is now no additional fee payable for voluntary registration.

Section 123 also gives to the Chief Land Registrar the power to extend the two-month period for first registration. This will assist late applicants, who will, however, be required to furnish the Registrar with an explanation of the reasons for the delayed application. If a late application is accepted (and they normally are), title vests in the new proprietor, but only from the date of registration. If a late application has to be made, the Land Registry will require up-to-date search results along with those made at the time of completion.

Section 123 also covers the situation where there is a complete failure to apply for compulsory first registration. Where this occurs the unregistered deed is deemed void in relation to the 'grant or conveyance of the legal estate'. The effect of this is that on completion, the legal estate in the unregistered title will pass from the seller to the buyer but with the non-registration of the title within the statutory period of two months the legal estate will revert back to the seller but will still have the original effect in equity. This is now embodied in the new s. 123A of the Land Registration Act 1925 inserted by s. 1 of the Land Registration Act 1997. Of course the seller will hold the title as a bare trustee in trust for the buyer pending completion of the application for first registration (see *Pinekerry Ltd* v *Kenneth Needs (Contractors) Ltd* (1992) 64 P & CR 245). The deed is not void for all purposes. The enforcement of covenants contained within it will be possible even though registration has not taken place or been applied for. Furthermore, failure to submit an application on behalf of a client is a clear-cut case of professional negligence and if your client suffers loss, you will have to look to your professional indemnity insurance policy.

1.4.2 Classes of registered title

On receipt of an application for first registration the Land Registrar will investigate the title and in the light of that investigation allocate to the property one of the following classes of title:

(a) freehold absolute (see 1.4.2.1),
(b) freehold possessory (see 1.4.2.2),
(c) freehold qualified (see 1.4.2.3),
(d) leasehold absolute (see 1.4.2.4),
(e) leasehold possessory (see 1.4.2.5),
(f) leasehold qualified (see 1.4.2.6),
(g) good leasehold (see 1.4.2.7).

1.4.2.1 Freehold absolute
An absolute title is the best class of title available, be it freehold or leasehold. So far as the freehold estate is concerned it is the registered equivalent of the classic fee simple absolute in possession. Section 5 of the Land Registration Act 1925 stipulates that an absolute title shall 'vest in the person so registered an estate in fee simple in possession in the land, together with all rights, privileges and appurtenances belonging or appurtenant thereto'. The title holder will take the legal estate subject to any encumbrances protected by an entry on the register and overriding interests (see 1.4.5). Furthermore, where the proprietor is not entitled to the land in his or her own right and where such proprietor has notice of minor interests, the title holder takes subject to those minor interests (see 1.4.6). (Thus a proprietor who holds the land as trustee will take it subject to the interests of the beneficiaries.) Most applications for the first registration of freehold property will end up classified as absolute titles. If the Registrar refuses to grant an absolute title then no appeal can be made (see *Dennis* v *Malcolm* [1934] Ch 244). Of course this would not preclude judicial revie· of the Registrar's decision.

1.4.2.2 Freehold possessory
If the Registrar is not satisfied with the applicant's title, as represented by the deeds and documents contained in the application papers, a possessory title will be issued. Such a registration has the same effect as an absolute title save in one very important respect. The first proprietor of a possessory title will take subject to any adverse interests which exist or are capable of existing at the date of the first registration. Indeed a warning to that effect will be included in the register. There are two usual

scenarios where this class of title will arise: (a) where the title deeds are lost or missing, (b) where the applicant is seeking registration based upon adverse possession ('squatter's rights'). In either case the Registry will almost certainly require the applicant to make a supporting statutory declaration giving details of how the deeds were lost or how adverse possession is claimed.

1.4.2.3 Freehold qualified

This class of title is rare, indeed the authors cannot recall having seen such a title during all their years of combined conveyancing practice! However, the Registrar can issue such a class of title for a freehold where there is a defect or flaw affecting the applicant's title. This class of title excepts from the effect of registration any estate, right or interest arising before the creation of a particular deed, or date or some other matter mentioned in the title. The applicant must consent to this class of title being created but if consent is not given the applicant is likely to be issued with a possessory title, which would be even worse than a qualified title, as it would be subject to every pre-registration issue!

1.4.2.4 Leasehold absolute

This is the term of years equivalent of the freehold absolute class. Section 9 of the Land Registration Act 1925 states that a proprietor of an absolute leasehold title holds the legal leasehold estate subject to the same rights as those affecting a freehold absolute estate but subject in addition to the covenants and obligations that are contained within the registered lease. Accordingly the proprietor of an absolute leasehold title holds the land subject to all entries on the registers, overriding interests, minor interests and the covenants and obligations in the registered lease. A lease that is granted or assigned with 21 years or less to run is not registrable (but will be an overriding interest, see s. 70(1)(k) of the Land Registration Act 1925). If an unregistered lease with more than 21 years to run is assigned for value, it will be subject to compulsory first registration.

When the Registrar issues an absolute leasehold title the State is thereby guaranteeing not just that there is a legal leasehold but also that the lease has been validly granted out of the reversionary title. Clearly the Registrar can only do this if the reversionary title has been disclosed to the Registry to confirm that the lessor has the power to grant the lease. Where the superior title, usually the freehold, is already registered with an absolute class of title, this is sufficient to confer the same class of title upon the leasehold. The position where the superior title is not seen is dealt with at 1.4.2.7 in relation to good leasehold titles.

1.4.2.5 Leasehold possessory

A proprietor of a possessory leasehold title is in the same weak position as a freehold possessory title holder. In both cases the title registration is subject to any estate or interest that is adverse to the proprietor's title at the time of first registration. The same printed note to that effect as appears in the registers of a freehold will appear in such a leasehold title (see 1.4.2.2).

1.4.2.6 Leasehold qualified

The comments about a freehold qualified title apply to a leasehold qualified title (see 1.4.2.3). In essence, if the Registrar believes there is a flaw or defect in a leasehold title the Registrar will, with the applicant's consent, issue a qualified title.

1.4.2.7 Good leasehold

A proprietor of this class of title is in the same position as a proprietor of an absolute leasehold title save as to one major factor (see the Land Registration Act 1925, s. 10). The registration is such that there is no guarantee that the lease has been validly granted. This class of title will be issued by the Registry when the superior title, the reversionary title, has not been seen and approved by the Registrar. If the lessor was not entitled to grant the lease in the first place then clearly the Registry would not have all the details to enable them to guarantee the validity of the lease. As a consequence, a good leasehold title will be issued in place of the more desirable absolute leasehold title. Some mortgagees will not accept a good leasehold title as a security and the lender's requirements should always be considered and dealt with if a good leasehold title is offered for sale to a person who requires a loan for the purchase. The problem for the lender is of course that if the lease is held to be invalid, the lender will lose its security.

Title conversion is possible and this is now considered.

1.4.3 Title conversion

Section 11 of the Land Registration Act 1986 amended and simplified the original conversion of title provisions of s. 77 of the Land Registration Act 1925. The following title conversions are now available to proprietors of registered property.

1.4.3.1 Qualified to absolute or qualified to good leasehold

This upgrade becomes possible only when the Registrar is satisfied with the title details and that the qualification need no longer be considered. In effect satisfactory evidence of title needs to be shown to enable the upgrade to take place. A good leasehold will be issued if the Registrar has not seen details of all and any superior title (see 1.4.2.6 for details of when this might arise).

1.4.3.2 Possessory to absolute or possessory to good leasehold

This upgrade is possible in two sets of circumstances. First if the proprietor can show 12 years of registered title ownership along with exclusive possession and occupation. The second method would be by the more simple route of disclosing to the Registrar satisfactory evidence of ownership of title to the subject property. A good leasehold title will be issued if the Registrar has not seen details of the superior title (see 1.4.2.6 for details of when this might arise).

1.4.3.3 Good leasehold to absolute leasehold

This is perhaps the most important title conversion and probably the most frequently sought. A good leasehold title can be upgraded to absolute so long as an applicant is able to produce to the Registrar the freehold reversionary title together with any superior leasehold titles.

1.4.4 The title certificate and the three registers

The title certificate is an assembly of three separate registers but each title will have a unique title number. This is the reference number that practitioners must always quote to the Land Registry in all dealings with the title. The three registers are the property, proprietorship and charges registers.

(a) The property register provides a description of the property including a statement of estate, i.e., whether it is a freehold or leasehold property. If leasehold, the statement of estate will also include the date of the registered lease, its term, parties and start date. Rights of way and all other easements for the benefit of the property can also be detailed in this register. For all properties reference will also be made in this first register to the filed plan of the registered property. The filed plan shows the location of the property along with adjoining property. All registered titles will have a filed plan and a copy will be included within the land or charge certificates.

(b) The proprietorship register includes the class of title followed by the name and address of the registered proprietor. Restrictions and cautions (as well as the rarer inhibitions) will appear within this register (see 1.4.6.2 to 1.4.6.4).

(c) The charges register lists the registered charges affecting the property and these are listed in order of priority. (Proprietors of second or subsequent charges will each receive their own charge certificate. In each case the charge certificate will include copies of the three registers and the original charge.) The charges register also includes adverse interests such as restrictive covenants to which the property may be subject. Furthermore leases that do not comprise overriding interests will also be noted within the charges register.

The certificate will be either a land or charge certificate, depending on whether or not there is a registered charge. In the absence of a registered charge, the land certificate is issued to the registered proprietor. If there is a registered charge, the Land Registry retain the land certificate and issue a charge certificate to the proprietor of the registered charge, i.e., the mortgagee who has lent money to the owner of the registered title. In either case the certificate contains copies of the registers and represents evidence of the title to the property owned by the registered proprietor. However, the land or charge certificate is simply a copy of the register at the Land Registry and the register is the actual proof of title. A land or charge certificate may start out being an exact duplicate of the register but in time it may well become out of date. This is because entries can be made on the register without the certificate being at the Registry and this is particularly so when an entry is made without the consent of the registered proprietor, e.g., a caution.

Should the certificate be destroyed or lost and if satisfactory proof of the destruction or loss can be given to the Registrar, the Registry will issue a duplicate certificate with a fresh title number. Proof will be by way of a statutory declaration along with the payment of a fee for the process. If the application is successful the applicant must undertake to the Registry to return any old certificate that might subsequently reappear.

Once registered, all dealings with the legal estate must be submitted to the Registry for registration. Accordingly all transfers, mortgages, new long leases over 21 years in duration, legal easements and transmissions of title, such as on the death of a deceased registered proprietor, must be registered. If they are not registered, the legal title will not pass.

1.4.5 Third-party rights; overriding interests

Section 3 of the Land Registration Act 1925 stipulates that an overriding interest is not protected by an entry in the registers because such a registration is not required. Thus the Act provides that they are 'all the encumbrances, interests, rights, and powers not entered on the register but subject to which registered dispositions are by this Act to take effect'. An overriding interest is of such importance in registered conveyancing that it will bind every registered proprietor even though there is no mention of the interest in the land or charge certificate. Overriding interests are then defined further in the Act within s. 70(1) and the more important elements of this section are:

- 70(1)(a) legal easements and profits, usually created before first registration;
- 70(1)(d) liability to deal with embankments and sea and river defences, e.g., walls;
- 70(1)(f) rights under the Limitation Acts, typically adverse possession claims;
- 70(1)(g) persons in actual occupation — this is an area of great and current importance and is therefore considered separately below;
- 70(1)(i) local land charges;
- 70(1)(k) any lease for a term not exceeding 21 years in duration, i.e., not registrable in its own right.

The existence of overriding interests would seem to strike at the very heart of the registered land system. The core of the registered approach has been highlighted and described as, 'if it is not on the register then you are not bound by it'. And yet here we have interests that are binding, come what may. The reality is that these interests are of such importance that they are binding irrespective of notice, in any event, and a prudent practitioner acting for a purchaser should always be able to find out details of overriding interests through the proper use of searches and enquiries. For example, persons possibly falling within s. 70(1)(g) should be disclosed in replies to property information Forms or preliminary enquiries. Similarly inspection of the subject property before exchange should also help with this element as well as highlighting any tenants in occupation. Any local land charges affecting the property will of course be disclosed to a buyer if a local land charges search is sent to the relevant local authority, as it should be in all standard domestic and commercial conveyancing transactions.

If there is one area within the topic of overriding interests that has been the most problematic for owners and practitioners alike, s. 70(1(g) has probably provided the most likely candidate. The section provides that there will be an overriding interest to protect 'the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed'. What is protected by this section are the rights of the occupant. To that end there are two necessary elements, actual occupation and a claim or right to occupy. In *Hodgson* v *Marks* [1971] Ch 892 this provision was held to protect the rights of a beneficiary behind a bare trust who was in actual occupation of the property. Perhaps the most famous example of this kind of protection is the celebrated case of *Williams and Glyn's Bank Ltd* v *Boland* [1981] AC 487. When buying a property both Mr and Mrs Boland paid moneys towards the cost price but only Mr Boland was registered as proprietor. The bank held a mortgage but the court held that Mrs Boland was entitled to a half share of the estate, and as she was in actual occupation the bank was subject to the interest of Mrs Boland. Moreover the bank had not made any enquiries about the occupancy or interest of the non-owning spouse. As a consequence the bank could not obtain vacant possession of the property and Mrs Boland was entitled in priority to the bank.

If the occupant is in occupation at the time of completion, the buyer will take subject to the rights of that occupant. However, *City of London Building Society* v *Flegg* [1988] AC 54 makes it clear that the rights of persons in actual occupation can be overreached. If there are two trustees of the legal estate and if the consideration is properly payable to them, the interest of a beneficiary under a trust is overreached on sale (see section 5.6.3.2 for a more detailed discussion of overreaching).

Practitioners should always be on their guard against the danger of an undisclosed occupier. When acting for a buyer, enquiries should always be made of the seller about who is in actual occupation and what, if any, their interest might be in the property. In particular if only one spouse is selling, enquiries should be made about the whereabouts of the other spouse and the existence of any family disputes. The property should be physically inspected and enquiries made about occupiers. This is really a matter of common sense. If the property is meant to be empty but there are signs of occupation then further enquiries must be made of the seller. Similarly if the seller is meant to be single but again there are signs of another person living at the property, further enquiries must be directed to the seller.

1.4.6 Third-party rights; minor interests

Third-party rights that are not protected as overriding interests or by being registered charges on the title are known as minor interests. If the list of overriding interests set out in the Land Registration Act 1925, s. 70, does not cover the third-party interest in question then it can only be a minor interest. A clear example of such an interest is an estate contract. In such a case the minor interest *must* be protected by a registration, i.e., by an entry on the register of the relevant title. If there is no such registration then a buyer will take free of the third-party interest, and the question of notice for that buyer is quite immaterial. Accordingly, in the case of the above example, if a registered proprietor enters into a contract to sell part of the title, and before completion of that contract, contracts to sell the whole of the title, then, if there is no registration of the first contract, the second buyer will take the property free of it. If this happens, the first buyer will only have a claim in damages against the seller and the second buyer will be unconcerned with the contract that did not have the benefit of a protective registration. Minor interests can include equitable interests behind a trust of the legal estate, although such interests can be overreached. Just what form that protective registration might take in each case is covered by the four categories listed below:

1.4.6.1 Notices

This form of protective entry is a specific entry on the charges register protecting a particular interest. Notices are used to protect restrictive covenants, leases not capable of being registered in their own right, and, where the seller concurs, an estate contract. The support of the registered proprietor is required because a fundamental requirement for the registration of a notice is that the owner's land or charge certificate must be lodged with the notice at the time of application to the Registry for registration. Alternatively the certificate could be placed on deposit to meet the application for the registration of the notice. (However, there is one principal exception to this, which is a notice protecting a spouse's right of occupation pursuant to the provisions of the Family Law Act 1996.) The effect of the registration of a notice is that it is good notice to all and remains on the title with no further action required for the maintenance of the registration.

1.4.6.2 Cautions (including cautions against first registration)

A caution is a protective entry that may be seen in the proprietorship register. It can be used to protect the same type of third-party interest as can be protected by a notice. The main difference between a caution and a notice is that with a caution you do not need to lodge the land or charge certificate with the caution application. Accordingly, a caution is used in hostile situations where the cooperation of the title owner is not going to be forthcoming. Land Registry Form 63 will be required together with a Form of statutory declaration. The declaration must give details of the nature of the claim, e.g., an estate contract where there is going to be an appreciable delay between exchange and completion. Preprinted forms from law stationers normally contain Form 63 on one side of a single sheet of paper, with the declaration form on the reverse.

The effect of having a caution registered is to afford the cautioner a terminable period of protection. When a caution is registered the Land Registry will give notice to the cautioner of any imminent dealing with the land comprised in the subject title. This is termed 'warning the caution'. In effect the Registry warn the cautioner of the intended registration or dealing, and give notice to the cautioner that if no steps are taken to show why the caution should remain, then within 14 days of giving the warning the caution will be removed and the pending registration or dealing will proceed. The cautioner must take steps to commence action within the 14-day notice period and to seek a hearing before the Registrar. It is imperative that any cautioner acts swiftly once a 'warning-off' notice has been received otherwise the protection of the caution will be lost. Practitioners should note that by s. 56(3) of the Land Registration Act 1925, any person lodging a caution without reasonable cause will be liable to pay compensation to any other person who has as a consequence of the improper registration suffered loss or damage.

Caution against first registration A caution against first registration is different from mainstream cautions in that it exists only in relation to unregistered titles. A person who wishes to advance a claim against an unregistered title may wish to object to that title being submitted for first registration, as registration could adversely affect the person's interest in the land in question. If a caution against first registration is lodged and accepted, the Registrar will advise the cautioner of an application for first registration that affects all or part of the land in dispute. The cautioner will then have a limited period during which to show cause why first registration should not be allowed. The usual period during which the cautioner must respond is 14 days but the notice can state a longer period. A typical example would be where there are two adjoining unregistered titles and there is a dispute about the line of their common boundary. If one party wanted to be sure that registration of the other title did not take place before the question of the boundary line was resolved, a caution against first registration would assist.

1.4.6.3 Restrictions

Registration of a restriction will prevent dealings with the registered title until there has been conformity with a particular requirement. For example, a consent may be required to the transfer of a registered lease from the management company that looks after the estate in which the property is located. The most commonly seen restriction is that for a tenancy in common, where the restriction will highlight the fact that no disposition by one proprietor of the land under which capital moneys arise is to be registered except under an order of the court or the Registrar. Another common restriction is that in favour of a registered lender, which will effectively stop any disposition of the land without the approval of that lender. Some restrictions will be automatic, e.g., where a charity is the proprietor, and some will be voluntary, as is the case mentioned above involving the lender. A restriction registration application requires the proprietor's land or charge certificate to be lodged at the Registry.

1.4.6.4 Inhibitions

This is a rare form of registration as it is draconian in its effect. It stops all dealings with the property completely. As a result it is really only seen where the registered proprietor is an individual who is adjudged bankrupt. In these circumstances a bankruptcy inhibition will be registered pursuant to a receiving order in bankruptcy. Otherwise an inhibition can only be entered on the title pursuant to an order of the court or the Registrar and then only for wholly exceptional circumstances such as suspected forgery (see *Ahmed* v *Kendrick* (1987) 56 P & CR 120, CA).

1.4.7 Rectification and indemnity

If a person is registered as a proprietor of a registered title then the State guarantees that the legal estate is indeed vested in the registered proprietor. Moreover, if that is proved to be wrong, i.e., that the registers are wrong, then any innocent party suffering loss will be compensated for the loss of any estate or interest in a registered title. As a consequence the Land Registry are most careful in vetting title submitted for first registration. Rectification can occur and would involve an amendment to the registers or filed plan to put right a substantive error or any claim that has been given legal recognition. Rectification will be made by the court although it will in effect be dealt with by the Chief Land Registrar. Section 82 of the Land Registration Act 1925 lists various cases where rectification may be claimed, e.g., s. 82(1)(c) allows rectification in any case and at any time with the consent of all parties and s. 82(1)(d) allows it where the court or Registrar is satisfied that any entry in the register has been obtained by fraud. In essence the court has the power to order rectification when it is deemed just to rectify the register. Rectification can be ordered notwithstanding that the rectification may affect an estate interest or any entry on the register. In other words there really is no limitation on the scope of rectification, even though it is, of course, simply a discretionary power.

However, the register will not be rectified so as to affect the title of a proprietor who is in possession unless the proprietor has caused or substantially contributed to the error or omission by fraud or lack of proper care. Even this element of protection from rectification can be ignored if it is considered unjust not to rectify the register or the order for rectification is to give effect to an overriding interest.

The system of registered land is predicated upon the concept that a person who suffers loss as a result of an error or omission in the register will be compensated by the State. Section 83 of the Land Registration Act 1925 provides a right of indemnity. This will be available if there is loss suffered as a result of rectification or indeed non-rectification. An indemnity payment may also be available as a result of an error made by the Registry in an official search result or as a result of the Registry losing a deed or document.

The indemnity will only be available if the claimant has suffered actual loss. For example, if rectification is ordered so that an overriding interest can be recognised, then the court has held that there is no loss for the purposes of s. 83, see *Re Chowood's Registered Land* [1933] Ch 574. (The Law Commission has recommended that the indemnity provisions be extended to include compensation where rectification is ordered to give effect to an overriding interest.)

There is one particularly important exclusion affecting the right to indemnity. Section 83(5) stipulates that no indemnity is available where the applicant has caused or substantially contributed to the loss by fraud or lack of proper care. (This will also be true if the applicant derives title through a person who contributed to the loss by fraud or lack of proper care unless the applicant was entitled by reason of a disposition for valuable consideration which has been registered or is protected by an entry within the registers.)

The amount of the indemnity will depend upon the nature of the case and will fit one of two templates. First, if rectification is not ordered, the amount of the indemnity will not exceed the value of the claimed estate, charge or interest at the time of making the error or omission. Secondly, if rectification is ordered, the amount of the indemnity will not exceed the value of the claimed estate, charge or interest at the time just before rectification took place.

As from 27 April 1997 the indemnity rules have changed. An indemnity will now be paid to a claimant who has suffered loss as a result of an error or omission in the register whether or not the register is in fact rectified. This is of course subject to the proper care provisions etc. mentioned above. No indemnity will be paid for costs and expenses without the Registrar's prior approval.

KEY POINTS SUMMARY: REGISTERED LAND CONVEYANCING PROCEDURES

- All of England and Wales is now an area of compulsory registration. Consequently all purchases of unregistered land will be potentially subject to first registration, but not new leases of 21 years or less, or longer existing unregistered leases where the remaining term is 21 years or less. The Land Registration Act 1997 includes assents, gifts and mortgages including re-mortgages as events that give rise to registration.
- An application for first registration must be lodged within two months of completion failing which the legal title will revert back to the previous owner who will in effect hold the property on a bare trust.
- The following title conversions are now available to proprietors of registered property: qualified to absolute; qualified to good leasehold; possessory to absolute; possessory to good leasehold; good leasehold to absolute leasehold. The last is perhaps the most important title conversion and probably the most frequently sought. A good leasehold title can be upgraded to absolute so long as an applicant is able to produce to the Registrar the freehold.
- Always remain vigilant about the major effects of a person in actual occupation pursuant to the provisions of s. 70(1)(g) of the Land Registration Act 1925. Make full enquiries and searches.
- If you have an interest that requires a protective entry on the title, use a notice if the owner cooperates or a caution if the proprietor's assistance is not forthcoming.
- If a cautioner receives a warning-off notice from the Registry, action must be taken within 14 days of the notice, failing which the benefit of the caution will be lost.
- The State guarantees registered titles and that the legal estate is vested in the registered proprietor. If that is proved to be wrong then any innocent party

suffering loss will be compensated for the loss of any estate or interest in a registered title. An indemnity will now be paid to a claimant who has suffered loss whether or not the register is in fact rectified. This is subject to the proper care provisions mentioned above.

C DEFENSIVE LAWYERING IN CONVEYANCING

1.5 DEFENSIVE LAWYERING AND THE CONVEYANCING PROCESS

In March 1997 the managing director of the Solicitors' Indemnity Fund wrote that conveyancing 'accounts for over half of all claims against the fund over all years, by both number and value'. Clearly this is a reflection of both the pressure on practitioners to expedite transactions at all costs as well as inappropriate working practices that provoke negligence claims. It is our view that conveyancers, like medical professionals, must practise defensively. By this we mean that in our daily conveyancing routine we must build in working practices that protect us from negligence claims as well as looking after the best interests of the client. If doctors can practise in this way, so can conveyancers.

At the same time that the managing director wrote the above, the Risk Improvement Unit of the Solicitors' Indemnity Fund also issued a fact sheet entitled *Claims Prevention for Conveyancers*. It is an excellent basis for all practitioners to develop a defensive lawyering methodology. We believe this is such an important area of concern to all conveyancing practitioners that we are considering it here at the start of the book. We hope you will bear in mind this crucial section when working through the subsequent elements of the book. Indeed some ingredients of this section initially may be unclear, without the information that follows in the rest of the book. Even then, we hope you will turn back to this section to underpin your knowledge of the conveyancing process with a defensive lawyering methodology, once you have read through the following parts of the book. Much of what we set out below rests heavily upon the claims prevention fact sheet issued by the Indemnity Fund, and we acknowledge the benefits of this document. We urge you to obtain a copy.

1.5.1 Your duties as a conveyancing practitioner and your client

1.5.1.1 Fraud

The worst mistake a practitioner can make is to fail to spot something fraudulent. You should be fully aware of the pitfalls in practice when fraud occurs. As a form of basic guidance, you should read through the Law Society's Green Property Fraud Card issued in January 1996. It makes practical suggestions such as 'Question unusual instructions' and 'Verify signatures', as well as ending up with this warning, 'Any failure to observe these signs and to take the appropriate steps may be used in court as evidence against you if you and your client are prosecuted, or if you are sued for negligence'. To assist, this area is considered in detail in the section dealing with mortgage fraud, see 7.13. One point that can be overlooked is the need to verify if the practitioner on the other side is real. It has been known recently for fictitious firms to appear and disappear with money to which they were not entitled. If in doubt, telephone the Law Society Records Centre or the Council for Licensed Conveyancers to make sure the firm you are dealing with is noted on either of their records.

You should also review the Law Society's guidance issued in January 1996 entitled *Mortgage Fraud — Variation in Purchase Price.* The guidance has been issued to deal with a current professional conduct point of concern where a practitioner is acting for both the lender and the borrower and the purchase price is varied. If you become aware of a change in the price or of other information that a lender might reasonably consider would affect the terms of the loan then you should advise the lender. You act for the lender and there is, as a consequence, a clear obligation on your part to so inform the lender. If you knew something material, but did nothing to advise the lender, this could involve you in a civil action in negligence. Also, see 1.5.1.2(b) on what other information a lender might be entitled to receive. Of course practitioners do have a duty of confidentiality to their private clients, but this cannot be invoked to the detriment of another client. There is an obligation to act in the best interests of each client. The lender should be told about the variation in the price, but if the client will not agree to this step then there is a conflict and you should cease to act (see also 2.8).

1.5.1.2 Recent cases

There have been several recent cases in the courts that impact heavily upon working practices in the modern law office. You need to be aware of their impact and to change how you conduct transactions to meet the new standards required. To assist, we set out in this section some of the more important recent decisions that need to be considered by any conveyancing practitioner.

(a) *Barclays Bank plc* v *O'Brien* [1994] 1 AC 180 is important if you are acting for married couples or long-term cohabitees. Where you are instructed by co-owners and a mortgage is being entered into by both owners, to cover the debts of just one of them, always ensure the other owner is told about on the need to be advised independently *before* the loan is completed.

(b) If you know that your client is in arrears with a current mortgage but has instructed you to act on a remortgage, you may be under an obligation to report the arrears to the potential new lender before completing the new mortgage (see *National Home Loans Corporation plc* v *Giffen Couch and Archer* (1996) *The Times*, 31 December 1996 and *Birmingham Midshires Mortgage Services Ltd* v *David Parry and Co.* [1996] PNLR 494). The *National Home Loans* case went on appeal and on 18 June 1997 the Court of Appeal reversed the decision, finding in favour of the firm of solicitors. However, what is clear is that each case is decided on the facts and it may well be that the extent of the duty of a solicitor will depend on the instructions and the extent to which the client appears to require advice. What is clear is that at the moment there are conflicting authorities, and we would recommend that if you know of arrears this should be reported to your client lender or you should decline to act for the mortgagee (see 2.85 for further details).

(c) *Mortgage Express Ltd* v *Bowerman and Partners* [1996] 2 All ER 836 makes it clear that practitioners have a duty to a lender beyond just checking the title and perfecting the security. You must advise lenders of any non-confidential material information if you believe that information would be of potential significance to the lender and might have a bearing on whether or not the lender would allow the loan to complete.

(d) You must not release the mortgage advance on completion until you have in your possession a properly completed, i.e., executed, mortgage deed. If you do, you risk being in breach of trust, see *Target Holdings Ltd* v *Redferns* [1996] AC 421. If there is a breach of trust, the liability to the client could be substantial.

1.5.1.3 Your client

Always verify your client's identity for the purposes of the Money Laundering Regulations 1993. If you have not acted for the client before, you need to be sure that the client is not seeking to launder money through the conveyancing transaction in respect of which you have received instructions. The major concern in this area for a conveyancing practitioner is that any failure to report a client where there is a reasonable suspicion of money laundering can lead to the practitioner being prosecuted by the authorities for not informing them about the suspicious activities of the client. Because of this onerous obligation on practitioners, always be most careful in verifying the identity of any new client. Furthermore if a client insists on paying large sums of cash in relation to a purchase this will amount to a suspicious act for money laundering purposes. (Also, see the Money Laundering Regulations 1993, EC Council Directive 91/308 of 10 June 1991, which apply to practitioners carrying on investment business as defined by the Financial Services Act 1986. These regulations are detailed and require practitioners to put in place procedures to prevent money laundering and to provide staff training in respect of such procedures.) If you do have any suspicion about money laundering involving your client, you should report your concern to the National Criminal Intelligence Unit, Spring Gardens, Vauxhall, London SE11.

Be sure there are no conflicts of interest and also be sure you have proper instructions from all clients. In effect, despite whatever family relationship exists, you have to be aware of the interests of each individual client, be it a lender, spouse or child. Always confirm your instructions in writing at each stage of the transaction and especially just before exchange. If you write to confirm instructions then there can be no dispute at a later stage if the client then becomes disillusioned with your assistance. Keep full and detailed attendance notes recording telephone conversations with the client as well as meetings in the office with the client. Adopt checklists such as those that permeate this book. Make diary entries of important dates such as completion dates or search priority periods (see chapter 8).

1.5.1.4 Crucial time limits

Conveyancing practitioners are constantly up against crucial time limits. The problem is, in a busy modern legal office, these can easily get overlooked. Your professional negligence insurers will not look kindly upon simple errors like overlooked time limits. The use of diaries either written or electronic is strongly recommended by us and we set out below some of the more important time limits to look out for. However, in all cases we suggest you use the early warning date system. This puts in your diary a date warning at least a week before the actual deadline. In this way you will have a full five working days' early warning of the final deadline in which to make sure you take the necessary steps required in the particular transaction. You should always use the early warning date system in the following cases:

1.5.1.4.1 Land Registry search priority periods When buying a registered title, the precompletion Land Registry search is of fundamental importance. First, it will highlight undisclosed encumbrances. Secondly, it will provide a priority period during which no other registration can obtain priority over your client's application. It is therefore imperative that you submit your registration application at such a time that the Registry receive it within the priority period. The dates and period are clearly stated on the search result and final deadlines for the application should be entered in your diary on receipt of the search result. Make no mistake, if you do not make the application within the priority period and a third party therefore gets in an application for registration, to the detriment of your client, you will be held clearly responsible in negligence for any consequential loss your client suffers. (See chapter 8 on pre-completion searches for further details of these important Land Registry searches.)

1.5.1.4.2 Company mortgage registration period If you act for a limited company client, any mortgage that it takes out, i.e., where the company is borrowing the money, *must* be registered at Companies House within 21 days of the completion date. Remember the courts almost never extend the time limit. Failure to register within the 21-day period will inevitably mean that you will be held liable in negligence to your client for any loss it may suffer as a consequence of your inaction. To ensure the application gets to the appropriate department within Companies House without delay we recommend you mark the envelope 'for the attention of the Mortgage Section' and it should then go straight there. If there are then any queries on the Form submitted with the mortgage, you will have sufficient time to deal with the problem so as to allow the actual registration to take place within the 21-day period.

1.5.1.4.3 Stamping deadline After completion of a purchase where the consideration exceeds currently £60,000, stamp duty of 1 per cent of the consideration must be paid to the Inland Revenue within 30 days of completion. If the price is more than

£250,000 the duty goes up to 2 per cent and if the price is more than £500,000 the duty increases to 3 per cent of the consideration. If you fail to stamp the deed within this period, late stamping will only be possible on payment of a penalty fee. On the assumption that you were in funds to pay the duty there can be no excuse for not paying the duty on time and the penalty fee will almost certainly come out of your own funds as the amount will be insufficient to warrant a claim on your indemnity policy (see chapter 9 regarding post-completion matters including the stamping of documents).

1.5.1.4.4 Landlord and Tenant Act 1954 deadlines Part II of this Act covers the statutory renewal of business leases. This is a particularly fertile area for negligence claims as the statute is fraught with strict time limits. These matters are considered in chapter 12 with regard to commercial conveyancing. Some conveyancers will say that this is an area best left to litigators. However, it is also the case that many conveyancers deal with commercial lease renewals, which necessitates a secure knowledge of the Act and the time limits concerned. In particular, if a lessor has served a notice to quit upon your tenant client you must notify the lessor within two months of the receipt of the notice to quit that the lessee wishes to renew and will be applying to the court for a new lease. Thereafter the application to the court must be filed not sooner than two months and not later than four months from receipt of the notice. These time limits are not capable of extension. You must diarise the date sequence once you have instructions and you know the date the notice was served. There should be at least two entries; the first recording the last time the first counternotice must be served, and the second being the last time you must make the application to the court for an order for renewal. These are complicated time constraints and so you must have a proper diary system to protect you from missing a date. (See chapter 12 which deals with commercial leases generally.)

1.5.1.5 Keep a claims record

Learn from your mistakes. Keep a record of all claims and complaints and see if any pattern is emerging. In this way you can quickly expose any weak links within your firm that require immediate attention. Keep your procedures under constant review and introduce change quickly whenever required. Keep all your staff fully trained and up to date in all aspects of the law, practice and procedure.

1.5.1.6 Undertakings

Undertakings given by a conveyancing practitioner can lead to liability that was not contemplated when giving the undertaking. To ensure this does not happen to you, always carefully consider the wording and effect of an undertaking before you actually enter into the particular obligation. Furthermore, wherever practicable, instruct all members of staff that letters of undertaking must be seen and signed by the partner in charge of the department. Hopefully, this will emphasise to all members of staff the critical nature of a professional undertaking and that your firm will not issue an undertaking without critical appraisal of all its terms by a practitioner at partner level.

KEY POINTS SUMMARY: DEFENSIVE LAWYERING AND THE CONVEYANCING PROCESS

- Always make detailed file notes of telephone conversations with your client and with the practitioner for the other party, and always confirm decisions and instructions in writing.
- Be on your guard against fraud, particularly money laundering. Verify your client's identity.
- Ensure all date-sensitive cases, e.g., commercial lease renewal cases under the terms of the Landlord and Tenant Act 1954, are carefully diarised using early warning date systems where you have a week's warning before the final deadline.
- Regularly review your working procedures. Issue internal guidelines to all conveyancing staff covering the areas that are particularly sensitive, e.g., when giving undertakings.
- Learn from your mistakes. Do not ignore previous claims, keep a claims record and make sure you do not repeat history!

D CONVEYANCING AND INFORMATION TECHNOLOGY

Professor R. W. Staudt wrote in January 1993 that 'Lawyers for the twenty-first century must learn to use electronic information tools to find the law, interact with governmental agencies, prepare their own work and communicate with courts, other lawyers and their clients' ('The Electronic Law School: A 1992 Snapshot of the Centre for Law and Computers at Chicago-Kent College of Law' (1993) 3(6) Comp & Law 33). We believe that Staudt neatly sums up the demands that will be made of conveyancing practitioners in the next century, and he also sets out several critical areas where information technology must develop in the future.

The pressure for innovation and change is already upon us. In the context of conveyancing the section in this chapter concerned with the future of this legal specialty shows how, if conveyancers are to survive, they will need to adapt and change to the needs and demands of society. information technology must help in this respect. Furthermore this trend affects all aspects of the legal profession. For example, the 1995 interim report by Lord Woolf to the Lord Chancellor concerning access to justice is unusual in that it recommends the use of information technology as one of the solutions to the three main problems that affect litigation, namely, high costs, delay and complexity. The report highlights PC-based conferencing as a way of keeping costs down in case management and the hearing of evidence. It follows that this must also be true for meetings and conferences that require to be organised in connection with conveyancing matters. The report also advocates the provision of legal information in 'advice kiosks', on CD-ROM and on the Internet. In the same way, so far as conveyancing and the storage of legal data on computer are concerned, the core elements of conveyancing will soon be computerised, with the Land Registry aiming to hold computer records for 20 million titles by the end of the century.

What this means is that the involvement of information technology in the legal workplace is now irreversible. It also indicates that there is a stark need to involve trainee lawyers and indeed all new conveyancing practitioners at the earliest opportunity if conveyancing is to survive as a profitable source of income, and if Lord Woolf's suggestions are to come to fruition. This will only be possible if those who are to be the future lawyers of this country are trained to expect information technology in the office (and the courts), as an integral part of the conveyancing process rather than be surprised by its presence.

The accountants Robson Rhodes conduct annual surveys that are provided to the public. They are used to ascertain how far solicitors are taking up the various elements that make up legal information technology. In the 1995 report the survey covered responses from 312 firms with nearly 19,000 fee earners and almost 20,000 support staff. It does not purport to be a detailed consideration of the whole legal information technology market. However, what it does do is to highlight likely trends and current uses in the legal profession where the employment of information technology is concerned.

One of the major findings of the survey is a significant increase in the introduction of fee earner computer workstations. The results show that the percentage of partners with computers actually on their desk has risen to 43 per cent in 1995. Indeed, in the largest firms, with more than 50 partners, 67 per cent already utilise their own workstations. However, perhaps as a consequence of the economies of scale the survey noted that there was only a slight increase in firms where all fee earners had workstations, from 10 to 13 per cent. As P. Sugar wrote in 1994, 'most, if not all, sole practitioners who computerise will, at some time, want to be able to use the equipment themselves' ('Sole practitioners v computers' (1994) 5(2) Comp & Law 23). This immediate availability of computer access has given rise to a marked increase in the use by fee earners of the main software applications. The most common usage of information technology by all fee earners is for requesting client or matter information (more than 80 per cent), followed closely by word processing (more than 50 per cent). As to the software in use in firms generally, 96 per cent of firms utilised accounting software and the same large percentage used word processing.

Of greater interest is perhaps the analysis of the computer applications that seem to be increasing in popularity rather than those already well established in solicitors' offices as they relate to the process of conveyancing. Legal forms, the compilation of formalised legal documentation for the Land Registry and conveyancing generally, is a major growth area in legal information technology. The 1995 Robson Rhodes survey showed that this software is now used by 35 per cent of firms, up from 26 per cent in the previous year. From a conveyancing perspective it is particularly interesting to note that it is often an integral part of case management, or 'conveyancing transactional management software'. Indeed in the larger firms of between 50 and 100 partners, the percentage was up to 83 per cent. Another 19 per cent indicated that this software application was to be upgraded in 1995/96. Similarly the survey noted that during the preceding year there was a rapid uptake in the use of legal texts and precedents available on CD-ROM. Usage has risen from 7 per cent to 13 per cent overall. Again the larger firms show a greater take-up at 58 per cent of firms with 26 or more partners. Finally there has been a significant growth in electronic communication with growing use of e-mail facilities, the Internet and the dedicated legal communication facility, LINK. This may be client driven in that the survey notes that more than four out of every five law firms surveyed had major clients who had requested access to their lawyers via e-mail. Other applications currently computerised include conveyancing support at 27 per cent of the firms surveyed and trust and probate at 24 per cent. Accordingly, it is clear that the most likely software applications to be encountered in a solicitor's office are accounts (possibly linked to time recording), word processing, legal forms, computer communication systems, legal texts on CD-ROM and subject-specific software such as precedent and support facilities for conveyancing. Professor Susskind wrote in 1992 that 'It is hard to imagine a large law firm today operating without information technology. Word processing, accounting systems, electronic mail and many more administrative and management applications are widely used.' He was accurately describing a survival plan for conveyancing practitioners, albeit in the context of another legal specialism. (See 'Computers in support of litigation', *Financial Times* 23 January 1992.) We say this as it is quite clear that there are economic pressures on conveyancing practitioners which dictate that they must automate their offices to survive and to enhance the profitability of their practices. It is noteworthy that the Robson Rhodes survey shows that among the external influences that make law firms increase their information technology investment, the most important factors were quality and speed of service to clients, providing value for money and competition from other firms. The survey shows that modern legal practice can only survive and develop with the support of IT.

In the future we anticipate that high street practitioners will survive and prosper by having a computer on their desk, which they will use directly without the assistance of a secretary. The computer will have a conveyancing case management system as the core of its programs with voice recognition software being used to input data rather than the keyboard. The practitioner will input case information by dictating to the computer and not by typing on a keyboard. Legal forms will be on screen as will a database of precedents utilising the large storage capacity available through CD-ROMs. (In this way practitioners will gain access to all the volumes of the *Encyclopaedia of Forms and Precedents* as well as other legal databases.) Communication with the outside will be via e-mail or fax from the computer as well as through the ordinary postal service. On-line enquiries will be made of the Land Registry and other relevant agencies such as Companies House. In this way the conveyancing process will become streamlined and thereby ready to meet the challenges of the next century.

KEY POINTS SUMMARY: CONVEYANCING AND INFORMATION TECHNOLOGY: SOME OF THE HARDWARE AND SOFTWARE FACILITIES AVAILABLE

Hardware

- While the very largest practices may have installed their own large stand-alone computers serving many terminals scattered around their offices, this is not essential for smaller firms. Many small and medium-sized firms will want to consider personal computers (PCs) linked together in a local area network. This enables each workstation to run commonly found and easy to use Windows software. (For an explanation of the meaning of Windows, see the software section below.) These PCs are differentiated by the central microprocessor running at the heart of the PC. Currently the fastest is a Pentium or Pentium II processor. The work rate of the processor is declared by its clock speed, measured in megahertz. The faster this is (i.e., the greater the number), the quicker the processor will work (e.g., 200 MHz is faster than 166 MHz).
- However, remember that the central processor can only go as fast as the parts with which it communicates. The other elements within the PC should be matched to the speed of the processor. This should be discussed with your supplier before purchase.
- Laser printers with a high-quality print output can be purchased inexpensively. However, the warm-up time and pages per minute output rate are two factors to be investigated before purchase. Much time can be wasted waiting for a printer to warm up or print out a long document.
- The screen is vital as it will be looked at on a regular, possibly long-term, basis. It should be of the best quality you can afford and have a screen size rating of not less than 15 inches. A screen size of 17 inches is to be preferred. This is because a size rating does not actually mean that the picture will be the full 15 inches or 17 inches. It will always be less as the black border around the screen is included! Small screens are more tiring to a user than larger ones.

Software

- All practitioners should have a Windows-based word processor. (Windows is the name for the most commonly found system by which the PC actually operates. It is in effect the program that runs all the other programs.) The word processor is a very sophisticated way of typing with an infinite variety of formats available as well as fonts, layouts etc. Correction is on screen and insertions can be made anywhere in your document. This software is essential for any cost-sensitive conveyancer, as all your conveyancing letters, deeds and documents, indeed all your printed output, will inevitably be produced from your word processor.

- Legal on-screen forms are a major boon to conveyancers. These enable you to call up on screen any form you require, e.g., a Land Registry search request, transfer, Land Charges Registry search request, Inland Revenue Form or whatever, and then you can complete it on screen. This means that mistakes can be corrected without the expense of a new pre-printed Form, as would be the case if you did not have on-screen Forms. This software is, in our view, essential to a modern conveyancing practice.
- Conveyancers must communicate to operate. PCs can run software that will allow that communication by fax direct from your PC (and thereby cutting out the expense of a dedicated fax machine) as well as by e-mail. E-mails use the Internet (a global system of networked computers) and are fast and cheap. E-mails are documents that can be sent electronically. No doubt in due course videoconferencing using PCs will become the norm for communication as well.
- Access to the Internet should be encouraged and in particular the World Wide Web. This is a graphical part of the Internet where you can make searches for desired information both legal and general. Access to government records is possible as well as details of statutes. It is an invaluable source of detail to all conveyancers. However, the real importance lies in the future where it may well be that conveyancing transactions will be conducted over the Internet. A Web browser is required. This is software that will allow the user to access the information available. The most popular browser is called Netscape. The only other browser of note is from Microsoft called Explorer. Obtain the latest version as they seem to be constantly rewritten to correct security problems.
- CD-ROMs, the same size as the compact discs that play your music at home, can hold large quantities of data. One CD can hold all the many volumes of the *Encyclopaedia Britannica*. It will therefore come as no surprise that these can offer practitioners vast libraries of conveyancing precedents that can be called up on screen and used in any conveyancing transaction. This should be quicker than using a text and could in the long run be cheaper to acquire and use.
- There are transaction management software packages available that purport to conduct each conveyancing transaction for you by producing diaries, letters, checklists and precedents. They seek to make the conveyancing process quicker and cheaper for the practitioner and client.
- PCs can also be used to hold databases, i.e., lists of important data. These could include a registry of all the client deeds you are holding in your fireproof safe or the details of your clients for future reference. Databases are becoming easier to use and more versatile and will offer practitioners assistance in the smooth operation of their office records systems.
- On-line searches will in due course become commonplace. It should soon be possible to arrange access direct from your computer to the Land Registry, so that you can obtain copy deeds and search results. In effect your computer will talk direct to the Land Registry computer. In due course this system should also include local authorities and other agencies responsible for searches, although this is at present a somewhat more distant possibility.

E THE FUTURE FOR CONVEYANCING

Following on from the discussion set out above concerning the anticipated integral use of IT by future conveyancing practitioners, we believe that much of the success in the future will lie in a reconstruction of the way in which many conveyancers presently work. We advocate the full integration of all the facilities that legal information technology can offer. However, there are other external influences at work that may dictate to conveyancing practitioners what the future will hold.

First, the change of government in May 1997 brought in politicians who immediately expressed an interest in trying to end the 'misery' of gazumping, of sellers withdrawing from a proposed sale to sell to another proposed buyer who has put in a higher offer. Secondly, in the light of declining profit costs and increasing competition in the conveyancing market place many solicitors have decided to change their own working practices and in particular to try to make the process of buying and selling a house all inclusive: the one-stop approach, in which solicitors will sell property in the style of estate agents and also offer the conveyancing of the property. These two areas of concern are now examined.

1.6 GAZUMPING

On 28 July 1997 *The Times* ran an article with the headline 'House selling system to be overhauled'. This made clear that the new Labour government was examining how radical changes could be made and that 'Its aim will be to cut costs, uncertainty, delay and unhappiness'. It would seem that top of the list of targets for change is the 'resurgent menace of gazumping'. Three Ministers, for Housing, for Consumer Affairs and a Parliamentary Secretary in the Lord Chancellor's Department have all been charged with the responsibility for this examination. Individual case studies will be considered to see where changes can be made to the role of solicitors as well as other integral elements of the conveyancing process, including the involvement of lenders, costs, charges and delays. However, it is the scourge of gazumping that will undoubtedly come in for most scrutiny. When, as at present, house prices are on the increase, gazumping occurs frequently. (In an editorial in *The Times* of 28 July 1997 it was stated that 'Last year, 50,000 people were gazumped, according to National Association of Estate Agents estimates. The number is likely to be higher in 1997 as the housing market bubbles over.')

The government has clearly signalled that an end to gazumping is the core element within its intended proposals for streamlining the system of buying and selling properties in England and Wales. Current suggestions to stop gazumping include two front runners, namely, the Scottish system or a forfeitable preliminary deposit. In Scotland the buyer and seller enter into a binding agreement as soon as an offer has been accepted. However, this apparently sensible system is not without its own problems and it would therefore seem that the adoption of forfeitable deposits could find favour. In Scotland, before an offer can be made, the buyer still has to pay for, and have in place, a mortgage facility and a survey result. If the offer is then rejected, the fees for the offer and survey will be wasted.

In the circumstances where a deposit system is to be preferred, a sizeable deposit would be payable by both the proposed buyer and seller. The size of the deposit would have to be at least 0.5 or a full 1 per cent of the proposed purchase price. In the context of an average-priced property this could amount to somewhere in the region of between £300 to £700 per transaction. Indeed if this arrangement is to operate as a true sanction, a deposit of £1,000 would seem more appropriate. If subsequently but before the creation of a binding agreement between them either party withdrew, that deposit would be forfeited to the innocent party. The intention is to make sure that the innocent party is not out of pocket as a result of the other party withdrawing. Anti-gazumping deposits are not a perfect solution as they would involve the preparation of additional conditions listing when there would be no forfeiture, such as when the buyer's survey was adverse. Perhaps the best solution is to find another way to speed up the whole process so as to avoid long delays during which the seller might be tempted to decide to sell to another higher bidder. One other alternative is to adopt lock-out agreements (see the precedent in appendix 5). Ultimately, we anticipate that in the future, the following will all amount to viable methods of improving the system:

(a) Impose financial penalties on all agencies and authorities responsible for issuing search results where they are dilatory in sending out the result,
(b) Pre-contract lock-out agreements could be adopted in all cases backed up with statutory support,
(c) Impose the requirement for forfeitable deposits of not less than £750 to £1,000, again backed up by statutory authority,
(d) Adopt the Scottish system in all aspects including solicitors selling property.

The whole system of buying and selling property would certainly be speeded up if the one-stop system was adopted, and this is now considered.

1.7 ONE-STOP CONVEYANCING

'An attempt to take the pain out of house buying through a network of onestop services was announced yesterday by the Law Society.' So read a headline to an article in the *Guardian* on 1 August 1997 outlining a new scheme for Solicitors' Property Centres. These centres intend to provide 'consumers with all the services needed to buy and sell a home, including estate agents, solicitors and financial advisers'. The intention is to set up a chain of franchised centres covering the whole of the country. Inevitably, at the core of the service to be provided by the Solicitors' Property Centres will be easily accessible information technology. The proposal is that this will speed up the flow of information through the estate agency stage as well as when the conveyancing itself is in progress.

However, this has really only become a possibility as a consequence of changes recently made by the Law Society. Rules inhibiting the work of solicitors in selling property were, in July 1997, earmarked for relaxation by the Law Society's Council.

It recommended that changes to the rules should be made to 'deregulate' estate agencies separately operated by solicitors. Further recommendations would enable a solicitor acting as an estate agent to work also as a solicitor for the seller and in certain circumstances a buyer, as well as to provide financial and mortgage advice. However, this clearly raises potential problems of conflict of interest (see chapter 2).

It is proposed that the future conveyancing practitioner will work in a dedicated property centre where all types of property are bought and sold, where the practitioner will offer mortgage and financial advice and will of course convey property for sellers and buyers. Practitioners will use information technology as a core element of the working day for all aspects of their work, be it the giving of advice, the production of documents, letters, faxes, e-mails and indeed sales documentation for properties on their sales lists. The present somewhat limited horizons for the high street conveyancer must be broadened if their work and profit costs are to survive. Without this wholesale adoption of a generic approach to the process of buying and selling property the future will be bleak. It is our view that with it the future will be assured.