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Introduction to CeMAP Modules 2&3 Revision Notes

Using the Revision Notes

These notes are designed to assist with your revision. However, **it is important that you have read and also keep referring back to your study manual** to ensure that you have a full understanding of the subject matter.

Revision tips:

The odd hour of revision here and there is not enough to gain this professional qualification. Make a revision plan and ensure that you adhere to it.

Know your strong and weak subject areas and mix them into your timetable, do not do all the more difficult subjects at once!

Set targets that you know you can reach and tick them off when you have accomplished them.

Find somewhere quiet to revise.

- **Condense:** fitting notes onto one side of paper or onto permanent cards makes them easier to revise from, so write and cut down as you go.
- **Highlight:** target areas using colour and symbols. Visuals help you remember the facts.
- **Record:** try putting important points onto a tape. If you hear them AND read them, you will have a better chance of remembering them.
- **Talk:** read your notes aloud; it's one way of getting them to register.
- **Test:** see what you can remember without notes, but avoid testing yourself on areas that you know already.
- **Time:** attempt specimen exam questions against the clock.
- **Do not overdo it:** your concentration lapses after a short space of time, so take regular breaks.
- **Focus:** look at practice questions and see how they could be asked.

On the day of your examination:

- Set off in plenty of time, allowing for bad weather or traffic.
- Make sure you know where the exam venue is and where you can park or how close the train station is.
- Make sure any documents you need (such as identification) are laid out the night before.

Important note:

You are not expected to memorise specific case law names and dates, or current tax and national insurance rates and allowances. A list of appropriate tax and national insurance rates and allowances, etc, will be made available at the examination itself.

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*(Note: Units are numbered from 3. Units 1 and 2 are found in CeMAP Module 1 and are **NOT** tested in this module).*

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- Section 7 Assessment of Status
- Section 8 Assessment of Security
- Section 9 Guarantees and Additional Security

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- Section 12 Other Mortgage-Related Products

Unit 6 – Mortgage Arrears and Post-Completion

- Section 13 Mortgage Arrears and Post-Completion
- Section 14 Arrears, Debt Management and Recovery
- Section 15 Other Post-Completion Matters

Section 1 – Borrowers

Principles of Contract

Basic requirements for a binding contract:

- Offer and acceptance
- Consideration – transfer of money or money's worth
- Capacity to contract – legal ability to enter into a contract (e.g. of sound mind);
- Must be the intention to create a legal relationship
- Utmost good faith: both parties must answer all questions honestly.

Principles of Agency

An agent acts on behalf of the principal – can conclude contracts on behalf of the principal.

Estate agents act as agents of the seller. There should be a written contract setting out what is expected of each party.

- In law, the acts of the agent are treated as being those of the principal
- Agents should only act within the authority given to by the principal
- If an agent exceeds this authority, they could be liable, unless:
 - **apparent authority** – this happens where an agent acts outside his authority, but something done or said by the principle gives the impression he has authorised the agent
 - **ratification** – if the agent exceeds his authority, the principal can agree to what the agent has done, i.e. ratify it after the event.

Types of Borrower

Personal Borrowers

- Loan amount usually determined by a form of salary multiple
- Joint borrowers – mortgage will always be on a joint basis, even where ownership of the property is as tenants-in-common.

Limited Companies

- Lending could be for residential or business purposes
- The loan is to the company, which is a separate legal entity
- Company's powers to borrow – in its Memorandum of Association
- Directors' authority to commit it to borrowing – in its Articles of Association
- Status as a credit risk – lenders assess its financial position: accounts, etc.
- Limited liability companies (i.e. most) – lender may need to obtain additional guarantees from directors.

Business Partnerships

- Unlike companies, most partnerships are not separate legal identities
- The assets and liabilities are jointly owned by the partners
- Lender will require to see a copy of the partnership agreement
- All partners must sign documents – unless one is authorised to sign for all.
- Partners are jointly and severally responsible for the debt

Limited Liability Partnerships

- A partnership but set up as a separate legal entity
- Can borrow in its own right – mortgagee lends to partnership not partner
- Partners liability is limited to initial capital invested
- Lender may require guarantees from partners

Personal Representatives (Executors/Administrators)

- Lenders can lend to personal representatives of deceased people if the loan is for administering the estate.

Attorneys

Attorneys are people who act legally on behalf of someone else (the donor).

- Lenders can lend to attorneys – power of attorney must be current and must not exclude the power to borrow
- Enduring power of attorney – no longer available – can still be registered but for property only not welfare
- Lasting power of attorney – property and affairs and/or personal welfare
- Registered with Office of the Public Guardian to take effect

Trustees

- Lenders can lend to trustees if the trust deed specifically permits borrowing.

Voluntary Housing Sector

- Providers of social housing
- Non-profit organisations providing housing for rent or purchase
- Registered and regulated by the Homes and Communities Agency

Clubs/Associations

- Lenders need to see constitution to check its rules; also the authority of its officers to take out a loan; and the accounts to check ability to repay.

Those Unable to Borrow

Minors

- Under 18 years old
- Contracts cannot generally be enforced against minors – so no mortgage.

The Mentally Incapacitated

- Persons who are mentally incapacitated cannot borrow in their own right
- They cannot make a power of attorney
- If they made an enduring power of attorney (EPoA) in anticipation of later becoming mentally incapacitated, that would then come into force:
 - an EPoA must be registered with the Public Guardianship Office/Office of the Public Guardian and can only be revoked with the consent of the Court of Protection
- Otherwise, the Court of Protection can appoint an attorney to represent them
- LPAs replaced EPAs from 1/10/2007, but EPOAs are still valid.

Undischarged Bankrupts

Undischarged bankrupts are those who are declared bankrupt by a county court and have not yet been released (discharged) – this is normally after 12 months (Enterprise Act 2002).

- Although the law does not prevent an undischarged bankrupt from borrowing, it is a criminal offence to try to obtain credit for more than £500, either alone or jointly with any other person without disclosing the bankruptcy
- They cannot take out a mortgage during that period
- Discharged bankrupts are still required by law to declare their former bankruptcy at any future time when applying for a mortgage.

Individual Voluntary Arrangements

- Agreement to pay a percentage of debts over agreed period which is usually 60 months
- Will not legally prevent borrowing, but lenders are unlikely to lend.

Lending Policy

Lending policy is broadly concerned with:

- To whom loans will and will not be made
- Security that is and is not acceptable
- Product prices, interest rates, fees and charges
- Special conditions attached to each category of loan.

The FSA expects lenders to have a clear written policy for each category of borrower.

This will include the following areas of policy and practice:

- Geographical catchment area of lending
- Minimum and maximum advances
- Types of security acceptable
- Maximum loan-to-value ratios
- Interest rate structure for different risks, etc.
- Interest rate calculation basis
- Discounting policy
- Charging structure for fees, penalties, fines, etc.
- Acceptable methods of repayment
- Mortgage-related products.

Section 2 – Mortgage and Property Regulation and Law

MCOB Rules

The FSA's MCOB rules relate to regulated mortgage contracts, 'home finance' plans and home reversion schemes.

A mortgage is regulated by the FSA if it meets the following criteria:

- It began on or after 31st October 2004, and
- The lender supplies credit to an individual or to trustees (the borrower), and
- The loan is secured by a first legal mortgage on land (not time-share) in the UK, at least 40% of which is (or will be) used as a dwelling by the borrower or a relative (spouse/cohabitant/civil partner; parent; grandparent; sibling; child or grandchild), or the beneficiary (or a relative) of a trust.

A **lifetime mortgage** is a regulated mortgage where the loan is only available to those over a specified age, and the capital is not repaid until the borrower moves, chooses to repay or dies. In addition, interest repayments can be rolled up rather than paid on a regular basis.

'**Home Finance**' plans cover Islamic mortgages. In brief, a **home finance plan** is defined as an arrangement where:

- One person (the provider) buys a qualifying interest in land
- An individual or trustee (the home purchaser) is obliged to buy the interest from the provider during, or at the end of, a specified period
- The home purchaser or beneficiaries of a trust, or a related person, is entitled to occupy at least 40% of the land as, or in connection with, a dwelling.

In brief, a **home reversion plan** is defined as:

- The reversion provider buys all or part of a qualifying interest in land from an individual or trustees
- The previous owner or a trust beneficiary (or a related person) is entitled to occupy at least 40% of the land as a dwelling
- The arrangement specifies that the right to occupy the property will end on one of the following:
 - the occupier becoming a resident of a care home
 - the death of the occupier
 - the end of a specified period of at least 20 years from the date of the arrangement.

The MCOB Sourcebook has 13 chapters:

- 1. Application and purpose:**
 - *help in understanding the MCOB rules and other FSA rules that are relevant*
- 2. Conduct of Business standards (General):**
 - *communications*
 - *inducements*
- 3. Financial promotions:**
 - *contents of promotions*
 - *no cold calling (on new customers)*
- 4. Advising and selling standards:**
 - *IDDS*

- *independence*
- *suitability of advice*
- 5. Pre-application disclosure:**
 - *KFIs*
- 6. Disclosure at the offer stage:**
 - *offer document contents*
- 7. Disclosure at start of contract and after sale:**
 - *e.g. annual statements*
- 8. Equity release: advising and selling standards:**
 - *special rules for home income plans, etc.*
- 9. Equity release: product disclosure:**
 - *special rules for home income plans, etc.*
- 10. Annual percentage rate:**
 - *how to calculate*
- 11. Responsible lending:**
 - *checking ability to repay*
- 12. Charges:**
 - *not to be excessive*
- 13. Arrears and possessions:**
 - *fair treatment of people faced with arrears and repossessions*

Principles of Mortgage and Property Law

Definition of a Mortgage

A mortgage is any arrangement where an asset is used as security for a loan.

The term 'mortgage' has come to be used mainly where the asset used is property (real estate) and where the loan is used to purchase the property.

- The transfer of rights in property used as security is called 'conveyance'
- The borrower is the mortgagor
- The lender is the mortgagee.

Types of Mortgage

- Mortgage by way of legal charge:
 - the property is not transferred to the lender, but the property is charged with the debt as security for the lender, by means of a mortgage deed
- Mortgage by demise:
 - the property is transferred from vendor to lender until the loan is repaid, and then transferred from lender to purchaser (rarely, if ever used).

Second mortgage:

- Borrower who already has a first mortgage against a property raises more money against the same property with a different lender:
 - if it is with the same lender, it is termed a 'further advance'
- Second (and subsequent) mortgagees rank after first mortgagees in terms of security
- The priority of secured loans is established by the date of registration with the Land Registry

Types of Joint Ownership

It is important to understand the difference between joint tenancy and tenancy in common.

(Note that the words tenant/tenancy in this context do not relate to the letting of property).

- **Joint tenants:** the whole property is deemed to be owned by each of the owners:
 - if one joint tenant dies, the property automatically passes to the other(s); it does not become part of the deceased's estate
- **Tenants in common:** in this case, each person owns a specific proportion of the property. On death, that proportion becomes part of his estate and is dealt with under the terms of the will or intestacy rules.

Land Tenure

Freehold Estate

Estate in fee simple, absolute, in possession:

- **Fee simple:** right for property to be inherited on death
- **Absolute:** no limits or conditions on ownership
- **In possession:** immediate entitlement to the land.

The nearest there is to absolute ownership. There are, however, many possible restrictions:

- Title restrictions imposed by earlier owners
- Planning and building regulations
- Rights of utility companies and others
- Obligations to those who enter the property or pass by it
- Easements and covenants.

Leasehold Estate

- Freeholder creates a lease for certain period
- Leaseholder has rights over the land for a specific period only and pays an annual ground rent.

Possible Terms in the Lease

- Maintenance and repair of property
- Constraints on use of property
- Restrictions on alterations
- Duties in respect of common areas
- Insurance – possible through a particular insurer.

Significance for Lenders

- The lease should not be too restrictive
- The lease should have around 30-40 years left after the mortgage will end. Otherwise, the property may be inadequate security, as it may be difficult to sell
- Failure by the leaseholder to comply with any term of the lease could result in the lease being terminated and reverting to the freeholder (forfeiture)
- This is serious for the lender, whose security would be lost
- Lenders therefore insert clauses in the mortgage deed requiring leaseholders to maintain the lease and enabling the lender to maintain it if they do not.

Commonhold and Leasehold Reform Act

The Commonhold and Leasehold Reform Act 2002 changed the rules under which leaseholders who are **qualifying tenants** can buy the freehold. A qualifying tenant is one that holds a lease that was originally more than 21 years.

- The building must contain two or more flats
- At least two-thirds of the flats must have leases originally granted for more than 21 years (known as a 'long lease')
- No more than 25% of the internal floor area (excluding common areas) must be non-residential
- 50% of leaseholders must agree to participate.

Leaseholders who do not participate can lease their flats from the new freeholders.

Extending the Lease

- Those who have held a long lease for two years have the right to extend their lease
- Can be extended by 90 years from the end of the existing lease.

Commonhold

The Act introduced a new type of tenure ('commonhold') as an alternative to owning leaseholds in blocks of flats.

- The block is known as a multi-unit property, and each flat is known as a unit
- A commonhold association is formed – it is a company and will manage the overall estate
- It must have a commonhold community statement showing the rights and obligations of individual unit-holders, and other essential rules
- The land must be registered as commonhold with the Land Registry
- Each individual owns the freehold of his unit and is a member and shareholder of the commonhold association
- The association collects a 'commonhold assessment' – the equivalent of a management charge from each member
- Common areas in the overall property belong to the association.

Land Registration

The process by which the estate guarantees the title in a registry.

Easements and covenants 'run with the land':

- That is they are passed on to subsequent purchasers and can only be removed by the courts
- If any one person or body objects to their removal, they remain in place.

Easements

The right of one person over the land of another, for example:

- Right of way
- Right of light or prospect (view)
- Right to ventilation
- Right to hang a sign on another property.

The land that enjoys the right is the **dominant** tenement.

The land over which the right is held is the **servient** tenement.

Covenants

- **Positive covenants:** a condition imposed by an earlier owner, specifying something that subsequent owners must do
- **Restrictive covenants:** similar, but this time specifying what must *not* be done.

Easements and covenants 'run with the land'.

Registering Land

Registration is now compulsory for all transfers of land.

HM Land Registry – Three Registers

- **Property Register:** description, plan, map, title number, beneficial easements
- **Proprietorship Register:** details of the owner and the nature of the title:
 - *Absolute title* – clear title to the property is established
 - *Good leasehold* – the leasehold is good but the freeholder's title may not be absolute
 - *Possessory title* – when the title deeds are missing, or when someone occupies someone else's land without redress (squatter's rights): right to the land can be claimed after 12 years but the Land Registry will only convert to absolute title after a further 3 years (15 in total)
 - *Qualified title* – there is some defect in the title
- **Charges Register:** any charges over the property, e.g. rights of mortgagees or spouse's interests registered under the Family Law Act 1996.

Unregistered Land

Rights over unregistered land can be registered at the Land Charges Registry.

The most common types of charge registered here are:

- Legal mortgages not protected by deposit of title deeds (e.g. second mortgages)
- Spouses interests registered under the Family Law Act 1996.

Matrimonial Interests (Family Law Act 1996)

- Non owning spouse who lives in a property can register an interest at the Land Registry
- If so property cannot be sold until the interest is removed
- Mortgage applications – non owning spouse is likely to be asked to sign a consent to mortgage form

Title Guarantees

- Full title guarantee – free from charges and encumbrances
- Limited title guarantee
- No guarantee.

Irrespective of the type of guarantee offered, the vendor is deemed to covenant that:

- They have the right to sell the property
- They will do all they can to give the purchaser the title they require.

If the sale is with full title guarantee, the vendor also covenants that they sell free from:

- Any charges and encumbrances and from any rights exercisable by third parties.

If the sale is with limited guarantee, the vendor covenants that they have not themselves created any new charges or encumbrances over the property.

Consumer Legislation

Consumer Credit Act 1974

Regulated by the Office of Fair Trading (OFT). Amended by the Consumer Credit Act 2006

- Regulates most aspects of lending – except mortgages
- Covers loans up to and including £25,000
- Mortgages regulated by the FSA are exempt.

The Consumer Credit Act 2006 (amends 1974 Act)

Act's provisions will be phased in over the period to October 2008. The key points of the Bill are to build on the CCA in the following ways:

- Independent ombudsman service through the Financial Ombudsman Service
- Easier for consumers to challenge unfair lending practices and loan agreements
- Definition of an 'individual' is changed to an 'ordinary' borrower or a partnership with three or fewer members. Other businesses are still outside the legislation
- £25,000 cap on most loans covered will be removed – the amount will be unlimited
- Loans over £25,000 to a small business for business purposes exempt
- High net worth exemption – borrowers with income and capital over specified amounts can declare they are willing to forego protection under the Act
- Enhanced Office of Fair Trading powers
- Reform of the consumer credit licensing regime.

Data Protection Act 1998

Covers computer-based and manually-held data.

Data controllers must follow the principles of good practice.

- Data must be processed fairly and lawfully
- Data must be obtained only for a specified purpose or purposes
- Data must be adequate (but not excessive), and relevant to the purpose for which it is processed
- Data must be kept accurate and up to date
- Data must not be kept for longer than is necessary
- Data must be processed in accordance with the rights of data subjects
- Data controllers must take appropriate measures to keep data secure
- Data must not be transferred to a country that does not guarantee an adequate level of data protection.

Offer of Advance

Offer of advance is not a legal contract and is not binding on either party. It can be withdrawn if:

- The application contained false or inaccurate information
- The applicant's financial or other circumstances change
- The property is no longer considered suitable security-damage, faulty title, etc.

The legal charge is executed at completion and is a formal contract. It sets out the lender's rights and the borrowers obligations. The terms cannot be altered without both parties agreement.

Lender's Rights:

- To charge capital, interest and other fees
- To call in the whole debt on default, the borrower's bankruptcy or a compulsory purchase order
- To insure the property if the borrower fails to do so
- To meet any conditions imposed by statute, a local authority or title if the borrower fails to do so
- To let the property after it has been taken into possession
- To transfer the mortgage to another lender, subject to the borrower's consent
- To make further advances without the need for a new mortgage deed.

Borrower's Covenants (obligations):

- To make payments in accordance with the mortgage deed
- To insure the property in accordance with the lender's requirements
- To comply fully with appropriate legislation, local authority by-laws and other regulations
- Not to let the property in good repair, and allow access to the lender for the purpose of inspection at any reasonable time
- To comply fully with all conditions of title, e.g. positive covenants, restrictive covenants and easements
- In the case of a leasehold property, to comply fully with the terms of the lease.