

## LOVE OR MONEY? MORTGAGES AND THE HOME

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### I. INTRODUCTION

**T**HE HOME IS A KEY SOCIAL INSTITUTION IN ANY MODERN SOCIETY and is central to all of our lives. However, it also has an important financial aspect in that it represents an investment opportunity for banks and other financial institutions. These two aspects of the home clearly have the potential to clash in cases where there is a dispute between a mortgagee and a beneficial co-owner, and this article will show how in such disputes the law almost always favours the mortgagee.

The article will begin by showing how the law does this in the context of priority disputes and remedies. It will then go on to argue that this position is not justified, and that the social value of the home<sup>1</sup> should be introduced to redress the balance in favour of the co-owner. What is meant by the ‘social value’ of the home will be explored further below, but for present purposes it is enough to say that relevant considerations are security, stability and fostering a family environment. It will conclude by saying that although such an approach would be problematic in the law on priorities, there is ample room in the law on remedies to take account of social considerations.

### II. PRIORITY DISPUTES: THE GENERAL LAW

There are a number of mechanisms under the general law which appear to favour the mortgagee over any beneficial co-owners. The first of these can be seen in the courts’ consideration of the

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<sup>1</sup> What is meant by the ‘social value’ of the home will be explored further below, but for present purposes it is enough to say that relevant considerations are security, stability and fostering a family environment.

‘first in time’ rule. In *Abbey National v Cann* the House of Lords rejected the argument that there was a *scintilla temporis* between the completion of the transfer of title and the completion of the charge where a mortgage was used to acquire the property.<sup>2</sup> Instead, the court held that this was one indivisible transaction. According to Lord Oliver, the court should focus on the “reality... that, in the vast majority of cases, the acquisition of the legal estate and the charge are not only precisely simultaneous but indissolubly bound together”.<sup>3</sup> This passage from Lord Oliver’s speech is fairly representative of the preference of the courts to focus on the financial reality of the transaction, rather than choosing to follow a more abstract approach which could have seen Mrs Cann being given priority based on the fact that the primary purpose of the property was arguably social rather than financial.

*Cann* was later supplemented by the decision of the Supreme Court in *Scott v Southern Pacific Mortgages*.<sup>4</sup> Here the court was faced with the question of whether, in the context of a sale and leaseback scheme funded by a mortgage from a third party, it was possible for a purchaser to grant proprietary rights before completion of the transfer. Although it was acknowledged that purchasers obtain “rights which are akin to ownership”<sup>5</sup> it was held that such rights are only property rights in a limited sense; equitable rights carved out of the estate contract were only capable of becoming proprietary when fed by the purchaser’s acquisition of the legal estate. *Cann* was then applied with the result that any such interests would always be subject to the mortgage.

Hence, as in *Cann*, the court preferred to take a strict ‘reality’ based approach rather than considering the situation through a social lens. Perhaps of particular interest in this regard are the *obiter* disagreements between Lords Collins and Sumption on the one hand, and Baroness Hale and Lords Wilson and Reed on the other. According to the latter group, it is not necessarily the case that conveyance and mortgage should always be treated as one indivisible transaction; Baroness Hale puts forward a number of circumstances in which she suggests that *Cann* should not be applied.<sup>6</sup> As Televantos and Maniscalco point out, this suggests an approach in which the court is able to take into account all of the circumstances in each case rather than simply applying an all or nothing rule.<sup>7</sup> Such judicial discretion flies in the face of the orthodox interpretation of *Cann* as supported by Lord Collins and Sumption which suggests that the transaction in such

<sup>2</sup> *Abbey National Building Society v Cann* [1991] 1 AC 56, [1990] 2 WLR 832.

<sup>3</sup> *ibid* AC 92.

<sup>4</sup> *Southern Pacific Mortgages Ltd v Scott* [2014] UKSC 52, [2015] AC 385.

<sup>5</sup> *ibid* AC [62] (Lord Collins JSC).

<sup>6</sup> For example, fraud and where the bank did not carry out the appropriate checks: see *ibid* [116]–[118] and [122].

<sup>7</sup> Andreas Televantos and Lorenzo Maniscalco [2015] CLJ 27, 29–30.

scenarios will always be indivisible. Further, as both groups acknowledge this goes to the deeper question of how far interests on the register should be protected. The second *obiter* issue on which the two groups disagreed was whether, if it was possible to carve a property right out of an estate contract, *Cann* meant that the contract, mortgage and conveyance were all part of one indivisible transaction. Again, Baroness Hale and Lords Wilson and Reed suggested that a discretionary approach which depended on the facts should be taken<sup>8</sup> whilst Lords Collins and Sumption opined that an indivisible approach should be taken.<sup>9</sup> Whilst the difference in opinion is ostensibly based on technical issues such as timing and the relevance of fraud, it will be shown below how Baroness Hale's approach could allow the court to take into account social considerations. Doing so would have profound and undesirable effects on the law in this area.

The second way in which the courts can be seen to favour mortgagees is through findings that the beneficial co-owner had consented to the mortgage. On many occasions such consent will be straightforward, however in situations where the beneficial co-owner is not aware of the mortgage judges have been willing to nevertheless find such consent. Perhaps the least controversial case which deals with this issue is *Cann*. Although *obiter*, Lord Oliver supported the view of the Court of Appeal in arguing that as Mrs Cann knew the net proceeds from the sale of her previous house would be insufficient to cover the purchase of the second property, she would be unable to assert priority over the mortgage even if she was successful on the 'first in time' issue.<sup>10</sup>

This point in *Cann* has been followed recently in *Credit and Mercantile v Kaymuu*.<sup>11</sup> In *Kaymuu* one individual purchased a property on behalf of another, but, without the latter's permission, executed a mortgage over the property and disappeared with the proceeds. The Court of Appeal held that as the mortgagee had not been made aware of any restrictions on the authority of the person it was dealing with, the mortgage did in fact have priority. However, *Kaymuu* has proved controversial amongst academic commentators. Dixon<sup>12</sup> points out that unlike in *Cann* and other cases on this issue<sup>13</sup> the beneficial co-owner was not aware, and had no reason to be aware, that a mortgage was intended or needed. Hence, reliance on the 'Brockleby principle' results in treating

<sup>8</sup> *Southern Pacific* (n 4) [116].

<sup>9</sup> *ibid* [85].

<sup>10</sup> *Cann* (n 2) 93 (Lord Oliver); see also the Court of Appeal decision of *Cann: Abbey National Building Society v Cann* (1989) 57 P & CR 381 (CA) 392 (Dillon LJ).

<sup>11</sup> *Credit and Mercantile v Kaymuu* [2015] EWCA Civ 655, [2015] 2 P & CR 15 (CA).

<sup>12</sup> Martin Dixon, 'The Boland requiem' [2015] Conv 285.

<sup>13</sup> See *Paddington Building Society v Mendelsohn* (1985) 50 P & CR 244.

the trust relationship as one of agency, undermining the beneficiary's property right in the process. It also goes some way to re-introducing the old doctrine of notice under s 29 of the Land Registration Act 1925 (LRA 1925), the latter of which will be explored further later. What all of this goes to show is the extent of the judiciary's willingness to manipulate and arguably distort the modern law to protect the mortgagee over the beneficiary.

Overreaching is a further way in which the mortgagee can gain priority. The doctrine, governed mainly by ss 2 and 27 Law of Property Act 1925 (LPA 1925), is one of the primary ways in which the trust structure intentionally benefits disponees. In *City of London Building Society v Flegg* the House of Lords interpreted the doctrine to mean that the beneficiaries can be overreached even if they are in actual occupation.<sup>14</sup> Such a result makes sense; as Lord Oliver pointed out once the property right is overreached there is nothing to which the actual occupation can be attached.<sup>15</sup> *State Bank of India v Sood* extended the logic of the doctrine to cases where no capital money had been paid if no money was payable under the mortgage agreement.<sup>16</sup> So far this is straightforward, however, two other cases show the same judicial willingness to manipulate the law that has been seen above.

In *Birmingham Midshires Mortgage Service v Sabherwal* the Court of Appeal was faced with a situation in which a mother attempted to claim priority over a mortgage executed by her sons on the basis of a proprietary estoppel claim.<sup>17</sup> At paragraph 31, Walker LJ dismissed the mother's claim, suggesting that in the "family situation, the concepts of trust and equitable estoppel are almost interchangeable, and both are affected in the same way by the statutory mechanism of overreaching." In *Mortgage Express v Lambert* the court held that although the appellant had the right to set aside an unconscionable bargain, which was a proprietary interest, it was also overreached.<sup>18</sup> It may seem natural that 'mere equities', which are arguably weaker interests, should be just as vulnerable to overreaching as the interests of co-owners. However, Televantos, writing on *Lambert* points out that the kind of rights in these two cases are not subject to the terms of the trust as they always had priority.<sup>19</sup> Hence, in the absence of the criteria in s 2(2) LPA 1925 being fulfilled, it is difficult to see how the court in these cases can reach the conclusion that the mortgagee has priority. In *Lambert* the court suggests an alternative route through s 26 of the Land

<sup>14</sup> *City of London Building Society v Flegg* [1988] AC 54, [1987] 2 WLR 1266.

<sup>15</sup> *ibid* AC 91.

<sup>16</sup> *State Bank of India v Sood* [1997] Ch 276, [1997] 2 WLR 421.

<sup>17</sup> *Birmingham Midshires Mortgage Service v Sabherwal* (2000) 80 P & CR 256.

<sup>18</sup> *Mortgage Express v Lambert* [2016] EWCA Civ 555, [2016] 3 WLR 1582.

<sup>19</sup> Andreas Televantos, 'Unconscionable bargains, overreaching and overriding interests' [2016] CLJ 458.

Registration Act 1925 (LRA 2002); allowing A (the beneficiary) to assert her interest as against C (the mortgagee) would mean that, contrary to s 26, the validity of C's title would be questioned.<sup>20</sup> This means that whenever there is a voidable transaction, C automatically has priority. Yet as Televantos points out, this approach would go some way to undermining the protocol set out in *RBS v Etridge (No 2)* in cases of undue influence, and, more generally, s 29 and Schedule 3 LRA 2002 (see Part III below).<sup>21</sup> Televantos goes on to suggest another way in which the court could find for the bank, however for present purposes the important thing to note is the court's willingness to go as far as it does in protecting the mortgagee.

Before moving on to examining the statutory regime, we should briefly take note of subrogation. The doctrine means that even if Mortgagee A does not have priority, it may be able to claim priority by claiming Mortgagee B's mortgage. In order to do this, a number of conditions must be fulfilled, namely: (a) B's mortgage has priority; (b) A has bargained for a mortgage with priority; (c) A does not receive such a mortgage; and (d) the proceeds from the mortgage are used to pay off a mortgage with priority.<sup>22</sup> Such priority only extends up to the amount of the original loan paid off by the moneys advanced,<sup>23</sup> however it will still mean that the beneficial co-owner will not be able to resist the mortgagee's priority. The author knows of no cases which have controversially extended the doctrine further in the mortgagee's favour. Nevertheless, if later mortgagees can show that they should be subrogated to the position of the original mortgagee, they will also benefit from the rules discussed above. They will therefore be able to take priority over the beneficiary with relative ease.

### III. THE EFFECT OF THE LAND REGISTRATION ACT 2002

The reader may notice a significant absence from the foregoing discussion, namely the Land Registration Act 2002. The act works alongside the common law rules outlined above, however in many cases it renders their application unnecessary as the legislation heavily favours the mortgagee. This can be seen most clearly in s 29 as the disponee takes priority over unregistered interests if: (a) there is a registrable disposition; (b) the estate or charge is registered; and (c) the disposition is made for valuable consideration. Hence, as long as the mortgagee fulfils these relatively straightforward requirements, it will have priority over the beneficial co-owner.

<sup>20</sup> *Lambert* (n 18) [27].

<sup>21</sup> *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773.

<sup>22</sup> See, eg, *Ghana Commercial Bank v Chandiram* [1960] AC 732, [1960] 3 WLR 328.

<sup>23</sup> *Cheltenham & Gloucester v Appleyard* [2004] EWCA Civ 291 [43].

A notable exception to this is the category of overriding interests. The protection this category provides is limited, but nevertheless is controversial as it seems to run counter to the rest of the law. Schedule 3 of the LRA 2002 outlines a number of situations in which the registered interests of the disponee can be overridden by unregistered interests. Most significant for present purposes is paragraph 2 which concerns the interests of persons in actual occupation of the property in question. Such protection for occupiers is plainly desirable; the Law Commission point out that many will not be aware of the need to register their interest in the land, and believe that their occupation provides the necessary protection from disponees.<sup>24</sup> Hence, failing to protect such occupiers would ignore the reality of modern property ownership and create the real risk of homelessness. There are, however, two caveats to this: if the interest holder failed to disclose her interest when asked, or if occupation would not have been obvious on a reasonably careful inspection of the land at the time of disposition then it is the disponee's interest which takes priority.

There have been two important developments in relation to this provision. In *Williams & Glyn's Bank v Boland* (dealt with under the LRA 1925) the House of Lords held that it was possible for the non-registered interests of a spouse to be protected as overriding interests.<sup>25</sup> The decision was welcomed by some commentators who believed that the case could be seen as a victory for women's rights, and the rights of beneficial co-owners more generally. We should, however, be careful to characterise *Boland* in this way. Conaglen points out that the outcome in *Boland* is the consequence of a natural reading of the statute. Indeed, there was little discussion in the House of Lords of the wider social considerations.<sup>26</sup> Lord Wilberforce, for example, stated that "[t]he solution must be derived from a consideration in the light of current social conditions of the Land Registration Act 1925 and other property statutes".<sup>27</sup> Lord Scarman did go slightly further than this in stating that the courts must interpret the statute in a way consistent with social justice if possible,<sup>28</sup> but ultimately said that "the ordinary meaning of the words used by Parliament meets the needs of social justice".<sup>29</sup> Therefore, whilst this decision does seem to favour interest holders such as co-owners, it would be wrong to see it as a deliberate judicial attempt to steer the law to

<sup>24</sup> Law Commission, *Land Registration for the Twenty-First Century a Conveyancing Revolution* (Law Com No 254, 2001) para 5.61

<sup>25</sup> *Williams & Glyn's Bank v Boland* [1981] AC 487, [1980] 3 WLR 138.

<sup>26</sup> Matthew Conaglen, 'Mortgagee Powers Rhetoric' (2006) 69 MLR 583.

<sup>27</sup> *Boland* (n 25) AC 502.

<sup>28</sup> *ibid* 510.

<sup>29</sup> *ibid*.

favour such individuals. The second development to note is the evolution in the definition of ‘actual occupation’. Before the 2002 act, cases such as *Cann* and *Boland* confirmed that the question of occupation was a factual and objective one. There has, however, recently been a departure from this approach. *Link Lending v Bustard* concerned the issue of whether a woman who was in a psychiatric hospital and only visited the land in question once a week was in ‘actual occupation’.<sup>30</sup> The court held that despite the fact that she was not at the property at the time of the disposition, she was still in ‘actual occupation’ for the purposes of Schedule 3, paragraph 2. Mummery LJ claimed that it would be wrong to simply lay down a single test and the court should instead look at a variety of factors including the ‘occupier’s’ intentions, the reason for her absence and her personal circumstances. The objective question of the person’s presence in the property was reduced to just one of a number of considerations. The full ramifications of such an approach can be seen in *Thomas v Clydesdale Bank* where the judge held that with regard to Schedule 3, paragraph 2(c), it is only the visible aspects of the interest-holder’s actual occupation which need be reasonably obvious.<sup>31</sup> Consequently where a claim of actual occupation rests on subjective factors, a physical inspection of the land in question may not be enough for the mortgagee to protect itself.

The desirability of this interpretation will be considered further below, however it is safe to say that it has proved controversial. Firstly, it significantly undermines the balance drawn by Parliament with regard to the interests of the occupier and the mortgagee. Secondly, critics such as Bevan point out that the approach runs counter to the general move towards a comprehensive register by undermining s 29 and sitting in tension with the more restrictive approach taken to overriding interests.<sup>32</sup> Hence, unlike the *Boland* decision, these cases do suggest a clear judicial rejection of the underlying policy preference in favour of disponees and mortgagees. The consequences of this rejection will be discussed further below.

#### IV. REMEDIES: THE POWER OF SALE AND THE STATUTORY REGIMES

Whether or not the mortgagee has priority over the co-owner, there are a number of possible remedies open to it with the most powerful being available only to a mortgagee with priority. The most obvious is the power of sale governed by ss 101, 103, and 104 of the LPA 1925. Although there a number of requirements that must be met, no court order is needed and the power may be

<sup>30</sup> *Link Lending v Bustard* [2010] EWCA Civ 424, [2010] 2 P & CR DG15.

<sup>31</sup> *Thomas v Clydesdale Bank* [2010] EWHC 2755 (QB) [38].

<sup>32</sup> Chris Bevan, ‘Overriding and over-extended? Actual occupation: a call to orthodoxy’ [2016] Conv 104.

exercised without the mortgagee gaining possession of the property (*Horsham Properties Group v Clark*).<sup>33</sup> In practice, however, the mortgagee will seek possession, not least because it is very difficult to sell a property with people still occupying it. Unlike the power of possession, the right to sell does not require a court order and there are no requirements the mortgagee must fulfil; if the mortgagee wishes to take possession as soon as the mortgage agreement is signed it is entitled to do so.<sup>34</sup> There are, however, three limits to the right to possession. The first comes from s 6(1) of the Criminal Law Act 1977 which makes it an offence to use or threaten violence for the purposes of entering a property when there is someone inside who is resisting entry. The mortgagee will consequently often seek a court order to avoid the risk of criminal liability. If a court order is sought, s 36 Administration of Justice Act 1970 gives the court the power to delay possession proceedings if the property is a dwelling house. Yet, this limitation can be easily circumvented by simply taking possession of the property by peaceful re-entry.<sup>35</sup> Finally, the court has an inherent jurisdiction to stay possession proceedings, yet in practice this jurisdiction is only exercised where the debt can be fully discharged within a very short period.<sup>36</sup>

As mentioned above, even if it is the case that the beneficial co-owner has priority, there are still a number of remedies open to the mortgagee. We must distinguish between two scenarios here: where the mortgagor is bankrupt, and where she is not bankrupt. Where the court is faced with the latter scenario, it will apply the Trusts of Land and Appointment of Trustees Act 1996 (TLATA). The mortgagee may make an application for the court to order a sale under s 14 of the act, and in deciding whether to accede to the application the court will consider a range of factors including those outlined in s 15. An order for sale is not inevitable; in *Mortgage Corporation v Shaire*, Neuberger J (as he then was) was clear in stating that the enacting of TLATA had changed the law so that the wishes of the person wanting a sale would not necessarily prevail.<sup>37</sup> Instead, he was willing to be flexible, stating that if the occupier is able to pay the bank a proper sum then the sale should be refused. This approach clearly pays considerably more attention to the interests of the occupier than other areas discussed above. However Neuberger J's flexibility cannot always be found in other judgments. In *Bank of Ireland Home Mortgages v Bell* for example, the court placed far

<sup>33</sup> *Horsham Properties Group v Clark* [2008] EWHC 2327 (Ch), [2009] 1 WLR 1255.

<sup>34</sup> *Four-Maids Ltd v Dudley Marshall (Properties)* [1957] Ch 317, 320. The mortgagee will, however become liable to the mortgagor for any rents and profits received, as well as wilful default. See *White v City of London Brewery Co* (189) 42 ChD 237, 246

<sup>35</sup> *Ropaigealach v Barclays Bank* [2000] QB 263, [1999] 3 WLR 17.

<sup>36</sup> See, eg, *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883, 912.

<sup>37</sup> *Mortgage Corporation v Shaire* [2001] Ch 743, [2001] 3 WLR 639.



more weight on the injustice that could be inflicted on the mortgagee if a sale was refused than on the consequences for the occupier.<sup>38</sup> Further, the s 15 factors were interpreted strictly, with the result that the fact that the original purpose of the acquisition was to provide a family home was no longer relevant when the husband had left it.<sup>39</sup> Despite Neuberger J's judgment in *Shaire*, the trend under TLATA is still to order sale.

If the mortgagor is insolvent, it is s 335A of the Insolvency Act 1986 which will apply. Subsection (2) directs the court to have regard to the interests of the bankrupt's spouse or civil partner (who will often, but not always, be a beneficial co-owner), however in (3) the act goes on to state that after one year the interests of the creditor are presumed to outweigh all other considerations unless the circumstances are exceptional. Hence, the mortgagee's preferred outcome will almost always be granted. It is worth noting that even if the court does order a sale under TLATA or the Insolvency Act, the beneficial co-owner still has priority over the proceeds. However seeing as, in most cases, the co-owner will not want a sale, the court is nevertheless favouring the interests and priorities of the mortgagee.

## V. REFORM? FAVOURING THE CO-OWNER

We can see that, in the majority of cases, the mortgagee will get its preferred outcome one way or another. This section will argue that this approach fails to take account of the co-owner's interests, and that the law could be reformed to result in a more balanced approach. As many of the cases mentioned came after *Boland*, some commentators have argued that these cases amount to a deliberate retreat from *Boland* and a policy decision from the judiciary to favour the mortgagee over the beneficial co-owner. First appearances may give this impression, however, we should be cautious in finding such an active and policy driven judiciary. Conaglen points out that the so-called retreat from *Boland* was, like *Boland* itself, nothing more than an application of ordinary land law rules and principles.<sup>40</sup> Indeed, the possibility of these rules being applied was expressly recognised at various stages in *Boland*. It is true that in some of the cases that have been explored certain doctrines have been extended beyond their initial rationale as a result of the focus on the financial aspect of property. The result has been the mortgagee's interests being protected in the majority of cases. Nevertheless, we can label these cases as problematic or even incorrect without

<sup>38</sup> *Bank of Ireland Home Mortgages v Bell* [2001] 2 All ER (Comm) 920.

<sup>39</sup> *ibid* [27].

<sup>40</sup> *Boland* (n 25).

questioning the importance or validity of the initial principle which such doctrines sought to protect; the security of transactions remains vitally important in this area, even if the doctrines that have sought to protect it have sometimes been applied inappropriately.

Yet we are still faced with the question of whether the courts should interpret or alter the rules in a way which pays more attention to the social importance of property. A number of commentators<sup>41</sup> have called for the law to recognise that whilst lending institutions view property in purely financial terms, many individuals view property in mostly, if not entirely, social terms. When buying a house, for example, most will think of it as a place of security and perhaps somewhere to start a family rather than as a financial asset. We can already see this approach being taken in relation to the question of actual occupation, as a person's subjective intentions and continuing emotional connection to the property are regarded as just as important as the objective fact of physical occupation. Reform to the law could take place in the area of priority disputes or remedies, or both. I shall examine each option in turn.

Reforming the priorities rules would probably be the most dramatic change in favour of co-owners. A simple way to do this would be to follow the approach in the case law on overriding interests. For example, the doctrine of overreaching could be reformed so that an interest is only overreachable where the interest holder is not in occupation of the property, or where the property has no social significance. Likewise, the *Cann* rule could be reformed so that it does not apply where the property has a primarily social purpose. It is plainly possible to reform most if not all of the priority rules in this way, however whether it is desirable to do so is a separate issue. It is argued that such reform would cause great confusion and uncertainty in the mortgage market, as well as having repercussions on wider trusts law. It is consequently argued that it should not be carried out.

This potential for uncertainty can be seen by examining two areas where the courts have chosen to take into account the social value of property. The first is the case law on Schedule 3, paragraph 2 as mentioned at Part III above. As a consequence of those cases, potential mortgagees may have to carry out an extremely in depth examination of both the property and the mortgagor's family and social circumstances. There is therefore a real possibility that the cost of carrying out such an examination may impact on a mortgagee's willingness to lend money. Moreover, if the beneficial co-owner is absent from the property for an extended period of time, it may actually be impossible for the mortgagee to fully protect itself. The current consequences of this approach is

<sup>41</sup> See, eg, Martin Dixon, 'Mortgage Default and Mortgagees' Remedies' [2008] Conv 474.

currently limited by the relatively small number of cases in which actual occupation is an issue, however if extended to cover all of the priority rules, there could be a considerable impact on lending practices.

Potential issues can also be seen when reflecting on *Stack v Dowden*.<sup>42</sup> The view taken here and developed in subsequent cases that domestic property should be treated differently from commercial property seems normatively desirable; however, it is inherently difficult to apply. As Hopkins points out, this is because there is no clear division between the commercial and the domestic.<sup>43</sup> A number of cases after *Stack* have had to grapple with this issue, with judges having to draw distinctions so fine that they verge on arbitrary.<sup>44</sup> The reason for this is very simple: people's lives are complicated and they use their land in a variety of ways that defy neat categorisation. Indeed, the Law Commission had to abandon its attempt to define the domestic context. Considering this, it may prove practically impossible to reform the law, at least in relation to priorities, along financial or social lines in a way which will be fair to all parties. Whilst the cases discussed above show that there sometimes is a clear distinction between the two, the existence of such borderline cases risks the law falling into a state of confusion and arbitrariness. Further, no matter how much the parties attempt to discover their true position, it is entirely possible that they might enter into a priority dispute without knowing whether the court will apply to 'financial' or 'social' rules. The presence of any judicial discretion would only aggravate this further. This kind of uncertainty as to the type of interest each party has would have serious implications for the mortgage market.

It may instead be more appropriate to consider how we could reform the rights and remedies of each party as the presence of judicial discretion here is not as objectionable. We saw above how the social aspect of property is sometimes taken into account in the remedial legislation, and it is argued that there is scope for further reform. When the mortgagee has priority, the main protection for the beneficial owner when the property is a dwelling house is found in AJA 1970 s 36, yet there are a number of problems with it. Firstly, as outlined above, the protection offered by s 36 can easily be circumvented by taking peaceful possession and so obviating the need for a court order;<sup>45</sup> moreover, it is possible for the mortgagee to simply sell the property under s 101 LPA 1925

<sup>42</sup> *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

<sup>43</sup> Nicholas Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' [2011] *Legal Studies* 175.

<sup>44</sup> See, eg, *Wodzicki v Wodzicki* [2017] EWCA Civ 95, [2017] 2 P & CR DG1 and *Geary v Rankine* [2012] EWCA Civ 555.

<sup>45</sup> See *Ropaigealach* (n 35).

without seeking possession.<sup>46</sup> To deal with this issue, Dixon puts forward a number of potential solutions.<sup>47</sup> To deal with the possession issue, Dixon suggests making possession a remedy rather than a right, and so effectively reversing *Ropaigealach*. Connected to this is the entitlement of the borrower to resist a possession claim if she can show a genuine intention to sell the property herself supported by prescribed steps. This would give the borrower control over disposal of the property and so prevent other occupants and co-owners being removed in a manner inconvenient for them. Dixon's suggestions have much to commend them, however some argue that they do not go far enough. Whilst ensuring the effectiveness of AJA s 36 indirectly benefits the beneficial co-owner, commentators such as Fox<sup>48</sup> and Whitehouse<sup>49</sup> point out that the focus remains on financial rather than 'home oriented' factors. If we are to take the concept of the family home seriously, the court should be willing to consider the social impact when exercising its discretion. That is not to say that social factors should allow occupants to remain in the property indefinitely, but it seems perverse to suggest that they are wholly irrelevant in deciding whether to delay a possession order. In relation to the right to sell under s 101 of the LPA, Dixon suggests keeping this right but placing the purchaser under the same obligations as the mortgagee would have been under in relation to possession.

S 335a of the Insolvency Act appears to make some progress in this direction, by explicitly referring to the needs of the bankrupt's spouse or civil partner, and any children. Nevertheless, there is still considerable scope for reform. Fox points out that the discretion is centred on the concept of the 'family' home, ignoring the variety of different ways in which people cohabit in modern Britain.<sup>50</sup> The provision also opens up the possibility that where the spouse and beneficial co-owner are different people, only the interests and needs of the former will be considered despite the fact that it is only the latter whose property is being affected. It therefore seems clear that the law focuses on the relationship between individuals occupying the property rather than between the individual and the property itself. Indeed, Fox points out that whilst family may be an important social connection to the home, it may not always be so, and it is not the only non-financial connection people have with their homes. Whether living alone, with friends or with family, a home provides a sense of stability and security, and there is no reason to privilege the

<sup>46</sup> See *Horsham Properties Group* (n 30).

<sup>47</sup> Dixon (n 41).

<sup>48</sup> Lorna Fox, 'Creditors and the Concept of "Family Home": A Functional Analysis' (2005) 25(2) *Legal Studies* 201.

<sup>49</sup> Lisa Whitehouse, 'The Mortgage Arrears Pre-Action Protocol: An Opportunity Lost' (2009) 72(5) *MLR* 793.

<sup>50</sup> See Fox (n 48).

family situation to the exclusion of all others. In both s 335a of the Insolvency Act and AJA s 36 cases it would be preferable for the courts to undertake a detailed examination of the significance the property plays in the life of the co-owner rather than relying on outdated and lazy categorisations.

The enactment of TLATA went some way towards introducing this individualistic approach into the law. S 15 expressly considers the social significance of the property, whilst the replacement of the trust of sale with a trust of land is surely a recognition that the home is different to other types of property. However despite this, the trend in the case law has been to grant sale. Dixon suggests that this may in part be due to the failure to recognise that the equitable co-owner's priority is being forcibly converted from a possessory interest to a monetary interest.<sup>51</sup> Given the increasingly recognised social aspect of the home, it cannot seriously be contended the two interests are the same. It would consequently make sense to take this difference in the character of the interest into account when deciding whether to order a sale.

Opponents of this reform may oppose it on the basis that, like reform to the priorities rules, it would cause uncertainty and instability in the mortgage market. However it is argued that such criticisms have no force in the remedies context. In relation to AJA s 36 and the Insolvency Act s 335a there is no question that the mortgagee will be able to realise its security, but the process suggested would be more sensitive to the social impact that leaving a property can have. The mortgagee can therefore be sure of its rights. It is true that in TLATA cases the mortgagee may not be able to realise its security, especially if the co-owners social interest in the property is taken into account. Yet this is not necessarily problematic. Dixon suggests that the courts should examine exactly why the mortgagee doesn't have priority and needs to use TLATA; if it is because of the mortgagee's own carelessness then it is difficult to see why the law should intervene to save it. Far from causing uncertainty, this method would encourage more careful lending practices and incentivise information gathering. Lenders would therefore be more rather than less confident of their rights.

<sup>51</sup> Martin Dixon, 'To Sell or Not to Sell: That is the Question—The Irony of the Trusts of Land and Appointment of Trustees Act 1996' [2011] CLJ 579.

## **VI. CONCLUSION**

This article has shown that in the majority of cases involving a dispute between a mortgagee and a beneficial co-owner, it will be the mortgagee who wins. This is largely because of a failure of the law on priorities and the law on remedies to fully appreciate the social significance that property may have. It has been argued that whilst such considerations can and should be made a part of the rules on remedies, it would be a mistake to reform the current priority rules due to the uncertainty and instability such reform could cause.