Chapter 1

HISTORICAL BACKGROUND

In **National Provincial Bank Ltd v Ainsworth [1965] AC 1175**, the question was whether a married woman whose rights at common law were to be provided with a roof over her head by her husband was to bind third parties to whom the husband had transferred the matrimonial home to. The House of Lords held that such rights were rights in personam and therefore did not bind third parties, even if they had notice of the woman's rights. The only protection which the woman had was to stop her husband from disposing of or selling the matrimonial home to a purchaser. If she was unsuccessful in stopping this sale, her rights would not bind the purchaser, and although she would be entitled to enforce her rights against her husband, this would not be an effective remedy, especially if the husband is insolvent.

The Matrimonial Homes Act 1967 was passed to remedy this situation where the woman or wife in the matrimonial home could effectively protect her rights against third parties. As the Law Commission put it, the object of the Act was not to protect the wife from violence, but to ensure that she had a roof over her head, by giving rights of occupation in the matrimonial home. In **Tarr v Tarr [1973] AC 254**, the House of Lords held that the courts had no jurisdiction under the Act to order the legal owner of the house to leave it altogether as distinct from only occupying part of it. The defect was remedied by **section 3** of the **Domestic Violence and matrimonial Proceedings Act 1976**. The legislation which is now consolidated in the **Matrimonial Homes Act 1983** constitutes an elaborate code regulating the rights of spouses in relation to the matrimonial home; see **Richards v Richards [1984]** where the House of Lords held that the effect of the Act was to "codify and spell out...the jurisdiction of the High Court and County Court in Ouster injunctions between spouses whether in pending proceedings or by way of Originating applications....."

THE STATUTORY RIGHT CONFERRED BY THE MATRIMONIAL HOMES ACT

The primary aim of the Act was to give a spouse in occupation a right not to be evicted from the home, during the marriage unless the court otherwise ordered. The Act is to protect occupation rights and not any financial expectation the spouse might have in the home.

The right not to be evicted is a purely personal right and therefore cannot be assigned. The Act however provides machinery where such a right can bind parties.

(a) Who is entitled to Protection under the Act?

A non-owning spouse – The Matrimonial Homes Act 1967 was designed to deal with the situation where one spouse (usually the wife) was at risk because the other spouse was the sole owner of the property and could deal with it i.e. by mortgaging or selling without her consent or knowledge. **Section 1 (1) of the Act** therefore confers certain rights on the non-owning spouse.

Joint owners – At first, it was thought unnecessary to make the Act apply where the legal estate was vested in both spouses, because in such cases, no effective disposition of the property could take place without both spouses concurrence. There was therefore no need to provide protection against third parties. But a problem arose where, for example, the legal estate was vested in one spouse on trust for himself and his wife as joint owners, so that the wife had a mere equitable interest in the

property. In such case, the equitable owners interest might be defeated by a sale to a third party without notice, see **Caunce v Caunce [1969] 1 WLR**, but it was arguable that as equitable owner, the wife was entitled to rights of occupation which she could protect under the Act. In 1970, the Act was therefore amended by the **Matrimonial Proceedings and Property Act 1970 (Section 38 which is now in Section 1 (11) of the Matrimonial Homes Act 1983)** to enable such a wife to protect her rights of occupation without prejudicing any claim she might have to a proprietary interest. Finally, in the **Domestic Violence and matrimonial Proceedings Act 1976, Section 4 (now consolidated as Section 9 of the Matrimonial Homes Act 1983)**, it was decided that although joint owners did not need the protection given by the Act against dispositions by one of them to a third party. It might nevertheless be appropriate to allow a joint owner to apply to the court to resolve disputes about the occupation of the home. The Act was amended and now permits applications to be made to the court for orders dealing with the exercise of the right to occupy the homes in cases where each of two spouses is entitled, by virtue of legal estate vested in them jointly, to occupy a dwelling house.

Persons who cannot apply

If neither spouse has an entitlement by reason of a beneficial interest, a contract, or an enactment giving him or her the right to remain in occupation of the property, then no application under the Act can be made. This might be the case if the spouses were licencees or were living in houses provided by their parents or by their employer.

The Act will not apply in respect of a house which was not a matrimonial home of the spouses in question, and no application can be made by persons who simply live together as husband and wife.

(b) The nature and extent of the rights protected

Section 1(1)(a) of the Act defines the rights of occupation conferred in it as follows:

(a) If in occupation, a right not to be evicted or excluded from the dwelling house or any part thereof by the other spouse except with the leave of the court given by an order under this section.;

(b) If not in occupation, a right with the leave of the court so given "to enter into and occupy the dwelling house".

As said earlier, these rights are personal in nature and are non-assignable. They come to an end on termination of the marriage by death or legal process **(O'Malley v O'Malley [1982] 1 WLR 244)**. Unless the court has otherwise ordered, they are void against the husband's trustee in bankruptcy; and there is thus no protection under the Act for the wife if her husband is adjudicated bankrupt or dies insolvent.

(c) How can the rights conferred by the Act be enforced?

Section 1(2) of the Act provides that "so long as one spouse has rights of occupation, either of the spouses may apply to the court for an order – (a) declaring, enforcing, restricting or terminating those rights; (b) prohibiting, suspending or restricting the exercise by either spouse

of the right to occupy the dwelling house, or (c) requiring either spouse to permit the exercise by the other of that part".

Two preliminary points should be noted about this provision. First, the rights which this section of the Act confers lasts only so long as one spouse has "rights of occupation" – that is to say, so long as (a) one spouse is entitled to remain in occupation "by virtue of a beneficial estate or interest or contract" or by virtue of an enactment and (b) the other is not so entitled. Thus, if the owner has sold his interest to a third party, the non-owner will no longer have rights of occupation. The Act thus embodies the strange paradox that a person who is carefully excluded from the benefit of the rights conferred by the Act may nevertheless apply to the court in exactly the same way as if he had been given those rights. A joint owner does not need to be given a right to occupy since he has it already, but he may need to apply to the court for protection – but it can be said that it makes for easy comprehension.

Secondly, the Act draws a distinction between the powers of the court in respect of the non-owner's rights (the "rights of occupation") and the right of either spouse to "occupy" the dwelling house. Thus it is provided that the court may "declare, enforce, restrict or terminate" the non-owners rights of occupation; but in contrast that it may "prohibit, suspend or restrict" either spouse's right to occupy the house and also require the one to permit the other to exercise that right.

(d) Application of the Act to situations of domestic violence

In **Richards v Richards [1984] 1 AC 174**, the House of Lords as already mentioned held that the **Matrimonial Homes Act 1983** codifies and spells out the jurisdiction of the court in relation to ouster proceedings between spouses, and that applications during the subsistence of the marriage for orders relating to the occupation of the matrimonial home should be made under the Act.

It therefore follows, that an application for an ouster order must be made by originating summons in the High Court or County Court; and the summons should be accompanied by an affidavit giving evidence of the applicant's rights of occupation of the matrimonial home and the circumstances in which the application is made. The form of order applied for should be an order declaring the applicants rights of occupation of the matrimonial home, and (if ouster is sought) prohibiting the respondent from exercising any right to occupy such home from a specified date and time until further order.

This decision gave rise to many problems. For example, no jurisdiction under the **Matrimonial Homes Act 1983** to grant a non – molestation order, and a separate application (under the **Domestic Violence and Matrimonial Proceedings Act 1976** or in matrimonial proceedings) will be necessary if such an order is also required. Moreover, there seems to be no power under the Act to prohibit the respondent from coming into the neighbourhood of the house – such orders are thought to be desirable in order to give the wife protection. The question also arises whether an order under the Act is an injunction at all because this is important since a power of arrest can only be attached to an injunction.

The Matrimonial Homes Act lays down a test to be applied by the courts in exercising its discretion under the Act; and the test attaches less weight to the interests of the children than had sometimes been thought appropriate in dealing applications for ouster injunctions.

(e) What factors should the court take into account in deciding applications under the Act?

Section 1(3) of the Act provides that the court may on an application make "such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case", and in **Richards v Richards [1984] 1 AC 174**, the House of Lords held that the criteria to be applied in determining applications for ouster orders are those set out in this provision and not any other criteria. "Sometimes treated as paramount by reported decisions of the court".

The principles which had evolved in judicial decisions dealing with ouster applications before the decision in Richards v Richards.

By 1971, the courts adopted a restrictive attitude to the grant of injunctions excluding a man from the family home, and it was said that such orders would only be granted where it was "impossible" or "intolerable" for the parties to continue to live together under the same roof, so that an injunction was necessary for the protection of the wife and children **(Hall v Hall [1971] 1 WLR 404)**. However in the course of the 1970's the courts took a more liberal approach in granting ouster orders. Indeed, according to one line of authority, if there were young children involved it was irrelevant whether (for example) a wife who had left the matrimonial home and then sought an order ousting the husband, had reasonable grounds for refusing to live in the same house as him **(Samson v Samson [1982] 1 WLR 252 CA)**. For this view, the welfare of the children was the first and paramount consideration and accordingly governed the outcome of the case, irrespective of whether the result achieved justice between the parties.

In **Richards v Richards [1984] 1 AC 174**, the wife who had filed a divorce petition containing allegations described by the judge and her counsel respectively as "rubbishy" and "flimsy in the extreme" left the matrimonial home, so that she could return there with the children. She told the judge that she could not bear to be in the same household as the husband' but the judge found that the wife had no reasonable grounds for refusing to live in the same house as her husband, and expressed the view that it would be "thoroughly unjust" to turn him out of the house. Nevertheless he granted the order in the interest of the children, commenting that "justice no longer seems to play any part in this branch of the law".

The House of Lords unanimously held that on the facts, the order should not have been made. In Lord Scarman's (dissenting) view, this was because, although the children's welfare was the first and paramount consideration in deciding such applications, an ouster order was not, on the facts of the case needed in the interests of the children. The other members of the House however went further. They did not accept that the needs of the children were the "first and paramount" consideration in dealing with applications for ouster orders (as distinct from applications in which the legal custody or upbringing of a child was directly in issue, when the principle that the child's welfare is the "first and paramount" consideration is embodied in statute). See **section 1** of the **Guardianship of Minors Act 1971.**

On this view, although the needs of the children are indeed by reason of the wording of **section 1(3) of the Matrimonial Homes Act 1983**, one of the matters to which the court is required to have regard in deciding applications for ouster orders, (and although it was admitted that there may indeed be cases in which those needs are "so claimant as in the circumstances of the case require them to be given paramountcy") it is wrong to regard the welfare of the children as being in principle, the first and paramount consideration. Instead, the court must consider all the matters referred to in **section 1(3) of the Act** – that is to say (1) the conduct of the spouses to each other and otherwise; (2) the respective needs of any children; and (4) all the circumstances of the case. None of these matters is made necessarily of more weight than the others; "the weight to be given to any particular one of them must depend on the facts of each case, and the essential requirement is that the order should be "just and reasonable".

(f) How far a spouse's right of occupation be made to bind third parties.

The main purpose of the **Matrimonial Homes Act 1967** was to remedy the mischief exposed by the decision of the House of Lords in **National Provincial Bank Ltd v Ainsworth [1965] AC 1175**. The Act therefore provides machinery whereby the rights of occupation enjoyed by a spouse in occupation of the matrimonial home may be protected against third parties. **Section 2(1) of the Act** provides that where at any time during the subsistence of a marriage, one spouse is entitled to occupy a dwelling house by virtue of a beneficial estate or interest "having the like priority as if it were an equitable interest created at whichever is the latest of the following dates, that is to say – (a) the date when (the husband)...acquires the estate or interest; (b) the date of the marriage; (c) the 1st January 1968...."

Thus, if H buys a house in July 1980, and gets married on November 1st 1980, the wife's charge will attach as from the latter date. The charge is registerable as a Class F land charge. See **section 2(7) of the Land Charges Act 1972**. Unless and until so registered, the charge will be void against a purchaser of the land or of any interest therein. This outlaws the terrible and difficult task for the purchaser making embarrassing enquiries about the vendor's matrimonial status. It is a comparatively simple matter for the wife to register, and thus protect her rights.

There is provision to enable the spouse (usually the wife) to postpone her charge to another person or to release it altogether; there is also provision protecting the position of a contracting purchaser: See **sections 6 of the Matrimonial Homes Act 1983.**

Accordingly, in practice but not in theory, registration of a wife's rights under the Act may well prevent the husband from dealing with the property at all, without the wife's consent. One spouse may, therefore, be tempted to register a charge as a tactful device to exert pressure on the other to come to some financial arrangement. This is a misuse of the Act, but it is not easy to ensure that it does not occur.

However, it is important to note that the act of registration does not extend to rights enjoyed under the Act. It is expressly provided that the rights of occupation shall be bought to an end by the death of the other spouse or by the termination (other than by death) of the marriage unless in the event of a matrimonial dispute or estrangement the court sees fit to direct otherwise by an order made during the subsistence of the marriage; and the only way in which the rights of occupation can be effectively crystallised is thus by application to the court for an order. Such an

order will bind third parties if the rights of occupation are protected by registration, but not otherwise. In the case of a mortgage on property, the spouse concerned has a statutory right to be served with notice of any action for the enforcement of the mortgage; and he may then be able to persuade the court to exercise its statutory powers to postpone enforcement. See **section 8(3) of the Matrimonial Homes Act 1983**.

Registration in special cases

(i) Only one charge registerable

The spouse who has rights of occupation over more than one house can only make his rights over more than one house, can only make his rights over a single house bind a third party; but this does not affect the one spouse's right to apply to the court for orders against the other spouse dealing with his rights of occupation or the right to occupy any or all of the houses.

(ii) Registration by a joint owner

A spouse who owns jointly does not need to register under a Class F Land Charge. If however, the spouses interest is equitable – perhaps an interest arising under an implied resulting or constructive trust founded on his contributions to the acquisition of the property or the carrying out of the improvements to it, he will nevertheless have rights of occupation and those rights will constitute a charge on the others beneficial estate or interest, and will be registerable accordingly.

(iii) The spouse who is not in occupation

The woman who is not in occupation and has no proprietary interest could only enter and occupy dwellings by leave of the court. It was argued that until the leave of the court was obtained, the woman had no charge, and if there was no charge, there was nothing to register. However, this reasoning was rejected by **Watts v Waller [1973] QB 153**. It has also been held that the non-occupying spouse has a right of entry which is conditional on the courts leave being obtained. This is sufficient to give her a charge registerable under the definition in the Act.

(iv) Does the common law protect unregistered rights of occupation?

As mentioned earlier, a wife who fails to register her interests will lose them against a bona fide purchaser. But it is perhaps possible to argue that she will not do so if the sale is a 'sham' as distinct from a genuine sale. See **Miles v Bull No 1 [1969] 1 QB 258**

(g) **Miscellaneous rights under the Matrimonial Homes Act 1983**

The right to pay outgoings – **Section 1(5) of the Act** provides that where a spouse is entitled under **section 1** to occupy a dwelling house or any part thereof, any payment or tender made by him in or towards satisfaction of any liability of the other spouse in respect of rent, rates, mortgage payments or other outgoings affecting the dwelling house shall be as good as made or done by the other spouse. The section goes on to say that a mortgagee may treat the payment as having been made by the other spouse, but that will not affect the right of the paying spouse to claim that he has acquired an interest in the property by virtue of the payment, under the doctrines discussed in **section 1(7) of the Act.**

(h) Application of the Matrimonial Homes Act to rented property

A tenant's wife during the currency of the marriage will have rights of occupation under section **1(1) of the Act**. She therefore cannot be evicted by her husband and can apply to the courts to declare and fix her rights. This is provided by **section 1(2) of the statute**.

The Act also confers special protection:

(a) Any payment of rent or rates by a spouse (wife) is as good as if made or done by the other spouse. Hence, so long as she pays the rent, the landlord cannot evict her.

(b) The wife's occupation is treated for the purposes of the Rents Acts as possession by the other spouse. The effect of this provision is to preserve for the wife, the complex rights of security of tenure conferred by the Rent Acts.

Transfer of Tenancies

Section 7 and Schedule 1 of the Matrimonial Homes Act 1983 provides that the court may on granting a decree of divorce, nullify or judicial separation, or at any time thereafter, order the transfer to the other party of certain tenancies protected by legislation.

Chapter 2

THE SPOUSES RIGHTS OF OCCUPATION AGAINST THIRD PARTIES

At common law, a wife has a right of occupation in the matrimonial home, but this does not necessarily mean that these rights will allow the wife in sharing residential accommodation in which her husband has set up a new home with a different partner. See **Nanda v Nanda [1968] p 351 at 354C, 357 D-E.** Her common law right of occupation is suis generis, in that the right to be housed by her husband arises from the fact of marriage itself and is an integral component of the dependency related notion of spousal maintenance. As already mentioned, the leading authority in **National Provincial Bank v Ainsworth [1965]** has emphasised that the wife's common law right of occupation is binding only on her husband and is not enforceable against third parties. But according to **Lee v Lee [1952] 2 QB 489 at 491F**, if the right of occupation is threatened by a sale of the matrimonial home by the husband, the wife could seek a court injunction in order to have the sale restrained. This injunction is always available except of course the husband provides the wife with alternative accommodation. However, the Matrimonial Homes Act now provides a process of registration by which mere rights in personam may effectively be transformed into rights in rem.

(1) Development of the Occupational Rights Enforceable Against Persons Outside the Family

In the 1950's the Court of Appeal developed the doctrine of the 'deserted wife's equity' in order to protect occupation claims in the family home against the assertion of rights by third parties. This doctrine held that if a husband abandoned his wife, leaving her in occupation of the matrimonial home, the deserted wife acquired at the date of desertion an 'equity' which could successfully oppose against any third party to whom her husband sold or mortgaged the home. And thus the common law rights of occupation enjoyed by the deserted wife were binding on any purchaser who took with notice of those rights. However, the 'deserted wife's equity' became a nightmare for practising conveyancers, since it represented an unregisterable, non-overreachable incumbrance which could bind purchasers on the basis of even constructive notice. In effect, the doctrine imposed an embarrassing onus of enquiry on any third party entering into any transaction with a man whose household included a resident adult female.

(2) The Modern Law

Because of these advantages, the 'deserted wife's equity' was finally destroyed in **National provincial Bank Ltd v Ainsworth [1965]**. It was replaced two years later by the **Matrimonial Homes Act 1967 (now consolidated as the Matrimonial Homes Act 1983)**. And as said earlier, the Act provided a process of registration.

(a) Process of registration

Section 2(1) of the Matrimonial Homes Act 1983 provides that where a spouse enjoys statutory 'rights of occupation' under the Act, the rights will constitute a registerable charge on any beneficial estate or interest held by the other spouse.

(i) **Entry in the register**

If the land is unregistered, a Matrimonial Homes Act Charge may be registered against the name of the relevant legal owner as a Class F Land Charge, as in **section 2(1), (7) of the Land Charges Act 1972**. On the other hand, if the land is registered, it may be entered by notice as a minor interest affecting the appropriate registered title. This is provided by **Section 2(8)(a) of the Matrimonial Homes Act 1983**. The statutory 'rights of occupation' may not be protected by the lodging of a caution as in **Section 2(9) of the Matrimonial Homes Act 1983**, but the entry of a notice in the register of title does not (unlike most cases of entry of a notice) require the production of the land certificate of the registered proprietor. (**Land Registration Act 1925, Section 64(5) as supplied by section 4(1) of the Matrimonial Homes and Property Act 1981**). A notice may thus be without the knowledge of the other spouse. The Law Commission (Property Law Third Report on Land Registration (Law Comm No 158, 31 March 1987), Para 4.41) has recommended that the statutory rights should henceforth be protected by notice only if the registered proprietor consents to the entry, and should in all other cases be protected by the entry of a caution. The mere fact that the spouse is not in occupation because he or she has been expelled from the matrimonial home or because he or she has left voluntarily will not prevent the entry in the register, but the spouse is only entitled to register only one dwelling house at a time as provided by **section 3 of the Matrimonial Homes Act 1983**.

(ii) **Registration for ulterior motives**

It seems, somewhat controversial to be the 'positive practice' of the Registry not to serve notice of the application for registration upon the owner of the legal estate. See **Wroth v Tyler [1974] ch 30 at 39B**. It has been criticised that the Matrimonial Homes Act facilitates 'spite' registrations, and Megarry J observed in Wroth v Tyler [1974] ch 30ch 30 at 46B that this piece of legislation has 'put into the hands of all spouses with statutory rights of occupation a weapon of great power and flexibility'. The registering spouse is usually presented with a very simple, speedy and secret means of preventing any proposed sale of the matrimonial home, which he or she disagrees. The ruthless spouse is thus enabled to force on his partner a purely private and unshared desire for domestic inertia or, even worse, is enabled to require the other spouse to buy off the charge. Considerations such as these led Megarry J in Wroth v Tyler to condemn the Matrimonial Homes Act charge as a 'companion in obloquy for what in Keeves v Dean....Scrutton LJ stigmatised as monstrum horrendum informe ingens'. This issue is dealt with in much more detail in later chapters.

(iii) Release of rights and cancellation of registration

Registered 'rights of occupation under the **Matrimonial Homes Act** ceases to have effect on the death of the spouse against whose estate they are registered. This is provided by **section 2(4)(a) of the Act. Section 2(4)(b)** provides that these rights normally come to an end on the termination of a marriage otherwise than by death. There is provision for cancellation of any registration of the statutory rights in either of these events or if the court itself exercises its discretion to terminate one spouse's 'rights of occupation'. See **section 5(1) of the Matrimonial Homes Act 1983. Section 6(3)** of the Act provides that a spouse can release his rights by writing or may in writing agree that his rights are to be cancelled, or to be postponed until some later date.

It is an implied term of any contract for the sale of a home with vacant possession that the vendor will have to ensure that any registration of subsisting 'rights of occupation' are cancelled.

Considerable problems usually occur if the vendor fails to secure the release of his spouses 'rights of occupation' and the cancellation of any existing registration. Such problems arose in **Wroth v Tyler** where the spiteful and ruthless wife released her rights when the husband who was going to sell the home was in the final day of exchanging contracts. The husband suffered grave financial setbacks and had to be declared bankrupt as he could not pay for damages on his breach of the contract. The wife's rights were also defeated in any event by her husband's trustees in bankruptcy.

(b) Effect of Registration

Registration of these rights becomes binding on and enforceable against almost all third parties. The only exception to this principle relates to the trustee in bankruptcy of the spouse against whom registration is affected. These 'rights of occupation' even though duly registered, are at best effective for only a limited period against such a trustee in bankruptcy. See **section 336(2) – (5) of the Insolvency Act 1986**, displacing the effect of **section 2(7) of the Matrimonial Homes Act 1983**. In the event of bankruptcy, such rights can now be terminated only on application to the bankruptcy court, which is statutorily directed to make 'such order....as it thinks just and reasonable'. See **section 336(4) of the Insolvency Act 1986**. The court's discretion is structured by reference to a number of statutory criteria. These criteria, which are similar to those which govern applications to terminate the 'rights of occupation' of the bankrupt himself. The criteria are adopted to include reference also to the conduct of the spouse 'so far as contributing to the bankruptcy'. See **section 336(4)(b) of the Insolvency Act 1986**, the needs and financial resources of the spouse is provided for by **section 336(4)(c)** and of course the needs of any children as provided by **section 336(4)(d)** are controlled by the injunction that the interests of the bankrupt's creditors shall normally be regarded as paramount in all applications made more than one year after the vesting of the bankrupt's estate in his trustee. See **section 336(5) of the Insolvency Act 1986**.

(c) Consequences of non-registration

A spouse's failure to register the statutory 'rights of occupation' has the consequence of becoming ineffective against a purchaser for value of any interest in the property. See **Miles v Bull [1969] 1 QB 258; Miles v Bull (No 2) [1969] 3 All ER 1585**. Moreover, in relation to registered land **section 2(8)(b) of the Matrimonial Homes Act 1983** specifically excludes any possibility that the unprotected rights may be claimed as an overriding interest even on behalf of a spouse who remains 'in actual occupation' of the matrimonial home.

Other methods of protecting 'occupational rights against third parties – Overriding interests under section 70(1)(G) of the Land Registration Act 1925

Overriding interests, as defined in the **Land Registration Act 1925**, are interests which bind the transferee of registered land, not withstanding that they are not recorded on the face of the register and notwithstanding that the transferee may have no actual knowledge of their existence. They are quite literally 'overriding'. Cumulatively they represent a group of interests in registered land which have been singled out either as having such distinct social importance or as involving such technical

conveyancing difficulty as to merit a protection which derives not from the force of the register but from the force of statute. There is no doubt that the most dramatic species of overriding interest is that referred to in **section 70(1)(g) of the Land Registration Act 1925.** It comprises of the rights of every person in actual occupation of the land or in receipt of the rent and profits thereof, save where enquiry is made of such person and the rights are not disclosed.

Lord Denning MR in **Strand Securities Ltd v Caswell [1965] ch 958 at 979 G** described it as being able to 'protect a person in actual occupation of the land from having his rights lost in the 'welter of registration'. Such a person may simply 'stay there and do nothing', but will nevertheless be protected since 'no one can buy the land over his head and thereby take away or diminish his rights'.

As a result of the interpretation given to this provision by the House of Lords in **Williams & Glyns Bank Ltd v Boland [1981] AC 487**, it is probable that the equitable interests enjoyed by spouses and other family members will often fall within this definition; in the result, they will be capable of binding purchasers notwithstanding the fact that no reference to them appears in the register. In that case, Mr. Boland bought a house in his sole name (the land was registered land) and went to live there with his wife and son. The wife made a substantial contribution to the purchase price. A loan was subsequently guaranteed to the husband by the bank to which he charged the house as security. The bank made no enquiries about the wife's interest. Subsequently, the bank brought proceedings for possession, with a view to its sale with vacant possession and to recover their money from the proceeds, as so much of the loan had remained due. Mrs Boland maintained that she had rights which prevailed against those of the bank. She claimed that she was entitled to a property interest in the house by reason of her contribution to the purchase; that she occupied the house and was entitled to continue to occupy it; and that her rights constituted an 'overriding interest' under **section 70(1)(g) of the Land Registration Act 1925**, which prevailed against the bank. The bank succeeded at first instance, but the judgement was reversed by the Court of Appeal, whose decision was unanimously upheld by the House of Lords. Their Lordships were of the opinion that the wife (Mrs Boland) was entitled to resist claims for possession bought by the bank because they were in actual occupation of the land within **section 70(1)(g)** and thus had an overriding interest to which the bank's charges were subject. This case was heard together with a similar appeal in Williams and Glyns Bank v Brown and has also due to its decision, given rise to a number of difficult conveyancing problems expressed by the Law Commission.

The position would have been quite different if the bank had advanced capital money to two trustees. This was discussed by the Court of appeal in **City of London Building Society v Flegg [1987] 2 WLR 1266** where Lord Templeman distinguished Boland from the present case on the basis that "if the wife's interest had been overreached by the mortgagee advancing capital moneys to two trustees, there would have been nothing to justify the wife in remaining in occupation as against the mortgagee. There must be a combination of an interest which justified continuing occupation plus actual occupation to constitute an overriding interest. Actual occupation is not an interest in itself".

The question is usually whether the purchaser has made such inspections as is reasonable to have been made under **section 199 of the Law of Property act 1925**. A purchaser is treated as having notice of the wife's rights if she is in occupation of the property at the time of the transaction. In **Kingsnorth Trust ltd v Tizard [1986] 2 All ER 54**, the court was faced with a case where the disputed property had an unregistered title. The question was whether the plaintiff's legal mortgage was

subject to the wife's agreed equitable rights in the house. The purchaser was held to be bound by the wife's interest, notwithstanding the fact that his surveyor had inspected the property and seen no evidence of occupation by her or any other female. This was because inspection had taken place by prior appointment on a Sunday afternoon and the husband had been able to conceal any evidence of his wife's existence. In the course of his judgement the Judge said "If the purchaser or mortgagee carries out such inspections 'as ought reasonably to be made' and does not either find the claimant in occupation or find evidence of that occupation reasonably sufficient to give notice of the occupation, then I am not persuaded that the purchaser or mortgagee is in such circumstances fixed with notice of the claimants rights".

Rights excluded from the scope of section 70(1)(g) of the Land Registration Act 1925

It is quite consistent that **section 70(1)(g) of the Land Registration Act 1925** should exclude from its ambit those rights which, although related to land in some broad sense, are classified either by statute or by the general law of property as mere rights in personam. The section therefore does not include rights which are in essence purely personal or contractual.

(i) Personal Rights to Occupy the Matrimonial Home

In **National Provincial Bank v Ainsworth [1965] AC 1175** the House of Lords finally, but conclusively, rejected the idea that this 'equity' could be anything more than a merely personal right effective only against the other spouse. In view of its nature and origin, the wife's 'equity' could rank under the general law as a right in rem and, since it therefore lacked an essential proprietary character, it fell outside the scope of **section 70(1)(g)**. These rights have been preserved in the matrimonial Homes Act, which as already mentioned confers statutory 'rights of occupation' on specified categories of spouse.

(ii) Contractual Licence

The general rule is that the rights of a contractual licensee bind only the licensor, and purchasers are never affected by a contractual licence, even though they purchase with express notice of the licensee's rights. But in **National provincial Bank Ltd v Hastings Car Movt Ltd [1964] ch 665 at 688F**, Lord Denning MR seemed prepared to include the contractual occupation licence as one of the 'rights' covered by **section 70(1)(g)**. This approach conflicts with the conventional understanding of the general rule, but for the time being, it is highly doubtful whether such rights as the contractual licence can properly be described as 'rights' which come within the threshold of **section 70(1)(g)**.

(iii) Collateral Contractual Rights

It is quite clear that collateral contractual rights cannot rank as overriding interests under **section 70(1)(g)**, even on behalf of a person in actual occupation of the land. This result inevitably follows even though such rights may be collateral to other rights of a proprietary nature which undoubtedly do come within the compass of **section 70(1)(g)**. In **Eden Estates Ltd v Longman (Unreported, 19 May 1980 [1982] conv 239 (PH Kenny))**, a tenant agreed on taking his tenancy to pay the landlord a deposit as security against non-payment of rent or breach of other covenants in the lease. The court of appeal refused to hold that this collateral agreement would bind a subsequent assignee of the landlord's interest, notwithstanding that it appeared to be

entirely verbal in origin. And so, even though, the tenant had remained at all times in ‘actual occupation’, his contractual right to recover his deposit could not generate an overriding interest under **section 70(1)(g)**.

Chapter 3

CRITICISMS OF THE REGISTRATION REQUIREMENT

According to Lord Denning in **Williams and Glyns Bank v Boland [1979] ch 312**, the wife was at a severe disadvantage because she had never heard of the class F Land Charge before "....this was immediately rectified to some extent by the matrimonial Homes Act 1967. It gave her a charge on the house: but it was subject to this severe restriction: it had to be registered as a class F Land Charge, and not all of the deserted wife's had sufficient knowledge or advice to do this. That Act (as it was passed in 1967) did not apply to a wife who was entitled to a share in the house. Her position was remedied to a slight extent in 1970 by **section 38 of the Matrimonial Proceedings and Property Act 1970**. It enables a wife, who has a share, to register a class F charge. But that amendment was of precious little use to her, at any rate when she was still living at home in peace with her husband. She would never have heard of a class F charge: and she would not have understood it, if she had". But perhaps this argument by Lord Denning is too far stretched, because there is evidence that registration is fairly widespread. For instance, according to the Annual Report of the Chief Land Registrar (1977 -78) there were about 10,687 applications in respect of registered land. Admittedly, most of these applications arise out of a matrimonial dispute as a way of protecting the deserted wife's interest in the home, but it must be remembered that it is mainly in cases of dispute that the need for registration arises. It has been said that joint owners i.e. a wife who owns a share in the matrimonial home, suffers no disadvantage, and in such a case the harmony of married life renders legal protection unnecessary.

The Matrimonial Homes Act contains nothing to require prior notice of any transaction to be given to the wife. Megarry J noticed this problem in **Miles v Bull [1968]** and in his own words: "...the Act of 1967 contains nothing to require prior notice of any proposed transaction to be given to the occupying spouse, and so where, as here, that spouse does not learn of the transaction until too late, the Act provides no protection". So that, by the time the wife registers her interest through a solicitor, the husband might have carried out transactions (the selling of the matrimonial home) to her disadvantage. This problem may not arise if it was a routine that whenever a matrimonial home is bought, the charge should be registered by the wife immediately, even if relations between them are good, then no one will suffer. But if relations deteriorated, the wife would be adequately protected without the necessity of taking any steps which could be seen as hostile to her husband. However, according to Meggary J in Wroth v Tyler [1974], this is not the present practice. The reason being that the Lord Chancellor was of the opinion that there would be a swamp of applications from wives all over the country in the Land Registry, as he put it, "It is not intended that houses of married couples who are living happily together should be subject to charges on the Land Registry by the wives. Indeed, it would place the staff of the Land Registry in considerable difficulties if they in fact did so". Baroness Summerskill agreed enthusiastically with this statement. Another reason was that if solicitors were consulted by both husband and wife, it might come to be regarded as a duty to inform the wife if rights were conferred on her by the Act, but it by no means follows that the solicitor should go on to advise the wife to register a land charge, if he/she had no reason to suppose that the marriage was anything but a happy one. If the husband was alone the solicitor's client, the latter would be reluctant in taking steps that would be adverse to his

client's interests. The result of this, it has been argued, is that the remedy under the Act is 'too little and perhaps too late'. There is also some doubt as to how protection of an interest is to be truly effective if it means depending on registration.

It has been argued that when registration is done in haste (in order to defeat the proposed transaction of the husband or estate owner whatever be the case) the solicitor might have a few difficulties in making such registration effective. Firstly, the wife concerned may not know whether the title is registered or not with the consequence of the solicitor registering a Class F land charge, rather than a notice or caution. Obviously, such registration will be ineffective and will cause further problems for the wife. But such a problem could be solved, because, even though it will be time consuming, solicitors can now find out if a title is registered by searching the index map. Secondly, in order to be effective, the name of the owner has to be in full and correct. It has been common practice for incorrect names to be registered and a purchaser will therefore not be bound against this incorrect registration. See **Diligent Finance Co Ltd v Alleyne [1971] 23 P & CR 346**, where the title was in 'Erskine Owen Alleyne' and registration against 'Erskine Alleyne' was ineffective; **cf Oak Co-operative Building Society v Blackburn [1968] ch 730**.

The wife may assume that registration of the charge gives her a greater degree of security than is in fact the case, and thus be lulled into a false sense of security. For instance, registration will not give her any protection against a prior incumbrancer who has taken the necessary steps to safeguard his rights. The wife's charge may well have priority from the date when the house was acquired **(see section 2(1) of the Act)**, but it will be void against a purchaser if unregistered see **Section 4(2) of the Land Charges Act 1972**. Hence, it will invariably be void against the building society which advances the purchase price as in **Hastings and Thanet Building Society v Goddard [1970] 1 WLR 1544**. **Section 1(5) of the Act** however gives her some form of protection because if she can find the money to keep up the mortgage instalments, she will in practice be able to keep the home, making payment by her as if made by her husband.

Secondly, registration will only protect against a third party the wife's rights such as they are. In particular, the rights being essentially personal, they come to an end if the husband dies or obtains a divorce unless application has previously been made to the court to extend them. See **section 2(2) of the Act**. If he dies, the wife will have to rely on whatever rights that she might have under the **Inheritance (Family Provision) Act 1938**. An increasingly serious threat is that the husband may obtain a foreign divorce which, if recognised here (as will often be the case: **Recognition of Divorces and Legal Separation Act 1971**) effectively deprives the wife of any rights at all. See **Turczak v Turczak [1970]**.

Finally as already mentioned, the case of **Wroth v Tyler [1973] 2 WLR 405**, shows that the Act may also be a menace to husbands and innocent purchasers, not to say their advisers. Briefly, in that case the plaintiffs contracted to buy the defendant's bungalow (the title to which was registered) for £6,000. The defendant's title was satisfactory except that just one day after contracts had been exchanged, his wife registered a notice protecting her rights under the Matrimonial Homes Act. The apparent reason for this was that she and her daughter did not wish to move. There was the question of the defendant attempting to deprive his wife of a home. She did not mention this fact to her husband, nor did anyone else, but the Land Registry

notified the mortgagee, who notified Mr. Tyler. The latter unable to persuade his wife to cancel the notice, and so he withdrew from the sale.

The plaintiffs sought specific performance and damages. By the completion date, the bungalow's value had risen to £7,500 and had rocketed to £11,500 at the time of the judgement. Five main issues were involved; entitlement to specific performance subject to the wife's statutory rights; whether specific performance was barred by delay; whether the rule in **Bain v Fothergill** limited damages and whether the measure of full damages should be £1,500 (being the difference between the contract price and the then value of the house) against the husband. The wife rejected a last minute attempt by the judge to enable the husband to extricate himself from the consequences of her act. She did not take part in the action, and it was not clear what her attitude to the problem was. A letter which she wrote to her husband's solicitor when the Class F Charge was first discovered suggests some lack of understanding of the legal consequences of a breach of contract;

"Dear Sir, I understand from my husband that we will probably have to pay about £800 {sic} due to withdrawal of the sale of the above address. This is nonsense, and as his solicitor it is up to you to see that he doesn't pay anything. Many of my friends have withdrawn sale of their houses, and not had to pay any compensation...."

It is difficult to know what she gained from the transaction; it seemed likely that the husband would be adjudicated bankrupt as a result of the judgement against him, in which his trustee in bankruptcy would be able to sell the property free of the wife's rights. See **section 2(5) of the Matrimonial Homes Act.** What is quite clear is that the Act has been used in circumstances where the wife was in no danger of being deprived of a roof over her head and to act in this way, has been held to be improper. The courts will usually set aside the registration as in **Barrett v Hassett [1981] 1 WLR 1385**.

Generally speaking, however, it may be thought that the registration requirement of the Act does not meet the specific problem it was designed to deal with, but as well as dealing with such problems, it also creates more. What then should be the remedy to this? Should the registration requirement be outlawed all together or should it be slightly modified? This will be the topic of discussion in chapter 4.

Chapter 4

ALTERNATIVE REMEDIES TO THE REGISTRATION REQUIREMENT

Wroth v Tyler was rendered dramatic by the extent of the damages, and the party's failure to settle the dispute at an early stage, when the damages would have been less, may have been due to the fact that the case raised certain questions of law, and it was by no means clear what the outcome would be. What **Wroth v Tyler** showed is that a vendor, such as the husband could find himself in enormous financial difficulties because of the wife's statutory occupational rights, and a purchaser may find he has sued the vendor where:

(i) the wife does not agree to the proposed transaction;

(ii) the husband binds himself by contract to complete the transaction, under which the purchaser is to take free from any right of the wife's;

(iii) the wife registers her right at any time, before or after the contract, before the purchaser makes his normal pre-completion official search of the register (or, if the purchaser has not made such a search, at any time before the completion of the transaction);

(iv) the purchaser discovers the registration before completion (as he is almost certain to do); and

(v) the wife is not prepared to withdraw the entry from the register.

The main objective of the **Matrimonial Homes Act** was to prevent the owner spouse from disposing of the property without the consent of the other. But cases may occur like in **Wroth v Tyler** where the wife agrees to the sale before the husband enters into the contract, and then changes her mind and registers a Class F Land Charge. Nothing in the **Matrimonial Homes Act** prevents her from doing this and that is the purpose of this chapter. And so, unless the contract otherwise provides, the husband will be under a contractual obligation to procure the cancellation of the entry before completion, in any case, the purchaser will be anxious for its removal. The Law Commission in its report: **Third Report on Family Property: The Matrimonial Home in June 1978** was of the opinion that the law in its present form had the means of granting the wish of the purchaser.

First, they had no doubt that if the wife made or led her husband to believe that she had no objections to a proposed transaction and he enters into a binding contract on that basis, the court would not permit her to retain the entry on the register. An application under **sections 1(2) and (3) of the Act** by the husband or even one founded on the principles of estoppel at common law would succeed. The wife's rights would not be terminated and the entry would be removed. This may not be a wholly satisfactory solution from the husband or purchasers point of view, because such an adverse entry may only be discovered at a late stage and the proceedings aimed at getting rid of the entry would almost certainly necessitate the postponement of the date fixed for completion. The Law Commission agreed about the existence of this problem.

Secondly, if the wife leads her husband to believe that she has no objection to any proposed transaction to which the latter has entered into, **section 6 of the Matrimonial Homes Act**

expressly enables the wife with rights of occupation to provide a written release of those rights. If such a release is made, the husband or purchaser should have no difficulty in procuring the discharge of any Class F entry, whenever made.

Thirdly, the husband could include in his contract with the purchaser, a term protecting him from the consequences of the emergence of a Class F entry which he cannot get his wife to withdraw. Such a term for example could give him the right to rescind without liability if such an event does arise. The Law Commission did not find this approach very attractive, because they were of the opinion that a vendor (husband) could misuse such a term especially if he changes his mind about the contract, and he is finding a way to get himself out of it.

The Law Commission therefore believes that **sections 1(2) and (3) and 6 of the Matrimonial Homes Act** provides adequate safeguards against abuse by the wife of the rights given to her by the Act. But the Act has been subjected to judicial and academic criticism. Megarry J. For instance has said that the Act does not require the Land Registry to notify the husband of the making of a Class F entry, and that it is not the practice of the Registry to inform him. The Law Commission have accepted that if an entry is made, and the husband is informed of it before he contracts to sell the house, he will be able to avoid getting into the position Mr. Tyler found himself in, of contracting to perform the impossible. It is however clear that a change in the law (or in the practice) would often be of negligible assistance to the husband; notification of an entry made after contract would not save the husband from entering into an embarrassing contract and would merely enable him to institute proceedings for the removal of the entry (if he had any grounds for such an application) a little earlier than might otherwise be the case. Even so, it would probably not enable him to meet the date fixed for completion.

Before the Law Commission came to their decision on its report on the Matrimonial Home, they had carefully considered some academic discussion. Amongst such academics was David J Hayton who argued that the current Law Society conditions of sale should be incorporated into the contract between the vendor and purchaser, as condition 18 thereof enables the vendor to rescind the contract. He felt that where the Class F charge is registered before a contract for sale, the vendor will still be able to take advantage of condition 18 if he had no cause to suspect that fact or even if he knows of the charge, so long as his wife has assured him that she would remove the charge when the time came and he had no reason to disbelieve her. Such a condition should become a standard conveyancing practice in the light of **Wroth v Tyler**. But there is the possibility of husband and wife getting together and bringing about the conditions for rescission, so enabling the husband (vendor) to negotiate another sale at a more favourable price.

Hayton has also argued that the simplest method is merely to have the vendors wife sign the contract for sale with vacant possession almost as if she were a co-owner but adding some words such as “I concur” so as to have express approval rather than approval to be inferred from the signature on its own. If she does endorse the contract as suggested, then her equitable charge ranking by virtue of section 2 of the Matrimonial Homes Act as an equitable interest loses its priority as first in time over the purchasers equitable estate contract owing to the wife’s positive conduct leading the purchaser justifiably to believe that his interest prevails. The disadvantage of this precautionary measure is that there would be nothing to prevent the wife

actually going ahead and registering a Class F charge, and nothing to prevent her retaining possession until a notice to complete served by the purchaser to make time of the essence had expired, so entitling the purchaser to sue the vendor for full damages. Of course, these problems could neatly be avoided if a special condition for rescission along the lines already suggested were present. It has also been said, that the wife could complicate and prolong matters by alleging that her concurrence in the contract had been obtained by undue influence without her appreciating the effects of her signature, though the onus of proving undue influence would lie upon her, as such is not presumed in a martial relationship.

Another measure suggested by Hayton, which the law Commission have also recommended in their report and other academics such as D.G Barnsley and S.M Cretney have inserted in their writings and discussions is taking advantage of **section 6(1) of the Matrimonial Homes Act**, which enables a spouse by a release in writing to relinquish her rights of occupation. Although the Chief Land Registrar would still accept a subsequent application by the wife for registration of a class f charge, it seems that upon seeing such a release he might look favourably upon a later application for cancellation of the charge.

D.G Barnsley writing in 'Current Legal Problems' in 1974 has argued that it would be most desirable for a vendor to take adequate steps before signing a contract to ensure that the sale is not frustrated by a post-contract registration. If a charge is known to have been registered before exchange of contracts, the husband can at least negotiate with his wife for its renewal on or before completion. Should she not agree to its discharge, he will need to consider his position very carefully. However, as no duty is laid upon either the wife or the registrar to notify the husband of the charge being registered, there exists a real danger that a vendor of registered land may contract to sell in ignorance of the registration.

Professor Stephen Cretney the well known author for Text books such as 'Principles of Family Law' and a one time member of the Law Commission has asked whether the sale contract should be registered as a Class C (IV) Land Charge. At first sight he says, this would seem a simple answer to the problem. It might be thought, applying the general principles of the Land Charges legislation, that the unregistered Matrimonial Homes Act charge will be void against a contracting party who does register his contract. But **section 4(2) of the Land Charges Act 1972** provides that "A land charge of Class A....shall be void as against a purchaser of the land charged with it or of any interest in such land, unless the land charge is registered in the appropriate register before the completion of the purchase".

Hence, the position seems to be that, at the date when the estate contract is registered, the wife's charge will be in existence **(see section 2(1) of the Act)** and will not be affected by the C (IV) registration.

As already mentioned, there have been other criticisms of the registration requirement apart from the problem in **Wroth v Tyler**. These criticisms have been mentioned in judicial discussions, but no solutions to these problems have been mentioned by any of the judges, and even if they have, it has not been made clear by them. Academicians such as Cretney and Barnsley have also highlighted them in some of their commentaries, but they have only really concentrated more on the **Wroth v Tyler** problem and hence have come out with no solutions or remedies to these problems. But the law Commission on the problem of the wife who is ignorant of the Class F

Land Charge have said that even though there is little reliable evidence about the extent to which laymen are aware of the need to protect their interests by registration. Law firms, Legal Advice Centres and Citizens Advice Centres who advice the layman are well aware of this need. In so far as there is ignorance in these matters, the most appropriate solution might be to seek to reduce the ignorance by means of a determined campaign of education and publicity. Although this could prove to be an effective remedy, a question arises; where would the funds come from, to support such a campaign? We are all aware that central government has limited funds, and have shown this by cutting funding from some services, notably education. But another question arises; will the tax payer be happy to know that his 'hard earned money' is being spent to promote a campaign making the non-owning spouse aware that they have a 'weapon of destruction'? See the activities of the wife in **Wroth v Tyler [1973] 2 WLR 405.**

Chapter 5

THE FUTURE OF THE MATRIMONIAL HOMES ACT

Although the registration requirement has its disadvantages and has been criticised severely, it should not be condemned as such. For instance, the requirement provides a purchaser with a virtually infallible guide to the possibility of a claim by a co-owner and relieves him of the need to make any enquiries outside the register as to such claims. The conveyancing system makes it vital for his protection that he searches the register before completing the transaction. The search is an elementary conveyancing routine, and a single search reveals all the relevant entries.

Secondly, registration brings benefits to co-owners, for the protection of their interests do not depend upon unpredictable factors, notably the fact of occupation and the extent of the purchasers enquiries.

Thirdly, the registration requirement brings consistency into the law, both generally by its accordance with the principles of the 1925 property legislation and creates consistency between the protection of statutory rights of occupation under the **Matrimonial Homes Act**.

Finally, the requirement usually avoids the increased cost, delays and complexity of conveyancing, for the time and expense of registration is minuscule by comparison with the trouble and expense involved in precautions before the Matrimonial Homes Act was introduced in 1967.

Perhaps on the whole, the fundamental difficulty connected with the Matrimonial Homes Act is the fact that an inherently worthwhile measure of reform has been made ineffective by the attempt to put family-based rights on to an existing system of registration of incumbrances governed by the general law of property. The problems that have arisen from the **Matrimonial Homes Act** are due to the fact that the statute itself is not rooted clearly in family considerations such as those which underpin the homestead legislation in force in other parts of the Commonwealth.

Perhaps the security of spouses will only be assured, when the **Matrimonial Homes Act**, finally gives way to a rule of automatic co-ownership of the legal estate in the matrimonial home during marriage; a regime not brought about by the application of commercialist principles of property law but resulting instead from the status of marriage. The social purpose of the current matrimonial homes legislation would be more effectively achieved through the statutory imposition of such a scheme of co-ownership. This proposal was put forward by the Law Commission in 1978 on their **Third Report on Family Property**.

Accordingly, the Commission recommended that any equitable co-owner not represented on the legal title should be able to protect his or her new statutory equitable interest either by registering a Class G Land Charge (in the case of unregistered land) or by entering a restriction in the register of title (in the case of registered land). But it has been criticised that such proposals are complex, and secondly since there is a major problem with the existing Class F registration i.e. for reasons of ignorance or sheer inertia, the qualifying spouse neglects to register his or her

rights, it has been said that it seems scarcely likely that the same spouses would be any more ready to register their 'Class G' entitlements.

However, the adoption of this proposed solution would mean that no disposition of the legal estate could ever occur without active participation of both spouses. Both would have to sign any document of transfer, lease or mortgage. A spouse's occupation of the matrimonial home would thus be rendered absolutely secure against hidden transactions with the title and there would be no need for any hostile registration to be effected where existing marital tension already threatens domestic harmony. A principle of automatic co-ownership would cut through the difficulties which have been exposed in the operation of the **Matrimonial Homes Act**, but as yet, no legislation incorporating this principle has been enacted in England.

It is quite clear that the working of the **Matrimonial Homes Act** will have to be reconsidered at a high level. If nothing else, the history of this legislation shows the perils of hasty interference with land law to satisfy vocal demands for instant piecemeal reform. The Act resulted from a private member's bill, introduced by Lady Summerskill. The Law Commission was pressed into service to give hasty assistance with the drafting, even though there was no time for the normal consultations and the Law Society intervened to secure numerous amendments, designed to reduce the practical difficulties to a minimum. In spite of all these efforts, an Act has been produced which is drafted in 'unnecessarily obscure language', which sometimes does too much and sometimes too little and which can be used as a spite measure by spouses who are not in the smallest peril of being deprived of a matrimonial home.

RECOMMENDATIONS PROPOSED

Many learned judges and academicians have criticised and suggested alternative remedies to the problems connected with the **Matrimonial Homes Act**, mainly the area on registration of a Class F Land Charge. Having carefully considered all these myself, I have decided to use the opportunity to recommend ideas that I think could resolve the problem which has been haunting spouses for the past number of years.

First, in **Wroth v Tyler [1974] ch 30** Megarry J noted that the Act does not require the Land Registry to let the husband know that his wife has made a Class F entry. If the Registry had a duty of informing the husband, then Mr. Tyler would not have found himself in the massive difficulties that surrounded him. I know that the purpose of the **Matrimonial Homes Act** was to protect the wife from the husband who intended to sell the matrimonial home without her consent. And so, making the registry inform the husband of a Class F registration could give the latter more powers, which Parliament was trying to prevent in the first place, when the 1967 Act was passed. But this does not mean that because the husband will be informed of his wife's entry that her interests will not be adequately protected. Far from that! It must be remembered that since the entry has been entered by the relevant spouse, that spouse's rights will be protected and the husband will be unable to dispose of the property over her head. Thus the Land Registry informing the husband of such an entry will not jeopardise the wife's protection. All that it will prevent is the problem of **Wroth v Tyler** ever occurring again.

Section 6(1) of the Matrimonial Homes Act 1983 provides that, "A spouse entitled to rights of occupation may by a release in writing release those rights or release them as respects part only

of the dwelling house affected by them". **Section 6(2)** also provided that, "Where a contract is made for the sale of an estate or interest in a dwelling house, or for the grant of a lease or underlease of a dwelling house, being (in either case) a dwelling house affected by a change registered under **section 2 of the Land Charges Act 1972 or Section 2(8)** above, then without prejudice to **subsection (1) above**, the rights of occupation constituting the charge shall be deemed to have been released on the happening of whichever of the following events first occurs.

(i) The delivery to the purchaser or lessee, as the case may be, or his solicitor on completion of the contract of an application by the spouse entitled to the charge for the cancellation of the registration of the charge, or;

(ii) The lodging of such an application at Her Majesty's land Registry.

There is therefore, nothing stopping the owner spouse in negotiating or persuading his wife to release her rights when he wants to dispose of the matrimonial home. Such release of rights could be incorporated in the contract of sale of the property. And the subsequent purchaser of the land should have no problems in getting rid of the Class F entry whenever it is made.

Where one spouse is in danger of being deprived of a roof over his or her head, but decides to use the Class F entry to spite the other spouse, then the latter may apply to the court under **section 1(2) of the Matrimonial Homes Act 1983** restricting or terminating those rights. In **Barrett v Hassett [1981] 1 WLR 1385** the courts set aside a Class F Charge that was registered by the husband, because he misused the process. **Section 1(2)** can also be used where a spouse usually the wife as in **Wroth v Tyler**, agrees to allow the husband to sell the home, but changes her mind subsequently and registers a Class F entry without him (the husband) knowing.

A favoured precaution for a purchaser in buying a house from one spouse is to require an undertaking from the other spouse before making the main contract. Such as "in consideration of your entering into a contract with my husband/wife for the purchase of Le Mirage with vacant possession, I undertake not to seek to enforce against you any right to possession or occupation whether arising by statute, by reason of any equitable interest or otherwise to which I may be or become entitled."

We are all aware that solicitors owe their clients a duty to look after their interests. I see no reason why the solicitor should not warn his client of a possibility of his wife entering a Class F Charge even if relations between the spouses are at their best. The solicitor, I believe should also make it a point of duty to check whether such an entry has been made, and if it has, then he ought to warn his client not to continue with any transactions that he/she might have entered into. Failure for the solicitor to carry out these duties should be considered a matter of negligence on the latter's part.

On the problem of the wife not registering a Class F entry against the correct full name of the owner, there is no reason why a competent solicitor should not put matters right even if he is also in the dark. All they (solicitor and relevant spouse) have to do is to check the correct name of the owner spouse into which he has had the property conveyed before entering the Class F Land Charge. Although, some will argue that it is time consuming, it is at least a precaution

against registering interests that could eventually become ineffective against any future purchaser.

Finally, because the spouse usually the wife is not aware of the necessity of protecting her interests in the property by registering a Class F Land Charge, I think there should be a campaign to educate them of this requirement. ‘Awareness’ Agencies working with the government should provide information on this issue, by distributing leaflets to members of the public. Legal Centres, Citizens Advice Bureaus and even legal practitioners themselves should also be in a position to advise such spouses. Although such a campaign will cost the Government money, it is nevertheless worth the cost. In the long run at least, once it has achieved its purpose, there will be no need to continue with it.