

Dispossession for Arrears: the Weight of Home¹

This chapter examines whether, and if so the extent to which, the processes of dispossessing a debtor of his or her home enable weight to be attached to the importance of *this* home to *this* person.² The focus is upon what will be called the ‘personal home story’.

The law implicitly accepts that forced loss of any home is likely to be a more serious business than deprivation of other kinds of real estate. There are, for example, special rules applying to rented homes that require there to be a court order before repossession, but these rules do not apply to other forms of rented property.³ The general aim of these rules is to ensure that the occupier does not lose her home without good lawful reason, but they do not allow the ‘meaning of home’ to be a consideration in deciding whether or not possession should be allowed on the facts. Sometimes the law goes further where the reason given for dispossession of a home is non-payment of monies due and it gives the occupier an opportunity to show to a judge that, given a reasonable time to do so, she will be able to sort out the arrears. An obvious example is the special powers given to judges to postpone possession if a mortgagee is seeking a court order to take possession of a dwelling house.⁴ In this way the law does give special protection to most home dwellers, albeit some more than others.⁵ Whilst there is, then, a general weighting that is given to homes in the law, the question addressed in this chapter is whether the law ever allows more than this by making the personal home story legally relevant.

Whilst losing a home will seldom be easy, the impact of loss will be much greater for some than others. A young person who has only recently rented a room in a shared house is unlikely to suffer serious harm, especially if she has friends or family nearby who she can move in with. But for others, perhaps a low income single parent with dependent children and mental health problems, the story could be quite different. For some, a forced move will be devastating: there are financial, emotional, social and practical consequences. It may mean dislocation from communities of family, friends, school, work, and other social groupings; it can lead to homelessness or overcrowding; it may exacerbate existing health problems, or generate new ones, and it can lead to a profound sense of ‘loss’ and insecurity. The reach will often be far wider. It is not only the debtor herself who stands to lose the home, but other occupiers may also be made homeless. The point is that loss of home impacts very differently upon different people depending upon their financial resources, expectations, health, family and social situation, and general resilience. Is this something that has any relevance in law?

Arrears and Dispossession

¹ Professor Susan Bright, New College, Oxford. I would like to thank Janet Bettle, barrister, for her advice on the practice of possession hearings.

² The legal and regulatory position discussed in this chapter is based on English law.

³ Protection from Eviction Act 1977 s 3.

⁴ Administration of Justice Act 1970 s 36.

⁵ Where all a court can do is to check that the lawful right to occupy has come to an end, this is much less useful than where it is able to postpone possession for occupiers likely to pay.

There are a number of distinctions that will need to be drawn in discussing the relevance of the personal home story. The central ones relate to the type of arrears, the tenure of the debtor, and the identity of the creditor; with clear connections between these.

The most obvious forms of arrears are those that relate to payment for the occupation: rent and mortgage⁶ payments. During 2009, the level of arrears was high. The number of residential mortgages in arrears had been steadily rising since early 2007 and by mid 2009 around 400,000 accounts were in arrears.⁷ Precise figures on rent arrears are hard to obtain, but around 1 in 3 private landlords had a tenant in arrears in mid 2009.⁸ Both forms of arrears can lead to dispossession, but the processes to follow will depend upon the tenure and the identity of the creditor. In outline, rent arrears can lead to a mandatory ground for possession with a private landlord (including a registered provider of social housing), but (usually⁹) only a discretionary ground for possession if there is a local authority landlord. Mortgage default gives a right to possession and sale. Other forms of debt can also lead to loss of the home. Judgement creditors, with unsecured debt, are able to apply for a charging order to be made if the debtor is a home owner with equity in the home,¹⁰ and can then apply for an order for sale of the house. Recent figures are not available, but in 2007 almost 100,000 charging orders were made, and Citizens Advice have expressed concern about the rising use of charging orders and the threat of orders for sale in order to intimidate debtors into paying what can be relatively small sums of money due.¹¹ Creditors can also make the debtor bankrupt, which can then also lead to loss of the home.

The likelihood of losing a home for money owed will depend not only on the formal legal rules that apply but on a variety of other factors, some formal, some less so. Even when a possession case reaches court there is considerable variety. As seen already, in some arrears situations the judge has no discretion but to order possession if the grounds are made out. But a judge who is uncomfortable with evicting a family may try very hard to find some way of avoiding this outcome, perhaps by a scrupulous scrutiny of the paperwork.¹² In other cases a judge may be given a discretion. This means that there can be much local variation, and research by Hunter and others into the exercise of judicial discretion in rent arrears cases shows that there are different patterns of decision between

⁶ Of course, not all mortgage loans are taken out in order to purchase the property; many will be business or other personal loans secured on the property. For convenience, the text treats mortgage payments as relating to occupation.

⁷ Financial Services Authority, *Statistics on Mortgage Lending*: June 2009 Edition.

⁸ According to the National Landlords Association (www.landlords.org.uk, visited 10 July 2009).

⁹ Most local authority tenants have 'secure tenancies', and the grounds for possession are discretionary. However, during the first year, or later following anti-social behaviour, there may be a form of tenancy that can be ended by notice.

¹⁰ See Charging Orders Act 1979.

¹¹ CAB evidence briefing, *Out of order*, June 2009.

¹² So, for example, a study by Hunter and others into how judges deal with rent arrears cases found that Ground 8 (the mandatory ground for rent arrears) was operating in a far from mandatory way: C Hunter and others, 'The exercise of judicial discretion in rent arrears cases' DCA Research Series 6/05, October 2005, iv. Anecdotal evidence shows that judges also search for technical reasons not to grant possession in mortgage cases by means such as applying service rules and time limits very strictly, and refusing to proceed if relevant searches have not been done.

courts and between individual judges in courts.¹³ But it is not only formal legal rules and what happens in court that matter as this is very much the end of the line. Before reaching court there are a number of formal regulatory practices that may affect how much of the occupier's personal story is known to the creditor, and how likely the creditor is to bring possession proceedings. In recent years there have, for example, been pre-action protocols issued both for rent arrears cases and mortgage default. But the informal, extra-legal, practices will also be tremendously important. Since the credit crunch has struck the government has launched a number of initiatives designed to help borrowers stay in their homes, but it tends to be only the big high-street lenders that have signed up to these. Borrowers from sub-prime lenders are much more likely to lose their homes not simply because their repayments are often at the margins of affordability but also because these lenders tend to be inflexible and hasty. Likewise, some landlords will be more patient and willing and able to allow time for payment whereas others may rush to recover possession.

Different Opportunities to tell Different Personal Stories

It is, of course, always possible for a creditor to listen to personal stories. There is no compulsion to recover possession. In terms of formal responses, however, there are three broad categories into which cases can be put.

First, there are those cases in which the personal story has no legal relevance. So, for example, in Ground 8 cases where a private landlord has a mandatory ground for possession on the basis of two months' rent arrears, a 'non-social' private landlord can recover possession without any real communication with the tenant. In other situations there will, however, be regulatory guidance, possibly not binding, which gives an opportunity for personal stories to be aired. Unlike the wholly private landlord, a social landlord using Ground 8 should both comply with the good practice guide on rent arrears management as well as the pre-action rent arrears protocol. Collectively these encourage greater communication between the landlord and tenant and promote 'eviction ... as a last resort' only.¹⁴

Secondly, there are cases in which the personal 'financial' story is legally relevant but not the wider home story. The personal financial story looks at the occupier's financial circumstances, the explanations as to why she has fallen into debt, and the prospects of her being able to make future payments and pay any arrears due, taking into account welfare payments to which she might be entitled as well as her other financial means. These are cases in which the judge is given some level of discretion in relation to the decision as to whether (and when) possession should be given, but the judge is allowed only to take account of financial matters. Mortgage cases come into this group. There are also various regulatory measures that may apply before the case reaches court and that may encourage the telling of the personal story but, as will be seen below, compliance with these is patchy.

¹³ C Hunter and others, 'The exercise of judicial discretion in rent arrears cases' DCA Research Series 6/05, October 2005, ii.

¹⁴ DCLG, *Improving the Effectiveness of Rent Arrears Management*, June 2005.

Finally, there are those cases in which both the personal financial and home stories can be taken into account. It is this category that gives the widest discretion to the judge. This degree of discretion is explicit in cases involving the Trusts of Land and Appointment of Trustees Act 1996 (TLATA) where a creditor has an interest in part of a co-owned property. It is also present, though with no express reference to home meanings, in tenancy cases that require the landlord to prove that it is 'reasonable' for possession to be ordered.

Personal Stories through Human Rights: a Trump Card?

Although the Human Rights Act 1988 came into force in October 2000, the courts are still working through exactly how the principles apply to cases involving the repossession of homes, notwithstanding several cases that have been heard in the House of Lords. The right most directly applicable is contained in Article 8 paragraph 1, which provides that everyone has the right to respect for his home. This is then qualified by paragraph 2 which says that there can be no interference by a public authority with the exercise of this right except as is in accordance with the law and (inter alia) is necessary in a democratic society in the interests of the economic well-being of the country or for the protection of the rights and freedoms of others. It has been clear since the case of *Kay v Lambeth* that a possession action does involve an interference with the home, even in cases when there is no continuing lawful right to occupy.¹⁵ It is also clear that where there is a lawful right to recover possession there will usually be justification for this interference as the housing needs of others is accepted as a legitimate aim,¹⁶ as is protecting the rights of the lawful owner.¹⁷ What remains obscure is the extent to which the decision to end a lawful right to occupy (which would apply to tenancies being terminated for rent arrears), to commence possession proceedings and then to evict must be reasonable in the light of the occupier's personal circumstances which are known (or perhaps, ought to be known) to the owner.

Although the law is still evolving in this area it does appear to have reached the point whereby a direct human rights challenge to possession is unlikely to succeed in English law. This sits uncomfortably alongside the approach taken in the European Court of Human Rights in *McCann v United Kingdom* where there was a clear statement about the need for there to be some balancing carried out before someone loses their home:

'The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end...'¹⁸

The kinds of matters that have been important in cases before the European Court of Human Rights where Art 8 has been found to be violated include matters that relate to the

¹⁵ [2006] UKHL 10, [2006] AC 465.

¹⁶ *Blecic v Croatia* (2004) 41 EHRR 185.

¹⁷ *McCann v United Kingdom* (App No 19009/04) [2008] LGR 474.

¹⁸ *McCann v United Kingdom* (App No 19009/04) [2008] LGR 474 [50].

personal home story, including the longevity of occupation.¹⁹ The tension between the domestic and European courts continues, and further cases are due to be heard in Strasbourg.

In the meantime, human rights law has not been completely without impact on domestic law. The courts appear to be edging towards a position whereby 'Convention ways of thinking' are influencing public law remedies. This means that a local authority landlord (and quite possibly registered social providers²⁰) must take account of relevant facts when taking possession action, which may include having regard to the personal circumstances of the occupier and the length of occupation.²¹ Furthermore, a court may also have to take into account the personal circumstances of the occupier. In practice, however, unless the court has a statutory discretion as to whether or not to order possession at all (as to which, see below), it may be that the most that the court will be able to do is defer possession by a short period. This is because section 89 of the Housing Act 1980 provides that possession should not be deferred for more than 14 days unless this would cause exceptional hardship, and even then it can not be more than six weeks from the making of the order.²²

It must be said that the state of the Art 8 jurisprudence is unclear. In practice, notwithstanding the torrent of case law, Art 8 has had very little impact on the outcome in possession cases to date. It is possible that the personal home story may be part of what a public authority landlord and the court have to take into account; if so, it may well buy a few extra weeks for the occupier but this is a jurisdiction that the courts already have through section 89 where possession would cause exceptional hardship. The discussion that follows is all subject to the possibility that through human rights law personal stories may be relevant.

Personal Stories: No Legal Relevance

There are two main types of case in which personal stories have no legal relevance. The first is where the property has been bought as a buy-to-let (BTL) investment and the landlord's mortgagee takes possession action. The second is where a private landlord seeks possession on Ground 8.

¹⁹ See *Connors v UK* (App No 66746/01) (2004) 40 EHRR 189 (ECtHR). At [85] the Court noted the seriousness of the interference: 'The applicant and his family were evicted from the site where they had lived, with a short absence, for some fourteen to fifteen years, with consequent difficulties in finding a lawful alternative location for their caravans, in coping with health problems and young children and in ensuring continuation in the children's education. The family was, in effect, rendered homeless, with the adverse consequences on security and well-being which that entails.'

²⁰ The Court of Appeal in *London & Quadrant Housing Trust v Weaver* [2009] EWCA Civ 587 held that termination of a tenancy by a Housing Trust was a public act sufficient to bring it within the Human Rights Act 1998.

²¹ *Doran v Liverpool CC* [2009] EWCA Civ 146; *Central Bedfordshire Council v Taylor* [2009] EWCA Civ 613.

²² This limitation does not apply to mortgagee possession actions or discretionary grounds for tenancy possession. See also *Central Bedfordshire Council v Taylor* [2009] EWCA Civ 613: but this was a case where the occupier had no lawful right to remain.

BTL Mortgages

Recent years have seen a dramatic growth in the number of properties let out by BTL landlords borrowing money in order to fund the purchase of properties that they intend to let out for residential occupation. With the recession, a significant number of BTL landlords have fallen into arrears with mortgage payments. The most common mortgagee response is to appoint a 'receiver of rent', rather than proceed to immediate sale.²³ The receiver collects the rent from the tenant and passes it on to the lender. This, of course, means that the tenant occupier can continue to live in the home. But the alternative remedy is repossession and sale, and although the total number of BTL repossessions is much lower than for owner-occupiers, the repossession rate in mid 2009 was marginally higher and rising.²⁴

With BTL repossession the occupier has no opportunity to tell his personal story. Even if aware of possession hearing,²⁵ the tenant has no standing and the judge can take no account of the tenant's situation, and there is no power to defer possession because of the tenant's circumstances.²⁶ The occupier often has little or no warning of imminent eviction.²⁷

Ground 8

Ground 8 can be used when the tenant is two months in arrears with rent and unless the arrears are paid by the time of the hearing, the judge must order possession.²⁸ The only – very limited – discretion is that in section 89 of the Housing Act 1980, which, as seen earlier, can at most lead to a short delay in possession. This means that, apart from the possible brief delay in possession, the judge is unable to listen to any stories, personal or otherwise, that might give a reason for not ordering possession. This is so even though a common cause of arrears is administrative delay with the payment of housing benefit. There is considerable judicial disquiet about Ground 8 and it was described by Dyson LJ in *North British Housing Association Ltd v Matthews* as 'potentially draconian in its

²³ In the first quarter of 2009, there were more appointments of receivers of rent than there were repossessions of BTL properties, and this was an absolutely stunning increase from the number of appointments a year earlier: 2,400 as against 1,700. Source: Council of Mortgage Lenders (CML).

²⁴ 1,700 BTL repossessions in the first quarter of 2009 (compared to 11,100 owner-occupier repossessions). The repossession rate among buy-to-let landlords was higher (0.15%) than in the mortgage market as a whole (0.11%). Source: CML.

²⁵ Procedural rules were changed in spring 2009 to ensure that tenants receive up to seven weeks notice of any repossession hearing (from 14 days), but in practice many tenants are not aware of the repossession hearing: 'A private matter? Private tenants: the forgotten victims of the repossessions crisis', Crisis, Citizens Advice Bureau, Shelter, Chartered Institute of Housing, March 2009.

²⁶ Crisis and others are calling for legislative amendment so that possession can be deferred, taking into account the interests of vulnerable occupiers and the household's economic circumstances: 'A private matter? Private tenants: the forgotten victims of the repossessions crisis', Crisis, Citizens Advice Bureau, Shelter, Chartered Institute of Housing, March 2009, p 6.

²⁷ 'A private matter? Private tenants: the forgotten victims of the repossessions crisis', Crisis, Citizens Advice Bureau, Shelter, Chartered Institute of Housing, March 2009. In a survey of advisers, 10% of respondents said that tenant had no notice at all, and nearly a quarter said that the most common outcome was that the tenant became homeless. In summer 2009 the government announced its intention to change the law so that tenants will have a minimum of two months' notice of having to leave: CLG, *Real help for tenants*, 13 May 2009; HM Government, *A Better Deal for Consumers: Delivering Real Help Now and Change for the Future*, July 2009, Cm 7669, p 18.

²⁸ It is 2 months if the rent is paid monthly, with different arrears periods for different payment methods.

application’.²⁹

There is particular concern over the use of Ground 8 by social landlords as it is thought, by some, to go against their mission. It is difficult to be sure how widespread the use of Ground 8 by registered providers is (although a study by Pawson and others is due to report in late 2009). It is clear that some social landlords never use it, whilst others make regular use of it.³⁰

Although the use of Ground 8 gives no opportunity for the occupier to tell his personal story to the judge, there may well be opportunities to do so at an earlier stage if a social landlord is involved. Social landlords should follow both the good practice guide to rent arrears management, and the pre-action rent arrears protocol (PRAP). Both aim to promote communication between the landlord and tenant so that eviction is used only as a last resort. The PRAP was introduced in late 2006 and applies to social landlords, both registered providers and local authorities. It requires parties to try to agree an affordable way of the tenant paying arrears, and for the landlord to assist the tenant in any housing benefit claims. The court is directed to take into account whether the protocol has been followed when considering what orders to make and sanctions for non-compliance are specifically provided: if the landlord unreasonably fails to comply with the protocol, the court can impose an order for costs, and, in non-mandatory grounds cases, the court may adjourn, strike out or dismiss claims.

CAB research indicates that the pre-action protocol has had a broadly positive effect in preventing unnecessary court action, although the extent of compliance varies.³¹

‘Overall, the county court advisers interviewed were very positive about the impact which the pre-action protocol had had on social landlords’ pre-court practices. Many commented that the protocol had resulted in landlords taking a more holistic approach, looking at the tenant’s situation in the round and exploring alternative options before considering court action.’

Of course, the fact that Ground 8 is used does not necessarily mean that the landlord is acting unreasonably. It may already have exhausted all other realistic options. Certainly, this is how it was seen by the housing manager for LQHT which makes ‘regular use of ground 8’.³² His evidence in *R (Weaver) v London and Quadrant Housing Trust* stated:

²⁹ [2004] EWCA Civ 1736 [33]. All but one of the judges interviewed by Hunter and others expressed some distaste for its use: C Hunter and others, ‘The exercise of judicial discretion in rent arrears cases’, DCA Research Series 6/05, October 2005, p 90.

³⁰ Research published in 2005 shows 1/3 of housing associations (and ½ of London housing associations) making use of Ground 8: H Pawson, and others, ‘The Use of Possession Actions and Evictions by Social Landlords’, ODPM, June 2005. A small scale study by CAB shows that of 10 HAs they contacted that do use Ground 8 and have full sets of figures, half evicted no tenants on the basis of Ground 8 whereas one said that Ground 8 evictions represented 93% of all tenants evicted: CAB evidence, *Unfinished Business*, May 2008 (Table 1).

³¹ It found there ‘was considerable variation in the level of compliance, both between housing associations and in terms of the different elements of the protocol itself’: CAB evidence, *Unfinished Business*, May 2008.

³² According to the Audit Commission report on LQHT referred to in *R (Weaver) v London and Quadrant Housing Trust* [2008] EWHC 1377 (Admin) [74].

‘...our principal objectives are to avoid arrears occurring in the first place, but where they do to deal with them without the need for service of a NoSP and certainly without the necessity then to issue proceedings let alone pursue them as far as a hearing In those cases where the arrears are high and neither a lump sum nor a suitable agreement is forthcoming, then obtaining an outright order under Ground 8 may be the only realistic or sensible option from the tenant's point of view as much as LQHT's’.³³

Indeed, Richards LJ in the Divisional Court agreed that the fact that LQHT had relied on Ground 8 did not mean that it had failed to use all reasonable alternatives as the focus should be not only on possession but also on the earlier measures taken to prevent the build up of arrears.³⁴

Although most social landlords who use Ground 8 may do so sensitively, this leaves tenants in a vulnerable position. The CAB was highly critical of the continued use of Ground 8 by a minority of housing associations as it prevents independent scrutiny by the courts as to the reasonableness of the landlord's claim for possession.

Personal Financial Story bears Legal Relevance

Although the personal home story is not legally relevant in owner-occupation mortgage cases, the personal financial story is. The usual process for mortgagee sale is for the mortgagee first to obtain a court order for possession of the property so that it can be sold with vacant possession. The judge has power to defer possession, but is unable to take into account ‘home meanings’. In deciding whether to grant possession, the judge is only able to consider the borrower's ability to pay; other personal factors are not relevant. By section 36 of the Administration of Justice Act 1970, where the mortgagee of a dwelling-house claims possession the court may adjourn, suspend or postpone possession if the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage. The process before the court gives little opportunity to ask detailed questions even within the confines of investigating the financial position of the borrower: previous studies have found that in practice, only around one half of borrowers attend possession hearings (although there are signs that there are higher attendance rates now) or make written submissions to the court, and the average length of a repossession hearing is five minutes. Possession orders are granted in around two thirds of claims issued by mortgagees, and more than half are for immediate possession.³⁵

This means that what happens before the case reaches the judge is important. Unless lenders are perceived to be supportive and sympathetic early on in the process, borrowers may simply abandon hope and walk away. In 2008 nearly one fifth of properties taken into possession were voluntary possessions.³⁶ Others, fearing repossession, have resorted

³³ *R (Weaver) v London and Quadrant Housing Trust* [2008] EWHC 1377 (Admin) [77].

³⁴ *R (Weaver) v London and Quadrant Housing Trust* [2008] EWHC 1377 (Admin) [89].

³⁵ Ministry of Justice, ‘Judicial and court statistics 2007’ Sept 2008, p. 58.

³⁶ In the first quarter of 2009, slightly more than 1 in 4 possessions were voluntary. These figures were supplied by CML and are based on possession by CML members (membership is open to lender organisations that are authorised and regulated by the Financial Services Authority). Of course, walking away does not discharge the contractual debt.

to sale and rent back deals, in the hope that this will enable them to stay in their home.³⁷ It is possible for the lender to take possession without a court order,³⁸ but this is unusual because of the risk of committing a criminal offence.

Most mainstream lenders are regulated by the Financial Services Authority (FSA) which provides guidance on arrears and repossessions in the Mortgage Conduct of Business Rules (MCOB).³⁹ The MCOB guidance on arrears and possession requires lenders to let customers have details of arrears, and of charges that the customer is likely to incur. Before bringing possession proceedings, it should also advise the customer to contact the local authority housing department. But apart from these information requirements there is nothing that requires lenders to find out about the circumstances of the occupier before acting, or in any other way tempers the legal right of the lender to seek possession. Possession claims may well be brought as soon as two months arrears have accrued,⁴⁰ and even if there is a simple and temporary explanation for the default the lender may never learn of it.

Studies show that different lenders behave differently, some far quicker to take action than others. A study by the FSA looking at lender practices towards arrears and repossessions⁴¹ showed that there was considerable variation, particularly between 'mainstream lenders' and 'specialist lenders' (the latter group includes those lending to people with impaired credit ratings, using self-certification, and buy-to-let landlords).⁴²

³⁷ Many of such schemes are disadvantageous and fail to offer the security sought and promised: see OFT, *Sale and Rent Back: An OFT Market Study*, October 2008, OFT 1018. The sale and rent back market is a recent phenomenon (around 50,000 transactions entered by the time of the OFT study), and evidence suggests that around 60% of individuals resorting to it were facing repossession: para 3.56. The Financial Services Authority introduced an interim regime to regulate sale and rent back in summer 2009, with a view to there being a full regulatory regime in place by the second quarter of 2010.

³⁸ *Ropaigealach v Barclays Bank* [2000] QB 263, CA. It is also possible to by-pass judicial control by selling mortgaged property with the occupiers still in and subject to the mortgage. Once the purchaser discharges the mortgage the occupiers will have no right to remain: *Horsham Properties v Clark and Beech* [2008] EWHC 2327 (Ch), [2009] 1 WLR 1255. A private members' bill is before Parliament that would require a mortgagee to obtain the court's permission before exercising the power of sale (Home Repossession (Protection) Bill; due to be debated on 16 October 2009), and the CML has issued a voluntary statement that its members will not sell owner occupied properties without first seeking a court order for possession (save for vacant and abandoned properties): <http://www.cml.org.uk/cml/policy/issues/4707>.

³⁹ The mortgage contracts regulated by the FSA are defined by paragraph 61 (3)(a) of The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544. Broadly, this covers mortgages to consumers that involve a first legal charge on a dwelling. It does not, for example, cover either buy-to-let mortgages or second charges. The section of the MCOB dealing with arrears and possessions is MCOB 13, available at <http://fsahandbook.info/FSA/html/handbook/MCOB>. Second mortgages come within the Consumer Credit Act 1974.

⁴⁰ In a small scale survey by the Citizens Advice Bureau (CAB), in 15% of cases the lender took court action before three months: Citizens Advice, 'Mortgage Remedies (Possession and Sale) Review Lines of Inquiry: Response by Citizens Advice to the Ministry of Justice' (London: Citizens Advice, January 2009) (replies to q14). A two month wait is required under the MCOB. The ability to sell the property is exercisable by statute after only two months arrears: Law of Property Act 1925, s 103.

⁴¹ Conducted before the introduction of the Mortgage Arrears Pre-action Protocol at the end of 2008 (discussed below in text).

⁴² FSA/PN/087/2008, 5 August 2008. Other, earlier, studies have likewise found considerable variation in lender practices, and the imposition of unreasonable charges on borrowers as soon as they fall into arrears: see P Tutton and S Edwards, *Set up to fail: CAB clients' experience of mortgage and secured loan arrears*

Specialist lenders were less likely to take account of the borrower's circumstances, were more ready (in fact, the FSA say 'too ready') to take court action, and had lower standards of controls in place. The FSA found that all lenders could have done more to consider customers' individual circumstances and offer options as to how to resolve arrears issues. Lenders tended to be inflexible and not willing to accommodate suggested alternative repayment schedules (the common response was 'pay in full or face legal proceedings'), and would initiate court proceedings at around the 3 months arrears mark.⁴³ Interestingly, whereas most borrowers were not happy with the treatment received from lenders when they were in arrears the research found that consumers felt that *courts* were more willing to be sympathetic and hear their stories, offering a managed solution.

As the scale of the credit crunch emerged and the rising possession figures came to the fore in the latter half of 2008,⁴⁴ the government introduced a raft of measures designed to help owner-occupiers to be able to stay in their homes. This included the introduction of a Mortgage Pre-action Protocol (MPAP).⁴⁵ Although this was headlined in government press releases as saying that lenders will be legally compelled to use repossession as a last resort, it is, in fact, less direct. The protocol encourages the mortgagee to communicate and share information with the mortgagor. The aim is to keep the borrower fully informed of the amount of their indebtedness and to encourage lenders to see if there is some way of sorting out the problem short of seeking possession. Ideally, then, this is the moment when the borrower is able to tell her personal story, and for the lender to be able to respond in a flexible way.

Again, however, the impact of the protocol is variable and the identity of the various players in the system matters. According to surveys conducted by a group of advice agencies, not all lenders appear to be following the protocol.⁴⁶ Although mainstream lenders have largely improved their arrears and repossession practices following the introduction of the MPAP, sub-prime and second charge lenders have not.⁴⁷ There are no sanctions for failing to use the protocol,⁴⁸ and it is unclear whether courts can impose a costs sanction.⁴⁹ Throughout, the tone of the protocol is much weaker than that of the PRAP discussed earlier, and the changes between the initial draft and the final version of

problems, December 2007; L Whitehouse, *The Impact Of Consumerism On The Homeowner*, in D Cowan ed, 'Housing: Participation and Exclusion' Dartmouth, 1998, 138. See also L Whitehouse, *The Homeowner: Citizen or Consumer?*, in S Bright and J Dewar, 'Land Law: Themes and Perspectives', OUP, Oxford, 1998.

⁴³ *Mortgage effectiveness review: arrears findings*, FSA, August 2008.

⁴⁴ CML figures show 40,000 properties taken into possession (this includes voluntary possessions) in 2008, up from 25,900 in 2007.

⁴⁵ Pre-action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in respect of Residential Property. This is available on the Civil Justice Council web-site. It came into force in November 2008.

⁴⁶ *Mortgage and secured loan arrears: Adviser and Borrower Surveys*, April 2009, Research from AdviceUK, Citizens Advice, Money Advice Trust and Shelter.

⁴⁷ The *Adviser and Borrower Surveys* looked at: arrears collection practices, arranging arrears payment plan, considering other options, granting time to sell their property (where there is equity in the property), capitalising arrears and/or extending mortgage term, and agreeing to change the payment date.

⁴⁸ In contrast to the explicit sanctions in the rent arrears protocol discussed below, and in the draft MPAP.

⁴⁹ The *Adviser and Borrower Surveys* says that there is case law authority which suggests that courts have power to disallow costs where they have been unreasonably incurred (fn 13), but the position is not clear.

the protocol suggest that the strong lobbying arm of the mortgage industry was effective to water down the proposals.⁵⁰

The MPAP has, however, had some positive effects. Surveys suggest that since the protocol was introduced judges have asked more questions about whether lenders have made attempts to reach agreement before taking court action, and that there is a willingness by many judges to adjourn cases where the lender does not appear to follow the protocol.⁵¹

Following the introduction of the protocol there was a significant reduction in the number of possession orders being made. There were 17,054 possession *orders* granted in the county courts in the first three months of 2009, 39 per cent lower than in the same period a year earlier and 43 per cent lower than in the last three months of 2008.⁵² The MPAP also coincided with a fall of around 50 per cent in the number of new mortgage repossession *claims* being issued,⁵³ but at the time of writing it is too early to know whether the protocol claims are merely being delayed rather than abandoned.

The MPAP is one of several government initiatives designed to contain the rising number of repossessions. These are also likely to have contributed to the reduction in the number of possession orders. Some are focussed on encouraging lenders to be more flexible in response to arrears, such as an early agreement reached with major lenders to wait at least three months before initiating repossession proceedings in order to give time to explore alternatives.⁵⁴ Others focus on affordability. Thus, the Homeowner Mortgage Support Scheme allows mortgagors to defer a proportion of the interest payments for up to two years.⁵⁵ Likewise, the period which a borrower has to wait before welfare payments to assist with mortgage payments are payable has been reduced.⁵⁶ There is also a mortgage rescue scheme, which enables qualifying borrowers,⁵⁷ with the assistance of social

⁵⁰ Whitehouse describes it as 'an opportunity lost to afford borrowers greater protection within the repossession process': L Whitehouse, *The mortgage arrears pre-action protocol: an opportunity lost*, MLR (forthcoming). She argues that the draft sought to challenge three fundamental tenets of the law of mortgage, namely, the economic rationale for regulation, the inherent right to possession and the freedom of contract principle. The final version is an 'ideological volte-face.'

⁵¹ Anecdotal evidence suggests that many district judges apply MPAP strictly, and effectively give it the force of law.

⁵² Ministry of Justice, *Statistics on mortgage and landlord possession actions in the county courts – first quarter 2009*, Statistics bulletin, 15 May 2009. As the Ministry of Justice makes clear, these figures do not indicate how many properties have actually been repossessed. Repossessions can occur without a court order being made, while not all court orders result in repossession.

⁵³ Figures taken from the daily and weekly numbers of new mortgage repossession claims being issued in the courts as evidenced from administrative records: Ministry of Justice, *Statistics on mortgage and landlord possession actions in the county courts – first quarter 2009*, Statistics bulletin, 15 May 2009.

⁵⁴ Announced by Communities and Local Government on 24 November 2008.

⁵⁵ The scheme came into effect after 14 April 2009. Under it, the government guarantees the *deferred* interest payments in return for banks' participation in the scheme. Because it is so recent, it was not included in the *Adviser and Borrower Surveys*.

⁵⁶ From 39 weeks to 13 weeks for new working age claims. The capital limit for eligible loans has also been increased. These changes came into effect 5 January 2009. The payment is known as ISMI, Income support for mortgage interest.

⁵⁷ To qualify they must be eligible for homelessness assistance and in priority need, and there is a cap on value of property. Initially it could not be used for those in negative equity, but this has been changed from

landlords, to stay in their home notwithstanding mortgage difficulties, either by reducing the size of the commercial mortgage (by changing to shared equity) or by becoming renters (through ‘mortgage to rent’).⁵⁸ Mortgage rescue and the homeowner mortgage support scheme are available only with the major lenders. This is a serious limitation. The more vulnerable borrowers - those with poor credit histories, illnesses and unreliable income levels - are much more likely to fall into arrears and to have borrowed from the sub-prime lenders who, as we have seen, pursue more aggressive arrears and repossession policies and are not participants in several of the government initiatives.

The thrust of these measures is to enable borrowers in financial difficulties to be able to stay in their home by working out some kind of accommodation with the lender. However, unless they are able to prove that there is a reasonable prospect of paying (all) the arrears within a reasonable time they have no *right* to stay but only a mere hope of the lender’s indulgence. In practice the likelihood of arrears leading to loss of the home is heavily dependent upon the attitude of the lender. The personal home story will be wholly irrelevant unless the borrower is able to appeal to the conscience of the lender.

Personal Stories with a Legal Voice

There are some situations in which a judge is able to take account of the debtor’s personal story when deciding whether to order possession. However, as will be seen, in the majority of cases the judge is most likely to focus on financial considerations rather than the personal home story.

Local Authority Tenancies

Most local authority tenants have security of tenure (effectively a right to stay for life unless the landlord can prove a ground for possession).⁵⁹ Even if there are rent arrears, possession is never automatic and can be granted only if the court considers it reasonable to make the order.⁶⁰ As well as this discretion, there is a further element of discretion given to the judge: even if the judge decides it is reasonable to order possession, there is discretion as to whether possession should be ‘immediate’ or ‘postponed’.⁶¹ Studies show that when a possession order is made in circumstances which give this kind of discretion to the judge, then suspended or postponed possession orders are much more common

1 May 2009.

⁵⁸ For figures on the uptake of the mortgage rescue scheme, see:

<http://www.communities.gov.uk/documents/housing/xls/table1303.xls>

It was introduced in Jan 2009; in the period to the end of May 2009 only six households had been approved for mortgage rescue (but the time taken to process things from application to approval is around 3.5 months, and 743 households applied for mortgage rescue during the period Jan-end May 2009).

⁵⁹ But not necessarily initially. CLG Table 601

(<http://www.communities.gov.uk/documents/housing/xls/141431.xls>) shows that in 2007/08, 69% of new lettings to new tenants were non-secure. It can be reasonably assumed that most of this is attributable to the use of ‘introductory’ tenancies which will usually become secure after one year. In the three years before the introduction of introductory tenancies, 8% of new lettings to new tenants were non-secure; this suggests that around 90% of local authority lettings are likely to end up as secure tenancies.

⁶⁰ Housing Act 1985, Sch 2, Ground 1.

⁶¹ Housing Act 1985, section 85.

than outright orders: in the social housing sector there were 41,089 suspended possession orders and 33,476 outright orders made in 2007.⁶² In practice, as many of the arrears cases involving social landlords are caused by the housing benefit system, the standard order in rent arrears cases has become an adjournment or suspension.⁶³ As the various actors in the system know this, there is often a pre-court agreements reached as to what the outcome will be.

The fact that possession is not automatic means that there is room to hear argument about the occupier's personal home story. The question of reasonableness gives the court a very wide discretion.⁶⁴ Lord Greene MR said in *Cumming v Danson*:

'In considering reasonableness ... it is... perfectly clear that the duty of the judge is to take into account *all relevant circumstances* as they exist at the date of the hearing. That he must do in what I venture to call a broad, common-sense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive, but it is quite wrong for him to exclude from his consideration matters which he ought to take into account.' (emphasis added)⁶⁵

In deciding reasonableness the judge must look at the effect that possession would have on *each* party. In *Cresswell v Hodgson* Somervell LJ said:

'I do not see how it is possible to consider whether it is reasonable to make a order unless you consider its effect on landlord and tenant, firstly, if you make it, and secondly, if you do not.'⁶⁶

Given that so few possession cases are reported, however, it is difficult to know what effect 'home meanings' have upon the exercise of judicial discretion. Further, although trial judges are required to consider reasonableness and not merely 'rubber stamp' the pre-agreed deals, there is a perception that many judges show 'enormous respect' for them, while others are more willing to reopen them.⁶⁷ The research by Hunter and others into the decisions of district court judges in rent arrears possession cases show that the personal characteristics of judges do impact on outcomes. The individual judge injects his or her own view of a case depending on things such as constructed models of worthiness (the worthy tenant being one who can't pay rather than won't pay, and who 'bothers' to attend the hearing),⁶⁸ perceptions as to whether the cause of arrears is a systemic failure or individual failure, whether the problem is perceived as a social welfare problem or a

⁶² Ministry of Justice, 'Judicial and court statistics 2007' Sept 2008. Nb these figures include both local authority and housing association possession cases (even though they are governed by different regimes) and are not confined to rent arrears cases.

⁶³ C Hunter and others, 'The exercise of judicial discretion in rent arrears cases' DCA Research Series 6/05, October 2005, 18.

⁶⁴ In *Whitehouse v Lee* [2009] EWCA Civ 375 Rimer LJ said that reasonableness was a question of fact entrusted to the trial judge, akin to, although different in kind from, the exercise of a discretion [23].

⁶⁵ [1942] 2 All ER 653 (CA) 655. In *Williamson v Pallant* [1924] 2 KB 173, 176, Swift J said: 'I can hardly conceive any circumstance which affects the relationship of the tenant to the premises which is not a proper circumstance for him to consider.'

⁶⁶ [1951] 2 KB 92, 96.

⁶⁷ See discussion in S Bright, 'Landlord and Tenant Law in Context', Hart, 2007, p 601.

⁶⁸ D Cowan and E Hitchings, *Pretty boring stuff': District Judges and Housing Possession Proceedings* (2007) 16 Social and Legal Studies 363, 374-5.

simple contractual debt, and the judge's perception of the judging role.⁶⁹ Respondents to the Law Commission's work on Renting Homes expressed concern about the variability of decisions on reasonableness.⁷⁰

In arrears cases, attendance at the court, payment history, and the level of arrears have been shown to be important factors in the exercise of discretion, as has knowledge of the tenant's personal circumstances (such as dependant children, old age, and mental health issues).⁷¹ Of these, attendance at court has been found to have a key influence on the outcome of hearings, District Judges being more willing to exercise their discretion in the tenant's favour if he is present in court. Why this is so remains unclear, although the fact that the tenant has 'bothered' to turn up may make a difference, as well as the fact that it gives an opportunity for the tenant to tell his side of the story and it is a harder act for a judge to make a person homeless who is standing before him.⁷² Knowledge of the tenant's personal circumstances is important, but seemingly not because of the 'home meanings' (that is, the importance of this home as a link to memories, local networks etc) but because of the *impact* that being made homeless may have. Judges are particularly concerned about the effect that repossession will have on the welfare of children. The predominant concern for some of the judges interviewed by Hunter and others was that 'repossessing the home would have a major impact on the children even though it was not their fault. Others made reference to societal issues of poverty and deprivation, with concern being expressed about the practical consequences of evicting a family.'⁷³

It is interesting that although there are some reported cases in which the personal home story is taken into account, these are all cases involving other discretionary grounds for possession, particularly where possession is sought on the grounds of suitable alternative accommodation being available. In these cases there is often strong and direct reference to personal home meanings. In *Bracknell Forest BC v Green*, a case involving a discretionary ground for possession based on the fact that the tenant occupied property bigger than required for his needs, the judge referred to 'genuine emotional attachment' to the property 'as part of the family', the fact that 'decades of family memories which they hold dear' were located in this home, and that the property provided a 'profound sense of security – connected as it is with their family memories – which sustains them.'⁷⁴ Likewise in *Whitehouse v Lee* the Court of Appeal overturned the trial judge (on the basis that he had misapplied the reasonableness test as he had failed to ask what the effect would be on the landlord if no order were made) and held it was not reasonable to make

⁶⁹ D Cowan and others, *District Judges and Possession Proceedings* (2006) 33 *J of L and Society* 547.

⁷⁰ Law Commission, 'Renting Homes' (Law Com No 284, 2003) 9.83.

⁷¹ C Hunter and others, 'The exercise of judicial discretion in rent arrears cases' DCA Research Series 6/05, October 2005.

⁷² In the research by Hunter and others, one district judge observed that when he first started it was difficult to look people in the eye if you were going to kick them out: C Hunter and others, 'The exercise of judicial discretion in rent arrears cases' DCA Research Series 6/05, October 2005, 58.

⁷³ C Hunter and others, 'The exercise of judicial discretion in rent arrears cases' DCA Research Series 6/05, October 2005, 63.

⁷⁴ [2009] EWCA Civ 238 [15-17]. Other reported cases in which the court has taken account of how long the tenant has lived in the property also involve estate management grounds for recovery: see *Battlespring v Gates* (1984) 11 HLR 6.

an order for possession. The home meaning was made clear: the couple had lived in the home for 45 years, it was 'one which they loved, where they had brought up their family and in which they had established themselves as valuable, popular and respected members of a local community.'⁷⁵

Although these remarks were made in the context of cases that had nothing to do with arrears, it may be that district judges are influenced by similar considerations in arrears cases. However, whereas home meanings may provide a reason for refusing the grant of a possession order in cases looking at whether it is reasonable to order possession on the grounds that suitable alternative accommodation is available, in rent arrears cases the outcome is likely to be possession, but postponed. The fact is that when money is owed, possession will usually follow.

Not all local authority tenancies are secure. Since 1996 it has been possible for local authorities to grant 'introductory tenancies' to new tenants for the first year. At the end of this they will automatically become secure tenants, but during this year a local authority can easily recover possession. The idea behind this has now, following the Antisocial Behaviour Act 2003, been extended to the secure tenancy itself; where there has been antisocial or nuisance behaviour the secure tenancy can be downgraded to a demoted tenancy.⁷⁶ The advantage to the landlord of using introductory tenancies is the ease with which they can be ended; a notice must be served setting out the landlord's reasons, and telling the tenant of her right to request a review of the decision, but if the landlord confirms the decision to evict and the case goes to court, the court must grant possession. Unlike with secure tenancies there is, therefore, no opportunity to tell a personal story, and no judicial discretion.

Owner-Occupation and Creditors

Applications for possession and sale may be bought by other creditors. There are various routes to this. One is where an (ordinary) judgment creditor seeks security for the debt and applies for a charging order on the property. Armed with a charging order he can then apply for an order for sale. Another route is to make the debtor bankrupt; the trustee in bankruptcy then steps into the bankrupt's shoes and has a duty to realise his assets, which may include the home, in order to satisfy the creditors. If the home is co-owned, then it may be necessary to apply for sale under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (TLATA). Similarly, if the judgment debtor has mortgaged the home but the mortgage operates only as a charge on the debtor's beneficial interest the lender will have to use TLATA to seek sale, rather than the more usual mortgage remedies.

In each of these contexts, it might be thought that there would be more scope for 'home meanings' to come into play. In the case of the charging order, the debt was not initially a

⁷⁵ [2009] EWCA Civ 375 [33].

⁷⁶ Housing Act 1996, ss.124-130. Housing Action Trusts can also operate introductory tenancy regimes. The introductory tenancy regime has been unsuccessfully challenged on human rights grounds (see *R (on the application of McLellan) v Bracknell Forest BC* [2001] EWCA Civ 1510, [2001] 1 All ER 899) and on the grounds of illegality (*Manchester CC v Cochrane* [1999] 1 WLR 809 (CA)).

secured debt and it is not obvious that it should take priority over the home interest. Likewise in cases of co-ownership it is not obvious why the creditors' interests should take priority.⁷⁷ Whenever sale is sought in a co-ownership situation using TLATA the court is directed by section 15 to take account of a range of (non-exclusive) factors, including the welfare of any minor living in the home, and the circumstances and wishes of the co-owners. The court can make such order 'as it thinks fit'. Similar considerations apply when the court exercises its discretion as to whether to order sale following a charging order.⁷⁸ If one of the co-owners is bankrupt and it is the trustee in bankruptcy seeking sale, it is not section 15 that then applies but section 335A of the Insolvency Act 1986. Again the court has discretion to 'make such order as it thinks just and reasonable' and is specifically directed to take account of the needs and financial resources of the bankrupt's partner, the needs of any children, and all the circumstances (other than the needs of the bankrupt). Likewise if the property is solely owned by the bankrupt, but there are others who occupy it as home and who enjoy statutory 'home rights' under the Family Law Act 1996, the court has discretion in similar terms to section 335A.⁷⁹

In each of these differing situations it is clear that the court has discretion and is able to take account of 'home meanings'. In some reported decisions, we can clearly see the first instance judges attaching weight to 'home'. In *Edwards v Lloyds TSB Plc*, for example, the judge postponed sale until the youngest child reached majority (which would be around 5 years) because there was sufficient value in the house for the bank's security to be safe until then and immediate sale 'would be unacceptably severe in its consequences upon Mrs Edwards and her children.'⁸⁰

Shortly after TLATA came into force there were signs that it would signal a new approach to applications for sale in co-ownership cases. In *Mortgage Corporation v Shaire* Neuberger J referred to the fact that the interest of secured creditors is only one of the factors that section 15 directs the court to have regard to and 'there is no suggestion that this is to be given any more importance than the interests of the children residing in the house...'.⁸¹ Indeed, Neuberger J clearly engaged with the balancing of home and security interests:

'To my mind, for Mrs Shaire to have to leave her home of nearly a quarter of a century would be a real and significant hardship but not an enormous one. She would have a substantial sum that she could put towards a smaller home. Even if Adam continued to live with her, she would only need a two-bedroom house. On the other hand, I have no evidence as to what properties might be available for the sort of money which she would be able to pay. For TMC to be locked into a quarter of the equity in a property would be a significant disadvantage unless it had a proper return and a proper protection so far as insurance and repair is concerned.'⁸²

⁷⁷ It is not obvious why money secured by a charge binding only on the debtor's interest in the home should win over the co-owner's interest which was first in time.

⁷⁸ *Close Invoice Finance Ltd v Pile* [2008] EWHC 1580 (Ch).

⁷⁹ Sections 336 and 337 Insolvency Act 1986.

⁸⁰ [2004] EWHC 1745 [33].

⁸¹ [2001] Ch 743, 758.

⁸² [2001] Ch 743, 763-4.

Neuberger J's solution was to try to meet both parties' interests by encouraging the occupier to agree to convert TMC's equity into a loan, which would enable TMC to receive a return, and would allow Mrs Shaire to stay in her home.

Although the court has greater flexibility under TLATA than the earlier law, in practice it is still usual for sale to be the outcome. It is surprising that this is so, especially in cases where the home is occupied by a co-owner who is not the judgment debtor and whose property interest was first in time. Observing that there has been an increasing number of 'non-priority' mortgagees applying for sale, Dixon comments:

'One response ... would be to deny sale outright in all but the most exceptional circumstances. After all, if the equitable owner's interest is actively proprietary, it might be thought entirely proper that the lender should have to show exceptional hardship in order to obtain sale and thereby reverse the possessory priority enjoyed by the equitable owner.'

Whilst acknowledging the importance of protecting the domestic lending market by protecting security for lenders, he suggests that sale should be more difficult to achieve – both for mortgagees without priority ('...who should not be able to translate forcibly the equitable owner's proprietary priority into cash priority') and for trustees in bankruptcy ('sale against the wishes of an innocent equitable owner should be more difficult to achieve').⁸³

Favouring sale is also seen in the other creditor contexts. Floyd J commented on how extreme a sanction it is to convert a charging order into an order for sale, 'particularly where the property to be sold is the debtor's home', but noted that it may nonetheless be justified if it is the only way of the debt being paid.⁸⁴ This is even more so when bankruptcy is involved. If the application for sale of the property is made more than one year after the bankrupt's estate vests in the trustee, the court is required to assume that the interests of the bankrupt's creditors will 'outweigh all other circumstances' unless the circumstances are 'exceptional'. Exceptional circumstances are rare in practice.⁸⁵ In *Re Citro*, Hoffmann J had postponed sale until the youngest child reached sixteen, taking into account the fact that there was not much money coming into the house, that the children's education would be upset if the family had to move; and that it would be difficult for the family to afford 'proper accommodation' if they had to move. The Court of Appeal disagreed with this approach. Sale would be only briefly postponed.⁸⁶ The facts of this case were not exceptional; in the words of Nourse LJ,

'it is not uncommon for a wife with young children to be faced with eviction in circumstances where the realisation of her beneficial interest will not produce

⁸³ M Dixon, *Equitable Co-ownership: Proprietary Rights in Name Only?*, in E Cooke (ed), 'Modern Studies in Property Law, Vol 4', 2007, Hart Publishing, 41, 47.

⁸⁴ *Royal Oak Property Co Ltd v Iktilat* [2008] EWHC 1703 (Ch) [9].

⁸⁵ The meaning given to 'exceptional' in some cases would not suggest such a level of rarity: Paul Morgan QC referred to them as 'out of the ordinary course, or unusual, or special, or uncommon' in *Hosking v Michaelides* [2004] All ER (D) 147. Even if there are exceptional circumstances, all that happens is that the assumption that the creditors outweigh all other circumstances is removed and the judge must still decide what is just and reasonable taking into account all the circumstances, including the interests of the creditors: *Nicholls v Lan* [2006] EWHC 1255 (Ch) [10].

⁸⁶ [1991] Ch 142; there were in fact two properties and two families involved, so the facts are simplified in the text accompanying this note.

enough to buy a comparable home in the same neighbourhood, or indeed elsewhere. And, if she has to move elsewhere, there may be problems over schooling and so forth. 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.⁸⁷

In most cases where exceptional circumstances are found to justify a delay in possession, these circumstances are based on ill-health. Courts tend not to refer to the kind of home meanings that we saw at work in some of the discretionary grounds for possession of council tenancies (longevity, community ties, memories etc). It is not sufficient to prove the kind of inevitable upset and disruption that moving usually has but what must instead be shown is that a forced move would have a very severe impact, usually linked to serious illness.⁸⁸ In *Nicholls v Lan*, for example, the co-owner suffered from schizophrenia and medical evidence showed that a forced move could be devastating for her, giving rise to the ‘probability of recurrent future hospitalisation and it being very possible that she would lose her independence.’⁸⁹ Sale was postponed for a minimum of 18 months. What made the circumstances exceptional in *Brittain v Haghighat* was the fact that the home had been adapted to deal with the severe disability of the eldest child. The court deferred possession for three years as it would be most unlikely for the local authority to provide any alternative suitable accommodation within a shorter time frame.⁹⁰

In all of the creditor contexts it will take unusual circumstances for the ‘solid tug of money’⁹¹ not to prevail. The general attitude of the courts is that it will be ‘very unfair’ to keep creditors – secured or otherwise – waiting for their money ‘with no prospect of recovery...and with the debt increasing all the time.’⁹² There is little evidence of the personal home story being taken into account unless there is serious illness. Occasionally the presence of children may make a difference, but seldom do other home meanings come into play even though this is quite within the jurisdiction of the judge. Of course, we only see the reported cases. Most cases will be heard in the county court and not reported. It is not unusual for an appellate court to overturn the decision of the first instance judge by ordering immediate sale,⁹³ notwithstanding their reluctance to interfere

⁸⁷ [1991] Ch 142, 157.

⁸⁸ In *Barca v Mears* [2004] EWHC 2170 (Ch) Strauss QC questioned whether such a narrow approach to exceptional circumstances was compliant with human rights law [39]-[42].

⁸⁹ [2006] EWHC 1255 (Ch) [35] (the findings of the district judge).

⁹⁰ [2009] EWHC 90 (Ch). It was the shorter of 3 years or 3 months after the disabled eldest child ceased to live in the property. For further illustrations of exceptional cases see: *Claughton v Charalambous* [1998] BPIR 558 (ill-health, special housing needs, and sale proceeds would be absorbed by costs); *Re Bremner* [1999] BPIR 185 (old age and terminal illness led to postponement until after death of husband); *Close Invoice Finance Ltd v Pile* [2008] EWHC 1580 (Ch) (sale postponed from the 120 days sought to 18 months, taking account of the effect on cancer treatment, the disturbance to education, but also the sizeable equity in the house).

⁹¹ A phrase used in the context of trusts of the family home: *Hofman v. Hofman* [1965] N.Z.L.R. 685 at 800 *per* Woodhouse J.

⁹² *Bank of Ireland v Bell* [2001] 2 FLR 809 [31]; although it should be noted that this was said in the context of a debt that already exceeded what would be realised on sale.

⁹³ See, for example, *Edwards v Lloyds TSB Bank Plc* [2004] EWHC 1745; *Bank of Ireland v Bell* [2001] 2

with the discretion of trial judges.⁹⁴ It would be interesting to know what the outcome is in cases before district judges that do not get reported, and, if there is more of a tendency to postpone or refuse sale at first instance, to know if this is because the judge has heard the personal story and listened to the voice of the occupiers.

The Randomness of it all

Until now this chapter has taken a descriptive approach to discover the extent to which the law and other processes that are involved when an application is made for possession of a home allows for the personal home story to be taken into consideration. The answer is that little formal account is taken of the personal home story.

From the perspective of the individual, things may appear quite random. Given that the occupier is in debt in all the situations that we have looked at, it is surprising that the likelihood and speed of losing the home will depend so heavily upon other factors: the form of tenure, and the identity of the creditor.

Many of the most vulnerable members of society live in social housing and are dependent on the notoriously complex and unsatisfactory system of housing benefit. A simple (and common) maladministration of housing benefit may lead to loss of the home through the use of Ground 8 if the landlord is a registered provider – and the judge has no power to prevent this if the ground is proven – whereas it is most unlikely to if the landlord is a local authority as the judge will order possession only if it is ‘reasonable’ to do so. Of course, one hopes that most registered providers will indeed use possession as a last resort in arrears cases, but the point is that the occupier’s home is at stake and should not depend upon the decency and patience of the registered provider. Even in discretionary possession cases, the study by Hunter and others suggests that the attitude of the district judge and the physical presence of the occupier at the hearing will affect the outcome. In the case of non-social private landlords bad payers may be evicted through use of Ground 8, but most likely the landlord will simply fail to renew the tenancy. If there is a personal home story to be heard, it probably will not be. And if a buy-to-let tenant is a good tenant but it is the landlord who is in default, there is nothing to be done. The occupier has no voice, and will be lucky to receive much notice of having to move.

Similarly, the vulnerability of owner-occupiers to losing the home will depend a great deal upon the identity of the creditor. Once a mortgage case reaches court, there is nothing a judge can do if the occupier is unable to pay the arrears within a reasonable time. But the likelihood of the case reaching court and of the occupier having a chance to tell his story will turn on the attitude of the mortgagee, on its willingness to engage in meaningful conversations with the borrower and to respond flexibly to the borrower’s difficulties. It is the most vulnerable who will have borrowed from the sub-prime lenders, and yet it is these lenders who are least likely to show tolerance. Again, it is the home that is at stake and the probability of debt leading to its loss should not be so heavily dependent upon the attitude of the lender.

FLR 809; *First National Bank v Achampong* [2003] EWCA Civ 487.

⁹⁴ See *Nicholls v Lan* [2006] EWHC 1255 [26-27].

The Home as a Weak or No-Right

The (non) importance of home in rent arrears cases provides an illustration of what van der Walt describes as the rights paradigm. The argument, developed in his book *Property in the Margins*, is that in the rights paradigm the outcome of property disputes is determined by a hierarchy of rights in which ownership rights⁹⁵ are privileged over weaker or no property rights. Only rarely is there a fundamental challenge to this paradigm, that is, an 'instance where a party with a weaker right or without any property right is allowed to challenge and prevent eviction by the ... person with a stronger right...', purely because of contextual factors or personal considerations that are unrelated to the relative rights of the parties.'⁹⁶ The strongest challenge to this rights paradigm that we have seen in this chapter is in the context of the discretionary ground for possession in local authority tenancy cases, and the intriguing question that might flow from this is whether there is something about the nature of ownership by public bodies, or the perceived welfare responsibilities of public bodies, that means that the rights paradigm does not apply with equal force to their property rights.

In the context of competing claims to property (the co-ownership cases), however, it is not always the one with the stronger property right that will win when it comes to disputes between an owner with a priority property right and a creditor with a secured property right. In this battle, it will almost invariably be the creditor that triumphs, even over strong property rights coupled with home rights.

A New Approach?

The due process protections that apply to the possession of dwellings acknowledge that people should not be lightly deprived of their homes. In the majority of situations, however, home meanings have no part to play when it comes to deciding whether an order for possession (or sale) should be granted. Even in situations in which judges have been given discretion to take account of any relevant circumstances, there is little evidence that they consider the impact that losing the home will have. This is particularly evident in the way that human rights jurisprudence is developing: where the property owner has an undisputed right in law to recover possession it is most unlikely that the 'right to respect for the home' will trump the owner's property right. It is surprising that the legal system attaches so little weight to the personal home story. There is a considerable body of empirical evidence focussing on the psychological and health impacts of losing one's home, but there are also clear financial, administrative and resource costs not only for the dispossessed individual but also for wider society.⁹⁷

In what follows a number of observations are made about the processes of dispossession.

⁹⁵ In civilian systems, and strong possessory rights in common law systems.

⁹⁶ A J van der Walt, *Property in the Margins*, Hart Publishing, 2009, p 32.

⁹⁷ L Fox, 'Conceptualising Home', 2007, Hart Publishing, pp109-122, and references therein.

First, in relation to owner-occupier mortgages, the government has been encouraging mortgagees to exercise restraint prior to recovering possession in cases of default. The problem is that the approach has been largely to rely on mortgagees exercising self-restraint. This simply has not worked; various studies show that sub-prime lenders are much more likely to rush to possession. If the home is important, it is not good enough to leave this to self-regulation. All home owners deserve the same kind of protection, and the regulatory measures, such as the MPAP, must be given teeth.

Secondly, BTL occupiers need some protection. Even with the (proposed) changes to the procedural rules that should ensure that tenants are given two months' notice of eviction, not enough account is taken of the occupier's position. If the rent is sufficient to cover mortgage repayments, and there is adequate security for the debt, the tenant should have a right to remain until expiry of the tenancy, paying rent direct to the mortgagee. Even if there is inadequate security the tenant should still be able present his or her story to the court, and the court should have discretion to delay possession if this would be reasonable.

Thirdly, it is suggested that there should always be opportunity for an occupier to air her personal stories – whether financial, home, or other – before an independent tribunal, before losing the home. This would be quite a radical change in the law. The suggestion is made tentatively because it is clear that in the vast majority of cases it is right and necessary for property owners to be able to recover their property, and there is 'economic importance ...[in] ensuring that there is an efficient machinery for the enforcement of debt obligations'.⁹⁸ Further, if the occupier's financial position is such that postponing possession is simply delaying the inevitable, then it will often be better for him to move sooner rather than later as a delay may lead to rising costs and interest payments. Balancing personal stories against the interests of property owners and creditors is difficult. As Hoffmann J noted in *Re Citro*, in the context of an application for sale brought by a trustee in bankruptcy,

'The two interests are not in any sense commensurable. On the one hand, one has the financial interests On the other, one has personal and human interests of these two families. It 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.'⁹⁹

Nonetheless, the occupier should be able to ask for such a balancing exercise to take place in exceptional cases. Procedures should ensure that the occupier has the opportunity to alert the court to the fact that there are special circumstances or that the consequences of losing the home would be unusually severe. In these exceptional situations the case will need to be listed for more than a simple five minute hearing. There would be an inconvenient impact on the court timetable; in *Whitehouse v Lee* a considerable amount of evidence was adduced to support the measure of the occupier's loss, and this necessitated a 3 day trial.¹⁰⁰ If the occupier is represented before the court, the lawyer or other adviser should present evidence in support of the fact that the special circumstances would mean that dispossession, now, would cause significant hardship.

⁹⁸ *Close Invoice Finance Ltd v Pile* [2008] EWHC 1580 (Ch) [12].

⁹⁹ [1991] Ch 142 (CA) 150. Hoffmann J was the first instance judge, being referred to in the Court of Appeal.

¹⁰⁰ [2009] EWCA Civ 375 [37].

It may be that certain factors could trigger the need for a special case to be made for possession, or at least for immediate possession. These could include longevity of occupation, the fact that the house has been adapted for special needs, serious illness of a household member, or severe disruption to education.¹⁰¹ If the court finds that the case is made out and immediate possession would cause significant harm, the court should be able to either refuse to grant possession if the interests of the creditor can be sufficiently protected without the grant of possession, or defer possession for more than the six weeks currently allowed by section 89 of the Housing Act 1980. There are examples of both responses in the context of TLATA case law.¹⁰²

Lastly, there is a much broader issue underlying this discussion. The credit crunch has caused much re-examination of values in contemporary society. In land law there is a hierarchy of protected interests: the landlord's ownership rights over the defaulting tenant's weak right, the secured creditor's rights over other property rights. As Fox's work has pointed out, the law has never really developed a coherent concept of 'home'. Undoubtedly, however, the home is of value for many reasons beyond it being a roof over the head. It is important for rootedness, and for the individual's ability to develop in relationship with others. It is necessary for human flourishing at both an individual and community level. To take a home away is to do far more than terminate a right to possession of property. As this chapter shows, there is little room in law for an occupier to argue that his or her home should count for its value as home when pitted against the might of a landlord's right to recover possession because of rent arrears or against the might of a creditor's claim to realise its security in order for the debt to be paid. There is a further problem. Even if it is accepted that it should count, there is the difficulty that Hoffmann J referred to in *Re Citro* of knowing how to weigh incommensurable interests.¹⁰³ Economic interests are readily quantifiable and the tools for measurement are well established.¹⁰⁴ The same can not be said of social measures. Social measures involve contested value judgments and are not as readily given to quantitative assessment.

¹⁰¹ South African law provides an interesting model, although the political and economic context is very different. Under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 the court can only grant an order for eviction if it just and reasonable taking into account all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women. If an unlawful occupier has been in occupation for more than 6 months the court must also consider whether land has been made available for relocation. This has (controversially) been held to apply to those who were initially lawfully in occupation as well as those who began with unlawful occupation: *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA). Further, in determining the date for eviction the court must have regard to all relevant factors, including the length of occupation. See also the Law Commission's suggestion of a structured discretion applicable in discretionary possession cases: Law Commission, 'Renting Homes' (Law Com No 284, 2003) 9.82-9.89. On the one hand, the court would have to consider the likely effect of an order on the home, family and private lives of occupiers, taking account of how long it is likely to take them to find somewhere else and how they will be affected by not having a home. On the other, it would consider the effect of not making the order on the landlord's interests, including financial interests.

¹⁰² *Mortgage Corporation v Shaire* [2001] Ch 743; *Brittain v Haghighat* [2009] EWHC 90 (Ch).

¹⁰³ [1991] Ch 142 (CA) 150.

¹⁰⁴ The remainder of this paragraph draws heavily on the work of the Relationships Foundation, particularly the booklet, *The Triple Test, Integrating economic, environmental and social policy*, January 2009. For further information, see: <http://www.relationshipsfoundation.org/>.

Economic and social measures cannot be weighed against one another in a simple exercise, but each must be taken into account as part of an overall assessment as to what is the appropriate course of action. For this reason it is necessary to develop better tools to evaluate social measures. In the context of home this should include a 'relational analysis'. This approach is being developed by the Relationships Foundation as a means of testing the impact that policy measures have on 'existing relational links, but also to see if ways can be found to encourage people increasingly to connect with each other in the public sphere.' Towards this goal, it has developed a framework – the Relational Proximity Model – that explores issues of connectedness, continuity, breadth, power and purpose in relationships. The relational impact of loss of home is one measure that needs to be weighed, alongside the impact on the physical and mental health and well being of the occupiers. These personal stories should matter in law.