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A critical look at the Goods Mortgages Act proposed to replace Bills of Sale

Law Commission of England & Wales - Bills of Sale - Report presented to Parliament on 12 September 2016
Law Com Number 369 and HC 641

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<u>Executive speed read summary</u>
The Law Commission of England and Wales has published its report on Bills of Sale which it has sent to the Secretary of State for Justice. It makes a number of recommendations but it has not drafted a Bill. It recommends that the High Court Register of Bills of Sale be kept for the time being but that filing can be done by email. The Law Commission wants to see a Goods Mortgage Act and its proposals go beyond Bills of Sale. The GMA would also cover other goods such as art, antiques and wine but not herds of animals, IP portfolios or ships and aircraft. The Law Commission also wants the GMA to cover the assignment of book debts which are available to limited companies under the fixed and floating charge regime that Companies House offer. The Law Commission also wants to extend protections that exist at the moment for vehicles on hire purchase to log book loans such as the one-third rule protection and voluntary termination rights.

It is useful at this juncture to review where the work of the Secured Transactions Law Reform Project under the guidance of Lord Savile has got to. Its work is far more ambitious and holistic than the limited proposals from the Law Commission. It has issued a policy paper setting out where it wants to go next with a focus on achieving an electronic registry of all asset backed financing transactions. The STLR has looked at what other common law jurisdictions has done and it is a good point to review what issues this has thrown up in New Zealand in particular.

Finally, the system for vehicles depends heavily on existing asset registries such as HPI. The Law Commission recommends that HM Treasury designate who runs the 'designated asset finance registry' that under pins its proposed GMA. It is a useful point to take stock of the workings not just of HPI but also the other statutory registers and commercial databases to understand the challenges and liabilities that whoever runs the new asset registry could end up taking on.

Law Commission of England & Wales
Bills of Sale Report *12 September 2016*
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What is a Bill of Sale?
Bills of sale are written instruments effecting transfers of personal property. Under the Bills of Sale Acts they are documents which effect or record the transfer of the legal ownership of goods. However with a Bill of Sale there is not a corresponding transfer of the actual property.

What do the Bills of Sales statutes say?
There are 4 statutes:

- Bills of Sale Act 1878 (which is a consolidating Act),
- Bills of Sale Act (1878) Amendment Act 1882,
- Bills of Sale Act 1890, and
- Bills of Sale Act 1891.

The preamble to the 1878 Act says that is an '*Act to consolidate and amend the law for preventing frauds upon creditors by secret Bills of Sale of personal chattels'*. There is an extensive definition of 'bill of sale' where section 4 says it is to '*include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of <u>personal chattels</u>, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon…'*

Whilst *'personal chattels'* are extensively defined, the definition does not include vehicles which have led to the most recent problems with them. The definition encompasses *'goods, furniture, and other articles capable of complete transfer by delivery …. fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined)'* but the definition excludes *'shares or interests in the stock, funds, or securities of any government, or in the*

capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands…..'

How are Bills of Sales meant to be registered?
This is dealt with under sections 10 to 17 of the 1878 Act. A Bill of Sale has to be '*attested and registered'* by a solicitor and the attestation is meant to state that '*before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor'.* To the Bill of Sale is meant to be attached a '*schedule or inventory'* of goods and there is meant to be a sworn affidavit *'of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or* giving' the attestation. It also needs to have *'a description of the residence and occupation of the person against whom such process issued'.* As to filing, the 1878 Act provides that a copy of the Bill of Sale with this affidavit has to be *'filed with the registrar within seven clear days after the making or giving of such bill of sale'.*

However s10(3) of the 1878 Act provides that a '*transfer or assignment of a registered bill of sale need not be registered'.* Registration of Bills of Sales are meant to be *'renewed once at least every five years'* with a further affidavit. The Registrar has to keep a register of Bills of Sale with an index of the surnames of those who have granted a Bill of Sale. Section 13 of the 1878 Act provides that Masters of the Queen's Bench Division of the High Court shall be the Registrar. Section 14 gives a Queen's Bench Judge power to rectify the register. This Register is a public one and those inspecting it are able to make copies of entries.

Section 20 of the 1878 Act provides insolvency protection because chattels in a Bill of Sale which has been duly registered '*shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act 1869'.* Finally there is a fee to register a Bill of Sale which was originally set at 2 shillings but is now £25 which oddly the Law Commission brands '*unfit for purpose*'[1] and '*expensive*'[2] because of this nominal fee.

What practical problems have been caused?
The 1878 Act was a protection for creditors from secret assignments. These creditors could, when assessing the credit-worthiness of a person, assume that goods in a person's possession were owned by them unless a bill of sale was registered. A secret or unregistered assignment would be void as against creditors, trustees in bankruptcy or liquidators. Section 4 of the 1878 Act does not apply to '*transfers of goods in the ordinary course of business of any trade or calling'.*

Other problem areas have included sale and lease back transactions. Where a court finds that such a transaction is a disguised chattel mortgage then the transaction will be void as an unregistered security bill. Where a written contract is found to be a bill of sale and void for non-registration, the original buyer will have neither right to the goods nor to any contractual repayment. In recent times there has been the question of which of 2 creditors has priority where 1 of those lenders had used a Bill of Sale and the other lender had failed to check the register.

What volumes of Bills of Sale has the market seen recently?
The Law Commission says[3] that 52,223 Bills of Sale were registered in 2014 whereas in 2001 only 2,840 were registered[4].

In recent times what sorts of consumers have been attracted to Bills of Sale?
Consumers that own their own vehicle such as a car or van have been attracted to them because it has allowed them to raise money on the security of a Bill of Sale and at the same time to carry on in possession of the vehicle.

What sorts of traders have focused their business model around Bills of Sale?
A number of traders have entered this market with the most prominent being Nine Regions Limited who traded as 'Log Book Loans'. There are others including:

- Betterpace Limited who trade as 'V5 Solutions',
- Greenlight Credit Limited who trade as 'Varooma',

[1] Para 2.29 page 15
[2] Para 3.5 page 22
[3] Para 1.26, page 6
[4] Para 1.25 page 5

- Carcashpoint Limited who trade as 'Car Cash Point',
- Car Loan Originations Limited who trade as 'Gissaloan' and 'Gissacar'.

What sorts of interest rates are charged on Bills of Sale?
Surprisingly given the security that such lenders take[5], this does not readily appear to be reflected in the interest rate charged to consumers:

- Gissaloan quotes a representative APR of 154.87%,
- Varooma 190.3%,
- Car Cash Point 230.7%, and
- V5 Solutions an eye watering APR of 690.44%.

Does the Law Commission want to introduce price caps?
The Law Commission in its report[6] says that '*some issues fall outside of our remit, such as a cap on the price of logbook lending*' noting that this rests with the FCA who did not respond to the Law Commission's consultation on this (but the Financial Services Consumer Panel did). Whether the FCA is going to intervene in this market in the same way that it has done so in the pay day lending market to restrict maximum charges remains to be seen.

Similarly, the Law Commission says it must remain with the FCA[7] to ensure log book lenders carry out affordability assessments, provide adequate explanations of the consequence of having a log book loan and provide adequate information on the cost of borrowing.

What changes does the Law Commission want to the sale process?
At the moment, log book lenders usually have a face to face meeting with the borrower so they can assess the vehicle and get the Bill of Sale witnessed. Surprisingly the Law Commission thinks this is a good idea and says it sees '*good reasons for preserving a face-to-face meeting before a borrower takes out a log book loan*'[8]. Equally bizarrely the Law Commission wants to maintain the requirement that a GMA regulated transaction continues to be signed '*in the presence of a witness*'[9]. The only sensible thing the Law Commission is capable of here is recommending that a '*goods mortgage may be in a separate document from the credit agreement*'[10] but this is not the Law Commission's idea at all but rather that of the STLR.

What action has been taken by regulators or former regulators?
Nine Regions Limited had a licence from the Office of Fair Trading to carry out consumer credit business. The OFT revoked that licence on 16 October 2009 claiming that it was unfit to hold it. An appeal against that licence revocation was dismissed[11] by the Consumer Credit Appeals Tribunal – **[2010] UKFTT 643 (GRC)**.

Nine Regions Limited then went into administration on 13 February 2012. Part of its loan book was then bought by Hermes Property Services who had requirements imposed on it by the OFT in relation to its affordability assessments and inadequate explanations provided to potential customers.

However the FCA has authorized Gissaloan, Varooma, Car Cash Point and V5 Solutions as well as other log book loan businesses to carry on consumer credit business[12]. The Consumer Credit Trade Association has issued a Log Book Loans code of practice.

What ruling did the High Court give in *Welcome Financial Services v. Nine Regions Ltd*?
In this case HHJ Simon Brown QC in the Birmingham Mercantile Court had to rule on the competing priorities. Welcome had provided finance by way of a hire purchase agreement to enable one of its customers to buy a car. Nine Regions Ltd t/a 'Log Book Loans' had then provided a log book loan on

[5] These lenders usually take the V5 Vehicle Registration document issued by the DVLA making it difficult if not impossible for a customer to sell on a vehicle legitimately
[6] Para 4.2, page 31
[7] Para 4.79, page 42
[8] Para 5.12, page 46
[9] Para 5.21, page 47
[10] Para 5.27, page 48
[11] http://consumercreditappeals.decisions.tribunals.gov.uk/Documents/decisions/0006_LogBookLoansCCA20090010and11_PrelimDecision.pdf
[12] The Law Commission says the FCA has '*authorised nearly all of the logbook lenders that applied*' saying that '*around 15 to 220 applications were made*'. Para 2.46 page 19.

the same vehicle. The customer failed to pay either creditor, the car was repossessed and sold at public auction. The court had to determine who was beneficially entitled to the sale proceeds.

In his judgement dated 22 April 2010 **[2010] EWHC B3 (Mercantile)** Judge Brown allowed Welcome's appeal from District Judge Habershon in Wandsworth County Court. He ruled that Log Book Loans did not fall within the innocent private purchaser provisions in sections 27-29 of the Hire Purchase Act 1964 because he ruled it was not a 'private purchaser'. Accordingly Judge Brown ordered that it was Welcome who were entitled to the sale proceeds and not Log Book Loans.

What happened when *Welcome FS v. Nine Regions Ltd* went to the Court of Appeal?
Nine Regions appealed the decision of Judge Brown which was heard by the Court of Appeal in March 2011. After the hearing, the solicitors for Nine Regions wrote to the Court of Appeal conceding that contrary to the submissions which its counsel had made in court that Nine Regions was indeed a trade or finance purchaser. This was because Nine Regions also traded in Scotland where Bills of Sales do not exist. In Scotland, Nine Regions provided finance for vehicles on conventional hire purchase terms and conditions. By order dated 16 March 2011 Nine Region's appeal was dismissed by consent.

What documentation formalities does the Law Commission envisage for GMA contracts?
For a report which is meant to recommend a reform to the law, the Law Commission struggles to let go of the past here. It says that the existing Bills of Sale requirements must be kept[13] so a GMA regulated contract would need to state:

- The date,
- Names/addresses of both borrower and lender,
- Obligation which is secured,
- A statement that 'ownership of the goods is being transferred' to the lender,
- Name/address/occupation of the witness, and
- Description of the goods.

In addition the Law Commission wants new prominent statements[14] on Log Book loans saying '*Your vehicle may be repossessed if you do not keep up repayments on your loan'*. These warnings are similar but not identical to those mandated by regulations made under the CCA 1974. Moreover the Law Commission wants any legislation to implement the GMA to give the '*FCA power to prescribe the wording of prominent statements*'[15].

For GMA contracts relating to vehicles, the Law Commission (in addition to keeping CCA regulated credit agreements) also wants the vehicle mortgage document **as well** to say that the lender owns the vehicle and that in the event of default the borrower risks losing possession of the vehicle[16]. It recommends that '*adapted versions'* of these statements be used for non-vehicle GMA contracts[17] but again without any justification as to why there should be such a difference. Finally the Law Commission wants a new warning notice on all vehicle mortgages (not just log book loan ones) that says '*If you sell the vehicle before you pay off your loan, you may be guilty of a criminal offence'*.[18]

What will the new GMA register look like?
The STLR project pressed quite rightly for a searchable electronic register of all assets (not just vehicles) that were covered by a financing arrangement. With monumental understatement, the Law Commission says that '*there is little Government attitude at this time for the implementation of such a register*'[19] and with breath taking arrogance says instead that it proposes '*to retain the High Court register in the short term*'[20]. Only in the '*medium term'* (which it does not define) does it see a '*more limited electronic register*' which could cover vehicles as well as other assets and book debts owned by non-corporates. Not only does this lack ambition, but it fails to fix the problem that the Law Commission was tasked with. All the Law Commission recommends is that the High Court register of

[13] Para 5.39, page 50
[14] Para 5.40, page 50
[15] Para 5.47, page 51
[16] Para 5.49, page 52
[17] Para 5.54, page 52-53
[18] Para 8.53, page 103
[19] Para 6.53, page 63
[20] Para 6.54, page 63

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Bills of Sale is kept but instead registration can be done by email, an affidavit will no longer be needed, original documents no longer need to be lodges and priority will be determined by the date/time of any email[21].

What about data quality of entries on the GMA register?
Fortunately the Law Commission has listened to the consultation responses here and what it proposes broadly mirrors what HPI already does. It is simply recommended that log book lenders remove satisfied vehicle mortgages from the asset finance registries and enter a 'notice of satisfaction' on the High Court register. The Law Commission wants goods mortgages to be re-registered every 10 years and that there be a complaints procedure for consumers where a log book loan remains registered after the loan has been paid off[22].

In which parts of the United Kingdom do Bills of Sales exist?
The Bills of Sales Acts apply only to England and Wales. They have never existed in Scotland. The proposals for the Goods Mortgage Register are from the Law Commission of England & Wales and would apply to England & Wales only. There has been no parallel proposal from the Law Commission of Scotland.

What had the Molony Committee recommended?
The Molony Committee issued its report on consumer protection (**Cmnd 1781)** in July 1962. It briefly considered the problems which occurred when a car on hire purchase was sold on to an innocent purchaser before the hire purchase agreement had been paid in full. Molony was alarmed by '*the frequency of these frauds*' but in the end it made '*no specific recommendation'* but instead expressed '*the opinion that action is overdue and that a solution must be found'*.

In relation to goods mortgages, Molony said this (paragraph 569, page 188):

> '569…*Under North American legislation the chattel mortgage device has been accepted as a means of providing the necessary security. We do not believe this device could be used on any widespread scale in respect of consumer goods without substantial alteration of long-established common law conceptions and statutory provisions*.'

What are the existing protections for those who buy vehicles on hire purchase?
Shortly after the Molony Report Part III of the Hire Purchase Act 1964 was enacted. Section 27 gave protection to '*innocent private purchasers'* who bought a '*motor vehicle'* from someone in '*good faith'* and 'withou*t notice of the hire-purchase or conditional sale agreement'*, then that purchaser would obtain good title to that vehicle.

What had the Crowther Committee recommended in its report in relation to asset registration?
Lord Crowther delivered his report on 'Consumer Credit' **Cmnd 4596** in March 1971. It proposed a '*Lending and Security Act'* (Volume 1, part 5, pages 182-230) which was never implemented. He recommended that this new law covered:

- the loan aspect of all credit transactions other than loans on the security of lands,
- security interests in pure personalty, and
- security interests in goods which become fixtures.

As well as unsecured loans, this ambitious proposal was intended to cover '*hire-purchase and conditional sale agreements; finance leases, mortgages and charges (including floating charges) of goods, documents and pure intangibles and pledges of goods and documents'*. To get there, this would have meant that the part III of the Hire Purchase Act 1964 and the Bills of Sales Acts would have to be repealed. At paragraph 5.5.6 it candidly admitted that it had '*drawn heavily on Article 9 of the American Uniform Commercial Code'*.

As to the protection of 3rd parties, Crowther recommended a 'notice filing' system based on UCC article 9 or section 88 of the Canadian Bank Act. However it said that such '*a registration or filing system must be limited to security interests*' and that registration '*is effected not against the security but against the name of the debtor by whom the security interest is granted'*. It said the downside was that such a '*system does not give such complete protection to a subsequent buyer or encumbrancer*

[21] Para 6.69, page 66
[22] Paras 6.84 & 6.86 – page 68

as a title registration system, since security registration can only show whether a prior security interest has been granted by the person who is disposing of or charging the goods; it will not reveal security given over the goods by a prior owner'.

As to the innocent purchase protection in part III of the HPA 1964, Crowther said at 5.7.31 that it had '*worked reasonably well and has not involved those engaged in hire-purchase business in significant loss*'. The Finance Houses Association then said that '*registration should be available for security interests in motor vehicles, and for certain other classes of goods such as caravans and unregistered vessels*'. Crowther said there were 3 options with the 3rd one being its preferred one:

- do nothing, or
- provide a title registration system (with or without certificates of title), or
- provide a registration system confined to the recording of the security interest in the vehicle.

What happened with the Crowther recommendations?
These recommendations were not taken forward and did not form part of the Consumer Credit Act 1974. In September 1973 report issued by the Department of Trade & Industry called '*Reform on the Law of Consumer Credit'* **Cmnd 5427** the Crowther proposals for legislation to create a new register of security interests were roundly and clearly rejected by the UK Government. It said (paragraphs 13/14 at pages 8-9):

> *'13. The Crowther Committee concluded that they could not deal adequately with consumer credit problems without considering the wider issues of lending and security generally which are relevant across the whole field of commercial transactions. Accordingly they devoted a considerable part of their report to proposals for a new framework for the taking of security in all types of loan transaction; its main impact would be on purely business transactions, but it would also affect consumer loans where security was taken. The Committee's recommendation for the more easy taking of chattel mortgages, together with the removal of present anomalies in the law governing them, was conceived as part of this new framework.*
>
> *'14. The Committee's proposals are for radical reform in a complex field and this implementation would require another major Bill, central to which would be the establishment of a Register of Security Interests and detailed priority provisions depending upon its existence and use. The Government accepts that there are aspects of the existing law in this field which cause difficulty, but they do not have sufficient evidence either of a need for such major recasting of existing law on new principles or of general support for the particular solution proposed by the Committee. They intend to institute consultations with those most closely concerned in the light of the situation existing after the passage of the Consumer Credit Bill.'*

It should be noted here that although the Law Commission does not refer to this 1973 DTI report in its Report at all.

What is Article 9 of the Universal Commercial Code ('UCC')
The original version of Article 9 was approved by the American Law Institute and the National Conference of Commissioners on Uniform State Laws as part of the 1962 Official Text of the Uniform Commercial Code. This was then amended in 1972 and revised in 1994 and 1995. The 1962 version states:

> '*This Article sets out a comprehensive scheme for the regulation of security interests in personal property and fixtures. It supersedes prior legislation dealing with such security devices as chattel mortgages, conditional sales, trust receipts, factor's liens and assignments of accounts receivable'*.

How does a notice filing system such as UCC article 9 work?
It should be stressed at the outset that registration of security interests is done at state level so that in the USA there are 50 separate registers of security interests. After a security interest has been created it is meant to be '*perfected*'. This can happen either by filing a notice with the state Registrar or by becoming in possession of the goods or there can be automatic perfection where there is a purchase money security interest in consumer. On priorities the basic rule is that the first to register an interest over an asset has priority against those that register later. The registered security interest is there to back up the underlying obligation that exists between a debtor and a creditor that he will repay the loan. When it is, the Register has to be updated by the creditor accordingly.

What countries have adopted UCC article 9?
All 50 states [including those late to the party such as Louisiana (1989) and Vermont (1994)] in the USA have now adopted UCC article 9.

What have the main common law countries done on asset registration?
A form of asset registration has been introduced recently in the main commonwealth jurisdictions with a security interest registration based on priority of registration at its heart. This has included:

- Canada:
  - Ontario - Personal Property Security Act 1990,
  - British Colombia - Personal Property Security Act 1996
- New Zealand - Personal Property Securities Act 1999 (came in force on 1 May 2002).
- Australia - Personal Property Securities Act 2009 (came in force in January 2012),

Has the new system in New Zealand been a success?
New Zealand had the advantage of looking at what had been the experience in Canada (including the states of Nova Scotia and Saskatchewan) when it drafted its own law. For a small conservative country with a population of under 5million people, in adapting the Canadian rules ordinarily you would not have expected this to have generated a significant amount of legislation. However this has not what has happened at all and in the short period of time the New Zealand law has been in place already 6 cases have gone to its Court of Appeal to be determined with 1 case having gone on final appeal to its Supreme Court.

What issues has the New Zealand Court of Appeal had to resolve on its new law?
There have been 6 cases on the Personal Property Securities Act 1999 which have so far gone up to the New Zealand Court of Appeal (with *Stiassny* having gone on to the Supreme Court too):

- *New Zealand Bloodstock Ltd v. Waller* **[2005] NZCA 254**,
- *Dunphy v. Sleepyhead Manufacturing Co Ltd* **[2007] NZCA 241**,
- *Marac Finance Ltd v. Greer* **[2012] NZCA 45**,
- *The Healy Homberg Trading Partnership v. Grant* **[2012] NZCA 451**,
- *Stiassny v. Commissioner of Inland Revenue* **[2012] NZSC 106**, and
- *Strategic Finance Limited (in receivership and in liquidation) v. Bridgman* **[2013] NZCA 357**,

In *Stiassny* the CIR succeeded on its submission that it did not have to refund Government sales tax because the payment it received was a '*debtor-initiated payment'* for which the Crown has priority under section 95 of the PPSA, having received it in '*good faith'* and having '*acted in accordance with reasonable standards of commercial practice*' in terms of section 25 of that Act.

As can be seen from this, the legislation still leaves key concepts such as '*good faith'* to be determined by courts having assessed any evidence before it.

What is HPI Limited and how does HPI work?
HPI founded in 1938 is now part of Solera Holdings Inc. HPI's principal activity is the provision of information and services to the car and finance industries in the UK including provenance data. HPI receives and aggregates information about vehicles from numerous sources including the DVLA, insurers, police forces, motor manufacturers and finance companies. Its basic check against a vehicle will return details of any outstanding finance agreements (not just hire purchase but also hire, conditional sale, or personal contract purchase). The full check will additionally return details of any plate transfers, security watch, stolen vehicles or condition alerts recorded against either the vehicle's registration number or its VIN (vehicle identification number).

What happens with HPI if vehicle data is not properly recorded or kept up to date?
Where a car dealer discovers the existence of prior finance recorded against a vehicle it is considering buying either directly or by way of a part exchange, it is meant to contact the finance company to obtain either a settlement figure or confirmation that the finance has now been cleared. The car dealer is meant to account to the finance company for any settlement figure provided. In theory HPI is a voluntary scheme but there can be few car dealers who are not subscribers. There may be delays in amending the data registers but HPI does not act as a guarantor that a clear search means there can be no issues with that vehicle at all.

What does the Law Commission recommend for the future about registers such as HPI?
It notes that car dealers pay around £3 for an HPI search but that consumers are charged £19.99 by either HPI or Experían for the same thing[23]. The Law Commission says that for vehicle provenance checks to be fully effective for consumers (as opposed to car dealers) that there needs to be a '*change to the pricing structure'* and a '*major advertising campaign'* about them. It does not say who should pay for the campaign or what sort of price it thinks is right.

It then recommends that the GMA law '*should contain a regulation-making power to repeal the protection granted to private purchasers of vehicles if vehicle provenance checks were to become free (or almost free) and a routine part of buying a second-hand vehicle'*.[24]

What did the House of Lords rule in *Twitchings* about HPI?
Registration of the existence of a hire purchase agreement with Hire Purchase Information Limited is voluntary. There is no obligation to register its existence. This applies to other companies which also maintain similar registers such as Experían, Callcredit or Dunn & Bradstreet. This lack of compulsion was key to the majority ruling of the House of Lords in *Moorgate Mercantile Company Ltd. v Twitchings* **[1977] AC 890** in which it had to rule on 2 issues.

The first issue was estoppel by representation where a lender had failed to register its hire purchase agreement with HPI. What was the position of an enquirer who received a clear search result who then suffered loss as a result when it later transpired there was undischarged hire purchase finance? By a 4-1 majority (Lord Salmon dissented), the House of Lords ruled that in exercising its functions HPI was acting for itself in giving in exchange for payment by its members, precise information in precise language which could not be stretched or moulded so as to constitute a representation that none of the finance house members of HPI had any interests in the car in question. Even if HPI could be regarded as agent for finance house members at all, it could only be as agent to answer inquiries in the exact form and upon the exact terms upon which it did answer.

On the 2nd issue as to whether it was negligent not to register the hire purchase agreement details with HPI at all, by a slender 3-2 majority (with Lord Wilberforce also dissenting), the House of Lords ruled that this was not negligent. It ruled that whilst this may have been careless the mere fact that the lender and car dealer were HPI members did not create a relationship between them which made them '*neighbours*' in the common law sense.

How important is hire purchase as a product?
Just over 1million new cars were bought on finance by consumers in the year to the end of August 2016. In the same period 1.25m used cars were bought by consumers and 0.5m new cars were bought by business users. Some business users will use either hire or contract hire as a finance tool. For lower value second hand cars, the advantage of retaining title may not be as great so that restricted-use credit agreements are used instead. For the rest however, hire purchase will be the usual finance agreement.

How does hire purchase and leasing compare from a tax point of view?
Under a hire purchase agreement, the end user in possession of the vehicle is able to claim any applicable capital allowances under the Capital Allowances Act 1990. The instalment payments do not attract VAT.

The reverse is the case with hire or leasing agreements including contract hire. With these the finance company is able to claim any applicable capital allowances which in theory will be available to reduce the rental payments charged to the end user. Rental payments attract VAT at the standard rate currently 20%. This should be a tax neutral issue to business users who are registered for VAT.

[23] Para 8.35 (3), page 101
[24] Para 8.45, page 102

What have been the main problems with hire purchase in recent years?
Hire purchase appears to be quite resilient but its innate product features mean that there are 2 recurring issues that financiers face.

The first occurs where more than one-third of the total price has been paid and a customer stops paying. Here unless there is a genuine voluntary surrender of the car, it is necessary to obtain a court order before a vehicle can be repossessed and sold. This affects all lenders but to different degrees depending on their risk appetite. It does however have a cost and slows down the process which needs to be factored into any risk modelling.

The second is the right under section 99 of the Consumer Credit Act to voluntarily terminate a hire purchase contract by handing back a car. If this right is exercised a consumer has to pay arrears and a sum so that the lender has received one-half of the purchase price. If the sums paid by the customer are more than this, then (unless repairs are needed to the car) nothing further need be paid. Lenders have sought to reduce their exposure to this by ensuring that contracts are no longer in duration than they need to be, to set an appropriately high deposit and to set monthly instalments at a corresponding level. With these mitigants in place, even if customers exercise their half-rule rights, that should mean that there is not a loss. Where there have been drops in the residual value of assets (which affects some manufactures or models more than others) then voluntary termination losses can mount up for lenders. This right of early termination first appeared in the Hire Purchase Act 1932 but surprisingly was not given with the buyers of vehicles in mind but rather those buying linoleum.

What is the Law Commission proposing on voluntary terminations?
This is one part of its report where it is not clear if it just relates to motor vehicles or any goods. Similarly it is not clear if its proposals relate only to log book loans (which are presently outside the CCA's scope) or whether it is proposing an across the board change. The Law Commission recommends that there be a voluntary termination right similar to that in the CCTA code and that a customer who exercises that right will not have anything more to pay. It says that this right should be available 'up until the earliest' of 3 points being:

- Where a lender has instructed repossession agents,
- When a visit has been attempted to collect a vehicle, or
- When a lender has issued proceedings for a court order[25].

Where a customer's vehicle has sustained 'intentional damage' then the Law Commission recommends that the right to voluntarily terminate be lost[26]. Finally on this the Law Commission says that where a goods mortgage secures a loan which is not a CCA regulated agreement, then goods (not just vehicles) '*may be repossessed without a court order*' and that there '*should be no statutory right of voluntary termination*'[27].

What attempts have been made by the UK Parliament to fix these problems?
In its December 20013 White Paper '*Fair, clear and competitive – the consumer credit market in the 21st century*'[28] the DTI note that hire purchase was '*fairly evenly distributed among all socio-economic groups, therefore the benefits of these reforms relating to hire purchase products are likely to be fairly evenly spread*' and whilst noting the problems the half rule cause on voluntary terminations recommended that this protection be retained even for business lending where the total amount of lending was £25,000 or less. This White Paper did not deal with Bills of Sale at all.

During the passage of the Bill through Parliament which led to the Consumer Credit Act 2006, an unsuccessful attempt was made to amend it so that the half-rule was abolished. The Minister limply offered a consultation on this issue. A consultation[29] followed on 2 September 2004 and the DTI then announced[30] in March 2005 it was not proposing to take any action. Interesting it said this:

> '*On balance, the Government has decided that* ***changes*** *to the voluntary termination provisions* ***are inappropriate at present****. …. the responses to the consultation do not add up collectively to a mandate*

[25] Para 7.115, page 89
[26] Para 7.121, page 90
[27] Para 7.133, pages 92-93
[28] www.gov.uk/government/uploads/system/uploads/attachment_data/file/273325/6040.pdf
[29] http://webarchive.nationalarchives.gov.uk/20050301212834/http://dti.gov.uk/ccp/consultpdf/creditvtcondoc.pdf
[30] http://webarchive.nationalarchives.gov.uk/20050301212834/http://dti.gov.uk/ccp/consultpdf/creditvtres.pdf

> *for change. There was an absence of consensus on the best way forward. … it has become clear that it would not be possible to remove the provisions on voluntary termination in isolation. Given their position at the heart of the law on hire purchase, to do so could call the whole concept of HP into question. We do not therefore believe that they should be abolished without a wider consultation on the future of hire purchase and other forms of secured lending for goods and vehicles. … While the responses from the credit industry emphasised the impact of the voluntary termination provisions on motor vehicle finance, it is also important to remember that hire purchase does not just apply to the motor finance sector. It is also extensively used to finance the purchase of "white goods", and the consultation revealed no pressure from that sector for the abolition of the voluntary termination provisions.*'

As to Bills of Sale, BIS issued a consultation[31] on 21 December 2009 on whether these should be banned at all. On 28 January 2011 BIS published its response[32] to that consultation and recommended that no legislative action be taken. Instead it said that '*following careful consideration of all the responses to the consultation, Government has come to the conclusion that a package of measures based on Option 2 (introduce an industry wide code of practice) is the most appropriate and proportionate way forward*'. Rather oddly the Law Commission misrepresent this in their report in which they note only that the DTI's '*initial proposal was to ban the use of bills of sale for consumer lending*'[33] but then the Law Commission fails to spell the January 2011 BIS response which was to regulate this by an industry code instead.

A code of practice[34] for lenders engaged in log book loans was then issued by the Consumer Credit Trade Association for its members. It was last updated in February 2015. In 3.14 the Code tries to deal with the problems that have occurred with log book lending (where lenders have used the Bill of Sale procedure registering those loans with the High Court) by providing that details of a Bill of Sale are to be registered with HPI '*within 24 hours of the making of the agreement'*.

When the OFT was abolished in April 2014, its powers were transferred to the new FCA. A new rulebook called CONC was introduced that those firms authorized by the FCA had to follow. The agreement reached between HM Treasury and the finance industry was there was to be a review of the retained provisions of the CCA 1974 with a report to be sent to HM Treasury by April 2019. A 'call for input' on these retained provisions (including the third-rule and half-rule rights) was issued by the FCA[35] on 18 February 2016. At the moment it is not clear what action, if any, either HM Treasury (which now has responsible for legislative policy for consumer credit) or the FCA will take.

Has the Law Commission looked at registration of security interests before?
Yes – three times:

- On 14 June 2002, the Law Commission issued a consultation paper (**Law Com No 164**) entitled '*Registration of security interests: Company charges and property other than land*' which referred to reform in the USA, New Zealand, Canada and Australia.
- This was followed by a Consultative Report, in August 2004 (**Law Com No 176**).
- A final report (**Law Com No 296**) entitled '*Company Security Interests*' was presented to the Government on 31 August 2005.

What did the Law Commission recommend?
That final report made these recommendations:

- a new online system to register company charges cheaply,
- all company charges to be registrable unless they are specifically exempt,
- lenders need only send brief details of the company charge in a statement of particulars,
- Companies House should not issue a conclusive certificate of registration,
- remove the 21-day time-limit for registration,
- removing the criminal offence of failing to register a company charge,
- a system of priority, based on the '*first to register'* principle, and

[31] www.gov.uk/government/uploads/system/uploads/attachment_data/file/31481/a_20better_20deal_20for_20consumers_20consultation_20on_20proposals_20to_20ban_20the_20use_20of_20bills_20of_20sale_20for_20consumer_20lending.pdf
[32] www.gov.uk/government/uploads/system/uploads/attachment_data/file/31484/11-516-government-response-proposal-ban-bills-of-sale.pdf
[33] Para 3.34 page 28
[34] www.ccta.co.uk/wp-content/uploads/2016/06/Bills-of-Sale-Code-of-Practice-consumer.pdf
[35] www.fca.org.uk/publication/call-for-input/call-for-input-review-retained-provisions-consumer-credit-act.pdf

- sharing of information between Companies House and the Land Registry, so charges over properties will need to be registered only once.

What happened to the Law Commission's proposals?
These proposals in relation to companies house charges were accepted by the Government and were implemented in the Companies Act 2006 (Amendment of Part 25) Regulations 2013 **SI 2013 No. 600** which came into force on 6 April 2013.

What had the Law Commission proposed in its work from 2002-2005 about vehicles or bills of sale?
The scope of the 321 page report **CP 164** was very broad:

- **Part VI** dealt with '*Functional equivalents to security*' (this included hire purchase, conditional sale and finance lease agreements),
- **Part VII** dealt with '*A functional approach to security'* (again this included hire purchase agreements but also a specific section on motor vehicles),
- **Part VIII** dealt with '*Security interests created by non corporate debtors and registration*' (which specifically dealt with Bills of Sale),
- **Part IX** dealt with '*Security interests created by non corporate debtors: the need for reform'*(which dealt with the complexity of the existing law, consumers and human rights issues), and
- **Part X** dealt with *'Extending the notice-filing system'* (which again dealt with bills of sale and motor vehicles).

In relation to motor vehicles the Law Commission said this:

- A '*Romalpa*' clause in which title is reserved in goods until payment is made in full '*is functionally similar to a security over the goods supplied and new goods*',
- A finance lease has a '*security purpose'* but an operating lease does not. The '*short-term hire of a car for a few days, for example, does not create a security interest but a finance lease for the economic life of the goods could*' but it admitted that '*the difference is not always easy to define*'.
- Under the current system, '*protection is afforded to private purchasers regardless of the legal personality of the "rogue" seller*' but '*under a notice-filing system that applied only to companies, if the rogue seller were a company, there could be rules in respect of innocent purchasers that might be similar to the protection offered by the Hire Purchase Act 1964'*. However, if the seller were an individual '*such a sale would be outside the operation of the system, since it would apply only to security interests created by companies*'. This means that Part III of the HPA 1964 would '*have to remain in existence at least in part, in order to protect purchasers from non-corporate sellers'*.
- Under the Sale of Goods Act 1979 where someone buys '*goods from a person who himself has agreed to buy them under a conditional sale agreement*' then if that buyer has '*obtained possession of goods under an agreement to sell but who is not yet owner of the goods has power to pass title to a person who takes the goods under a sale, pledge or other disposition in good faith and without notice of the rights of the original seller*' and provided also that '*the sale is made in circumstances that, were the first buyer a mercantile agent, would be within his ordinary course of business*' that buyer gets good title. However under the CCA 1974 where that conditional sale agreement is a regulated agreement then '*the buyer is treated in the same way as a hirer*' under a hire purchase agreement.
- Some of the protection given by the 1882 Act has been eroded by inflation: '*the ban on bills of sale for under £30 is now practically meaningless*'. However the ban on charging after-acquired property remains and '*as far as consumers are concerned, probably should continue to do so*' and we '*do not regard the ban on charging after-acquired property to be unduly restrictive in the case of consumers'*.
- It was the Law Commission's '*clear provisional view that the current law relating to security interests created by non-corporate debtors is in need of reform. The combination of a complicated and restrictive scheme of registration with the draconian consequences for non-compliance seems to us to be out of date and unfair*' and '*the current law unnecessarily fetters the ability of unincorporated businesses to raise finance'*. Provided safeguards were put in place to protect consumers there '*seems to be no reason why the ability of a*

partnership or a sole trader to raise secured finance should be significantly more restricted by the law than that of a company'.

- There were '*strong reasons for replacing at least the old and very technical system of registration of charges over goods and general assignments of book debts under the Bills of Sale Acts with a system that is less technical and therefore easier to use*'. The Law Commission saw '*no reason why the new, simple system of notice-filing of financing statements provisionally proposed for company charges should not in general be applied to charges created by non-corporate business debtors'* which would allow '*repeal of the Bills of Sale Acts*'.
- The Law Commission provisionally proposed that '*security interests over motor vehicles be registrable in the same way as other security interests, whether the debtor is a company, unincorporated business or a consumer*' and that '*an unfiled interest should not be binding on any purchaser, whether or not she knew of it*' whilst '*a filed interest should be binding on a trade purchaser*' but '*should not be binding on a person who buys the vehicle for private use unless she knows of the security interest'*.
- The Law Commission thought that '*notice-filing would be disproportionately burdensome for transactions of less than.. £1000'*.

What happened to these proposals from the Law Commission?
Although the Law Commission's proposals in relation to company charges were accepted and implemented, its proposals in relation to Bills of Sale were not. Similarly its ambitious proposals to have a compulsory wide register of assets including all financing agreements relating to vehicles were not progressed by the UK Government either. On one view **Law Com 369** is a final attempt by the Law Commission to get its earlier proposals in relation to Bills of Sales accepted. However it has to be noted, that under the radar the Law Commission is also attempting to link this with its earlier proposals for a compulsory register of assets including vehicles. It is not necessary to link the 2 proposals in this way.

What work did Lord Saville of Newdigate agree to sponsor?
Lord Saville agreed to be the sponsor of the Secured Transactions Law Reform Project ('STLR') – www.securedtransactionslawreformproject.org which was established in 2011. It says that there are serious shortcomings in the current law of England and Wales as it relates to security over personal property. It makes these 5 main points:

- The existing law is complex and not readily accessible to non-lawyers or those in other jurisdictions,
- Transactions which have the same purpose and function as security but which take a different form are outside the personal property security registration regime creating a lack of transparency,
- The law relating to the distinction between fixed and floating charges was then in an unsatisfactory state. This made it difficult to give clear advice when structuring transactions, and the cost of credit may be raised because steps have to be taken to avoid potential problems,
- Registration of security at Companies House applies only to English companies and operates independently from specialist asset registers and international registers, and
- The regime applied to unincorporated businesses is restrictive, creating an unnecessary pressure to incorporate for small and medium-sized businesses wishing to access secured credit.

What progress did the Savile working group make?
In April 2016 the STLR issued a general policy paper setting out what it had achieved so far and what it proposed for its future direction of travel. The STLR set out what it saw as the core of a modern secured transactions law with these essential features:

- A simplified and codified law of secured transactions,
- Adoption of a single concept of a consensual security interest,
- A regime of secured transaction which enables security to be taken over any asset, present and future,
- A regime of secured transactions, including registration, which covers security interests granted by all debtors whether corporate or non-corporate (but noting that there could be different rules for 'consumers'),

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- A fully electronic system of registration, where registration takes effect without human intervention, and
- A set of clear priority rules based on rational distinctions with a core rule that priority between registered interests is by date of registration.

Some of the STLR's proposals have been implemented particularly those on company charges which were implemented by the Companies Act 2006 (Amendment of Part 25) Regulations 2013.

What was the finance industry's view on the deliberations of the Savile working group?
Those that finance vehicles using hire purchase have so far not been supportive of the work of the STLR. The broad reason is that if these proposals are implemented it will mean that hire purchase as a product will cease to exist. Instead the financing of vehicles will be covered by the prior registration of security interests. This is something new or untested and there has been resistance to this level of change particularly where no immediate financial benefit can be seen. The finance industry's resistance is also historically rooted particularly the 1973 DTI White Paper and the Molony Report which were not supportive of the changes recommended by the Crowther Committee in its 1971 Report.

What is the STLR view of the GMA proposals from the Law Commission?
Surprisingly the Law Commission proposals have not satisfied the STLR. Its view is that whilst the Law Commission's proposals are designed not to interfere with further reform, do not take the position on secured transactions much further. The STLR has produced a general policy paper[36] setting out where it thinks it is and what it is are going to do next.

What is the Law Commission proposing with its Goods Mortgage Act ('GMA')?
At its most basic level, the Law Commission is recommending that all the Bills of Sales Act 'should be *repealed and replaced with a new Goods Mortgages Act'*[37]*.* It says that the word '*mortgage*' will '*convey a degree of seriousness to the transaction*'[38]but says there should be 2 categories: a '*goods mortgage'* and a separate '*vehicle mortgage'*. As to scope, it says the GMA should only apply to assets owned by '*an individual'* but instead of wanting to adopt the definition of 'individual' in section 189(1) of the CCA 1974, the Law Commission proposes something slightly different '*any natural person, that is, any unincorporated entity. This includes consumers, sole traders and general partnerships'*[39]*.*

In its Report (**Law Com 369**) presented to Parliament on 12 September 2016 on its '*Recommendations to reform the law of logbook loans and of other loans secured on goods'*, the Law Commission makes proposals for a GMA. It makes clear that if *'the Government accepts these recommendations, the next stage would be for the Law Commission to draft a Bill. We hope this Bill could be introduced into Parliament under the special procedure for uncontroversial Law Commission Bills.'* This rather begs the question as to whether what the Law Commission proposes is uncontroversial or not.

Similarly the Law Commission also misleadingly states that a '*logbook loan must be registered at the High Court by means of an expensive and cumbersome procedure*'. It is not clear what it means by '*expensive*' as there is only a nominal £25 fee to register a Bill of Sale and all that is needed is a simple affidavit exhibiting the bill which is a routine and not a '*cumbersome*' procedure.

What other sorts of 'goods' does the Law Commission contemplate?
The Law Commission says that unincorporated businesses are restrained in raising finance in a way that incorporated businesses are not. The Law Commission intends that not only will its proposals cover invoice financing where there is an assignment of book debts but other assets[40] such as fine art, wine, cattle, hotel furniture[41], antiques, etc.

[36] https://securedtransactionslawreformproject.org/draft-policy-paper/
[37] Para 4.16 page 32
[38] Para 4.9, page 32
[39] Para 4.21, page 33
[40] Para 1.25, page 5
[41] Para 1.29, page 6

On general assignment of book debts, the Law Commission recommends that the High Court register under the Bills of Sales Acts be retained but that its registration process be simplified[42] so that invoice financiers can email the necessary information to the High Court rather than having to lodge original documentation verified by affidavit. It also recommends that the little used absolute bills of sale be abolished[43].

What is the Law Commission proposing be excluded from the scope of the GMA?
It is proposing to exclude pawn broking[44] from the GMA's scope. It is not proposing that there be a minimum floor[45] before a contract can be registered under the GMA. These transactions are also proposed to be excluded:

- Intellectual property such a copyright in a catalogue of songs,
- Intangible goods such as shares,
- Ships & aircraft,
- Agricultural charges[46],
- Essential household goods[47], and
- Future goods[48].

Disappointingly, its justification for this approach is at best thin and at worst none existent. Far better is the approach of the STLR which is looking at this holistically.

What will happen where there is default under a GMA contract?
The Law Commission is clear on one thing and that is where a GMA contract (other than 1 relating to a vehicle) has not been registered it should remain enforceable against a borrower[49] but should not be enforceable against others such as a trustee in bankruptcy. The Law Commission wants customers with log book loans to have the same protection as customers under hire purchase agreements who have paid one-third or more of the purchase price. However it says they should only get this protection if they 'opt-in' or write to the lender when they get a default notice saying that they want to opt in to court control over the next steps.

The Law Commission proposes that opt-in rights are sent twice with a final reminder when the lender is '*on the cusp on enforcement action*'[50]. It recommends prescribed information for such an opt-in notice[51] and even more prescriptively says a lender would 'need to prove delivery' by a signature from registered post or personal service or ringing a customer to confirm they had got it or an email delivery receipt[52]. Where a customer does opt-in the Law Commission says a court should have the same powers[53] over a log book loan that it does on a Time Order application under CCA s129.

What restrictions is the Law Commission proposing on repossession?
Here the Law Commission's thinking becomes even more muddled. Under the CCA 1974, a car financed under a hire purchase agreement becomes 'protected goods' when a customer has paid one-third or more of the total purchase price. Unless a customer genuinely agrees to a voluntary surrender of their car, then a lender needs to obtain a court order before it can repossess that car on default. Similarly a court order under s92 of the CCA is needed to recover vehicles that are parked on private land rather than a public highway.

The Law Commission is recommending that a '*lender will only be entitled to repossess goods with a court order*'[54]. Further it says that where a lender has wrongfully repossessed then it should return the goods to the customer who will then have no further obligation to pay and that such a '*punitive*

[42] Para 9.24, page 110
[43] Para 10.26, page 117
[44] Para 4.28, page 34
[45] Paras 4.59- 4.66, pages 39-40
[46] It is proposing that the Agricultural Credits Act 1928 be retained – para 4.35, page 36
[47] Para 4.67, page 40. Although there is discussion of this in para 4.66, the Law Commission fails to define this term instead lamely ducking the issue saying there should be 'a regulation-making power' on this.
[48] Para 4.68-4.73, page 41. 'Future goods' are goods that at the time of the transaction, the borrower does not then own.
[49] Para 6.7, page 62
[50] Para 7.52, page 77
[51] Set out in para 7.56, page 78
[52] Para 7.53, page 77-78
[53] Para 7.63, page 80
[54] Para 4.51, page 38

element' is '*appropriate given the detriment that borrowers suffer*'[55]. The Law Commission also wants to replicate CCA s92 under its proposed GMA but this will apply not just to vehicles but any goods under a regulated GMA contract[56]. However unlike hire purchase contracts, the Law Commission is proposing the log book lenders who have to go to court to obtain a court order will not be able to recover the costs of doing so from the customer except for the court fee which it says '*can be left to the court's discretion*'[57]. The only sensible thing here is that the Law Commission says that the GMA legislation '*makes it explicit that the lender can use its own employees or debt collectors to enforce court orders*'[58].

What are the differences between the proposed GMA, UCC Article 9 and the Savile proposals?
The Law Commission's proposals represent a desire to try and do something in a hurry in relation to log book loans without fixing the underlying problem. The Law Commission work has been a distraction to the more important work undertaken by the STLR project under Lord Savile. The STLR seeks to produce something more wide ranging using an electronic register and using the learnings from the other common law jurisdictions that have already introduced something similar. The STLR has not underestimated the scale of its task.

Is there a danger of introducing unwanted proposals in the GMA by the back door?
Possibly but this danger is not an immediate one as the Law Commission is recommending retaining the Bill of Sale register with some changes. The real danger will come when there is a move to a stage beyond that. The Law Commission is also muddled as to which of its proposals apply only to log book loans, which to new GMA loans on vehicles and which to GMA loans for other goods. There is also poor justification for some of the Law Commission proposals. In many ways the Law Commission does little better than what is in the existing CCTA code on log book loans. It has to be questioned whether it is worth Parliament bothering with these proposals at all.

If the GMA becomes law, what will happen in Scotland or Northern Ireland?
Bills of Sale only exist in England and Wales. The proposals are from the Law Commission of England and Wales. It remains to be seen what Scotland or Northern Ireland do but regulation of financial services is a matter reserved to the Westminster Parliament[59].

What happens at the moment when a consumer motorist claims he is an innocent private purchaser in a bill of sale case?
The innocent private purchaser provisions under part III of the HPA 1964 do not apply to Bills of Sale. Where a lender has registered its Bill of Sale using the proper form, paying the fee and within 7 days of creation, then someone buying a car from another where there is an existing log book loan, has to either give the car to the log book loan company or pay for it twice.

The Law Commission is recommending that the FCA '*should be given jurisdiction to curb abuses in the way that lenders treat purchasers*'[60]. Although this is in a section of the report dealing with log book loan lenders the Law Commission's proposal is not qualified in that way.

How does a court approach the resolution of these disputed innocent purchaser issues?
At the moment in cases involving a dispute as to whether someone is an innocent purchaser or not, these are resolved in court. Whilst there will be a written statement of case and witness statements, frequently these cases are determined because of how well a witness stands up in cross-examination. Often this will cover issues such as how a transaction was initiated in the first place, where meeting(s) took place, what was said and where any money in the disputed transaction came from. Further for cases where not all the 'dispositions' are known, the statutory assumptions in section 28 of the HPA 1964 will come into play.

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[55] Parag 7.67, page 80
[56] Para 7.69, page 81
[57] Para 7.85, page 83. It should be noted here that this part of the report seems to have been written in a hurry because a cross-reference back to an earlier paragraph in 7.77 is missing.
[58] Para 7.89, page 84
[59] Schedule 5, Part II, Head A, A.3 – Scotland Act 1988. Schedule 3, paragraph 23 – Northern Ireland Act 1998.
[60] Para 8.62, page 105

What is the Law Commission proposing where there is a disputed innocent purchaser in its draft GMA?
The Law Commission is recommending that a private purchaser who acts in good faith and without actual notice of the goods mortgage should be able to acquire ownership of the goods. In a disturbing extension to the HPA 1964, it is proposing that this applies not just to purchasers who pay money but also those who make '*some other form of payment, such as exchange*'[61]. Section 27(2) of the HPA 1964 refers expressly to a '*purchaser*' and s27(3) to a '*first private purchaser'*.

This language is not accidental giving effect to the limited recommendations of the Molony Committee and excluding from protection transactions of barter. The Law Commission fails to understand this critical distinction and the reason why this policy choice was made in the HPA 1964. The Law Commission makes it even worse by proposing that this (widened) HPA 1964 protection should not just apply to dispositions of vehicles covered by a GMA contract but also '*to all goods subject to a goods mortgage*'[62] without any justification for this extension.

How would the Financial Ombudsman Service approach a disputed innocent purchaser case?
It should be noted here that FOS is entirely a paper based adjudication system. This assessment of critical evidence is not available to FOS (unless it chooses to change its procedures). This will mean that FOS deals with title disputes in relation to the Registrar of Goods Mortgages solely on a cursory paper sift. This is likely to be prejudicial to lenders and beneficial to fraudsters.

The Law Commission is recommending that FOS be given '*jurisdiction to hear complaints against lenders made by private purchasers*'[63]. This is in a section of the report dealing with '*logbook lender behaviour*' but its recommendation is not qualified in any such way.

Would FOS be an improvement under the GMA?
No. In relation to title disputes a court will always be better place to rule on these.

Who is it proposed will run the goods mortgage registration scheme?
This is not clear at all. The Law Commission in its paper refers endlessly to '*designated asset finance registry*'[64] but does not say who this could be. As well as HPI, Cheshire Datasystems Limited has responded to the Law Commission's consultation paper, so they must be strong contenders to run the proposed registry. At the moment HPI, Experían and CDL maintain vehicle subscriber databases and the Law Commission notes that they '*would likely be the initially designated finance registries*'[65] but that HM Treasury should designate the registries as suitable to register vehicle mortgages under its existing powers[66]. It does not want a cost structure that '*discourages searches'* and that there be a complaints system '*to deal with disputes about the validity of vehicle mortgages between traders, third parties and borrowers*'[67] but it is not clear how this will link in with FOS or whether any complaint system will usurp a court's powers in any way.

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[61] Para 8.23, page 98
[62] Para 8.33, page 100
[63] Para 8.66, page 105
[64] Para 4.83, page 43
[65] Para 6.27, page 58
[66] Para 6.34, page 60
[67] Para 6.33(4), page 60

What rulings have the courts made recently where statutory registers have been inaccurate?
It is interesting that we have seen a number of court cases recently where loss has been claimed because other statutory registers have been inaccurate. If a Bill is introduced to Parliament to implement the GMA proposals, it will have to be examined to see how these very real situations with these other registers will be treated.

In what circumstances has the court found liability on a statutory registrar?
In these 2 cases the keeper of the statutory register has been **found liable** for losses where the register was inaccurate:

- Companies House - *Sebry v. Companies House* **[2015] EWHC 115 (QB)** (Edis J)

Mr Sebry, the managing director of a company called Taylor and Son**s** Ltd ('the company') successfully brought a claim for £8million against the Registrar of Companies ('the Registrar)' for damages for negligence and breach of statutory duty. An employee of Companies House had erroneously registered Taylor and Son**s** Ltd as being in liquidation instead of Taylor and Son Ltd. As a result of the negative publicity this created, the company lost key contracts, supplier credit terms and cash advances from its bank, which quickly led to the company filing for its own administration.

The company was incorporated in 1900 and operated as steel fabricators with a staff of approximately 250. One of its largest customers was Tata Steel. On 28 January 2009 the High Court made a winding up order against Taylor and Son Ltd, a completely unrelated company. The order, which did <u>not</u> include the company number, was sent to Companies House for registration on 12 February 2009. On 20 February 2009 it was registered at Companies House, not against Taylor and Son Ltd, but against Taylor and Son**s** Ltd. The order should have been sent with a notice to Companies House form including the company number, but was not. The Official Receiver should have put the company number on the covering letter but did not.

The mistake was discovered when the Official Receiver telephoned Mr Sebry to tell him he was in liquidation. Mr Sebry instructed the company's solicitor immediately, who soon sorted out the mistake with the Official Receiver who in turn contacted Companies House. It was quickly established they had the wrong Taylor and Son**s** Ltd. However, during a subsequent routine check of the register of companies (the register) by the company's accountant, it was discovered (on 23 February 2009) that the company was still showing as being in liquidation at Companies House. The company solicitor contacted Companies House directly and a correction was made to the Register that afternoon.

However by then the damage had been done because the erroneous information had already been disseminated both by Companies House subscription services to credit and data agencies such as Experían, Dunn & Bradstreet, Equifax and Jordans. There was no mechanism to automatically feed this correction to these agencies. This led to the company's customers and suppliers to (wrongly) believe the company was in liquidation.

On 9 April 2009 the company went into administration. The claimant alleged this was as a direct result of the damage caused by the error at Companies House. Mr Justice Edis had to decide:

- whether the defendants owed the company a **duty** of care under statute or common law in the terms alleged by the claimant in his particulars of claim,
- whether, if so, the defendants **breached** any such duty. It was conceded that if there was any such duty, it was breached so this matter did not need to be decided, and
- whether, if so, the defendants' breach of duty **caused** the company to enter administration.

The judge found that where the Registrar undertakes to alter the status of a company on the register which it is his duty to keep, he assumes a responsibility to that company to take reasonable care to ensure that the winding up order is not registered against the wrong company. This special relationship between the Registrar and the company arises because it is foreseeable that if a company is wrongly said on the register to be in liquidation it could suffer serious harm.

On causation, the judge concluded that the claimant proved that the reason the company went into administration in April 2009 was due to the error made at Companies House. The judge was not satisfied there was a cause of action for damages for breach of statutory duty against the Registrar in relation to his functions under the Companies Act 2006 (CA 2006). The CA 2006 is a statute which regulates the keeping of the register and imposes duties on the Registrar for that purpose. The register publishes information which is available to the whole

world because it is available on the internet. An application for permission to appeal to the Court of Appeal was refused on 20 January 2016.

- The Law Society of England and Wales – Schubert Murphy v. Law Society **[2014] EWHC 4561 (QB)** (High Court, QBD, Mitting J)

  The Law Society website maintains a '*Find a Solicitor'* page. Under paragraph 4.3 of its practice note to solicitors on mortgage fraud dated 15 April 2009 was one of the means by which solicitors or the public were enabled to identify other solicitors on the Roll of Solicitors maintained by the Law Society pursuant to its statutory duties under section 10 of the Solicitors Act 1974. In May 2010 the claimant solicitors acting for a buyer on a conveyance of a Hertfordshire property paid the purchase price of £735,000 to a solicitor's firm (principal JD), who purported to act for the seller. That firm gave the usual undertaking to discharge the existing mortgagee's first charge on completion out of the purchase monies. It did not do so. They were not solicitors but made off with the purchase monies instead. Their details had been obtained by the claimants from the Law Society's website which represented that they were solicitors on the Roll. The claimants' insurers sought by subrogation to recover their losses for breach of statutory duty and/or negligent misstatement.

  The Law Society's application to strike out the claim on the basis that it had owed no duty of care to the claimants or to the purchaser was dismissed. In a representation case, if as assumed, the representation was erroneous because of carelessness, it did not matter that the alleged carelessness had occurred at a time when the person to whom the representation was made was not personally in contemplation of the defendant and its employees. The existence or not of a duty of care vested in the regulator in respect of its duties under section 10/10A of the Solicitors Act 1974 had to depend upon the careful analysis of a number of facts and circumstances, both general and particular to the case. Having regard to issues concerning the protection of the public, a strike-out should be refused and the claim be allowed to proceed to be determined at trial.

In what circumstances has the court found no liability at all on a statutory registrar?
By contrast in these 5 cases the keeper of the statutory register has avoided liability where the register was inaccurate:

- HM Land Registry – *Chief Land Registrar v. Caffrey & Co* **[2016] EWHC 161 (Ch)** (Chief Master Marsh)

  Sebry was distinguished. The duty is one to *register* the information correctly: it was not one of *verification* of the information.

- Keeper of the Registers of Scotland – Santander UK plc v. Keeper of the Registers of Scotland **2013 SLT 362** (Outer House, Lord Boyd of Duncansby)

  A bank (Santander) claimed damages against the Keeper of the Registers of Scotland for loss incurred by it as a result of the Keeper's acceptance and registration of a forged discharge of standard security personally presented by a land owner. That land owner subsequently granted a mortgage over the same property to another bank giving it priority ranking to Santander. Following arrears and repossession, that other bank had sold the property and Santander received nothing. Santander claimed its loss occurred because of the Keeper's fault & negligence and that the Keeper owed it duty of care.

  In deciding to lend money Santander necessarily bore certain risks in relation to its customer's creditworthiness or honesty and whether the value of the property would fully secure the loan. These risks were evaluated by the lender and not the Keeper. Santander had suffered loss but this had been created by its customer's forgery and subsequent fraudulent inducement. It was not fair, just and reasonable to impose a duty of care on the Keeper. The bank's claim was dismissed.

- Insolvency Register – *Smeaton v. Equifax PLC* **[2013] EWCA Civ** (Court of Appeal – Tomlinson & Davis LJJ and Sir Robin Jacob)

  Between May 2002 and July 2006, Equifax's credit file on Smeaton stated that he was subject to a bankruptcy order. However, that bankruptcy order had been rescinded in May 2002. In 2006, Smeaton approached a bank and applied for a business account and loan. These applications were rejected due to '*adverse data'* on his credit file. Smeaton brought a claim against Equifax for compensation unders13 of the Data Protection Act 1998 and sought damages for breach of duty at common law. Smeaton submitted that Equifax's breaches of duty caused him to be unable to raise finance for his company, resulting in a loss of forecast profits and then homelessness. The trial judge held that, by deciding to operate as a credit

reference agency (CRA), Equifax had assumed a responsibility to the consumers whose personal data it held, and had to act with reasonable skill and care. The trial judge concluded that Equifax's breaches of its statutory duties and the co-extensive duty of care in tort had caused Smeaton loss, in that they prevented his company from obtaining a loan in. Equifax's **a**ppeal from this ruling was allowed.

Up until 2008, Equifax obtained its data relating to bankruptcy orders from the London Gazette. The Official Receiver was required to advertise all bankruptcy orders in the Gazette. Prior to 1986, annulments and rescissions of bankruptcy orders were also required to be advertised in the Gazette. However, the Insolvency Rules 1986 introduced a change whereby the former bankrupt was given the option of requiring the Secretary of State to advertise the annulment or rescission upon payment of an appropriate fee. CRAs would only learn of a rescinded bankruptcy order if a debtor chose either to advertise the rescission or contacted the CRA directly. Upon being notified of an order annulling or rescinding a bankruptcy order, the Secretary of State was not under any duty to advertise the fact of the annulment or rescission in the London Gazette or anywhere else.

The judge had effectively concluded that Equifax had breached its duty to take reasonable steps to ensure the accuracy of its data because it had failed to attempt to persuade the Insolvency Service to initiate modifications to the legislative and regulatory framework. That was not a realistic conclusion. It was not reasonable either to expect CRAs to have identified the alleged blind spot in the scheme, or to lobby for a change to the legislative framework.

- Insolvency Register – *St John Poulton's Trustee in Bankruptcy v Ministry of Justice* **[2010] EWCA Civ 392** (Court of Appeal – Pill, Lloyd and Pitchford LJJ)

  The breach by a court of its duty under rule 6.13 of the Insolvency Rules 1986 to send to the Chief Land Registrar notice of a bankruptcy petition and a request that it be registered in the register of pending actions did not give rise to a private right of action against the court, either for breach of statutory duty or at common law The Court of Appeal ruled that the Ministry of Justice was not vicariously liable to a trustee in bankruptcy for breach of statutory duty. That breach was in respect of a county court's failure to discharge its duty under rule 6.13 to notify the Chief Land Registrar of a bankruptcy petition and to request its registration in the register of pending actions. This failure had resulted in the bankrupt being able to sell the registered land before the trustee was appointed with the result that the trustee he was unable to recover the proceeds of sale for the benefit of the her estate.

- Department of Transport – *Reeman v. Dept of Transport* **[1997] PNLR 618** (Court of Appeal – Lord Bingham CJ, Peter Gibson & Phillips LJJ)

  The claimants bought a commercial fishing vessel which had the benefit of a Department of Transport (DofT) certificate indicating compliance with relevant regulations concerning seaworthiness. The surveyor who had issued the certificate had made an arithmetical error when calculating the vessel's stability. A year after the purchase the error came to light and the vessel's certificate was withdrawn. The claimants were unable to use the vessel and could not afford to pay for modifications to make the vessel seaworthy. They sued the DofT for negligence claiming damages in respect of their economic loss.

  The Court of Appeal held that there was not a sufficient relationship of proximity between the claimants and the DofT. This was because having regard to the purpose of the certificate and the statutory scheme under which it was issued, which was to promote safety at sea, and the fact that the class of potential purchasers who might rely on the certificate could not be ascertained at the time when it was issued, the claimants were not sufficiently proximate. It ruled that it was not just, fair and reasonable to impose liability for economic loss.

  (A claim against the surveyors who had carried out a condition survey of the vessel for the plaintiffs was not pursued because the firm was insolvent. A claim against the valuers who had valued the vessel was dismissed).

What rulings have the courts made recently where commercial databases operated by credit reference agencies have been inaccurate?

In addition to these cases dealing with statutory registers, the courts have also had to rule on claims for losses cause where commercial databases have been inaccurate. As many of these commercial databases are 'mixed' in that they contain information compiled from public sources (such as HM Land Registry, the Electoral Roll and the Insolvency Service) as well as from their commercial subscriber members, then this adds an additional layer of complexity. It is inevitable that if the GMA proposals ever do get off the ground, the data contained in the public register underpinning it will end

up being mixed with other data held by commercial subscribers. As to who will be liable for any losses where GMA data is inaccurate, has not been registered at all or where there has not been timeous discharge will remain to be determined. In the meantime it is worth noting a few recent cases on commercial databases to see what the court has done.

- *Durkin v. DSG Retail Ltd & HSBC* **[2014] UKSC 21** (Supreme Court of the UK – Lady Hale DPSC, Lords Wilson, Sumption, Reed & Hodge JJSC)

  It was an implied term of a restricted-use debtor-creditor-supplier agreement under CCA 1974 section 12(b), that the credit agreement was conditional upon the survival of the supply agreement. A debtor on rejecting goods thereby rescinding the supply agreement for breach of contract, could also rescind the credit agreement by invoking that condition. Accordingly the claimant had been entitled to rescind and had validly rescinded his credit agreement with the bank.

  The bank, knowing of the claimant's assertion that the credit agreement had been rescinded, had been under a duty to investigate that assertion. The bank needed to reasonably satisfy itself that the credit agreement remained enforceable before reporting to credit reference agencies that the claimant was in default. By making no inquiries before registering these defaults and having accepted without question the retailer's position that the claimant had not been entitled to rescind the contract of sale, the bank had acted in breach of its duty of care to the claimant. An award of £8,000 damages for injury to the claimant would be restored

- *Smeaton v. Equifax PLC* **[2013] EWCA Civ** (Court of Appeal – Tomlinson & Davis LJJ and Sir Robin Jacob)

  The judge's conclusion that Smeaton's applications for credit had been refused on the sole ground of the bankruptcy entry on his credit file was unsustainable - his file showed many other items of adverse data. The judge's finding that Equifax's alleged breaches of duty caused Smeaton's loss was also unsustainable. The consequences which it was claimed arose from the alleged breaches of duty were far too remote to give rise to liability under either the Data Protection Act 1998 ('DPA') or at common law. A co-extensive duty of care in tort would be meaningless because the DPA provided a detailed code for determining the civil liability of credit reference agencies and other data controllers arising out of the improper processing of data.

- *Grace & George v. Black Horse Ltd* **[2014] EWCA Civ 1413** (Court of Appeal – Lord Dyson MR, Beatson & Briggs LJJ)

  In 1997 the Grace took out a hire-purchase agreement which was regulated under the Consumer Credit Act 1974. The lender was obliged to supply a copy of it to the first claimant but that copy differed in material respects from the agreement the first claimant had signed. Under CCA s63(5) the agreement was not properly executed and was irredeemably unenforceable. The 1st claimant fell into arrears, incurred penalty charges and refused to make further payments. The lender obtained a default judgment.

  The unenforceability of the agreement having come to light, the default judgment was set aside and the lender's predecessor in title was ordered to pay Grace's costs. It added these costs to the outstanding debt and registered the total as a default with the credit reference agencies. Grace on discovering the registration protested, and the lender removed the default registration. Grace then claimed he had been unable to obtain banking facilities because of his poor credit rating. Mrs George took out another hire-purchase agreement to buy a static motor home. She later discovered that the rate of interest was high because of her partner's poor credit rating. They issued a claim for damages under DPA 1998 section 13.

  The claimants' submitted that the default registration involved a breach of the data protection principles which had caused each of them damage. The trial judge dismissed the claims holding that while the inaccurate registration of the amount of the default had been a breach of the data protection principles, that breach had not been causative of the loss. The lender could have registered the Grace's default under the hire-purchase agreement, despite being unenforceable, which would have caused the same damage to his credit rating as the inaccurate registration.

  Even where a regulated consumer credit agreement was unenforceable, the underlying agreement and its rights and obligations remained in place. It was inaccurate to describe a consumer as a defaulter under a hire-purchase agreement once a competent court had decided that the agreement was unenforceable unless the entry also recorded the unenforceable nature of the debt. Registration of an inaccurate debt constituted a breach of the 4th data protection principle in contravention of DPA 1998 section 4. To the limited extent that the 1st claimant's claim was not

statute-barred, the breach of the DPA had caused him loss since no other registration of the 1st claimant as a defaulter under his hire-purchase agreement could have been made at that time

Shortcomings in the registration systems of credit reference agencies cannot excuse a registration which is in substance inaccurate because of an omission that the 'default' related to an unenforceable agreement. If an inaccurate registration cannot be accommodated, the industry should change its registration systems and in the meantime inaccurate registrations should not be made.

What principles emerge from these cases on liability for statutory registrars? What will be the position under the GMA where the register is inaccurate?
Whilst this piece does not note every case in which tortious liability for breach of duty by a statutory registrar was claimed, it has not been easy to find many cases in which such liability was found to exist. *Sebry* appears very much to be an exception that proves a rule that statutory registrars seem to escape liability when their registers are wrong and those relying on that data suffer loss. *Clerk & Lindsell*[68] seek to explain *Sebry* as occurring from a positive (wrongful) act committed by the Registrar of Companies. *Schubert Murphy* is a weaker case because the court declined to allow a strike out application saying there was sufficient there to allow the case to proceed to trial – which it did not as it settled.

All the other cases show the statutory registrar has escaped liability and 3 of these are at Court of Appeal level. In *Reeman* although a fishing vessel was incorrectly issued with a statutory certificate of seaworthiness, the Department of Transport avoided liability to the buy of that boat who relied on that certificate and bought a worthless boat on the basis of proximity. Will the Registrar of Goods Mortgages similarly avoid liability to those who rely on entries on its statutory register? Whilst the *Santander* decision feels about right as it was an ambitious attempt by a lender to offload its fraud losses onto the Keeper of the Registers of Scotland, the Registrar of Goods Mortgages is also going to encounter fraud. This could be an attempt to wipe the register clean (as in *Santander*) or failing to cross-reference relevant data from other statutory registers such as in *St John Poulton's Trustee* or *Smeaton.* At the moment it is not clear what liability, if any, the Registrar of Goods Mortgages will have for fraudulent entries on its register.

In *Smeaton* we also see that the Court of Appeal refused to allow a co-extensive duty of care in tort to arise because it said the DPA 1998 provided a complete code. Is this what will happen in the future when the Registrar of Goods Mortgages faces a similar claim? The only Supreme Court case we have in this area is *Durkin*. There it was held that a lender was under a positive duty, having been put on notice that something was wrong, before it continued reporting an account as in arrears to a CRA. Lord Hodge awarded damages of £8000 against the lender (the CRA not being a party to the action). Will there be a corresponding positive duty on lenders in relation to the Register of Goods Mortgage that will fix liability in the same way as in *Durkin*?

Finally in relation to *Grace,* Lord Justice Briggs ruled that shortcomings in a CRA's registration system cannot excuse an inaccurate registration and that where there were such shortcomings then inaccurate registrations should not be made. Briggs LJ allowed the appeal on a narrow basis on 1 point when he ruled that rregistration of an inaccurate debt constituted a breach of the 4th data protection principle. This appears to be a decision on a wider more principled basis. Will lenders or others registering data with the Registrar of Goods Mortgages end up with similar liability? At the moment we don't know – the Law Commission Report does not address this and we don't know what will be in any Bill presented to Parliament or how it will be amended. Clearly this is ripe territory for investigation and clarification when any bill reaches the upper chamber for amendment.

[68] Supplement to 21st edition, 2014. Professors Michael A Jones and Anthony Dugdale

Will the GMA mean the *Twitchings* is over turned?
One of the reasons the majority of the House of Lords ruled as they did in *Twitchings* was because HPI was a voluntary scheme. As the proposed Register of Goods Mortgages will be a compulsory registration scheme, then this distinction will go. Whilst this is not addressed head-on in the Law Commission Report, the inevitable consequence of its proposals is that any Bill introduced to Parliament to enact these proposals will involve the reversal of *Twitchings* at least as it relates to entries on the Register of Goods Mortgages

What is going to happen next with the Law Commission's proposals?
Very disappointingly, the Law Commission has not done a very good job here. You would normally expect a draft Bill to accompany a report of this nature but none has been produced. The Law Commission has then compounded this by suggesting that its proposals are '*suitable for introduction into Parliament through the special procedure*[69] *for uncontroversial Law Commission Bills'*[70]. As can be seen from the criticisms made in this paper, the proposals are far from uncontroversial. They are eminently not suitable for a parliamentary procedure that avoids proper scrutiny of their effects. The Report was commissioned by HM Treasury[71] but the Law Commission does not direct its report to HM Treasury but rather oddly to the Secretary of State of Justice. There is no explanation for this especially given the focus in the Law Commission report on consumer credit lending which it acknowledges is regulated by the FCA for whom HM Treasury is responsible legislatively.

22nd November 2016

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[69] House of Commons Briefing Note SN/PC/1756
[70] Paragraph 1.14, page 3
[71] Terms of Reference - para 1.9 page 2