

***Balancing creditors' claims against 'home' interests***

INTRODUCTION

There are a range of legal contexts in which a coherent legal concept of home could be usefully employed, including the conflict of interests between the occupiers of a property *as a home* and other parties with 'non-home' interests in the property, for example, creditors. The discussion of legal approaches in this area in Chapter Two has highlighted two key issues. Firstly, the idea that an occupier has an interest in the property linked to use and occupation *as a home* is clearly present in legal discourse. The idea of the occupier's home interest has often penetrated policy debates, whether in the context of Law Commission reports, Parliamentary debate or judicial reasoning. However, it is also clear that notwithstanding the persistence of home-type interests in discussion concerning creditor/occupier disputes, the creditor almost always succeeds in forcing the sale of the property once the debtor is in default. When the home interest comes up against the financial claims of creditors to the capital asset represented by the home, the difference between these types of claim is stark. While the creditor's financial claim is objectively measurable and easily valued in money terms, the 'home' interest is often dismissed as a chimerical concept, not subject to legal proof, not 'real' in the way that the creditor's financial claim is real, and therefore an interest that the court cannot protect.<sup>1</sup>

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<sup>1</sup> For example, in *Le Foe v Le Foe* [2001]EWCA Civ 1870 Ward LJ recognised that the disputed property: '...has been her home and her mother's home. There is huge emotional investment in it.'; [10] before concluding that: '...the protection of her emotional security...is, of course, an interest I cannot protect.' [13] The portrayal of the home interest as incomprehensible to legal reasoning is captured in Lord Scott's description

The systematic priority accorded to commercial claims rather than home interests is maintained by the following cycle of events: starting from the presumption that the interests of creditors ought to prevail on economic policy grounds, the cycle follows: creditors ought to prevail, so there is no need to investigate the meaning and value of the home interest. The home interest is not explored in the courts therefore creditors continue to prevail. This book starts from the premise that the importance of home, and the impact of losing one's home on occupiers, demands a more explicit analysis of the other side of the equation. Drawing on research in other disciplines which has established the authenticity of home meanings, the elements that go to make up home interests, and the very real consequences, for an occupier, of losing one's home involuntarily, it seeks to identify some of the values of home which might inform a legal concept of home, and so be 'weighed in the balance' on the occupier's side when decisions involving conflicts between home interests and commercial interests are considered by the courts. If there was some framework by which the home interests of occupiers could be recognised *in law*, this would facilitate legal policymakers – both legislators and the judiciary – in attaching appropriate weight to the occupier's home interest when balancing it against the creditor's financial, 'non-home' interest.

This chapter focuses on the initial premise from which the cycle of reasoning outlined above originates: the presumption that the occupier's 'home' interest can be dismissed without any real attempt to unpack the occupiers' claim, since economic policy dictates that the interests of secured creditors must prevail in any event. The general trend has been to accept that: '...where there are debts outstanding, a sale should be ordered...' <sup>2</sup> As Gibson LJ stated in *Bank of Ireland Home Mortgages Ltd v Bell*: '...a powerful consideration is and

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in *London Borough of Harrow v Qazi* [2003]UKHL 43, of the 'home' interest as: '...something ethereal, floating in the air, unconnected to bricks and mortar and land.' [145]

<sup>2</sup> *Re Lowrie* [1981]3 All ER 353 at 355-6, *per* Walton LJ.

ought to be whether the creditor is receiving proper recompense for being kept out of his money, repayment of which is overdue.’<sup>3</sup> This pro-creditor position can be justified on several grounds. For one thing, the debtor owes a contractual obligation to the creditor, by facilitating the exercise of the creditor’s remedies of possession and sale, the court is merely enforcing that contract. Another frequently cited argument is the importance of protecting the creditor in order to ensure that they remain willing to lend money to home owners. Since the expansion of owner occupation depends on the availability of credit, it is reasoned, the law must safeguard that flow of credit by protecting creditors in the event of default. In fact, as Lord Templeman suggested in a House of Lords debate on the subject:

No one has great sympathy for lenders or bank...[but] the point is that at the end of the day it is the borrower who pays, unless there is some speedy and efficient method of conveyancing.’<sup>4</sup>

These arguments appear to have largely been accepted, without question, in this jurisdiction. Neither policymakers nor legal academics have questioned the idea that the commercial interests of creditors must be protected and prioritised over other types of claim, such as home interests. However, this discourse is largely unarticulated, but rather implicit to the policies adopted in Parliament and in the courts.

The following sections will consider the economic arguments that have been advanced to support the routine prioritisation of the commercial claims of creditors over the home interests of occupiers. These arguments in support of the pro-creditor bias will then be evaluated against a range of theoretical perspectives drawn from different schools of economic thought. Finally, this chapter will consider the broader economic consequences of repossession and loss of home, as identified by social analysis. The aim of this chapter is to

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<sup>3</sup> [2001]2 All ER (Comm) 920, [31].

<sup>4</sup> 437 HL Deb (5<sup>th</sup> Series) col 650 (15 December 1982) Lord Templeman.

demonstrate that, while the idea that creditors must generally prevail has become trite, the economic and social consequences of repossession and forced sale are not straightforward but highly complex. Rather than simply presuming that creditors must win, there is a need for further consideration concerning the appropriateness of the balance currently struck between creditors and home occupiers.

## ENFORCING THE CONTRACT

From the most simplistic perspective, when the court grants the proprietary remedies of possession and sale – where judicial intervention is necessary in order to achieve these – the court order can be regarded as merely enforcing the contract agreed between the debtor and the creditor when the proprietary security was granted. A contract is defined as: ‘...an agreement giving rise to obligations which are enforced or recognised by law.’<sup>5</sup> The court’s role in ensuring that contracts are enforced is pivotal, since:

...if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered freely and voluntarily, shall be held sacred and shall be enforced by the Courts of Justice.<sup>6</sup>

In addition to the general ‘public policy’ argument, the court’s role in enforcing the terms of the contract is underpinned by both economic and moral arguments. Taking firstly the ‘moral’ argument, the enforcement of bargains between contracting parties is justified on the basis that, so long as the parties freely entered into the agreement, it creates a reasonable expectation which the law should enforce. So the argument goes, that: ‘[w]hen all persons

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<sup>5</sup> GH Treitel, *The Law of Contract* (11<sup>th</sup> edn, London, Sweet & Maxwell, 2003), p1.

<sup>6</sup> *Printing and Numerical Registering Company v Sampson* (1875)LR 19 Eq 462 at 465, per Sir George Jessel.

interested in a particular transaction have given their consent to it and are satisfied, the law may safely step in with its sanctions to guarantee that right be done by the fulfilment of reasonable expectations.<sup>7</sup>

The proposition that valid contracts – freely entered into - should be enforced between the parties is, at a basic level, difficult to dispute. However, it is important to bear in mind that, when balancing the interests of creditors and occupiers, the outcome will often have significant impact beyond the contracting parties themselves. Although a creditor has no direct right of action against the non-debtor occupier, the exercise of remedies against the secured property itself has obvious implications on those in occupation. While the issues surrounding the relationship between creditor and debtor have been extensively analysed,<sup>8</sup> less attention has been focused on the consequences for non-debtor occupiers, and the weight which ought to be attached to the home interests of such occupiers in competitions with creditors. Yet, if the debtor shares the home with others – either non-debtor adults or

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<sup>7</sup> D Hughes Parry, *The Sanctity of Contract in English Law* (Hamlyn Lectures, London, Stevens & Sons Ltd, 1959), p4. As Professor Goodhart later echoed: ‘...the moral basis of contract is that the promisor has by his promise created a reasonable expectation that it will be kept.’; AL Goodhart, *English Law and the Moral Law* (Hamlyn Lectures, London, Stevens & Sons Ltd, 1952) p10. Hughes Parry went on to suggest that the moral dimension to the sanctity of contract was rooted in the ecclesiastical courts: ‘[t]here is no doubt but that the association of a breach of contract with the sin of breach of faith in the ecclesiastical courts and the readiness of the Court of Chancery to regard failure to perform one’s promises as tantamount to bad faith and dishonest dealing, combined to give to contracts a measure of religious blessedness and to breaches of contract a mark of sinful or unethical aberration.’; above, p 8.

<sup>8</sup> See for example, I Ramsey (ed), *Debtors and Creditors: A Socio-legal Perspective*, (Abingdon, Professional, 1986); G Howells (ed) *Aspects of Credit and Debt* (London, Sweet & Maxwell, 1993); J Ford, *The Indebted Society: Credit and Default in the 1980s* (London, Routledge, 1988), Elliott, *Credit, the life of Commerce: being a defence of the British Merchant against the unjust and demoralising tendency of the recent alterations in the laws of Debtor and Creditor; with an outline of remedial measures* (1845).

children – they will obviously be affected by the enforcement of proprietary security against the property. While it is reasonable to argue that:

The fact that all persons whose interests are affected by an arrangement have freely and with full knowledge agreed on that arrangement is, in general, cogent evidence in favour of its justice;<sup>9</sup>

the application of this reasoning in the context of possession actions presumes that ‘all persons whose interests are affected’ will have been party to the contract. While the trend in legal policy after the decision in *Williams & Glyn’s Bank Ltd v Boland*<sup>10</sup> has been to ensure, so far as possible, that all adult occupiers are joined in credit transactions affecting the shared home, a number of issues remain outstanding.

For one thing, the fact that a non-debtor occupier has not consented to a credit transaction goes only to the question of whether or not the non-debtor’s share of the ownership of the property will take priority over the creditor’s proprietary interest. So, where an occupier is joined or consents to the transaction, they agree that the creditor’s proprietary interest will take priority over their claim. Again, the arguments for enforcing this contract – so long as it was freely entered into and with full knowledge<sup>11</sup> - are valid. However, there are two major gaps in this reasoning. Firstly, even if a creditor does not succeed in establishing priority over the non-debtor occupier’s share, this does not preclude the creditor from applying to the court for an order for sale. Furthermore, as the discussion in Chapter Two has demonstrated, in the vast majority of cases, the court will grant the order for sale

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<sup>9</sup> Hughes Parry, above n7, p4.

<sup>10</sup> [1981]AC 487; for discussion of this decision and the consequences that followed, see ch 2.

<sup>11</sup> The potential difficulties associated with the validity of consents from home sharing sureties are well rehearsed; see, for example, B Fehlburg, *Sexually Transmitted Debt: Surety Experience and English Law* (1997, Oxford, Clarendon Press); R Auchmuty, ‘Men Behaving Badly: An Analysis of English Undue Influence Cases’ (2002)<sup>11</sup> *Social and Legal Studies* 257.

notwithstanding the non-debtor's interest. Rather than enabling the occupier to retain the home, this claim becomes a claim against the capital proceeds following the forced sale.

Secondly, a distinction may be made between debts which are secured against the property *ab initio*, and usually with the consent of any adult occupiers, and cases in which the creditor does not demand proprietary security at the time of the transaction, but later attempts to 'inflate' his claim by seeking to secure the debt against the debtor's property *ex post facto*, for example, through a judicially imposed charging order. Even when a creditor does not obtain proprietary security at the time of the credit transaction, the Charging Orders Act 1979 allows the creditor to obtain a charging order against the debtor's property. The charging order confers proprietary security over the debtor's property through court order rather than contractual agreement. This has implications, in turn, on any non-debtors who occupy the property as their home. As the discussion of the legal policies surrounding the grant of charging orders against jointly owned land in Chapter Two has demonstrated, the court's jurisdiction to grant a charging order secured against a debtor's beneficial interest in co-owned land<sup>12</sup> - and thus affecting a non-debtor's property - was conferred in the Charging Orders Act 1979. However, the discussion that preceded this Act indicated that the outcome of this extension in the court's jurisdiction was more significant than the policymakers had expected. In fact, Law Commission had anticipated that the existence of a charging order against the shared property would not render the non-debtor co-owner vulnerable to a forced sale at the hands of a creditor.<sup>13</sup> The Commission predicted - wrongly as it turned out - that a court would refuse to follow the grant of a charging order with an order for sale when other

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<sup>12</sup> Charging Order Act 1979, s 2(1)(a)(ii).

<sup>13</sup> See generally, L Fox, 'Co-owners, not Co-owners: Legislative and Judicial Policy in Relation to Charging Orders and Co-ownership' (1998)29 *Cambrian Law Review* 9.

(non-debtor) co-owning occupiers would be affected.<sup>14</sup> However, the decisions in *Lloyd's Bank plc v Byrne*<sup>15</sup> and *Barclay's Bank plc v Hendricks*,<sup>16</sup> when the court ordered sale of the defendants' homes, involved just such circumstances: in both cases the debtor's wife was a co-owner and occupier of the family home, which had become subject to a charging order. Even though, in each case, the debtor's wife was neither a debtor herself, nor had she consented to the use of her home as security, the clear principle that emerged from these cases was that: '[w]here there was a conflict between a chargee's interest in a matrimonial home and the interests of the innocent spouse, the interests of the chargee prevailed except in exceptional circumstances.'<sup>17</sup>

The issue of affecting parties other than the debtor(s) through the enforcement of creditors' actions for possession and sale is complex, and often clouded by law's attitude towards the relationship between the debtor and the non-debtor occupier. Non-debtor occupiers stand outside the contractual relationship between the creditor and the debtor. However, although it is sometimes suggested that both the creditor and the non-debtor occupier are 'innocent victims' of the debtor's default, the classification of non-contracting occupiers as 'innocent' parties is not unproblematic. In fact, it has been suggested that occupiers – for example, the debtor's partner – cannot properly be regarded as innocent of the debtor's default in this context, either because there is a suspicion that the debtor and his or her occupying partner may have colluded to defeat the creditor's claim,<sup>18</sup> or because non-

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<sup>14</sup> Law Commission, *Charging Orders*, Law Com No 74 (1976, London: HMSO) para 71.

<sup>15</sup> [1993]1 FLR 369.

<sup>16</sup> [1996]1 FLR 258

<sup>17</sup> *Ibid.*

<sup>18</sup> Even in relation to *Williams & Glyn's Bank Ltd v Boland* [1981]AC 487 – the high-water mark of pro-wives judicial policy, the shadow of collusion has been raised. Gray & Gray make this suggestion with their comment that: '...the wife was not locked in mortal combat with her husband.'; KJ Gray & SF Gray, *Elements of Land*



debtor occupiers are regarded as having already enjoyed the benefits of the loan, and ‘must take the good times with the bad.’<sup>19</sup> These ideas appear to implicitly underpin the balancing exercise between creditors and non-debtor occupiers. For example, in discussion of the decision in *Williams & Glyn’s Bank Ltd v Boland*<sup>20</sup> – the high-water mark of pro-wives judicial policy – the shadow of collusion has been raised, with the observation that: ‘...the wife was not locked in mortal combat with her husband.’<sup>21</sup> Templeman J, who heard the case at first instance, observed that the system governing security transactions affecting the home could prove difficult to operate if a wife: ‘...could say or allege at any time that he or she had contributed to the purchase price.’<sup>22</sup> The suggestion was that a wife who had no formal legal ownership interest may claim an interest in the property under an implied trust, ostensibly against her husband, but with the actual purpose of defeating the creditor’s action for possession and sale.

However, this is unlikely to arise in many cases, in practice, since creditors follow a practice of identifying, and seeking consent from *all adult occupiers*, unless they disclaim any interest in the property. Rather, the issue at stake for these co-owning occupiers is the conversion of their interest in the home itself into a claim against the proceeds of sale,

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*Law* (4<sup>th</sup> Edn, 2005, Oxford, Oxford University Press), para 12.209, footnote 2. Templeman J, who heard the case at first instance, observed that the existing system could prove difficult to operate if a wife: ‘...could say or allege at any time that he or she had contributed to the purchase price.’; *Boland* (1978)36 P&CR 448 at 454.

<sup>19</sup> See M Freeman, ‘Wives, Conveyancers and Justice’ (1980)43 *Modern Law Review* 692, where, in relation to the Court of Appeal’s decision in *Williams & Glyn’s Bank Ltd v Boland* (which was affirmed by the House of Lords), Freeman noted that: ‘This was not a case in which a wife had been deserted by her husband who might well have been concerned to defeat her interest. On the contrary, there is nothing to suggest that the lives of Mr and Mrs Boland were other than models of domestic felicity.’; at 696.

<sup>20</sup> [1981]AC 487.

<sup>21</sup> Gray & Gray, above n18, [12.209], footnote 2.

<sup>22</sup> (1978)36 P&CR 448 at 454.

without their involvement in the transaction upon which the creditor relies for his contractual rights. When this consequence is justified by reference to the relationship between husband and wife, this raises major issues regarding the presumptions that are made about that relationship, and particularly about the autonomy of the non-debtor partner, and the degree of control that partner – often the female partner – is given over her ownership interest in the property. This argument may be countered with the proposition that the non-debtor co-owning occupier must ‘take the good times with the bad’. As Freeman suggested, in relation to the decision in *Boland*:

Had Mr Boland’s building business prospered, no doubt Mrs Boland would have shared in the increased standard of living made possible by the successful use of capital provided by the Bank. Marriage is, after all, a partnership to which both parties contribute. Is there any justification for departing from the normal principle of partnership, under which profits are shared if things go well, but losses are shared if they go badly?<sup>23</sup>

Once again, this argument does not adequately justify the proposition that the enforcement of the debtor’s contractual relationship with the creditor is the basis for the presumption in favour of creditors that has dominated discourse in this area, even where other co-owning occupiers are affected by the outcome. The principles that govern these disputes have been developed under the ambit of property law and contract. Consequently, notwithstanding reform endeavours to the contrary,<sup>24</sup> there are no ‘special rules’ for spouses when a creditor

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<sup>23</sup> Freeman, above n19, at 696.

<sup>24</sup> After the decision in *Boland*, the Law Commission proposed that the rules governing priority should be altered by legislation providing that creditors were *only* required to make inquiries from spouses in occupation, but not from other occupiers: Law Commission, *The Implications of William’s and Glyn’s Bank Ltd v Boland*, Law Com No 115 (1982). Although these proposals were put before Parliament in the Land Registration and Law of Property Bill 1985, the Bill was withdrawn from the Parliamentary calendar due to lack of time, and

seeks possession and sale of the home. The idea that the general approach adopted by the courts can be justified on the grounds that spouses, having entered the contract of marriage with each other, can be regarded as ‘throwing their lot in with each other’, such that a judgment creditor of one spouse should be permitted to procure the sale of the jointly owned home, does not provide an adequate justification for a principle that applies across the gamut of creditor/occupier contests.

Whether the dispute concerns the priority of interests between a creditor and a co-owning non-debtor occupier, or the creditor’s action for possession and sale of the jointly owned land, the same set of principles apply whether the co-owning occupiers are spouses, cohabitants or non-conjugal home sharers. For example, although, as the House of Lords recognised in *Williams and Glyn’s Bank Ltd v Boland*, the decision in that case had social implications for wives,<sup>25</sup> it was not because a ‘special protection’ was extended to them, but because a discriminatory barrier that had *previously* prevented the law from recognising the occupation of a co-owning spouse had been removed. The *Boland* decision can be described in short hand as establishing that: ‘...if there is actual occupation, and the occupier has rights, the purchaser takes subject to them.’<sup>26</sup> Thus it was true to say that:

...the appeals [did] not...involve any question of matrimonial law, or of the rights of married women, or of women as such. Exactly the same issue could arise if the roles

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when the Bill was re-introduced the following year, to deal with unregistrable leases and the abolition of the minor interests index in unregistered land, the provisions relating to inquiries were not included.

<sup>25</sup> Lord Scarman recognised: ‘...the undoubted fact that, if the two wives succeed, the protection of the beneficial interest which English law now recognises that a married women has in the matrimonial home will be strengthened.’; [1981]AC 487 at 510.

<sup>26</sup> *Ibid* at 504, *per* Lord Wilberforce.

of husband and wife were reversed, or if the persons interested in the house were not married to each other.<sup>27</sup>

Similarly, in relation to the decision to order the sale of a co-owned property, the relevant principles and provisions apply to *all co-owners*, not merely to spouses. Consequently, any explanation of the policy adopted by the court across the range of contexts in which these actions arise, that seeks to explain the court's approach by reference to the marital relationship, must be incomplete.

Not only is the idea that the creditor's contractual obligation must be enforced regardless of the consequences for other, non-debtor co-owners insufficient justification for the persistent pro-creditor approach adopted by the English courts, but it is highly undesirable from a gender perspective. By permitting that a non-debtor co-owner, who has no contractual relationship with the creditor, can find their interest in their home relegated to a claim against the proceeds of the sale of the property without any involvement with the creditor, but based on their relationship with their co-owner, this legal doctrine raises difficult issues about the presumptions made by English law about the consequences of co-owning property. While the presumptions outlined above are more understandable in the context of marital relationships, the argument that non-spouses (whether conjugal cohabitants or non-conjugal home sharers) should be regarded as having formed such a partnership, rendering their co-owned home vulnerable to forced sale because of actions taken by one co-owner outside the context of the joint venture of co-ownership – for example, when one co-owner's personal debts are secured against the jointly owned property by means of a charging order - is difficult to justify.

As a result, it is suggested that, notwithstanding the contractual obligation between creditor and debtor, the strength of 'enforcing the contract' arguments must vary from case to

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<sup>27</sup> [1981]AC 487 at 502.

case. For one thing, a distinction can be drawn between acquisition and non-acquisition credit: while the occupier clearly benefits from acquisition credit since it provided the home in which they live, when dealing with non-acquisition credit, it will not always be clear that the non-debtor occupier has benefited directly or even indirectly from the transaction. Furthermore, the idea that the non-debtor co-owning occupier's interest can be dismissed with the suggestion that they may be in collusion with the debtor or that they 'must take the good times with the bad' imposes a paradigm on all co-owners that is rooted in presumptions about marital partnership. Such presumptions, while arguably justifiable on a technical basis between spouses, are inappropriate for other contexts. The issues raised by the paradigm of collective interests in a shared home are considered in more detail in Chapter Seven, where it is argued that it would be preferable, from both a gendered and a general justice perspective, to view home sharing individuals *as* autonomous individuals, focusing on occupation of the *home per se* rather than the occupier's relationship with a debtor or membership within a 'family unit'.

A related issue to be considered in this regard is the significance of the 'enforcement of contracts' argument with regard to the treatment of child occupiers. The interests of child occupiers are distinguishable from those of adult non-debtor occupiers on several grounds.<sup>28</sup> A minor cannot hold legal title to land, and, in the absence of express declaration, is unlikely to acquire an equitable interest in the property.<sup>29</sup> In addition, contracts executed by minors in relation to an interest in land are voidable on majority, at the minor's behest.<sup>30</sup> The

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<sup>28</sup> For a detailed discussion of child occupiers and home, see ch 9.

<sup>29</sup> The principles of resulting and constructive trust, rooted as they are in the requirements of financial contribution or an express agreement, arrangement or understanding that ownership of the property will be shared (*Lloyd's Bank plc v Rosset* [1991] 1 AC 107) are unlikely to give rise to interests in favour of children.

<sup>30</sup> *Clayton v Ashdown* (1714) 2 Eq Ca Abr 516; *Whittingham v Murdy* (1889) 60 LT 956; *Thurstan v Notts PBBS* [1902] 1 Ch 1; *Orakpo v Manson Investments Ltd* [1978] AC 95.

marginalisation of child occupiers with regard to the creditor/occupier paradigm is highlighted by the fact that, even following the decision in *Williams and Glyn's Bank Ltd v Boland*,<sup>31</sup> when creditors became alerted to the necessity of obtaining consent from persons in actual occupation of property in order to ensure the priority of their charge, it became routine to seek consent from *adult* occupiers only. In fact, as the Court of Appeal confirmed in *Hypo-Mortgage Services Ltd v Robinson*,<sup>32</sup> even children who have a beneficial interest in the property following a declaration of trust are not regarded as being in 'actual occupation' for the purposes of overriding status under section 70(1)(g) of the Land Registration Act 1925. When dealing with child occupiers, the child's interest in the property *as a home* is irrelevant so far as either property law or the law of contract is concerned. Furthermore, the idea that a child occupier may have colluded with the debtor to defeat the creditor's claim, or that the child has benefited from the advance either directly or indirectly, and so must take the good times with the bad, is wholly inapt.

The suggestion that allowing a secured creditor to force the sale of a home in which the creditor has a security interest (even if that interest only extends over a part share of the ownership) is merely 'enforcing the contract' has provided a short-hand explanation for the approach adopted in many creditor/occupier contexts. However, the argument that the interests of creditors must prevail over those of occupiers in order to satisfy the contractual obligations entered into by the parties does not provide a complete justification for disregarding the home interests of occupiers. There is obviously more to it than that. The following section considers another argument often advanced to support the pro-creditor position: the idea that commercial interests must prevail over home-type interests on the grounds of economic efficiency. When it comes to enforcing proprietary security in an

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<sup>31</sup> [1981]AC 487.

<sup>32</sup> [1997]2 FCR 422.

economy that depends on credit, it has been suggested that creditor's actions against secured property must be enforced, since: '[e]conomic self-interest cannot afford the general disappointment of creditors' expectations.'<sup>33</sup> In the context of owner-occupied housing, one of the issues that has influenced legal policy is the potential impact of *refusing* sale on the willingness of creditors to lend money for home ownership.

### **The availability of credit for home ownership**

Looking beyond the issues concerning the enforcement of security contracts, the priority accorded to the concerns of the creditor in the context of actions against domestic property is also based on economic arguments linked to the availability of credit. There can be little doubt that the expansion of owner occupation, characterised by Lord Diplock in 1970 as the: '...emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society-owning democracy',<sup>34</sup> depended – and continues to depend - on the availability of credit.<sup>35</sup> Thus, in light of the expansion of home ownership, the priority accorded to creditors' rights of enforcement on default became incontrovertible.<sup>36</sup> The caution: 'Remove the legal sanction and men will give credit with more care.'<sup>37</sup> seems to have significantly influenced the development of legal policy in creditor/occupier disputes. Before the

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<sup>33</sup> Hughes Parry, above n7, p4.

<sup>34</sup> *Pettitt v Pettitt* [1970]AC 777 at 824, *per* Lord Diplock.

<sup>35</sup> See further, ch 5.

<sup>36</sup> It is interesting to note, in passing, Sir Gordon Borrie's observation that: '...no Beveridge, no government set out a policy for Parliamentary approval that credit should be made so widely and readily available or on what conditions...commercial concerns made commercial decisions that fulfilled a growing public urge to borrow.'; G Borrie, *The Credit Society - its benefits and burdens*, (Eleanor Rathbone Memorial Lecture, Liverpool, Liverpool University Press, 1986), p3.

<sup>37</sup> K Llewellyn, 'What price contract? - An Essay in Perspective', (1931)40 *Yale LJ* 704 at p725.

introduction of the Matrimonial Homes Act 1967, one member of the House of Lords argued that whatever measures were enacted, they ought not to: ‘...make it too difficult for a husband, when he is looking for a matrimonial home, to borrow money.’<sup>38</sup> This issue has re-emerged time and again when legislators and courts have justified their pro-creditor approaches. In fact, the arguments concerning willingness to lend are often expressed in a roundabout fashion, as protecting the occupier’s interests, rather than focusing solely on the creditor’s claim. Thus, as Lord Templeman suggested in a House of Lords debate following the decision in *Boland*: ‘[n]o one has great sympathy for lenders or bank...[but] the point is that at the end of the day it is the borrower who pays, unless there is some speedy and efficient method of conveyancing.’<sup>39</sup> Any incursion into the protection of the creditor’s ability to realise the security would, it was presumed, not only inhibit dealings in property, but would also: ‘...add to the expenses and complications of mortgages on houses and other dealings.’<sup>40</sup>

It is equally clear that the availability of funds for the *acquisition* of domestic property is not the only issue at stake here. In *Barclay’s Bank Plc v O’Brien*,<sup>41</sup> it was clear that the House of Lords was concerned with the ability of a home owner to capitalise on their equity in the home, in order to obtain funds for other activities, such as business enterprises. Lord Browne-Wilkinson stated that:

...it is important to keep a sense of balance in approaching these cases. It is easy to allow sympathy for the wife who is threatened with the loss of her home at the suit of a rich bank to obscure an important public interest *viz*, the need to ensure that the

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<sup>38</sup> 275 HL Deb (5<sup>th</sup> Series) col 46 (14 June 1966), Lord Cohen.

<sup>39</sup> 437 HL Deb (5<sup>th</sup> Series) col 650 (15 December 1982) Lord Templeman.

<sup>40</sup> 275 HL Deb (5<sup>th</sup> Series) col 32 (14 June 1966), Lord Derwent.

<sup>41</sup> [1994]1 AC 180.



wealth currently tied up in the matrimonial home does not become economically sterile. If the rights secured to wives by the law render vulnerable loans granted on the security of matrimonial homes, institutions will be unwilling to accept such security, thereby reducing the flow of loan capital to business enterprises. It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions.<sup>42</sup>

The willingness of creditors to lend money to home owners – either for the acquisition of the property, or, subsequently, against the security of the debtor's equity in the home – is considered in this section. One of the curious aspects of the reasoning set out above – the idea that creditor's will refuse to lend money unless their rights are strongly protected on the debtor's default – is that while the logic of this reasoning has rarely been questioned, it has been subjected to relatively little critical analysis.

In 1931, Karl Llewellyn acknowledged, in relation to the argument that any diminution in the legal sanctions available to the creditor would have a negative effect on the availability of credit, that: 'Speculation is unfortunately much easier than finding out, as well as less useful...My own guess is that in the main writers, both legal and other, tend to over estimate heavily the effects of law...'<sup>43</sup> Since then, empirical analysis has been carried out concerning the effect of personal bankruptcy exemptions on credit supply and demand,<sup>44</sup> which indicated that higher exemptions have: '...a significant, positive effect on the probability that households will be turned down for credit or discouraged from borrowing.'<sup>45</sup> Furthermore, this empirical analysis has also indicated that the effect of lowering creditor

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<sup>42</sup> *Ibid*, at 188.

<sup>43</sup> *Ibid*, at 725, footnote 47.

<sup>44</sup> R Gropp, JK Scholz & M White, 'Personal Bankruptcy and Credit Supply and Demand' (1997)112 *Quarterly Journal of Economics* 217.

<sup>45</sup> *Ibid*, at 220.

protections on credit availability is spread disproportionately across borrower income groups. While high-income households had the most to gain from high exemptions – that is, when creditor protections are lowered - low-income households experienced greatest difficulty obtaining credit in these circumstances. Thus, Gropp *et al* concluded that:

...while generous state-level bankruptcy exemptions are probably viewed by most policy-makers as benefiting less-well-off borrowers, our results suggest that they increase the amount of credit held by high asset households and reduce the availability of credit to low-asset households; ie, they redistribute credit toward borrowers with high assets.<sup>46</sup>

The consequences, for the borrower, may take various forms, ranging from higher interest rates and higher qualification requirements for loans, increased collateral requirements, or more vigorous screening of loan applications. Gropp *et al* suggested that since low-asset households pay higher interest rates in high exemption states, in contrast to high-asset households, who either have assets greater than the bankruptcy exemption level or are in a position to offer lenders greater collateral, lower income borrowers are more likely, when creditor protections are reduced, to experience difficulty with credit availability.

These findings would appear to support the argument that, unless the law protects creditors, it is consumers – particularly, it would appear, low income consumers – who will be adversely affected because they will find it more difficult to obtain credit. However, even though this premise appears to be supported by empirical analysis of the credit market, the application of this principle in the context of legal policy for creditor/occupier disputes indicates a presumption in favour of ensuring the widespread availability of credit, regardless of the debtor's ability to repay. The policy of ensuring widespread availability of credit – particularly for low-income households – is intrinsically linked to the political ideology of

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<sup>46</sup> *Ibid.*

home ownership, which is analysed in more detail in Chapter Five. The policy of successive British governments throughout the twentieth century in favour of home ownership depended on the availability of credit finance to fund owner-occupation. The implications of this policy, particularly with reference to low-income households, will be considered further in the next section. One issue which is noteworthy at this stage, however, is that the economic analysis that has influenced the development of legal doctrine in the field of creditor actions against domestic property has been selectively focused on the *availability* of credit finance to fund homeownership.

This relatively narrow perspective has prioritised the *availability* of credit over and above other measures of economic efficiency in credit markets. The argument that creditors' rights must be protected in order to ensure that credit finance remains widely available presumes that:

the primary economic function of the credit market is to provide cheap funds, and that this function can only be accomplished when creditor rights are protected and sanctions on non-performing debtors are enforced.<sup>47</sup>

This outlook has attracted considerable criticism by several commentators, who argue that in assessing the performance of the credit market, the availability of cheap credit has been inappropriately emphasised at the expense of other important factors – such as effective screening by the lender, insuring risk-averse entrepreneurs and protecting overconfident individuals and households.<sup>48</sup>

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<sup>47</sup> AJ Padilla & A Requejo, *The Costs and Benefits of the Strict Protection of Creditor Rights: Theory and Evidence* (2000, Washington DC: Inter-American Development Bank, Research Network Working Paper #R-384), p5.

<sup>48</sup> *Ibid*, p6. See also, M Manove & AJ Padilla, 'Banking (Conservatively) with Optimists' (1999)30 *Rand Journal of Economics* 324; M Manove, AJ Padilla & M Pagano, 'Creditor Rights and Project Screening: A Model of Lazy Banks' (Boston, MA, Mimeographed document, 1999); cited in Padilla & Requejo, *ibid*.

The links between legal policies in the context of creditor protections and these broader measures of economic efficiency was highlighted by Posner, in his seminal text, *The Economic Analysis of Law*. Posner argued that these other factors - which can be summarised as effective gate-keeping by creditors – must be brought to bear when considering the law’s attitude towards creditor protections. For example, although it is generally assumed that where the law provides a high degree of creditor protection against default, this will have positive results in terms of credit availability, Posner cautioned that when lenders are aware that their interests will typically be preferred in the event of default by the debtor, they will be inclined to assume unjustified risks. Higher creditor protections reduce the risks associated with lending for creditors, so encouraging riskier lending practices, which have been linked to higher rates of bankruptcy.<sup>49</sup> Yet, while lower creditor protections encourage entrepreneurship, they are also linked to higher interest rates and higher rates of default. Although Posner acknowledges that the outcome of his analysis is ambiguous,<sup>50</sup> the complexity of economic efficiency arguments in the context of creditor protections casts some doubt on the narrow approach that has appeared to inform legal analysis. While the pro-creditor position has been justified in legal discourse by reference to the need for widely

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<sup>49</sup> ‘Some [US] states have generous household exemptions for insolvent debtors, others chintzy ones. In the former states, the risk of entrepreneurship is reduced because the cost of failure is less, but interest rates are higher because default is more likely and the creditor’s position in the event of default is weaker. And note that higher interest rates make default all the more likely. Cutting the other way, however, is the fact that in low-exemption states lenders’ risk is less, which induces lenders to make more risky loans, ie loans likely to end in bankruptcy. It is therefore unclear whether there will be more bankruptcies in the high-exemption states or in the low-exemption states.’; RA Posner, *The Economic Analysis of Law* (Boston, Little, Brown and Company, 1992), pp440-441.

<sup>50</sup> Similarly, Padilla and Requejo’s empirical study of the costs and benefits of strict creditor protections found no conclusive evidence on the sign and magnitude of the effect of creditor rights protection on credit market efficiency; above, n47.

available credit to fund home ownership, the focus on lending volume, at the exclusion of other measures of market performance, such as default rates, is questionable. It may even be the case that economic efficiency in the credit market is not determined by the degree of legal protection afforded to creditors, but by other factors altogether. In fact, several studies have suggested that an effective judicial system and macroeconomic stability are more significant as determining factors for the development and optimal performance of the credit market than the degree of legal protection conferred on creditors.<sup>51</sup> If the legal approach to creditor/occupier contests is to be informed by economic analysis, a more comprehensive view of economic efficiency is required. A broader range of economic (and non-economic) costs, linked to the creditor/occupier dispute, are considered further in later sections of this chapter. Firstly, however, it is important to recognise another of the policy factors underpinning the pro-creditor preference of current law and policy: the goal of widening participation in the home ownership market.

### **‘Widening participation’ in the home ownership market**

To date, the influence of economic analysis in the creditor/occupier context has emerged most strongly in relation to the availability of credit – that is, the willingness of creditors to lend money, either for the acquisition of the owned home (acquisition finance), or against the security of such a property (non-acquisition finance). On the one hand, concerns regarding the availability of acquisition finance are clearly influenced by the government policy of expanding home ownership, discussed in Chapter Five. The issue that has dominated

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<sup>51</sup> R La Porta, F Lopez-de-Silanes, A Shleifer *et al*, ‘Legal Determinants of External Finance’ (1997)52 *Journal of Finance* 1131-1150; R La Porta, F Lopez-de-Silanes, A Shleifer *et al*, ‘Law and Finance’ (1998)106 *Journal of Political Economy* 1113-1155; M Meador, ‘The Effects of Mortgage Laws on Home Mortgage Rates’ (1982)34 *Journal of Economics and Business* 143 at 147.

economic analysis in the legal context, in respect of acquisition credit, has been the willingness of creditors to lend capital to prospective home buyers, and so to support the government's policy of widening access to home ownership. If the protection afforded to occupiers in their homes vis-à-vis creditors were to be bolstered, it is thought that this could potentially have a negative effect on the availability of acquisition credit, and so undermine the viability of widespread owner occupation. On the other hand, concerns linking the pro-creditor approach that has emerged in legal analysis of the creditor/occupier dispute have also been informed by a policy of promoting the 'usability' of the home as security for non-acquisition finance.<sup>52</sup> When considering the impact on non-acquisition credit, any diminution in creditor protections could make it more difficult to secure subsequent credit against the owned-home, and so potentially inhibit entrepreneurial activity. The concerns raised by each issue are clearly linked to distinct policy objectives: if the object is to support the expansion of home ownership, the key consideration must be the position of creditor supplying acquisition credit. On the other hand, if the policy concern at stake is the 'usability' of the home as a financial asset to support other activities, then the economic considerations at play must be evaluated in light of questions concerning the desirability of facilitating the securitisation of non-acquisition debts on the (family) home.<sup>53</sup>

The previous section has indicated that the economic issues at stake in the creditor/occupier context are more complex than the discourse of credit availability would suggest. However, even within a relatively narrow perspective that focuses on the availability of credit, the idea that it is necessarily desirable for credit to be readily available – particularly for low-income households – is questionable. The empirical findings discussed

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<sup>52</sup> See above, n41-42 and associated text.

<sup>53</sup> While some commentators argue that the ability to release capital from your owned home is one of the principal advantages of owner occupation, others oppose the use of the home in this way; see further, ch 1.

above suggested that lowering creditor protections would not impact particularly on high-income households so far as credit availability is concerned, but could have negative effects on lending volume to low income households. Where this is presented as an argument against attaching weight to the interests of occupiers – because ‘at the end of the day it is the consumer who pays’ – it is worth considering the value of ensuring the availability of acquisition credit and non-acquisition credit for low-income households.

In relation to the ‘usability’ of the home as a financial asset to support other activities, arguments asserting the importance of strict creditor protections to enable home owners to use their properties as collateral security for non-acquisition debts are cast in an interesting light by evidence that the value of the home as a financial asset, which can be utilised to fund other activities, is limited for low-income households. Smith has argued that the owner-occupied home is increasingly regarded as a repository of wealth – by both the owner-occupier and the state – and that the desire to release wealth through securitisation of credit is strong, as wealth tied up in the home is currently regarded as: ‘...more “spendable” now than it will be ever again.’<sup>54</sup> However, in a recent study of low-income home owners, Burrows and Wilcox found that the homes of low-income households are not as ‘usable’ as security for non-acquisition credit, but rather that: ‘[t]he housing assets of low-income homeowners are tied up in their home for the duration of their lifetime, and provide very limited opportunities for them to alleviate their poverty.’<sup>55</sup> For low-income households, the idea that equity in the home is used to fund other activities through the securitisation of non-acquisition credit was not supported by the research. If concerns about the links between

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<sup>54</sup> S Smith, *Banking on Housing: Speculating on the role and relevance of housing wealth in Britain* (Paper prepared for the Joseph Rowntree Foundation Inquiry into Home Ownership 2010 and Beyond, 2005), p2.

<sup>55</sup> R Burrows & S Wilcox, *Half the poor: Home-owners with low incomes* (London, Council of Mortgage Lenders Research Report, 2000), p77.

lending volume and creditor protections are directed towards the use of the home as an asset against which to secure non-acquisition finance, then the evidence that lowering creditor protections has more impact on low-income households should be reviewed against the research findings that suggest that low-income households are unlikely to utilise their property in this way, in any event. This is not to say that some low-income households may wish to use their property in this way, however, if the pro-creditor position that has influenced creditor/occupier contests to date is justified by reference to economic consequences, a more subtle analysis of the effects of legal doctrine on the economic interests of the relevant parties must be carried out.

In relation to acquisition finance, the picture, once again, is complex. On the one hand, the availability of acquisition credit for low-income households has particular resonance in light of the culture of home ownership and the benefits associated with buying your own home – whether in respect of the individual home owner’s well-being, the effects on stable family life or the positive impact on communities – have become socially embedded.<sup>56</sup> However, on the other hand, it has been suggested that the key housing issue in contemporary Britain, and for the foreseeable future, is the sustainability – rather than the expansion – of home ownership.<sup>57</sup> The widespread availability of cheap credit for house purchases has meant that the proportion of home owners with low incomes has increased dramatically. In fact, 32% of those classed as ‘poor’ in the UK are owner occupiers subject to a mortgage.<sup>58</sup> Furthermore, since low-income households are at greatest risk of default, it

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<sup>56</sup> See further, ch 5.

<sup>57</sup> D MacLennan, G Meen, K Gibb & M Stephens, *Fixed Commitments, uncertain income: Sustainable owners-occupation and the economy* (Housing Research 228, London, Joseph Rowntree Foundation, 1997). See also, J Ford, R Burrows & S Nettleton, *Home Ownership in a Risk Society: A social analysis of mortgage arrears and possessions* (Bristol, Policy Press, 2001).

<sup>58</sup> Burrows & Wilcox, above, n55, p77.



has been argued that the risks associated with home ownership – especially those associated with health and family life<sup>59</sup> - must be re-evaluated in the context of poverty research.<sup>60</sup> The range of economic and social issues associated with mortgage possession actions and low-income households support the argument that the strict protection of creditor's rights should be analysed not merely in terms of creditor availability, but in relation to overall market efficiency, including the rates of default and the costs associated with default and enforcement of security.

The issues associated with the expansion of the home ownership sector are considered further in Chapter Five, while the costs of possession actions are discussed below. Although there are undoubtedly significant benefits to be reaped from home ownership, some households find owner occupation unsustainable, which leads to default, repossession and major economic, social and emotional losses. For these households, it is arguable that their interests would be better served by encouraging creditors to act as effective gate-keepers, and to follow responsible lending practices, rather than focusing exclusively on lending volume. This has repercussions for legal analysis which purports to assert that high creditor protections are, 'at the end of the day', in the interests of the consumer. It is also worth bearing in mind that when creditors are highly protected against default, there is less incentive for them to negotiate, restructure and reschedule payments with defaulting debtors.

So far as the economic argument is concerned, it is clear that the position is more complex than the apparently simplistic admonition that 'money will not be lent', or 'at the end of the day it is the borrower that pays'. However, even if these axioms concerning the consequences of reducing the degree of creditor protection could be substantiated by empirical evidence, this would not necessarily be the end of the story. Perhaps, for those who

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<sup>59</sup> See further, below.

<sup>60</sup> See R Burrows, *Poverty and Home ownership in contemporary Britain* (Bristol, Policy Press, 2003).

persist in valuing the availability of credit over and above other – including other economic - considerations,<sup>61</sup> the task of conceptualising *home* may remain meaningless. In fact, from this perspective, the conceptual underdevelopment of *home* rather accommodates the continued pre-eminence of the creditor's interests. However, the validity of adopting a pure economic efficiency approach is in itself questionable when viewed from a broader perspective. Bearing in mind that, historically, the promotion of homeownership was not purely driven by market considerations but was also significantly influenced by socio-cultural goals,<sup>62</sup> the suggestion that law's response to creditor/occupier disputes should be rooted only in economic cost/benefit analysis, without taking account of other considerations, is anomalous. This is particularly pertinent in light of the current movement, in a range of disciplines, to re-evaluate market practices from more social perspectives.<sup>63</sup> The next section will consider some of the considerations that might be taken into account when pursuing such an avenue of inquiry.

## ALTERNATIVE PERSPECTIVES ON STRIKING THE BALANCE

Notwithstanding the complexity of the issues surrounding the provision of credit for home ownership, the 'efficiency model' that appears to have influenced the current pro-creditor stance when determining disputes between creditors and occupiers appears concerned with only one aspect of the socio-economic context of conflicts involving *home* – that is, the availability of credit. Furthermore, as the discussion in Chapter Two has demonstrated, there

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<sup>61</sup> Overlooking, for example, the economic and other costs of repossession discussed below.

<sup>62</sup> See ch 5.

<sup>63</sup> Susan Smith discusses: '...the struggle to reclaim markets for social ends which is now appearing in literatures from international political economy to science and technology studies, from the sociology of finance to the world of economic geography, from political philosophy to grass roots practice.', above, n54, p33.

is little evidence that other factors – either in relation to economic efficiency, or non-economic factors - are taken into account when the court is balancing the home interests of occupiers against the commercial claims of creditors.

The previous section has suggested that the issue of credit availability is only one of the factors that should be regarded as relevant to any economic analysis of the creditor/occupier context. This section moves beyond that position, to discuss the broader notion of economic efficiency which has implicitly underwritten the pro-creditor stance adopted in legal discourse. The constraints that characterise narrowly framed economic analysis – particularly the overwhelmingly privileged status conferred on market efficiency relative to other goals - have attracted criticism from various quarters. As Quigley has argued in the housing context, even where economic efficiency can be established: ‘many find the efficient outcome unpalatable.’<sup>64</sup> The following sections consider some of the theoretical analyses underpinning the proposition that legal discourse should look beyond a simple efficiency analysis of credit transactions, to take account of wider ‘justice’ and ‘social values’ considerations.

### **‘Law and market economy’**

The proposition that ‘there’s more to it than efficiency’ has attracted considerable attention from critical economic theorists in recent years. For example, the ‘law and market economy’ school<sup>65</sup> argues that, while economic efficiency is one factor which can be taken into account

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<sup>64</sup> JM Quigley, ‘Why Should the Government Play a Role in Housing? A View from North America’ (1999)16 *Housing, Theory and Society* 201.

<sup>65</sup> This branch of critical economics can be found in the work of Robin Paul Malloy: see generally, RP Malloy, *Law and Market Economy: Reinterpreting the Values of Law and Economics* (Cambridge, Cambridge University Press, 2000); RP Malloy, *Law in a Market Context: An Introduction to Market Concepts in Legal Reasoning* (Cambridge, Cambridge University Press, 2004).

when thinking about law, law's concerns go beyond economic efficiency to include considerations of justice, fairness and morality; consequently, exchanges cannot be viewed purely in terms of efficiency maximisation, but must also be embedded in social and community values. Applying this reasoning to the context of creditor/occupier conflicts over the home, it could be argued that the non-economic preferences of occupiers – their practical, psychological, social, cultural and even emotional interests in their homes – are significant values that should be taken into account when determining the legal issues at stake, even though such interests are not readily translatable into monetary value. Thus, it is argued that while issues pertaining to the availability of credit and the interests of creditors are certainly relevant to the balancing of creditors' and occupiers' claims, there are also other considerations to be brought to bear. One inherent difficulty, however, is the very nature of these 'other' considerations. Since 'home interests' are inherently intangible, and to date have not been enumerated or analysed within a legal framework, a dual difficulty arises. For one thing, in order to justify the development of a concept of home in the context of creditor/occupier disputes, it is necessary to demonstrate that there is a 'case to answer' for tempering the protection of creditors' interests with other values. However, without unpacking the meanings of home and analysing the occupiers' various interests within alternative legal frameworks, it is difficult to represent such claims in terminology that is recognisable to economists – or indeed to lawyers.

In *Law and Market Economy*,<sup>66</sup> Malloy critiqued the traditional law and economics movement for: '...borrow[ing] too heavily from positive economics without acknowledging that the tools and methods of economics are directed at a different 'end' than that of law.'<sup>67</sup> Malloy particularly emphasised the fact that: 'The assumptions of the economist embody

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid*, p8.

certain subjective choices concerning what gets measured and valued and what is ignored or excluded',<sup>68</sup> with the result that the conclusions reached: '...reflect these assumptions and constraints.'<sup>69</sup> Where traditional economic analysis regards money as: '...a symbolic sign or representation of all values';<sup>70</sup> Malloy argues that:

...money...can only represent value in some respects, not in all respects. Money cannot express or interpret all social values and, therefore, it cannot be a universal medium for perfect exchange and substitution. For example, money cannot meaningfully capture important environmental values, the value of child bearing and child rearing, nor can it capture social values such as love, affection, and respect. Yet, we know these values are important to many communities.<sup>71</sup>

The dichotomy that Malloy is seeking to demonstrate is clearly evident in the creditor/occupier context. While the creditor's interest is easily quantifiable in money terms, the occupier's interest in retaining the property for use and occupation as a home, although undoubtedly 'of value', is less readily calculable.

The outcome of legal balancing exercises between the commercial claims of creditors and the home interests of occupiers is also consistent with Malloy's theory that failure to recognise non-financial values: '...privileges the value of those things that are more easily quantifiable while conventionalising the habit of assuming the superiority of highly monetized relationships.'<sup>72</sup> This effect can be clearly observed in the context of conflicts between the readily quantifiable commercial claims of creditors and the non-financial interests of occupiers in retaining their home for use and occupation *as a home*. Malloy

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<sup>68</sup> *Ibid*, p9.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid*, p18.

<sup>71</sup> *Ibid*, pp18-19.

<sup>72</sup> *Ibid*, p19.

argues that in order for economic analysis to remain useful and relevant, it must be tempered with other values, including moral, social and political interests.<sup>73</sup> Applying this line of reasoning to the context of the creditor/occupier dispute, it is readily apparent that the currently prevailing pro-creditor bias in English law cannot be justified in the absence of some attempt to unpack and to conceptualise the occupier's home interests. Only once this process has been carried out, can the court legitimately claim to balance the competing interests at stake.

### **Feminist economics and the 'masculinity' of land law**

The ordering of economic analysis around the discourse of efficiency, to the overwhelming exclusion of other criteria of economic (and other type of) well-being, has also been criticised by feminist economic theorists. Feminist economic analysis seeks to challenge the claim to neutrality and objectivity that characterises neoclassical economics. While law and economics scholars emphasise the purported neutrality of their pursuit of efficiency, feminist economic analysis seeks to re-cast traditional market economy as sexually-specific and its basic unit of analysis – the 'rational economic man' – as masculine in gender. Aspects of

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<sup>73</sup> As Malloy argued in an earlier essay: '...American society is confronted with many complex social problems. Evaluating and resolving these problems require that policymakers appeal to many interdisciplinary theories to achieve a better understanding of the problems and to move closer to a reasonable corrective response. From this perspective, economic analysis can be a useful tool in the evaluation of law and social policy. But economics, like other disciplines, has its limitations. In a complex society, rights are not always absolute; once there is a retreat from the absolute, lines have to be drawn by an imperfect process of balancing competing interests. Some of these interests are economic interests, but, unfortunately for the usefulness of economic analysis, other interests such as political and moral interests must also be considered,'; RP Malloy, 'Equating Human Rights and Property Rights – The Need for Moral Judgment in an Economic Analysis of Law and Social Policy' (1986)47 *Ohio State Law Journal* 163 at 171.

feminist economic analysis shed interesting light on the current treatment of the creditor/occupier conflict in English law.

Firstly, from a feminist perspective the lack of attention given to the argument on behalf of the occupier in legal disputes involving creditors can be attributed, in part, to the apparent subjectivity – and therefore ‘femininity’ - of the occupier’s home interest. One of the hurdles that stand in the path of developing a legal concept of home is the idea that ‘home-type’ interests are anathema to legal reasoning. Indeed, home *is* an essentially subjective phenomenon. It does not appear to be easily quantifiable, and the value of the ‘home’ interest is not readily susceptible to legal proof. These characteristics have led the court to dismiss the idea of home in law as: ‘...something ethereal, floating in the air, unconnected to bricks and mortar and land.’<sup>74</sup> Furthermore, home interests are not generic, but vary from one context to another. Empirical research has established that not all occupiers value their homes in the same way. Different individuals may have different levels of attachment to their properties. For instance, Wikstrom’s research indicated that while: ‘[i]n some cases these bonds [to the home] seemed to be so strong, that breaking them by moving would lead to disaster [while] [f]or some young people, the flat was just a place where they slept and stored their belongings.’<sup>75</sup> Indeed, as Hoffman J acknowledged in *Re Citro*, when balancing the commercial interests of creditors against the home interests of occupiers: ‘[i]t is very hard to see how they can be weighed against each other, except in a way which involves some value judgment on the part of the tribunal.’<sup>76</sup>

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<sup>74</sup> *London Borough of Harrow v Qazi* [2003]UKHL 43 at [145].

<sup>75</sup> T Wikstrom, ‘The Home and Housing Modernisation’ in DN Benjamin (ed), *The Home: Words, Interpretations, Meanings, and Environments* (Aldershot, Ashgate, 1995), p268.

<sup>76</sup> [1991]Ch 142 at 150; Nourse LJ quoted from Hoffman J’s comments in the High Court decision.

These characteristics present obvious impediments when it comes to assessing the balance to be struck between creditors and occupiers, from a law and economics perspective. However, feminist critics argue that while traditional economic analysis seeks to avoid: ‘...areas where strong normative interests are at stake’;<sup>77</sup> it is important to recognise that these interests are both relevant and significant, since: ‘...economic analyses that explicitly recognise the values they embody are more honest and objective than analyses that make claims of value-free neutrality’;<sup>78</sup> Furthermore, feminist economic thought claims to provide the tools by which to broaden the scope of economic analysis, and take account of the full range of interests at stake in any given context, as:

...issues...that are often seen to be too value-laden by traditional economists are viewed as legitimate areas of inquiry by feminist economists who accept that economic questions involve values and value-judgments.<sup>79</sup>

Yet, even looking beyond the mere question of subjectivity *per se*, feminist economic thought is particularly pertinent to the legal recognition of home interests, specifically when balanced against the commercial claims of creditors.

It is interesting to note that the prioritisation of the commercial claims of creditors involves the elevation of their ‘objective’, rational, measurable and easily quantifiable interests, over and above what are perceived as the more ‘subjective’, irrational, emotional and intangible interests of occupiers in their homes. This can also be constructed as the prioritisation of (what are perceived to be) ‘masculine’ traits over (what are perceived to be)

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<sup>77</sup> SF Feiner and BB Roberts, ‘Hidden by the Invisible Hand: Neoclassical Economics Theory and the Textbook Treatment of Race and Gender’, in AL Aerni & K McGoldrick (eds) *Valuing Us All: Feminist Pedagogy and Economics* (Michigan, University of Michigan Press, 1999), pp43-44.

<sup>78</sup> J Peterson, ‘Addressing US Poverty in Introductory Economics Courses – Insight from Feminist Economics’, in Aerni & McGoldrick, *ibid*, p80.

<sup>79</sup> *Ibid*.



‘feminine’ values.<sup>80</sup> The weight attached to the security interests of creditors, and the lack of exposition regarding the home interests of occupiers provide an apt illustration of law’s tendency to favour the ‘rational’ interests of ‘economic man’.<sup>81</sup> Nelson provided a vivid illustration of the contrast between the interests at stake in her description of the ‘Cartesian model of objectivity’, as: ‘...the abstract, general, detached, emotionless, ‘masculine’ approach taken to represent scientific thinking...radically removed from, and clearly viewed as superior to, the concrete, particular, embodied, passionate, ‘feminine’ reality of material life...’<sup>82</sup> Nelson’s observations about the way in which ‘masculine’ and ‘feminine’ interests are ordered is clearly reflected in the conflict between the commercial claims of creditors and the home interests of occupiers. While the creditor’s claim to the abstract capital asset represented by the property can be characterised as masculine, rational, easily quantifiable, ‘knowable’, the material concerns associated with using and occupying the property as a home can be construed as a ‘feminine’ interest. The ethos of legal policy, which recognises

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<sup>80</sup> ‘Masculine knowing characterises itself as rational, self-interested, hierarchical and, above all, abstracted from His emotional life and physical body, being concerned with the fittest ideas in a competitive market. In His book, feminine (un)knowing is inevitably His converse: intimate, nature, material, emotional.’; K Green, ‘Being Here – What a Woman Can Say About Land Law’, in A Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (London, Cavendish, 1996), p83.

<sup>81</sup> Hewitson has described ‘rational economic man’ as androcentric on the grounds that he is conceptualised as: ‘a selfish, radically separate individual divested of those traits and involved in those activities traditionally associated with women. These traits and activities are consequently devalued and rendered very nearly invisible within the neoclassical framework, while roles and traits traditionally associated with men are extolled.’; GJ Hewitson, *Feminist Economics: Interrogating the Masculinity of Rational Economic Man* (Cheltenham, Edward Elgar, 1999), p70.

<sup>82</sup> JA Nelson, ‘The study of choice or the study of provisioning? Gender and the definition of economics’, in MA Ferber & JA Nelson (eds) *Beyond Economic Man: Feminist Theory and Economics* (Chicago, University of Chicago Press, 1993), p25.

and elevates the creditor's claim while underrating, if not totally overlooking the occupier's home interest, is wholly consistent with the model set out in Nelson's analysis.<sup>83</sup>

If neoclassical economics is primarily concerned with rational individual choices, competitive markets, market efficiency, and abstract scientific reasoning, it has much in common with the central tenets of English land law. The distinction set out above – between 'masculine' and 'feminine' interests – and the ordering of abstract, rational claims over material and subjective interests – is clearly reflected in the description of land law as aspiring to the status of a 'rational science'. Although law, as a system created by human beings to regulate human conduct, cannot be an exact science, the aim of developing a system which will be closely analogous to the 'hard sciences' is most evident in the field of land law. English land law has been described by leading commentators as:

...display[ing] many of the features of a closed system of logic or an autopoietic order, prompting immediate analogies with mathematics and, more particularly, with the discipline of Euclidean geometry...every strategic move is dictated by an arbitrarily predetermined set of foundational principles...property in land 'behaves' in a manner just as predictable and verifiable as any other branch of rational science.<sup>84</sup>

Although this apparently strict rationality cannot be absolute, and must sometimes be mediated by other values, Gray & Gray argue that the extrinsic values brought to bear in contexts such as mortgage (or landlord) possession actions also favour commercial interests rather than 'home-type' interests.<sup>85</sup> In relation to dealings between creditors and occupiers,

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<sup>83</sup> Nelson goes on to say that: '[n]ature, childhood, bodily needs, and human connectedness, cut off from 'masculine' concern in the Cartesian split, remain safely out of the limelight'; *ibid*, p26.

<sup>84</sup> Gray & Gray, above, n21, pp204-5.

<sup>85</sup> For a discussion of the commercialism of the 1925 legislation, and its role in justifying the über-rational approach of English land law, see A Bottomley and N Jackson, 'Shifting Conceptual Frames: Experiences of

they identify a rhetoric within which: ‘...relationships are strictly commercial, bargaining is hard-nosed, social bondings are minimal and the value attached to land is primarily, perhaps even exclusively, an ‘exchange value’. Altruism is in very short support; we are talking money.’<sup>86</sup> Thus, not only does the central core of strict logic and rationality in (property) law tend to favour the objectively measurable (in money terms) interests of creditors, over and above the subjective, intangible, non-financial ‘home’ interests of occupiers, but the values by which this rationality is tempered also tend towards the financial interests of commercial parties rather than the non-financial, social, psychological or emotional ‘home’ claims of occupiers.

There is a clear resonance between the disciplines of neoclassical economics and English land law. This is also reflected in critical analyses – particularly feminist critique – of both disciplines. For example, when Green examined the pursuit of a ‘scientific’ approach in land law, she identified the characteristics outlined above – the association with mathematics, the preference for abstract, rational claims - as typically ‘masculine’. In fact, Green stated that:

Of all academic pigeonholes, property law (and its exemplar, land law) is the epitome of a masculine knowledge. It is perceived as one of the most difficult core subjects, one of the most rigorous, that requires a love of maths, an aptitude for chess; the abstract play of interests in land is a war-game for minds.<sup>87</sup>

The parallel with neoclassical economics is emphasised in Green’s suggestion that:

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Teaching Land Law’ (Paper delivered in WG Hart Workshop, London, 1993; held at the Institute of Advanced Legal Studies, University of London), p6.

<sup>86</sup> KJ Gray & SF Gray, ‘The Rhetoric of Realty’ in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (2003, London: Butterworths), p241.

<sup>87</sup> Green, above n80, p93.

The rules maintain their logic and predictability for rational men; distance and a certain ruthlessness are also persuasive of land law's masculine world view...All the rules are judged rationally, according to their fitness for their purpose: the test is whether they render the market more or less efficient.<sup>88</sup>

The significance of this ethos in respect of the creditor/occupier context is evident. The prioritisation of commercial interests, such as the creditor's interest in the secured home as capital - over and above the use value of the home to occupiers - is clearly facilitated by the apparent masculinity of land law's self-identity. On the one hand, it is clear that values associated with 'the market', and so, by extension, with reason and rationality, are lauded,<sup>89</sup> while, on the other hand, non-economic interests are cast as 'non-legal', and consequently dismissed.<sup>90</sup>

When considering the role of gender in legal discourse, the 'masculinity' of the creditor's commercial claim provides a perfect foil to the 'femininity' of the occupier's home interest. Yet, the significance of critical feminist analysis, when applied in this context, goes

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<sup>88</sup> *Ibid*, p101.

<sup>89</sup> 'Commentators have seen land law's function as providing the 'certainty' essential to the smooth running of the market: conveyancing must be facilitated so that rational men know where they stand. Reason is seen to demand that the needs of property owners, self-interested and rational individuals in the market place, override the needs of those who are different: weaker or poorer, or in a different way defined as Other.'; *ibid*, pp93-4. Green later added that: '...it is clear that land law can be represented as a typically masculine pursuit. The land lawyer's object is to provide certainty by manipulating scientifically derived and maintained classifications of 'interests in land'. This certainty, predictably, is necessary to facilitate the activities of rational, autonomous actors in the market place.'; *ibid*, p95.

<sup>90</sup> '...the law constructs itself precisely by excluding that which is considered non-legal...The 'rightness' of objectivity, rationality, scientificity and independence...obtains its force from the exclusion of a culturally devalued 'feminine' or wrong way...'; M Davies, 'Feminist Appropriations: Law, Property and Personality' (1994) *Social and Legal Studies* 365 at 376.

beyond the specific outcome in possession actions. Rather, it is indicative of the more general difficulties associated with developing a concept of home in law. While commercial interests 'fit' readily into the framework of interests that are recognised by property law, the relationship between an occupier and his or her home, inherently intangible and difficult to define, is not readily comprehensible to lawyers. Legal analysis, particularly in the field of property law, tends to favour the rational, the objective, and the tangible:<sup>91</sup> interests which conform to the 'hard nosed' masculinity of land law. The proposition that a property may be meaningful, in a social, psychological and emotional way, is totally at odds with these types of values. Furthermore, this incongruence has become increasingly marked, as land law has been 'bureaucratised', from the introduction of title registration in the final decades of the nineteenth century, through the 1925 legislation, and most recently in the Land Registration Act 2002. The link between home interests and the philosophy of 'dwelling' is explored in Chapter Four. The concept of 'dwelling' as the way in which humans live in the world laid the foundations for an understanding of *home* as: 'an emotionally based and meaningful relationship between dwellers and their dwelling places.'<sup>92</sup> However, the bureaucratisation of land law has caused a decisive shift in the frame of reference underpinning ownership and occupation of land.

This is clearly evident in the philosophy of the Land Registration Act 2002. The Land Registration Act 2002 has altered the landscape of land law in several major respects. In their seminal textbook, Gray & Gray state that:

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<sup>91</sup> For further discussion, see, for example, D Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in W Twining (ed) *Legal Theory and the Common Law* (Oxford, Blackwell, 1986).

<sup>92</sup> K Dovey, 'Home and Homelessness', in I Altman & CM Werner, *Home Environments* (New York, Plenum Press, 1985), p34.

There has always been an instinctive bias in favour of transactional certainty in the land market and this perceived imperative has now acquired a heightened emphasis with the enactment of the Land Registration Act 2002. By various means this legislation infuses a new quality of rationality into dealings with land...The 2002 Act accordingly oversees an intensified system of almost universal recordation of property rights in the Land Register, thereby sharpening up the effects of dealings between strangers and reducing potential threats to any title taken by a transferee or mortgagee.<sup>93</sup>

Before the development of title registration, possession was the root of title in land. The significance of possession in the theoretical framework of property law is considered further in Chapter Six. According to the common law tradition, physical possession was the basis for presumptive ownership, rather than abstract title.

The material fact of possession was the basis for the doctrine of *seisin*, a principle which: ‘...expressed the organic element in the relationship between man and land and as such provided presumptive ownership within the medieval framework of rights in land.’<sup>94</sup> As Alice Ehr-Soon Tay wrote in 1978:

...it is because all proprietary and possessory rights ultimately stem from enjoyment that seisin lies at the very root of the development of the English law of property and of the Englishman’s concept of freedom – of his home as his castle. The common law, then, begins with and long maintains a bias in favour of the factual situation – the citizen’s actual behaviour and powers *against* the claims or privilege and authority as such...The role of the underlying seisin-possession concept in the common law is to

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<sup>93</sup> Gray & Gray, above n18, [2.48].

<sup>94</sup> KJ Gray & PD Symes, *Real Property and Real People: Principles of Land Law* (London, Butterworths, 1981) pp48-49.

recognise and protect those still important areas in which men live, work and plan as users...<sup>95</sup>

This account of the significance of possession in the common law tradition of land law highlighted the weight that was attached to the material fact of dwelling on land, of living and using and occupying the property.

The shift away from this type of system is associated with the introduction of title registration. As the system of title registration has developed, and particularly with the enactment of the Land Registration Act 2002, it has affected a shift in emphasis: ‘...from possession to title, from empirically defined fact to state-defined entitlement, from property as a reflection of social actuality to property as a product of state-ordered or political fact. In short, instead of the citizen telling the state who owns land, the state will henceforth tell the citizen.’<sup>96</sup> Even prior to the enactment of the 2002 Act, Green identified the trend of bureaucratisation in land law, and suggested that it was significant in signalling: ‘...a distancing from the material and subjectively known (feminine) *place* to an intellectual and objective (masculine) *space*.’<sup>97</sup>

The particular implications of gendered perceptions of home values are explored in greater depth in Chapter Eight, which unpacks the development of feminist legal theory with regards to the concept of *home*, and analyses the ambiguities of home for feminist commentators against empirical studies concerning the meaning and values of home and the experiences of mortgage possession for men and women. Green has argued that women’s interests in land have often been ‘invisible’, as: ‘...there are no official statistics on the

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<sup>95</sup> A E-S Tay, ‘Law, the citizen and the state’, in E Kamenka, R Brown, A E-S Tay, (eds) *Law and Society: The Crisis in Legal Ideas* (London, E Arnold, 1978), p11.

<sup>96</sup> Gray & Gray, above n86, p245.

<sup>97</sup> Green, above, n87, p95. The philosophical study of dwelling, space and place is considered in more detail in ch 4, below.

ownership of land by women, or on the value of their shares in land, their dispossessions or evictions.<sup>98</sup> Although there is a dearth of quantitative data on issues concerning women and property ownership within the land law system, Chapter Eight will draw on qualitative analysis, across a range of other disciplines, on the significance of gender in the creditor/occupier context. Chapter Eight will also consider the ambiguities surrounding the idea of the home as a meaningful and significant place for women occupiers.

Feminist theorists have traditionally rejected the idea of the 'home' as place for women, due to the connotations that this concept has traditionally had with patriarchy, domination and the confinement of women to the private sphere. Feminist critics have described 'home', particularly when associated with the idea of 'women in the home', as a prison, a place of patriarchy and oppression,<sup>99</sup> and in extreme cases a place of violence.<sup>100</sup> Home is represented as the paradigmatic 'private' sphere, which both practically and emblematically assists the patriarchal endeavour of keeping women invisible to the law, vulnerable to abuse, and without access to public power. When conceived within this framework, Valerie Burks argued that feminists must reject home, since: '[f]rom its very beginnings, feminism has, in large part, sought to expose the separation of public and private

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<sup>98</sup> *Ibid*, p93.

<sup>99</sup> B Martin & M Mohanty, 'Feminist Politics: What's Home Got to do with it?' in T de Laurentis (ed), *Feminist Studies/Critical Studies* (Bloomington, Indiana University Press, 1986) pp191-211; T de Laurentis, 'Eccentric Subjects: Feminist Theory and Historical Consciousness' (1990) *Feminist Studies* 16:1:115-150; B Honig, 'Difference, Dilemmas, and the Politics of Home', (1994) *Social Research* 61:3: 563-597.

<sup>100</sup> E Stanko, 'Fear of Crime and the Myth of the Safe Home: A feminist critique of Criminology', in K Yllo & M Bograd (eds) *Feminist Perspectives on Wife Abuse*. (London, Sage, 1988); E Saraga, 'Dangerous Places: The Family as a site of crime', in E Muncie, & H McLaughlin, (eds) *The Problem of Crime*, (London, Sage, 1996); L Moran, 'The poetics of safety: lesbians, gay men and home', in A Crawford, (ed) *Crime, Insecurity, Safety in the New Governance*, (Cullompton, Willans Publishing, 2002).



life as a mere fabrication of phallo-centric power structures meant to quell woman's political identity and 'keep her at home'.<sup>101</sup>

The association between women and the 'home as private sphere' are also significant in relation to critical law and economics analysis of the creditor/occupier contest. The public-private dimension provides another layer of gender differentiation, and demonstrates once again the elevation of that which is perceived to be 'masculine'. The commercial interests of the creditor are associated with the market – a public arena – and therefore 'masculine', while the home – a private space – is associated with 'femininity'. Furthermore, as Green & Lim asserted: '...the difference matters, because the public is economically and politically more important than the private.'<sup>102</sup> This dichotomy is brought into sharp relief when analysing credit transactions secured against the home – particularly the family home. When home interests are defeated by creditor actions, the outcome can be characterised as: '...private actions in the family home...being judged by public values – rationality over altruism, competition over co-operation, individual over community, men over women.'<sup>103</sup> Of course, the interests of occupiers encompass financial interests as well as non-economic values, but it is 'x'-factor<sup>104</sup> that transforms a house into a home - the social, psychological, emotional responses that create attachments to home – that renders 'home-oriented' arguments vulnerable, since the proposition that home can encapsulate meanings beyond the physical structure of the house, or the capital value it represents, continues to present conceptual difficulties for lawyers.

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<sup>101</sup> VC Burks, 'Women's Place: An Arendtian Critique of Feminism' (1994)14 *Women and Politics* 19.

<sup>102</sup> K Green & H Lim, 'Weaving Along the Borders: Public and Private, Women and Banks', in S Scott-Hunt & H Lim, *Feminist Perspectives on Equity and Trusts* (London, Cavendish, 2001) p91.

<sup>103</sup> *Ibid*, p90.

<sup>104</sup> The 'x' factor is explored further in ch 4, below.

The stark conflict between creditors and occupiers is emphasised once again since, while the 'home' interest is perceived as 'feminine', equally so the creditor's action to realise the capital value of the property is regarded as a 'masculine' act. Rosemary Auchmuty has contrasted the perception of non-economic home values as 'important to most women' with: '...the masculine concern for business profits.'<sup>105</sup> The significance, from a gender perspective, of the automatic priority afforded to creditors in actions against domestic property, is patent. Yet, gender is not the only issue at stake. Rather, as Kate Green has suggested, the (effectively) automatic prioritisation of the claims of creditors over the interests of occupiers reflects the way in which the: '...needs of property owners, self-interested and rational individuals in the market place, override the needs of those who are different: weaker or poorer, or in a different way defined as Other.'<sup>106</sup> This proposition has been borne out in the repossession context by numerous empirical studies, which have demonstrated both the salience of home for certain categories of occupier – whether because of low-income;<sup>107</sup> age - both for children<sup>108</sup> and the elderly;<sup>109</sup> disability;<sup>110</sup> race;<sup>111</sup> or marital

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<sup>105</sup> R Auchmuty, 'The Rhetoric of Equality and the Problem of Heterosexuality', in L Mulcahy & S Wheeler (eds) *Feminist Perspectives on Contract Law* (London, Glasshouse Press, 2005), p71.

<sup>106</sup> Green, above n80, pp93-94.

<sup>107</sup> Low-income is an obvious issue in relation to vulnerability to repossession: see, for example, P McCarthy & B Simpson, *Issues in Post-Divorce Housing* (Aldershot, Avebury, 1991) while the high proportion of low-income households in the owner occupied sector emphasises the extent of the potential for default. One study suggested that for low-income home owners, the social and economic value of ownership was mitigated by the fact that ownership increases financial and psychological stress among families living on the economic margin: D Balfour & J Smith, 'Transforming lease-purchase housing programs for low-income families: Towards empowerment and engagement' (1996)18 *Journal of Urban Affairs* 173; see also L Rainwater, 'Fear and the house-as-haven in the lower class', (1966)32 *Journal of the American Institute of Planners*, 23–31.

<sup>108</sup> See further, ch 9.

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<sup>109</sup> Elderly people may be rendered particularly vulnerable as occupier for various reasons, including health problems and financial circumstances, at a time when ‘home’ can play a critical role in maintaining their sense of personal identity and independence: see, for example, A Dupuis & DC Thorns, ‘Meanings of Home for Older Home Owners’ (1996)<sup>11</sup> *Housing Studies* 485; A Dupuis & DC Thorns, ‘Home, Home Ownership and the Search for Ontological Security’ (1998)<sup>46</sup> *The Sociological Review* 24; PC Kontos, ‘Resisting Institutionalization: Constructing Old Age and Negotiating Home’ (1998)<sup>12</sup> *Journal of Aging Studies* 167; J Mansvelt, ‘Working at Leisure – Critical Geographies of Ageing’ (1997)<sup>29</sup> *Area* 289; G Mowl, R Pain & C Talbot, ‘The ageing body and homespace’ (2000)<sup>32</sup> *Area* 189.

<sup>110</sup> The issues associated with access to, and support of, homeownership for people with disabilities have attracted considerable critical attention: see, for example, S Galbraith, ‘A Home of One’s Own’, in A Tymchuck, KC Lakin & R Luckasson (eds), *The forgotten generation: the status and challenges of adults with mild cognitive limitations* (Baltimore, Brookes, 2001); E Hepp & C Soper, ‘One family’s story of homeownership’ (2000)<sup>15</sup> *Journal of Vocational Rehabilitation* 79; J Klein, ‘The history and development of a national homeownership initiative’ (2000)<sup>15</sup> *Journal of Vocational Rehabilitation* 59; J Klein & M Black, *Extending the American Dream: Home Ownership for people with disabilities* (Durham NH, University of New Hampshire Institute on Disability, 1995); J Klein & D Nelson, ‘Homeownership for people with disabilities: The state of the states in 1999’ (2000)<sup>15</sup> *Journal of Vocational Rehabilitation* 67; J Klein, B Wilson & D Nelson, ‘Postcards on the Refrigerator: Changing the power dynamic in housing and assistance’, in J Nisbet & D Hagner (eds), *Part of the Community: Strategies for including everyone* (Baltimore, Brookes, 2000); J O’Brien, ‘Down stairs that are never your own: Supporting people with developmental disabilities in their own homes’ (1994)<sup>32</sup> *Mental Retardation* 1. In addition to the issues concerning physical disability, the Court of Appeal has recognised, in the context of tenant evictions, that: ‘To remove someone from their home may be a traumatic thing to do in the case of many who are not mentally impaired. It may be even more traumatic for the mentally impaired.’; *Manchester City Council v Romano and Samari* [2004]EWCA Civ 834, *per* Brooke LJ.

<sup>111</sup> The positive relationship between home, gender and race was explored by bell hooks in *Yearning: race, gender, and cultural politics*, (Boston, South End Press, 1990); on the other hand, like gender, race has had implications on the availability, and sustainability of owner occupation: see, for example, JW Frasier, FM Margai & E Tettley-Fio, *Race and Place: Equity Issues in Urban America* (Boulder, Westview Press, 2003); D Conley, *Being Black, Living in the Red: Race, Wealth, and Social Policy in America* (CA, University of

status<sup>112</sup> - as well as their heightened vulnerability in relation to possession actions. Saegert's research has suggested that when a person's economic and social resources are limited, home and the neighbourhood environment play a critical role in that person's life chances and identity.<sup>113</sup> Yet, paradoxically, it would seem that those who stand to gain significantly from the individual economic and social/psychological ('x factor') advantages purportedly associated with home ownership,<sup>114</sup> are most vulnerable to repossession and forced sale at the hands of a creditor.<sup>115</sup> Those who have the most to lose in terms of *home* interest are also most likely to find the 'dream' of home ownership turning into a nightmare.

It is clear that, although legal policy in creditor/occupier disputes has been heavily influenced by the economic clout of creditors, when balancing the arguments for and against ordering possession and sale of a home, the current justifications are inadequate. The argument that, since the extension of homeownership depends on the availability of credit then creditors' rights must prevail, suggests that the issues at stake are straightforward and simplistic and that the necessary outcome is obvious. Creditors must be protected, and the home interests of occupiers must be dismissed. The discussion above has attempted to unpack some of the complex issues in play in this context, and to argue that economic

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California Press, 1999), W Webster, *Imagining Home: Gender, 'Race' and National Identity, 1945-64* (London, UCL Press, 1998).

<sup>112</sup> The significance of definition of 'family' in limiting the applicability of the concept of *family home* is discussed in ch 7.

<sup>113</sup> S Saegert, 'The role of housing in the experience of dwelling' in I Altman & CM Werner (eds), *Home Environments* (New York, Plenum Press, 1985), pp289-90; see also A Schorr, *Slums and Social Insecurity* (Washington DC, US Government Printing Office, 1964).

<sup>114</sup> See further, ch 5.

<sup>115</sup> This raises potential equality issues, considered further in ch 10, which analyses the treatment of *home* interests within human rights frameworks.

efficiency, based on the costs to the creditor, is neither the only option for legal policy makers nor, necessarily, the obvious choice. The pro-creditor bias that dominates legal discourse concerning creditor/occupier contests is heavily value laden, and neither the issues at stake, nor the full range of costs, have been taken into account in reaching that position.

Furthermore, even if the balancing exercise was envisaged purely in terms of an economic cost-benefit analysis, there are other economic costs to consider alongside the potential losses to the creditor in the event of default. In *Home Ownership in a Risk Society*,<sup>116</sup> Ford, Burrows & Nettleton identified several socio-economic consequences resulting from mortgage arrears and repossessions, including financial costs - from outright losses to costs resulting from the physical deterioration of property - to the social and psychological costs associated with housing debt, restricted residential mobility and relationship difficulties, as well as health related costs, and administrative costs. These costs, it was argued, may be experienced by a range of actors: borrowers, lenders, insurers, central government, local government, housing market institutions, labour market institutions, and health services.<sup>117</sup> In addition, there may be potential costs to existing homeowners and to creditors if homeownership were to become less popular. These considerations provide a further challenge to the presumption that appears to have taken hold in the legal domain, that an economic analysis of creditor/occupier disputes can be swiftly executed by identifying and elevating one element of the equation – the idea that by protecting commercial interests, legal policy makers can safeguard the flow of capital into housing. While this solution may satisfy the interests of individual creditors or landlords, in the long term the ultimate question of ‘who pays’ is much more complex. If consequentialist economic analysis is the justification for allowing commercial interests to routinely outweigh home interests, then there is

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<sup>116</sup> Above, n57.

<sup>117</sup> *Ibid*, p108.

currently no indication that all the potential costs - financial and non-financial - have been taken into account.

#### THE IMPACT OF LOSING A HOME: FROM THE PERSONAL TO THE POLITICAL

The context of disputes between creditors and occupiers provides a stark example of the way in which the values of home to an occupier are actually minimised, especially when weighed against the more tangible claims of creditors, despite the fact that the net result for the occupier, if the creditor's claim to the house as security prevails, is often the loss of their home. One of the issues associated with the arguments surrounding the impact of losing a home, however, reflects an obstacle frequently encountered when dealing with 'home-type' issues – that is, both the apparent subjectivity of home attachments, and the difficulty in subjecting the personal impact of creditors' possession actions on occupiers to legal proof. As one home theorist has suggested in another context: '...the problem lies with the fact that we are dealing with environmental intangibles – attachment, grief, loss – which are immeasurable, difficult to articulate, and thus easy to ignore by the cost-benefit brigade.'<sup>118</sup> In one sense, the impact of losing one's home can only ever be quantified after the event, since: '[b]eing intangible, qualities of home are often only identified when they are lost.'<sup>119</sup> Thus, as Buttimer suggested:

Whether all these values are consciously articulated in legal or behavioural terms does not seem to be the crucial point. In fact, they are often not brought to consciousness

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<sup>118</sup> JD Porteous, 'Domicide: The Destruction of Home' in Benjamin (ed), above, n75, p153.

<sup>119</sup> Dovey, above, n92, p56.

until they are threatened: normally they are part of the fabric of everyday life and its taken for granted routines.<sup>120</sup>

Not only do home values become more easily identifiable when the occupier's relationship with the home is threatened, but the argument that home interests are significant and should be protected is brought into sharp relief when creditors bring actions against the property, and the occupier faces the loss of their home.

Empirical studies which have focused on the psychological impact of losing one's home identify extreme responses including alienation and grief amongst dispossessed occupiers.<sup>121</sup> In Brown and Perkins' study of disruptions in place attachment, they found that: 'After the development of secure place attachments, the loss of normal attachments creates a stressful period of disruption followed by a post-disruption phase of coping with lost attachments and creating new ones.'<sup>122</sup> Similarly, in 'Grieving for a Lost Home', Marc Fried considered the crisis of losing one's home and concluded that: '...for the majority it seems quite precise to speak of their reactions as expressions of grief.'<sup>123</sup> Victims of home loss reported a range of responses, including:

feelings of painful loss, the continued longing, the general depressive tone, frequent symptoms of psychological or social or somatic distress, the active work required in

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<sup>120</sup> A Buttimer, 'Home, Reach, and The Sense of Place', in A Buttimer & D Seamon (eds), *The Human Experience of Space and Place* (London, Croom Helm, 1980), p167.

<sup>121</sup> See RJ Lawrence, 'Deciphering Home: An Integrative Historical Perspective', in Benjamin (ed), above, n75, pp61-62; and M Fried, 'Grieving for a Lost Home' in J Duhl (ed), *The Urban Condition – People and Policy in the Metropolis* (New York, Basic Books, 1963).

<sup>122</sup> BB Brown and DD Perkins, 'Disruptions in Place Attachment', in I Altman & SM Low, *Place Attachment* (New York, Plenum Press, 1992), p279.

<sup>123</sup> Fried, above, n121, p151.

adapting to the altered situation, the sense of helplessness, the occasional expressions of both direct and displaced anger, and tendencies to idealise the lost place.<sup>124</sup>

The dramatic nature of the occupier's response to losing his or her home is consistently evident across the literature. For example, Fried described the effect of forced relocation as: '...a crisis with potential danger to mental health...' <sup>125</sup> Indeed, Fried's views regarding the detrimental health consequences of losing one's home have been legitimated by several recent studies into the impact of loss of home on mental and physical health. The evidence that has emerged from research studies on this question, particularly in the context of mortgage possession actions, is considered further below.

Although the experience of losing one's home will vary from one occupier to another, there is sufficient evidence of the generally negative effects of home loss to indicate that: '[g]rieving for a lost home is evidently a widespread and serious social phenomenon.'<sup>126</sup> Fried's 1963 research, which focused on the context of urban slum clearance, suggested that the most extreme responses to losing one's home – either negative or positive – were likely to arise in only a minority of cases. He claimed that the experience of home loss was: '...likely to increase social and psychological 'pathology' in a limited number of instances; and it is also likely to create new opportunities for some, and to increase the rate of social mobility for others.'<sup>127</sup> In the majority of cases, however, the effects of dispossession were negative, albeit less extreme. Fried argued that: '[f]or the greatest number, dislocation is unlikely to have either effect but does lead to intense personal suffering despite moderately successful adaptation to the total situation of relocation.'<sup>128</sup>

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<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*, p152.

<sup>126</sup> *Ibid.*, p167.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*



Another study, which examined the effects on occupiers of losing their homes because they were to be demolished, also supported the argument that the repossessed occupier experiences a sense of loss that cannot be redressed by simply relocating that occupier, or family, in another housing environment.<sup>129</sup> Porteous claimed that: ‘...domicide has negative social and psychological effects on its human victims’;<sup>130</sup> regardless of whether the occupier’s shelter needs were met in another way. The significant factor for the occupiers was forced relocation from their homes. The research indicated that: ‘[c]hange almost invariably involves loss, and bereavement-like symptoms of grief are common among those uprooted and relocated.’<sup>131</sup> It is particularly interesting to note that Porteous related this grief to the loss of the particular property with which the occupier had a ‘home relationship’, since even where the occupiers were moved to properties that could be regarded as objectively superior, they were found to: ‘...pay for this in terms of considerable social and psychological disruption.’<sup>132</sup>

These studies are relevant to analysis of the occupier’s home interest, and to the legal concept of home, since both Fried and Porteous were concerned with the consequences, for the occupier, when they were involuntarily dispossessed. However, some factors distinguish the situations examined in these studies from the context of creditor possession actions. For one thing, in both studies, the ‘domicide’ to which the authors referred involved the destruction of whole neighbourhoods for the purposes of planning or urban development. While this obviously affected the individual occupiers of homes within those neighbourhoods – and the focus of both analyses was on the personal responses of the dispossessed occupiers

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<sup>129</sup> Porteous, above, n118.

<sup>130</sup> *Ibid*, p153.

<sup>131</sup> *Ibid*, p159.

<sup>132</sup> *Ibid*.

– these situations differ somewhat from the loss of home through mortgage possession actions. For one thing, in the neighbourhood cases, the dispossessed occupiers may be less susceptible to feelings of guilt and shame compared to repossessed occupiers. For occupiers who lose their homes following default on a debt, there may be a greater feeling of responsibility for the predicament than for those who are dispossessed, like their neighbours, as part of a wider development strategy. In addition, while the cases involving ‘domicide’ affected whole communities, the occupier who loses their home through repossession is more likely to find the experience isolating relative to the wider community.

Yet, statistical research has indicated that while the volume of creditor possession actions has stabilised since the last major recession in the early 1990s, a range of economic factors have meant that the ‘normal’ level of risk associated with mortgage debt have increased significantly.<sup>133</sup> The economic context of home ownership in the early twentieth century is considered further in Chapter Five. While the political, social and cultural ideologies of home ownership remain deeply embedded amongst British citizens, the economic experience of home ownership has been affected by a range of systemic factors. These have included the expansion of home ownership, particularly low-income home ownership, but without adequate governmental support; demographic transformations, particularly in the shape of higher rates of household dissolution and instability; economic transformations, particularly in relation to employment practices; and the re-structuring of government safety-net provisioning.<sup>134</sup> The unsustainability of contemporary home ownership emphasises the growing incidence of occupiers losing their homes through creditor possession actions. One consequence of this has been an increase in academic interest concerning the effects of repossession on occupiers. The following section considers

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<sup>133</sup> Ford, Burrows & Nettleton, above, n57.

<sup>134</sup> *Ibid*, chs 2-4.

some of the empirical research carried out in recent years concerning the impact of possession actions on home occupiers. This research casts an interesting light on any evaluation of the ‘costs’ of creditor protections, both economic and non-economic.

### **Losing one’s home through creditor possession actions**

While loss of home is indeed a subjective experience, the negative (or positive) effects of which will vary from case to case, there appears to be sufficient evidence of the potentially adverse effects of dislocation from one’s home to justify further consideration of the specific consequences of loss of home through creditor possession actions when evaluating the broader policy context of creditor/occupier disputes. One useful source in this regard is Ford, Burrows and Nettleton’s qualitative study of the experiences and perceptions of 30 families with children following mortgage repossession.<sup>135</sup> This social analysis adopted a wide ranging perspective in relation to the costs of mortgage arrears and possession actions. Alongside analysis of the economic factors that have rendered home ownership unsustainable, this study classified the potential range of costs associated with mortgage arrears and possessions, to demonstrate how the impact of possession actions is embedded in society. These costs are experienced by a range of actors, including borrowers and lenders, but also extending to include insurers, central government, local government, housing market institutions, labour market institutions and health services. It is suggested that the impact on non-debtor occupiers sharing a home with the borrower could be added to this list.

Ford *et al* classify these costs as social, social psychological, health, administrative, financial, political and organisational. For example, lenders and insurers endure the social costs of loss of trust when debtors fall into default and actions for possession are brought. Housing market institutions experience the social psychological cost of reduced confidence in

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<sup>135</sup> *Ibid*, chs 6 & 7.

the sector, while insurers and the labour market may experience health-related costs through increased risk of accident claims and employee absenteeism. Parties affected by administrative costs include the lender, who must invest resources in pursuing the debt and bringing an action for default; central government, through arrangements for the payment of ISMI (income support for mortgage interest);<sup>136</sup> local government, through increased demand for homelessness provision; and the health services, who are liable to face additional demand for services. The financial costs are particularly widespread, affecting almost all of the parties identified. The creditor, obviously, faces the prospect of real financial losses, but the borrower also faces a range of financial costs, such as administrative charges from the creditor, the burden of residual debt, increased payments and falling into poverty. Insurers face financial costs through payout on mortgage insurance; financial costs for central government include payments of ISMI and on ‘mortgage rescue’ schemes; local government bodies face the financial costs of increased homelessness provision and the provision of housing advice. The housing market is affected by reduced revenue and a fall-off in housing transactions when home ownership becomes less popular, while the health services face financial costs in respect of additional demand from repossessed occupiers whose mental health and well-being are affected by the loss of their homes.<sup>137</sup>

While financial costs, and administrative or resource costs are readily identifiable, and tend to be persuasive both in government policy and legal decision making, it is the social, social psychological and health costs visited upon borrowers and other occupiers that are more difficult to capture. Ford *et al* suggested that the costs of mortgage default and

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<sup>136</sup> ISMI is a benefit to pay mortgage interest. It is available, subject to restrictions, to borrowers claiming income support, jobseekers allowance or pension credit. Although the costs of central government expenditure on ISMI has decreased with the reduction in state-sponsored safety-nets for home-buyers (see ch 5) total state expenditure on ISMI in 1998/99 was estimated at £650 million; R Burrows & S Wilcox, above n55, p60.

<sup>137</sup> See Ford, Burrows & Nettleton, above n57, Table 5.1.

possession actions for borrowers include the social costs of social exclusion, insecurity and reduced standards of living; the social psychological costs include experiencing the stigma of debt as well as reported relationship difficulties, and that these factors, along with the experience of possession itself – which, the study found, led to an increase in feelings of sadness, loss and insecurity – could have implications for mental health and well-being. The combination of factors linked to the social, social psychological and health consequences of losing one's home through creditor possession actions are most readily conveyed by listing the range of impacts that emerged from this study.<sup>138</sup> Ford *et al* identified consequences linked to quality of life; social status and identity; personal and family relationships; future aspirations; and health and well being. These consequences include:

### **Quality of life**

- Homelessness
- Loss of lifestyle
- Poverty
- Long-term debts
- Insecure tenancy
- Social isolation
- Loss of job
- Loss of friends
- Unsuitable accommodation
- Lack of space
- Loss of personal possessions
- No access to credit

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<sup>138</sup> The factors listed below are set out in Ford, Burrows & Nettleton, above n57, Figure 5.1.

- Loss of pets

### **Social status and identity**

- Stigma
- Humiliation
- Embarrassment
- Loss of 'owner' status
- Sense of failure
- Letting family down
- Loss of confidence
- Loss of self-esteem
- Sense of regret
- Becoming 'second class citizens'

### **Personal and family relationships**

- Marital breakdown
- Relationship tension
- Split up household
- Arguments
- Inability to invest trust in relationships
- Parenting difficulties

### **Future aspirations**

- Financial insecurity
- Fear of the future

- Fear can't buy again
- Lost 'hopes and dreams'
- No independence
- Poverty in old age

### **Health and well-being**

- Poor mental health
- Poor physical health
- Depression
- Stress

### **Health implications of loss of home through mortgage possession actions**

Mortgage default and repossession are clearly matters of considerable personal stress and distress for the occupiers of the home. One aspect which has attracted considerable attention in recent literature is the mental and physical health implications of living with mortgage arrears and repossession.<sup>139</sup> Research on the relationships between housing and health indicates that: '...the social, social psychological and health related consequences of mortgage possession are both dramatic and overwhelmingly negative.'<sup>140</sup> Characteristics of

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<sup>139</sup> See, for example, S Nettleton, 'Losing a home through mortgage repossession: a 'new' public health issue' (1998)8 *Critical Public Health* 47; S Nettleton & R Burrows, 'When a capital investment becomes an emotional loss: the health consequences of the experience of mortgage possession in England' (2000)15 *Housing Studies* 463; E Kempson, A Bryson & K Rowlingson, *Hard Times? How poor families make ends meet*, (London, Policy Studies Institute, 1994); S Middleton, K Ashworth & R Walker, *Family fortunes: pressures on parents and children in the 1990s* (London, CPAG, 1994); E Kempson, *Life on a Low Income* (York, Joseph Rowntree Foundation, 1996).

<sup>140</sup> Ford, Burrows & Nettleton, above n57, p113.

the experience of arrears and repossession include living with debt, uncertainty and lack of control. Falling into arrears and facing the prospect of repossession is ‘a stressful life event’, and the social and social-psychological consequences of being in arrears and experiencing repossession are thought to: ‘...help to explain the link between problematic homeownership and poor health.’<sup>141</sup>

In their study, Ford, Burrows and Nettleton linked the experience of living with mortgage arrears to: ‘...stress, social isolation, social exclusion and a loss of social status and valued identity.’<sup>142</sup> Other features of living with debt included social isolation, strain on personal relationships, and a feeling of shame and stigma,<sup>143</sup> all of which are factors associated with poor health. In addition to this, the prospect of repossession actions was recognised as causing considerable stress. The process of possession actions for the borrowers surveyed was characterised by uncertainty, insecurity and lack of control, and this exacerbated the adverse health implications of living with debt.<sup>144</sup> The mortgage possession process itself was: ‘...a long process characterised by uncertainty’;<sup>145</sup> and the outcome was influenced by several factors outside the occupier’s control.<sup>146</sup> One study emphasised that: ‘...households were rarely able to plan, or exert any control over the nature and location of their post possession housing, and...they found it difficult to exert any control over the processes involved in the transition from owner occupation to renting.’<sup>147</sup> Evidence from

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<sup>141</sup> Nettleton, above, n139.

<sup>142</sup> Ford, Burrows & Nettleton, above n57, p9.

<sup>143</sup> Nettleton, above n139, p54; Kempson, above n139, p37.

<sup>144</sup> Nettleton, *ibid*, p55.

<sup>145</sup> *Ibid*, p53; see also Ford, Burrows & Nettleton, above n57, ch 6.

<sup>146</sup> Nettleton cites as example, the policies and practices of lenders, the attitudes of judges and the resources available to the households themselves; Nettleton, above, n139, p53.

<sup>147</sup> *Ibid*, p55.



Christie's study also indicated that: 'Worry and stress were intensified by going to court for a repossession hearing, to the extent that the health and well-being of individual household members was affected.'<sup>148</sup> These difficulties may be heightened when the household includes children, since: '[h]ouseholds with children were more likely to want to stay put, regardless of how they now viewed the house and all the associated financial problems.'<sup>149</sup>

The particular issues that arise in creditor/occupier disputes, when the occupiers are custodial parents, or in relation to child occupiers, are considered in more detail in Chapters Seven and Nine. Analysis of the legal response to home interests in these chapters reveals that although the discourses of family life and the interests of children are discernible in legislative and judicial policies, the extent to which their home interests have influenced the outcome of creditor actions for possession and sale has been limited. In fact, when presented with arguments that highlighted the consequences of ordering possession and sale of a family home, the court's typical response has been that:

Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society has been familiar.<sup>150</sup>

It is indeed the case that the circumstances of debt, default and repossession have become increasingly familiar in recent decades. In *Home Ownership in a Risk Society*,<sup>151</sup> Ford, Burrows and Nettleton discussed the systemic factors that have given rise to 'unsustainable home ownership', including demographic factors, broader economic shifts, for example in the

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<sup>148</sup> H Christie, 'Mortgage Arrears and Gender Inequalities' (2000)15 *Housing Studies* 877 at p896.

<sup>149</sup> *Ibid*, p899. In addition, the process of mortgage repossession begins with the accrual of arrears, and this itself is often associated with other stressful life events such as relationship breakdown, illness, unemployment, or even the death of a partner.

<sup>150</sup> *Re Citro (A Bankrupt)* [1991]Ch 142 at 157, *per* Nourse LJ.

<sup>151</sup> Above, n57.

nature of the labour market, the government's very successful promotion of home ownership across all income groups, and the re-structuring of government safety-net provisions for borrowers. Ford *et al* identified a link between unsustainable home ownership and government policy in housing and in welfare provision for owner occupiers, which supports the proposition that, while the experiences of occupiers who lose their homes through creditor possession actions may not be exceptional, the combination of government policies that has created this situation, combined with the 'public health' implications associated with forced sale,<sup>152</sup> render the loss of home through mortgage possession a *political* issue, rather than a merely *personal* experience. The political ideology of home ownership presents owner occupation, particularly amongst low income households, as an opportunity to accumulate wealth, status, and ontological security. However, studies have indicated that while well-being – particularly for low-income households – is enhanced by stable, long-term housing, regardless of ownership status, the financial and psychological stresses of unsustainable home ownership can undermine the potential benefits.<sup>153</sup> These issues are examined in the context of the political ideology of home ownership, in Chapter Five.

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<sup>152</sup> Nettleton's research has shown that: 'stressful life events, and this includes the anticipation of events, are associated with both physical and mental health. Psychosocial factors have a negative impact on health when associated with a sudden and dramatic change or life event and where a high stress environment is endured over the long term. Such changes are made worse when there is a lack of control over events and circumstances. All these features – long term insecurity, lack of control, changed social status and financial stress – are intimately bound up with the social processes of mortgage possession. It therefore seems reasonable to suggest that mortgage possession and mortgage debt constitute a growing public health problem.'; Nettleton, above, n139, p56.

<sup>153</sup> D Balfour & J Smith, 'Transforming lease-purchase housing programs for low-income families: Towards Empowerment and Engagement' (1996)18 *Journal of Urban Affairs* 173. The role of the political and cultural ideologies of home ownership in a legal concept of home will be considered in greater detail in ch 5.

One of the recurring themes of this book is the way in which the development of a legal concept of home in law has been inhibited by law's tendency to focus upon the tangible entity of the house, as a physical structure and a capital asset, rather than the intangible factors that make a *house* into a *home*. Yet, research examining the experience of loss of home for occupiers has emphasised the salience of the intangible elements of the home interest. The range of meanings associated with *home* are analysed in Chapter Four. Following the approach adopted in empirical and theoretical analysis in other disciplines, *home* is analysed as *house* + 'x'.<sup>154</sup> The 'bricks and mortar' of the house as a physical structure are recognisable to law, as is the idea of the property as a capital asset. However, the 'x'-factor also represents the social, psychological, emotional and cultural importance of the property for the occupiers of the home. In Chapter Four, these meanings are explored under the (relatively loose) headings of *home as financial investment*; *home as physical structure*; *home as territory*; *home as identity*; *home as social and cultural unit*. It is interesting to note that research examining psychological responses to 'home' has never shown the common assumption to be true: that the physical structure of home is its most important aspect.<sup>155</sup> The multi-disciplinary findings discussed in Chapter Four support the proposition that it is the intangible meanings of home – which are currently dismissed as incomprehensible in legal analysis – that are most significant for the people who live in these properties.

This analysis is consistent with empirical analysis into the experience of mortgage possession actions for occupiers. In fact, when investigating the relationship between loss of home through repossession actions and the impact on the occupier's psycho-social well-being, Ford, Burrows and Nettleton argued that it is the disruption caused to the 'x'-factor

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<sup>154</sup> A Rapoport, 'A Critical Look at the Concept "Home"', in D Benjamin (ed), above, n75.

<sup>155</sup> DG Hayward, 'Home as an Environmental and Psychological Concept' (1975)20 *Landscape* 2.

values – the social, psychological, emotional and cultural attachments that the occupier has with the property – that are most damaging. Although the ‘tangible’ dimensions of losing one’s home - including the loss of financial investment as well as the practicalities of losing one’s shelter - are, of course, significant when it comes to considering the effects of loss of home,<sup>156</sup> the findings of this study supported the argument that:

losing a home in this way means more than that to most people. The [re]possession of a property constitutes a significant loss of a home that is invested with meaning and memories. Not only that but...the bureaucratic procedures associated with the administrative processes of possession mean that people have to endure long periods of insecurity and uncertainty. A whole set of events is set in train that is out of their control...according to the psychosocial literature on the social determinants of health it is these experiences (uncertainty and lack of control) that are coming to be regarded as among the most crucial determinants of poor health in contemporary societies.<sup>157</sup>

From the occupier’s perspective: ‘losing a home through mortgage possession involves more than just losing a property.’<sup>158</sup>

### **Law and the emotions**

Another factor that has inhibited the development of the legal concept of home has been the suspicion that the occupier’s ‘home’ interest is ‘mere emotion’, and so irrelevant to legal decision making. Indeed, to many legal scholars the idea that law has an emotional dimension: that is, that legal doctrine and decision making is, or should be, influenced by

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<sup>156</sup> ‘Of course the material aspects of losing a mortgaged home are very important...buying a property constitutes a capital investment and an important financial asset; something to ensure financial security in old age and something to ‘pass on’ to the children.’; Ford, Burrows & Nettleton, above n57, p163.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*, p163.

emotional considerations; may seem surprising, to say the least, antithetical or even heretical. As students of the law we are taught that law is objective, rational, impartial, that legal training teaches one to ‘put emotions to one side’ and to adopt purely rational analyses.<sup>159</sup> From this perspective, the idea that emotional responses and analyses might have a role to play in law conjures up the spectre of a subjective, irrational and partial system, which is anathema to our idea of ‘what law is’. Yet, although much legal analysis is posited on the presumption that law is and should be rooted in logic and rational choice, based on fact rather than feeling, there are strong arguments to support the relevance of emotions analysis to legal processes.<sup>160</sup>

One of the principal arguments in support of emotional analysis of law can be stated quite simply by focusing attention on law as a system by which human actors seek to regulate human behaviour. As Feldman has argued: ‘[g]iven that law is made by and for people, the relatively little attention lawyers, judges, and legal scholars have paid to human psychology is surprising.’<sup>161</sup> To a certain extent, analyses linking the proclivities of human nature with the law have been at the core of the law and psychology movement. The growth of interest in law and psychology as a branch of legal theory is testament to an acknowledgement, within the scholarly community, of the inter-relationships between law and human behaviour. The empirical and scientific findings of psychological scholarship in relation to the meanings of home to occupiers have much to offer by way of a conceptual springboard for the development of a legal concept of home.

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<sup>159</sup> See generally, D Sugarman, ‘Legal Theory, the Common Law Mind, and the Making of the Textbook Tradition’ in Twining, W (ed) *Legal Theory and the Common Law* (Oxford, Blackwell, 1986).

<sup>160</sup> For a general discussion of the relevance of emotional analysis to legal discourse, see K Laster & P O’Malley, ‘Sensitive New-Age Laws: The Re-assertion of Emotionality in Law’ (1996)24 *International Journal of the Sociology of Law* 21.

<sup>161</sup> H Feldman, ‘Foreword: Law, Psychology, and the Emotions’ (2000)74 *Chicago-Kent Law Review* 1423.

However, as the discussion in this chapter has illustrated, the incongruities between home analysis, on the one hand, and legal discourse – particularly ‘property-speak’ – on the other, have frustrated attempts to recognise the meaning of home in law. As Ward LJ declared in *Le Foe v Le Foe*,<sup>162</sup> the disputed property had: ‘...been her home and her mother’s home. There is a huge emotional investment in it’;<sup>163</sup> yet ‘...the protection of her emotional security is, of course, an interest I cannot protect.’<sup>164</sup> In the first place, the introduction of ‘home’ analysis - particularly with regard to emotional, psychological, social and other attachments - into the legal domain appears to run counter to the presumed rationality of the legal system: procedurally fair, treating like cases alike, and thus disinclined to attach weight to subjective or emotional factors.<sup>165</sup> Consequently, the idea of home in law has not carried much weight, particularly when balanced against easily measurable, legally definable, proprietary and contractual interests in the property. Furthermore, land law is often regarded as the *sine qua non* of this legal model of rationality, with leading commentators characterising it as a ‘rational science’ in which: ‘...the perfection of pure reason appears most nearly attainable. English land law – more obviously than any other area of the law...displays many of the features of a closed system of logic...’<sup>166</sup> The idea of home

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<sup>162</sup> [2001]EWCA Civ 1870.

<sup>163</sup> *Ibid*, [10].

<sup>164</sup> *Ibid*, [13].

<sup>165</sup> Laster & O’Malley argued that “Enlightenment assumptions about rationality, objective truth and formal legal equality obviously have shaped modern law. Since the eighteenth century, the processes of law have been used to...remove emotions and the non-rational from legal considerations and the administration of justice. Emotions can be seen as antithetical to order, justice and coherence: the object of law was to define and refine the measures which would provide an objective basis of assessing causation, the nature of wrongdoing and the method of assessment of harm. In both civil and criminal law, the focus increasingly came to be on (measurable or calculable) physical harm and pecuniary loss.”; above n160, p24.

<sup>166</sup> Gray & Gray, above n86, pp204-5.

- as an experiential, intangible, if nonetheless real phenomenon – does not sit easily within this framework of objectively measurable, clearly definable interests.

Yet, empirical research on the experience of losing one's home through mortgage possession actions has established the significance of the occupier's emotional reaction to repossession, and the tangible negative impact that this emotional trauma can have on the occupier's physical and mental health. Research on the sociology of emotions has indicated that: '...social events and circumstances can have bodily correlates...' <sup>167</sup> Ford *et al* have characterised the emotional impact of experiencing mortgage possession actions as a 'loss of emotional capital' for the occupier. <sup>168</sup> The loss experienced by the occupier is not just the loss of a property, but also: '...constitutes a significant loss of a home that is invested with meaning and memories.' <sup>169</sup> These aspects of home are considered further in Chapter Four. In analysing the potential health implications of losing a home, Ford *et al* argued that *in addition* to the negative health consequences associated with the stressfulness of arrears and repossession: '...it is also an intensely emotional life event that has somatic consequences.' <sup>170</sup> The emotional impact of losing one's home through mortgage possession actions has been recognised as a significant element of the experience for the occupier, alongside the social, psychological and cultural implications of repossession. Furthermore, the emotional element has been linked to the detrimental health consequences of losing one's home. This is particularly significant in relation to the broader economic costs of high creditor protections. The financial costs of possession actions are experienced not only by the occupier, but by the

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<sup>167</sup> Ford, Burrows & Nettleton, above n57, p163; see P Freund, 'The expressive body: a common ground for the sociology of emotions and health and illness' (1990)12 *Sociology of Health and Illness* 452; S Williams, "'Capitalising" on emotions? Rethinking the inequalities in health debate' (1998)32 *Sociology* 121.

<sup>168</sup> Ford, Burrows & Nettleton, above n57, pp163-165.

<sup>169</sup> *Ibid*, p163.

<sup>170</sup> *Ibid*.

health services, which face an increased demand for services, by the labour market, in respect of employee absenteeism, and by insurers who must pay out on health insurance or accident claims. The idea that the impact of the action on the occupier's emotional well-being can be simply dismissed as irrelevant highlights the very narrow outlook that currently prevails in legal analysis of the creditor/occupier context.

Another highly significant aspect of this study was the finding that: '...the likelihood of ensuring negative emotional experiences that have detrimental physical effects is greater for those who are in socially disadvantaged position.'<sup>171</sup> Another theme of this book is the promotion of home ownership, particularly amongst low-income borrowers, as a source of social status and ontological security. Research in the sociology of emotions has indicated that the emotional impact of negative experiences is exacerbated for people in less powerful positions. Freund claimed that:

In general, the threats to ontological security are greater for those in dependent, subordinate positions. The lack of resources to protect oneself or to legitimate oneself further contributes to status led insecurity. Less powerful people face a structurally built-in handicap in managing social and emotional information and this handicap may contribute to existential fear and anxiety.<sup>172</sup>

It is interesting to note that when correlating sociological analysis of the experiences of 'less powerful' people against their social analysis of mortgage possession actions, Ford *et al* shift the focus away from 'those disadvantaged by social divisions such as gender, ethnicity, class and age'.<sup>173</sup> Since the rise of 'unsustainable' home ownership has been attributed to a range of extrinsic factors, including demographic changes and labour market changes, the

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<sup>171</sup> *Ibid*, pp163-4.

<sup>172</sup> Freund, above, n167, pp466-7; quoted in Ford, Burrows & Nettleton, above n 57, p164.

<sup>173</sup> Ford, Burrows & Nettleton, above n 57, p164.



researchers suggest that: ‘...people are often ‘disadvantaged’ in terms of more situationally specific contexts and are disempowered in relation to their experiences with institutions.’<sup>174</sup>

Home ownership can no longer be regarded as: ‘...simply the domain of the contented middle classes.’<sup>175</sup> Rather, broader economic and demographic changes in society have rendered many home owners potentially vulnerable to the effects of losing their homes, even though they may not traditionally be regarded as ‘disempowered’. However, ‘situational’ events – unemployment, relationship breakdown, death of a partner – can affect all home owners, and for those who fall into default, the consequences are debilitating since:

...mortgage possession deprives people of an important source of social status; they perceive themselves and are perceived by others to have slipped down the housing ladder. They have suffered a biological disruption that demands a reassessment of their sense of self. Furthermore, they are relatively disempowered when they come to deal with lenders and local authorities.<sup>176</sup>

These findings, in conjunction with data concerning the impact of loss of home on mental and physical health and well-being have been advanced in support of the argument that, combining the potential health consequences of losing one’s home through mortgage possession with the systemic factors that have given rise to concerns about the sustainability of home ownership in Britain, have turned the ‘private matter’ of default on a debt and the execution of the creditor’s security into a ‘public health issue’.<sup>177</sup>

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<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*, p165.

<sup>176</sup> *Ibid.*, p164.

<sup>177</sup> S Nettleton, above, n139 at p49; see also S Nettleton & R Burrows, ‘Individualisation processes and social policy: insecurity, reflexivity and risk in the restructuring of contemporary health and housing policies; in J Carter (ed), *Postmodernity and the fragmentation of welfare* (London, Routledge, 1988); S Nettleton & R Burrows, ‘Mortgage debt, insecure home ownership and health: an exploratory analysis’, in M Bartley, D Blane

## EVALUATION: THE CASE FOR RE-CONSIDERING THE PRO-CREDITOR PRESUMPTION

The costs of repossession, which impact not only on dispossessed occupiers, but on the various agencies tasked to deal with the repercussions of loss of home - ranging from the practical need for shelter to social, psychological and health issues - are complex. Yet, the legal regulation of possession actions in many jurisdictions, including England and Wales, has typically allowed little room for consideration of the broader issues at stake. Rather, legal discourse in this context has been dominated by a pro-creditor presumption that has left little scope for consideration of alternative arguments or of the wider issues linked to creditor possession actions. There are, obviously, legitimate arguments to support the weight attached to the commercial interests of creditors in enforcing their proprietary security interests. However, in striking a balance between the interests of creditors and the interests of those who occupy the secured property as a home, legal analysis has subjugated the 'home' interests of the occupier to such an extent that they appeared to have become effectively irrelevant. Despite occasional references to the status of the property 'as a home', at the end of the day the creditor always wins.

This approach has had significant impact on the treatment of 'home' interests by legal academics. The dismissal of the home interest in legal practice does little to encourage academic analysis of the idea of home in law. Yet without academic analysis to support home-type arguments, the chimera of home interests continues to lurk in the shadows of

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& G Davey-Smith (eds) *The sociology of health inequality* (Oxford, Blackwells, 1998); S Nettleton & R Burrows, 'When a capital investment becomes an emotional loss: the health consequences of the experience of mortgage possession in England' (2000) 15 *Housing Studies* 463-79.

policy discourse. Without a conceptual framework within which to comprehend the meanings and values of home interests for law, their claims are no match for the economic clout of the creditor. Creditors continue to prevail, and legal understandings of the home interest remain underdeveloped. This chapter has sought to establish an argument for breaking that cycle, setting aside the pro-creditor presumption, and investigating the various interests at stake in creditor/occupier disputes. For one thing, it has been suggested that the justifications for prioritising creditors' claims are based on narrowly defined interpretations of contractual obligations, and a model of efficiency that recognises only a limited range of economic costs, that is, the financial costs to the creditor.

This chapter has sought to demonstrate the complexity of the policy issues surrounding creditor/occupier contests. Not only are there salient issues underlying law's proclivity towards financial value, over and above other values, but even within a model of economic efficiency that measured costs only in terms of financial overheads, creditor possession actions bring a range of potential costs, affecting the creditor, the occupier, and many other agencies and interested parties, into play. Of course, this is not to say that, on evaluating these factors, the weight legitimately attached to the commercial interests of creditors might not still be so great as to outweigh the home-type considerations on the side of the occupier. However, at present, the task of balancing the interests of creditors in the capital represented by the property against the claims of occupier to use of the property as a home is very much skewed against the occupier, as a result of the underdevelopment of the occupier's home interest in law. This book seeks to demonstrate the relevance of home interests to legal analysis. While the outcome of such analysis may not, ultimately, justify exempting the home from repossession, or even swinging the balance away from the creditors' financial claim in all (or many?) cases, the process of legal decision making would be more legitimately grounded on a full and clear exposition of the interests at stake.

As the discussion in this chapter has demonstrated, one obstacle in the path of this analysis is the perception that any argument seeking to displace the weighty status currently conferred on creditors' interests may appear to be 'swimming against the tide' in terms of the prevailing values of contemporary legal discourse. However, it is worth bearing in mind that there is nothing inherently unworkable about a concept of home in law. It has been recognised that, although the idea of home has not prevailed in mortgage possession contexts in recent decades, the idea that a person's home amounts to a special type of property has not been wholly absent from legal discourse. In fact, only a few decades ago, leading land law commentators anticipated the development of this idea of home in the area of possession actions when they suggested that:

Changing times produce new needs, and one of the foremost claims of the present age is the demand for residential security. Recent developments have witnessed the recognition of what is virtually a modern concept of *seisin* – the idea that the possession of the actual occupier of land must be protected.<sup>178</sup>

This pro-occupier stance was based on the idea that: '[t]he things which are today of real value to the man on the street are assets like his job, his pension, and the right to undisturbed possession of his home.'<sup>179</sup>

It is interesting to note, with reference to the discussion of unsustainable home ownership above, that arguments asserting the importance of residential security in the early 1980s were linked to concerns about ontological *insecurity*, resulting from 'housing shortage, economic recession and an unprecedented rate of family breakdown', factors which made it 'increasingly important to have a secure domestic base.'<sup>180</sup> Gray and Symes even went so far

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<sup>178</sup> Gray & Symes, above, n94, preface, vi.

<sup>179</sup> *Ibid*, p11.

<sup>180</sup> *Ibid*, p13.

as to suggest that: ‘...the enjoyment of residential protection in circumstances of adequate housing is an essential condition for a life of dignity and purpose...[thus]...for reasons which are basically social in origin, residential protection has been conferred upon defined classes of deserving citizen’.<sup>181</sup> It is particularly pertinent to note that these social factors were – at this time – viewed as capable of giving rise to proprietary rights, and thus potentially outweighing the commercial interests of creditors. The authors claimed that: ‘[e]ntitlement to ‘use value’ of property has become more important than entitlement to ‘exchange value’ on the freehold market’.<sup>182</sup> Yet, following a dramatic shift in housing laws and policies under the Thatcher government and after, which prioritised the protection of capital interests to encourage lending to home owners and investment in the private rental sector,<sup>183</sup> the idea of protecting the occupied home faded from the legal academic’s agenda.

Nevertheless, there is reason to believe that the tide may be beginning to turn. For example, even in the decision in *Re Citro*,<sup>184</sup> which established that in cases involving a bankrupt debtor, the court must order sale unless the circumstances of the case are *exceptional*, and that ‘exceptional’ circumstances must go beyond: ‘...the melancholy consequences of debt and improvidence with which every civilised society has become familiar.’;<sup>185</sup> there was evidence that, given the appropriate tools, the court might have

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<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.* ‘There is a very real sense in which the right to live in a house or flat free from the threat of arbitrary eviction, free from the unrestricted impact of normal market forces, has itself become a new form of proprietary right. It matters not that the residential occupier has no legal title to the property which he occupies. His position is secure so long as the courts are prepared to recognise that he enjoys a ‘status of irremovability’. Protected de facto possession of residential property has become an informal version of title’; *ibid.*

<sup>183</sup> These policies are discussed in detail in ch 5.

<sup>184</sup> Above n76.

<sup>185</sup> *Ibid.*, at 157, *per* Nourse LJ.

preferred to adopt a less harsh approach towards the occupiers. Referring to the High Court judgment under appeal, Bingham LJ stated that in allowing the occupier's home interest to prevail, Hoffman J had regarded the existing authorities: '...as entitling or obliging him simply to balance the interests of the creditors against those of the wife, the creditors' prima facie entitlement to their money being simply one element in the scales – and not a particularly weighty one at that.'<sup>186</sup> Although Bingham LJ stated that he: '...did not...think [this approach] reflects the principle which...clearly emerges from the cases';<sup>187</sup> he did admit that he:

...would willingly adopt this [more flexible] approach if I felt free to do so. It is in my view conducive to justice in the broadest sense and it reflects the preference which the law increasingly gives to personal over property interests.<sup>188</sup>

While his Lordship was inclined to adopt a more flexible approach, which would allow the occupier's home interest to be genuinely considered in the balance, he did not consider that the precedents permitted such an approach to be taken. Nonetheless, the implication was that there was some element of judicial willingness to redress the balance in favour of the home occupier, should such a course of action be justifiable according to authority.

Another indication that the home interests of occupiers may be creeping back onto the agenda in legal analysis of creditor/occupier disputes can be found in the decision in *Edwards v Lloyd's TSB Bank*.<sup>189</sup> The decision in *Edwards*, which is discussed in greater detail in Chapter Nine, suggested some shift in judicial attitudes, specifically regarding the interests of

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<sup>186</sup> *Ibid*, at 161, *per* Bingham LJ.

<sup>187</sup> Which his Lordship identified as being: '...that the order [for sale] sought by the trustee must be made unless there are, at least, compelling reasons, not found in the ordinary run of cases, for refusing it.'; *ibid*.

<sup>188</sup> *Ibid*.

<sup>189</sup> [2004] EWHC 1745.

*child occupiers*<sup>190</sup> in the context of orders for sale. In *Edwards*, the court refused to grant an order for immediate sale under sections 14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996 (TLATA) on the grounds that it: ‘...would be unacceptably severe in its consequences upon Mrs Edwards and her children.’<sup>191</sup> The court held that sale of the property should be postponed for a period of at least five years, when the younger child would have reached the age of majority, and when: ‘...it seems possible that...it will no longer be in practice incumbent on Mrs Edwards to provide a home at her expense for her son and daughter.’<sup>192</sup> This case provided a relatively rare example of a instance in which the outcome of an application for sale was not ordered according to the wishes of the creditor.

To some extent, this shift in judicial policy change is attributable to the legislative context of the decision: the court’s reasoning was framed by sections 14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996: section 14 conferred on the court a jurisdiction to order the sale of property held on a trust of land, and replaced the broad discretion to order sale under section 30 of the Law of Property Act 1925; section 15 set out various criteria to be taken into account by the court when considering whether to make an order for sale under section 14. One of the factors to be considered by the court when making orders in respect of property held on a trust of land is ‘the welfare of any minor occupiers’ (section 15(1)(c)). Nevertheless, and notwithstanding TLATA and the section 15 criteria, prior to the decision in *Edwards*, there had been little evidence that the interests of children carried sufficient weight to persuade the court to refuse an application for sale,

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<sup>190</sup> See further, ch 9.

<sup>191</sup> *Edwards*, above n189, [33].

<sup>192</sup> *Ibid*, [33(iii)].

particularly when balanced against the interests of creditors in recouping their capital.<sup>193</sup> This case suggested that, where there was a legitimate statutory basis for recognising the home interests of occupiers, the lower courts, at least, may be willing to give effect to that.

To this end, another significant case was the decision in *Barca v Mears*,<sup>194</sup> in which the court considered the implications of the obligations set out in the European Convention on Human Rights (ECHR) and given effect by the Human Rights Act 1998, on an application for possession and sale made by a trustee in bankruptcy. Although the court decided, on the facts, that there had been no infringement of Mr Barca's – or his son's – right to respect for private and family life and the home under Article 8 of the ECHR, the court did open this up as an avenue by which the court's overwhelming predisposition towards creditors might be challenged. In *Barca v Mears*, counsel for the occupier, Mr Barca, argued that an order for possession and sale would have detrimental impact on both himself and his minor son - who spent a substantial portion of the week living in the house and who was alleged to have special educational needs. Thus, he argued that in granting the order, the Deputy Registrar had failed to take account of their right to family life, home and privacy. Although Mr Strauss QC, sitting as Deputy Judge of the High Court, accepted that the rights set out in Article 8(1) are not absolute, but qualified by the matters set out in Article 8(2),<sup>195</sup> he stated that, as a matter of human rights law:

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<sup>193</sup> See, for example, *Bank of Ireland Ltd v Bell* [2001]1 All ER (Comm) 920; *First National Bank plc v Achampong* [2003]EWCA Civ 487; and in the bankruptcy context, *Trustee of the Estate of Eric Bowe (A Bankrupt) v Bowe* [1998]2 FLR 439.

<sup>194</sup> [2004]EWHC 2170.

<sup>195</sup> The right, as set out in article 8(1), can be justifiably 'interfered with' so long as any such interference is: '...in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'



[c]learly, in many or perhaps most cases, the sale of a bankrupt's property in accordance with bankruptcy law will be justifiable on the basis that it is necessary to protect the rights of others, namely the creditors, and will not be a breach of the Convention.<sup>196</sup>

However, the court did question the automatic elevation of creditors' claims in the context of bankruptcy. The judge questioned whether the 'narrow approach' adopted in bankruptcy cases, whereby it is only in 'exceptional circumstances' that the court will even consider the possibility of refusing sale, was consistent with the Convention.

The judge emphasised the effect of automatically prioritising the interests of creditors, particularly when there are other occupiers, besides the debtor, who will be affected by an order for possession and sale against the property. The current approach:

...requires the court to adopt an almost universal rule, which prefers the property rights of the bankrupt's creditors to the property and/or personal rights of third parties, members of his family, who owe the creditors nothing.<sup>197</sup>

The issue that seemed to concern the court was the tendency to refer to the occupiers' home interest in merely cursory terms: since the interests of creditors prevailed as a matter of course, the potential human rights implications in respect of home and family were being effectively ignored. Mr Strauss reasoned that:

The eviction of the family from their home, an event that naturally ensues from the operation of the presumption of sale in s335A [of the Insolvency Act 1986], could be considered to be an infringement of the right to respect of the home and family life

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<sup>196</sup> *Barca v Mears*, above n194, [39].

<sup>197</sup> *Ibid.*

under Article 8 if the presumption is given absolute priority without sufficient consideration being given to the Convention rights of the affected family.<sup>198</sup>

The scope of the potential afforded by the Human Rights Act 1998 to re-evaluate not only the outcome of creditor/occupier disputes, but the process by which the relevant interests are weighed in the balance, is discussed further in Chapter Ten.<sup>199</sup> It is suggested, however, that the framework of human rights discourse has presented a new perspective on the automatic elevation of creditors' claims, without any real attempt to consider the nature and weight to be attributed to the occupier's home interests that has characterised legal analysis in the creditor/occupier context in recent decades.

## CONCLUSIONS

This chapter has endeavoured to identify the arguments in support of re-evaluating current approaches to the creditor/occupier conflict, in light of a more nuanced understanding of the occupier's home interest. Although it is recognised that the commercial interests of creditors, the availability of credit to fund home ownership and the argument for economic efficiency are undoubtedly significant, this chapter argues that the contest between the creditor and the occupier should not be ceded to the creditor without further exploration of the broader implications of loss of home through creditor possession actions. The approach proposed by Malloy is particularly instructive in this context. The fundamental basis of Malloy's approach is recognition of the 'incompleteness' of economic theory:

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<sup>198</sup> *Ibid.*

<sup>199</sup> Although the decision in *London Borough of Harrow v Qazi* [2003]UKHL 43 appeared to demolish the prospect of developing the concept of home through Article 8 and the Human Rights Act 1998, subsequent decisions have cast some doubt on the validity of the strict view taken by the House of Lords; see for example, *Price v Leeds City Council* [2005]EWCA Civ 289; see further, ch 10.

The underlying question of whether or not an individual should be entitled to an education or to shelter cannot be answered by economic analysis alone. The difficult questions of what rights or treatment befits human beings in our society are questions that must be answered by means other than economics. Economics becomes a valuable tool only after reason resolves the nature of the right to be explored.<sup>200</sup>

Malloy suggests that the first step should be to comprehend the values at stake; only once these values have been analysed - in a social, community or moral sense - should economic analysis be employed as a useful tool by which to determine how best to achieve the goals that have been identified. This is consistent with the argument that, before the respective claims of the creditor and the occupier can be weighed against each other in a meaningful way – under the exercise of the court’s discretion to order possession or sale, or when reconciling their competing interests within a human rights framework – the starting point must be to develop some sense of the meaning of home in law. Only once the nature of the interests at stake has been ‘worked out’ can the legislature or the courts legitimately regard themselves as conducting a ‘balancing exercise’ between the competing claims.

To date, laws and policies governing disputes between creditors and occupiers have not had the benefit of a conceptual framework within which to recognise and take account of the non-economic values associated with use and occupation of property as a home, or the impact of loss of home through repossession on the occupiers of the property. Although it is often argued that creditors must prevail on economic grounds, this book highlights the need to weigh the occupier’s stake in retaining the home for use and occupation against those financial interests. Furthermore, while there is no ambiguity surrounding the value of the property to the creditor, if this value is to be ‘balanced’ against the value of the home to the occupier, some effort must be made, from a conceptual point of view to develop a clearer

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<sup>200</sup> Malloy, above n73, p173.

concept of the value of home in law. The significance of home, and the impact of losing one's home for occupiers, demands a more explicit analysis of the other side of the equation – the occupier's home interest. While there is little ambiguity in relation to the value of the property to the creditor, the chimera of 'home' that currently lurks in the shadows of policy reasoning is easily ignored or trivialised. If these interests are to be 'balanced' one against the other, it is necessary to develop a clearer concept of the value of home in law. At the very least, a more coherent legal concept of home would encourage a more explicitly reasoned approach when legislative and judicial policy decisions that potentially undermine the interests of occupiers in their homes are made.

Overarching all of this, and arguably hindering the development of a legal concept of home, is the argument that the concept of home is not 'real'. Yet, although epigrams such as 'home is where the heart is' and 'there's no place like home' portray attachment to home as sentimental, these expressions, and the responses they describe, are informed by important social, psychological, cultural and emotional attachments. One of the difficulties, from a legal perspective, is the inherent intangibility of these responses towards home. Even aside from the commercial clout of the creditors, it is not altogether surprising that the rationally underpinned legal system prefers the interests of creditors in the economic value of the house to the non-economic interests of occupiers in their homes. While an occupier's interest in the property *as a home* may be intangible, that is certainly not an insurmountable hurdle to the recognition of a legally significant interest. Nevertheless, as Chapter Two has demonstrated, even when legal policies are specifically directed at recognising and protecting the 'home' interest of the occupier, they have been, broadly speaking, ineffective.

This chapter has attempted to set out an argument for greater consideration of home interests in the mortgage possession context. However, in order to proceed with the development of a legal concept of home, it is necessary to evaluate the meanings and values

of home to the occupier. At this point, the benefits to be gained from inter-disciplinary analysis are highlighted. Although the idea of ‘home’ is often dismissed in legal discourse as: ‘...something ethereal, floating in the air, unconnected to bricks and mortar and land’;<sup>201</sup> research in other disciplines has established the authenticity of home meanings and attachments for occupiers. While the concept of home has remained relatively under-developed in law, interest in the meanings and values of home has burgeoned in other disciplines in recent years. This research emphasises that *home* is indeed a ‘real’ phenomenon. Furthermore, empirical and theoretical research in other disciplines could usefully contribute to the conceptualisation of home in law. The meanings and values identified by studies in other disciplines could provide a useful conceptual springboard from which to launch the search for a concept of home in law. This cross-disciplinary examination of home scholarship is the subject of Chapter Four.

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<sup>201</sup> *London Borough of Harrow v Qazi* [2003]UKHL 43 at [145].