

Evaluating Legal Models of Affordable Home Ownership in England

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Introduction

In England the majority of households live in homes that they own.² Home ownership is not only the majority tenure but is also the tenure of choice,³ part of the dream of modern life,⁴ and to aspire to home ownership is seen as “normal”.⁵ Rising house prices have, however, meant that traditional homeownership has become unaffordable for a significant proportion of the population.⁶ This has not tempered the UK government’s desire to extend home ownership rates yet further. Even when the rate of owner occupation was in the region of 70%, the Labour government declared its commitment to extending this to 75%.⁷ This has meant that new and different ways of enabling homes to be purchased have been developed, and the promotion of low cost home ownership (LCHO) has become a central plank of English housing policy in order to expand the opportunity to own.

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² 67.9% in England in 2008-9. This represents a fall from the previously attained peak of 70.9%. DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, *English Housing Survey: Household Report 2008-09* 10, tbl.1.1 (2010), <http://www.communities.gov.uk/documents/statistics/pdf/1750765.pdf>.

³ Communities and Local Government, *Public Attitudes to Housing in England: Report based on the results from the British Social Attitudes Survey* (2011), p 5 reports that 86% would choose to buy if they had a free choice. The preference for home ownership has remained consistently high despite fluctuations and variations within age groups. A review of attitudes between 1975-2007 is provided by Alison Wallace, *Public Attitudes to Housing* (2010) Joseph Rowntree Foundation.

⁴ The connection between homeownership and the “American Dream” is considered by Lorna Fox-O’Mahony, “Homeownership, Debt, and Default: The Affective Value of Home and the Challenge of Affordability”, in “AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS” 169, 170-175 (Nestor M. Davidson & Robin Paul Malloy eds., 2009).

⁵ Craig M. Gurney, *Pride and Prejudice: Discourses of Normalisation in Public and Private Accounts of Home Ownership*, HOUSING STUD. Mar. 1999, at 163, 179.

⁶ See *Shared Ownership: Facts & Figures*, PROMOTING SHARED OWNERSHIP, http://www.shared-owner.co.uk/media/static/SO-the_facts.pdf (last visited Feb. 8, 2011)(Promoting Shared Ownership is a group of 21 housing associations. Chapter 2 of this work is especially relevant).

⁷ HM TREASURY & OFFICE OF THE DEPUTY PRIME MINISTER, THE GOVERNMENT’S RESPONSE TO KATE BARKER’S REVIEW OF HOUSING SUPPLY (2005).

In this chapter we analyse the legal routes used to deliver LCHO in England where there is some element of public subsidy involved. Subsidy is provided in one of two ways. Some schemes use what we call “subsidy forgiveness”, in which a grant or discount is given to the individual purchaser and which is either initially non-recoverable or is written off over time.⁸ Other schemes seek to ensure that the subsidy component remains available for public use in the longer term.⁹ In these subsidy “retention” or “recapture” schemes the subsidy is either never released to the individual purchaser or becomes repayable on future sale. The aim of this chapter is to evaluate how effective these legal models are at delivering the stated policy objectives of LCHO rather than to question the policies themselves.

The major route to LCHO in England in the last three decades has been through the Right to Buy (RTB) given to council tenants.¹⁰ RTB has been incredibly popular, in part because it was built on a generous subsidy forgiveness model; but RTB sales are now withering, and the high costs of RTB – both in economic terms and in relation to the impact it has had on the affordable housing stock – have been recognised.¹¹ In recent years, alternative models have been promoted under the umbrella of LCHO, ranging from grants towards house purchase, through part-ownership schemes, to co-operative housing models. Whereas RTB was driven by the single minded mission of giving people what they want – full ownership – the newer models are more sophisticated and take account of a wider range of objectives. They are sold to purchasers through a range of “products” designed for particular categories of purchaser and/or types of property.

In order to evaluate these products, this chapter:

⁸ Subsidy forgiveness is characteristic of the Right to Buy (RTB) discussed further in this chapter.

⁹ Eg, shared ownership and shared equity schemes discussed further in this chapter.

¹⁰ Councils are directly elected local government authorities. In contrast with federal systems of government, they derive their formal legal powers and duties from Parliament. For an account of local government in the UK see, eg Sir William Wade and Christopher Forsyth, *Administrative Law* (10th ed, 2009) chap 4. Local authorities, together with similar public institutions, dominated public sector housing until the 1980s. It is estimated that around 2.5 million dwellings have been sold to Council tenants through the Right to Buy: STEVE WILCOX, UK HOUSING REVIEW 2009/2010 tbl.20d (2010), available at <http://www.york.ac.uk/res/ukhr/ukhr0910/tables&figures/pdf/09-020a-d.pdf> and see *infra* note 27. Shared ownership, the next largest low cost home ownership scheme, accounts for around 120,000 properties: *Homes & Communities Agency, Council of Mortgage Lenders and National Housing Federation, Shared Ownership: Joint Guidance for England* (2010) para [4] (hereinafter Shared Ownership: Joint Guidance for England).

¹¹ See, e.g., HOUSING CORPORATION (UK), A HOME OF MY OWN: THE REPORT OF THE GOVERNMENT’S LOW COST HOME OWNERSHIP TASK FORCE 59-82 (2003) [hereinafter A HOME OF MY OWN].

- a) Explains the legal frameworks used to deliver the main LCHO products available in England;
- b) Explores the potential benefits of home ownership to the individual in the form of wealth creation, “mainstreaming” and security of place;
- c) Sets out key additional policy objectives of LCHO, in particular introducing and supporting tenure mix (sustainable communities) and sustaining the opportunity for continued use of the subsidy to provide access to LCHO for intermediate income households; and
- d) Evaluates the extent to which the different products available deliver both the individual benefits of home ownership and support the wider policy objectives.

Through this evaluation, our chapter feeds into two key debates that reflect the theme of this collection. The first of these debates is the identity of the individual as a home owner. In other work, we have used the English model of shared ownership as a lens through which to explore the problematic nature of the label “home ownership”.¹² In the context of a deeply ingrained dichotomy between an owner and a renter, the label of “ownership” generates “a range of expectations and understandings in the mind of the consumer”¹³ opposed to those associated with being a “mere” renter.¹⁴ In this chapter we consider the ability of a suite of products to deliver the benefits of home ownership to the individual. The second debate concerns the wider objectives now attributed to schemes aimed at expanding home ownership; in particular the desire to create sustainable mixed communities. Hence, in this way, we are concerned both with the identity of the individual as a home owner and with the role of home ownership in the community. At its heart, our chapter is a study of how the twin policy objectives of delivering the benefits of home ownership to the individual whilst creating sustainable mixed communities are translated by and through different legal models.

A: The Legal Frameworks

As already mentioned, a variety of products are potentially available as routes into affordable home ownership. In this chapter we have chosen to group them together into three main headings: schemes delivering full ownership, part ownership schemes, and co-

¹² Susan Bright and Nicholas Hopkins “Home, Meaning and Identity: Learning from the English Model of Shared Ownership” (2010) *Housing, Theory and Society* DOI:10.1080/14036096.2010.527119.

¹³ *Id* at 17.

¹⁴ *Id* at 14-17.

operative housing models. Although there are some differences between the individual products available within these headings, the groupings that we have chosen enable us to draw out what we think are some of the key issues that emerge when seeking to evaluate routes to LCHO.

The table below provides a summary of the key aspects of each scheme, with a fuller explanation being given in the text following.

<i>Full Ownership</i>	
Scheme	Legal Framework
RTB/RTA ¹⁵	Purchaser acquires freehold of current rented property at discounted price
Cash incentive scheme	Purchaser acquires freehold of property on the open market with help of a grant
<i>Part Ownership</i>	
Shared ownership	Purchaser buys a “share” of the house value; minimum share usually 25% Purchaser acquires long lease (usually 99 years) Housing provider retains freehold Purchaser pays rent on “non-purchased” share Purchaser can (usually) “staircase” up to full ownership
Shared equity	Purchaser buys a “share” of the house value; minimum share usually 70-80% Purchaser acquires freehold “Non-purchased” share is subject to subsidised mortgage Purchaser can “staircase” up to full ownership
<i>Co-operative Housing</i>	
Mutual home ownership	Purchaser given medium term lease (20 years) Occupation payment linked to income Equity purchase through share in fund

i) Schemes delivering full ownership.

Under schemes that deliver full ownership the purchaser acquires a freehold of the house.¹⁶ There are two main LCHO programs that can lead to this. The first, a Cash Incentive Scheme, involves a subsidy in the form of a cash grant, which is given to the purchaser who is then

¹⁵ The Right to Acquire (RTA) is a scheme similar to the RTB but applicable to certain tenants of housing associations. See *infra* text following note 38 40.

¹⁶ We assume, throughout, that the property purchased is a house. For complex legal reasons to do with the enforceability of covenants, flats and apartments can only be sold on leases and not as freeholds. So that we can focus on evaluation of the various LCHO models, we have chosen to avoid the additional layer of complication that may arise if the property bought is a flat or apartment and thus must be leasehold. For further discussion of the legal complexities of flat ownership in English law see Ben McFarlane, Nicholas Hopkins and Sarah Nield, *LAND LAW: TEXT, CASES AND MATERIALS* ch 28 (2009).

free to purchase a property in the open market.¹⁷ There may be a condition that if the property is sold within a certain period of time a proportion of the grant has to be repaid, and the grant may be hedged around with various other conditions, for example relating to the size of the property that can be purchased.¹⁸ The individual has no legal right to such a grant and its availability will be at the discretion of local councils or other social landlords.¹⁹ In practice, the use of grants tends to be restricted to areas in which there is great housing demand as they can be used as a means of encouraging existing social renters to move out of their present housing, thereby releasing the home for another family in housing need.²⁰

The second main route is the RTB. In outline, this gives existing council tenants the right to purchase their current home at a discounted price.²¹ This was first introduced as a legal right in 1980, following the election of the Conservative Party to power in the 1979 general election.²² Prior to that point in time it had been possible for individual local authorities to facilitate and allow discretionary sales, but the willingness of local authorities to do so was a political football, as is shown by the variation in the number of sales according to whether the Conservative Party or the Labour Party was in power: during three Conservative years (1971-1973) there were 97,426 sales of dwellings by public authorities in England and Wales, compared to 13,470 sales in the three successive years of a Labour government.²³ When the RTB was introduced (giving a legally enforceable RTB) the number of annual sales

¹⁷ The statutory basis for the scheme is contained in the Housing Act, 1988, c. 50, § 129 (Eng.).

¹⁸ Under the Housing Act, 1988, c. 50, § 129 (Eng.) local housing authorities have wide discretion as to whether to operate a Cash Incentive Scheme and, if they choose to do so, the scheme “shall contain such provisions as the local housing authority considers appropriate”. Schemes are therefore able to reflect local housing needs and priorities. The exact terms of schemes differ and may change year on year. The comments in this section reflect schemes that have been or are being offered, but given both the local and temporal operation of individual schemes references to particular schemes are not provided.

¹⁹ The ability to offer Cash Incentive Schemes is currently restricted to local housing authorities but is expected to be extended to other social landlords by the Localism Bill, 2010-11, H.C. Bill [126] cl.149 (Eng.).

²⁰ This statement reflects the wider strategic outcome the scheme can be used to achieve identified in A HOME OF MY OWN *supra* note 11 p 95 para [44] and the ability of local housing authorities to devise terms for individual schemes that reflect local housing needs and priorities.

²¹ The RTB is the topic of extensive discussion in housing literature in the UK. For textbook accounts see, eg Susan Bright, *Landlord and Tenant Law in Context* (2007), 743-759 and Jill Morgan, *Aspects of Housing Law* (2007), 396-412. For further analysis see COLIN JONES & ALAN MURIE, *THE RIGHT TO BUY: ANALYSIS AND EVALUATION OF A HOUSING POLICY* and PETER KING, *HOUSING POLICY TRANSFORMED: THE RIGHT TO BUY AND THE DESIRE TO OWN* (2010).

²² Housing Act, 1980, c. 51, (Eng.).

²³ *id* at 23 tbl.2.3 (2006)(table is titled *Sales of dwellings by public authorities (England and Wales) 1960-80*).

to sitting council tenants soared, reaching a peak of 170,600 RTB home sales in England in 1982-83.²⁴ The operation of the RTB was relatively simple. There was a statutory scheme setting out the various qualification requirements and the level of discount available (which was based on the length of prior occupation of the council home), as well as setting out the process to be followed in order to exercise the right. As the purchaser of a house would get the freehold, the end result was that the purchaser would look like any other home owner and the lender financing the purchase would be able to take a legal charge over the property in the traditional manner. Admittedly, the purchaser would have no choice as to which property could be purchased as the right only applied to their current home, and this also meant that they would remain in an area of predominantly social rented housing, but the RTB proved to be extremely popular. According to the then Conservative Secretary of State for the Environment, the leitmotif underlying the scheme was that it would deliver “what people wanted” by fulfilling a “deeply ingrained desire for home ownership”.²⁵ Even the Labour Party had, a few years earlier, remarked that home ownership meets a “basic and natural desire”.²⁶ RTB delivered what people wanted with great success, at least if the number of people choosing to exercise their rights is anything to go by: more than 2.5 million RTB sales occurred in Great Britain in the period 1980 to 2008.²⁷ This success is not surprising as it not only tapped into people's dreams and aspirations but it did so in a way that gave a significant financial incentive, and enabled them to become owners without having to move. Although the level of discount available varied over time, it was generous from the start – the initial maximum discount for houses was 50%, and at one point was as much as 70% on sales of flats.²⁸ Once the RTB had been exercised, the new owner was free

²⁴ See 272 PARL. DEB., H.C. (6th ser.) (1996) 3-4W (U.K.).

²⁵ 976 PARL. DEB., H.C. (6th ser.) (1980) 1445 (U.K.) (Michael Heseltine, Conservative Secretary of State for the Environment).

²⁶ DEPARTMENT OF THE ENVIRONMENT, HOUSING POLICY: A CONSULTATIVE DOCUMENT, 1977, Cm. 6851, at 50, ¶ 7.03.

²⁷ WILCOX supra note 10. The number of sales may in fact be higher. Jones and Murie note that between 1979-2003 over 2.7 million dwellings were sold by councils into home ownership: supra note 21 at 54 tbl 4.2 (2006) (table is titled *Public sector dwelling sales into home ownership 1979-2003*). The authors explain that while this number is not confined to RTB sales the larger figure is a more appropriate reference as not all sales taking place under the RTB are officially recorded as such.

²⁸ The initial discount for houses was 33% following three years of qualifying residence, with a further 1% for each complete year of tenancy, to a maximum of 50%: Housing Act, 1980, c. 51 ss 1(3) and 7(1) (Eng.) (now repealed). The more generous discounts for flats were provided in the Housing and Planning Act, 1986, c. 63 s 2(2)(b) (Eng.) which gave an initial discount of 44% rising at 2% per annum to a maximum of 70%. Over time the initial period of residence required has been varied and the discounts available have become less generous: Bright supra note 21 at 748 and 753-754.

to sell the house on the open market.²⁹ If the resale occurred within a specified period of time (initially three years), then some of the discount had to be repaid (the amount repayable depending on timing of the resale), but after the expiration of this repayment period the purchaser was free to keep the whole of the sale price received.³⁰

As is argued for in the somewhat controversial book by Peter King, *Housing policy transformed*, the RTB was a resounding success when measured against the single-minded policy goal of allowing tenants to become owner occupiers whilst breaking the influence that councils had over housing.³¹ RTB has always, however, been subject to much criticism by housing policy commentators.³² It contributed to the “residualisation” of council housing as the better off tenants living in the nicer properties tended to be the ones who exercised the RTB, leaving the less attractive properties under council control rented to those on lower incomes.³³ Over time it was also alleged that the RTB could be used for profiteering.³⁴ These concerns led to further restrictions being imposed on the RTB. Thus the period within which resale can trigger repayment of the discount was extended to five years in 2004³⁵ and the level of discount has been restricted to a maximum discount of £16,000 in areas of housing pressure.³⁶ In addition, to address concerns over the impact on the availability of stock, a right of pre-emption is now built into RTB sales so that if the purchaser sells the house within 10 years it must be offered back to the local authority for purchase at market values.³⁷ RTB sales are no longer occurring on the scale that they did in the first couple of

²⁹ But this changed in 2005: Housing Act, 1985, c. 68, § 156A (Eng.) (introduced by the Housing Act, 2004, c. 34 (Eng.)) provides that if there is a disposal within 10 years the property must first be offered back to a social landlord at full market value.

³⁰ Bright supra note 21 at 754-755.

³¹ King supra note 21 at 66.

³² For an overview of its impact, see BRIGHT supra note 21 at 160-164 (2007). For more detailed analysis, see generally JONES & MURIE supra 21 (especially chapter 12).

³³ See, eg Colin Jones and Alan Murie id, 210-211.

³⁴ See Nicholas Hopkins & Emma Laurie, *Housing or Property? The Dynamics of Housing Policy and Property Principles in the Right to Buy*, 26 LEGAL STUD. 65 (2006).

³⁵ .Bright supra note 21 at 754-755.

³⁶ Housing (Right to Buy) (Limits on Discount) (Amendment) Order 2003/498.

³⁷ Supra note 29.

decades.³⁸ Of course this is also not surprising; the number of nice council homes available for RTB has been significantly reduced, partly by the fact that so many homes have already been sold but also because much rented stock has been transferred from local authorities to housing associations.³⁹ There is a similar scheme available to certain tenants of housing associations, which is known as the right to acquire (RTA) but this right has always been more limited in both scope and availability.⁴⁰ Additionally, the limits to the RTB that have been introduced in recent years make it less obviously attractive to council tenants, and even more recently the economic downturn and constraints on mortgage lending have also played their part in reducing RTB sales.⁴¹

ii) Part Ownership

RTB was limited in scope as it applied only to council tenants. Likewise, cash grants are usually only made to enable existing council tenants to move on and free up council housing

³⁸ In 2009-10 there were only 3,100 RTB sales in England: DEPARTMENT OF COMMUNITIES AND LOCAL GOVERNMENT, SOCIAL HOUSING SALES TO SITTING TENANTS, ENGLAND, 2009-10 (2010), <http://www.communities.gov.uk/publications/corporate/statistics/socialhousingsales200910> .

³⁹ Housing associations are “independent, non-profit-distributing organisations governed by voluntary boards to provide mainly rented housing at below market rents”: David Mullins and Alan Murie, *Housing Policy in the UK* (2006) at 178. Since the 1980s local authority (council) housing has declined while the role of housing associations in providing social housing has increased. The sale of council homes to tenants through the Right to Buy and the transfer of other council housing stock to housing associations through “large scale voluntary transfers” have both been significant causes of this shift: Bright supra note 21 at 7-8. It has been predicted, in respect of England, that housing associations “will soon be the second largest form of housing tenure next to owner occupation”: Morag McDermont, *Governing Independence and Expertise: The Business of Housing Associations* (2010) at 1.

⁴⁰ The Right to Acquire (RTA) was introduced by the Housing Act, 1996, c. c. 52 (Eng.). It applies only to properties built or acquired on or after 1 April 1997 and the discounts available range from £9,000 to £16,000 depending on the location of the property: Bright supra note 21 at 758. In the period from its introduction to 2009-2010 just 2,670 homes had been sold through the RTA: DEPARTMENT OF COMMUNITIES AND LOCAL GOVERNMENT, SOCIAL HOUSING SALES TO SITTING TENANTS, ENGLAND, 2009-10 (2010), at 9, <http://www.communities.gov.uk/publications/corporate/statistics/socialhousingsales200910>

⁴¹ Official statistics show that in England, while sales had been declining over a 4 year period, they fell sharply by 76% between 2007-2008 and 2008-2009 (with a further fall of 20% recorded for 2009-2010): DEPARTMENT OF COMMUNITIES AND LOCAL GOVERNMENT, SOCIAL HOUSING SALES TO SITTING TENANTS, ENGLAND, 2009-10 (2010), Table 2. Table is titled, Total Right to Buy sales in England, <http://www.communities.gov.uk/publications/corporate/statistics/socialhousingsales200910>. The decline between 2007-2008 and 2008-2009 has been linked to the fall in the housing market caused by the recession: King supra note 21 at 63.

stock.⁴² To reach other groups unable to access traditional home ownership, different schemes have been developed that enable the purchase of part, as against the whole, of the equity in the house. This is sometimes referred to as “intermediate tenure” but we prefer to use the label “part ownership” for three reasons. First, the phrase “intermediate tenure” is not used consistently and the different uses of the term may mislead. In particular, intermediate tenure is sometimes used to disclose a policy goal under which part ownership is generally seen as a stepping stone into full ownership, rather than intended to be a permanent form of tenure.⁴³ This policy goal is of particular importance in delivering the benefits of home ownership to the individual as studies have shown that it is schemes that enable purchasers to progress to full ownership that most satisfactorily fulfil individuals’ aspirations for home ownership.⁴⁴ In a limited range of circumstances, however, shared ownership cannot be a stepping stone to full ownership and there is a cap on the amount of equity that the purchaser can acquire. This is the case, for example, in respect of “designated protected areas”. These are geographical areas prescribed by statute in which there is considered to be an overriding need to protect the supply of affordable housing

⁴² The Cash Incentive Scheme is intended to operate alongside the RTB but not in conjunction with it. Hence local housing authorities typically specify in the terms of their individual schemes that a cash grant cannot be used to buy an existing rented home under the RTB. To enable a tenant to do so would be to confer a double benefit from the public purse as the tenant would obtain a discount on the purchase price of their existing rented home through the RTB.

⁴³ In addition to highlighting the transitional status of a tenure, “intermediate tenure” has sometimes been used to capture the fact that the tenure is neither rental nor open market ownership (which is how it is used in *A HOME OF MY OWN*, *supra* note 11) and sometimes it is used to indicate that the housing is priced somewhere between subsidised social rents and open market prices (this latter appears to be the meaning understood by the Department of Communities and Local Government. See DEPARTMENT OF COMMUNITIES AND LOCAL GOVERNMENT, *Definitions of general housing terms*, <http://www.communities.gov.uk/housing/housingresearch/housingstatistics/definitiongeneral/> (last visited Feb. 12, 2011)). For further discussion of the definition of intermediate housing, see Sarah Monk & Christine Whitehead, *Introduction*, in *MAKING HOUSING MORE AFFORDABLE: THE ROLE OF INTERMEDIATE TENURES* 1, 8-11 (Sarah Monk & Christine Whitehead eds., 2010).

⁴⁴ Simon Pinnegar, Vivienne Milligan, Dana Quintal, Bill Randolph, Peter Williams & Judith Yates, *Innovative Financing for Home Ownership: The Potential for Shared Equity Initiatives in Australia* 34, Australian Housing and Urban Research Institute Position Paper No. 137 (2008), available at <http://www.ahuri.edu.au/publications/projects/p70394>. See also PATRICK ALLEN, *SHARED OWNERSHIP: A STEPPING STONE TO HOME OWNERSHIP. SURVEY OF LOCAL AUTHORITY SHARED OWNERSHIP SCHEMES* 18 (1982). A survey of purchasers of early shared ownership schemes found “[t]he nearer respondents are to full ownership the happier they appear to be with the scheme”. *Id.*

(both rented and owned).⁴⁵ Shared ownership may also be used in this limited way in warden-assisted homes for elderly residents. Secondly, even where the intention is to provide a stepping stone to full ownership the practical reality for many purchasers is that this bigger step into full ownership is never taken and part ownership becomes, for the individual, a permanent tenure.⁴⁶ Thirdly, while purchasers of current part ownership schemes have the *right* to move further towards full ownership when they are able to afford to do so (outside the exceptional schemes referred to above) and indeed there may also be an expectation that they will exercise this right,⁴⁷ the traffic is not entirely one way. Provision can also be made for purchasers to reduce their share of the equity, and even to revert wholly to renting.⁴⁸ Although providers are not obliged to enable so-called “downward staircasing” or “flexible tenure” its availability has been described as a “strong moral imperative” in the context of the increased risk of repossession during the global economic crisis.⁴⁹ Notably, it is being promoted not only for the benefit of the individual⁵⁰ but also as a means of retaining property within the affordable home ownership sector.⁵¹ Part ownership is also supported as part of the government’s “Mortgage Rescue Scheme” for “priority” home owners⁵² in England at risk of homelessness through repossession, to enable them to convert from full ownership to a part ownership arrangement with a social housing provider. The number of home owners who have converted to part ownership is

⁴⁵ Leasehold Reform Act, 1967, c. 88 schedule 4A, paragraph 4A (Eng.) (inserted by the Housing and Regeneration Act, 2008 c. 17) and the Housing (Right to Enfranchise) (Designated Protected Areas) (England) Order 2009/2098. See further, SHARED OWNERSHIP: JOINT GUIDANCE FOR ENGLAND, paras [7]-[10] and [51]-[58].

⁴⁶ See *infra* note 65.

⁴⁷ See *infra* text accompanying note 86 88.

⁴⁸ DEPARTMENT OF COMMUNITIES & LOCAL GOVERNMENT, ASSISTING SHARED OWNERS AT RISK OF REPOSSESSION: FLEXIBLE TENURE - QUESTIONS AND ANSWERS 4 (2010), available at <http://www.communities.gov.uk/publications/housing/flexibletenurequestions> (hereinafter ASSISTING SHARED OWNERS).

⁴⁹ ASSISTING SHARED OWNERS, ID, AT 4.

⁵⁰ The individual benefit is twofold: first, retaining the benefit of owner-occupation; and secondly avoiding the negative effects connected with repossession.

⁵¹ ASSISTING SHARED OWNERS, *supra* note 49, at 4.

⁵² Those with dependent children, pregnant women, and others considered vulnerable through old age, mental or physical disability or other special reason. The Mortgage Rescue Scheme is open both to those who bought their homes on the open market with mortgage finance in the usual way and those who have become full owners through a transitional tenure. For details, see DIRECTGOV, <http://www.direct.gov.uk> (last visited Feb 14, 2011).

tiny,⁵³ but the scheme reflects the need for provision of affordable home ownership other than at the point of entry into the housing market, in contrast to the focus of schemes that provide a first “foot on the property ladder”. It also provides an alternative to a return to renting for those for whom full home ownership has ceased to be affordable.

Although the number of part-owned units is relatively small (around 135,000 homes as at March 2009),⁵⁴ the expansion of this form of ownership remains a part of government policy.⁵⁵ Part ownership schemes are currently marketed collectively under the label of

⁵³ Monitoring statistics covering the period from the inception of the Mortgage Rescue Scheme in January 2009 to the first quarter 2011 show only 41 households converted to part ownership (in the form of shared equity, see later text). In the same period, over 2,500 households converted from homeowners to renters (on an assured shorthold tenancy) through “Government Purchase to Rent” also available under the Mortgage Rescue Scheme. DEPARTMENT OF COMMUNITIES & LOCAL GOVERNMENT, MORTGAGE RESCUE MONITORING STATISTICS – MARCHQUARTER 2011, *available at* <http://www.communities.gov.uk/publications/corporate/statistics/mortgagerescuestatisticsq12011>.

⁵⁴ HOMES & COMMUNITIES AGENCY, DATA COMPENDIUM: A COLLATION OF PUBLISHED DATA ABOUT THE INTERMEDIATE MARKET 26 ¶ 75 (2010), <http://www.homesandcommunities.co.uk/public/documents/Data-Compendium-autumn2010.pdf>. The text accompanying these figures refers to homes owned by housing associations ‘on a leasehold basis where the purchaser had not acquired 100% equity (ie on shared ownership terms)’, but the footnote referenced at this point suggests that this includes not only shared ownership but also shared equity properties where the purchaser has not acquired 100% of the equity. Both terms are discussed below in the text. The definitional confusion within official documents illustrates just how little understood these products are.

⁵⁵ DEPARTMENT OF COMMUNITIES & LOCAL GOVERNMENT, THE COALITION: OUR PROGRAMME FOR GOVERNMENT 12 (2010), <http://www.communities.gov.uk/documents/corporate/pdf/1657233.pdf> (hereinafter THE COALITION: OUR PROGRAMME FOR GOVERNMENT). The Coalition government’s programme for affordable homes for the period 2011-2015 gives priority to “affordable rent” schemes (rented at 80% of market value) but states that consideration will be given to the inclusion of “affordable home ownership proposals, where it is a local priority and offers value for money.” DEPARTMENT OF COMMUNITIES AND LOCAL GOVERNMENT & HOMES & COMMUNITIES AGENCY, 2011-15 AFFORDABLE HOMES PROGRAMME – FRAMEWORK 20 ¶ 4.1 (2011), <http://www.homesandcommunities.co.uk/public/documents/Affordable-Homes-Framework.pdf> (hereinafter *Affordable Homes Programme – Framework*). In respect of the two major schemes discussed in the text that accompanies this note, shared ownership will form the main element of affordable ownership offerings “to ensure that households on a range of incomes can be assisted,” (id, ¶ 4.9) but equity loans (shared equity) will be considered if they are “the most appropriate home ownership option for the local area and agreed with the local authority” (id). It has since been announced that of the first 80,000 affordable homes to be provided within the new programme, 79% will be rented and 21% will fall within low cost home ownership: <http://www.homesandcommunities.co.uk/affordable-homes>.

HomeBuy, but this marketing tool hides the fact that there are two very different legal models being used here. Indeed, language is used very deceptively in relation to these products, and is little understood.⁵⁶ The two major schemes are commonly distinguished according to whether they offer “shared ownership” or “shared equity”.⁵⁷ Broadly, take-up of these schemes depends upon the income level of the purchaser. Those on lower incomes tend to be limited to shared ownership schemes as the part purchased can be as little as 25% of the full value of the property, whereas shared equity schemes usually require a minimum purchase of 70-80% of the full value.⁵⁸ As will now be seen, the legal details of how the schemes work is quite different.

Although referred to as shared ownership, there is in fact no ownership that is shared at law under this scheme. The purchaser is granted a long lease of the house (usually 99 years) in return for the capital sum paid, whilst the housing provider retains the freehold to the property.⁵⁹ Where the homes are provided with grants from state funds, as will usually be

⁵⁶ See *supra* note 43 above for one illustration of confused language. This is not a new phenomenon: Alder similarly accuses the ‘co-ownership tenancies’ pioneered in the 1960s of being a misnomer. John Alder, *Co-operative Housing Associations – An Alternative Tenure – Part 1*, CONV. & PROP. LAW., May-June 1988, at 187, 192 (1988).

⁵⁷ The existence of these two distinct schemes is well established despite the lack of consistency in the nomenclature used. Useful explanations of the operation of each scheme is provided by SHARED OWNERSHIP: JOINT GUIDANCE FOR ENGLAND in respect of shared ownership and Communities and Local Government, *HomeBuy Direct: A Buyer’s Guide* (2009) http://cfg.homesandcommunities.co.uk/public/documents/HCA_HomeBuy%20brochure_201109.pdf, (hereinafter HomeBuy Direct Buyer’s Guide) in respect of shared equity. See further the description of individual schemes on http://www.direct.gov.uk/en/HomeAndCommunity/BuyingAndSellingYourHome/HomeBuyingSchemes/DG_40_01347 (last accessed 12 July 2011).

⁵⁸ The difference in affordability between the schemes and the percentage of the property that the purchaser must be able to buy is acknowledged in A HOME OF MY OWN pp 61-62, paras [9]-[10] and pp.64-65, paras [13]-[16]. Individual schemes vary as to the level of equity loan available. Eg, in HomeBuy Direct, which is based on shared equity, the minimum share that must be purchased is 70%: HOMEBUY DIRECT BUYERS’ GUIDE, p 8. The scheme is discussed further below note 82 and text. Funding for the HomeBuy Direct scheme ceased to be available from 30 September 2010. A new scheme, FirstBuy, launched in April 2011 requires a minimum purchase of 80%: <http://www.homesandcommunities.co.uk/firstbuy>. See generally, in relation to that scheme, Homes & Communities Agency *FirstBuy Buyers’ Guide* (2011), <http://www.homesandcommunities.co.uk/sites/default/files/our-work/firstbuy-buyers-guide-010711.pdf> An 80% minimum purchase will become the norm: the Affordable Homes Programme – Framework at ¶ 4.10 caps the equity loan for shared equity schemes approved within the period of the programme (2011-2015) at 20%.

⁵⁹ SHARED OWNERSHIP: JOINT GUIDANCE FOR ENGLAND, para [5].

the case, there are certain prescribed clauses that must be included in the leases.⁶⁰ In practice, most shared ownership leases will be on the terms of the model leases provided by the Homes and Communities Agency (HCA), and formerly the Housing Corporation.⁶¹ In recognition of the fact that only part of the value has been purchased, the purchaser is still required to pay a rent on the un-purchased share of the property.⁶² The rent is set at a level intended to be affordable,⁶³ but even so the combination of having to finance the equity share purchased, carry the repairing costs, and pay rent on top does mean that the total cost can be difficult to maintain for those on the lowest incomes. In line with the intermediate nature of the tenure, it is possible for the purchaser to “staircase” up the proportion that is owned, and provision is made for the freehold to be transferred once the purchaser's share reaches 100%.⁶⁴ In practice, the majority of shared owners do not appear to move from this intermediate tenure to full ownership. Figures vary but, at the highest, only a quarter of shared ownership purchasers eventually staircase to 100% ownership.⁶⁵

Shared ownership purchasers are, therefore, leaseholders. In English law it is never possible for the purchaser to “own” land in any absolute sense; instead what is owed is an “estate”

⁶⁰ *Id.*, para [13].

⁶¹ The Homes & Communities Agency is the national housing and regeneration agency for England. It is a public body funded by the Department of Communities and Local Government and created by the Housing and Regeneration Act 2008. Housing and Regeneration Act, 2008, c.17 (Eng.). Some of its functions were previously exercised by the Housing Corporation, a body abolished by the same statute. *Id.* The Homes & Communities Agency publishes two model shared ownership leases, one for the purchase of a house and one for a flat: <http://cfg.homesandcommunities.co.uk/model-leases-for-housing-association-use-from-april-2010.htm> (hereinafter the model lease).

⁶² SHARED OWNERSHIP: JOINT GUIDANCE FOR ENGLAND, para [5].

⁶³ No more than 3% of the un-purchased share. HOMES AND COMMUNITIES AGENCY, *Affordable Housing Capital Funding Guide*, <http://cfg.homesandcommunities.co.uk/nbhb-rents> (last visited Feb. 14 2011).

⁶⁴ Provision for the leaseholder to staircase to 100% and own the property outright is a mandatory term of the lease for schemes provided with state funds, other than for properties in designated protected areas (explained above note 45: see SHARED OWNERSHIP: JOINT GUIDANCE FOR ENGLAND, para 6 and schedule 5 of the model lease for a house.

⁶⁵ Simon Graham, *The role of shared ownership in the future housing market – a discussion paper* 10 (2010), http://www.shared-owner.co.uk/media/static/May_2010-The_role_of_shared_ownership_in_the_future_housing_market-a_discussion_paper.pdf, refers to data from the National Housing Federation that suggests on average 25% of shared owners staircase to 100%. TENANT SERVICES AUTHORITY, EXISTING TENANTS SURVEY 2008, *SHARED OWNERS* 23 (2008), available at http://www.tenantservicesauthority.org/upload/pdf/ETS_technical_report.pdf, says a much lower figure, 8%, had increased their share (at all) since moving in.

in the land, which is essentially land for a time. The most expansive estate that can be owned is the freehold, which is effectively unlimited in duration. The other estate, the leasehold, exists for a fixed period of time. But the difference between freehold and leasehold estates runs deeper than their duration. A leasehold is carved out of a freehold and creates an on-going relationship between the leaseholder and the freeholder as landlord. In this sense, the leasehold is a subservient estate to the freehold. In legal terms the relationship is founded on a contract which sets out the various rights and responsibilities of the landlord and leaseholder. Studies have shown that leasehold ownership can lead to certain frustrations as it reduces the autonomy of the individual to treat the house as their own.⁶⁶ The leaseholder may, for example, be unable to make any alterations to the property without the landlord's consent. A shared ownership leaseholder is also vulnerable to losing the home if they fall behind with *either* the mortgage payment on the purchased share *or* the rental payment in respect of the lease. This latter point can have an especially hard and unjust impact, as is illustrated in the County Court case of *Richardson v Midland Heart*.⁶⁷ In this case the purchaser, Miss Richardson, entered a 99 year shared ownership lease with the housing association Midland Heart.⁶⁸ She paid £29,500 for a 50% stake, and paid rent on the unpurchased share.⁶⁹ Significantly, there was no mortgage in this case. In 2003, Miss Richardson had to move into a women's refuge.⁷⁰ This led to her owing a great deal of rent under the shared ownership lease as the housing benefit that she had depended on ceased to be payable.⁷¹ In 2005, Miss Richardson attempted to sell the property, which was now valued at £151,000.⁷² For reasons that are not entirely clear from the report of the decision, the housing association nonetheless used the rent arrears as grounds for terminating the lease under what is known as Ground 8, which gives a mandatory ground for possession.⁷³ The judge has no discretion and must order

⁶⁶ Ian Cole & David Robinson, *Owners Yet Tenants: The Position of Leaseholders in Flats in England and Wales*, HOUSING STUD. July 2000, at 595.

⁶⁷ [2008] Landlord & Tenant Reports 31 (Eng.).

⁶⁸ *Id* at [2].

⁶⁹ *Id* at [2].

⁷⁰ *Id* at [3].

⁷¹ *Id* at [4].

⁷² *Id* at [5]-[6].

⁷³ Housing Act 1988 sch 2, Ground 8.

possession.⁷⁴ The consequence was that Miss Richardson lost her home. But what made the decision especially shocking is that she also lost all the capital that she had invested in the property. The £45,000 uplift destined to her on a sale represented, according to the judge, a “windfall” for the housing association.⁷⁵ Although the housing association chose to make an ex gratia payment of the initial investment (not the uplifted value, and less rent arrears and various costs), at law she was not entitled to anything.⁷⁶

In order to ensure that the housing stock is available to those meeting the landlord’s eligibility criteria rather than being placed on the open market, the shared ownership lease also contains restrictions on sale. The way that the lease is structured encourages the shared owner who is planning to market the property to notify the landlord of his or her plans, rather than market the property for sale through an estate agent in the way that a conventional or traditional⁷⁷ owner occupier would. The landlord then has the opportunity to nominate a purchaser.⁷⁸ Once this process is triggered, sale may be protracted: it is only if the landlord does not exercise its rights (or the nominated purchaser fails to exchange contracts), that the shared owner is then able to sell the property on the open market.⁷⁹ Further, within the sale process the shared owner does not necessarily have the same freedom to negotiate the sale price enjoyed by a conventional owner-occupier.⁸⁰ If the shared owner has staircased to 100% the restrictions on sale appear even more prescriptive: before any sale can take place on the open market the property must be offered back to the (former) landlord at a price determined by an independent valuation.⁸¹ This right of pre-emption lasts for 21 years.

⁷⁴ Housing Act 1988 sch 2 distinguishes between “grounds on which court must order possession” (Part I of the schedule, generally referred to as mandatory grounds) and “grounds on which court may order possession” (Part II of the schedule, generally referred to as discretionary grounds). In this schema, Ground 8 is a mandatory ground for possession.

⁷⁵ *Supra* note 67 at [24].

⁷⁶ *Id* at [24].

⁷⁷ By which we mean a person who buys full title on the open market, with any mortgage provided by a commercial lender.

⁷⁸ See, eg clauses 3.19-3.20 of the model lease for a house dealing with alienation.

⁷⁹ *Id*.

⁸⁰ The sale process triggers an independent valuation which the vendor is then encouraged to treat as a maximum sale price: see, eg clause 3.20.4 of the model lease for a house.

⁸¹ See, eg the right of pre-emption contained in schedule 5 part 2 of the model lease for a house.

Shared equity, which is also referred to as “equity shares”, operates quite differently. In such schemes the purchaser buys a freehold to the property (the same title that would be bought by a traditional owner occupier),⁸² but only a proportion of the value of the equity (typically between 70-80%).⁸³ The “purchased” share will usually be funded (at least in part) by a commercial mortgage and secured by a first legal charge.⁸⁴ The balance, the un-purchased share, is funded by an equity loan which is secured as a (usually) second legal mortgage.⁸⁵ This un-purchased share represents the subsidised component: the exact payment arrangements under the equity loan may differ between schemes, but typically there is an initial interest-free period in which no payments are made after which a low interest is charged, rising incrementally each year. For example, in HomeBuy Direct, one of the programmes that uses the shared equity model of part ownership, no interest is paid on the equity loan for the first five years, after which a fee of 1.75% per annum is paid, rising each year by the Retail Price Index plus 1%.⁸⁶

As with shared ownership, it is possible to staircase up and thereby increase the proportion of the equity purchased.⁸⁷ The introduction of, and incremental increase in, interest payments is intended to encourage staircasing as well as to ease financial pressures during the initial period of ownership.⁸⁸ When the property is sold on by the purchaser, the amount that the borrower has to repay to the second lender is linked to the value of the home.⁸⁹

⁸² HOME BUY DIRECT BUYERS’ GUIDE AT 1 puts the point starkly: “you will still have 100% title to your home”.

⁸³ *Supra* note 58.

⁸⁴ The expectation a commercial mortgage will be used is acknowledged in the HOME BUY DIRECT BUYERS’ GUIDE, P 1.

⁸⁵ Where the cost of the equity loan is split between the Homes and Communities Agency and the property developer, each will have an equally ranked charge. *See id.* at 14 in respect of HomeBuy Direct and Homes & Communities Agency, *FirstBuy Prospectus* (2011) para 5, http://www.homesandcommunities.co.uk/sites/default/files/our-work/firstbuy-prospectus_0.pdf in respect of FirstBuy.

⁸⁶ *Id.* at 1 & 12. This pattern of interest payments will be adopted in shared equity schemes introduced in the Coalition government’s programme for affordable homes for the period 2011-2015: Department of Communities and Local Government & Homes & Communities Agency *supra* note 58 at 21 ¶ 4.9. It is adopted in the FirstBuy scheme: Homes & Communities Agency *id.* ¶ 45.

⁸⁷ HOME BUY DIRECT BUYERS’ GUIDE, AT 11.

⁸⁸ *Id.*, at 13.

⁸⁹ *Id.*, at 9.

Thus, on this model, the subsidy component is repaid in a way that keeps the value of the subsidy in line with rising property values. This does however have repercussions for the shared equity owner on a sale. Although the property is sold on the open market, the amount repayable may be determined by reference to an independent valuation.⁹⁰ If the actual sale price falls below this valuation, the percentage payable is still calculated by reference to the higher figure.⁹¹ If, however, the actual sale price exceeds the valuation, then the amount payable is determined according to the actual price attained.⁹² In this way, the shared equity owner acts as guarantor that the amount of the subsidy repaid is commensurate with the property value.

Whereas the lease documentation for shared ownership is now in a very standardised form, there is more variety with the legal structuring of shared equity purchases. There are, however, features common to both models. Under both shared ownership and shared equity, the purchaser is responsible for the full costs of repairs to the property even though they own only a part of the equity. This feature of the schemes has been a source of criticism for purchasers since the introduction of shared ownership.⁹³ Purchasers' concerns have been cast aside in part on the basis that responsibility for repairs is part and parcel of being an "owner".⁹⁴ In the context of shared ownership, the imposition of liability for repairs and maintenance thus chimes with the general claim that "the shared owner has the normal rights and responsibilities of a full owner-occupier".⁹⁵ In shared equity it is consonant with the fact that from the outset the purchaser will have "100% title to [their] home".⁹⁶ Under both models there will probably be a prohibition on making physical alterations to the property without the landlord's written consent. Even though this consent cannot be unreasonably withheld, it is a constraint not found in traditional home ownership. Under both models requirements of consent to subsequent borrowings have been put in place that

⁹⁰ *Id.* at 10.

⁹¹ This appears implicit *id.* at 10 in relation to HomeBuy Direct and is explicit in the terms of a precedent shared equity agreement logged with the authors.

⁹² This is the position in the terms of a precedent shared equity agreement logged with the authors.

⁹³ ALLEN, *supra* note 22, at 17.

⁹⁴ *Id.* at 21 ¶ 12.

⁹⁵ HOMES AND COMMUNITIES AGENCY, COUNCIL OF MORTGAGE LENDERS & NATIONAL HOUSING FEDERATION, SHARED OWNERSHIP: JOINT GUIDANCE FOR ENGLAND 6 ¶ 5 (2010), <http://www.housing.org.uk/Uploads/File/Policy%20briefings/Research%20Futures/Shared%20Ownership%20guidance%202010.pdf>.

⁹⁶ HOMEBUY DIRECT BUYERS' GUIDE, at 1.

are designed to limit, or at least to exercise some control over, the purposes for which additional loans are taken.⁹⁷

There is an alternative legal model that can be used to deliver part ownership. In English law, co-ownership of land is given effect under a trust.⁹⁸ Trusts of land arise, for example, whenever a home is co-owned by a married couple, civil partners or cohabitants. The proportion owned by each party is reflected in his or her beneficial share. The same device could have been utilised to provide for LCHO with the provider of the public subsidy becoming a beneficial co-owner together with the purchaser(s). The trust has some advantages particularly over the shared ownership lease. It is an existing and familiar legal device for achieving co-ownership and avoids the need to impose a lease in the case of houses.⁹⁹ To date, however, trusts have not been favoured for LCHO. While there is no clear reason why this is the case it may be no more than an accident of legal history. While co-ownership of the home is now pervasive it is a relatively recent phenomenon.¹⁰⁰ Prior to the

⁹⁷ A mortgage protection clause (MPC) is a prescribed term of the shared ownership lease (on which see supra note 61). In the clause that has been used in leases since 6 April 2010 the landlord underwrites losses arising on borrower default. Additional borrowings are protected by the MPC only if approved by the landlord. Although the MPC is not explicitly so-confined, it seems that additional borrowings will only be possible for staircasing or to comply with covenants under the lease: SHARED OWNERSHIP: JOINT GUIDANCE FOR ENGLAND 16 ¶¶ 27-28. At the least, the potential liability of landlords under the MPC will impact on their willingness to give approval for loans for other purposes: Bright & Hopkins supra note 12 at 9-10. Borrowing outside the MPC remains possible, but will be less commercially attractive to the lender. In shared equity, further borrowings require the consent of the provider of the subsidised mortgage (known as the HomeBuy Agent). THE HOMEBUY DIRECT BUYERS' GUIDE, at 16, advises that "[a]dvances to be used for staircasing or repaying the Agency's contribution will usually be welcomed. Advances for other purposes will be considered by the National HomeBuy Agent on a case by case basis".

⁹⁸ The use of a trust as the vehicle for co-ownership is a distinctive feature of English land law. In the absence of an express trust, a statutory trust is imposed in every conveyance to joint owners through the Law of Property Act 1925, ss 34 and 36. For further discussion on the regulation of co-ownership in English law see Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law: Text, Cases and Materials* (2009) ch 19.

⁹⁹ For further discussion, see TROWERS & HAMLINS LLP, SHARED OWNERSHIP TRUSTS: DELIVERING LOW COST HOME OWNERSHIP (2007), <http://www.trowers.com/attachments/published/1615/Shared%20ownership%20trusts%20delivering%20low%20cost%20home%20ownership.pdf>.

¹⁰⁰ In Great Britain (ie, England, Scotland and Wales), home ownership rates increased dramatically after World War II (from 26% in 1945, 60% in 1984): Ray Forrest, Alan Murie and Peter Williams, *Home Ownership: Differentiation and Fragmentation* (1990) at 57, table 3.1. Table is titled "Housing Tenure in Great Britain, 1914-1988 (percentage of dwellings). There are no statistics indicating whether a dwelling is in sole or joint ownership but a survey of married and formerly married people conducted for the Law Commission and published in 1972, showed that there was a marked increase in the rate of joint ownership that began in the 1960's and was continuing: 1972-73 (274) *The Law Commission* (Law Com. no. 52). Family law. First report on

Trusts of Land and Appointment of Trustees Act 1996, the trust imposed on the co-owned home (the “trust for sale”) was far from fit for purpose as the rights and responsibilities of the trustees and beneficiaries reflected an expectation that co-ownership would typically arise in relation to investment property rather than the home.¹⁰¹ Hence, as the legal models for LCHO evolved in the 1970s and 1980s the co-ownership trust would have appeared far from an ideal device. Conversely by the time of the 1996 Act the legal models for LCHO were perhaps too entrenched to then be superseded by the trust.

iii) Co-Operative Housing Models

Only a tiny proportion of UK housing (0.6%) is based on co-operative models,¹⁰² and this is nearly all rental housing for low income groups. The idea of mutual home ownership (MHO) is, however, being developed as a way of filling a gap in the intermediate housing market.¹⁰³ The details of potential models are still evolving, but they are built around co-operative ideals that enable individuals to build capital assets. In essence, a locally based entity (usually a community land trust) would own the land on which the homes are built.¹⁰⁴ The

family property: a new approach, p. 8. Co-ownership rates are likely to have continued to increase since then given the increased economic activity of women: between 1971-2008 employment rates for women rose from 56%-70% (Matthew Hughes (ed), *Social Trends No 39* (2009) Office of National Statistics, at 48-49), and the development of informal means of acquiring rights in the home since the 1970s, particularly the constructive trust (*Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886).

¹⁰¹ The difficulties with the trust for sale were well recognised and are reflected in the Law Commission’s work leading to the Trusts of Land and Appointment of Trustees Act, 1996, c. 47 (Eng.): The Law Commission Report No 181, *Transfer of Land: Trusts of Land* (1989).

¹⁰² COMMISSION ON CO-OPERATIVE AND MUTUAL HOUSING, BRINGING DEMOCRACY HOME 5 (Nic Bliss ed., 2009), available at <http://www.ccmh.coop/sites/default/files/Commission%20Report.pdf> [hereinafter BRINGING DEMOCRACY HOME].

¹⁰³ The idea is being developed in particular by CDS Co-operatives and the Accord Housing Group. We base our comments on the model supported by CDS Co-operatives, which is discussed in CDS CO-OPERATIVES, A SIMPLE GUIDE TO MUTUAL HOME OWNERSHIP (2005), https://docs.google.com/fileview?id=0BwtFGmkmSI96OTkwM2NiYtItOTNhYy00OTRILWEwMzctMzk1MzVkYmZlZDAw&hl=en_GB (hereinafter A Simple Guide to Mutual Home Ownership) and COMMUNITY FINANCE SOLUTIONS, COMMUNITY LAND TRUSTS: A PRACTITIONER’S GUIDE app. 5.3a (2007), <http://www.communitylandtrusts.org.uk/resources/publications> and CDS CO-OPERATIVES, A CONSUMER’S GUIDE TO MUTUAL HOME OWNERSHIP 3RD DRAFT, <http://www.cds.coop/about-us/mutual-home-ownership/A%20new%20way%20of%20owning%20a%20stake%20in%20your%20home.pdf> (hereinafter A Consumer’s Guide to Mutual Home Ownership).

¹⁰⁴ Usually a “community land trust” (recognised in English statute law in the Housing and Regeneration Act, 2008, c.17, §79(1)) or a ‘local housing trust’. See also Chris Handy, *Community Land Trusts*, 13 J. HOUSING L., no. 5, 2010, at 83, 83-86.

element of public subsidy is likely to be in the provision of the land at no, or low, cost;¹⁰⁵ and the value of this land is never passed through to individuals buying into the scheme.¹⁰⁶

Under the MHO scheme homes are built on the land of the community land trust by a co-operative society which is controlled by its members, who will also be the occupiers of the homes.¹⁰⁷ The individual occupier is given the right to occupy by a lease – under the MHO model it is a fixed term lease of 20 years (it cannot be longer because of the impact of enfranchisement laws, which enable tenants to require the landlord to sell the freehold to them).¹⁰⁸ But the individual never owns an equity share in the property itself; instead the individual has the opportunity to build a capital asset through investing in an investment fund held by the mutual home ownership society.¹⁰⁹ The MHO Society takes out a single mortgage loan and the occupiers have to pay monthly charges to cover the mortgage and servicing costs.¹¹⁰ Effectively the occupiers pay a “service charge and rent, *plus*”. The actual amount that any individual occupier has to pay will be based upon their income, and the “plus” component will determine the size of the equity share that that individual acquires.¹¹¹ Linking occupation payments to income levels ensures that this is an affordable housing product, but also provides great flexibility as the price may change as income levels rise or drop for the individual.¹¹² Again, there can be a large variety in the way that the asset building dimension works. The model which differs the most from the other home ownership products considered in this chapter, is one in which the growth that the purchaser is able to take from the trust when he or she moves on is linked to local wage levels rather than to property values.¹¹³

¹⁰⁵ The need for low cost land to be made available has operated as a major constraint on the development of community land holding vehicles.

¹⁰⁶ See *infra* note 168 and following text.

¹⁰⁷ A Consumer’s Guide to Mutual Home Ownership, at 3 and 6-7.

¹⁰⁸ *Id* at 10.

¹⁰⁹ The cost of building the homes is divided into £1,000 “equity shares” that form the capital asset held by members. Further details on how these shares are accrued, bought and sold is contained *id* at 3-4, 7-8 and 11.

¹¹⁰ *Id* at 3.

¹¹¹ *Id* at 3-4.

¹¹² *Id* at 8. The underlying principle, explained *id* at 3 is that housing costs remain at between 35%-40% of the household income.

¹¹³ For fuller discussion and explanation of this point, see *infra* note 144 and following text.

The MHO idea has been developed particularly from models found in the United States and Australia¹¹⁴ where co-operative housing is more common, but has been tailored for the UK housing context. It fits well with the localism agenda being developed by the Coalition Government that took power in 2010 and the Coalition Government agreement contains a commitment that the government “will create new trusts that will make it simpler for communities to provide homes for local people”.¹¹⁵ But even if MHO in some form does move beyond the planning stage it will always remain a fairly niche market as it is dependent upon local people showing enthusiasm and commitment to the model.

B: Individual Benefits of Home Ownership

In this chapter we explore the impact that these different routes to home ownership have on both the individual and the wider community. Inevitably we have to be selective in the criteria that we use to measure this against. In relation to the individual we are looking at the ability of the schemes to provide the individual with both the financial and the non-financial benefits of home ownership. This section of the chapter explains what we mean by this. The following section then looks at the main community objectives that have come to the fore in recent discussions of LCHO programmes. We will then in the final section of this chapter evaluate how the different routes to LCHO fare against these measures. There is a myriad of ways in which home ownership is claimed to provide benefit to individuals, but for ease we are grouping them into three main categories: wealth creation, mainstreaming, and security of place.¹¹⁶ Each of these terms needs some further explanation.

i) Wealth creation

The core financial benefit lies in ownership of the capital value of the home, that is, in wealth creation. This brings a number of advantages (as well as risks), including the safety of a foot on the housing ladder, the opportunity for accumulating an asset base, the liquidity and utility of having collateral that can be borrowed against for a variety of purposes and, ultimately, the prospect of financial security with a long-term reduction in housing costs. Access to this investment function is the key to distinguishing an owner from a renter as the renter’s interest in the home is confined to its use value, that is, the home as a consumption

¹¹⁴ The influence of schemes in these jurisdictions is acknowledged in A Simple Guide to Mutual Home Ownership. A brief overview of the operation of co-operative tenures internationally is provided in PAT CONATY, JOHNSTON BIRCHALL, STEVE BENDLE ROSEMARY FOGGITT, “COMMON GROUND – FOR MUTUAL HOME OWNERSHIP” 66 (2003), http://www.neweconomics.org/sites/neweconomics.org/files/Common_Ground.pdf. at 21-24.

¹¹⁵ THE COALITION: OUR PROGRAMME FOR GOVERNMENT, *supra* note 55, at 12.

¹¹⁶ We explore the benefits of home ownership to the individual more fully in Bright & Hopkins *supra* note 12.

good only. The policy objectives for HomeBuy state in stark terms that “homes are not just places to live; they are assets. Supporting people on lower incomes to achieve home ownership can help to encourage social mobility and address these economic inequalities”.¹¹⁷ This statement chimes with evidence that home ownership is desired for the investment potential and opportunity for individual gain that it provides,¹¹⁸ although there are commentators who challenge the economic prudence of the home-owner putting all of their eggs in one basket.¹¹⁹

ii) Mainstreaming

For many, becoming a home owner gives a sense of having “arrived”, and having achieved the dream. Whether home ownership is in fact necessary for the non-financial benefits associated with it to be attained remains the subject of debate.¹²⁰ Hiscock, Keans, MacIntyre and Ellaway report that the psycho-social benefits of ownership (represented in their study by the home as a haven, as a site of autonomy and as providing social status) are not

¹¹⁷ OFFICE OF THE DEPUTY PRIME MINISTER, HOMEBUY: EXPANDING THE OPPORTUNITY TO OWN. FINAL REGULATORY IMPACT ASSESSMENT 3 (2005), available at <http://www.communities.gov.uk/documents/housing/pdf/142385.pdf>.

¹¹⁸ For a recent example, see, e.g., Pinnegar et al., *supra* note 44, at 44. Reporting on discussions in focus groups of two schemes, one based on individual equity and the other on community equity, the authors note “[w]hile the benefits provided by both schemes ... were acknowledged and welcomed, the role of the home as an asset became more emphasised when the schemes were discussed”. *Id.*

¹¹⁹ See, e.g., Lee Anne Fennell, “Homeownership 2.0” 102 NW. U. L. REV. 1047 (2008). She seeks to “start a conversation,” *id.* at 1053, for a model of home ownership that decouples the use and investment functions and gives home owners a choice of how much risk they take of factors (such as trends in the housing market) that are outside their control. See also Christine Whitehead & Judith Yates, “Increasing Affordability Problems – A Role for Shared Equity Products? Experience in Australia and the UK” 21 HOUSING FIN. INT’L, Dec. 2007, at 16, 17. They note “[t]heory would say that the owner should at least transfer some of the risks involved in owning this specific housing asset to others ... This both provides greater financial flexibility and frees up funds from the housing asset to allow the individual household to invest in other investments with different risk profiles”. *Id.* The ability of existing English models of shared ownership and shared equity models to reduce the risks of home ownership is considered by CHRISTINE WHITEHEAD, SHARED OWNERSHIP AND SHARED EQUITY: REDUCING THE RISKS OF HOME-OWNERSHIP? (2010), <http://www.jrf.org.uk/publications/shared-ownership-shared-equity>. She notes that these products can address the risks of housing market volatility and those associated with a particular dwelling (such as the impact on market value associated with the neighbourhood and neighbours) as the impact of price change is shared between the owner and provider. Whitehead suggests that this “in principle, allows the SO or SE purchaser to diversify into other parts of the housing market and into other types of asset, both reducing their holding of specific risk and enabling a portfolio that better reflects the level of risk they are prepared to take on”. *Id.* at 6.

¹²⁰ LORNA FOX, CONCEPTUALISING HOME: THEORIES, LAWS AND POLICIES 232-236 (2007) (responding to the claims famously made in PETER SAUNDERS, A NATION OF HOME OWNERS (1990)).

necessarily to do with tenure, but with a wide range of factors such as wealth, location, housing type, and being in a settled relationship and work.¹²¹ However, even their study found that many interviewees “saw owner-occupation as the only worthwhile tenure”.¹²² Reporting on a study of low-income American homeowners, Rohe and Stegman concluded that home ownership had a significant effect on overall life satisfaction, even though it did not affect people’s self-esteem or sense of control.¹²³ While the picture that emerges is therefore undoubtedly complex, it is apparent that home ownership is desired and perceived as a source of some possibly ill-defined non-financial benefits. This is reflected in research conducted for the Australian Housing and Urban Research Institute (AHURI). In their report on the potential for low-cost home ownership schemes in Australia, they note that “most participants [who took part in their study] were looking for a stepping stone that helped them realise ‘the dream’, rather than a variant thereof”.¹²⁴

iii) Security of place

We use this term to refer to a non-financial benefit, linking it to the idea of ontological security that provides a sense of the reliability of things and place.¹²⁵ Security of place depends upon the extent to which the owner has choice about whether to stay in the home, or perhaps to move from it. There are various ways in which home ownership reinforces security of place. A home owner will rarely be forced to move unless there are financial difficulties,¹²⁶ in contrast to a renter who may have to move simply because the lease term ends or because a legally recognised ground (or reason) for ending the lease can be proved. In the private rented sector in England, it is unusual for a new renter to have any security of

¹²¹ Rosemary Hiscock, Ade Kearns, Sally MacIntyre & Anne Ellaway “*Ontological Security and Psycho-Social Benefits from the Home: Qualitative Evidence on Issues of Tenure*,” 18 HOUSING, THEORY & SOC’Y, Feb. 2001, at 50, 62.

¹²² *Id.* at 61.

¹²³ William M. Rohe & Michael A. Stegman, “*The Effects of Homeownership on the Self-Esteem, Perceived Control and Life Satisfaction of Low-Income People*,” 60 J. AM. PLAN. ASS’N 173 (1994).

¹²⁴ Pinnegar et al., *supra* note 44, at 34.

¹²⁵ The phrase is captured by Giddens, who defines it as: “The confidence that most people have in the continuity of their self identity and in the constancy of their social and material environments.” ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 92 (1991).

¹²⁶ Compulsory purchase (eminent domain) would be one instance of where there may be a move forced for non-financial reasons.

tenure beyond the contractual term date. This makes it very difficult for private tenants to build a sense of place and community.¹²⁷

Even if there are financial difficulties, some forms of home ownership enable there to be flexibility in relation to financial payments. This is particularly so in the case of MHO where the principle underlying the amount that an occupier has to pay reflects his or her income at that point in time. This means that if times are hard and the income suddenly drops, the occupier may still be able to remain in his or her home.

C: Community Benefits: Widening the Policy Focus Beyond the Individual

As LCHO programmes evolved, their initial focus rested firmly on delivering the benefits of home ownership to the individual. This is reflected most clearly in the RTB which, as we have seen, pursued the single-minded policy goal of allowing tenants to become owner-occupiers. But delivering the benefits of home ownership to individuals also characterised early shared ownership schemes. Shared ownership pre-dates the RTB, with early schemes pioneered in Birmingham in 1975.¹²⁸ Between 1975-79 some 24 local authorities sold homes on a shared ownership basis.¹²⁹ These schemes pursued the primary objective of expanding home ownership, coupled with the further objective of providing a stepping stone to full home ownership for lower-income households and those with no deposit.¹³⁰ The introduction of the RTB reduced reliance on shared ownership. The RTB discount made full home ownership affordable and ensured that the scheme became the principal means through which existing council tenants purchased their home. At that stage it was anticipated that shared ownership would provide a route to home ownership for younger or newly established households or those from outside the public rented sector; that is, households falling outside the RTB scheme.

¹²⁷ See, e.g., LIAM REYNOLDS, SHELTER SAFE AND SECURE? THE PRIVATE RENTED SECTOR AND SECURITY OF TENURE 24-26 (2005), http://england.shelter.org.uk/data/assets/pdf_file/0017/48041/Safe_and_Secure.pdf.

¹²⁸ ALLEN, *supra* note 22, at 23. Schemes have been traced to the formation of new model housing associations in the 1960s: David Cowan, *Shared Ownership: Some Problems of Law and Policy*, 13 J. HOUSING L., no. 4, 2010 at 56, (citing RAY FORREST, STEWART LANSLEY & ALAN MURIE, A FOOT ON THE LADDER?: AN EVALUATION OF LOW COST OWNERSHIP INITIATIVES (1984)).

¹²⁹ ALLEN, *supra* note 22, at 1 ¶ 3.

¹³⁰ *Id.* at 20 ¶¶ 2, 3 & 7.

The turning point in English political attitudes towards LCHO came with the launch in 2003 of the government's Sustainable Communities Action Programme.¹³¹ At that time, the government's commitment to increasing levels of home ownership and the development of LCHO became enmeshed with the idea of creating sustainable communities. Such a community was considered to require "[a] well-integrated mix of decent homes of different types and tenures to support a range of household sizes, ages and incomes".¹³² Within the wider objective of achieving a sustainable community, home ownership was seen as "[giving] people a bigger stake in their community, as well as promoting self-reliance".¹³³ The Action Programme led to the creation of the government's LCHO Task Force whose report, "A Home of My Own" was published in November 2003. The overarching ethos of the Report is the idea that fulfilling individual aspirations for home ownership, or delivering the benefits of home ownership to the individual, does not provide sufficient justification for expanding LCHO. Hence the Task Force explains that filling the "aspirations gap" between those who are home owners and those who would like to be "is not an end in itself".¹³⁴ Homeownership can achieve a number of objectives which "can translate into benefits for individual and benefits to society".¹³⁵ The conclusions of the Task Force in turn underpinned the development of HomeBuy – at the time, a label envisaged to be used for a simplified portfolio of LCHO products based on shared equity, but which has come to be used as a generic brand for government-funded shared ownership and shared equity schemes. The Office of the Deputy Prime Minister's consultation on HomeBuy that was carried out subsequent to the work of the Task Force therefore states as the key objective "[w]e want to help more people to own a home where this helps to achieve their aspirations, and where it helps to meet additional objectives, such as those identified by the Home Ownership Task Force".¹³⁶ These "additional objectives" include creating mixed,

¹³¹ OFFICE OF THE DEPUTY PRIME MINISTER, SUSTAINABLE COMMUNITIES: BUILDING FOR THE FUTURE (2003), available at <http://www.communities.gov.uk/documents/communities/pdf/146289.pdf>.

¹³² *Id.* at 5. This is one of the requirements given in the Report in response to the question "what makes a sustainable community?"

¹³³ *Id.* at 5 para. 3.33. A similar sentiment is expressed in parallel developments in the social rented sector. The introduction of "choice-based lettings" aimed to promote sustainable communities on the basis that tenants who are involved in decisions about their home are more likely to have a longer term commitment to the locality. See DEPARTMENT OF THE ENVIRONMENT, TRANSPORT AND THE REGIONS, QUALITY AND CHOICE: A DECENT HOME FOR ALL 79 ¶ 9.7 (2000), <http://www.communities.gov.uk/documents/housing/pdf/138019.pdf>.

¹³⁴ A HOME OF MY OWN, *supra* note 11, at 38 ¶ 2.

¹³⁵ *Id.*

¹³⁶ OFFICE OF THE DEPUTY PRIME MINISTER, CONSULTATION PAPER: HOMEBUY – EXPANDING THE OPPORTUNITY TO OWN 9 ¶ 2.1 (2005), available at <http://www.communities.gov.uk/documents/housing/pdf/142115.pdf>.

sustainable communities and freeing up existing social housing by encouraging tenants to move into home ownership.¹³⁷ In this chapter our focus on the creation of mixed and sustainable communities reflects the broader policy objective within which LCHO has been located. In the English political landscape it is unsurprising that this shift in emphasis occurred during the Labour government, in contrast to the focus on the individual benefits promoted through the RTB by the Conservatives.

i) Sustainable Communities: Creating Mix

A mixed community does not necessarily imply the inclusion of owner-occupation. It could, for example, consist of a bipartite mix of private and affordable / social rented housing. The inclusion of home-ownership may be seen as important in building a sustainable community, however, as it is home-ownership that gives an individual a “stake” in the community and promotes self-reliance. As McKee explains, the political assumption underlying the policy rhetoric of mixed communities “is not only that mono-tenure public housing estates have ‘failed’, but that owner-occupation is the solution to solving the ‘problem’ of poor communities by ‘reconnecting’ them to mainstream society”.¹³⁸ Within this, LCHO is important in providing an affordable route to home-ownership in the context of a mixed community. Tenure mix is, therefore, part of a mixed community. But income mix may also be important. There could, for example, be a community of mixed rental and ownership properties which are only available on the open market (or available only as affordable housing units). The implicit assumption behind the rhetoric of sustainable mixed communities is that both tenure and income mix are desirable. This requires there to be rental properties, owner-occupied properties, market properties and affordable properties.

ii) Sustaining Mixed Tenure Communities

For a community to be sustainable, the tenure mix must be sustained over time – the idea being that a community that ceases to contain a tenure mix ceases to be sustainable. This means that home ownership must remain accessible to low and intermediate income households over time. The best way to achieve this is for *both* the particular stock to remain available as LCHO rather than being released onto the open market on resale *and* for the subsidy to continue to be available in a form that ensures the stock remains affordable. The

¹³⁷ For a list of the wider objectives see *A HOME OF MY OWN*, *supra* note 11, at 38.

¹³⁸ Kim McKee, *Promoting Homeownership at the Margins: The Experience of Low-Cost Homeownership Purchasers in Regeneration Areas* (2010) 4 PEOPLE, PLACE & POL’Y ONLINE, no. 2, 2010 at 38,39, http://extra.shu.ac.uk/ppp-online/issue_2_290710/documents/homeownership_margins_lowcost_regen_areas.pdf.

following paragraphs consider how these goals of stock retention and continuing availability of subsidy can be delivered.

a) Sustainable Communities: Stock Retention

With new developments, LCHO is one of a mix of housing that can be built, and when planning laws have been used to require intermediate housing to be built as part of new sites this “on-site” provision has been shown to make an important contribution to mixed communities.¹³⁹ RTB has also introduced mix into formerly council rented estates. Whether LCHO can sustain mixed communities in the longer term will depend in part on what happens to the intermediate housing stock on future sales. The clearest route is to ensure through “stock retention” that each unit sold in the LCHO market is kept within that market, which requires there to be limits on the resale of the property. Typically this is done in the UK through rights of first refusal and rights of pre-emption which require the property to be offered back to the original housing provider on resale, and for a system of valuation to be applied.¹⁴⁰ This enables the housing provider to re-offer that unit as LCHO to a new household. For the individual the inability to sell the property through estate agents in the usual way may make the experience feel less like mainstream ownership

b) Sustainable Communities: Continuing Affordability

As seen above, there are two main forms that the provision of subsidy takes: subsidy forgiveness and subsidy retention/recapture. The fact that with subsidy forgiveness schemes there is no requirement for the subsidy be repaid¹⁴¹ means that it is effectively a “gift” to the individual from the public purse. As such, irrespective of the potential for such a scheme to create a mixed community (for example, by turning a community of council tenants into a mixed community of owner-occupiers and council tenants) it does not provide the opportunity for the subsidy to be used to provide access to LCHO for subsequent low and intermediate income households. The Low Cost Home Ownership Task

¹³⁹ Sarah Monk & Christine Whitehead, *Conclusions*, in MAKING HOUSING MORE AFFORDABLE: THE ROLE OF INTERMEDIATE TENURES 261, 268 (Sarah Monk & Christine Whitehead eds., 2010) (and references therein). For more detailed discussion of the relationship between planning and intermediate housing, see Tony Crook & Christine Whitehead, *Intermediate Housing and the Planning System*, in MAKING HOUSING MORE AFFORDABLE: THE ROLE OF INTERMEDIATE TENURES 101 (Sarah Monk & Christine Whitehead eds., 2010).

¹⁴⁰ Cf. the US where restrictive covenants have been used. See, e.g., James J Kelly Jr., *Homes Affordable for Good: Covenants and Ground Leases as Long-Term Resale-Restriction Devices* 29 ST. LOUIS U. PUB. L. REV. 9 (2009).

¹⁴¹ Unless resale occurs within the specified period of time that requires the subsidy to be repaid in whole or part.

Force was doubtful as to whether subsidy forgiveness schemes are ever appropriate: “[g]iven that people are gaining a capital asset that will normally appreciate, we think it is reasonable to recoup the subsidy wherever this is possible which leads to a re-think of the use of grants and discounts in the future”.¹⁴² It suggested, therefore, that “in the future, grants and discounts should be limited to achieving wider strategic outcomes not just to help people into home ownership”.¹⁴³ This reflects the ethos of the Task Force’s Report that providing the benefits of home ownership to the individual does not in itself provide sufficient justification for LCHO. There must be a wider justification for making a gift from the public purse.

In contrast, subsidy recapture requires the owner to repay the subsidy component to the provider upon future sale. Again, there are lots of variations as to how this operates. The shared equity scheme works this way as the second loan (representing the non-owned equity) is repaid on sale at current property values. Assuming that property prices have risen since the initial purchase, this means that the subsidy repayment will similarly be higher than the original amount loaned. The risk of negative equity may also be split proportionately between the parties, or the original purchaser may be liable to repay at least the original subsidy. Subsidy recapture at current property values does not, however, necessarily ensure that access to *affordable* home ownership is sustained over time. If wage increases do not keep pace with property values, then recapturing the subsidy in this way will not enable an equivalent property to be made affordable to an intermediate income household: the affordability gap the subsidy is needed to fill has increased.¹⁴⁴ Continuing

¹⁴² A HOME OF MY OWN, *supra* note 11, at 93 ¶ 34. It should be acknowledged however that the public purse is also used to subsidise the costs of home ownership through Support for Mortgage interest (SMI) payments provided as part of the social security system. While directed at providing assistance with interest payments, not the capital sum, the effect of SMI is to help the home owner retain their capital asset.

¹⁴³ *Id.* at 95 ¶ 44.

¹⁴⁴ COMMUNITY FINANCE SOLUTIONS, PLACESHAPING: A TOOLKIT FOR URBAN COMMUNITY LAND TRUSTS 66 (2008), http://www.communityfinance.salford.ac.uk/pdf/Urban_tools_complete.pdf, provides a worked illustration: “A £60,000 mortgaged share in a property valued at £100,000, bought at the end of 2001 on a household income of £17,000, became worth £120,000 at the end of 2007. An income of £34,000 would be needed to buy this yet average incomes over the 6 year period have risen around 30% to ~£22,000. So the home has become unaffordable and no longer meets the needs of the community.” The report shows that the value realised can be capped with reference to the property value increase, or by reference to average earnings. The worked example of the CLT Resale Formula in BUILDING AND SOCIAL HOUSING FOUNDATION, EQUITY SHARING WITH COMMUNITY LAND TRUSTS: DELIVERING SUSTAINABLE LOW COST HOME OWNERSHIP BY LOCKING IN VALUE IN PERPETUITY (2006), available at <http://www.bshf.org/published-information/publication.cfm?thePubID=21F46BEA-15C5-F4C0-993C6311518A3D40> (an information paper to the government’s Shared Equity Taskforce), appears to assume that through the use of restrictive covenants the share of the capital uplift that the purchaser gets on resale is limited; in the worked example it is limited to 25% of the uplift. The paper draws on the use of restrictive

affordability is therefore best achieved if the amount of the equity that the owner can retain on resale is not a direct reflection of value of the equity that the owner possesses, but is capped in some way. Thus the owner may be allowed to keep only a specified percentage of the uplift in value of the owner's share, or repayment may be linked to an affordability measure such as a local wage index. This would ensure that the housing provider recovers sufficient funds for the subsidy to be ploughed back into housing at a level that ensures forward looking affordability. This kind of provision has been discussed in England in the context of co-operative housing,¹⁴⁵ but is not replicated in any currently available English schemes that we are aware of. Capping the personal gain in this way does, of course, mean that the wealth created for the individual is more limited; and this limitation means that LCHO delivered in this way is unlikely to have mass appeal. It will also make it very difficult for the individual to "move up the housing ladder".

Legally, subsidy recapture is relatively straightforward – it simply requires the subsidy to be secured by a second mortgage. This is in contrast to the more complex provisions restricting onward sale that are necessary to achieve stock retention. The provider of the subsidy is sometimes described as a "silent partner",¹⁴⁶ but this description is not commonly used in relation to English LCHO schemes and would be misleading where (as may usually be the case) the subsidy provider retains some input over decisions affecting the use of the property. Although subsidy recapture provides the opportunity for the subsidy to be used to provide access to LCHO to another intermediate income household, there may be no obligation that the subsidy is reinvested in another LCHO property or (if it is) within the same community. Hence, subsidy recapture does not necessarily do anything to help promote a *mixed* sustainable community over the long term.

The goals of creating and maintaining mixed communities and preserving affordability over time are therefore best achieved if there is both stock retention and subsidy retention that caps the individual gain by linking it to an affordability measure. Only in this way is the subsidy both trapped within a specific unit and at a level that ensures that if house prices have risen more rapidly than wages (as is common) it can be used to enable future low and intermediate households to access LCHO.

D: Evaluation

covenants in the USA and it is far from clear that covenants would be the appropriate legal device in English law. For a discussion of different ways in which the resale price can be "controlled" see James J. Kelly, Jr., *Land Trusts that Conserve Communities*, 59 DEPAUL L. REV. 69, 81-82 (2009).

¹⁴⁵ Eg, A Consumer's Guide to Mutual Home Ownership, at 11-12.

¹⁴⁶ See, e.g., Pinnegar et al., *supra* note 44, at 27.

The table that follows provides a snapshot evaluation of the three routes to affordable home ownership discussed in this chapter, measured against the potential community and individual benefits that we have identified. The schemes within each route are assessed as having “achieved”, “not achieved” or achieving to a limited extent (“limited”) the particular forms of community and individual impact. This evaluation must be understood in conjunction with the accompanying text.

<i>Full Ownership</i>						
Scheme	Community impact			Individual impact		
	<u>Introduces income / tenure mix</u>	<u>Sustains tenure mix over time</u>	<u>Sustains opportunity for access to equity growth</u>	<u>Wealth</u>	<u>Mainstreaming</u>	<u>Security of place</u>
RTB/ RTA	Achieved for tenure	Achieved, but not guaranteed	Not achieved	Achieved	Achieved	Achieved
Cash incentive scheme	Not achieved	Not achieved	Not achieved	Achieved	Achieved	Achieved
<i>Part Ownership</i>						
Shared ownership	Achieved	Achieved	Achieved	Achieved, but with risk	Limited	Achieved, but with risk
Shared equity	Achieved	Limited	Achieved	Achieved	Limited	Achieved
<i>Co-operative Housing</i>						
Mutual home ownership	Limited to non-market mix	Achieved for non-market mix	Achieved	Limited	Not achieved	Limited

As can be seen, none of the models of affordable home ownership fully achieves all of the community and individual benefits. Inevitably there has to be a trade off. Of course, for the earlier schemes, particularly RTB, the community benefits we discuss were never part of the objective – it is only since the launch in 2003 of the Sustainable Communities Action Plan that the use of LCHO to deliver community benefits has been a policy goal.¹⁴⁷ The need for “trade-offs” between objectives was acknowledged in the work of the Low Cost Home Ownership Task Force.¹⁴⁸ Housing literature recognises that tensions exist in seeking to deliver both the individual and community benefits of home ownership.¹⁴⁹ Writing about affordable housing (not specifically affordable home ownership), Diamond discusses what he terms the “conflict of competing goods”.¹⁵⁰ This expression is used to capture the conflict between different housing goals that most people would agree are socially and morally desirable. Diamond explains that it is impossible to maximise each competing goal and therefore society is “put to the choice among incommensurables”.¹⁵¹ The tension between individual and community benefits can aptly be described as such a conflict¹⁵² and is reflected in attempts to balance the creation of mixed sustainable communities against delivering the benefits of home ownership to the individual.

¹⁴⁷ The RTB was incorporated into the sustainable communities programme: ODPM, *Sustainable Communities: Homes for All* (2005) at 9 para [1.22] states “Right to Buy will continue...to give people more choice and promote mixed communities”. A critical evaluation of its contribution to sustainable communities is provided by Jones & Murie *supra* note 21 chapter 8. It may further be suggested, in light of King’s analysis (*supra* note 21), that an attempt to incorporate the RTB into this wider objective is misplaced. On King’s account, the simplicity of the scheme in pursuing a single-minded policy goal, is integral to its success: *id* at 66-67. The limitations on the ability of the RTB to deliver mixed sustainable communities is further discussed in the text that follows.

¹⁴⁸ A HOME OF MY OWN, *supra* note 11, AT 9 ¶ 5.

¹⁴⁹ See, e.g., Pinnegar et al., *supra* note 44, at 11.

¹⁵⁰ Michael Diamond, “Affordable Housing and the Conflict of Competing Goods: A Policy Dilemma,” in *AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS* 1 (Nestor M. Davidson & Robin Paul Malloy eds., 2009).

¹⁵¹ *Id.* at 1.

¹⁵² Diamond refers to “the competition between the provision of decent, affordable shelter and the creation of wealth for homeowners”. *Id.* at 3. While this could cover the policy choice between an affordable rented home or individual home ownership, some of the issues that arise reflect the choice between individual and community benefits in the context purely of affordable home ownership. Hence, Diamond explains, “to the extent that society seeks to preserve an affordable housing unit for the long term, it must restrict the wealth that an owner can derive from the sale or rental of that property. To the extent the owner is able to demand full market value for the unit, it would likely be too expensive, either as a purchase or as a rental, for a low income resident”. *Id.*

Schemes providing full ownership are most successful in delivering the benefits of home ownership to the individual. Indeed, the position of purchasers under such schemes may be almost analogous to that of a traditional owner-occupier. The RTB/RTA operates on the basis of subsidy forgiveness, subject to the subsidy being clawed back in the event of a re-sale within an initial period. Greater variety may be found in the Cash Incentive Scheme where the terms of the grant are determined by the individual local authority. In relation to mainstreaming, the RTB/RTA is subject to the limitation, which may be significant, that the purchase is limited to the current rented home rather than offering a choice of property.¹⁵³ On the Cash Incentive Scheme choice may be restricted in terms of the size of property (based on number of bedrooms) that can be purchased.

As has been noted, it is now considered that the provision of grants and discounts that provides the basis of the RTB/RTA and Cash Incentive Scheme should be “limited to achieving wider strategic outcomes”. The Cash Incentive Scheme does not help to provide mixed communities as the recipient of the grant leaves their social rented home to buy as an owner-occupier on the open market. However, the scheme does free up the social rented home currently occupied by the recipient of the grant for a person in greater need of social rented housing and, as we have noted, this is one of the other wider objectives that has been associated with the provision of LCHO. The RTB introduces a bipartite tenure mix by bringing owner-occupation into a previously mono-tenure public rented community, though as it is existing tenants who buy their home there is no change in the income mix in the neighbourhood. Although the tenure mix may be sustained over time (the purchased unit remaining in the owner-occupation sector, subject to the right of pre-emption that is now built into RTB sales), it is not guaranteed: there are no controls on the number or percentage of properties within a particular estate that can be sold. Hence, an entire estate could move from a mono-tenure public rented community to a community of owner-occupiers. As the scheme is based on subsidy forgiveness the RTB does not sustain the opportunity for future low and intermediate income households to access equity growth. Further, unlike the Cash Incentive Scheme, the RTB does not free up or make available social housing for a person in greater need. Indeed, under the Conservative governments of the 1980s and 1990s Local Authorities were prevented from using the capital sums received through the RTB to re-invest in new housing.

The provision of wider community objectives alongside the individual benefits of home ownership has been an overt policy goal of part ownership schemes since the launch of the Sustainable Communities Action Programme. The schemes highlight the difficulty in balancing these objectives and illustrate the trade-offs that inevitably result. The

¹⁵³ See, e.g., Pinnegar et al., *supra* note 44, at 37-38.

introduction of part-ownership into a community creates a tenure / income mix, although the nature of that mix is dependent on the particular scheme or product concerned. As we have noted, both shared ownership and shared equity are marketed under HomeBuy. Different HomeBuy schemes or products may be targeted at particular groups of purchaser and / or particular properties.¹⁵⁴ Where property is purchased in a new build development,¹⁵⁵ the scheme may create a mix of affordable and open-market home ownership in a community that may otherwise have become exclusively open market ownership. Social HomeBuy, that enables social tenants to become part owners of their home, may introduce part ownership into a community of social renters.

Both part-ownership models (shared ownership and shared equity) sustain the opportunity for future intermediate income households to access equity growth but each achieves this differently and this difference impacts on the ability of schemes to sustain a tenure mix over time. The restrictions on sale and rights of pre-emption in the shared ownership lease provide the opportunity for the subsidy to be retained in the individual unit and, by doing so, enable the tenure mix to be sustained over time. In contrast, in current shared equity schemes the property will invariably be sold on the open market with the subsidy recaptured on sale as a proportion of the market value. Therefore, there is the opportunity for the subsidy to be used to provide access to equity growth for future households even though, as we have noted, there is no obligation that the subsidy will be reinvested and even if the subsidy is reinvested this may not take place within the same community. This point has particular resonance in the English context where housing demand is not evenly spread and market “hot-spots” (for example, in London and the South East) typically arise in areas where there is a lack of land available for future development. The loss of the housing unit by a sale on the open market means that shared equity, in contrast to shared ownership, is limited in its ability to sustain a tenure mix over time. Neither scheme is able to ensure full affordability for future generations; as mentioned earlier, if property prices have risen at a faster pace than earnings there may need to be a bigger subsidy to enable low earners to buy any share.

Although part ownership schemes provide many of the benefits of home ownership to the individual it is not the same thing as full – traditional - home ownership. As is the case with all LCHO schemes, the individual does not have complete freedom as to which property to buy; only certain stock can be bought through LCHO.¹⁵⁶ Shared ownership is likely to feel

¹⁵⁴ A list of current products can be found at HOMEBUY, <http://www.homebuy.co.uk> (last visited Feb. 21, 2011).

¹⁵⁵ Through either New Build HomeBuy (shared ownership) or HomeBuy Direct or FirstBuy (shared equity).

¹⁵⁶ Although free choice is not impossible: at one point there was ‘Open Market HomeBuy’ which did enable an individual to find a property on the open market and then purchase through the shared equity scheme.

less “mainstream” than shared equity, because of the fact that shared ownership is given effect through a lease. Long leases of houses do exist in the owner occupier market, but they are very much the exception¹⁵⁷ and there is generally no legal reason why a lease needs to be used. Research has demonstrated that long leaseholders experience confusion as to their status, which is summed up in Cole and Robinson’s description of them as “owners yet tenants”.¹⁵⁸ The use of a lease for shared ownership of a house therefore brings part ownership into an already problematic category. The terms of the lease impose rights of pre-emption on sale and exercise a degree of control over further borrowing that are not experienced by traditional owner-occupiers. The ambiguity of status has been commented on by shared owners: “...at the end of the day the property will never be yours. You can partly buy it but you have to pay rent on the rest of it”.¹⁵⁹ It has further been noted that shared ownership “...could be the worst of both worlds offering neither the security of social renting nor the freedom and independence of owner-occupation”.¹⁶⁰ In this respect, the limitations imposed on shared equity purchasers are less apparent but are still present. Purchasers under shared equity hold 100% of the legal title from the outset and are not subject to limitations on sale (other than the fact that sale triggers repayment of the subsidy). However, the property is still not fully “theirs” and the provider of the subsidy is not merely a “silent partner”¹⁶¹ but retains input into decisions affecting the use of the property, particularly for subsequent borrowing which requires the consent of the provider of the subsidised loan.

Both shared ownership and shared equity are capable of delivering the benefits of wealth creation and security of place to the individual. Shared equity appears better equipped to do so, however, because of the particular risks in the shared ownership lease powerfully illustrated by the *Richardson v Midland Heart* case.¹⁶² Part owners, like full home owners,

¹⁵⁷ Long leaseholds of house account for just 4% of owner-occupied housing stock. DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, ENGLISH HOUSING SURVEY LIVE TABLES TBL. S305: PERCENTAGE OF HOUSEHOLDS WHO OWN THEIR HOME FREEHOLD AND LEASEHOLD, <http://www.communities.gov.uk/housing/housingresearch/housingsurveys/surveyofenglishhousing/sehlivetables/owneroccupiersincluding/?view=Standard> (data from 2005-06).

¹⁵⁸ Cole & Robinson, *supra* note 66, at 595.

¹⁵⁹ HOUSING CORPORATION & CHARTERED INSTITUTE OF HOUSING, HOUSING ASPIRATIONS AND SHARED OWNERSHIP 10 (2008), <http://www.cih.org/publications/pftf/pdfs/Aspirations.pdf>.

¹⁶⁰ *Id.*

¹⁶¹ *Cf.* Pinnegar et al., *supra* note 44, at 27.

¹⁶² [2008] Landlord & Tenant Reports 31 (Eng.). The decision in the case is discussed *supra* note 67 and accompanying text.

have the opportunity for wealth creation through increases in property values (and the corresponding risk of falling values). Equally, part owners are vulnerable to loss of their home if they are unable to maintain payments on a mortgage used to purchase their “share” of the home (while shared equity purchasers must also pay interest on the subsidised loan). However, where possession proceedings arise following mortgage default, courts at least have discretion to postpone possession¹⁶³ and, if the home is lost through mortgage possession, the part owner, like the full owner, is entitled to any financial equity that remains following the discharge of the outstanding debt and costs. The shared owner, however, is vulnerable to the additional risk of possession proceedings for non-payment of *rent*. Possession then may be mandatory, not discretionary, and the financial consequences are Draconian - leaving the shared owner with no legal entitlement to the return of their investment or any uplift in the value of the property. It should be acknowledged however that this particular risk could be removed by ensuring that tenants of registered providers of social housing are not subject to Ground 8.¹⁶⁴

In light of the current policy objectives, limitations on the ability of part ownership to deliver the benefits of home ownership to the individual can, to an extent, be explained as representing a trade-off with benefits provided to the community. Hence, for example, the right of pre-emption in a shared ownership lease that detracts from the individual’s benefits of home ownership nevertheless helps sustain a tenure / income mix over time. But it would be wrong to attribute all compromises to such a trade-off. It does not explain, for example, the imposition of additional risks through reliance on shared ownership as the method of delivery when other legal models (shared equity and co-ownership trusts) are available. More generally, in a social and political context in which expectations are built around the “dream” of home ownership, part-ownership inherently represents a compromise for those for whom the mainstream of full ownership remains an unaffordable aspiration. It is unsurprising to find that not all limitations are attributable to balancing individual and community benefits when it is recalled that the legal models of shared ownership and shared equity themselves pre-date the recognition of wider benefits to the community as an explicit policy goal.

¹⁶³ Administration of Justice Act, 1970, c.31, §36 (Eng.).

¹⁶⁴ The Law Commission recommended the abolition of Ground 8 in the social rented sector. LAW COMMISSION, REPORT NO. 297, 1 RENTING HOMES: THE FINAL REPORT 20-21 ¶¶ 1.43 – 1.50 (2006), *available at* http://www.lawcom.gov.uk/docs/lc297_vol1.pdf. Even in the absence of implementation of the Report, the same result could be achieved through the terms of the shared ownership lease.

MHO has been developed as a means of “couching aspirations for individual assets in a community safety net”.¹⁶⁵ Its ethos lies firmly in the collective.¹⁶⁶ The tenure mix achieved is limited to the extent that schemes are based exclusively on the provision of affordable housing (both rented and owner-occupied) to the exclusion of private or market-based housing. The mix is sustained over time as assignments of leases through which individuals occupy their home take place through the co-operative.¹⁶⁷ This is to ensure that units are not sold at a premium.¹⁶⁸ Ensuring the retention of the subsidy to help future low and intermediate households lies at the heart of the scheme. The subsidy (in the form of the free or low cost provision of the land) is held in the community land trust and does not fall into the ownership of the individual occupier. Indeed, the community land trust is “designed to extract the land from the market and retain it as a public asset”.¹⁶⁹ There are significant limitations on the ability of MHO to deliver the benefits of ownership to the individual. Wealth creation (through the purchase of equity shares) may be capped, for example by being linked to the regional average wage index rather than house prices. Where average wages do not keep pace with property values this may mean it becomes unaffordable for the individual to leave the co-operative. The extent to which security of place is achieved will depend on terms- and length - of the tenancy used, but one of the models being proposed at the moment provides a 20-year term. MHO does not represent the mainstream, or purport to do so. Instead, it is promoted as a means of enabling people to achieve some of the aspirations they have for home ownership while representing “an option of choice for some people because of its shared sense of belonging, identity in communities and mutual support structures”.¹⁷⁰ For the individual, the difference between traditional home ownership, or even part ownership, and MHO, is reflected most potently in two respects. First, in the de-coupling of the wealth creation function of home ownership from property values and secondly in the fact that what is owned is not the home but shares. With its emphasis on the community, the attraction of co-operative housing lies in a

¹⁶⁵ BRINGING DEMOCRACY HOME, *supra* note 102, at 6.

¹⁶⁶ See, e.g., *id.* at 25 ¶ 3.37 “Co-operative and mutual housing is particularly relevant within a wider changing cultural shift from individualism to collective, communitarian, ethical and environmental approaches ... It may be that co-operative and mutual housing sits alongside trends such as car sharing, recycling, use of low energy appliances and local produce and positive responses to the Co-operative Bank’s and Co-operative Group’s ethical policies.”

¹⁶⁷ Conaty et al *supra* 114 at 66.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 4.

¹⁷⁰ BRINGING DEMOCRACY HOME, *supra* note 102, at 27(6).

lifestyle choice. It may represent, in essence, a positive decision not to enter the mainstream housing market.

Conclusion

In this chapter we have evaluated the legal models of affordable home ownership in England against their ability to provide both the benefits of ownership to the individual and a wider community benefit represented by the creation of sustainable mixed communities. As seen, there is an inevitable trade-off between the maximisation of benefits to the individual and benefit to the community. The result is a suite of products that are much less attractive to the individual than the earlier RTB. We have also seen that not all of the compromises that are made can be attributed to that trade-off. The choice of legal model used to deliver LCHO also impacts on the experience of the purchaser. The common difficulty for all forms of LCHO is that individuals' aspirations for ownership are constructed around traditional owner-occupation. In their different ways, and to different degrees, by departing from those aspirations, each of the legal models we have examined ultimately challenges established understandings of what "ownership" really means.