

The Idea of Home in Law

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(1) Introduction

“The phenomenon of home...used to be an overwhelming and inexchangeable something to which we were subordinate and from which our way of life was oriented and directed...Home nowadays is a distorted and perverted phenomenon. It is identical to a house; it can be anywhere. It is subordinate to us, easily measurable in numbers of money value. It can be exchanged like a pair of shoes.” (Vycinas 1961: 84-85)

In his afterword to the collection ‘The Home: Words, Interpretations, Meanings, Environments’, David Benjamin considered five aspects of meaning associated with home: the word, the descriptive use of the word, the word in psychiatric research, the empirically derived cultural phenomenon and the juridical meaning of home. In relation to the juridical meaning of home, Benjamin claimed that: “...the home is still a legally binding definition to this day...[and] [m]embers of the elite in Western society take [home] boundaries very seriously” (Benjamin 1995: 296). This article argues that this assertion - that home is meaningful in law - must be approached with caution. While the idea of home has attracted considerable critical attention in other disciplines in recent decades, home has continued to be represented in law as ‘identical to a house’, ‘easily measurable in numbers of money value’ and ‘exchang[able] like a pair of shoes’. Cross-disciplinary scholarship on the meaning and values of home to occupiers - as a social, psychological, cultural and emotional phenomenon - has not penetrated the legal domain, where the proposition that home can encapsulate meanings beyond the physical structure of the house, or the capital value it represents, continues to present conceptual difficulties.

At first glance, it does appear as though the significance of home is acknowledged in legal discourse. For example, the obligations imposed on the United Kingdom's domestic legal institutions by the Human Rights Act 1998 (HRA), which gave effect to the European Convention on Human Rights, included an obligation to respect private and family life, home and correspondence (Article 8(1)). Consequently, the HRA requires domestic institutions – both Parliament and the courts - to ascertain, when article 8 is argued by the home occupier, whether legislative measures or judicial decisions involve any *prima facie* interference with the complainant's home. The protection conferred by article 8 is not, however, 'absolute', but 'qualified'. Where an interference is established, it can be justified under article 8(2), if the interference can be shown to be 'in accordance with law and...necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'. Thus, the claims of the party seeking to 'interfere' with the occupier's home must be balanced against the obligation imposed on domestic institutions to respect the applicant's home.

However, notwithstanding the apparent recognition of, and regard shown for, home interests in article 8, it has recently become apparent that the protection afforded to 'home' by article 8 is strictly circumscribed. Prior to the enactment of the HRA, English courts had appeared receptive to the proposition that the right to respect for home in article 8 could be raised as a relevant argument against the loss of one's home through repossession.¹ Nevertheless, post-incorporation attempts to invoke the provision in this context have been unsuccessful. In *Ebert v Venvil*, the court acknowledged, in respect of Mrs Ebert's appeal against an order for the sale of her home in the circumstances of her husband's bankruptcy, that: "[i]t is always traumatic to be evicted from the family house...and one cannot help but have very great

sympathy for her...[But] The European Convention is not a charter which allows bankrupts to avoid paying money which the courts have held to be owing to creditors...It is a Convention protecting people from encroachment into their basic rights. It is not a document which allows people to avoid paying their debts.” (paras 16-18) The English courts clearly concluded that the occupier’s right to respect for home was outweighed by the creditor’s claim to recover the capital tied up in the property. A similar picture has also emerged in the context of public sector tenancies, where the House of Lords has unambiguously set out the limits of the right to respect for home in article 8.

In the recent decision of *London Borough of Harrow v Qazi* the House of Lords held that article 8 provided no defence to a tenant against the contractual and proprietary rights of a landlord or, by analogy, a mortgagee. The decision in *Qazi* highlighted the persistent difficulties associated with advancing a juridical meaning of home. In the course of their discussion on article 8, the House of Lords stated that ‘home’ does not carry any special meaning in law. One consequence of this absence of meaning, it is argued, is that home advocates in law are left with little to draw upon when attempting to construct an argument for the protection of home-oriented values and interests. As a result, the absence of a coherent legal concept of home has facilitated the subjugation of occupiers’ interests in their homes, particularly when weighed against the objectively measurable claims of creditors and landlords (Fox 2002: 586-7). The decision in *Qazi* has exacerbated this trend further yet, by declaring that where a dispute requires the court to resolve a clash of interests between a home interest and a commercial interest within the framework of article 8, it is not even necessary to balance the competing claims: rather, the home interest is automatically defeated, and ‘article 8 is simply not applicable’.

The idea of home in law – that is, the development of a coherent and functional legal concept of home that recognises a property’s value other than as a capital asset - is clearly problematic, and the neglect of home analysis in law is particularly stark when compared to the progress that has been made in other disciplines in relation to the meaning and values of home. This article begins by reviewing the decision in *Qazi*, before moving on to consider the background to the policies that have prevailed in this area of law, and the values that have underpinned these policies. The article considers why, although often (implicitly) acknowledging that ‘home’ is different from other types of property, English courts have been reluctant to attach any significant weight to that distinction. This is particularly evident when the ‘home’ dispute is governed by principles of property law. While analysis in other disciplines has taken account of the psychological, social, and emotional aspects of home, property law is overwhelmingly oriented towards rationality, and financial interests. Consequently, although home theorists have encouraged cross-disciplinary analysis (Altman & Werner, 1985, Preface xx) property law has remained broadly unreceptive to home-oriented arguments, and persisted in identifying the house (home) as a capital asset, easily measurable in terms of its money value, and as readily exchangeable as any other item of property.

(2) The decision in *London Borough of Harrow v Qazi*

The decision of the House of Lords in *London Borough of Harrow v Qazi* clearly illustrates the lack of weight attached to the idea of ‘home’ in law. The case was concerned with Mr Qazi’s claim against the housing authority, when his tenancy was terminated and the council obtained a possession order of his home. Mr and Mrs Qazi were joint tenants of a secure tenancy under the Housing Act 1980. Following the breakdown of their relationship, and the

departure of Mrs Qazi and their daughter from the property, Mrs Qazi served a notice to quit on the housing authority, which was, according to domestic law, effective to terminate their joint tenancy. Mr Qazi, who wished to continue living in the property, applied for a sole tenancy, but his application was rejected on the basis that the property provided family sized accommodation, and so, in accordance with the authority's allocation policy, could not be (re-)granted to a single individual. When Mr Qazi appealed this decision, he revealed that he was, by this stage, living in the property with his new wife and her son, and that the second Mrs Qazi was pregnant with another child. The Court of Appeal held that Mr Qazi was entitled to remain in the property by virtue of his right to respect for his home under article 8 of the European Convention on Human Rights, as given effect in domestic UK law under the Human Rights Act 1998. The Council appealed this decision to the House of Lords, who reversed the Court of Appeal judgment, and awarded a possession order against Mr Qazi. In the course of the House of Lords decision, the reference to respect for home in article 8 was essentially stripped of any effect so far as the defence of possession actions was concerned.

The reasoning of the House of Lords in *Qazi* is of considerable interest with regard to the status of the home in law. Although there was some difference of approach regarding the way in which article 8 should be applied in this context,² all five judges agreed that the possession order should be granted in this case. The first issue the court addressed was whether the disputed property could be described as Mr Qazi's home for the purposes of article 8, and on this question all five judges were satisfied that Mr Qazi qualified. Lord Bingham stated that:

“On a straightforward reading of the Convention, its use of the expression ‘home’ appears to invite a down-to-earth and pragmatic consideration whether the place in

question is that where a person ‘lives and to which he returns and which forms the centre of his existence’, since ‘home’ is not a legal term of art...” (para 8)

Lord Bingham explicitly acknowledged the affective significance of ‘home’ by commenting that: “[n]ot surprisingly, the need for some protection of the home was recognised in the Convention, since few things are more central to the enjoyment of human life than having somewhere to live...” (para 8) The definition of ‘home’, which Lord Bingham drew from his analysis of the UK and Strasbourg case law, was, however, strictly non-technical. ‘Home’ was described as an ‘autonomous concept’, and Lord Bingham adopted the test set out by the European Commission on Human Rights in *Buckley v United Kingdom*, whereby: “[w]hether or not a particular habitation constitutes a ‘home’ which attracts the protection of Article 8(1) will depend on the factual circumstances, namely, the existence of sufficient and continuous links.”; (para 63) that is, an on-going relationship between the occupier and the property.

In one sense, this approach facilitated a broad and flexible interpretation of home: it was not necessary for the claimant to fall within a strictly defined legal category of ‘home’ in order for article 8 to be relevant, and so a claim could be brought even if the relevant domestic legislation did not recognise that the property in question constituted the claimant’s home. If – as discussed below - article 8 conferred a meaningful protection on occupiers in relation to the occupation of their homes, then a broadly defined idea of home would enable more potential claimants to enjoy that protection. From another perspective, however, it may be regarded as regrettable that, by reducing the idea of home in Article 8 to the property in which the claimant lives as a matter of fact, the judgments in *Qazi* avoided the opportunity of engaging with conceptual analyses of the idea of home in law. The conclusion that: “[home] does not...bear a special legal meaning...as does the expression ‘civil rights’ for example. It bears its natural and ordinary meaning as popularly understood throughout the contracting

states...”; (para 95) ensured that the idea of home in law did not develop beyond to the property in which a person lives as a matter of fact: nothing more.

Since the court accepted that the property in question was Mr Qazi’s ‘home’ for the purposes of article 8, the next issue to be considered was whether, by taking possession of the property, the Council had interfered with Mr Qazi’s right to respect for home under article 8(1). Empirical research has indicated that homes can be meaningful to occupiers in several ways: as a physical structure for shelter; as valued territory; to satisfy various social and psychological needs; as an area of control; as a place of self-expression; as a secure environment; as the territory in which they can achieve privacy; as an aspect of identity; and as a socio-cultural unit (Fox 2002). Nevertheless, the majority of the House of Lords in *Qazi* focused on only one of these aspects of home meanings: the right to privacy within the home. Lord Hope reasoned that, since the other limbs of article 8 – the right to respect for private and family life and correspondence – were concerned with privacy, the reference to respect for home in article 8 was simply another aspect of the more general right to privacy afforded by article 8.³ Article 8 was delineated as a provision conferring rights with respect to privacy in the home, but not with any of the other aspects associated with occupying the property *as a home*.

Having delimited the extent of article 8 in this way, the law lords then divided on the question of whether council *had* interfered with Mr Qazi’s right to respect for his home. Lord Bingham and Lord Steyn argued that the granting of a possession order against the property constituted as *prima facie* interference with home under article 8(1), but concluded that this interference could be justified within the terms of article 8(2). The majority adopted a more restrictive approach, however, by finding that, save in wholly exceptional circumstances, the

granting of a possession order in favour of a landlord or a mortgagee, who was entitled to possession of the property under domestic law by virtue of their contractual or proprietary rights, would not constitute an infringement of article 8(1). Lord Millett stated that:

“...once [the court] concluded that the landlord is entitled to an order for possession, there is nothing further to investigate. The order is necessary to protect the rights of the landlord; and making or enforcing it does not show a want of appropriate respect for the applicant’s home.” (para 108)

Although he acknowledged that in many circumstances the court was required to balance the interests of the respective claimants, this was not necessary in the present case, since: “...no such balancing exercise need be conducted where its outcome is a foregone conclusion.” (para 103) In a concurring judgment, Lord Scott added that it was not necessary to consider the effects – social, psychological, emotional - of losing his home on the occupier, since the authorities revealed:

“...no case in which this conclusion [that the landlord’s rights prevail] has been reached by considering the degree of impact on the tenant’s home life of the eviction. There is no case in which a balance has been struck between the tenant’s interests and the landlord’s rights. In every case the landlord’s success has been automatic. And so it must be unless article 8 is to be allowed to diminish or detract from the landlord’s contractual and proprietary rights. In my opinion, the Strasbourg jurisprudence has shown, in effect, that article 8 has no relevance to these landlord/tenant possession cases.” (para 146)

Lord Scott also extended this reasoning beyond the facts of the instant case, and of landlord and tenant disputes, adding that a similar conclusion should be drawn in relation to actions for possession by mortgagees (para 137).

The interpretation and application of the article 8 reference to home in *Qazi* was clearly influenced by policy factors. Lord Hope, who expressed concerns about the potential consequences of denying the Council of what is currently a convenient procedure by which to enforce their right to possession, reasoned that:

“[t]he point of automatic possession proceedings is generally to provide a quick and reliable way of evicting tenants whose leases have by the operation of law been terminated. A procedure which gives a discretion to the court by requiring it to consider whether having regard to article 8(2) the making of the order would be proportionate is inimical to that purpose...Therein lies the importance in domestic law of the issues...in this appeal.” (para 38)

Since the aim of facilitating landlords in re-taking possession of their properties once a tenancy was terminated was unquestionably endorsed, the key consideration was whether the court’s interpretation of article 8 furthered this goal. The pursuit of this objective was also rationalised in the context of the European Convention on Human Rights, which included the protection of property rights – manifest, in this context, as the landlord’s (or by analogy, the mortgagee’s) right to possession of the property - within its remit. It is important to emphasise, however, that the major significance of the *Qazi* decision was the majority conclusion that, although both the application of qualified provisions and the resolution of disputes involving conflicting convention rights is usually dealt with by conducting a judicial balancing exercise between the competing interests, this was unnecessary when the relevant interests were the landlord’s property right and the occupier’s home right. In this context, the home interest brought no weight to bear against the landlord’s property right, which automatically prevailed.

Although the weight attached to the contractual and proprietary claims of the landlord was influenced by several factors, including the obligation to protect property rights and the housing policy context, the lack of weight conferred on the home interest was also a key factor in the outcome of this decision. While the landlord's claim was rooted in the conceptually solid terrain of contractual and proprietary rights, the tenant's home argument appeared insubstantial and incoherent by comparison. Lord Scott's closing comments provide a useful summation of the difficulties associated with the idea of home in law. Since, it was argued, Mr Qazi would not have had the opportunity to establish a home in the property had it not been for the contractual tenancy granted by the landlord, Lord Scott asked:

“[h]ow could the termination of that tenancy in a manner consistent with its contractual and proprietary incidents be held to constitute a lack of respect for the home that had been thus established? The home was always subject to those contractual and proprietary incidents. The contrary view seems to me to treat a ‘home’ as something ethereal, floating in the air, unconnected to bricks and mortar and land.” (Lord Scott, para 145)

Once the contractual and proprietary rights associated with Mr Qazi's occupation of the property were terminated, nothing tangible remained to constitute his ‘home’ interest. In law, home is most readily understood as the house, which exists as both a physical structure, and as representative of an economic asset; consequently, rights can exist in respect of ‘bricks and mortar and land’, and interests are recognised in the capital asset represented by the home. Lord Scott's comments capture the essential sticking point regarding the idea of home in law: the idea of home in legal discourse remains some considerable distance from engaging with the comprehensive range of meanings that have flowed from home discourse in other disciplines.

(3) The Idea of Home in Legal Discourse

Despite early indications that suggested some scope for the protection of occupiers in possession proceedings through the right to respect for home in article 8, the decision of the House of Lords in *Qazi* negated this possibility by prioritising the proprietary and contractual interests of landlords, and, by analogy, mortgagees, rather than the home interests of occupiers. Although the House of Lords emphasised that, so far as the definition of ‘home’ was concerned, it was “...an autonomous concept which does not depend on classification under domestic law...” (para 9), the relevance of existing domestic law so far as the substantive complaint was concerned was patent. When considering whether Mr Qazi had suffered an article 8(1) interference with his home, Lord Millett emphasised that the court: “...would, of course, have to consider whether the landlord was entitled to possession as a matter of ordinary domestic law (ie apart from the Human Rights Act 1998), taking into account the various statutory provisions which operate in this field.” (para 108). Having concluded that the Council was, in the circumstances, entitled to exercise its contractual and proprietary right to possession, Lord Scott described the failure of the article 8 argument as ‘inevitable’, since: “...an article 8 defence can never prevail against an owner entitled under the ordinary law to possession.” (para 152) The supremacy of the domestic position was emphatically brought home by the statement that: “...once [the court] concludes that the landlord is entitled to an order for possession, there is nothing further to investigate.” (para 108)

The pre-eminence of domestic law in this context is consistent with the approach to article 8 advocated by the European Court of Human Rights in *Hatton v United Kingdom*, when the court emphasised: “...the fundamentally subsidiary role of the Convention” in assessing

whether a particular domestic decision or provision constituted an interference with respect for home. The European Court of Human Rights stated that:

“...national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight.” (para 97)

The approach taken in *Qazi* - that article 8 did not justify allowing a tenant to ‘hang on to his home’ when the requirements of domestic law has been complied with⁴ - was subsequently applied in the context of possession actions concerning the owner-occupied family home in the context of bankruptcy,⁵ and to priority contest between mortgage lender and home occupier.⁶ In *National Westminster Bank plc v Malhan*, Sir Andrew Morritt V-C followed the *Qazi* approach by rejecting the occupier article 8 argument on the ground that:

“[i]t would create havoc in the mortgage lending field as well as substantial injustice to both borrowers and lenders if priorities clearly settled before the Human Rights Act 1998 came into force could be altered by its application thereafter.” (para 52)

The prospect of utilising article 8 to develop an argument in support of home where such a claim is not supported in domestic law appears increasingly unlikely. Rather, it would seem that any recognition of the meanings and values of home must emerge from legislative or judicial policy decisions at the domestic level. Evidence to date suggests, however, that domestic courts overwhelmingly regard the home in terms of its money value, as the exchangeable asset of the house, and thus are inclined towards protecting the capital interests of landlords and mortgagees in that asset, rather than the occupier’s interest in use of the property as a home.

When faced with the competing claims of an occupier - whose interests are both financial and non-financial: for an occupier, the prospect of repossession raises issues ranging from the financial and practical value of the property, to social, psychological, and emotional attachments to the home – and a secured creditor or mortgagee, whose interests are much more readily calculable in financial terms, the English courts have acknowledged that:

“[t]he two interests are not in any sense commensurable. On the one hand, one has the financial interests of the Crown, some banking institutions and a few traders. On the other, one has the personal and human interests of these two families. It is very hard to see how they can be weighed against each other except in a way which involves some value judgment on the part of the tribunal.” (*Re Citro*, at 150, *per Nourse LJ*)

However, attempts to argue ‘home’ interests in law, particularly against financial interests, are beset by difficulties. Although interdisciplinary research has established the authenticity of home meanings, the relationship between an occupier and his or her home, inherently intangible and difficult to define, is not readily comprehensible to lawyers. Legal analysis tends to favour the rational, the objective and the tangible (Sugarman 1986) and, as Dovey recognised in the context of urban planning: “[r]eason responds to intangibility by reducing terms such as *home* to precise and bounded definitions. Rationally considered, a home becomes reduced to a house; the meaning and experience of home as a relationship becomes confused with the object through which it is currently manifest.” (Dovey 1985: 52) The lack of verifiability associated with the idea of home has clearly frustrated efforts to transpose the idea of ‘use value’ in the home into legal frameworks. As one commentator who sought to define the meaning of home in law concluded: “[i]n the long pursuit of this chimera, the hunter always circles back to his starting point and finds no more, yet no less than a dwelling, located in space, within and beyond which individual human beings grouped in households

engage in a complex set of activities.” (Merritt 1992: 65) Since legal analysis has not yet drawn on cross-disciplinary research into the meanings and values of home, the idea that home bears specific and identifiable meanings beyond the physical structure or capital value of the house remains, to the legal perspective, an unverifiable and illusive proposition.

It is important to emphasise, however, that the instinct to value ‘home’ as a special type of property is not totally absent from the legal sphere. When a creditor seeks to repossess property, section 36 of the Administration of Justice Act 1970 provides a mechanism for delaying the effect of a possession order for a limited period of time where the disputed property is a dwelling house, and: “...it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable time to pay any sums due under the mortgage...” This does provide an example of a legal context where what are in substance ‘home considerations’ are taken into account, and may enable the occupier to obtain interim relief. However, the conditions for the exercise of the section 36 discretion are strict, and wholly focused on the debtor’s financial ability to make good on arrears within a ‘reasonable time’ whilst continuing to meet instalments as they fall due:⁷ the sole criterion for obtaining relief is financial. Similarly, in the context of bankruptcy, sections 336 and 335A⁸ of the Insolvency Act 1986 directed the court, when exercising its power to capitalise property which was occupied as the ‘family home’, to have regard to factors such as the needs and financial resources of an occupying spouse and any children of the family, as well as the interests of secured creditors, yet when balancing the relevant factors the courts have typically favoured the financial interests of the creditors, since: “...one must be just before one is generous...”⁹ Furthermore, the court was directed to presume, at the end of a period of one year from the vesting of the bankrupt’s estate in the trustee in bankruptcy, that unless the

circumstances of the case are exceptional, the interests of the bankrupt's creditors outweigh all other considerations (section 336(5)).¹⁰

This tendency to focus on financial criteria, particularly the financial interests of creditors in the capital value of the home rather than the non-financial claims of occupiers to the use of the property as a home should not, however, be regarded as evidence of an inherent inability in law to recognise the alternative grounds on which home can be regarded as meaningful. Rather, this trend clearly emanated from the policy goals that influenced the overhaul of English property law in 1925. One of the central pillars of the 1925 legislation¹¹ was that land, including a person's home, was to be treated in the same way as other forms of property. The reforms sought to make land as easily and securely transferable as possible, by treating land as merely another form of capital, as a commercial asset, as readily exchangeable as any other asset, and to deny that land had any special meaning just because it was occupied as a home. This goal was achieved, in part, by imposing a statutory 'trust for sale' on all jointly owned property, which presumed that the primary object of any joint holding of property – for example between spouses or partners – was investment and sale rather than use and occupation.¹² The Parliamentary debates preceding the Law of Property Act (LPA) 1925 attested to the Government's policy of assimilating land with other forms of property, so that land would carry no special meaning. This policy met with some opposition from members of the legislature, who argued that: "[y]ou cannot compare the transfer of stocks and shares with the transfer of property."¹³ and that: "[y]ou may want one special piece of land...no one wants one special stock certificate...There is no magic in one stock certificate."¹⁴ Nevertheless, and notwithstanding the argument that: "...land is a special property. A man may want one particular piece of land, and it may be that no money can

compensate him for the loss of it.”;¹⁵ these considerations were outweighed by the government’s desire to facilitate land transactions by designating land as mere capital.

One of the outcomes of this policy was a strong presumption in favour of sale when English courts addressed the conflict of interests between the creditor’s financial claim to property, and the occupier’s interest in retaining the property for use and occupation as a home. Although the power to order sale was discretionary,¹⁶ the legislative policy in support of alienability strongly influenced the courts’ willingness to order sale at the request of creditors, and the policy ultimately adopted in the courts was a strong presumption in favour of sale – that “...where there are debts outstanding, a sale should be ordered.”;¹⁷ that: “[b]ankruptcy has, in relation to the matrimonial home, its own claim to protection.”;¹⁸ and that: “...one must be just before one is generous.”¹⁹ The ethos of the 1925 property reforms provided the courts with the ideology, the language, the tools and the justification to adopt a presumption in favour of sale, to value land as a capital asset only, and to disregard the non-financial interests of occupiers in their homes, which set the tone for legal analysis thenceforth.

The Trusts of Land and Appointment of Trustees Act 1996 purported to re-introduce the idea of use value in the home to the legal framework of property ownership by recognising that home owners do not, in reality, regard their property as merely an investment asset. Nevertheless, the policy of the earlier legislation had established so clearly the idea that property was to be reckoned in terms of its exchange value - that even when dealing with a person’s home, it should be treated as a capital asset - that this perspective was difficult to shift. The objects of the 1996 Act were clear: the idea that land could be assimilated to other types of property was criticised, and members recognised that property in the home could

hold additional value for its occupiers, by virtue of being: "...the place where the beneficiaries live, or want to live in the future."²⁰ While the 1925 legislation had presumed that the purpose of land ownership was: "...as an investment rather than as a home, to be bought and sold as market conditions demand, with the beneficiaries being interested in the proceeds of sale rather than the property for its own sake."²¹ the 1996 Act purported to recognise that: "...most co-ownership of property is for the purpose of providing a home rather than an investment."²² Furthermore, one of the explicit objects of the new regime was to recognise that occupiers might suffer a loss from repossession that would go beyond the capital value of the property, since their: "...realistic concern is often with the enjoyment of the land itself..."²³ Consequently, courts considering whether or not to grant an order for the sale of the property at the request of a creditor were directed to take into consideration a number of factors, including the intention behind the purchase, the interests of any beneficiaries in occupation, and the interests of any minor occupiers, as well as the interests of any secured creditors.²⁴ Yet, with the exception of one recent case,²⁵ the courts have remained largely faithful to the ethos of the 1925 legislation, and continued to favour sale over retention of property when balancing commercial claims with home interests.²⁶

It is interesting to consider the policy justification advanced in support of this pro-sale tendency, even in the face of the apparent recognition of home meanings in the 1996 Act. One of the arguments most frequently advanced as justification for prioritising sale over 'home-oriented' interests is the need to protect the financial interests of creditors and landlords, since they control the capital on which the housing system relies so heavily. Otherwise, it is reasoned, capital holders will be unwilling to invest in the housing system, or will offer less attractive terms, so that ultimately the housing consumer will pay (see Fox 2002: 585-587). There has been a significant lack of interest in pursuing alternative avenues,

which while not inherently alien to legalistic analysis might allow more scope for consideration of home interests. For example, an alternative economic analysis could move beyond the immediate financial interests of landlords and creditors, and take account of the broader costs of repossession, not only to home occupiers, but to the economy as a whole, by factoring in the costs – both direct, in terms of the burden imposed on the state by emergency housing costs, and indirect, in relation to the wider economic burden imposed on society – associated with loss of home.

Ford *et al* (2001) identified several socio-economic consequences flowing from mortgage arrears and repossessions, including financial costs, which range from outright losses to costs resulting from the physical deterioration of property, and the social and psychological costs associated with housing debt, restricted residential mobility, relationship difficulties, health related costs, and administrative costs. These costs, it was argued, may be experienced by a range of actors: borrowers, lenders, insurers, central government, local government, housing market institutions, labour market institutions, and health services (Ford *et al* 2001: 108). These findings challenge the presumption that appears to have taken hold in the legal domain, that an economic analysis of home possessions can be reduced to a policy of facilitating the protection of commercial interests to ensure the flow of capital into housing. While this solution may satisfy the interests of individual creditors or landlords, in the long term the ultimate question of ‘who pays’ is much more complex. If economic analysis is the justification for allowing commercial interests to routinely outweigh home interests, then there is currently no indication that all costs - financial and non-financial - have been taken into account.

(4) Land law, logic and legal reasoning

Interdisciplinary research has greatly enhanced our understanding of the values which home represents to its occupiers (see for example, Despres 1991; Smith 1994); the nature of the relationship between the occupier and the home (Altman & Werner 1985; Benjamin 1995) and the effect of involuntary loss of home on the well-being of occupiers (Fried 1963; Porteous 1995). Although the idea of attachment to home remains essentially subjective and intangible: "...*home* is not an empirical variable whose meaning we might define in advance of careful measurement and explanation. As a consequence, understanding in this area is plagued by a lack of verifiability that many will find frustrating." (Dovey 1985: 34); scholarship in other disciplines has endeavoured to unpack the complex issues wrapped up with human responses to home, and significant progress has been made in this area. Law, however, has appeared generally resistant to the influence of this developing body of scholarship, as recently illustrated in *Qazi*, when the House of Lords dismissed the idea that home could be distinguished from the house as suggesting the existence of: "...something ethereal, floating in the air, unconnected to bricks and mortar and land." (para 145) The proposition that home could be valued in law, other than as a physical structure or a capital asset, was dismissed with language evoking images of a vaporous, insubstantial (non-)entity.

The tendency of the English courts to favour the capital claims of creditors and landlords over the home interests of occupiers is explicable, in part, by the apparent incongruities between home analysis, on the one hand, and legal discourse – particularly ‘property-speak’ – on the other. In the first place, the introduction of ‘home’ analysis - particularly with regard to emotional, psychological, social and other attachments - into the legal domain appears to run counter to the presumed rationality of the legal system: procedurally fair, treating like cases alike, and thus disinclined to attach weight to subjective or emotional factors.²⁷

Consequently, the idea of home in law has not carried much weight, particularly when balanced against easily measurable, legally definable, proprietary and contractual interests in the property. This was illustrated in *Le Foe v Le Foe*, when a qualitative distinction was drawn between the creditor's financial claim against the property and Mrs Le Foe's emotional claim to her home. While Ward LJ acknowledged that the disputed property: "...has been her home and her mother's home. There is a huge emotional investment in it" (para 10) the court concluded that Mrs Le Foe's emotional attachment to her home was: "...an interest I cannot protect." (para 13) Furthermore, land law is often regarded as the *sine qua non* of this legal model of rationality, with leading commentators characterising it as a 'rational science' in which: "...the perfection of pure reason appears most nearly attainable. English land law – more obviously than any other area of the law...displays many of the features of a closed system of logic..." (Gray & Gray 2003: 204-5) The idea of home - as an experiential, intangible, if nonetheless real phenomenon – does not sit easily within this framework of objectively measurable, clearly definable interests.

Nevertheless, it is important to acknowledge that, although law is often regarded as predominately rational, it is ultimately a system through which human actors seek to regulate human behaviour, and thus can never be an 'exact science'. One commentator has argued, however, that where 'human nature' has influenced law it is: "...commitments to ownership and exchange [that have been regarded as] the activities it takes to be distinctly human and centrally important to human welfare." (Feldman, 2000: 1425) This impression has also filtered through to the context of land law, where it has been suggested that on the occasions when strict rationality gives way to factors that are 'unquestionably fuzzy', the extrinsic values that have been brought to bear against the strict logic of the system have, increasingly in recent decades, tended towards commercial interests rather than 'home-type' interests. In

relation to dealings between creditors and occupiers, or landlords and tenants: “...relationships are strictly commercial, bargaining is hard-nosed, social bondings are minimal and the value attached to land is primarily, perhaps even exclusively, an ‘exchange value’. Altruism is in very short support; we are talking money.” (Gray & Gray 2003: 241) Not only does the central core of strict logic and rationality in (property) law tend to favour the objectively measurable (in money terms) interests of creditors, over and above the subjective, intangible, non-financial ‘home’ interests of occupiers, but the values by which this rationality is tempered also tend towards the financial interests of commercial parties rather than the non-financial, social, psychological or emotional ‘home’ claims of occupiers. Consequently, when located within the framework of current land law logic, and in the absence of cross-disciplinary analysis, the idea of home can be dismissed as a mere chimera – an intangible, irrational and indefinable relationship with property, of little relevance to the ‘hard-nosed’ business of legal decision making.

(5) An Idea of Home in Law?

“...land is not just piles of coins, walls of exclusion, but also a different ownership, unrecognised in the old books, a having by using, a possessing by sharing...” (Green 1995: 156-7)

What prospect, then, for the idea of home in law? Should home-advocates admit defeat and resign themselves to the prospect that, notwithstanding the authenticity of home meanings, they are either unrecognisable, or unimportant, to lawyers? Although recent case law on the application of the right to respect for home in article 8 of the European Convention on Human Rights has established the limited scope of that line of analysis, it is important to bear

in mind that there is nothing inherently unworkable about the idea of home in law. In fact, although the idea of home has not prevailed in possession contexts, the idea that a person's home amounts to a special type of property has not been wholly absent from legal discourse. The idea that a home should be treated differently from other types of property is evident in tax law, where the financial benefits which flow from ownership of one's home are exempt from capital gains tax and from income tax, and in the law governing compulsory purchase of property, whereby the payment a property owner receives includes additional compensation where the compulsorily purchased property is occupied as a home: "...to make some compensation to a man for the loss of his home..." (*R v Corby District Council, ex p McLean*). From the turn of the twentieth century until the 1980s the Rent Acts, which conferred security of tenure on the basis of residential occupation, were premised on the law's recognition of the special values represented by property occupied as a home. More recently, the Enterprise Act 2002 has introduced measures to provide some degree of protection for some homes in the event of bankruptcy by exempting 'low value homes'²⁸ from applications for sale or possession, and by providing that the home of a bankrupt or a bankrupt's spouse or former spouse should cease to form part of the bankrupt's estate if, after a period of three years from the instigation of bankruptcy proceedings, the trustee in bankruptcy has not taken steps to possess or sell the property.²⁹ Although they cannot be regarded as amounting to a legal concept of home, these *ad hoc* examples provide evidence of the law's capacity to recognise ideas related to home in order to further particular policy aims, so long as this does not run counter to the overarching goals of the system.³⁰

Yet, it remains evident that legal discourse has not developed a coherent concept of home which is capable of carrying weight against competing claims, such as the protection of commercial interests. When posited against such claims, home interests seem to evaporate

into the ether. In comparison with the tangible, measurable, objective claims on capital, the idea of a subjective attachment to home can readily be dismissed as insubstantial, not provable, and therefore irrelevant to legal decision making. The idea of home in law could acquire substance by drawing on theoretical developments and empirical evidence from other disciplines, yet, to date, lawyers, particularly property lawyers, have not engaged with home discourses. Nevertheless, advocates seeking to establish cross-disciplinary contact with a view to placing home-oriented analysis on the legal landscape should bear in mind that, although the protection of commercial interests appears firmly established within the current legal framework, law – even land law - is not immutable. Only a few decades ago, leading land law commentators suggested a shift towards: “...the idea that the possession of the actual occupier of land must be protected.” (Gray & Symes 1981: iv); based on law’s recognition that: “[t]he things which are today of real value to the man on the street are assets like his job, his pension, and the right to undisturbed possession of his home.” (Gray & Symes 1981: 11) Greater recognition of the value of home in possession contexts was predicted, although this did not come to fruition as housing laws and policies since the 1980s, in relation to both owner occupation and rented property, have prioritised the protection of capital interests to encourage lending to home owners and investment in the private rental sector. Nevertheless, a number of arguments could yet be advanced in support of developing the idea of home in law in the context of possession actions.

Firstly, there is support within property theory for the recognition of home in law, above and beyond the capital asset of the house. Radin has argued in favour of a ‘personhood perspective’ in property law: that is, recognition of the possibility that an individual’s attachment to particular property, for example their home, may be so strong that the property becomes constitutive of their personhood. Since: “...some property is worthier of protection

than other property.” (1993: 48) Radin proposed that “...the personhood perspective...[could] serve as an explicit source of values for making moral distinctions in property disputes...” (Radin 1993: 35) The home is presented as a quintessential example of ‘worthy’ property on the ground that: “...in our social context a house that is owned by someone who resides there is generally understood to be towards the personal end of the continuum. There is both a positive sense that people are bound up with their homes and a normative sense that this is not [an undesirable response].” (Radin 1993: 54) Radin argued that the law of the United States had implicitly recognised the: “...traditional connection between one’s home and one’s sense of autonomy and personhood.” (Radin, 1993: 57) The application of a personhood perspective to home in contemporary property law could be bolstered by advances in other disciplines with regard to delineating the meanings and values of home, and research on the consequences of loss of home through repossession. Furthermore, it is arguable that, bearing in mind the recent suggestion that law is experiencing a process of ‘re-emotionalization’ (Laster & O’Malley, 1996; Karstedt, 2002), which, it has been suggested is linked to broader patterns of emotional culture in late modern societies (Karstedt, 2002; Wouters, 1986; Barbalet, 1998; Williams, 2001), it could now be apposite to argue for greater recognition of home attachments, hitherto dismissed in law as ‘mere emotion’.

Another possibility would be to advance home analysis in the legal domain by highlighting particular aspects of home meanings and attachments. The idea of ‘family home’ carries significant policy kudos, and as a result the law has traditionally tended to favour arguments involving ‘family home’ rather than merely *home per se*.³¹ Nevertheless, even the ‘family home’ argument has not been sufficiently persuasive to outweigh commercial interests, as the court has concluded that:

“...it is not uncommon for a wife with young children to be faced with eviction...Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society has been familiar.” (*Re Citro* at 157, *per* Nourse LJ)

The recent High Court decision in *Edwards v Lloyd's TSB Bank* has suggested, however, that there may yet be some scope for the development of a defence that focuses more specifically on the presence of children in the home. In *Edwards*, the court refused an application for sale by the bank in the interests of the welfare of the children who occupied the property as their home. The decision in *Edwards* is significant as (somewhat surprisingly) the first reported decision in which the court explicitly balanced the interests of creditors to capitalise the property against the interests of child occupiers in the use and occupation of the property as their home.³² A number of factors persuaded the court to postpone the sale of the property for a period of at least five years. Bearing in mind the difficulty that Mrs Edwards was likely to encounter in finding another, smaller house, if the order for sale were to be granted, and the fact that the bank's security was not in jeopardy,³³ Park J held that: “[i]n the circumstances I do not want to order an immediate sale, because I believe that that would be unacceptably severe in its consequences upon Mrs Edwards and her children.” (para 33) Since the court remained of the view that the bank would eventually, albeit later rather than sooner, be able to recover the debt, with interest, the order for sale was postponed for a period of five years, until the younger child would have reached the age of eighteen. By this time, the court reasoned: “...it seems possible that...it will no longer be in practice incumbent on Mrs Edwards to provide a home at her expense for her son and daughter.” (para 33(iii)) Park J even went so far as to suggest that sale might be postponed even further, if, for example, either or both of the children were still in full time education at the end of five years, and

therefore still: "...in practice dependent on their mother for the provision of a home." (para 33(iv))

The association between children and home is potentially fruitful for a number of reasons. On the one hand, legal discourse is accustomed to not only taking account of, but prioritising the interests of children, and it is suggested that in constructing a 'family-oriented' home argument, the functional relationship between parent(s), child(ren) and home would be a more appropriate starting point than the 'spouse-centred' approach that typified 'family home' arguments in the past.³⁴ In addition, there is interdisciplinary support for focusing on children within the home: empirical research has established that the value of home as a place of security and protection is heightened when children are present (Fitchen 1989), and that it is the presence of children that makes a house into a home (Rakoff 1977). For the child, the significance of the home environment has been clearly established (Parke 1978), while the loss of a child's home has been described as: "...nothing less than an invitation to chronic illness." (Smizik & Stone 1988) The concept of the child's home is one angle which is worthy of further analysis within the legal domain.

(6) Conclusion

The decision in *London Borough of Harrow v Qazi* emphasised the difficulties currently faced by home advocates in English courts. Not only do the commercial interests of landlord and creditors outweigh the home interests of occupiers, but the House of Lords has stated that it is not even necessary to weigh 'home' interests in the balance when applying article 8 to possession proceedings. It therefore falls to domestic provisions to determine whether home interests are protected in this context. At present, the courts are overwhelmingly inclined to

protect the non-occupier's interests in the property as a capital asset over the occupier's interest in the home. Although law is not inherently unable to accommodate a coherent concept of home, developments in other disciplines have yet to make any significant impact on legal reasoning and, if anything, the historical shift has been away from home-oriented thinking in law. It is, of course, important to bear in mind the commercial and practical constraints within which the law regulates possession proceedings between home interests and commercial actors. Nevertheless, and although the weight attached to home in law has declined, the tools exist in law for the re-emergence of home-oriented arguments. Advocates of such an approach could usefully draw upon the development of the concept of home in other disciplines when arguing that, notwithstanding legal statements to the contrary, home is meaningful beyond its capital value.

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¹ In *Albany Home Loans Ltd v Massey*, which concerned repossession of the defendant's home following default on the mortgage by her husband, Schiemann J suggested that Article 8: "...provides a clue to the solution to the problems posed by this case..." (at 612).

² The House of Lords fell broadly into two camps, with Lord Bingham and Lord Steyn in the minority and Lord Hope, Lord Millett and Lord Scott in the majority.

³ "[t]he emphasis is on a person's home as a place where he is entitled to be free from arbitrary interference by the public authorities. Article 8(1) does not concern itself with the person's right to peaceful enjoyment of his home as a possession or as a property right." (para 50)

⁴ The decision of the House of Lords in *Qazi* has subsequently been applied in several Court of Appeal decisions: see *Newham London Borough Council v Kibata* [2003]EWCA Civ 1785; *Birmingham City Council v Bradney*; *Birmingham City Council v McCann* [2003]EWCA Civ 1783; *Lough and others v First Secretary of State* [2004]EWCA Civ 905; furthermore, as Auld LJ noted in *Lambeth Borough Council v Kay* [2004]EWCA Civ 926, the European Court of Human Rights has ruled that Mr Qazi's application to it did not disclose any appearance of a violation of the Convention or its protocols and declared it inadmissible (11 March 2004).

⁵ *Hosking v Michaelides* [2004]All ER (D) 147.

⁶ *National Westminster Bank plc v Malhan* [2004]EWHC 847 (CH).

⁷ See, for example, *Cheltenham & Gloucester Building Society v Norgan* [1996]1 WLR 343.

⁸ As amended by the Trusts of Land and Appointment of Trustees Act 1996.

⁹ *Re Bailey* [1977]1 WLR 278 at 284, *per* Walton J. This philosophy was endorsed by the Court of Appeal in *Re Citro* [1991]Ch 142.

¹⁰ The effects of the *Qazi* decision reverberated in this context in *Hosking v Michaelides*, when Paul Morgan QC, sitting in the High Court, stated that he: "...would not have been prepared to hold that section 336 of the Insolvency Act 1986, construed in accordance with the approach in *Re Citro* [see note 6 and associated text] was incompatible with Article 8 of the Convention on Human Rights having regard to the way in which Article 8 was construed by the majority of the House of Lords in *Harrow London Borough Council v Qazi*..." (para 70).

¹¹ 'The 1925 legislation' is an expression to refer collectively to the major overhaul of the property system effected by the Law of Property Act 1925, the Land Registration Act 1925, the Settled Land Act 1925 and the Trustee Act 1925, the Land Charges Act 1925 and the Administration of Estates Act 1925.

¹² As the Law Commission for England and Wales would later observe: "The defining feature of the trust for sale...is that the trustees are under a duty to sell the trust land. Implicit in this is the notion that this land should be held primarily as an investment asset rather than as a 'use' asset."; Law Com No 181, *Transfer of Land: Trusts of Land* (1989), para 3.1.

¹³ 154 HC Deb (5th Series) col 145 (15 May 1922).

¹⁴ 154 HC Deb (5th Series) col 124 (15 May 1922).

¹⁵ 154 HC Deb (5th Series) col 124 (15 May 1922).

¹⁶ LPA 1925, section 30.

¹⁷ *Re Lowrie* [1981]3 All ER 353 at 355-6, *per* Walton LJ.

¹⁸ *Re Bailey* [1977]1 WLR 278 at 279, *per* Megarry VC.

¹⁹ *Ibid*, at 284, *per* Walton J.

²⁰ Law Com No 181, para 3.10.

²¹ 569 HL Deb (5th Series) col 1718 (1 March 1996).

²² *Ibid*. Interestingly, in the course of these debates, Lord Browne-Wilkinson described this shift from ‘home as capital’ and exchange value towards recognition of the use value of the home for its occupiers as being: “...at last...a little bit of common sense...” (569 HL Deb (5th Series) col 1725 (1 March 1996).

²³ Law Com WP No 106, para 3.1.

²⁴ Trusts of Land and Appointment of Trustees Act 1996, section 15.

²⁵ In the decision in *Edwards v Lloyd’s TSB Bank* [2004]EWHC 1745 (CH), the court adopted a much more ‘home-oriented approach’ to the issue of sale where the welfare of minor occupiers was in issue; see further, section 5, below.

²⁶ See for example, *TSB Bank plc v Marshall* [1998]39 EG 308; *Bank of Ireland Home Mortgages Ltd v Bell* [2001]2 FLR 809; *First National Bank plc v Achampong* [2003]EWCA Civ 487). In *Bank of Ireland Home Mortgages Ltd v Bell*, endorsed by the Court of Appeal in *First National Bank plc v Achampong*, Gibson LJ stated the policy of the courts under sections 14 and 15 of the TLA: “Prior to the 1996 Act the courts under s30 of the Law of Property Act 1925 would order the sale of a matrimonial home at the request of the trustee in bankruptcy of a spouse or at the request of a creditor chargee of a spouse, considering that the creditors’ interest should prevail over that of the other spouse and the spouse’s family save in exceptional circumstances.” Although Gibson LJ suggested that: “[t]he 1996 Act, by requiring the court to have regard to the particular matters specified in s15, appears to me to have given scope to some change in the court’s practice.”, he concluded that: “[n]evertheless, a powerful consideration is and ought to be whether the creditor is receiving proper recompense for being kept out of his money, repayment of which is overdue (see *Mortgage Corporation Ltd v Lewis Silkin* (25 February 2000, unreported)). In the present case it is plain that by refusing sale the judge has condemned the bank to go on waiting for its money with no prospect of recovery from Mr and Mrs Bell and with the debt increasing all the time, that debt already exceeding what could be realised on a sale. That seems to me to be very unfair on the bank.” [2001]2 All ER (Comm) 920, para 31.

²⁷ Laster & O’Malley argued that “Enlightenment assumptions about rationality, objective truth and formal legal equality obviously have shaped modern law. Since the eighteenth century, the processes of law have been used to...remove emotions and the non-rational from legal considerations and the administration of justice. Emotions can be seen as antithetical to order, justice and coherence: the object of law was to define and refine the

measures which would provide an objective basis of assessing causation, the nature of wrongdoing and the method of assessment of harm. In both civil and criminal law, the focus increasingly came to be on (measureable or calculable) physical harm and pecuniary loss.” (Laster & O’Malley, 1996: 24)

²⁸ Enterprise Act 2002, s313A. A ‘low value home’ is defined in the Insolvency Proceedings (Monetary Limits) (Amendment) Order 2004 as a property with equity worth less than £1,000 after deductions for mortgages or other charges, third party interests and the reasonable costs of sale.

²⁹ Enterprise Act 2002, section 283(A).

³⁰ The objects of the Enterprise Act 2002 included the promotion of enterprise by minimising the effects of failure, relaxing the effects of bankruptcy and reducing the sense of stigma associated with it; see Levy & French, 2003.

³¹ See for example, Matrimonial Homes Act 1967 and 1983, Family Law Act 1996, and sections 336 and 335A of the Insolvency Act 1986.

³² Section 15(1)(c) sets out the welfare of any minor who occupies the property as his home as a factor to be taken into consideration in the exercise of the court’s discretion, while section 15(d) of the Trusts of Land and Appointment of Trustees Act 1996 requires the court to have regard for the interests of any secured creditor of any beneficiary.

³³ The debt owed to the bank did not exceed the value of the interest in the property (50%) over which the bank had an equitable charge.

³⁴ The shift in focus to provision for children rather than between conjugal partners, to a definition of family that revolves around the caregiving relationship between a dependent child (or other dependent person) and his or her principal nurturer - most often the mother - and the shift towards considerations of children’s welfare is also in line with developments in family law; see for example, Fineman, 1995; Woodhouse 2000.