

CHAPTER 7

TREATMENT OF A DEBTOR'S HOME IN FOREIGN JURISDICTIONS

What has been will be again,
what has been done will be done again;
there is nothing new under the sun.

Ecclesiastes 1:9
The Bible (New International Version 1984)

7.1 Introduction

Consideration of the treatment of the home of the debtor both inside and outside of insolvency, in other jurisdictions, may prove useful as guidance may be drawn from experiences abroad. Comparative research reveals differences in treatment of a debtor's home in various jurisdictions. In systems which do provide protection for the home against the claims of creditors, there are differences in the method in, and extent to, which this occurs. Traditionally, broadly speaking, two approaches have been identified. In some jurisdictions, formal statutory "homestead exemptions", the monetary limits of which are often capped, apply both in the individual debt enforcement process and in the event of the debtor's insolvency. In others, there is no formal "home exemption", as such, but statutory provisions regulating, *inter alia*, the civil process, family law, insolvency law or the recognition of human rights afford a measure of protection. This occurs, for example, by the imposition of certain procedural requirements before the home may be sold, protecting the interest in the home of a spouse or partner of the debtor from creditors' claims or postponing the forced sale of the family home, in certain circumstances.

In a comparative study of exempt assets, after noting the differences, in various jurisdictions, in treatment of the debtor's home, McKenzie Skene submits that the exemption of a debtor's home from an insolvent estate may be one area where

harmonisation amongst jurisdictions is "simply not possible".¹ However, as Rajak observed, in light of his comparative research into bankruptcy regimes, while "local culture has influenced the shape of the particular institutions" and "[s]uperficially they may seem poles apart, ... below the surface they sometimes resemble each other quite closely."² McKenzie Skene recognises basic commonalities of purpose. She draws attention to the INSOL International *Consumer Debt Report* of 2001, in relation to the need to give special attention to problems connected with housing.³ She also points out that the UNCITRAL Legislative Guide on Insolvency Law suggests that, when identifying exclusions of assets from the estate of a natural person, "consideration might need to be given to applicable human rights obligations, including international treaty obligations, which are intended to protect the debtor and relevant family members and may affect the exclusions that should be made." Bearing these in mind, McKenzie Skene submits that it may be possible to create model provisions or general legislative principles for "the debtor's home (in relation to level of exemption where an exemption exists and level of protection to be afforded to the debtor/family where there is no exemption)".⁴

The INSOL International *Consumer Debt Report II*, published in November 2011, states:⁵

Many countries ... seek ... to prevent the sale of the ... [home] in order to keep the family together or[,] at least, [to] offer them, during a certain period, the opportunity to develop alternatives. The court should then balance the interests of the creditors, the conduct of the spouses in the period before the insolvency, the financial position of the both spouses, the needs of the children and all other circumstances. ... Generally a waiting period (of one year) is taken into account, unless the circumstances of the case are exceptional or the interests of the creditors outweigh all other considerations. The first year is generally the most difficult period, during which the family is offered the opportunity to adapt to the

¹McKenzie Skene 2011 *Int Insolv Rev* 29, 35-36.

²See Rajak "Culture of Bankruptcy" 25.

³McKenzie Skene 2011 *Int Insolv Rev* 50-51, with reference to the INSOL International *Consumer Debt Report* of 2001 16 <http://www.insol.org/pdf/consdebt.pdf> [date of use 15 March 2012]. The INSOL International *Consumer Debt Report II*, of 2011, discussed at 6.10.6, above, was published, in hard copy only, in November 2011.

⁴McKenzie Skene 2011 *Int Insolv Rev* 54.

⁵INSOL International *Consumer Debt Report II* 5-6.

new situation. In the legislation of many countries a natural person is offered various possibilities to keep the family home.

The purpose of this chapter is to analyse and compare the position in certain jurisdictions in which treatment of a debtor's home is regulated by legislation. This will be done with a view to drawing guidance for consideration of the possible introduction, in South Africa, of provisions, mechanisms, or practices employed elsewhere, appropriately modified to address inadequacies in our legal system. Mindful of essential differences between our system and others and, as Rajak observed, the influence of "local culture" in shaping institutions,⁶ the purpose of this chapter is to consider aspects which reflect distinctions and parallels as well as international policies and trends, in order to draw on comparative experience and wisdom. This chapter is not intended to contain a comprehensive analysis of the legal position in each of the chosen jurisdictions, but merely to highlight aspects which may be relevant in the South African context. As a result, the position in some of the jurisdictions is canvassed in more detail than in others.

This chapter will cover the position in the United States of America and in Canada, each of which has a long tradition of protection of the debtor's home against creditors through a formal "homestead exemption". It will also include brief discussion of a statutory exemption in New Zealand which, interestingly, is due for repeal. This chapter will also deal with the position in England and Wales as well as in Scotland which, traditionally, have fallen into the second category, mentioned above, in which protection of the family home against creditors' claims has developed through the enactment of provisions in various statutes, without the application of a formal home exemption. Attention will be given to recent developments, in England and Wales, Scotland and Ireland, and will include current proposals for legislative reform in Scotland and in Ireland. The current position in Europe will be touched on very briefly.

⁶See Rajak "Culture of Bankruptcy" 25.

7.2 *The United States of America*

7.2.1 *General and historical background*

The statutory homestead exemption of the United States of America is said to date back to 1839, when Texas offered free land grants and homestead exemption.⁷ The purposes were, mainly: to attract settlers; to provide a home for a settler and his family and some means to support them, if the settler suffered economic losses, to prevent his family from becoming a burden on the public; and to retain, in pioneers, the sense of freedom and independence which was deemed necessary to uphold the democratic institutions.⁸ Other states followed suit, partly to deter residents from leaving and moving to Texas, but also to protect families from becoming destitute. By the mid-nineteenth century, the "homestead exemption movement" became politically charged and associated with broader social ideals, such as land reform, abolitionism, and temperance, the latter movement, for example, supporting homestead exemptions as they viewed creditors as encouraging alcoholism among male breadwinners.⁹ On the other hand, critics regarded homestead exemptions as encouraging families to defraud creditors, drying up credit markets,¹⁰ undermining economic self-sufficiency by encouraging dependence on the state, and giving wives undue influence over the financial dealings of their husbands.¹¹

In 1862, the "free homestead law" was enacted, entitling every adult citizen to 160 acres of unappropriated public lands¹² for a nominal fee of between \$5 and \$10. After five

⁷See Morantz 2006 *L Hist Rev* 1, 8, with reference, *inter alia*, to Goodman 1993 *J Am Hist* 470, 477. See also Ferriell and Janger *Understanding Bankruptcy* 102 n 358 and references cited there.

⁸See Fox 2006 *Legal Studies* 201, 222-223, with reference to *Vernon's Interpretative Commentary to the Texas Constitution* 1993 art XVI, ss 49-50.

⁹See Morantz 2006 *L Hist Rev* 9-10, with reference, *inter alia*, to Goodman 1993 *J Am Hist* 477, 478-9.

¹⁰Along similar lines, it is submitted, as Mokgoro J's concept of a "poverty trap", in *Jaftha v Schoeman*.

¹¹Notably, the laws of some states prohibited the alienation or mortgage of the homestead by the head of the family, unless the wife joined in the deed; see Spofford "Homestead and exemption laws" 547.

¹²Valued by the government at \$1.25 per acre. Alternatively, a citizen was entitled to 80 acres valued at \$2.50 per acre.

years of actual residence on the land, the settler obtained valid title, called a "patent",¹³ with the proviso that the land would not be "liable for any debts of the settler contracted before the issuing of the patent for his homestead". It was explained thus:¹⁴

The spirit of most of the laws aimed at guarding the home from alienation through the improvidence or misfortune of the head of the family, and it ...[was] held to be the interest of the state, [*sic*] as a matter of public policy, to secure to each citizen so much of independence as is involved in the possession of a homestead.

...

The freeholder is the natural supporter of a free government. Tenantry is unfavorable to freedom. The tenant has in fact no country, no hearth, no domestic altar, no household god. It should be the policy of republics to multiply their freeholders.

The United States of America has been cited as an example of a jurisdiction which conferred systematic legal protection on domestic property against third parties on the basis of recognition of the worth of home *per se*.¹⁵ Home ownership was later promoted as part of the "American Dream" and has been supported by successive presidential administrations.¹⁶

7.2.2 *The current homestead exemptions*

Federal bankruptcy laws¹⁷ exempt an owner's equity in a homestead up to a maximum value of \$21 625.¹⁸ However, states may opt out of the federal homestead exemption and apply their own to a homeowner domiciled in their jurisdiction. In some states, homestead protection is automatic while, in many others, the homeowner must file a

¹³Issued by the general land office of the United States, in Washington. If an individual wished to, he could purchase more land.

¹⁴Spofford "Homestead and exemption laws" 547 II.153.2, with reference to Revised Statutes ss 2289-2317 <http://www.econlib.org/library/YPDBooks/Lalor/IIcY544.html> [date of use 15 March 2012].

¹⁵Fox 2006 *Legal Studies* 201, 219, 221, with reference to McKnight 1983 *Sw Hist* Q369 who stated that homestead has come to mean "not only family home but also property that is accorded particular protection because it is the family home".

¹⁶See Ferguson *Ascent of Money* 246-249, 251-253, 266-268; Boyack 2011 *AmULRev* 1489, 1560; Hochbein 2010 *Cap Univ L Rev* 889.

¹⁷These are contained in the Bankruptcy Reform Act of 1978, commonly, and hereafter, referred to as the "Bankruptcy Code", which is embodied in Title 11 of the United States Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, commonly referred to as "BAPCPA".

¹⁸In terms of s 522(b) read with (d)(1) of the Bankruptcy Code. The amount of \$21 625 applies in 2011.

claim for homestead exemption, in the particular state, in order to obtain its protection.¹⁹ State homestead exemptions vary widely: some states provide an unlimited dollar value homestead exemption,²⁰ although they each limit the exemption to a certain (maximum) area of land, while others provide no homestead exemption.²¹ Other states offer exemptions which range from \$5 000, in Ohio, to \$350 000, in Nevada. In many states, although the dollar value of the homestead exemption is too low for a debtor to avoid the forced sale of, and to retain, his home, it may at least permit the debtor to receive a portion of the proceeds of the sale.²²

Homestead exemptions are usually only available in respect of property which is the principal residence of the debtor or one of his dependants.²³ In most states, the homestead exemption is not restricted to real estate²⁴ but also includes personal property used for residential purposes, such as a mobile home, a trailer, or a houseboat.²⁵ State homestead exemptions apply both within, and outside of, bankruptcy. However, generally, consensual liens,²⁶ such as mortgages, and construction and artisan's liens,²⁷ cannot be eliminated either inside or outside of bankruptcy, even where they are attached to property subject to an exemption. Therefore, to avoid the sale of the home, the debtor would have to pay to the mortgagee the amount due in terms of the mortgage and, where applicable, the claims of the holders of construction and artisan's liens. Thus, in circumstances where the home is heavily mortgaged, the exemption may be worth very little, if anything, to the debtor. It is also important to remember that the statutory provisions exempt *equity* in the home, up to the specified amount. Therefore, in bankruptcy, in order to avoid his home being sold,

¹⁹Ferriell and Janger *Understanding Bankruptcy* 102-103.

²⁰Examples are Florida, Iowa, Kansas, South Dakota and Texas.

²¹Examples are Delaware, New Jersey, and Pennsylvania. See Fox 2006 *Legal Studies* 220.

²²Ferriell and Janger *Understanding Bankruptcy* 430-431; Ferguson *Ascent of Money* 252.

²³Ferriell and Janger *Understanding Bankruptcy* 103, 430.

²⁴That is, immovable property.

²⁵Ferriell and Janger *Understanding Bankruptcy* 103, 430. Cf *Norris v Thomas* Texas Supreme Court case no 05-0476 <http://www.supreme.courts.state.tx.us/historical/2007/feb/050476d.htm> [date of use 15 March 2012], in which the majority judges held that a four bedroom, three bathroom, yacht, valued at \$400 000, was not a homestead.

²⁶See Ferriell and Janger *Understanding Bankruptcy* 354-355.

²⁷The homestead exemption also does not apply in respect of outstanding taxes owed in respect of the property; see Ferriell and Janger *Understanding Bankruptcy* 60ff, 67-69.

the debtor would also have to "purchase" any equity which exceeds the amount of the available exemption and which would otherwise be distributed among unsecured creditors.²⁸ Where the debtor holds insufficient equity in the home for him to retain it and it is sold, an applicable homestead exemption would allow him to receive the proceeds of the sale of the home, up to the limit of the exemption, in order for him to purchase other, more affordable accommodation or to contribute towards payment of rent.²⁹

A related aspect of the homestead exemption laws is that restrictions may apply in relation to the use of home equity as security for purposes not directly linked to the acquisition, or improvement, of the property, nor to pay taxes due in respect of it. In most states, the home is exempt from actions to recoup other, unsecured debts.³⁰ In this respect, mortgages are often referred to as "no recourse" loans, connoting that, when the mortgagor defaults, the lender can only collect the value of the property and cannot seize other property or put a lien on future wages.³¹

Following abuse of the state homestead exemptions,³² the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 brought about a number of modifications.³³ Now a person qualifies for a particular state's homestead exemption only if he was domiciled in that state for a period of 730 days preceding the bankruptcy filing.³⁴ Further, although states may opt out of the federal exemptions, the Bankruptcy

²⁸Ferriell and Janger *Understanding Bankruptcy* 430-431; Tabb and Brubaker *Bankruptcy Law* 654; Evans *Critical Analysis* 195.

²⁹See Ferriell and Janger *Understanding Bankruptcy* 430-431.

³⁰Fox 2006 *Legal Studies* 223.

³¹Ferguson *Ascent of Money* 270; Ferriell and Janger *Understanding Bankruptcy* 96; Warren and Westbrook *Debtors and Creditors* 867. See also, in relation to mortgage foreclosure cases and the "anti-deficiency", or "no recourse", provisions in the Fair Debt Collection Practices Act 1977, Bergia 2010 *Rev Litig* 391, 401-404.

³²See Gross *Failure and forgiveness* 45-49 and references cited there. See Tabb and Brubaker *Bankruptcy Law* 680 on the so-called "millionaire's mansion loophole".

³³Hereafter referred to as "the BAPCPA". The amendments to the homestead exemption provisions came into effect on 20 April 2005.

³⁴ See s 522(b)(3)A of the Bankruptcy Code which is intended to prevent debtors from moving from a state with a limited homestead exemption, to one with a more favourable exemption, shortly before filing for bankruptcy, or, where they reside in a state with no limitation on the value of the homestead exemption, from increasing the value of the equity in their homestead just before filing for bankruptcy. See Gross *Failure and forgiveness* 45-49 and references cited there.

Code does impose, in certain circumstances, a restriction on the value of a homestead that a debtor may exempt in bankruptcy notwithstanding the state exemption.³⁵

7.2.3 Bankruptcy provisions

Under the Bankruptcy Code, there are mainly two bankruptcy processes available to consumers. Chapter 7 provides for liquidation of the debtor's assets, often referred to as "straight" bankruptcy, and Chapter 13 provides for debt rescheduling, often referred to as "a wage earner's plan" or reorganisation. The filing of a bankruptcy petition creates an estate which is a separate legal entity and which holds and controls all assets owned by the debtor.³⁶ The content of the bankruptcy estate differs depending on whether it is a Chapter 7 or a Chapter 13 bankruptcy filing.³⁷ Under Chapter 7, all interests, assets and property, broadly defined,³⁸ owned by the debtor at the time of commencement of the case, are included in the bankruptcy estate.³⁹ Under Chapter 13, the bankruptcy estate includes the same assets as under Chapter 7 as well as specified types of property which the debtor acquires after the commencement of the case.⁴⁰ Federal and state exemptions of property, including, for example, clothing, bedding, and household items, as well as the homestead exemptions, assist the bankrupt to obtain a "fresh start".⁴¹

In the Chapter 7 bankruptcy process, which is supervised by the bankruptcy court, the debtor's assets are surrendered to, and sold by, the trustee and the proceeds are distributed amongst the bankrupt's creditors, subject to the debtor's right to retain

³⁵See s 522(p), (q) and (o) of the Bankruptcy Code. In 2011, the amount of equity exempted is restricted to \$146 450.

³⁶See Ferriell and Janger *Understanding Bankruptcy* 223; Evans 2010 *CILSA* 337, 347.

³⁷See s 541 of the Bankruptcy Code. See Ferriell and Janger *Understanding Bankruptcy* 224ff; Evans 2010 *CILSA* 348.

³⁸See s 541(a)(1) of the Bankruptcy Code. See Gross *Failure and forgiveness* 44.

³⁹See s 541(a)(1)-(6) of the Bankruptcy Code.

⁴⁰And before the case is closed, dismissed or converted into a case under Chapters 7 or 11 of the Bankruptcy Code; see s 1306(a)(2) of the Bankruptcy Code. See Ferriell and Janger *Understanding Bankruptcy* 255ff, 645.

⁴¹For discussion of the exemptions in American law, see Evans *Critical Analysis* 165ff; Evans 2010 *CILSA* 345, 346ff; Gross *Failure and forgiveness* 93.

certain exempt property and the rights of secured creditors.⁴² To be eligible to file for a Chapter 7 bankruptcy, a debtor must qualify for relief under a "means test" which, *inter alia*, requires an income below a certain threshold.⁴³ Ordinarily, debtors who file for a Chapter 7 bankruptcy do not have non-exempt assets, with the result that there is no need for a sale to be held and, in practice, the bankrupt receives a discharge within a short period of time.⁴⁴

The purpose behind a Chapter 13 bankruptcy is not liquidation, but the preservation, of the estate, and the rehabilitation of the debtor by giving him a "fresh start" without necessarily becoming a burden on the state.⁴⁵ The debtor generally remains in possession of the property of the estate which, should he successfully complete the payment plan, becomes part of his new estate.⁴⁶ Thus, the debtor may re-acquire pre-petition property by committing post-petition earnings to the payment of creditors' claims.⁴⁷ On the other hand, however, if the plan fails and the bankruptcy is converted to a Chapter 7 bankruptcy, the property must be surrendered to the trustee for liquidation.⁴⁸

A person is eligible for Chapter 13 relief as long as his unsecured debts are less than US\$360 475 and secured debts are less than US\$1 081 400.⁴⁹ The person must file a petition for Chapter 13 relief with the bankruptcy court of his domicile and it is a requirement that the petitioner must have received credit counselling within 180 days before filing.⁵⁰ As soon as the petition is filed, an "automatic stay" is entered which temporarily stops all debt collection actions against the debtor or his property, including

⁴²See Ferriell and Janger *Understanding Bankruptcy* 603ff.

⁴³See Ferriell and Janger *Understanding Bankruptcy* 604, 607ff.

⁴⁴See Ferriell and Janger *Understanding Bankruptcy* 603; Evans 2010 *CILSA* 340; Gross *Failure and forgiveness* 25. An alternative procedure for consumers with very large debt is Chapter 11.

⁴⁵Evans *Critical Analysis* 162-163, 164-166.

⁴⁶Ferriell and Janger *Understanding Bankruptcy* 223-224, 645, 646.

⁴⁷As Evans 2010 *CILSA* 349 explains, in this way, the debtor "saves" assets which would have been liquidated, in a Chapter 7 bankruptcy, by using property, or post-petition acquisitions, which would have been exempt under Chapter 7.

⁴⁸See Ferriell and Janger *Understanding Bankruptcy* 644; Evans 2010 *CILSA* 349.

⁴⁹See s 109(e) of the Bankruptcy Code. These amounts are adjusted periodically to reflect changes in the consumer price index. See Ferriell and Janger *Understanding Bankruptcy* 642-643.

⁵⁰See ss 109, 111 of the Bankruptcy Code.

a mortgage foreclosure sale.⁵¹ The automatic stay remains in effect until the bankruptcy case is completed. Within 15 days of filing the petition, the debtor must file: schedules of assets and liabilities; a schedule of current income and expenditure; schedules and details of all financial affairs; and a proposed payment plan to pay to the trustee, for the benefit of creditors, a portion of his debts over a period of between three to five years.⁵² If the plan is confirmed by the bankruptcy court,⁵³ the debtor is re-vested with all of the property not disposed of in terms of the payment plan.⁵⁴ The debtor must then pay his debts according to the confirmed payment plan.

Many debtors file for Chapter 13 bankruptcy with the specific object of saving their home from a mortgage foreclosure sale.⁵⁵ In a Chapter 13 filing, it is possible to obtain "cram down modification" of secured debt. This means that the bankruptcy court may confirm a payment plan which entails the adjustment of the terms of the original agreement without the consent of the secured creditor.⁵⁶ However, this does not apply to a mortgage over real estate which is the debtor's principal residence.⁵⁷ Therefore, if the debtor wishes to avoid his home being sold in foreclosure, he must continue to make payments in accordance with the original mortgage agreement. If the debtor is already in default with respect to his mortgage obligations, in an explicit exception to the rule that prohibits modification of home mortgages, the Bankruptcy Code allows him to "cure and reinstate" the mortgage at any time prior to a foreclosure sale of the

⁵¹See s 362 of the Bankruptcy Code. See Ferriell and Janger *Understanding Bankruptcy* 257-258, 275, 356-357. However, if the debtor has no valuable interest in the property and does not need it to reorganise, the court must lift the automatic stay and permit the creditor to foreclose, as if the bankruptcy case had not been filed.

⁵²It may be noted that, in practice, the proposed payment plan is generally filed at the time of filing; see Ferriell and Janger *Understanding Bankruptcy* 643.

⁵³See s 1325(a) and (b) of the Bankruptcy Code for requirements for confirmation of a plan. See also Ferriell and Janger *Understanding Bankruptcy* 663ff.

⁵⁴See s 1327(b) of the Bankruptcy Code. See also Ferriell and Janger *Understanding Bankruptcy* 694; Evans 2010 *CILSA* 349.

⁵⁵See Ferriell and Janger *Understanding Bankruptcy* 257-258, 656-657; White and Zhu 2010 *J Leg Studs* 33; Morris and Guccion 2011 *ABI L Rev* 1, 18.

⁵⁶See 1325(a)(5) of the Bankruptcy Code.

⁵⁷See s 1322(b)(2) of the Bankruptcy Code; Ferriell and Janger *Understanding Bankruptcy* 654-657, 687-688. It may be noted that, if the residence is personal property, such as a trailer or a motor home, the creditor's claim may be modified.

mortgaged property.⁵⁸ Thus, the payment plan should require the debtor to make all regular instalment mortgage payments which will become due after filing the Chapter 13 petition as well as to make additional payments so that arrear mortgage payments will be paid within a reasonable time.⁵⁹ In the event that the bankrupt makes all payments timeously and pays any arrear amounts within a reasonable time – something which he is often more able to do once other debt obligations have been modified – he may become eligible to refinance the property after a period of repayment. In this event, he might be able to make additional payments to unsecured creditors.⁶⁰

7.2.4 *The recent recessions and related developments*

The recent economic crisis and recessions, which necessitated the implementation of measures akin to emergency measures traditionally extended to counter the effects of disasters, war and revolution,⁶¹ brought to the fore the need to address and, in the longer term, to avoid, the adverse consequences of home mortgage foreclosures for homeowners, creditors and society, generally.⁶² During 2007 and 2008, as increasing

⁵⁸See s 1322(c)(1) of the Bankruptcy Code. See also Ferriell and Janger *Understanding Bankruptcy* 657 n 112 refer to *In re Cain* 423 F.3d 617 (6th Cir. 2005). S 1322(c)(2) contains another explicit exception to the rule that prohibits modification of home mortgages. It applies when the last payment on the mortgage is due before the end of the payment plan. This might occur, for example, if the debtor files for a Chapter 13 bankruptcy within the last few years of the residential mortgage or where, in terms of the original agreement, there is a "balloon payment" due in the three- to five-year period after the debtor has filed for the Chapter 13 bankruptcy. See Ferriell and Janger *Understanding Bankruptcy* 657.

⁵⁹See Ferriell and Janger *Understanding Bankruptcy* 657; Morris and Guccion 2011 *ABI Law Rev* 19-20.

⁶⁰See Ferriell and Janger *Understanding Bankruptcy* 430-431, 657.

⁶¹See 2.3.5.2, above.

⁶²See Wagner 2010 *Geo J Pov Law & Policy* 423; Carr and Lucas-Smith 2011 *Suffolk U L Rev* 7; Boyack 2011 *AmULRev* 1489; Braucher 2010 *Ariz L Rev* 727; Smith 2011 *J Civ Rights & Ec Dev* 525; Martin "New Housing Program is Aimed at the Unemployed" *New York Times* (7 July 2011) <http://www.nytimes.com/2011/07/08/business/new-housing-program-is-aimed-at-the-unemployed.html> [date of use 15 March 2012]; Streitfeld "Big Banks Easing Terms on Loans Deemed as Risks" *New York Times* (2 July 2011) <http://www.nytimes.com/2011/07/03/business/03loans.html> [date of use 15 March 2012]; Streitfeld "Backlog of Cases Gives a Reprieve on Foreclosures" *New York Times* (19 June 2011) <http://www.nytimes.com/2011/06/19/business/19foreclosure.html?pagewanted=print> [date of use 15 March 2012]; Morgenson "Countrywide to Distribute Settlement to its Clients" *New York Times* (20 July 2011) http://www.nytimes.com/2011/07/21/business/countrywide-to-pay-borrowers-108-million-in-settlement.html?_r=1 [date of use 15 March 2012]; The Associated Press "Wells Fargo Agrees to Pay \$85 Million Over Loans" *New York Times* (20 July 2011) <http://www.nytimes.com/2011/07/21/business/wells-fargo-to-settle-mortgage-charges-for-85-million.html> [date of use 15 March 2012]; Herron "Banks repossessed 1 million homes last year – and 2011 will be worse" *msnbc.com* (13 January 2011) http://www.msnbc.msn.com/id/41051419/ns/business-real_estate/t/banks-repossessed-million-homes-last-year-will-be-worse/ [date of use 15 March 2012].

levels of unemployment raised the rate of mortgage defaults and, in turn, home mortgage foreclosures by lenders,⁶³ a "downward spiral" ensued as residential areas became filled with empty homes abandoned by defaulting mortgagors or vacated, in foreclosure. As property values sank well below their "boom-time" values and amounts for which homes had been mortgaged exceeded their current values, owners found themselves "underwater", holding "negative equity" in their homes. Increased homelessness following evictions from rented and owned homes in foreclosure placed a strain on the social security system. Homeowner assistance programmes, facilitated by the Mortgage Forgiveness Debt Relief Act of 2007, formed with the main purpose of encouraging lenders not to foreclose but to modify loan terms by agreement,⁶⁴ could not stem the tide.⁶⁵

The HOPE for Homeowners Act of 2008⁶⁶ sought, for the benefit of "distressed borrowers", to encourage lenders to reduce principal loan balances by 10 percent.⁶⁷ However, this programme, in which participation by lenders was voluntary, also was

⁶³Carr and Lucas-Smith 2011 *Suffolk U L Rev* 10-11.

⁶⁴The Hope Now Alliance was one such programme. The Mortgage Forgiveness Debt Relief Act of 2007, Pub L 110-142, 121 STAT 1803, enacted on 20 December 2007, provided that debt "forgiven", or cancelled, in the course of mortgage loan modification, or in the course of foreclosure, on a primary residence, during the period from 2007 to 2009, would not be treated as income, for tax purposes. This period was extended, to 2012, by the Emergency Economic Stabilization Act of 2008, discussed below. See Hochbein 2010 *Cap Univ L Rev* 889.

⁶⁵By April 2008, the State Foreclosure Prevention Working Group reported that the rate of home mortgage foreclosures exceeded the capacity of homeowner rescue programmes on account of the complex and slow consultation and administrative processes which had to be followed when seeking refinancing. See Christie "Housing relief efforts slow as pace of foreclosures rise" *CNN Money* (28 April 2008) http://money.cnn.com/2008/04/28/real_estate/Hope_Now_workouts_slow/index.htm?postversion=2008042817 [date of use 15 March 2012].

⁶⁶Passed as part of the Housing and Economic Recovery Act of 2008, Pub L 110-289, 122 Stat 2654, enacted on 30 July 2008, consisting of a legislative package, made up of various statutes, which established a scheme mainly to restore confidence in Fannie Mae and Freddie Mac, the two large suppliers of mortgage funding, by strengthening regulations and injecting capital into them. (For background information on Fannie Mae and Freddie Mac, see Boyack 2011 *AmULRev* 1489.) It also introduced significant regulatory reforms for the provision of housing finance and new requirements, for lenders, in relation to early disclosure of mortgage terms and charges, and new regulations regarding registration and conduct of loan originators.

⁶⁷It authorised the Federal Housing Administration to guarantee up to US\$300 billion in new 30-year fixed rate mortgages for subprime borrowers. It also authorised states to refinance subprime loans using mortgage revenue bonds and established the Federal Housing Finance Agency which placed Fannie Mae and Freddie Mac under its conservatorship. See Johnson and Waldrep 2010 *NC Bank Inst* 191, 203-204.

unsuccessful.⁶⁸ On 3 October 2008, the Emergency Economic Stabilization Act of 2008,⁶⁹ now commonly referred to as "the bailout", was enacted. This created the Troubled Asset Relief Program ("TARP") to enable the United States Treasury to purchase failing bank assets and to encourage mortgagees to take advantage of the HOPE for Homeowners Program, or other available programmes, to keep foreclosures to a minimum.⁷⁰ However, this aim was not achieved.⁷¹ In February 2009, President Barack Obama announced the Homeowner Affordability and Stability Plan, including the Home Affordable Modification Program,⁷² which, once again, encouraged mortgage servicers' voluntary participation by offering them incentives to modify loans and which, it was envisaged, would assist an anticipated three to four million homeowners to avoid foreclosure. But this, also, has generally not been regarded as a success.⁷³ The Helping Families Save their Homes Act of 2009⁷⁴ was passed without the controversial, proposed "cram down" provisions which would have granted bankruptcy judges the authority, when confirming Chapter 13 payment proposals, to reduce the capital sum or applicable interest rates or to extend the repayment period up to a maximum of 40 years, for home mortgages on primary residences.⁷⁵

⁶⁸There were significantly fewer applications than anticipated, and very few refinanced mortgages were processed, a fact attributed to high fees, high interest rates, reluctance on the part of lenders to reduce the principal sum owing, and a requirement that the federal government should receive 50% of any appreciation in value of the house.

⁶⁹Division A of Pub L 110-343, 122 Stat 3765, enacted on 3 October 2008.

⁷⁰It permitted the Treasury Secretary to apply loan guarantees and credit enhancements in an effort to promote the resort to loan modifications to avert foreclosures.

⁷¹See Carr and Lucas-Smith 2011 *Suffolk U L Rev* 10.

⁷²It provided \$75 billion, supplemented by US\$200 billion in additional funding, for Fannie Mae and Freddie Mac to purchase, and more easily refinance, mortgages. It encouraged lenders to reduce homeowner's monthly payments to 38% of their gross monthly income and the government would share the cost to further reduce the payment to 31%. The plan also involved potentially forgiving, or deferring, a portion of the borrower's mortgage balance. For details of the Home Affordable Modification Program, see Braucher 2010 *Ariz L Rev* 727; Johnson and Waldrep 2010 *NC Bank Inst* 191, 205-206.

⁷³Colesanti 2011 *J Civ Rights & Ec Dev* 483, 489; Crespi 2011 *Santa Clara L Rev* 153, 179-180; Carr and Lucas-Smith 2011 *Suffolk U L Rev* 15ff; Braucher 2010 *Ariz L Rev* 787-788.

⁷⁴111-S 896.

⁷⁵This would have involved an amendment to s 1322(b)(5) of the Bankruptcy Code. Although the House of Representatives voted to pass the bill (HR 1106, with votes recorded as 234 to 191), Senate did not approve the cram down provisions. See Johnson and Waldrep 2010 *NC Bank Inst* 207-208. For arguments in favour of the cram down provisions, see Maynard 2010 *NC Bank Inst* 275; Seidenberg 2009 *ABA Jnl* (August) 55.

Commentators have advanced various proposals to resolve the problem. One proposal included the introduction of "cram down" provisions in Chapter 13 bankruptcy cases to provide for streamlined mortgage principal reduction.⁷⁶ Another recent proposal has been to encourage strategic default by homeowners, to force lenders to reduce principal sums which, it was suggested, they would be more likely to choose than foreclosure, in the prevailing economic circumstances.⁷⁷ Yet another proposal includes a combination of allowing foreclosure sales only as a last resort, mandatory pre-foreclosure mediation and conciliation as well as overhauling the Home Affordable Stability Program to provide for broad-scale principal reduction for borrowers who are "underwater". Where foreclosure cannot be avoided, the proposal posits avoiding eviction of borrowers by implementing enhanced buy and rent back schemes to allow them to remain in occupation, for a period, as tenants.⁷⁸

Programmes using mediation, or a negotiation process, facilitated by a neutral third party or loss mitigation processes which do not involve any third party have been introduced in some cities, counties and states of the United States of America.⁷⁹ For example, in the state of New York, initially arising out of a court having postponed foreclosure proceedings until parties had attempted meaningfully to reach settlement, legislation now provides, in respect of all home mortgages, for a mandatory pre-foreclosure settlement conference to be held within 60 days of proof of service having been filed with the county clerk.⁸⁰ It requires the homeowner and the lender to negotiate in good faith with the purpose of settling the matter to avoid foreclosure. The lender is required to have a representative or attorney present at the settlement conference with

⁷⁶See, for example, Posner and Zingales 2009 *Am L & Ec Rev* 575, suggested this in respect of homes located in areas which had experienced a reduction in median house prices of 20% or more, calculated with reference to the reduction in median house prices, on the basis that, if the home was later sold, 50% of the proceeds would go to the lender.

⁷⁷Crespi 2011 *Santa Clara L Rev* 153.

⁷⁸Carr and Lucas-Smith 2011 *Suffolk U L Rev* 22-24; See Smith 2011 *J Civ Rights & Ec Dev* 561-562; Behrend 2010 *NC Bank Inst* 219.

⁷⁹See Kulp "Foreclosure Mediation Program Models" compiled by the American Bar Association <http://www.abanet.org/dispute/mediation/resources.html> [date of use 15 March 2012]. See also Khader 2010 *Co J L & Soc Probs* 109, 111-112 and references cited there; Ornstein, Yoon and Holahan 2010 *Consumer Fin LQ Rep* 98. For discussion of the advantages of loan modification, for both the lender and the borrower, see Wagner 2010 *Geo J Pov L & Policy* 423.

⁸⁰See s 3408 of the Civil Practice Law and Rules of New York which was signed into law on 15 December 2009. This applies to "one- to four-family" homes.

the authority to fully negotiate and settle the matter. The foreclosure proceedings are stayed until the referee, or judicial hearing officer, determines that the settlement conferences have been concluded, in that they have resulted in loan modification or an appropriate alternative, or because one of the parties has not satisfied the requirements. The referee, or judicial hearing officer, thereafter makes a recommendation to the judge presiding over the foreclosure proceedings.⁸¹

In the city of Philadelphia, the Residential Mortgage Foreclosure Diversion Program, administered by the courts, requires plaintiffs to meet in person with each defendant, to whom the court allocates a *pro bono* attorney, before a judge will certify a home foreclosure sale.⁸² In Florida, a state-wide, compulsory mediation program, instituted through administrative orders issued by the Florida Supreme Court, applied, between December 2009 and December 2011, to regulate the substantive and procedural requirements in all foreclosure cases pertaining to residential mortgages.⁸³ In Indiana, a local rule was established in Marion County, providing for mandatory pre-foreclosure settlement conferences. Thereafter, an amendment to the Indiana Code granted defendants in residential mortgage foreclosure actions the right to request a settlement conference and, in time, Best Practices Guidelines were developed in this regard.⁸⁴ In

⁸¹A proposed amendment will allow only two postponements on account of the lender having no representative present who is authorised to settle the matter, or failing to negotiate in good faith, or to meet other deadlines, after which the claim will be dismissed. See Bill number S442-2011 <http://open.nysenate.gov/legislation/bill/S442-2011> [date of use 15 March 2012]. For critical comment on the legislation applicable to foreclosure cases in New York, see Dillon 2010 *Pace L Rev* 855.

⁸²See Joint General Court Regulation No 2008-01, issued by the First Judicial District of Philadelphia and the Court of Common Pleas of Philadelphia County.

⁸³The first administrative order, AOSC09-54, was written by Chief Justice Peggy Quince on 28 December 2009. All other circuits followed suit. See Ornstein, Yoon and Holahan 2010 *Consumer Fin L Q Rep* 86; Press 2011 *Nev LJ* 306, 338. It may be noted that the state-wide, managed mediation programme was terminated, by a subsequent administrative order, AOSC11-44, issued by Chief Justice Charles T Canady, on 19 December 2011. The Chief Justice suggested that, henceforth, circuit chief judges should use their statutory powers to adopt appropriate measures, including referral of cases to mediation on a case-by-case basis.

⁸⁴See Marion County (Indianapolis) Local Rule LR49-TR85-231 Marion Circuit and Superior Court Rules 16 <http://www.inbar.org/LinkClick.aspx?fileticket=LNe5yUFfNRU%3D&tabid=387> [date of use 15 March 2012] and Indiana Code Chapter 10.5 Foreclosure Prevention Agreements for Residential Mortgages <http://www.in.gov/legislative/ic/code/title32/ar30/ch10.5.html> [date of use 15 March 2012]. For discussion of this legislation, see Ornstein, Yoon and Holahan 2010 *Consumer Fin L Q Rep* 197.

Maine,⁸⁵ a mortgage holder filing a foreclosure complaint against an owner-occupied residence is obliged to serve a one-page notice on the homeowner including a warning that failure to answer the complaint will result in foreclosure of the property. A sample answer, and an envelope in which to mail their answer to the court, must be provided with the notice, as well as a description of the mediation programme. Once an answer is filed with the court, all foreclosure proceedings are stayed until the mediation process is complete. The mediation sessions must be attended by the mediator, who is usually a former judge, attorney or bank professional, the homeowner, and a representative of the mortgage holder who has authority to restructure the loan. An initial informational session is held to assist the homeowner by advising him of the procedure, the documents required to be submitted for consideration, and what facts and circumstances would be relevant. Voluntary mediation programmes also operate in a number of other states, in the United States of America.⁸⁶

In a comparable development, the Southern District of New York bankruptcy court facilitated loan modification by making use of its inherent power to order parties to negotiate in good faith in an effort to mitigate loss.⁸⁷ Thus, a Loss Mitigation Program was established for which the court has become renowned.⁸⁸ The result is that, where appropriate, the homeowner will remain in his home, or parties negotiate a "graceful exit" in terms of which the bankrupt has a specific period to vacate his home or a "short sale" or the creation of a deed in lieu of foreclosure.⁸⁹

⁸⁵See 14 MRS s 6321-A and Civil Rule 93 Maine Rules of Procedure (1 January 2010) <http://www.mainelegislature.org/legis/statutes/14/title14sec6321-A.html> [date of use 15 March 2012].

⁸⁶See, for example programmes described in: Schneider and Fleury 2011 *Nev LJ* 368 for details of the voluntary programme run by the Marquette University Law School and the City of Milwaukee; Benson 2010 *CBA Record* (24 October 2010) 36, on Cook County's Programme; and Johnson and Waldrep 2010 *NC Bank Inst* 203-206, on legislation passed in North Carolina.

⁸⁷For academic comment on the opportunities posed for mortgage loan modification in bankruptcy cases, see Porter 2009 *Tex L Rev* 121; Eggum, Porter and Twomey 2008 *Utah L Rev* 1123; Levitin 2009 *Wisc L Rev* 565; Jacoby 2009 *Loy J Pub Interest L* 171.

⁸⁸See Morris and Guccion 2011 *ABI L Rev* 46ff. See also Loss Mitigation Program Procedures <http://www.nysb.uscourts.gov/pgh/lossmitigation/LossMitigationProcedures.pdf> [date of use 15 March 2012].

⁸⁹See published testimony, on 11 February 2011, of the Hon Robert D Drain of the US Bankruptcy Court for the Southern District of New York before the Senate Judiciary Committee in 2011 *ABI Jnl* (30 March 2010) 10. For the meaning of a "short sale" and a "deed in lieu of foreclosure", see Braucher 2010 *Ariz L Rev* 743.

In July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010⁹⁰ was enacted with the primary stated aim of promoting financial stability.⁹¹ Part of this legislation was designated as "Enumerated Consumer Law", to be administered by the Bureau of Consumer Financial Protection, newly created to regulate standards for residential mortgages. An important new requirement is that a consumer who applies for a loan which will be secured by his principal dwelling must obtain pre-loan counselling from a certified counsellor. The Act has also amended legislation applicable to "real estate settlement procedures", introduced new requirements in relation to mortgage servicers' interaction with consumers and new rules, applicable in the Home Affordable Modification Program, to assist eligible homeowners with loan modifications on their home mortgage debt.⁹²

In September 2010, flaws in the foreclosure processes emerged. These included the employment of "robo-signers" who mass-produced documents and affidavits which resulted in the filing of false court documents.⁹³ Amidst controversy, the four major banks declared a moratorium on foreclosures⁹⁴ which resumed only after the institution of reforms in the administration of the foreclosure procedures and the introduction of closer scrutiny by courts of the relevant documents.⁹⁵

In July 2011, the Treasury Department announced a home mortgage relief program in terms of which eligible, unemployed homeowners may defer part or all of their monthly

⁹⁰Pub L 111-203, HR 4173, effective 21 July 2010. For discussion of this legislation, see Pottow "Ability to Pay"; Cook and Musselman 2010 *Consumer Fin L Q Rep* 231; Ropiequet, Naveja and Hirsh 2010 *Consumer Fin L Q Rep* 284.

⁹¹This it aimed to do through financial regulatory reform by, *inter alia*, improving accountability and transparency in the financial system, ending "bailouts" and protecting consumers from abusive financial services practices, limiting the TARP and reducing the national deficit.

⁹²Various provisions anticipate significant structural reforms of Fannie Mae and Freddie Mac and provide for \$35 million dollars as additional funding for mortgage relief, neighbourhood stabilisation programs and legal assistance for foreclosure-related issues. For a useful explanation of the Bureau's function and powers, see Ropiequet, Naveja and Hirsh 2010 *Consumer Fin L Q Rep* 285-289.

⁹³See Banks 2011 *ABI Jnl* 54; Froehle 2011 *Iowa LR* 1712, 1719.

⁹⁴See DeCosta 2011 *Boston BJ* 23; Greenberg 2010 *Temp L Rev* 253.

⁹⁵Streitfeld "Backlog of Cases Gives a Reprieve on Foreclosures" *New York Times* (19 June 2011) http://www.nytimes.com/2011/06/19/business/19foreclosure.html?_r=1&pagewanted=all [date of use 15 March 2012].

mortgage payments and interest for up to 12 months while they seek employment.⁹⁶ An increase in foreclosures was predicted for 2011.⁹⁷ However, it seems that, in a number of states, the delays caused by the backlog of foreclosure cases provided a type of reprieve for defaulting homeowners. This was as a result of, *inter alia*, courts requiring pre-foreclosure settlement conferences and increased court scrutiny by the courts of documentation, the existence of sufficiency of proof, and adherence to proper process.⁹⁸ There are also indications that lenders frequently take the initiative and proactively seek out borrowers, who are not yet in default. Lenders reportedly often prefer to modify the terms of their original agreements, which include adjustable interest rates and delayed "balloon" payments of principal and interest, and sometimes even offer to reduce principal loan amounts in an effort to prevent the borrower defaulting in future and to avoid prospective foreclosure proceedings.⁹⁹

7.2.5 Comment

The existence of a formal homestead exemption does not necessarily assist the debtor as it does not apply to provide protection to a homeowner against the claim of a mortgagee. In the individual debt enforcement process, the substantive and procedural requirements as well as best practice guidelines may all be regarded simply as forming part of the response to the economic crisis, or emergency measures, devised in an effort to prevent economic collapse. Be that as it may, it is submitted that they also serve as an excellent model for proper and appropriate consideration of relevant circumstances before forced sale of a debtor's home is sanctioned by a court.

⁹⁶The three-month deferment period allowed in an earlier programme was too short. See Martin "New Housing Program is Aimed at the Unemployed" *New York Times* (7 July 2011) <http://www.nytimes.com/2011/07/08/business/new-housing-program-is-aimed-at-the-unemployed.html> [date of use 15 March 2012].

⁹⁷Herron "Banks repossessed 1 million homes last year – and 2011 will be worse" *msnbc.com* (13 January 2011) http://www.msnbc.msn.com/id/41051419/ns/business-real_estate/t/banks-repossessed-million-homes-last-year-will-be-worse/ [date of use 15 March 2012].

⁹⁸Froehle 2011 *Iowa L R* 1722, 1740; Streitfeld "Backlog of Cases Gives a Reprieve on Foreclosures" *New York Times* (19 June 2011) http://www.nytimes.com/2011/06/19/business/19foreclosure.html?_r=1&pagewanted=all [date of use 15 March 2012].

⁹⁹Streitfeld "Big Banks Easing Terms on Loans Deemed as Risks" *New York Times* (2 July 2011) <http://www.nytimes.com/2011/07/03/business/03loans.html> [date of use 15 March 2012].

The Chapter 13 bankruptcy payment plan is comparable to South Africa's debt review process. Important differences are that home mortgage obligations are not included in a Chapter 13 payment plan but, to save his home from forced sale, the debtor is required to pay any mortgage arrears and to maintain regular current payments that become due. Therefore, the payment plan must cater for this. In the Chapter 13 bankruptcy process, a court may not modify the terms of the mortgage without the consent of the mortgagee. By contrast, in the South African debt review process, a magistrate's court is empowered to modify the terms of the original mortgage agreement without the consent of the mortgagee.

The recent economic crisis and recessions forced authorities, in the United States of America, to address the adverse consequences of, and to stem the tide in, the alarming rate of home mortgage foreclosures. Legislation was enacted in terms of which mortgage assistance was provided, in various forms, by the state to homeowners. Proposed solutions include allowing foreclosure sales only as a last resort, with mandatory pre-foreclosure mediation and conciliation between debtors and creditors. A number of states introduced practices and programmes including mediation and pre-action negotiation processes. In the state of New York, legislation now provides for a mandatory pre-foreclosure settlement conference to be held. Compulsory mediation requirements also apply in Philadelphia, Indiana, and Maine. In the bankruptcy process, the Southern District of New York bankruptcy court requires mitigation loss conferences between parties to ensure that sale of bankrupt persons' homes occurs only as a last resort and, where sale is unavoidable, that bankrupt persons and their families are not evicted in such a way as to render them homeless.¹⁰⁰

¹⁰⁰See 7.2.4, above.

7.3 Canada

7.3.1 General and historical background

The Canadian homestead exemption is stated to have arisen out of necessity, in the western provinces, in that they needed to compete against the United States for immigrants.¹⁰¹ The modern Canadian home exemption has been described as "an explicit and systematic scheme of legal protection for the home by exempting it – to a greater or lesser extent – from the pool of assets which creditors can access to recoup their losses on default."¹⁰² However, the level of protection varies widely, depending on the province or territory in which the debtor's home is situated,¹⁰³ not only on account of statutory differences but, it seems, as a result also of regional differences and approaches to the interpretation of the exemption statutes.¹⁰⁴

7.3.2 The statutory home exemptions

In most of the provinces and territories, legislative provisions allow exemptions from execution, or seizure by virtue of a writ of execution, of a limited acreage of agricultural land, commonly referred to as "homestead" exemptions, and also of primary residences, but limited as to value. In Ontario, New Brunswick, Nova Scotia, and Prince Edward Island, there is no exemption for land or a primary residence although, in New Brunswick and Prince Edward Island, there is a provision that land that is seized may not be sold unless the debtor "does not produce sufficient personal estate to satisfy the judgment upon which the execution is levied".¹⁰⁵

¹⁰¹See Telfer "Evolution" 593, 595.

¹⁰²Fox *Conceptualising Home* 310.

¹⁰³See Davies "Federal Exemptions in Bankruptcy" Parliamentary Information and Research Service document PRB 02-28E <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0228-e.pdf> [date of use 15 March 2012]; Boraine, Kruger and Evans "Policy Considerations" 681-682; Sarra "Economic Rehabilitation" 45-46 [http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapi/Economic_Rehabilitation.pdf/\\$file/Economic_Rehabilitation.pdf](http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapi/Economic_Rehabilitation.pdf/$file/Economic_Rehabilitation.pdf) [date of use 15 March 2012].

¹⁰⁴See Telfer "Evolution" 595.

¹⁰⁵Boraine, Kruger and Evans "Policy Considerations" 681, with reference to Prince Edward Island *Judgment and Execution Act* RSPEI 1988 c J-2 s 26(2).

In all of the other provinces and territories, some provision is made for exemption of the home.¹⁰⁶ A few notable features will be mentioned specifically. In Manitoba, a house may not be sold unless it has the prescribed value and, if so, that amount must be paid to the judgment debtor before anybody is put in possession of it.¹⁰⁷ Further, in Manitoba, where a mobile home, which is ordinarily used as the judgment debtor's permanent residence, has been seized under a writ of execution, proceedings to sell it may not commence for a year.¹⁰⁸ In Saskatchewan, the exemption includes "a trailer or portable shack" and, if the homestead is larger than 160 acres, specific provision is made that the surplus may be sold subject to any lien or encumbrance.¹⁰⁹ In Saskatchewan, the exemptions apply also to protect from seizure or sale, a home or land which was provided as security in a security agreement¹¹⁰ except, it should be noted, where such agreement created a "purchase-money security interest" in the home or land, in which

¹⁰⁶For instance, in Alberta, equity in a principal residence, up to a value of CAN\$40 000 (with a co-owner's share reduced proportionately), is exempted, as is up to 160 acres of farm land if the principal residence is situated on it; see Alberta *Civil Enforcement Act* RSA 2000 c C-15. In Manitoba, equity in a principal residence of a non-farmer is exempted, up to a value of CAN\$2 500 (reduced to CAN\$1 500 for a co-owner), and up to 160 acres of cultivated or grazing land, regardless of whether the primary residence is located on it. The house, stables, barns and fences on the debtor's farm will also be exempt from seizure. See s 13(1) of the Manitoba *Judgments Act* CCSM c J10 and the Manitoba *Executions Act* CCSM c E160, as amended. In Saskatchewan, equity in the house and buildings in which the debtor lives and the lot on which the home is situated, is free from seizure by virtue of a writ of execution, up to a value of CAN\$32 000, as is up to 160 acres of land; see Saskatchewan *Farm Security Act* SS 1988-89 c S-17.1 and the Saskatchewan *Exemptions Act* RSS 1978 c E-14. In British Columbia, there is a CAN\$12 000 exemption of equity in the principal residence, in Greater Vancouver and Victoria, whereas the rest of the province exempts equity of up to CAN\$9 000; see the British Columbia *Court Order Enforcement Act* RSBC 1996 Chapter 78 and the applicable Regulations. In Quebec, "[a]n immovable serving as the principal residence of the debtor is also exempt from seizure where the amount of the claim is less than \$10,000, except where ... the claim is secured by a prior claim or legal or conventional hypothec on the immovable other than a legal hypothec securing a claim arising out of a judgment"; see article 553.2 (1) of the Quebec *Code of Civil Procedure*. In Newfoundland and Labrador, there is a CAN\$10 000 exemption for the principal residence of the debtor, as well as an exemption for an interest in land; see the Newfoundland and Labrador *Judgment Enforcement Act* SNL1996 Chapter J-1.1, as amended, and applicable Regulations. In Yukon and in the Northwest Territories, the exemption is for an equity value of up to CAN\$3 000; see the Yukon *Exemptions Act* Chapter 80 and the Northwest Territories *Exemptions Act* SNWT 2010 c4. In Nunavut, the exempt amount has been designated by regulation at CAN\$35 000; see the Nunavut amendments to the *Exemptions Act* and s 1 of the Exemptions Regulations to the *Exemptions Act* R-006-2006, registered with the Registrar of Regulations on 26 May 2006.

¹⁰⁷See s 13(4) of the Manitoba *Judgments Act*.

¹⁰⁸See s 36 of the Manitoba *Executions Act*.

¹⁰⁹See Saskatchewan *Farm Security Act* SS 1988-89 c S-17.1 and the Saskatchewan *Exemptions Act* RSS 1978 c E-14.

¹¹⁰See s 3(1) of the Saskatchewan *Exemptions Act* RSS 1978 c E-14. Buckwold 1999 *Osg Hall LJ* 303 states that Saskatchewan may be regarded as an exception.

case the exemption is ineffective.¹¹¹ In British Columbia, the value of equity exempted, in Greater Vancouver and in Victoria, is higher than that in the rest of the province because of the difference in median house prices in those areas.¹¹²

7.3.3 *The individual debt enforcement process*

A mortgagee's usual remedies for default by the mortgagor include the taking of possession, foreclosure,¹¹³ judicial sale, or contractual power of sale.¹¹⁴ It is important to note that, despite the existence of statutory home exemptions, no province or territory precludes seizure of real property by way of mortgage foreclosure, or other security enforcement, proceedings.¹¹⁵ However, the mortgagor's right of redemption, which he may exercise against proceedings for foreclosure or judicial sale, or in the case of extra-judicial sale, as well as provincial legislation regulating civil procedure, do impose restrictions on the enforcement of the mortgagee's rights.¹¹⁶ Generally, the mortgagee, having first issued a demand for payment, must commence action by a petition, with accompanying affidavits to support the claim, in the particular court which has jurisdiction.¹¹⁷ Once the court has established the amount owing, it may issue an "order *nis*" of foreclosure, specifying a period – known as the "redemption period" – within which the mortgagor must pay. The redemption period has traditionally been six months, although it may be shorter, or longer, in specific cases.¹¹⁸ If the respondent pays all amounts owing, including interest and any costs awarded by the court, within

¹¹¹See s 5(1) of the Saskatchewan *Exemptions Act* RSS 1978 c E-14. A "purchase-money security interest" would arise out of an agreement such as is referred to, in South African law, as a *kustingbrief*, discussed at 4.3.3, above. In relation to types of security interests in land, recognised in Canadian law, see Roach *Mortgages* 3ff.

¹¹²See British Columbia *Court Order Enforcement Act* RSBC 1996 Chapter 78 and the applicable Regulations.

¹¹³It should be noted that the term "foreclosure" is not interpreted consistently across the Canadian provinces and territories. See Roach *Mortgages* 136ff.

¹¹⁴Roach *Mortgages* 13, 417, and other, specific, chapters on each remedy.

¹¹⁵For explanation and criticism of the position, see Buckwold 1999 *Osg Hall LJ* 305-306.

¹¹⁶See Roach *Mortgages* Chapter 4.

¹¹⁷It may be of interest, from a South African perspective, that in Canada, provision is made for a registrar to sign a default judgment for foreclosure; see Roach *Mortgages* 145-145.

¹¹⁸See Roach *Mortgages* 113,135.

the redemption period, he may redeem the property.¹¹⁹ Further, at any time before foreclosure, the mortgagor may apply to the court for an order for the property to be sold.¹²⁰

Once the order *nisi* has been issued, the mortgagee may enforce, or execute on, the judgment by selling other assets of the respondent. Alternatively, he may wait until the redemption period has expired, with no payment having been made by the mortgagor, to proceed with the foreclosure proceedings in which event he must apply for an order absolute. The grant of an order absolute has the effect of "foreclosing", or terminating, all of the interests of the mortgagor in the property and, once it is registered in the Land Title Office, to convey the property into the name of the mortgagee.¹²¹

In some of the provinces and territories, legislation provides a measure of protection for a mortgagor against the harsh consequences of an acceleration clause.¹²² Where a mortgagor defaults and an acceleration clause renders the whole of the outstanding balance, including the principal amount and interest, due and payable, legislative provisions allow a court, on application by the mortgagor, to stay foreclosure or other proceedings. This may occur provided the default is cured within a specified period, by payment of all arrears and any other payments due, including costs and expenses incurred by the mortgagee. It may be noted that, in Nova Scotia, the applicable provision may be resorted to only once.¹²³

¹¹⁹The mortgagor's right to redeem is based on equity. See, further, Roach *Mortgages* Chapter 2, particularly, 43, 75ff.

¹²⁰The order is usually made subject to the proviso that the sale must be approved by the court.

¹²¹It may be of interest, from a South African perspective, bearing in mind *ABSA v Bisnath*, and related issues, discussed at 4.3.3, above, that, in some provinces, where, after the order absolute has been granted, the erstwhile mortgagee sells the property for an amount less than the judgment debt, he has no claim against the erstwhile mortgagor for the shortfall, unless he is in a position to re-convey the land. Further, if the former later sells the property for more than the amount that was owed, he is not obliged to pay any surplus to the erstwhile mortgagor. See, further, Roach *Mortgages* 131, 134, with specific reference to *Lockhart v Hardy* (1846) 9 Beav 349 50 ER 378, 15 LJ Ch 347, and legislation applicable in Alberta, Manitoba, Ontario and Saskatchewan.

¹²²See Roach *Mortgages* 131 and Chapter 12, particularly 419-421, with reference to ss 22 and 23 of the Ontario *Mortgages Act* RSO 1990 c M40; s 38(1) of the Alberta *Law of Property Act* RSA 2000 c L7; and s 115 of the Manitoba *Real Property Act* RSM 1988 c R30. See also s 17(1) of the Alberta *Judicature Act* RSA 2000 Chapter J-2; s 42 of the Nova Scotia *Judicature Act* 1989 RS c 240.

¹²³See s 42(4) of the Nova Scotia *Judicature Act*.

7.3.4 Treatment of the home in bankruptcy

The federal Bankruptcy and Insolvency Act 1985 provides for certain assets, including assets which are exempt from execution or seizure under provincial law applicable where they are situated and where the bankrupt resides, to be placed beyond the reach of creditors in bankruptcy.¹²⁴ Thus, a bankrupt homeowner's entitlement to an exemption varies depending on the province in which he lives. Although the Personal Insolvency Task Force on Bankruptcy Law Reform recommended a standardised homestead exemption of CAN\$5 000,¹²⁵ this has never been implemented.¹²⁶

Exempt property which is subject to a security interest is excluded from distribution as part of the bankrupt's estate. Therefore, it does not vest in the trustee.¹²⁷ Although the Bankruptcy and Insolvency Act imposes a general stay on the exercise by creditors of any remedy against a bankrupt debtor of his property, the claims of secured creditors are exempt from the general stay.¹²⁸ However, provision is made for a court to postpone the rights of realisation of the security for a period of up to six months.¹²⁹ Apparently, such an order will be granted only where there is evidence that the creditor is likely to realise the security in a way which will yield an unreasonably low return, which would unduly increase the amount of that creditor's unsecured claim for any deficiency and would thus prejudice the interests of those entitled to share in a potential surplus.¹³⁰

¹²⁴See ss 67(1)(a) and (b) of the *Bankruptcy and Insolvency Act* RSC 1985 c B-3, hereafter referred to as "the Bankruptcy and Insolvency Act".

¹²⁵Final Report (Ottawa, Industry Canada: Office of the Superintendent of Bankruptcy, August 2002).

¹²⁶See also the Canadian Association of Insolvency and Restructuring Professionals' submission on proposed personal insolvency amendments under Bill C-55 to the House of Commons Standing Committee on Industry, Natural Resources, Science and Technology, 21 October 2005, referred to by Sarra *Economic Rehabilitation* 17-18, 42-47. See also Telfer 2005 *Can Bus LJ* 279-327; Davies *Parliamentary Information and Research Service document PRB 02-28E* 11.

¹²⁷See ss 67(1)(b), 70(1) and 71 of the *Bankruptcy and Insolvency Act*. See also Boraine, Kruger and Evans "Policy Considerations" 667-668, with reference to *MacKesev v Royal Bank of Canada* (1991) 97 Sask R (Sask CA); Evans 2008 *De Jure* 257; Buckwold 1999 *Osg Hall LJ* 304.

¹²⁸See s 69.3(1) and (2) of the *Bankruptcy and Insolvency Act*. S 69.3(2) provides that "the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed...". See Buckwold 1999 *Osg Hall LJ* 281.

¹²⁹See s 69.3(2) of the *Bankruptcy and Insolvency Act*.

¹³⁰Buckwold 1999 *Osg Hall LJ* 284-285, with reference to *Northwest Territories (Commissioner) v Simpson Air* [1994] NWTR 184 (NWTSC) 189.

Such an approach has been regarded as being in accordance with the obligation on secured creditors, imposed by provincial legislation which regulates the individual debt enforcement process, to act in good faith and in a commercially reasonable manner in exercising rights of realisation.¹³¹

An insolvent debtor will often resort to a consumer proposal in an effort to save his home from forced sale. The consumer proposal provisions, contained in the Bankruptcy and Insolvency Act,¹³² enable eligible consumer debtors to restructure their payment obligations through binding composition agreements with their creditors. However, a consumer proposal will not affect the rights of a secured creditor unless the latter elects to subject itself to its terms.¹³³ Once a consumer proposal has been filed in terms of the Bankruptcy and Insolvency Act, a security agreement may not be terminated. The filing may also not trigger the operation of an acceleration clause, even if the parties' agreement provides for it. However, any other type of default does entitle a secured creditor to realise its security, free of the general 30-day stay imposed by the filing of a consumer proposal.¹³⁴ Therefore, a debtor who wishes to protect his home from forced sale must ensure that the terms of the proposal enable him to maintain regular mortgage payments as agreed with the mortgagee.

In Canada, provincial family law provisions also operate to provide some protection for a spouse against third parties, in relation to the family home. Provincial legislation generally enables non-transacting spouses to prevent unilateral dispositions of the family home without their consent¹³⁵ and third party claims are regulated by legislation in a number of states.¹³⁶ Some of these statutes provide for designation and registration

¹³¹Buckwold 1999 *Osg Hall LJ* 285, 280, 303.

¹³²See ss 66.11-66.40 of the *Bankruptcy and Insolvency Act* RSC 1985 c B-3, as amended.

¹³³See s 66.28(2)(b): an approved proposal is binding on secured creditors only if they have filed a proof of claim. See also Buckwold 1999 *Osg Hall LJ* 299.

¹³⁴See s 69.2 of the *Bankruptcy and Insolvency Act*.

¹³⁵Fox 2006 *Legal Studies* 219-220; Fox *Conceptualising Home* 349.

¹³⁶See s 21 of the Ontario *Family Law Act* 1986; Chapter 246 of the British Columbia *Land (Spouse Protection) Act* 1996 RSCB; c D-15 of the Alberta *Dower Act* 2000 RSA 2000; c H80 Manitoba *Homesteads Act* 1992 CCSM, which also recognises rights of a "common-law partner"; c M-1.1 of the New Brunswick *Marital Property Act* 1980 SNB 1980; Chapter F-2.1 Prince Edward Island *Family Law Act* 1995; Divisions II and III, dealing with the family residence and family patrimony, respectively, of the

of a family home. They also provide for the situation where a creditor proceeds to realise upon a lien, encumbrance or execution, or exercises a forfeiture on property that is a family home. In such a case, the spouse who has a right of possession of the family home has the same right of redemption or relief against forfeiture as the other spouse and is entitled to the same notice in respect of the claim and its enforcement or realisation.¹³⁷

7.3.5 Comment

As is the position in the United States of America, the Canadian homestead exemptions, which apply both in the individual debt enforcement process and in the bankruptcy process, generally do not provide any protection for the home of the debtor against a mortgagee's, or other secured creditor's, claim. This has prompted the comment that, in this sense, secured creditors "enjoy the best of both worlds".¹³⁸ The homestead exemptions do not affect a mortgagee's right of realisation of the security but, when the family home is sold, once the mortgagee's claim has been satisfied, the permitted amount of equity is retained by the homeowner.¹³⁹ However, the right to redeem, and rules of civil procedure applicable in various provincial and territorial jurisdictions, place restrictions on the enforcement of a mortgagee's remedies, effectively allowing for a stay of foreclosure proceedings and affording the opportunity for a mortgagor to remedy his default within the redemption period, or a period specified by the court.¹⁴⁰ Also, as in the United States of America, in Canada, it is common for a homeowner to resort to an alternative debt relief measure, the consumer proposal,

Quebec Civil Code; Chapter F-2 of the Newfoundland and Labrador *Family Law Act* 1990 RSNL 1990; and c 275 of the Nova Scotia *Matrimonial Property Act* RSNS 1989, which applies also to cohabitants in heterosexual and homosexual relationships by virtue of the Law Reform Act 2000 which extended the provisions of the Matrimonial Property Act to a "common-law partner" and the Vital Statistics Act which recognised a "domestic partnership". It may be noted that a domestic partnership declaration must be executed before cohabitants are protected by Nova Scotia's "homestead scheme".

¹³⁷This statement uses wording employed, for example, in the Prince Edward Island *Family Law Act* 1995.

¹³⁸See Buckwold 1999 37 *Osg Hall Law Journal* 305.

¹³⁹Although, in Manitoba, a house may not be sold unless it has the prescribed value and, if so, that amount must be paid to the judgment debtor before the sale is carried out, or any person is put in possession of it, this does not affect the claim of a mortgagee. See ss 13(4), 17 of the Manitoba *Judgments Act*.

¹⁴⁰See 7.3.3, above.

provided for in bankruptcy legislation, in an effort to save his home from forced sale. However, a mortgage debt will not be included in the consumer proposal and, therefore, its terms should enable the debtor to satisfy any arrear payments and maintaining regular mortgage payment obligations.¹⁴¹

An aspect of Canadian law which should be considered for implementation in South Africa is that, where an acceleration clause operates upon the mortgagor's default, he may apply for a court order to stay foreclosure proceedings commenced by the mortgagee, provided he cures his default and pays arrears and applicable costs within a period which the court has specified. Notably, in Nova Scotia, such indulgence is afforded to the mortgagor only once.¹⁴² It is submitted that introduction of a similar provision, in South Africa, could pose a solution to the problem experienced in *ABSA v Ntsane*, in relation to the repeated defaults of the mortgagor.¹⁴³

7.4 New Zealand

7.4.1 General

New Zealand, which commentators have regarded favourably as a jurisdiction where policies explicitly recognise the home as a site of special significance,¹⁴⁴ also has a long tradition of protecting the debtor's home against creditors' claims. The Family Home Protection Act 1895 was enacted "to make provision for securing homes for the people and for preventing such homes from being sold for debt or otherwise".¹⁴⁵ Available to married couples only, it enabled the owner to "settle" a dwelling house as a family home during his lifetime and until his children reached the age of 21. The act of "settlement" protected the home from the claims of unsecured creditors and the Official Assignee in

¹⁴¹See 7.3.4, above.

¹⁴²See 7.3.3, above.

¹⁴³Discussed at 5.5.2, above.

¹⁴⁴Fox 2006 *Legal Studies* 219; Fox *Conceptualising Home* 349; Brown 2007 *J S Pacific L* 89, 93; Frieze *Personal Insolvency Law* 1148, 1150; Miller 1986 *Conv & Prop Law* 393, 404; Gravells 1985 *Ox J L Studs* 132, 140ff.

¹⁴⁵See New Zealand Law Commission Preliminary Paper 44 *The Future of the Joint Family Homes Act* August 2001, hereafter referred to as "Preliminary Paper 44", par 1.

Bankruptcy and gave a total exemption from death duty. An important point to note is that no home that was settled could be mortgaged.¹⁴⁶

The Joint Family Homes Act 1950,¹⁴⁷ enacted as part of a programme to reinforce Christian family values in an attempt to counteract the high divorce rate, permitted, by a process of registration, the settlement of a home which was occupied by a married couple, on both spouses. Thus, they became co-owners. It set at £4 000 the upper limit of value for a home to be eligible for settlement and protected the home from creditors' claims and death duty to the limit of £2 000.¹⁴⁸ Mortgaged property could be settled as long as the spouse who was not a party to the mortgage assumed personal liability to the mortgagee on settlement. A 1955 amendment removed the upper limit on the value of a home that could be settled.

The Joint Family Homes Act 1964, which is still on the statute books, was enacted primarily "to obtain protection of a family asset and put it beyond the reach of creditors"¹⁴⁹ and "to encourage joint ownership of the matrimonial home as a means of promoting stability and security in family life".¹⁵⁰ This was perceived to be "a higher social end than that represented by commercial security for the creditor."¹⁵¹ It enabled married couples, through a simplified process, to register their home as a joint family home upon which immunity would be provided against creditors' claims up to a maximum amount, referred to as the "specified sum". Thus, a creditor could bring an action to realise the value of the registered home but, once sold, the spouse would be entitled to the proceeds of the sale, up to the amount of the specified sum, before an

¹⁴⁶See Preliminary Paper 44 pars 1 and 2. These provisions were re-enacted as Part I of the Family Protection Act 1908 in terms of which only an unmortgaged home with a capital value of £1 500 or less qualified for protection. Not widely used, the Family Protection Act 1908 was repealed in 1955.

¹⁴⁷For discussion of the Joint Family Homes Act 1950, see Preliminary Paper 44 pars 3-8. This Act was amended in 1951, 1952, 1955, 1957, 1959 and 1960.

¹⁴⁸According to Preliminary Paper 44 par 7, "these were not unsubstantial amounts in the currency of the day". The amounts were set with reference to house prices at the time.

¹⁴⁹This was stated in a parliamentary debate prior to its amendment; see Preliminary Paper 44 par 13, with reference to (1974) 390 NZPD 1504. See also Fox *Conceptualising Home* 349.

¹⁵⁰See Preliminary Paper 44 par 9, with reference to a statement made in a parliamentary debate by the then Minister of Justice; see (1964) 340 NZPD 2994. See also Fox 220.

¹⁵¹Frieze *Personal Insolvency Law* 1150.

unsecured creditor would receive any of the proceeds.¹⁵² As in the 1950 Act, mortgagees were protected in that mortgaged property could be settled only if the spouse consented and assumed personal liability to the mortgagee.¹⁵³

A 1974 amendment created a type of exemption in insolvency by excluding the proceeds, up to the protected limit, of the sale, transfer, or other disposition of the home from the definition of "property" in the Insolvency Act 1967, as long as the home was registered as a joint family home at least two years prior to bankruptcy.¹⁵⁴ Section 16 of the Joint Family Homes Act 1964 provides that, as long as the net equity exceeds the specified sum, upon application by any creditor or the Official Assignee in bankruptcy, the high court may direct a mortgage or sale of the entire settled property and a distribution of the money borrowed, or of the proceeds of the sale. However, the spouses must be left with "an 'absolute' protected entitlement" which is equal to the specified sum.¹⁵⁵ In *Official Assignee of Pannell v Pannell*,¹⁵⁶ the court held that, except in special circumstances, the policy behind the statute was to preserve a joint family home for the benefit of the registered proprietors and their family. Wilson J stated:¹⁵⁷

The special circumstances which justify an order for the sale of a joint family home will necessarily vary with each case but I think the greater the hardship to the registered proprietors and their family the weightier must be the countervailing circumstances necessary to be proved in order to justify making an order for sale.

In the circumstances, the court, not regarding the bankruptcy of either or both of the spouses nor the large amount of the bankrupt's debts in themselves to be sufficient to justify an order for sale, refused an application for it.¹⁵⁸ However, in *Official Assignee v*

¹⁵²Initially, the specified sum, for protection from unsecured creditors, was £2 000. In the course of successive amendments to the Act, the specified sum has been increased. The amount is currently NZ\$103 000; see cl 3 of the Joint Family Homes Act (Specified Sum) Order 2002 (SR 2002/364).

¹⁵³See Preliminary Paper 44 pars 23-24.

¹⁵⁴See the second proviso to s 9(2)(d) of the Joint Family Homes Act 1964. See also Preliminary Paper 44 par 12; *Official Assignee v Noonan* [1988] 2 NZLR 252, referred to by Brown 2007 *J S Pacific L* 89, 93.

¹⁵⁵See s 16(1) and (2) of the Joint Family Homes Act 1964, as amended.

¹⁵⁶*Official Assignee of Pannell v Pannell* [1966] NZLR 324 (HC).

¹⁵⁷*Official Assignee of Pannell v Pannell* [1966] NZLR 324 (HC) 326. See also the Preliminary Paper 44 par 22; Gravells 1985 *Ox J Legal Studs* 141.

¹⁵⁸*Official Assignee of Pannell v Pannell* [1966] NZLR 324 (HC) 326.

Lawford,¹⁵⁹ the court held that it had an unfettered discretion to permit the sale of the home without the need for defined special circumstances. The court ordered the sale in circumstances where both spouses had been declared bankrupt and where the outstanding debts amounted to less than half of the value of the equity in the joint family home. However, the court did not order the immediate sale of the home but ordered the bankrupts to execute a mortgage, preferably in favour of the Official Assignee, for a period of one year, with a power to sell the property in the event of the bankrupts failing to refinance within that period. In view of the poor health of the husband, the amount to be raised by mortgage was fixed at only two-thirds of the total debts.¹⁶⁰

Another statute, the Property (Relationships) Act 1976,¹⁶¹ applicable to marriages, civil unions and *de facto* partnerships, including same-sex relationships,¹⁶² provides that each spouse or partner has a protected interest in the family home which includes the proceeds of the sale of the family home.¹⁶³ It provides that the protected interest of each spouse or partner is not liable for the unsecured debts of the *other* spouse or partner.¹⁶⁴ The value of the protected interest of a spouse or partner is the lesser of the specified sum or half of the equity of the spouses or partners in or, if it has been sold, half of the proceeds of the sale of the family home.¹⁶⁵ In practice, the specified sum is kept equal with the specified sum, under the Joint Family Homes Act 1964, and is currently set at \$103 000.¹⁶⁶

¹⁵⁹ *Official Assignee v Lawford* [1984] 2 NZLR 257.

¹⁶⁰ *Official Assignee v Lawford* [1984] 2 NZLR 257, 264. See Preliminary Paper 44 par 22; Gravells 1985 *Ox J Legal Studs* 141-142.

¹⁶¹ Formerly known as the Matrimonial Property Act 1976 which, in some respects was regarded as superseding the Joint Family Homes Act 1964; see Preliminary Paper 44 par 14.

¹⁶² See s 1 of the Property (Relationships) Amendment Act 2001.

¹⁶³ See s 20B(1) of the Property (Relationships) Amendment Act 2001.

¹⁶⁴ Except for an unsecured debt incurred for the purpose of acquiring, improving or repairing the family home.

¹⁶⁵ See s 20B(2) of the Property (Relationships) Amendment Act 2001.

¹⁶⁶ See Preliminary Paper 44 par 29. See also cl 3 of the Property (Relationships) Act (Specified Sum) Order 2002 (SR 2002/363).

In 2001, the New Zealand Law Commission considered whether the Joint Family Homes Act 1964 should be retained or repealed.¹⁶⁷ It compared, in minute detail, its provisions with those contained in the Matrimonial Property Act 1976 and analysed their shortcomings.¹⁶⁸ It specifically considered whether both Acts should be repealed and replaced "with a blanket protection (up to the amount of the specified sum) of a bankrupt's principal dwelling house, roughly analogous in effect to the protection of necessary tools of trade and necessary household furniture and effects to be found in the Insolvency Act 1967 section 52".¹⁶⁹ However, the Law Commission did not recommend a "blanket exemption", stating that, in bankruptcy, it would discriminate against non-homeowners who would not "be able to start their post-adjudication life assisted by a nest egg represented by the protected interest in the homestead". It also took into account the "geographical inequity" in light of variances in median home prices.¹⁷⁰ The Law Commission acknowledged the advantage of the protection which the Joint Family Homes Act 1964 offered against creditors.¹⁷¹ However, it took into account that it had seldom been used¹⁷² and that, without any amendment, it discriminated against single homeowners, unmarried persons, and those in hetero- and homosexual *de facto* relationships, in a society which reflected a reduced rate of marriage and couples' preferences for *de facto* relationships.¹⁷³ It also regarded the requirement, where mortgaged property was settled, that the spouse had to assume personal liability, to be disadvantageous to the spouse, particularly in cases of negative equity.¹⁷⁴ In the result, the Law Commission recommended that the Joint Family Homes Act 1964 should be repealed and not replaced.¹⁷⁵ However, a decade later, it has not yet been repealed.¹⁷⁶

¹⁶⁷ See Preliminary Paper 44 and New Zealand Law Commission Report 77 *The Future of the Joint Family Homes Act* December 2001, hereafter referred to as "Report 77".

¹⁶⁸ See Preliminary Paper 44 pars 26-33, 38, 42.

¹⁶⁹ See Preliminary Paper 44 par 45; Report 77 pars 17-18.

¹⁷⁰ See Preliminary Paper 44 par 34; Report 77 par 18.

¹⁷¹ See Preliminary Paper 44 pars 5, 20 and Report 77 par 14.

¹⁷² See Report 77 par 15.

¹⁷³ See Preliminary Paper 44 pars 38, 42. Under s 21(1)(b) of the Human Rights Act 1993, marital status is a prohibited ground of discrimination.

¹⁷⁴ See Preliminary Paper 44 par 24.

¹⁷⁵ See Report 77 par 22.

¹⁷⁶ The reason for the delay is not clear, it is submitted. The Joint Family Homes Act 1964 is apparently on the parliamentary agenda for debate on the recommended repeal; see <http://www.parliament.nz/en->

7.4.2 Comment

It is ironic, it is submitted, that a form of statutory protection for the home, *per se*, against the claims of creditors, lauded as it was by certain commentators, is due for repeal, especially at a time when solutions are being sought across the globe to protect debtors' homes from forced sale.¹⁷⁷ The original statutory provisions contained "forward-thinking" features which reflected a balance between "promoting stability and security in family life" and the commercial interests of the creditor. It is submitted that it is unfortunate that the Law Commission did not more seriously consider preserving at least the essence of the protection afforded by the Joint Family Homes Act 1964, in an amended form which conforms to constitutional imperatives and extends its application to civil unions and *de facto* relationships.

A pertinent observation, it is submitted, is that, as in the United States of America and in Canada, New Zealand's legislation does not provide any meaningful protection for the home, from the debtor's family's perspective, against the claims of a mortgagee and other secured creditors.

7.5 England and Wales

7.5.1 General

England and Wales have no formal homestead exemption. However, a combination of

[NZ/PB/Legislation/Bills/Ballot/8/0/f/49HOOCBallot201011111-Member-s-bill-ballot-Thursday-11-November-2010.htm](http://www.stuff.co.nz/nz/pb/legislation/bills/ballot/8/0/f/49HOOCBallot201011111-Member-s-bill-ballot-Thursday-11-November-2010.htm) [date of use 15 March 2012]. On the other hand, however, it may be noted that, on 25 August 2008, a new regulation 5A, in the Joint Family Homes Amendment Regulations 2008 (2008/280), was made to provide for electronic lodgment of applications for registration of a home as a joint family home. Apparently, it is anticipated that new applications will be lodged despite the Law Commission's recommendation for the repeal of the Joint Family Homes Act 1964.

¹⁷⁷New Zealand has apparently also been affected. See McManus "Mortgagee sales rise 'frightening'" *Sunday Star Times* New Zealand (15 February 2009) <http://www.stuff.co.nz/the-press/1401532/Mortgagee-sales-rise-frightening> [date of use 15 March 2012]; Page "Mortgage sales reach 1-in-25-level" *Sunday Star Times* New Zealand (28 June 2009) <http://www.stuff.co.nz/business/2546165/Mortgagee-sales-reach-1-in-25-level> [date of use 15 March 2012].

statutory provisions which were first introduced in the second half of the twentieth century into legislation regulating family law, provides a scheme which gives family members "home" occupation rights. Legislation and other rules regulating debt, including mortgage, enforcement procedures and bankruptcy processes, empower the courts to delay the forced sale of the home in appropriate circumstances, depending on the ability of the debtor to pay and, in some cases, his personal circumstances. Although the law of England and Wales reflects a concept of land ownership and land use¹⁷⁸ which is very different from that applicable in South Africa, the effects of these statutory provisions allow useful comparisons to be made. With English law as a source, at one stage, of South African commercial and insolvency law, and with the impact of the Human Rights Act 1998 which applies the European Convention on Human Rights to the United Kingdom, interesting commonalities emerge between the English and the South African position. Given the influence of English law on the development of South African law, a historical overview will be provided of the treatment of debtors and bankruptcy, generally,¹⁷⁹ as well as an account of treatment of the home. It should be noted, however, that English law influences on South African law¹⁸⁰ took place at a time before English law developments which provided statutory protection for "matrimonial home rights".¹⁸¹ These rights are now more correctly, from constitutional and other perspectives, referred to as "home rights".¹⁸²

¹⁷⁸See, generally, Gray and Gray *Elements of Land Law*; Omar 2006 *Conv & Prop Law* 157, 157-158.

¹⁷⁹For a succinct account of the historical development of bankruptcy law in England, see Milman *Personal Insolvency Law* 5-12.

¹⁸⁰As mentioned at 2.3.1, above, the Cape Ordinance 6 of 1843, which was based on English law may be regarded as the basis of current South African insolvency law.

¹⁸¹For discussion of which, see 7.5.3, below.

¹⁸²One of the effects of the enactment of the Civil Partnership Act 2004 was to amend the Family Law Act 1996, and related enactments, so that they apply in relation to civil partnerships, that is, registered, same-sex relationships, in the same way as they apply in relation to marriages.

7.5.2 Historical background

During the twelfth and thirteenth centuries, a creditor could execute against the movable assets of a debtor.¹⁸³ In the thirteenth century, a trader could be imprisoned for outstanding debt¹⁸⁴ and, in later centuries, so too could a non-trader.¹⁸⁵ A later development was that imprisonment could be prevented by an assignment for the benefit of creditors.¹⁸⁶ Because, under the feudal system, land had occupied a central position, execution could occur only against personal property and profits or rents of real property.¹⁸⁷ However, from the late thirteenth century onwards, execution was permitted against the real property of a debtor who was a trader.¹⁸⁸

Originally, personal bankruptcy was regulated by the Law Merchant,¹⁸⁹ consisting of European commercial customs and practices, based on Italian mercantile law, itself originally based on Roman law,¹⁹⁰ in terms of which only traders could go bankrupt.¹⁹¹ From the fourteenth century onwards, the Law Merchant was absorbed into the English Common Law. The first English Bankruptcy Act¹⁹² was enacted in 1542. It was conceived as a criminal statute to combat debt evasion¹⁹³ and it dealt with debtors who were traders and who had absconded in the sense that they were "fleeing" or "keeping

¹⁸³See, generally, Rajak "Culture of Bankruptcy" 11ff. In relation to the writs of *levari facias*, *fieri facias* and *elegit*, see Evans *Critical Analysis* 84, with reference to Bauer *The Bankrupt's Estate* 33; Dalhuisen *International Insolvency* vol 1 1-39.

¹⁸⁴11 Edward I (1283), also known as the Statute of Acton-Burnell; 13 Edward I (1285). Milman *Personal Insolvency Law* 6 states that imprisonment for debt may be traced back to a statute of 1263.

¹⁸⁵The creditor could imprison the debtor, take him to court and deprive him of his goods in payment of his debts, instead of applying for writs of *fieri facias* and *elegit*. This was extended to non-traders by enactments in 1352 and 1503. See the *Report of the Review Committee: Insolvency Law and Practice* (1982) Cmnd 8558, hereafter referred to as "the *Cork Report*", pars 26ff, 31ff; Dalhuisen *International Insolvency* vol 1 1-41; Evans *Critical Analysis* 84-85, with reference to Bauer *The Bankrupt's Estate* 35; Milman *Personal Insolvency Law* 6.

¹⁸⁶Dalhuisen *International Insolvency* vol 1 1-40; Evans *Critical Analysis* 85.

¹⁸⁷By obtaining a writ of *fieri facias* or *elegit*. See Evans *Critical Analysis* 85, with reference to Bauer *The Bankrupt's Estate* 39.

¹⁸⁸Provided for by the second Statute of Merchants, of 1285, and the Statute of Staples, of 1353. See Evans *Critical Analysis* 86-87, with reference to Bauer *The Bankrupt's Estate* 44.

¹⁸⁹The Law Merchant was a body of law developed by medieval courts in various European countries.

¹⁹⁰See Fletcher *Law of Insolvency* 8, with reference to Dalhuisen *International Insolvency* Vol 1 Part 1 Ch 2; Key 2001 *Common L World Rev* 206, 221-228.

¹⁹¹See the *Cork Report* par 32ff; Evans *Critical Analysis* 83, with reference to Jones *English bankruptcy* 5.

¹⁹²34 & 35 Henry VIII c 4 (1542-3).

¹⁹³See Milman *Personal Insolvency Law* 5-6.

their houses".¹⁹⁴ This Act made provision for the seizure and sale of the debtor's property, including personal and real property, at the instance of any aggrieved party and the distribution of the proceeds to the creditors in proportion to the respective debts.¹⁹⁵

Criticisms of the position were that an insolvent trader could not apply to be declared bankrupt and bankrupts were treated as if they were criminals, with no differentiation being made between honest debtors who had become insolvent through misfortune and dishonest, or reckless, debtors.¹⁹⁶ There was no provision for discharge¹⁹⁷ until, in 1732, necessary wearing apparel of the bankrupt and his wife and children, his tools, household goods and furniture were exempted.¹⁹⁸ The English Common Law continued to apply to "non-trader" debtors, the treatment of whom became increasingly harsh and inhumane, with committal to debtor's prison a common occurrence, even where the debtor had no assets with which to satisfy his debts.¹⁹⁹ Reforms were introduced by the creation, in 1813, of a Court for the Relief of Insolvent Debtors and, thereafter, by the enactment of various successive Bankruptcy Acts. In 1861, a Bankruptcy Act was enacted which was applicable to all debtors, including "non traders".²⁰⁰

¹⁹⁴ A debtor was "keeping his house" if he had taken refuge in his house, often with his creditor's goods, where he enjoyed immunity from the law. See the *Cork Report* par 35; Rajak "Culture of Bankruptcy" 12; and Evans *Critical Analysis* 87-88, with reference to Bauer *The Bankrupt's Estate* 68, who links it with the notion that an Englishman's home was his castle. Evans suggests that this might have been one of the earliest indications of the notion of exempt property in bankruptcy, and, more specifically, that a debtor's home deserved to be protected.

¹⁹⁵ This reflected, for the first time, a system of collective participation by creditors and *pari passu* distribution among them of the debtor's available property. See Fletcher *Law of Insolvency* 9; Evans *Critical Analysis* 87, with reference to Bauer *The Bankrupt's Estate* 65, 71. In 1571, the Bankrupts Act 13 Elizabeth 1 c 7 was enacted to make more detailed provision for bankrupt traders.

¹⁹⁶ See the *Cork Report* pars 37-38; Fletcher *The Law of Insolvency* 10-11.

¹⁹⁷ Although a measure of discharge was introduced by statute (4 & 5 Anne, c 4 (1705), amended and explained by 6 Anne, c 22 (1706) and 10 Anne, c 25) which allowed bankrupts to surrender their property in exchange for the exemption of some of their goods and discharge of liability for debts. See Fletcher *Law of Insolvency* 10; Evans *Critical Analysis* 92.

¹⁹⁸ This was in terms of a statute, 5 George II, c 30 (1732); see Evans *Critical Analysis* 92.

¹⁹⁹ "Non-traders" were persons who were employed, or who practised a profession, or who were landowners or farmers. In the late eighteenth century, imprisonment of debtors was referred to as "the English equivalent of the slave trade". See the *Cork Report* pars 32, 40-41; Milman *Personal Insolvency Law* 7-8. The state of affairs was depicted by Charles Dickens in *The Pickwick Papers* 1836 and *Little Dorrit*; see Rajak "Culture of Bankruptcy" 12.

²⁰⁰ Except for married women who were not traders; see the *Cork Report* par 42; Evans *Critical Analysis* 87; Milman *Personal Insolvency Law* 8.

The Bankruptcy Act of 1883 provided for a bankruptcy order to vest the property of the bankrupt in the official receiver of the court and thereafter, once appointed, in a trustee. The property included land and "hereditaments" of the debtor and included not only property of the bankrupt, at the date of the bankruptcy order, but also that which he acquired during bankruptcy. Exemptions included after-acquired earnings, any award made for a personal wrong committed against the bankrupt and trust property held by the bankrupt. The trustee could disclaim any right to property that would be onerous to the bankrupt estate.²⁰¹ In terms of the Bankruptcy Act of 1914, the trustee could claim excess income which the bankrupt would not require for the survival of himself and his family. Real property acquired after the bankruptcy order did not vest in the trustee unless he intervened to claim it.²⁰²

In January 1977, a Review Committee on Insolvency Law and Practice²⁰³ was appointed, under the chairmanship of Sir Kenneth Cork, to carry out a comprehensive review of insolvency law and practice and to consider necessary and desirable reforms.²⁰⁴ The Cork Committee, in its report,²⁰⁵ commonly referred to as the *Cork Report*, having considered exempt property and family assets,²⁰⁶ recommended that greater emphasis should be placed on a bankrupt's surplus income during bankruptcy being applied to the payment of his debts.²⁰⁷ In particular, it called for clarity in the position of the family home²⁰⁸ and recommended that a court should be obliged to take into account the welfare of the bankrupt's family.²⁰⁹

²⁰¹ Evans *Critical Analysis* 94-95, with reference to Stephen *New commentaries* 176-177.

²⁰² Evans *Critical Analysis* 95-96, with reference to s 47 of the (Bankruptcy) Act of 1914.

²⁰³ Hereafter referred to as the "Cork Committee".

²⁰⁴ Fletcher *Law of Insolvency* 17-18 observes that the mandate did not include a review of the general law of credit and security, nor debt enforcement and nor was the Law Commission for England and Wales involved in the review.

²⁰⁵ *Report of the Review Committee: Insolvency Law and Practice* (1982) Cmnd 8558, which, as mentioned above, is referred to, in this thesis, as "the *Cork Report*".

²⁰⁶ The *Cork Report* pars 1094ff.

²⁰⁷ The *Cork Report* par 591.

²⁰⁸ The *Cork Report* par 241.

²⁰⁹ The *Cork Report* par 1120. See 7.5.3.1, below.

The Insolvency Act 1986 introduced new provisions, many of which were based on the Cork Committee's recommendations regarding estate assets,²¹⁰ including changes to the trustee's powers in relation to the debtor's home. The enactment of the Insolvency Act 2000 brought about further, debtor-orientated reform²¹¹ and the Enterprise Act 2002 introduced provisions impacting on the way a trustee in bankruptcy deals with the home of the bankrupt.²¹² In 2000, the coming into operation of the Human Rights Act 1998 has impacted on certain aspects of debtor-creditor law and insolvency law.²¹³ Section 6(1) of the Human Rights Act imposes a duty on public authorities, including courts and tribunals, not to act in a way which is incompatible with rights recognised by the European Convention on Human Rights and to protect individuals against breaches of their rights. Section 3 requires that all primary and subordinate legislation must be read and implemented in a way which is compatible with such rights. Article 8 of the European Convention on Human Rights, which provides that everyone has the right to respect for his family life and his home, is applicable, in particular, to protection of a debtor's home, in this context.²¹⁴

Article 8 provides:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest 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.

²¹⁰See Fletcher *Law of Insolvency* 21.

²¹¹See Fletcher *Law of Insolvency* 23-24.

²¹²See Fletcher *Law of Insolvency* 24-26 for discussion of the Enterprise Act 2002 the relevant provisions of which came into effect on 1 April 2004.

²¹³See Gearty and Davies *Insolvency Practice and the Human Rights Act 1998* 41. See also, 7.5.3.3 (c), below, in relation to interpretation of the Insolvency Act 1986.

²¹⁴Lindberg 2010 *Denning LJ* 1. It has also been argued that Article 1 to the First Protocol may provide a defence to a debtor against an application by a creditor for forced sale of the home. See Pines Richman 2000 *NLJ* 1102, 1104. See 7.5.3.3 (c), below.

It has been held that interference with respect for the home can take place either at the home or by affecting the continued enjoyment of the home itself.²¹⁵ However, the approach of the English courts has been that Article 8 does not affect the mortgagee's right to possession after the mortgagor has fallen into arrears. In *Harrow London Borough Council v Qazi*,²¹⁶ Lord Scott stated, with reference to the decision in *Wood v UK*,²¹⁷ that "the [European] Commission's conclusion ... [made] it clear ... that a mortgagor cannot invoke Article 8 in order to diminish the contractual and proprietary rights of the mortgagee under the mortgage. Article 8 is simply not applicable."²¹⁸ The majority, in *Harrow London Borough Council v Qazi*, adopted the view "that courts were not required to conduct a balancing exercise in individual cases, as domestic law itself struck the right balance between the interests of individuals and the interests of the community."²¹⁹ On the other hand, in a minority judgment, Lord Bingham of Cornwall declared that "few things are more central to the enjoyment of human life than having somewhere to live."²²⁰ It has been submitted that the decision of the European Court of Human Rights, in *Connors v United Kingdom*,²²¹ "carries the strongest implication that *Qazi* was wrongly decided".²²² Cases that are more recent seem to suggest that this might indeed be the position.²²³ This, it is submitted, is a current issue which requires clarification in English law.

²¹⁵See *McCann v United Kingdom* [2008] 47 EHRHR, 40 ECHR par 50; *Howard v United Kingdom* 52 DR 198 (1985), which concerned the compulsory purchase of the home; Pines Richman 2000 *NLJ* 1104; Fox *Conceptualising Home* 8; Lindberg 2010 *Denning LJ* 1.

²¹⁶*Harrow London Borough Council v Qazi* [2003] UKHL 42, [2004] 1 AC 983.

²¹⁷*Wood v UK* (1997) 24 EHRR CD 69, a decision concerning possession proceedings brought by a local authority against a tenant. See *Miller Family, Creditors and Insolvency* 78.

²¹⁸*Harrow London Borough Council v Qazi* [2003] UKHL 42, [2004] 1 AC 983 par 135. On the impact of this decision, see Fox *Conceptualising Home* 481ff; Gray and Gray *Elements of Land Law* 89.

²¹⁹See "Housing: possession proceedings by local authority - absence of an offence - judicial review" 2011 *EHRLR* 105-106.

²²⁰See remarks by Gray and Gray *Elements of Land Law* 89, with reference to *Harrow London Borough Council v Qazi* [2004] 1 AC 983 par 8.

²²¹*Connors v United Kingdom* (2005) 40 EHRR 9; also mentioned at 3.3.1.1, above.

²²²Gray and Gray *Elements of Land Law* 128.

²²³See *McCann v UK* (2008) 47 EHRR 40 and *Kay v United Kingdom* (App No 37341/06) [2011] HLR 2 (ECHR). See also *Manchester City Council v Pinnock* [2010] UKSC 45 (SC). See Loveland 2011 *EHRLR* 151; Lindberg 2010 *Denning LJ* 1, 21ff, 30; Baker 2010 *Conv & Prop Law* 352, 359; Bright "Dispossession for Arrears" 13, 18.

7.5.3 Statutory treatment of the debtor's home

7.5.3.1 General

In modern English law, a creditor may apply for orders for possession, and for sale, of a debtor's land, provided certain requirements have been met.²²⁴ With regard to mortgaged property, it has been stated that the mortgagee holds an inherent right to possession "as soon as the ink is dry".²²⁵ However, in practice, it will only be once the mortgagor has defaulted that the mortgagee will exercise his right to sell the property and apply the proceeds to satisfy the debt.²²⁶ The mortgagee will ordinarily seek a court order for the possession of the property so that it can be sold with vacant possession.²²⁷ However, a court order is not always necessary. Where a mortgage deed contains a clause providing for the mortgagee to sell the property once payment is due, he may exercise his contractual rights without a court order.²²⁸ Even in the absence of such a clause, the mortgagee has an implied statutory power, conferred by section 101 of the Law of Property Act 1925, to sell the property.²²⁹ However, a mortgagee may not exercise this power until a mortgagor has been in default of payment for at least three months after having received notice to pay.²³⁰ A mortgagee may also apply, under section 91(2) of the Law of Property Act 1925, for a judicial order for the sale of the property in consequence of which the court may direct a sale of the mortgaged property

²²⁴See, generally, Schofield and Middleton *Debt and Insolvency* 13ff; Miller *Family, Creditors and Insolvency* Chapter 4.

²²⁵*Per* Harman J, in *Four Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317. See Lindberg 2010 *Denning LJ* 1, 7-8.

²²⁶The mortgagee also has other remedies, for discussion of which see, generally, Cousins *Mortgages*. See also Omar 2005 *Int Co Comm LR* 445; Harper 2002 *NILQ* 318.

²²⁷See Miller *Family, Creditors and Insolvency* 53ff; Fox *Conceptualising Home* 43ff. It may be noted, that, in English law, a mortgagee's claims, in this regard, are referred to as a claim for an order for possession, and for sale, respectively. Other legal systems refer to this as a claim for "foreclosure". In English law, "foreclosure" connotes a termination of the mortgagor's right to redeem the mortgage, and not merely an order for possession and sale. A court order is required for foreclosure. For discussion of foreclosure, see Cousins *Mortgages* 514ff; for discussion of secured credit in English law, see McCormack *Secured Credit* 39-53.

²²⁸Miller *Family, Creditors and Insolvency* 71; Lindberg 2010 *Denning LJ* 1, 8ff.

²²⁹The mortgagee may convey the property sold to a purchaser. See Miller *Family, Creditors and Insolvency* 71-72.

²³⁰See s 103 of the Law of Property Act 1925.

"on such terms that it thinks fit".²³¹ In terms of the Charging Orders Act 1979, an unsecured judgment creditor may, in the court's discretion, obtain a charging order which has the effect of securing the debt by creating a charge, *ex post facto*, against the debtor's property. A charge imposed by a charging order has the same effect as an equitable charge created by the debtor.²³² In the context of the family home, the court will exercise its discretion in such a way as to "strike a balance between the normal expectation of the creditor and the hardship to the spouse or partner and children if an order is made".²³³

Where the mortgaged property constitutes the debtor's home, although, traditionally, the claims of secured creditors enjoyed priority over any other claims of creditors or family members, developments reflect a measure of recognition for the need to consider the interests of "innocent" family members.²³⁴ Where the debtor owned the home, in some cases, courts allowed the wife a right of occupation of the "matrimonial home" to prevail over the right of the husband's trustee in bankruptcy to sell the property, based on the "deserted wife's equity".²³⁵ The position became statutorily regulated with the enactment of the Matrimonial Homes Act 1967²³⁶ the effect of which was to give the "non-entitled" spouse statutory rights of occupation which could also be protected against third parties by registration.²³⁷ However, these rights of occupation were expressly made void against the trustee in bankruptcy of the "entitled spouse" or against his creditors,²³⁸

²³¹For discussion of judicial sale, see Cousins *Mortgages* 530ff.

²³²See s 3(4) of the Charging Orders Act 1979. Thus the creditor acquires the status of a secured creditor who may, upon the debtor's default, ask for an order for the sale of the property. However, a charging order is void against a purchaser for value of the land unless it is registered. See Schofield and Middleton *Debt and Insolvency* 15-25; Miller *Family, Creditors, and Insolvency* 15-21; Fox 2006 *Legal Studies* 210.

²³³Cousins *Mortgages* 323ff, with reference to *Harman v Glencross* [1968] Fam 81, 104A.

²³⁴Fletcher *Law of Insolvency* 231; Fox 2006 *Legal Studies* 203, 208; Davey 2000 *Insolv Law* 2 2-3; Omar 2006 *Conv & Prop Law* 159. Milman *Personal Insolvency Law* 97-109; Miller *Family, Creditors and Insolvency* 106; Fox *Conceptualising Home* Chapter 3.

²³⁵*Bendall v McWhirter* [1952] 2 QB 466 (CA) was one such case. However, the decision was overruled by the House of Lords, in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175. See Hunter 1999 *J Bus L* 491, 505; Fletcher *Law of Insolvency* 231 n 54; Cretney 1989 *LQR* 169; Fox *Conceptualising Home* 314-319. See, also, for interesting parallels drawn between equity and *ubuntu*, Bennett 2011 *PELJ* 30, mentioned at 3.2.2, above.

²³⁶The provisions of the Matrimonial Homes Act 1967 were consolidated by s 1 of the Matrimonial Homes Act 1983.

²³⁷Miller *Family, Creditors and Insolvency* 80.

²³⁸S 2(7) of the Matrimonial Homes Act 1967.

which meant that a person's home was always at risk of being sold in the event of bankruptcy.²³⁹

In most cases, courts tended to favour the interests of creditors over those of the bankrupt's spouse and children unless circumstances were clearly exceptional.²⁴⁰ A case, frequently cited as an illustration of "home interests" prevailing over commercial interests,²⁴¹ is *Williams & Glyn's Bank Ltd v Boland*.²⁴² In this case, in an action by the mortgagee, upon the mortgagor's default, for possession of his home, both the Court of Appeal and the House of Lords found that the mortgagor's wife's equitable interest, under an implied trust, of which the mortgagee had been unaware, prevailed over the latter's claim against the husband. Lord Denning stated that "monied might [should not be given] priority over social justice" and that the bank was "not entitled to throw these families onto the street – simply to get the last pennies of the husband's debt".²⁴³ As Fox related, Lord Wilberforce, in a separate judgment, acknowledged that the court's decision "signalled the need for a 'a departure from an easygoing practice of dispensing with inquiries as to occupation beyond that of the vendor, and substitution of a more careful inquiry extending to spouses and other members of the family, or even of persons outside it'".²⁴⁴ Fox also highlights a passage from the judgment of Lord Scarman who "also suggested that: '[t]he difficulties are, I believe, exaggerated: but bankers, and solicitors, exist to provide the service which the public needs. They can – as they have successfully done in the past – adjust their practice, if it be socially required'".²⁴⁵ In a subsequent debate, in the House of Lords, it was stated that the "integrity" of the family home is of great social importance and that there was a need to

²³⁹Hunter 1999 *J Bus L* 493.

²⁴⁰See, for example, *Jones v Challenger* [1961] 1 QB 176; *Re Solomon* [1967] CH 573; *Re Turner* [1975] 1 All ER 5, [1974] 1 WLR 1556; *Re Densham* [1975] 3 All ER 726, [1975] 1 WLR 1519; *Re Bailey* [1977] 2 All ER 26, [1977] 1 WLR 278; *Re Lowrie* [1981] 3 All ER 353; *Re Citro Domenico*, *Re Citro Carmine* [1990] 3 WLR 880. Cf *Re Holliday* [1981] 1 Ch 405 (CA), where the sale of the home was postponed for five years.

²⁴¹Fox *Conceptualising Home* 53.

²⁴²*Williams & Glyn's Bank Ltd v Boland* [1979] Ch 312 (CA), [1981] AC 487.

²⁴³See Fox *Conceptualising Home* 54, with reference to *Williams & Glyn's Bank Ltd v Boland* [1979] Ch 312 (CA) 333.

²⁴⁴See Fox *Conceptualising Home* 54, with reference to *Williams & Glyn's Bank Ltd v Boland* [1979] Ch 312 (CA) 508.

²⁴⁵See Fox *Conceptualising Home* 54-55, with reference to *Williams & Glyn's Bank Ltd v Boland* [1979] Ch 312 (CA) 510.

"secure and safeguard the values which society upholds in the institution of marriage and the family".²⁴⁶ Although, apparently, subsequent cases²⁴⁷ did not reflect the same measure of judicial activism, Fox makes an interesting comment that, "despite initial concerns regarding the standard of inquiry after *Boland*, within a few years the requirement that *all* occupiers be ascertained and inquiry made of them had come to be regarded as acceptable." Fox also points out that, "[i]n order to avoid losing priority to the equitable interests of occupiers, it is now standard conveyancing practice for creditors to make inquiries from all adult occupiers, to ask that they disclose any interests claimed in the land, and to seek their consent or join them as parties to the transaction." She also states that, "in 1987, the Law Commission concluded that 'conveyancers have learnt to live with it'".²⁴⁸

The Cork Committee expressed concern that "[e]viction from the family home ... may be a disaster not only to the debtor himself ... but also to those who are living there as his dependants."²⁴⁹ It observed that the family home was often the most valuable asset in the bankrupt's estate. It also took into account the shortage of domestic accommodation as well as how expensive housing was.²⁵⁰ It recommended that the bankrupt debtor's interest in the family home should vest in the trustee and that the bankruptcy court should be required to resolve any dispute in relation to it.²⁵¹ It further recommended that the court should have specific power, taking into account the welfare of any children and of any ailing or elderly adults in the family, to postpone a trustee's right of possession

²⁴⁶See Fox *Conceptualising Home* 326; Fox 2006 *Legal Studies* 204, with reference to 437 HL Official Report (5th series) cols 640 and 653, 15 December 1982.

²⁴⁷For discussion of which, see Fox *Conceptualising Home* 55-61. See, in particular, *Bank of Bharoda v Dhillon* [1998] 1 FLR 524; *Mortgage Corp Ltd v Shire* and *Mortgage Corp Ltd v Shaire* [1998] 1 FLR 973.

²⁴⁸Fox *Conceptualising Home* 55, with reference to Law Commission *Third Report on Land Registration* Law Com No 158 1987.

²⁴⁹The *Cork Report* par 1116.

²⁵⁰The *Cork Report* par 1115.

²⁵¹The *Cork Report* pars 1126-1128.

and sale of the family home.²⁵² The *Cork Report* contained the following summative recommendations as regards the sale of a bankrupt's home:²⁵³

The court will have absolute discretion, but it may be expected to consider, *inter alia*, the following factors:

- (a) the means available to the family (other than the debtor himself);
- (b) how much of the debtor's income is to be contributed to the creditors, and how much is likely to be left for him and his family;
- (c) the suitability of the standard of amenity provided by the present family home and the available alternatives;
- (d) any offer by the debtor to move if given help (whether out of the proceeds of the sale or otherwise) in rehousing the family;
- (e) the amount likely to be realised by the sale of the debtor's interest in the family home in relation to the disturbance caused;
- (f) the need for the family to remain in a specific area for business or schooling reasons;
- (g) any personal hardship caused to an individual creditor by a proposed postponement; and
- (h) any arrangements that may have been made with a mortgagee of the premises.

Although the Insolvency Act 1986 did not go as far as these recommendations,²⁵⁴ it reversed the effect of the Matrimonial Homes Act 1967, so that the family members' occupational rights were no longer void as against the trustee in bankruptcy. It also permitted the bankruptcy court to delay the sale of the home by the trustee in bankruptcy in appropriate circumstances.²⁵⁵

²⁵²The "family home" was defined as a dwelling in which there is, or are, living: the debtor and his wife; the debtor or his wife with (in either case) a dependent child or children; the debtor's wife; or the debtor, and a dependent parent of the debtor or of his wife who has been living there as part of the family on the basis of a long-term arrangement. See the *Cork Report* pars 1120, 1124.

²⁵³The *Cork Report* par 1131.

²⁵⁴In relation to the debates preceding the enactment of the Insolvency Act 1985, see Fletcher *Law of Insolvency* 232 n 56, with reference to Miller 1986 *Conv & Prop Law* 393; Cretney 1991 *LQR* 177.

²⁵⁵Fletcher *Law of Insolvency* 232; Hunter 1999 *J Bus L* 505.

Thus, since the enactment of the Insolvency Act 1986, the position differs, depending on whether the debtor has been declared bankrupt or not. A distinction is also drawn between the position where the debtor is the sole owner of the home and, on the other hand, where the home is jointly owned by the debtor and his spouse or civil partner. This is because, in all cases where it is sought to sell jointly-owned property, the provisions of the Trusts of Land and Appointment of Trustees Act 1996²⁵⁶ are applicable.²⁵⁷ The applicable "home rights" provisions now form part of the Family Law Act 1996, as amended by the Civil Partnership Act 2004.²⁵⁸ The following attempts briefly to set out the current position in the debt enforcement process, where the home is solely, and where it is jointly, owned. Thereafter, the position, where the debtor has been declared bankrupt, will be discussed.

7.5.3.2 The individual debt enforcement process

(a) Where the debtor is the sole owner of the home

Where there is sole ownership of the home, the Family Law Act 1996²⁵⁹ provides "home rights"²⁶⁰ for the "non-owner" spouse or civil partner, former spouse or former civil partner, or cohabitant or former cohabitant, respectively.²⁶¹ Home rights may include a right not to be evicted or excluded from their home by the other party to the relationship, except with the leave of the court, and, if not in occupation, a right, with the leave of the court, to enter and to occupy the home. Section 31 of the Family Law Act provides that, where one spouse or civil partner is entitled to occupy a dwelling-house by virtue of a

²⁵⁶ Hereafter referred to as "the TLATA".

²⁵⁷ S 30 of the Law of Property Act 1925 used to apply. Now, ss 14 and 15 of the TLATA apply. See 7.5.3.2 (b), below.

²⁵⁸ The effect of s 82 and Sch 9 of the Civil Partnership Act 2004 is to amend the Family Law Act 1996, and related enactments, so that they apply in relation to civil partnerships, in the same way as they apply in relation to marriages. A "civil partnership", defined in s 1 the Civil Partnership Act 2004, is a registered, same-sex, relationship.

²⁵⁹ Hereafter referred to "the Family Law Act".

²⁶⁰ Formerly referred to as "matrimonial home rights", the effect of the enactment of the Civil Partnership Act is that they are now referred to as "home rights".

²⁶¹ See ss 30-36 of the Family Law Act.

beneficial estate or interest, the other spouse's or civil partner's home rights are a charge on the estate or interest.²⁶²

Section 33 provides for a court, in its discretion, to make an occupation order,²⁶³ on application by a person who has estate or interest or who has home rights. In the exercise of its discretion, the court is obliged to have regard to all the circumstances, including: the housing needs and housing resources of each of the parties and of any relevant child; the financial resources of each of the parties; the likely effect of any order, or of any decision by the court not to exercise its powers under the section, on the health, safety or well-being of the parties and of any relevant child; and the conduct of the parties in relation to each other and otherwise.²⁶⁴ The court may impose restrictions on the parties concerned where it considers this just and reasonable.²⁶⁵

Under the English Common Law, where a mortgagee sought to enforce his rights, the court had no discretion to decline to make an order for possession or to adjourn the hearing for the mortgagor to pay the arrears, if the mortgagee did not agree to it.²⁶⁶ Section 36 of the Administration of Justice Act 1970 provides that, where the mortgagee claims possession of mortgaged property that is a dwelling-house, if it appears to the court that the mortgagor is likely to be able, within a reasonable period, to pay any sums due under the mortgage, or to remedy any other default, the court may adjourn the proceedings, stay or suspend execution of any judgment or order, or postpone the date

²⁶²See ss 31(1) and (2) of the Family Law Act. In terms of s 31(3), such charge has the same priority as if it were an equitable interest. For further detail, especially in relation to the claim of a mortgagee, see Cousins *Mortgages* 316-317.

²⁶³The occupation order may regulate or impose restrictions on the parties' respective rights, such as to declare a party entitled to occupy the home, to evict, or to bar a party from having access to the home.

²⁶⁴See s 33(6) of the Family Law Act. S 33(7) makes provision for the interests of the applicant or any relevant child. In relation to an order in respect of a cohabitant's home rights, the court is obliged to have regard to additional factors, including the nature of the parties' relationship, the length of time during which they have lived together, circumstances relating to any children of both parties or for whom they have, or have had, parental responsibility, and the legal or beneficial ownership of the dwelling-house. See ss 36(6), (7) and (8) which make provision for the interests of the applicant or any relevant child in such circumstances.

²⁶⁵See s 33(8). Under s 33(10), such an order may, in so far as it has continuing effect, be made for a specified period, until the occurrence of a specified event or until further order.

²⁶⁶Although an exception did apply for the hearing to be adjourned, for a short period, if there was a reasonable prospect of the mortgagor paying the mortgagee in full. See Miller *Family, Creditors and Insolvency* 54.

for delivery of possession, for a reasonable period.²⁶⁷ The purpose of section 36 is to assist a person who has mortgaged his home and is experiencing temporary financial difficulties.²⁶⁸ Following a restrictive interpretation of this section,²⁶⁹ section 8 of the Administration of Justice Act 1973 was passed to provide that, in the situation where, upon default, the principal sum became due, then, for the purposes of section 36 of the Administration of Justice Act 1970, a court may treat as due under the mortgage, on account of the principal sum secured and of interest on it, only such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment.²⁷⁰ Thus, in appropriate cases, a court may exercise its discretion not immediately to grant the order sought in order to enable the mortgagor to clear the arrears or to sell the property.²⁷¹

As to what would constitute "a reasonable period" in this context, for the mortgagor to clear the arrears or to remedy any other default, in *Cheltenham & Gloucester Building Society v Norgan*,²⁷² the Court of Appeal stated that a good starting point was to calculate whether, by the end of the full term of the mortgage, the mortgagor would be able to clear the arrears.²⁷³ The court took into account the options available to a mortgagee, such as extending the term of the loan and deferring interest payments. It also considered the policy declaration of the Council of Mortgage Lenders that "[l]enders seek possession only as a last resort" and that "[t]hey are in business to help people buy homes, not to take loans away from them".²⁷⁴ The court provided a summary of the

²⁶⁷ See s 36(2) of the Administration of Justice Act 1970. See Cousins *Mortgages* 503-508.

²⁶⁸ See Cousins *Mortgages* 504.

²⁶⁹ In *Halifax Building Society v Clark* [1973] Ch 307.

²⁷⁰ Further, a court may only make an order under s 36(1) if it is also likely that, by the end of the period of postponement, the mortgagor will be able to pay any further amounts that he would have expected to be required to pay by then if there had been no such provision for earlier payment; see s 8(2) of the Administration of Justice Act 1973.

²⁷¹ See Miller *Family, Creditors and Insolvency* 61; Fox *Conceptualising Home* 43. See also Lindberg 2010 *Denning LJ* 31 who questions whether s 36 of the Administration of Justice Act 1970 is *necessary* to safeguard the mortgagee's rights and is therefore compliant with Article 8 of the European Convention on Human Rights.

²⁷² *Cheltenham & Gloucester Building Society v Norgan* [1996] 1 All ER 449, hereafter referred to as "*Cheltenham v Norgan*".

²⁷³ *Cheltenham v Norgan* 459-460, *per* Waite LJ, who expressed the view that treating the full loan term as a guide to what was a reasonable period would operate in the interests of the mortgagee and the mortgagor as it would avoid the need for frequent court attendance and would thus minimise costs.

²⁷⁴ *Cheltenham v Norgan* 461-462. See also Miller *Family, Creditors and Insolvency* 61-62.

judgments as a guide for future cases and suggested that the mortgagor should provide detailed figures, including, ideally, a "budget", for the court to be in a position to exercise its discretion appropriately.²⁷⁵ Income support and other social security assistance to which the debtor and his spouse or civil partner may be entitled are also relevant.²⁷⁶

A criticism of the position is that, where a mortgagee exercises its contractual right to sell the property without a court order,²⁷⁷ the Administration of Justice Acts of 1970 and 1973 will not apply, and thus, the court will not be in a position to exercise the discretion given to it by that Act.²⁷⁸ Another criticism is that section 36 of the Administration of Justice Act 1970 requires consideration to be given only to the debtor's ability to pay the debt within a reasonable period and does not contemplate any consideration at all for the personal circumstances of the debtor or the reasons for the default.²⁷⁹ However, it may be noted that, under the Family Law Act, a "connected person", being a spouse, former spouse, cohabitant or former cohabitant, who is able to meet the mortgagor's liabilities, may apply to be joined as a party to the proceedings before final disposal of the matter. It follows that the court ought to take into account a "connected person's" ability to assist in satisfying the mortgagor's liabilities when exercising its discretion in terms of section 36 of the Administration of Justice Act 1970.²⁸⁰

(b) Where the home is jointly owned

Where the home is jointly owned by spouses, civil partners, or cohabitants, if one of them defaults on payment of a debt, the creditor may exercise his rights against the debtor's share in the property. Thus, the entire home is vulnerable to forced sale at the instance of the creditor.²⁸¹ In terms of the TLATA, where property is co-owned, a trust of

²⁷⁵ *Cheltenham v Norgan* 459, 463.

²⁷⁶ See *Miller Family, Creditors and Insolvency* 63-64.

²⁷⁷ See 7.5.3.1, above.

²⁷⁸ See *Ropaigealach v Barclays Bank* [1999] 4 All ER 235; *Horsham Properties Group v Clark and Beech* [2008] EWHC 2327 (Ch). See Lindberg 2010 *Denning LJ* 8ff; Dixon 1999 *Camb LJ* 281; Cousins *Mortgages* 505.

²⁷⁹ See Lindberg 2010 *Denning LJ* 9.

²⁸⁰ See Cousins *Mortgages* 499.

²⁸¹ See Fox *Conceptualising Home* 61-62. A creditor may obtain a charging order over a debtor's share of the property. The co-owner spouse, civil partner or cohabitant may defend an action for possession

land is regarded as being in existence, with the owners as trustees and beneficiaries.²⁸² Where the creditor seeks to exercise its security rights against the debtor's share, it must bring an application for a court order for sale of the land in terms of section 14 of the TLATA.²⁸³ Section 15(1) requires the court, in determining an application under section 14, to have regard to:

- (a) the intentions of the person or persons (if any) who created the trust;
- (b) the purposes for which the property subject to the trust is held;
- (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home; and
- (d) the interests of any secured creditor of any beneficiary.

Section 15(3) provides that the court may also have regard to the circumstances and wishes of any beneficiaries of full age, and entitled to an interest in possession in property subject to the trust, or of the majority according to the value of their combined interests.

Before the TLATA was enacted, in disputes between beneficiaries, the courts had often applied a "collateral purpose" doctrine, taking into consideration that the property had been purchased with the purpose of providing a family home.²⁸⁴ However, most of the reported decisions favoured the creditor's interests.²⁸⁵ After the TLATA came into force, there was an apparent trend to favour the creditor's interests,²⁸⁶ although a number of later reported cases reflect some consideration for the family members' interests, even if the outcome was not in their favour.²⁸⁷

and/or sale of their home by trying to establish that his or her equitable interest takes priority over the creditor's charge. If this fails, an occupier may rely on s 36 of the Administration of Justice Act 1970, where it is applicable, to try to delay the repossession of the property, as discussed in 7.5.3.2 (a), above.

²⁸²See Cousins *Mortgages* 39, 510-512.

²⁸³Ss 14 and 15 of the TLATA replaced s 30 of the Law of Property Act 1925. In terms of s 17(2) and (3), the court may give directions as to the disposal of the proceeds of sale to those interested.

²⁸⁴See, for example, *Re Evers' Trust* [1980] 1 WLR 1327.

²⁸⁵See Omar 2006 *Conv & Prop Law* 162-163. Cf *Abbey National Building Society v Moss* [1994] 1 FLR 307. See *Bankers Trust v Namdar* [1997] EGCS 20, for comments made about the impact of the TLATA.

²⁸⁶The position was possibly influenced by decisions concerning bankrupt debtors, such as *Re Citro Domenico*, *Re Citro Carmine* [1990] 3 WLR 880, [1991] Ch142 CA, hereafter referred to as "*Re Citro*". See further cases cited by Omar 2006 *Conv & Prop Law* 163-164.

²⁸⁷For example, in *Mortgage Corp Ltd v Shaire* [1998] 1 FLR 973, the court allowed the wife to remain in the property as long as she maintained its value, for later mortgagees, by repairing and insuring the property. This decision was approved in *Bank of Ireland Home Mortgages v Bell* [2000] EGCS 151 although, on the facts, the court did not allow the wife to remain in the property on

7.5.3.3 The bankruptcy process

(a) *Where the debtor is the sole owner of the home*

Where the bankrupt is the sole beneficial owner of the home, sections 336 and 337 of the Insolvency Act 1986 apply. Their effect is to enable a court to postpone the sale of the family home for up to one year from the date when the bankrupt's estate vests in the trustee and, thereafter, to postpone it further, but only in exceptional circumstances.²⁸⁸

Section 336(2) provides that, where a non-bankrupt spouse or civil partner has acquired statutory rights of occupation under the Family Law Act which give rise to a charge on the estate or on the interest of the bankrupt,²⁸⁹ the charge not only continues to subsist despite the bankruptcy but also binds the trustee of the bankrupt's estate and persons deriving title through him.²⁹⁰ It further provides that any application to evict²⁹¹ a spouse or civil partner who is in occupation must be made to the bankruptcy court.²⁹² Section 336(4) provides that the court may make such order as it thinks just and reasonable, having regard to:

- (a) the interests of the bankrupt's creditors;
- (b) the conduct of the spouse or civil partner or former spouse or civil partner in contributing to the bankruptcy;
- (c) the needs and financial resources of the spouse or civil partner or former spouse or civil partner;
- (d) the needs of any children; and
- (e) all the circumstances of the case other than the needs of the bankrupt.

account of her share in the property being only 10% and her inability to afford to buy the remaining interest in the property. In *First National Bank v Achampong and others* [2003] EWCA Civ 487, the court allowed the sale of property as it had been bought ostensibly for business purposes and, although the wife's signature had been obtained by undue influence, and she had children to support, there were no other "exceptional circumstances" to take into account. See Pawlowski 2007 *Conv & Prop Law* 78, 86 who comments that "the trend ... is to afford the interest of the creditor priority over the occupying spouse even in circumstances where the effect of the order is to cause considerable hardship to the wife and her resident family."

²⁸⁸Fletcher *Law of Insolvency* 232.

²⁸⁹As explained in 7.5.3.1 and 7.5.3.2 (a), above.

²⁹⁰For discussion of s 336, see Sealy and Milman *Annotated Guide* Vol 1 384-385.

²⁹¹Under s 33 of the Family Law Act.

²⁹²See s 336(2)(b) of the Insolvency Act 1986.

Section 336 has been criticised for falling short of the recommendations of the Cork Committee in that it does not reflect the emphasis which the committee placed on the welfare and education of the bankrupt's children which had been fundamental to the courts' approach until then.²⁹³ It may be significant that the interests of the creditors stand first, in the order of the factors listed, while the needs of any children stand fourth. Fletcher submits that, although there is express mention only of children, the interests of other dependants, such as ailing, or elderly, adult members of the household, including parents or grandparents, could be taken into account by the court under section 336(4)(e).²⁹⁴

In terms of section 336(5), if the application is made more than one year after the vesting of the bankrupt's estate in the trustee, "the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations".²⁹⁵ Thus, the court's discretion is unfettered during the period of one year after the first vesting of the bankrupt's estate in his trustee. However, as Fletcher observes, these provisions seem to suggest that, if the trustee in bankruptcy brings an application for an order of eviction after a year, in most cases, a court would probably grant an order in his favour. It would seem that the legislative intention was to allow a "period of grace" of up to one year in order to "minimise the inevitable hardship and distress for those in the process of losing their home".²⁹⁶

Section 337 applies where the bankrupt is entitled to occupy the home by virtue of a beneficial estate or interest, and any persons under the age of 18 occupied the home

²⁹³See Cretney 1991 *LQR* 177, 179, also referred to by Gibson 1998 11(4) *Insolvent Intell* 29, 31.

²⁹⁴See Fletcher *Law of Insolvency* 233, with reference to the *Cork Report* pars 1120-1121.

²⁹⁵For reported cases concerning the interpretation of "exceptional circumstances" which affect a decision about the postponement of sale of the home, see *Re Citro*; *Judd v Brown* [1997] BPIR 470; *Re Raval* [1998] BPIR 389; *Re Bremner* [1999] 1 FLR 558; *Zandfraid v BCCI* [1996] 1 WLR 1420; *Re Ng* [1997] BCC 507; *Trustee of the Estate of Bowe v Bowe* [1997] BPIR 747. Earlier cases included *Jones v Challenger* [1961] 1 QB 176; *Re Solomon* [1967] CH 573; *Re Turner* [1975] 1 All ER 5, [1974] 1 WLR 1556; *Re Densham* [1975] 3 All ER 726, [1975] 1 WLR 1519; *Re Bailey* [1977] 2 All ER 26, [1977] 1 WLR 278; *Re Lowrie* [1981] 3 All ER 353. Cf *Re Holliday* [1981] 1 Ch 405 (CA), a case in which the sale of the home was postponed for five years. For further discussion of "exceptional circumstances", see 7.5.3.3 (c), below.

²⁹⁶Fletcher *Law of Insolvency* 234.

with the bankrupt, at the time of the bankruptcy proceedings.²⁹⁷ If he is in occupation, the bankrupt has a right as against the trustee of his estate, not to be evicted or excluded from the home, except with the leave of the court²⁹⁸ and, if he is not in occupation, a right, with the leave of the court, to occupy the home. The bankrupt's rights are a charge, with the same priority as an equitable interest, on his estate or interest in the home which vests in the trustee in bankruptcy.²⁹⁹ The bankruptcy court is required to make an order, as it thinks just and reasonable having regard to the interests of the creditors, the bankrupt's financial resources, the needs of the children and all the circumstances of the case other than the needs of the bankrupt.³⁰⁰ If the application is made more than a year after the vesting of the bankrupt's estate in the trustee, the court must assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations.³⁰¹

*Re Haghghat (A Bankrupt)*³⁰² illustrates the application of sections 336 and 337 with regard to a family home which is owned solely by the bankrupt. The bankrupt's severely disabled child, who could not walk or speak and had to be fed through a tube, required constant care by his mother, the bankrupt's wife, whose health was also deteriorating. The evidence was that, in the absence of an order of possession, the City Council would be able to provide suitable alternative accommodation for the family only after six years. Two of the creditors held charges over the home, the bankrupt's only asset. If the home were to be sold, this would still leave a large shortfall in the bankruptcy, in respect of other, unsecured creditors' claims and costs.³⁰³ The court found these circumstances to be exceptional and, having carefully considered the balancing of the creditors' and

²⁹⁷ See s 337(1)(a) and (b) of the Insolvency Act 1986.

²⁹⁸ Any application made by the trustee in bankruptcy to evict the bankrupt must be brought to the bankruptcy court. See s 337(4) of the Insolvency Act 1986 and s 33 of the Family Law Act.

²⁹⁹ See s 337(2)(a) and (b) of the Insolvency Act 1986. This applies regardless of whether a spouse or civil partner of the bankrupt has home rights under the Family Law Act

³⁰⁰ See s 337(5) of the Insolvency Act 1986.

³⁰¹ See s 337(6) of the Insolvency Act 1986.

³⁰² *Re Haghghat (A Bankrupt)* [2009] EWHC 90 (Ch), [2009] 1 FLR 439, hereafter referred to as "*Re Haghghat*".

³⁰³ *Re Haghghat* par 75.

the bankrupt's family's interests,³⁰⁴ directed that the order for possession by the trustee in bankruptcy should be deferred for three years.³⁰⁵

As far as a mortgaged home is concerned, the making of a bankruptcy order does not affect a mortgagee's right to enforce his security.³⁰⁶ When the mortgagor has been declared bankrupt, the mortgagee may realise his security and, in the event of the proceeds being insufficient to satisfy the debt, prove a claim, as an unsecured creditor, for any balance owing to him.³⁰⁷ Alternatively, he may value his security and prove a claim for the unsecured balance.³⁰⁸ On the other hand, the mortgagee may surrender his security to the trustee and prove his claim in full as an unsecured creditor or he may decline to prove a claim in the bankruptcy in which event he will be obliged to rely on his security alone.³⁰⁹ If a mortgagee wishes to cause the property to be sold, he may apply to the court for an order directing that it be sold. Usually, the trustee is given the duty to sell the mortgaged property.³¹⁰

(b) Where the debtor is co-owner of a jointly owned home

Before the enactment of specifically applicable provisions in the Insolvency Act 1986, the courts usually favoured the interests of the creditors over those of bankrupt's spouse and children. This occurred even though they did have the discretion to refuse orders for possession and for sale, in exceptional cases, where the sale of the home was likely to cause serious hardship for the spouse and children.³¹¹ An example of a case in which

³⁰⁴ *Re Haghghat* pars 80-83.

³⁰⁵ *Re Haghghat* par 82.

³⁰⁶ See s 285(4) of the Insolvency Act 1986. See *Cousins Mortgages* 669.

³⁰⁷ See rule 6.109(1) of Insolvency Rules 1986.

³⁰⁸ See rule 6.93(4) of Insolvency Rules 1986. See *Cousins Mortgages* 670 on the position where the trustee is not satisfied with the value which the mortgagee has placed upon the security.

³⁰⁹ See rule 6.109(2) of Insolvency Rules 1986; *Cousins Mortgages* 671.

³¹⁰ See rule 6.197(1) of the Insolvency Rules 1986; *Cousins Mortgages* 671.

³¹¹ See *Fletcher Law of Insolvency* 231; *Hunter* 1999 *J Bus L* 493; Van Heerden, Boraine and Steyn "Perspectives" 233-234. As mentioned above, at 7.5.3.2 (b), s 30 of the Law of Property Act 1925, which used to apply in this situation, has been repealed and, now, s 14 of the TLATA 1996 applies.

the court *did* exercise its discretion in this regard is *Re Holliday*,³¹² where the court held, *per Goff J*, that the test to be applied was:³¹³

having regard to all the circumstances, including the fact that there are young children and that the debtor was made bankrupt on his own petition, whose voice, that of the trustee seeking to realise the debtor's share for the benefit of his creditors or that of the wife seeking to preserve a home for herself and the children, ought in equity to prevail.

In the circumstances, the court postponed the sale of the home for five years, thus "balancing the interests of the creditors and of the wife". In particular, the court considered the "wife's inability to purchase a home for herself and the children out of her resources[,] ... the possible upsetting of the children's education and the fact that any postponement of sale would cause no great hardship to the principal creditors."³¹⁴

The position now is that, where the home is owned jointly by the bankrupt and his spouse, former spouse, civil partner, or former civil partner, a trust of land is regarded as having arisen. Section 335A of the Insolvency Act 1986 requires the trustee in bankruptcy to apply, under section 14 of the TLATA, to the bankruptcy court for an order authorising the sale of the family home. In the event of a sale, the trustee will be entitled to the proportion of the proceeds which represents the bankrupt's beneficial interest in the family home.³¹⁵ The same factors apply as in section 336(4). The court must have regard to: the interests of the bankrupt's creditors; the conduct of the spouse, or civil partner, or former spouse, or civil partner, in contributing to the bankruptcy; the needs and financial resources of the spouse, or civil partner, or former spouse, or civil partner; the needs of any children; and all the circumstances of the case, other than the needs of the bankrupt.³¹⁶ After one year has passed since the vesting of the bankrupt estate in the trustee, as in section 336(5), "the court shall assume, unless the circumstances of

³¹²*Re Holliday* [1981] Ch 405 CA.

³¹³*Re Holliday* [1981] Ch 405 CA 420.

³¹⁴*Re Holliday* [1981] Ch 405 CA headnote par 4.

³¹⁵See Fletcher *Law of Insolvency* 236; Sealy and Milman *Annotated Guide* Vol 1 382-384.

³¹⁶See, further, Schofield and Middleton *Debt and Insolvency* 107-109.

the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations".³¹⁷

(c) The interpretation of "exceptional circumstances" and the impact of the Human Rights Act 1998

The extent of protection for the family home depends largely on the courts' interpretation of what constitutes "exceptional circumstances", for the purposes of sections 335A, 336, and 337 of the Insolvency Act 1986.³¹⁸ A very narrow interpretation was applied in *Re Citro*, in relation to the pre-1986 position, where Nourse LJ stated:³¹⁹

What then are exceptional circumstances? As the cases show it is not uncommon for a wife with young children to be faced with eviction in circumstances where the realisation of her beneficial interest will not produce enough to buy a comparable house in the same neighbourhood or indeed elsewhere. And, if she has to move elsewhere, there may be problems over schooling and so forth. Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society has been familiar.

In *Re Citro*, the decision of the court of first instance was overturned on appeal. That judgment, delivered by Hoffmann J, had inclined more towards the interests of the family by ordering the postponement of the sale of the bankrupt brothers' homes until the youngest child of each of them turned 16. It has been regarded as having taken into account the views of the Cork Committee.³²⁰ Later judgments reflected a more "sympathetic" tendency by the courts to consider family hardship as "exceptional circumstances".³²¹ In *Mortgage Corporation v Shaire*,³²² the court viewed the legislative

³¹⁷See s 335A(3) of the Insolvency Act 1986.

³¹⁸For a useful discussion of what constitutes "exceptional circumstances" in this context, see Schofield and Middleton *Debt and Insolvency* 109-114.

³¹⁹*Re Citro* 157A-D.

³²⁰*Re Citro* 142; see Omar 2006 *Conv & Prop Law* 167.

³²¹In *Re Raval* [1998] BPIR 384, the court held that the mental illness (schizophrenia) of a spouse was an exceptional circumstance. In *Re Bremner* [1999] BPIR 185, the court postponed the sale of the home so that the bankrupt's wife could look after her 79-year old terminally ill husband. An interesting aspect of the decision was that it was the wife's interests which the court took into consideration and not the bankrupt's illness *per se*. See Omar 2006 *Conv & Prop Law* 169; Davey 2000 *Insolv Law* 12-13; Baker 2010 *Conv & Prop Law* 353.

³²²*Mortgage Corporation v Shaire* [2000] EWHC 452 (Ch), [2001] Ch 743.

changes as likely to have been "intended to relax the fetters on the way in which the court exercised its discretion in cases such as *Citro* and *Byrne*, so as to tip the balance somewhat more in favour of families and against banks and other charges".³²³ This *dictum* may be regarded as posing an opportunity for wider interpretation of "exceptional circumstances" in this context.³²⁴

Further, the application of the Human Rights Act 1998 potentially impacts on the interpretation of "exceptional circumstances" in the application of the relevant provisions of the Insolvency Act 1986.³²⁵ Pines Richman questions whether interfering with the family home, by granting an order for possession, is "necessary" for the protection of the rights of creditors who can acquire a charge over the home until such time as the home may be sold, without harm, or by choice. She contends that the term "exceptional circumstances" should include all instances where the family home and the rights of children are in issue. Regarding the doctrine of proportionality, she advocates that the impairment of the creditors' rights to realise the bankrupt's assets is justified in that it is necessary to accomplish the legitimate objective of protecting the family home and is in the best interests of the children.³²⁶

The reality, however, is that the reported cases do not reflect a marked change in the outcome of applications by trustees for orders for possession and sale.³²⁷ Although, in *Barca v Mears*,³²⁸ the court having considered the published views of various authors

³²³ *Mortgage Corporation v Shaire* [2000] EWHC 452 (Ch), [2001] Ch 743 par 73.

³²⁴ Pines Richman 2000 *NLJ* 1103 advocates an interpretation which "favours the family in all domestic circumstances and not just unusual and tragic circumstances such as acute or chronic debilitating sickness and death". Schofield and Middleton *Debt and Insolvency* 102 state that ss 336 and 337 of the Insolvency Act 1986 "effectively tip the scales in the direction of creditors, although the balance has been tipped back slightly in favour of the bankrupt and his family in recent years. It has been suggested that Art 8 of the European Convention on Human Rights will confirm this trend."

³²⁵ See 7.5.2, above. See Pines Richman 2000 *NLJ* 1103; Baker 2010 *Conv & Prop Law* 357ff.

³²⁶ Pines Richman 2000 *NLJ* 1104.

³²⁷ See *Barca v Mears* [2004] EWHC 2170 (Ch), hereafter referred to as "*Barca v Mears*"; *Nicholls v Lan* [2006] EWHC 1255 (Ch), [2006] BPIR 1243, [2006] Fam Law 1020; *Donohue v Ingram* [2006] EWHC 282 (Ch); *Foyle v Turner* [2007] BPIR 43; *Dean v Stout* [2004] EWHC 3315 (Ch), [2006] 1 FLR 725 which, Dixon *Modern Land Law* 146 stated, indicates more what are *not*, rather than what *are*, exceptional circumstances.

³²⁸ *Barca v Mears* [2004] EWHC 2170 (Ch), referred to, in this thesis, as "*Barca v Mears*".

on the human rights issues raised by the insolvency legislation,³²⁹ did remark that the approach adopted by the majority, in *Re Citro*, might need to be revisited in order to comply with the European Convention on Human Rights.³³⁰ In *Nicholls v Lan*,³³¹ it was held that the purpose of section 335A(2)(b) of the Insolvency Act 1986 was "to identify the need to respect the home, not as an absolute objective to be guaranteed in every case but as a consideration in a balancing exercise".³³² Considering cases dealing with sections 336 and 335A of the Insolvency Act 1986, Fox identified a "persistently decisive" pro-creditor position which was adopted by the courts, with circumstances having to be "extreme" before they would refuse to order sale, and the mere presence of children being insufficient to justify delaying the sale of the family home.³³³ However, more recently, some cases have indicated a tendency towards a more debtor-orientated interpretation of "exceptional circumstances".³³⁴ In *Avis v Turner and another*,³³⁵ although "exceptional circumstances" were not pleaded by the wife, the court *mero motu* raised the question of their possible existence thus reflecting its regard for the importance of evidence concerning factors which, historically, might have been treated as the "melancholy consequences of debt and improvidence with which every civilised society has become familiar".³³⁶

³²⁹See *Barca v Mears* pars 37 and 39, where the court referred to (Lord) Steyn 1998 *EHRLR* 153, 155; Lester and Pannick *Human Rights* 33-37 and Rook *Property Law* 2001 203-5.

³³⁰*Barca v Mears* pars 39-43. For discussion of this case, and subsequent cases, see Baker 2010 *Conv & Prop Law* 352; Dixon *Modern Land Law* 146.

³³¹*Nicholls v Lan* [2006] EWHC 1255 (Ch), [2006] BPIR 1243, [2006] Fam. Law 1020.

³³²See Pawlowski 2007 *Conv & Prop Law* 85. In the circumstances, the court held that there was no compelling reason why the bankruptcy creditors should not be paid their money, while the wife, who was chronically ill, retained an interest in another property, and it regarded the court *a quo*'s postponement, for 18 months, of the sale of the home, as a just and reasonable solution.

³³³Fox 2006 *Legal Studies* 209 with reference to *Judd v Brown* [1997] BPIR 470; *Claughton v Charalambous* [1998] BPIR 558; *Re Raval (a Bankrupt)* [1998] BPIR 389.

³³⁴See *Foenander and another v Allan* [2006] EWHC 2101 (Ch), [2006] BPIR1392, [2006] All ER (D) 352; *Martin-Sklan v White* [2006] EWHC 3313; *Everitt v Budhram* [2009] EWHC 282 (Ch), [2010] 2 [WLR] 637; *Re Haghghat*, discussed at 7.5.3.3 (a), above. See also Dixon *Modern Land Law* 146.

³³⁵*Avis v Turner and another* [2007] 4 All ER 1103, [2007] EWCA Civ 748, [2008] Ch 218.

³³⁶This observation, made with reference to *Re Citro*, is based on a comment by Pavitt "High Court clarifies impact of Human Rights Act in Family Home Possession Cases" which used to be, but is no longer, available at <http://www.bllaw.co.uk> [date of use 8 June 2011].

(d) *Other relevant provisions of the Insolvency Act 1986*

(i) *Trustee may obtain charging order*

Section 313 of the Insolvency Act 1986 provides that, where the trustee is unable, for the time being, to realise the bankrupt's home, he may apply to the court for a charging order to be made in respect of the property, for the benefit of the bankrupt estate.³³⁷ The benefit of such charge forms part of the bankrupt's estate and, until it is enforced, it attaches to the property which re-vests in the bankrupt.³³⁸ A trustee will probably rely on this procedure where, having applied section 335A, section 336, or section 337, the court has regarded the needs of the bankrupt or his family members, to remain in occupation of the home, as prevailing over the interests of the creditors.³³⁹ In terms of an amendment brought about by the Enterprise Act 2002, the maximum value of the charge will be the value of the bankrupt's interest in the property at the date of the court order, together with interest on that amount.³⁴⁰ Thus, any increase in the value of the equity will redound to the benefit of the bankrupt and not to the trustee in bankruptcy.³⁴¹

(ii) *Restriction on sale of "low equity" home*

Partly in response to widespread differences, in practice, in the way in which trustees in bankruptcy dealt with the home of the bankrupt,³⁴² a new section 313A was introduced into the Insolvency Act 1986 by the Enterprise Act 2002.³⁴³ Section 313A(2) requires the court to dismiss an application by a trustee in bankruptcy for an order for sale, or for

³³⁷Fletcher *Law of Insolvency* 232, 237-238; Sealy and Milman *Annotated Guide* Vol 1 365-366. See also r 6.237D of the Rules, inserted by SI 2003/1730.

³³⁸Ss 313(2) and (3) of the Insolvency Act 1986 require that the order must provide for the property itself to cease to form part of the bankrupt's estate, and to re-vest in the bankrupt subject to the charge.

³³⁹Under s 332 of the Insolvency Act 1986, a trustee in bankruptcy is permitted to summon a final meeting of creditors even though he has not been able to realise the property due to the occupation rights which exist and the trustee may present his concluding report upon his administration and seek his release. See Fletcher *Law of Insolvency* 238.

³⁴⁰See ss 313(2), (2A) and (2B) of the Insolvency Act 1986 and r 6.237D of the Rules, inserted by SI 2003/1730. The amendment was brought about by s 261 of the Enterprise Act 2002.

³⁴¹See Tolmie *Insolvency Law* 298.

³⁴²See Tolmie *Insolvency Law* 298-299, with reference, *inter alia*, to the Annual Report of the Insolvency Practices Council for 2000.

³⁴³S 313A was inserted by the enactment of s 261(3) of the Enterprise Act 2002.

possession, or for a charging order under section 313, in relation to the sole or principal residence of the bankrupt, his spouse, civil partner, former spouse, or civil partner, if the value of the bankrupt's interest in it is below a prescribed level. Thus, the purpose of this provision is effectively to prevent the sale of the bankrupt's home where the net equity which he holds is so low that, after the costs of the procedure have been covered, it would not yield any benefit for creditors.³⁴⁴ As Tolmie explains, section 313A was inserted in the Insolvency Act 1986 to address the practical problem, for trustees in bankruptcy, where the bankrupt or his spouse are unable to borrow money to cover the value of the bankrupt's share in the equity, but it is uneconomic for the trustee to pursue the matter through the courts.³⁴⁵ An aspect worth noting is that the "low value" home is not excluded from the bankrupt estate, but re-vests in the bankrupt after the expiry of the three-year period laid down in section 283A of the Insolvency Act 1986, which is discussed below.³⁴⁶

Tolmie submitted, before the determination of the prescribed level, that the extent to which the amendments would ameliorate the position for bankrupts would depend largely on the level at which the "amount prescribed" was pitched. She anticipated that the measure was more a way of addressing a practical difficulty facing the trustees in bankruptcy than a way of providing protection for the family.³⁴⁷ Tolmie states that the government recognised that there was a need for widespread consultation before the prescribed amount was set and that differences in the values of property in various parts of the country would have to be taken into account. She refers to the Minister's suggested amount of between £2 500 and £10 000.³⁴⁸ The amount was set at £1 000³⁴⁹ and has not been amended. One may anticipate that Tolmie would not regard this as providing effective protection for the family.

³⁴⁴See Walters 2005 *J Corp L Studies* 65; Sealy and Milman *Annotated Guide* Vol 1 366-367.

³⁴⁵Tolmie *Insolvency Law* 299.

³⁴⁶See Schofield and Middleton *Debt and Insolvency* 118-119. Cf Milman *Personal Insolvency Law* 32-33 who states that "certain 'low value' properties were entirely excluded from the estate" by s 261 of the Enterprise Act 2002. S 283A is discussed at 7.5.3.3 (d) (iii), below.

³⁴⁷Tolmie *Insolvency Law* 299.

³⁴⁸Tolmie *Insolvency Law* 299 n 28, with reference to comments by the Minister, Melanie Johnson, when she introduced the clause to the House of Commons on 17 June 2002.

³⁴⁹Fixed in terms of Article 2 of the Insolvency Proceedings (Monetary Limits) (Amendment) Order 2004 (SI 2004/547).

(iii) Trustee to deal with home within three years

In the past, in order to obtain as high a price as possible, a trustee in bankruptcy would often wait for several years and, sometimes, depending on the property market, even after the date of the discharge order, before he would bring an application for an order for possession and sale of the bankrupt's home.³⁵⁰ This practice was criticised for leaving the bankrupt and his family vulnerable and as running contrary to the policies of finality and of the bankrupt receiving a fresh start on the discharge of the bankruptcy order.³⁵¹ The Enterprise Act 2002 introduced a new section 283A to the Insolvency Act 1986³⁵² which requires the trustee to deal with the sole or principal residence of the bankrupt, his spouse, or civil partner, within three years of the date of the bankruptcy order. Failure on the part of the trustee to do so has the effect that the property will re-vest in the bankrupt, unless a court has extended this three-year period, which it may do if it deems it just and reasonable in the circumstances.³⁵³ The trustee must either realise the bankrupt's interest in the home, or do one of the following. He must apply for an order for possession or sale, apply for an order for a charge on the family home for the benefit of the bankrupt's estate,³⁵⁴ or reach an agreement with the bankrupt that the latter will give consideration in return for which the interest in the family home will cease to form part of the estate.

In *Lewis v Metropolitan Property Realisations Ltd*,³⁵⁵ the court applied a purposive interpretation of section 283A. It recognised that its purpose was to provide certainty for bankrupts by requiring that the value of the realisation should be known by the end of the three-year period after the granting of the bankruptcy order, a consideration being

³⁵⁰ See, for example, *Nicholls v Lan* [2006] EWHC 1255, [2006] BPIR 1243, [2006] Fam Law 1020; *Avis v Turner and another* [2007] 4 All ER 1103, [2007] EWCA Civ 748; *Holtham v Kelmanson* [2006] EWHC 2588, [2006] BPIR 1422, [2006] NPC 112.

³⁵¹ See *Curl* 2010 23(5) *Insolv Intell* 74-76; *Pannell v Official Receiver* [2008] EWHC 736 (Ch), [2008] BPIR 629.

³⁵² This section was inserted by s 261 of the Enterprise Act 2002 which came into force on 1 April 2004.

³⁵³ R 6.237C of the Insolvency Rules 1986 (SI 1986/1925), inserted by r 51 of the Insolvency (Amendment) Rules 2003 (SI 2003/1730). See, for further detail, Sealy and Milman *Annotated Guide* Vol 1 334-336; Omar 2006 *Conv & Prop Law* 169.

³⁵⁴ Under s 313 of the Insolvency Act 1986, as discussed, at 7.5.3.3 (d) (ii), above.

³⁵⁵ *Lewis v Metropolitan Property Realisations Ltd* [2008] EWHC 2760 (Ch), [2009] BPIR 79 and, on appeal, *Lewis v Metropolitan Property Realisations Ltd* [2009] EWCA Civ 448, [2009] BPIR 820.

that the bankrupt, or spouse, might wish to purchase the property themselves.³⁵⁶ The comment has been made that this and other decisions suggest a recent tendency by courts to favour the interests of the spouse above those of creditors of the bankrupt's estate.³⁵⁷

(iv) Individual Voluntary Arrangement

Because a bankrupt's interest in his home vests in the trustee for the benefit of creditors, a debtor will often try to come to an arrangement with his creditors in an effort to avoid bankruptcy and the forced sale of his home. The Insolvency Act 1986 introduced a procedure called Individual Voluntary Arrangement ("IVA") to regulate arrangements between debtors and their creditors. This formal debt relief mechanism, available as an alternative to bankruptcy, makes provision for the payment of debts over a period of up to five years, according to a payment plan agreed upon by a majority of creditors whose decision is binding on other creditors, regardless of whether the latter participated in the voting.³⁵⁸ An IVA may not contain terms which affect the rights of secured creditors to enforce their security or the treatment of preferential creditors, in the absence of their express consent to the specific modification of their rights.³⁵⁹

A debtor who wishes to protect his position while the terms of the IVA are being negotiated may apply to the court for an interim order pending the approval of the IVA. A court may, in terms of such an interim order, stay any action, execution or other legal process against the debtor or his property.³⁶⁰ The effect of an interim order is to

³⁵⁶See *Lewis v Metropolitan Property Realisations Ltd* [2009] EWCA Civ 448, [2009] BPIR 820 par 24.

³⁵⁷See *Lewis and Another v Metropolitan Property Realisations Ltd*, as well as other decisions, concerning ss 339, 340 and 423 of the Insolvency Act 1986, in which trustees sought to have set aside the transfer of the home by the bankrupt to his or her spouse or former spouse, including *Hill v Haines* [2007] EWCA Civ 1284, [2008] 2 WLR 1250; *Re Jones (A Bankrupt)* 2 FLR 1969, [2008] BPIR 1051 Ch D; *Papanicola v Fagan* [2008] EWHC 348 (Ch), [2009] BPIR 320. See Curl 2010 23(6) *Insolv Intell* 81-87, with reference to Briggs 2008 21 *Insolvency Intelligence* 90; Capper 2008 *LQR* 361; and Miller 2008 *PCB* 227. Clearly, it is submitted, Curl's viewpoint is pro-creditor.

³⁵⁸The required majority is 75% in value of creditors who voted; see ss 257-258, 260 of the Insolvency Act 1986.

³⁵⁹See s 258(4) of the Insolvency Act 1986. See Walters 2009 *Int Insolv Rev* 18; Fletcher *Law of Insolvency* 62-63; Cousins *Mortgages* 668.

³⁶⁰See s 254(1) of the Insolvency Act 1986.

preclude a bankruptcy petition relating to the debtor being presented or proceeded with as well as any other proceedings, execution or legal process being commenced or continued against the debtor or his property, except with the leave of the court. An interim order is effective for 14 days which period may be extended.³⁶¹ While a mortgagee may be precluded from enforcing his security while an interim order is in force, his security rights and remedies, as mortgagee, remain preserved and, once the IVA is approved, he may rely on them unless he has consented specifically to their modification or limitation in terms of the IVA.³⁶²

A debtor may submit a proposal for a voluntary arrangement even after he has been declared bankrupt. If the proposed arrangement is approved by creditors, the court may annul the bankruptcy order.³⁶³ The Enterprise Act 2002 introduced amendments to provide for a "fast-track voluntary arrangement"³⁶⁴ which is now available to an undischarged bankrupt. The "IVA Protocol"³⁶⁵ provides a standard framework for dealing with a "Straightforward Consumer IVA" where, typically, a salaried consumer debtor has sufficient income to provide for his and his dependants' needs, with a surplus to make payments to creditors over a period. The provisions which apply, in bankruptcy, to allow a secured creditor to realise his security and prove for the balance, or to re-value his security, or for the security to be redeemed at the value attributed to it by the secured creditor,³⁶⁶ do not apply to an IVA. Thus, a secured creditor, who anticipates that his security is worth less than the amount of the debt secured by it, usually insists

³⁶¹ See ss 252, 254(1) and 255(6) of the Insolvency Act 1986. See Cousins *Mortgages* 666-667.

³⁶² See Cousins *Mortgages* 668 who also states, however, that the mortgagee's right to sue for the debt under the personal covenant to repay will be suspended while the IVA is in effect.

³⁶³ Fletcher *Law of Insolvency* 68-69.

³⁶⁴ Ss 263A-263G, providing for a "fast-track voluntary arrangement", were inserted in the Insolvency Act 1986 by s 264 and Sch 22 of the Enterprise Act 2002. See Fletcher *Law of Insolvency* 51, 74.

³⁶⁵ The "IVA Protocol", "brokered" by the Insolvency Service, through consultation with all stakeholders, became available for use in February 2008. It was amended by the IVA Standing Committee in June 2008. See Walters 2009 *Int Insolv Rev* 34-35; Fletcher *Law of Insolvency* 75-76. A revised version of the IVA Protocol, known as the "2010 Protocol", which has been in use since May 2010, is http://www.insolvencyhelpline.co.uk/downloads/pdf-files/iva_terms_of_business_2010.pdf [date of use 15 March 2012].

³⁶⁶ See 7.5.3.3, above. See rr 6.109, 6.5115 and 6.117 of Insolvency Rules 1986, referred to by Cousins *Mortgages* 669.

that the appropriate bankruptcy provisions are expressly incorporated in the terms of the IVA.³⁶⁷

Because an IVA will not affect the claim of a mortgagee, a debtor who is a homeowner must maintain regular mortgage repayments in order to avoid repossession of his home. Therefore, the payment plan should cater for this.³⁶⁸ According to the IVA Protocol, it is expected that, in addition to making monthly payments to debtors, salaried homeowners will release a portion of any equity which might accrue during the course of the IVA.³⁶⁹ Typically, an obligation is placed upon the debtor to re-mortgage the home as the IVA is nearing completion, in order to release capital for the benefit of unsecured creditors who are bound by the IVA.³⁷⁰ Thus, the IVA potentially provides an effective means for a salaried debtor who owns the family home to protect it against forced sale.³⁷¹

An approved IVA will usually provide for a stay on debt enforcement proceedings by individual creditors during the operation of the payment plan and will allow for a measure of discharge for the debtor once he has completed the payment plan.³⁷² However, the stay of enforcement proceedings will apply only for as long as the debtor continues to comply with his obligations under the arrangement.³⁷³ Although the Insolvency Act 1986 provides that a supervisor of a voluntary arrangement, or any person other than the debtor himself, may present a bankruptcy petition against the debtor, it should be noted that a court must not make a bankruptcy order on such a petition unless it is satisfied as to at least one of three matters. These are that: either, the debtor has failed to comply with his obligations under the voluntary arrangement; or the debtor furnished false or misleading information in a statement of affairs or any

³⁶⁷Cousins *Mortgages* 669.

³⁶⁸See Walters 2009 *Int Insol Rev* 20-21.

³⁶⁹Debtors will be expected to release, in the fifth year of the IVA, an amount of equity of at least £5 000 of equity, any amount in excess depending on the particular circumstances of the case. See Walters 2009 *Int Insol Rev* 34-35; Fletcher *Law of Insolvency* 76.

³⁷⁰See Walters 2009 *Int Insol Rev* 21.

³⁷¹See Walters 2009 *Int Insol Rev* 20-21.

³⁷²See Pt VIII ss 252-263G of the Insolvency Act 1986, as amended by provisions contained in the Insolvency Act 2000 and the Enterprise Act 2002. See Fletcher *Law of Insolvency* 50ff; Walters 2009 *Int Insolv Rev* 17ff.

³⁷³Fletcher *Law of Insolvency* 69.

other document; or the debtor has failed to comply with all things reasonably required of him by the supervisor of the voluntary arrangement. The making of a bankruptcy order in this instance will ordinarily terminate the voluntary arrangement.³⁷⁴

7.5.4 *The recent recessions and related developments*

7.5.4.1 Council of Mortgage Lenders' commitment

Of current significance are various government and other initiatives which have been implemented in the United Kingdom to avoid unnecessary possession and sale of mortgaged homes and, more recently, in response to the financial distress caused by the global recessions.³⁷⁵ The Council of Mortgage Lenders reaffirmed a commitment, originally made on 19 December 1991, to a policy of taking possession only as a last resort.³⁷⁶ The Council of Mortgage Lenders stated that it supported compliance with the civil procedure rules issued by the Ministry of Justice and the principle of "treating customers fairly" and confirmed that lenders are duty-bound to obtain the best price reasonably obtainable when they sell repossessed property.³⁷⁷

³⁷⁴Fletcher *Law of Insolvency* 69.

³⁷⁵For a useful summary of these initiatives, see <http://www.legalmortgage.co.uk/#/government-initiatives/4532753545> [date of use 15 March 2012]. In relation to the impact of the recessions, see O'Grady "British Repossessions Soar" *Business Week* (6 May 2008) http://www.businessweek.com/globalbiz/content/may2008/gb2008056_230244.htm [date of use 15 March 2012]; Werdigier "As foreclosures mount, Britain acts to change mortgage system" *New York Times* (23 August 2007) <http://www.nytimes.com/2007/08/23/business/worldbusiness/23iht-home.5.7233625.html> [date of use 15 March 2012]; Treanor "The Bank of England mortgage plan" *The Guardian* England (17 April 2008) <http://www.guardian.co.uk/business/2008/apr/17/banking.bankofenglandgovernor> [date of use 15 March 2012]. See also Bright "Dispossession for Arrears" 13-40; Dyal-Chand "Home as Ownership" 41-54.

³⁷⁶A formal announcement to this effect was made by the Chancellor of the Exchequer in the House of Commons and at a Council of Mortgage Lenders Press Conference on 19 December 1991. The Council of Mortgage Lenders undertook that, where borrowers had suffered a significant reduction in their income but were making a reasonable regular payment, lenders would not seek possession. This was contained in par 16 of a Statement of Practice on Handling of Arrears and Possessions which was, but is no longer, available at <http://www.cml.org.uk/cml/policy/issues/1629> [date of use 28 June 2011].

³⁷⁷This was stated in the Statement of Practice on Handling of Arrears and Possessions par 17.

7.5.4.2 Mortgage Conduct of Business rules

The Mortgage Conduct of Business rules, first issued by the Financial Services Authority in October 2004, regulate lenders' practices in England and Wales.³⁷⁸ The rules apply in respect of all "home finance transactions"³⁷⁹ and to every firm that carries on a "home finance activity".³⁸⁰ The rules, covering arrears and repossessions, require a lender to deal fairly with any borrower who is in arrears or who has a sale shortfall³⁸¹ and requires a lender to put in place, and operate in accordance with, a written policy and procedures to comply with this duty.³⁸² The MCOB also requires a lender, when a borrower is experiencing "payment difficulties", to make reasonable efforts to reach agreement on the method of payment of any arrears or payment shortfall, or an alternative to taking possession of the home, or, if the home has already been sold, any sale shortfall. The lender must also liaise, at the borrower's instance, with a third party source of advice regarding the payment shortfall or sale shortfall and must allow a reasonable time over which the payment shortfall or sale shortfall should be repaid in terms of a payment plan which is practically suited to the borrower's circumstances. Further, the lender must grant, unless it has good reason not to do so, a customer's request for a change to the date on which the payment is due (provided it is within the same payment period) or the method by which payment is made. It must give the customer a written explanation of its reasons if it refuses the request.

Where no reasonable payment arrangement can be made, a lender must allow the customer to remain in possession for a reasonable period to effect a sale and must not repossess the property unless all other reasonable attempts to resolve the position have

³⁷⁸See the *Mortgages and Home Finance: Conduct of Business sourcebook* <http://fsahandbook.info/FSA/html/handbook/MCOB> [date of use 15 March 2012], hereafter referred to as the "MCOB". The Financial Services Authority derives its powers to make these rules from the Financial Services and Markets Act 2000. The rules have been amended from time to time.

³⁷⁹These include "regulated mortgage contracts", "home purchase plans", "home reversion plans" and "regulated sale and rent back agreements". According to the MCOB glossary definition, a "regulated mortgage contract" is a loan on the security of a first legal mortgage on land in the United Kingdom of which at least 40% is used as or in connection with a dwelling by the borrower. See, also, other definitions in the MCOB glossary.

³⁸⁰This includes a mortgage lender, administrator, arranger or adviser; see MCOB 1.2.1.

³⁸¹A "sale shortfall" is defined as the amount due to the lender following the sale of the property.

³⁸²MCOB 13.3.1.

failed.³⁸³ Whenever a property is repossessed, whether this occurs voluntarily or through legal action, a lender must ensure that steps are taken to market the property for sale as soon as possible and to obtain the best price reasonably possible in the circumstances.³⁸⁴ A lender is also required to consider whether it would be appropriate to extend the payment period, defer payment of interest due, capitalise the arrears,³⁸⁵ or make use of any government forbearance initiatives which may be available.³⁸⁶ Although the MCOB Sourcebook is implemented under the statutory authority, the criticism has been made that it is a "non-legal code of practice" with which mortgagees are not legally obliged to comply, and that it therefore "lacks legal backing" and is "neither consistently nor uniformly followed by mortgage providers".³⁸⁷

7.5.4.3 Regulation of sale-and-rent-back schemes

The Financial Services Authority has implemented an interim regime, effective since 30 June 2010, to regulate firms that engage in sale-and-rent-back schemes.³⁸⁸ This protective framework of rules and guidance sought to curb exploitation of financially distressed homeowners who had frequently sold their homes, often at prices well below their market value, to companies on terms which allowed them to remain in their homes for a limited period but which later changed dramatically, to their prejudice. This had often resulted in eviction, at the instance of the mortgagee, upon the company's default.³⁸⁹

³⁸³MCOB 13.3.2A(1)-(6).

³⁸⁴See MCOB 13.6.1; Cousins *Mortgages* 288-289.

³⁸⁵Although, it may be noted, it is not entitled to do so automatically; see MCOB 13.3.2A.

³⁸⁶MCOB 13.3.4A.

³⁸⁷See Lindberg 2010 *Denning LJ* 11 who notes that the Financial Services Authority has proposed that the guidelines be converted into binding rules. See Cousins *Mortgages* 289.

³⁸⁸See Sale and Rent Back (Regulatory Reporting) Instrument 2010 http://www.fsa.gov.uk/pages/Library/Policy/Policy/2010/10_08.shtml [date of use 15 March 2012].

³⁸⁹See Lauren Thompson "Beware of the debt traps" *The Times* England (13 March 2009). See, for example, *Redstone Mortgages Plc v Welch* (2009) 36 EG 98 CC where the court allowed the occupiers, the previous owners, to remain in the house. Cf *North East Property Buyers Litigation* 2010 EWHC 6 (Ch).

7.5.4.4 Regulation of administration costs

Another abuse which came to light was that, frequently, lenders had levied excessive arrears charges which "did not reflect administration costs". The Financial Services Authority, viewing the charges as unfair, directed that mortgagors should be refunded.³⁹⁰ It also drafted proposals that lenders should cease to levy monthly arrears charges when customers agree to a plan to clear the missed payments over a period.³⁹¹ In this regard, the Financial Services Authority expressed the view that "[l]enders need be in no doubt of their obligations to customers who fall behind with payments and must realise that such circumstances are not an opportunity to create further profits."³⁹² The Financial Services Authority has drafted revised guidelines on good practice for lenders in relation to mortgage arrears charges.³⁹³

7.5.4.5 The Pre-Action Protocol

The Ministry of Justice has put in place specific civil procedure rules³⁹⁴ and practice directions³⁹⁵ which apply to claims for possession of mortgaged residential property.³⁹⁶ This is supported by the *Pre-Action Protocol for Possession Claims based on Mortgage*

³⁹⁰ Hall "Thousands of homeowners set for big mortgage refunds" *The Times* England (23 January 2010).

³⁹¹ James Charles "Homeowners in arrears to get better protection" *The Times* England (26 January 2010). See also "Redstone Mortgages fined over mortgage arrears failings" http://www.fsa.gov.uk/pages/consumerinformation/firmnews/2010/redstone_mortgages.shtml [date of use 15 March 2012].

³⁹² Per Lesley Titcombe, the director responsible for the mortgage sector at the Financial Services Authority; see James Charles "Homeowners in arrears to get better protection" *The Times* England (26 January 2010).

³⁹³ See http://www.fsa.gov.uk/pubs/cp/cp10_02.pdf; http://www.fsa.gov.uk/pages/Library/Other_publications/Miscellaneous/2009/mortgage_arrears_1/charges.shtml [date of use 15 March 2012].

³⁹⁴ See Civil Procedure Rules (CPR) 55th Update from 6 April 2011; Part 55 *Possession Claims* <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/parts/part55.htm#id4223902> [date of use 15 March 2012], commonly referred to as "CPR 55".

³⁹⁵ See Practice Direction 55A *Possession Claims* http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part55a.htm#id4223900 [date of use 15 March 2012] and Practice Direction 55B *Possession Claims On-line* http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part55b.htm [date of use 15 March 2012].

³⁹⁶ For useful discussion of the rules and their application, see Cousins *Mortgages* 498ff.

*or Home Purchase Plan Arrears in Respect of Residential Property.*³⁹⁷ The aim of the Pre-Action Protocol is to "encourage more pre-action contact between the lender and the borrower in an effort to seek agreement between the parties, and where this cannot be reached, to enable efficient use of the court's time and resources."³⁹⁸ This Pre-Action Protocol sets out what action a court would require a lender to have taken before the latter starts a possession claim.³⁹⁹

The Pre-Action Protocol requires the lender to provide a borrower, who has fallen into arrears, with, where appropriate, the required regulatory information sheet, or the National Homelessness Advice Service booklet on mortgage arrears, as well as other information. Such information includes: the amount of the arrears; the total amount outstanding on the mortgage or home purchase plan; whether interest or charges will be added to such amount; and, if so, details of the interest or charges that may be payable. The lender must advise the borrower to make early contact with the housing department of the borrower's local authority and, should, where necessary, refer the borrower to appropriate sources of independent debt advice. Further, the parties must take all reasonable steps to discuss the cause of the arrears, the borrower's financial circumstances, and proposals for repayment of the arrears. The lender must consider a reasonable request from the borrower to change the date of regular payment (within the same payment period), or the method by which payment is made. It must, within a reasonable period, give the borrower a written explanation of its reasons for any refusal of such request. Where a borrower makes a proposal for payment to which the lender does not agree, the lender should give reasons in writing to the borrower within ten business days of the proposal. If the lender submits a proposal for payment, it must set it out in sufficient detail to enable the borrower to understand the implications of the proposal and to give the borrower a reasonable period in which to consider it. If the

³⁹⁷See the *Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property*, hereafter referred to as the "Pre-Action Protocol" http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/protocols/prot_mha.htm [date of use 15 March 2012]. The Pre-Action Protocol came into force on 19 November 2008 and has been amended on a number of occasions, the most recent amendment being the CPR 55th Update from 6 April 2011.

³⁹⁸Pre-Action Protocol par 2.

³⁹⁹Pre-Action Protocol pars 5-9.

borrower fails to comply with an agreement, the lender should warn the borrower, by giving the borrower 15 business days' written notice, of its intention to start a possession claim unless the borrower remedies the breach in the agreement.⁴⁰⁰

A lender must consider not commencing a possession claim for mortgage arrears where the borrower is eligible for assistance in terms of the Support for Mortgage Interest scheme, or from a local authority under a Mortgage Rescue Scheme, or is entitled to payment under a "mortgage payment protection insurance policy". A lender must consider postponing a possession claim for mortgage arrears if a borrower can demonstrate that reasonable steps have been, or will be, taken to market the property at an appropriate price. If the lender decides against postponing the possession claim, it must inform the borrower of the reasons for its decision at least five business days before starting proceedings.⁴⁰¹

The Pre-Action Protocol specifically requires a possession claim to be brought as a last resort and only after all other reasonable attempts to resolve the position have failed. The parties should consider whether, given the individual circumstances of the borrower, and the form of the agreement, it is reasonable and appropriate to: extend the term of the mortgage; change the type of a mortgage; defer payment of interest due under the mortgage; capitalise the arrears; or make use of any government forbearance initiatives in which the lender chooses to participate.⁴⁰² A Mortgage Pre-action Protocol checklist has been issued by the Ministry of Justice, for use in every claim for possession of mortgaged property.⁴⁰³ A copy of the checklist, Form N123, is attached as "Annexure A" to this thesis manuscript. As indicated on the form, two copies of the completed checklist, with a signed statement confirming the truth of its contents, must be handed in at court on the day of the hearing. The checklist is posed in a questionnaire type of format, with straightforward questions which are simply put. The

⁴⁰⁰Pre-Action Protocol par 5.

⁴⁰¹Pre-Action Protocol par 6.

⁴⁰²Pre-Action Protocol par 7.

⁴⁰³See Annexure A to this manuscript; Mortgage pre-action protocol checklist Form N123, issued by the Ministry of Justice http://hmctscourtfinder.justice.gov.uk/courtfinder/forms/n123_e.pdf [date of use 15 March 2012].

issues which are required to be addressed are clearly stated, as are the requests for explanations which are required. Further, the Law Society of England and Wales has issued a Practice Note on Mortgage Possession Claims, to assist legal practitioners involved in cases of mortgage default.⁴⁰⁴

The purpose of the checklist is obvious: the type, and level of detail, of information and explanations required to be furnished ensure that lenders are familiar, and have complied, with the Pre-Action Protocol before they proceed to court. Further, a court will be in a position easily to ascertain whether the matter is ready for consideration by it and immediately to identify the crisp issues which need to be addressed in each matter. This Pre-Action Protocol has been criticised on similar bases as was the MCOB. It has been submitted that "the lack of compulsory wording and sanctions for non-compliance" means that the Pre-Action Protocol is "toothless" and constitutes "an opportunity lost" in addressing, *inter alia*, "premature repossession proceedings".⁴⁰⁵

7.5.5 Comment

7.5.5.1 Comment on the position in England and Wales

Thus, in England and Wales, a variety of statutory mechanisms potentially protects the debtor's home against the claims of creditors. Outside of insolvency, ordinary rules of civil procedure, supported by principles, policies and protocols, implemented by government and regulatory bodies, provide the framework within which a debtor's home, whether mortgaged or not, will be subjected to forced sale only as a last resort. The Pre-Action Protocol, applied through the employment of a Mortgage pre-action checklist, makes explicit, for all concerned, the steps required before a court will consider an application for an order for possession or sale of a home. Once the debtor

⁴⁰⁴See Practice Note on Mortgage Possession Claims <http://www.lawsociety.org.uk/productsandservices/practicenotes/mortgagerepossession/2827.article> [date of use 15 March 2012]. For an outline of the procedure which is followed, see Cousins *Mortgages* 499ff.

⁴⁰⁵See Lindberg 2010 *Denning LJ* 12 and references cited there, including McAuslan 2009 *JIBFL* 138 who has referred to the Pre-Action Protocol as a "complete waste of time and paper". Cf Bright "Dispossession for Arrears" 24ff.

has been declared bankrupt, specific statutory provisions contained in the Insolvency Act 1986 apply, requiring the trustee in bankruptcy to obtain an order of court before he can sell the bankrupt's home. Where appropriate, the bankruptcy court is empowered to delay the sale of the home. The Insolvency Act 1986 also places restrictions on the way in which the trustee may deal with the bankrupt's home. Nevertheless, commentators have criticised the framework of debt enforcement rules and protocols, in England and Wales, as lacking legal standing⁴⁰⁶ and the application of the law, as being too creditor-orientated.⁴⁰⁷ On the other hand, there are also those who view the courts as leaning too far in favour of the debtor's family.⁴⁰⁸ This, it is submitted, underscores the challenge inherent in balancing the interests of all interested parties.

It may be apposite at this juncture to comment on the relative positions, depending on whether or not the debtor has been declared bankrupt – in other words, whether it is a creditor, or a trustee in bankruptcy, who seeks an order for the sale of the home. Although different statutory provisions apply, there is a measure of alignment between decisions reached both inside and outside of insolvency.⁴⁰⁹ It may be observed that, in *Lloyds Bank v Byrne*,⁴¹⁰ an *obiter* statement was made that a chargee may be in a better position to obtain an order of sale. This is because postponement would occasion that creditor to have to bear the full amount of the debt, while individual creditors may lose very little in the collective procedure involved in a bankruptcy.⁴¹¹

⁴⁰⁶See 7.5.4.2, above.

⁴⁰⁷See Lindberg 2010 *Denning LJ* 1; Fox *Conceptualising Home* 10, 12-14, 79-130; Fox 2006 *Legal Studies* 202; Pines Richman 2000 *NLJ* 1103; Cretney 1989 *LQR* 173-174; Cretney 1991 *LQR* 179-180; Wise 1995 8(5) *Insolv Intell* 35; Dixon 2005 *Conv & Prop Law* 161; McQueen 2002 *JIBL* 85, 88; Frieze *Personal Insolvency Law* 1148-1149; Baker 2010 *Conv & Prop Law* 352. See also Tolmie *Insolvency Law* 297-298 who states that the provisions contained in the Insolvency Act 1986, in relation to the bankrupt's home, are "a continuation of the previous pro-creditor stance of the common law".

⁴⁰⁸See Curl 2010 23(6) *Insolv Intell* 87, where he expresses concern that "the pendulum has now swung too far in favour of the interests of the spouses of bankrupts and against the interests of the creditors of those bankrupts".

⁴⁰⁹See Miller *Family, Creditors and Insolvency* 86; Fletcher *Law of Insolvency* 236; Omar 2006 *Conv & Prop Law* 165.

⁴¹⁰*Lloyds Bank v Byrne* [1993] FLR 369.

⁴¹¹See Omar 2006 *Conv & Prop Law* 165.

Tolmie highlights several, in her view, unsatisfactory aspects of the position where the debtor is insolvent.⁴¹² She suggests that a better balance might have been achieved between concern for the bankrupt's family and respect for the creditors' rights, by exempting the bankrupt's home under section 238(2) of the Insolvency Act 1986. This would render the home subject to section 308, which would entitle the trustee to claim it if the value of the property exceeded the cost of a reasonable replacement. Tolmie also rejected the notion, suggested by the Insolvency Service, in its consultation document *Bankruptcy – A Fresh Start*,⁴¹³ of a form of limited exemption in relation to a bankrupt's home. Tolmie pointed out that, frequently, where the bankrupt has little or no equity in the home, it will be the mortgagee's actions, outside of the insolvency context, which dictate the fate of the home.⁴¹⁴ It is submitted that Tolmie's earlier, published views tend to indicate that she would be dissatisfied with the current position.

The position in England and Wales has also been criticised for providing insufficient protection for the individual occupiers in their homes, as the emphasis has been on the *family*. This, critics argue, occurs not only in the ordinary debt enforcement process⁴¹⁵ but also in bankruptcy, where a court's consideration of individual needs, as directed by sections 336 and 335A of the Insolvency Act 1986, may only take place in the *family* context.⁴¹⁶ However, it may be noted that the interests of child occupiers of homes are

⁴¹²Tolmie *Insolvency Law* 298 discusses, for example, the fact that the equity in the home might be owned jointly by the bankrupt and a spouse or a cohabitee and, in light of the complexities of English property law, it may be difficult to establish who is entitled to share, and in what proportions, in the proceeds of the family home. The same difficulties would apply if the bankrupt and other owners wish to buy out the interest of the trustee by passing another mortgage over the property. See also, in this regard, Schofield and Middleton *Debt and Insolvency* 85ff; Barlow "Rights in the family home" 53ff.

⁴¹³Insolvency Service consultation document *Bankruptcy – A Fresh Start* (March 2000) http://insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/con_doc_archive/consultation/freshstart/sec1.htm [date of use 15 March 2012].

⁴¹⁴See Tolmie *Insolvency Law* 299.

⁴¹⁵See Fox 2006 *Legal Studies* 203-204 and references cited there. Fox also identifies "tension between individual and family-oriented perspectives" in the courts' application of the collateral purpose doctrine, in actions for the sale of a family home, which, she states, focused on the family unit and relationships, rather than the interests of individual family members.

⁴¹⁶See Fox 2006 *Legal Studies* 207-208 who points out that the Cork Committee had been concerned "to alleviate the personal hardships of those who are dependent on the debtor but not responsible for his insolvency", in the *Cork Report* par 1118, and, at par 1116, that "eviction from the family home ... may be a disaster not only to the debtor himself ... but also to those who are living there as his dependants." Fox observes, at 208, that, to distinguish the protection of the debtor, who was viewed as the wrongdoer, from that of the debtor's dependants, innocent victims of the bankrupt's default, suits those who see the home

required specifically to be taken into account, both in section 15 of the TLATA and in section 335A of the Insolvency Act 1986.⁴¹⁷ Commentators have also criticised the provisions of the Insolvency Act 1986 for not allowing consideration of aged persons or ailing adults who occupy the home.⁴¹⁸

Another criticism is that different principles apply where the home has a sole owner, such as in a single adult household, as opposed to where the home is jointly owned.⁴¹⁹ Also, no specific provision has been made for cohabiting couples, regardless of gender, who are either unmarried or who have not registered a civil partnership.⁴²⁰ Given these criticisms, it is not surprising, it is submitted, that debtors who own homes might prefer to resort to an IVA, provided for by the Insolvency Act 1986 as amended, in an effort to retain their family home.

Gravells, writing before the Insolvency Act 1986 was enacted in England, comparing the then English position with the position in New Zealand, stated:⁴²¹

...what English law requires, in particular, is certainty for both creditors and debtors; and what the New Zealand statute demonstrates is that it is possible to confer a discretion on the courts which permits a sufficient degree of flexibility without generating uncertainty and unnecessary litigation.

as deserving protection but are concerned about elevating the debtor's interests over those of the creditor. Fox, at 206, cites, as an example, *Stevens v Hutchinson* [1953] Ch 299, where the court stated, at 307, that, although the debtor was "a ne'er do well and a waster", who probably would not pay his debts, to sell the property would be "unjust" since it would result in turning an innocent wife out of her home.

⁴¹⁷However, see Fox 2006 *Legal Studies* 213-214 for comments, in relation to the consideration of children's interests, in *Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 FLR 809 and *Edwards v Lloyd's TSB Bank plc* [2004] EWHC 1745.

⁴¹⁸See Keay 2001 *Common L World Rev* 206, 221; Fox 2006 *Legal Studies* 203-204. Cf Fletcher *Law of Insolvency* 233 who submits that the interests of elderly occupiers of the home may be taken into account under s 336(4)(e) of the Insolvency Act 1986.

⁴¹⁹See Fox 2006 *Legal Studies* 214-215.

⁴²⁰In *Re Citro*, it was held, at 159, that the law which applied to spouses prior to 1986 would be applicable to unmarried couples. See remarks, in this regard, by Hunter 1999 *J Bus L* 506; Keay 2001 *Common L World Rev* 221; Schofield and Middleton *Debt and Insolvency* 114-115. However, changes to the position, in relation to same-sex civil partners, since the enactment of the Civil Partnerships Act 2004, should be borne in mind. In relation to the position of cohabitants, see Tolmie *Insolvency Law* 301 n 41; Barlow "Rights in the family home" 73-75; Omar 2006 *Conv & Prop Law* 176-177.

⁴²¹Gravells 1985 *Ox JL Studs* 132, 143.

It is somewhat ironic, it is submitted, that the New Zealand statute referred to, namely, the Joint Family Homes Act 1964, is destined for repeal. It is also notable that, although the Insolvency Act 1986, as amended by the Enterprise Act 2002, now makes specific statutory provision for a measure of protection for the home, in insolvency, the position is still the subject of criticism. Be that as it may, Gravells' comment, it is submitted, identifies crucial criteria: that the court should have a discretion which provides flexibility without compromising the level of certainty, or predictability, required to avoid the need for litigation.

7.5.5.2 Comparative comment from a South African perspective

The validity of arguments that, if creditors' rights are curtailed by the extension to home occupiers of more effective remedies against possession and sale, creditors would simply not lend money, has been questioned. Sceptics refute concerns expressed about the potential effect on the availability of finance credit and capital investment as well as the property market. A contrary view is that the risk of default is inherent to the nature of the business of lending money and that creditors are in a position to protect their own interests. For instance, they could make reasonable enquiries into the debtor's situation, before lending money, and they are able to build their losses into their interest rates and charges.⁴²² With reference to the devastating financial, psychological and emotional effects which loss of a home may have on individuals and families, Fox submits that the "broader social and economic costs of repossession add weight to the argument that the interests of creditors should not be presumed to outweigh the home interests of occupiers, but that their respective interests should be evaluated within a more systematic framework."⁴²³

Bearing in mind similar assumptions made in judgments, in South African cases,⁴²⁴ and,

⁴²²See Fox *Conceptualising Home* 11-23, specifically, 15-16, and 79-130, specifically 89-92; Fox 2006 *Legal Studies* 223; Lindberg 2010 *Denning Law Journal* 31. Cf McCormack *Secured Credit* 4ff, 15ff, 18ff.

⁴²³Fox 2006 *Legal Studies* 223.

⁴²⁴*Jaftha v Schoeman* par 58; *Standard Bank v Saunderson* par 3; *ABSA v Murray* par 46; *FirstRand Bank v Seyffert* par 12; *Standard Bank v Bekker* par 20.

notably, Evans' submissions, discussed in Chapters 5 and 6, above,⁴²⁵ it is submitted that Fox's remarks are also pertinent in the South African context. It is interesting to note that the concerns raised by the Cork Committee indicate essentially similar reservations to those expressed by Mokgoro J in *Jaftha v Schoeman*, in the South African context, in relation to a home exemption constituting a "poverty trap" and its implications for the mortgage industry, the property market, and the economy.⁴²⁶ Academic commentators have suggested the introduction of an exemption from forced sale, in both the individual debt enforcement, and in the insolvency, process, of a "low value" home and, particularly, one in which a state subsidy was provided for its acquisition.⁴²⁷ Evans advocates that it should become entrenched policy completely to exclude low value homes from the reach of creditors in general and he goes further to suggest that the passing of mortgage bonds over low value homes, in order for debtors to access capital, should be prohibited.⁴²⁸ If such an exemption is considered for implementation in South Africa, valuable insights may be gleaned from the English experience, in relation to the restriction on the sale of a "low equity" home imposed on the trustee in bankruptcy by section 313A of the Insolvency Act 1986, introduced by the Enterprise Act 2002. Mindful of Tolmie's criticisms, it would be useful to consider the method by which the prescribed level of equity was determined.⁴²⁹ The wording of any provision to be proposed, for South Africa, should be carefully considered in view of the apparent uncertainty which exists as to whether section 313A has the effect of excluding a low equity home from the insolvent estate, or, on the other hand, exempting it from sale for three years after which it re-vests in the insolvent debtor.⁴³⁰ This is particularly pertinent to South Africa as Evans has indicated the lack of an appropriate

⁴²⁵See 5.6.8 and 6.6.1, above.

⁴²⁶See the *Cork Report* pars 20, 21, 24 and 25; Fox 2006 *Legal Studies* 223 and references cited there; Fletcher *Law of Insolvency* 232; *Jaftha v Schoeman* par 51.

⁴²⁷Evans "Does an insolvent debtor have a right to adequate housing?"; Borraine, Kruger and Evans "Policy Considerations" 694; Van Heerden and Borraine 2006 *De Jure* 352 argued for exemption from execution of state-subsidised houses. Steyn 2007 *Law Dem Dev* 118-119 did not regard an exemption as a "ready solution" to the problem and submitted that a thorough enquiry would first need to be conducted.

⁴²⁸See discussion at 6.6.3, above, and Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?". See, also, earlier comments by Evans *Critical Analysis* 423-424, 474; Evans 2008 *De Jure* 270. Cf *Standard Bank v Bekker* par 23, with reference to *Jaftha v Schoeman* par 58, discussed at 5.6.6, above.

⁴²⁹See 7.5.3.3 (d)(ii), above. In relation to the prescribed level of equity, see recent proposals, in Scotland, discussed at 7.6.4, below.

⁴³⁰See 7.5.3.3 (d)(ii) and (iii), above.

distinction between excluded and exempt property in our insolvency law.⁴³¹

It may be observed that, despite the existence of specifically applicable legislative provisions, the English courts encounter problems with issues which have not been pleaded, initially, nor raised on appeal. In *Avis v Turner and Another*, the Court of Appeal was not in a position to adjudicate upon the *real* issue – whether "exceptional circumstances" were present which would justify the postponement of the order for sale of the home by the trustee in bankruptcy – because this had not been raised in the pleadings or in the grounds of appeal.⁴³² Similarly, in the South African cases of *Standard Bank v Saunderson* and *ABSA v Ntsane*, the court in each case had to decide whether it could deal *mero motu* with the issue whether the defendants' section 26 rights would be unjustifiably infringed by the forced sale of their homes. The two courts adopted opposing views on this issue.⁴³³ However, clearly, the English Court of Appeal's approach is that, in the absence of the occupier of the home having raised the issue, the court may properly raise it *mero motu*.

In *Nedbank v Fraser*, the court questioned the correctness of a different aspect of the decision in *ABSA v Ntsane*. This was whether, where the mortgage deed includes an acceleration clause, it is the total amount outstanding or only the arrear amount which ought to be taken into account by a court when deciding whether to declare a person's mortgaged home specially executable.⁴³⁴ The English solution to a similar dilemma was the enactment of section 8 of the Administration of Justice Act 1973.⁴³⁵ Perhaps the enactment of a specific legislative provision would also be the answer in South Africa.

Another discernible parallel between contentious aspects of the position, in England and Wales and in South Africa, emerges from the approach of the court, in *Alliance and*

⁴³¹See 6.6.1, above.

⁴³²*Avis v Turner and another* [2007] 4 All ER 1103, [2007] EWCA Civ 748, [2008] Ch 218, 14-15, 38.

⁴³³In *Standard Bank v Saunderson*, the Supreme Court of Appeal adopted the approach that, because, none of the defendants had raised that sale in execution of their homes would infringe their s 26 rights, it did not have to decide the issue. On the other hand, in *ABSA v Ntsane*, the court dealt *mero motu* with the issue. See 5.5.2, above.

⁴³⁴*Nedbank v Fraser* pars 28-38, discussed at 5.6.3, above.

⁴³⁵See 7.5.3.2 (a), above.

Leicester plc v Slayford.⁴³⁶ In this case, it was held that it is not an abuse of process for a mortgagee, who is unable to exercise a power of sale in the ordinary debt enforcement process, to seek to place the debtor in bankruptcy. The rationale was that all creditors have the right to petition the court where they are owed an amount in excess of the statutory threshold, or where a demand for payment has gone unpaid, and such petitions cannot be unreasonably denied.⁴³⁷ This approach is apparently similar to that which has been adopted in South African law, as reflected in *Investec v Mutemeri*, *ABSA v Naidoo* and *FirstRand Bank v Evans*.⁴³⁸ It is submitted that this bolsters an argument for the need for specific judicial oversight, including consideration of all the relevant circumstances, before a trustee may sell an insolvent debtor's home, to bring requirements in the insolvency process into line with those in the individual debt enforcement process. A related, pertinent observation may also be that the introduction in South African insolvency legislation of a procedure akin to the English IVA would provide for a repayment plan as an alternative to the liquidation of assets in insolvency, with a clearly defined and regulated relationship between the two different procedures. This would create a possible means for averting the forced sale of a consumer debtor's home in the insolvency context.

In relation to the need for judicial oversight, it is interesting to observe, as an aside, that, in English law, a registrar is empowered to make an order for possession or for sale of a person's home.⁴³⁹ In light of the decisions in *Jaftha v Schoeman* and *Gundwana v Steko*, one may enquire whether this conforms to constitutional imperatives under the

⁴³⁶ *Alliance and Leicester plc v Slayford* [2001] 1 All ER (Comm) 1.

⁴³⁷ *Alliance and Leicester plc v Slayford* [2001] 1 All ER (Comm) 1 par 28. See remarks by Omar 2006 *Conv & Prop Law* 165; *Miller Family, Creditors and Insolvency* 106-107.

⁴³⁸ See Chapter 6, above.

⁴³⁹ In *Barca v Mears* [2004] EWHC 2170, the law report indicates that it was an appeal to the High Court against an order for possession and sale sought by the trustee in bankruptcy and granted by the Deputy Registrar. In *Foenander and another v Allan* [2006] EWHC 2101 (Ch), [2006] BPIR1392, [2006] All ER (D) 352 (Jul), the law report indicates that the decision appealed against was made by "the registrar". In passing, it may also be noted that a registrar is empowered to sign a default judgment for mortgage foreclosure, under Canadian law; see, for example, r 64.03(9) and (10) of the Rules of Civil Procedure RRO 1990 Reg 194, referred to by Roach *Mortgages* 143-145.

European Convention on Human Rights. It is clear, however, that in England, registrars are legally qualified persons.⁴⁴⁰

In England and Wales, the position is affected largely by aspects of family law, supported, where appropriate, by Article 8 of the European Convention on Human Rights which recognises the right to a home and family life. This is not the case in South Africa, where the basis of the protection granted is the right to have access to adequate housing, as provided in section 26 of the Constitution.⁴⁴¹ Criticisms have been levelled at the emphasis, in English law, on the interests of the family, as opposed to the individual, in the process of forced sale of the home.⁴⁴² The same criticisms do not arise in South Africa, with the focus thus far having been on the section 26 rights of the individual debtor. Indeed, it is submitted, if anything, these criticisms of the English system underscore the lack of attention paid, in the South African approach, to the debtor's family and other dependants. Commentators have expressed concern about how little regard is had for rights to shelter and the best interests of children who reside at the debtor's home.⁴⁴³ Now, in terms of the Constitutional Court's decision in *Gundwana v Steko*, a court must consider all the relevant circumstances before an order is made for the sale in execution of the "home of a *person*".⁴⁴⁴ This could perhaps be construed as effectively requiring that the interests of *all* occupiers of the home, as well as the debtor, should be taken into account.

Consideration of what the English courts regard as "exceptional circumstances", for the purposes of sections 335A, 336 and 337 of the Insolvency Act 1986, in their evaluation

⁴⁴⁰Curl 2010 23(6) *Insolv Intell* 84 makes the comment that counsel on opposing sides, in *Re Jones (A Bankrupt)*, had subsequently taken up appointments as "full-time" Registrar and Deputy Registrar respectively.

⁴⁴¹In *Ex parte Chairperson of the Constitutional Assembly In re Certification of the Constitution of the Republic of South Africa Act, 1996* 1996 4 SA 744 (CC), 1996 10 BCLR 1253 (CC), the court found that the non-inclusion of the "right to family life" in the final Constitution allowed for flexibility in the recognition of different family forms in a diverse society. See also *Grootboom* pars 73-79, in relation to a child's right to shelter, as provided by s 28(1)(c) of the Constitution, as opposed to a child's right to family care, or parental care, as provided in s 28(1)(b) of the Constitution.

⁴⁴²Fox 2006 *Legal Studies* 201; Omar 2006 *Conv & Prop Law* 157; Hunter 1999 *J Bus L* 491; Baker 2010 *Conv & Prop Law* 368; Dixon 2005 *Conv & Prop Law* 161, 167.

⁴⁴³See Steyn "'Safe as Houses?"; Stander and Horsten 2008 *TSAR* 215-216; Evans "Does an insolvent debtor have a right to adequate housing?".

⁴⁴⁴See *Gundwana v Steko* pars 49, 65.

of whether the sale of the family home by a trustee should be delayed, and the potential impact of the Human Rights Act 1998 on the interpretation of "exceptional circumstances" in this context provide useful pointers for potential application in the South African context. The question may be raised to what extent the concept of "exceptional circumstances", in the English insolvency law context, is similar to the notion of "extraordinary circumstances" employed by the court in *FirstRand Bank v Folscher*,⁴⁴⁵ in the context of the South African individual debt enforcement process.

It is submitted that the solution, as far as the perceived shortcomings of the English system are concerned, may well be the introduction of a bill of rights containing socio-economic rights,⁴⁴⁶ as has recently been considered⁴⁴⁷ in the United Kingdom.⁴⁴⁷ The following provision, in relation to housing, has been proposed:⁴⁴⁸

Housing

Everyone has the right to adequate accommodation appropriate to their needs.
Everyone is entitled to be secure in the occupancy of their home.
No one may be evicted from their home without an order of a court.

It is also anticipated that, if this provision is ever enacted, from a South African perspective, it will be useful to observe the manner in which it will be applied, in practice.

Given the well-established social security system of England and Wales which provides housing for the needy,⁴⁴⁹ there is an obvious point to postponing the sale of the home

⁴⁴⁵See *FirstRand Bank v Folscher* par 39, referred to at 5.6.4.2 (c), above.

⁴⁴⁶See arguments raised by Lindberg 2010 *Denning LJ* 1 in relation to upholding socio-economic rights under the Human Rights Act 1998.

⁴⁴⁷See *Report of the Joint Committee on Human Rights "A Bill of Rights for the UK?"* Twenty-ninth Report of Session 2007-2008 (August 2008) <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf> [date of use 15 March 2012].

⁴⁴⁸*Report of the Joint Committee on Human Rights "A Bill of Rights for the UK?"* 54-55.

⁴⁴⁹See, for example, policies and information, in relation to the system of Mortgage Interest Support, which is one of the Government forbearance initiatives referred to in MCOB 13.3.4A, discussed at 7.5.4.2, above. See, also, Local Housing Allowance, offered by the Department of Works and Pensions <http://www.dwp.gov.uk/policy/welfare-reform/housing-support/> [date of use 15 March 2012]. See also Woodroffe 1968 *J Soc Hist* 301 for an informative account of the origin, from the Elizabethan initiatives, including the passing of the Poor Law, in 1601, which "marked the beginning of a national system of poor

for a period, in order for the local authority to arrange appropriate accommodation for the family where the debtor is not in a position to settle the debt in question.⁴⁵⁰ This is in stark contrast to the lack of state funded housing support available, in South Africa, to a debtor and his family when they are rendered homeless by the forced sale of their home.⁴⁵¹ This, it is submitted, reinforces the argument that the personal circumstances of the debtor and other occupiers, including their accommodation needs, are highly relevant to a court's decision whether to declare their home executable. Further, the approach of the Constitutional Court, in *Blue Moonlight Properties (CC)*,⁴⁵² that it is the duty of the municipality to provide emergency accommodation to persons, who, once evicted from privately owned property, will be homeless, as "decant" pending admission to other housing programmes should be borne in mind.

A more systematic approach is called for, in South Africa, with the explicit inclusion, in housing policies and programmes, of debtors and insolvent persons and their families and other dependants who lose their homes through forced sale. This, it is submitted, would go a long way to enhance the effective application of the state's duty to provide access to adequate housing, as envisaged by the Constitutional Court in *Grootboom*. It is submitted that, in order truly to uphold all persons' section 26 rights in South Africa, a more explicit process is required to be mapped out for practitioners and for courts to follow, as is done by the English Pre-Action Protocol, through its tool, the Mortgage pre-action checklist.⁴⁵³ It is submitted that a similar checklist ought to be compiled for use, and applied, in South Africa.

relief directed by the state and incorporating the principle of communal responsibility", and development of the social security system in modern England.

⁴⁵⁰See, for example, *Re Haghghat*, discussed at 7.5.3.3, above.

⁴⁵¹See 4.2.1, above.

⁴⁵²See 3.3.1.4 (c), above.

⁴⁵³See Annexure A to this thesis manuscript.

7.6 Scotland

7.6.1 General

Scotland does not have a formal home exemption, but similar to England and Wales, a legislative scheme applies to afford a measure of protection for a debtor's family home against the claims of creditors. The level of protection, both inside and outside of insolvency, was enhanced in a number of respects by provisions contained in the Bankruptcy and Diligence etc (Scotland) Act 2007⁴⁵⁴ and in the Home Owner and Debtor Protection (Scotland) Act 2010.⁴⁵⁵ In August 2011, the Scottish Law Commission published its *Consultation Paper on Consolidation of Bankruptcy Legislation in Scotland*, accompanied by a consultation draft of the *Bankruptcy (Scotland) Bill 2011*.⁴⁵⁶ The aim is to revise and restate the bankruptcy legislation in the wake of the numerous recent amendments effected by, mainly, the Bankruptcy and Diligence etc (Scotland) Act 2007 and the Home Owner and Debtor Protection (Scotland) Act 2010.

In February 2009, a proposal was made to introduce a home exemption in the individual debt enforcement process and within the bankruptcy regime.⁴⁵⁷ The Scottish

⁴⁵⁴It may be noted that certain controversial provisions, contained in the Bankruptcy and Diligence etc (Scotland) Act 2007, which introduced a new form of "diligence", or debt enforcement process, called "land attachment", have not been brought into operation. A reason for this is the impact that they would have had on the treatment of a debtor's home. A proposal has been made that the family home should be exempt from the proposed "land attachment" provisions. See Accountant in Bankruptcy "Abolition of Adjudication for Debt and the introduction of Land Attachment", compiled for the Debt Action Forum <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000847.pdf> [date of use 15 March 2012]; St Clair and Gretton "Legislative Options Paper for the Debt Action Forum", commonly, and hereafter, referred to as the "Gretton-St Clair paper" February 2009 <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000850.pdf> [date of use 15 March 2012].

⁴⁵⁵The Home Owner and Debtor Protection (Scotland) Act 2010 modified and, in a sense, weakened, mortgagees' rights in the family home by amending, and ultimately effecting the repeal of, certain provisions of the Mortgage Rights (Scotland) Act 2001. This occurred in response to recommendations and proposals contained in the Repossessions Group *Final Report* June 2009 <http://scotland.gov.uk/Publications/2009/06/08164837/0> [date of use 15 March 2012].

⁴⁵⁶See the *Consultation Paper on Consolidation of Bankruptcy Legislation in Scotland* and the consultation draft of the *Bankruptcy (Scotland) Bill 2011* <http://www.scotlawcom.gov.uk/news/making-bankruptcy-law-accessible/> [date of use 15 March 2012].

⁴⁵⁷See McKenzie Skene 2011 *Int Insolv Rev* 29, 35. See, also, the proposals contained in the Gretton-St Clair paper, which constitutes Annex D to the Debt Action Forum *Final Report* June 2009

Government's response was that it would "issue consultation on ... what changes, if any, might be appropriate to the way in which the family home is treated in bankruptcy."⁴⁵⁸

7.6.2 *The individual debt enforcement process*

Under Scots law, upon a mortgagor's default, by failing either to make necessary payments or to comply with a term under a standard security,⁴⁵⁹ the mortgagee is entitled to seek repossession⁴⁶⁰ and sale of the mortgaged property. The Conveyancing and Feudal Reform (Scotland) Act 1970 provides for a mortgagee to proceed by issuing a calling-up notice, or a notice of default, to the debtor and to apply for a court order to exercise the power of sale.⁴⁶¹ Section 5 of the Heritable Securities (Scotland) Act 1894⁴⁶² provides for the mortgagee to eject the debtor from the mortgaged property. The effect of the coming into force, on 1 April 2009, of section 11 of the Homelessness etc (Scotland) Act 2003, is that a creditor is required to give notice to the local authority of proceedings to call up, or to apply to court for remedies on default of, a standard security or to eject a proprietor in personal occupancy.⁴⁶³ The purpose of these amendments was to place the local authority in a position to make timeous arrangements for the provision of alternative accommodation, where necessary, to prevent the debtor and his family from being rendered homeless.

<http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000813.pdf> [date of use 15 March 2012].

⁴⁵⁸See the Scottish Government response to the Debt Action Forum *Final Report* <http://www.aib.gov.uk/About/DAF/DAFofficialresponse> [date of use 15 March 2012]. See also <http://www.scotland.gov.uk/About/programme-for-government/2009-10/summary-of-bills/debt-family-homes-bill> [date of use 15 march 2012].

⁴⁵⁹For the meaning of "standard security", see s 9 of the Conveyancing and Feudal Reform (Scotland) Act 1970. It is submitted that, for the purposes of this study, a standard security may be regarded as an equivalent, in South Africa, of a mortgage over immovable property.

⁴⁶⁰"Repossession" is the term commonly used, in this context, even though the mortgagee has never been in possession of the property. See *Repossessions Group Final Report* June 2009 4 n 1.

⁴⁶¹See ss 19, 21 and 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

⁴⁶²"Heritable security", in this context, means immovable property.

⁴⁶³This occurs under ss 19 and 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970 and s 5 of the Heritable Securities (Scotland) Act 1894.

For various reasons, including inconsistencies between treatment of the debtor's home in the individual enforcement, as opposed to the bankruptcy, process,⁴⁶⁴ the Home Owner and Debtor Protection (Scotland) Act 2010 introduced restrictions to a creditor's rights to enforce a security over land that is "used to any extent for residential purposes". It amended the Conveyancing and Feudal Reform (Scotland) Act 1970 with the effect that, on default of a calling up notice or after service of a notice of default, a creditor may not exercise its rights, upon the voluntary surrender of the residential property, unless it is unoccupied.⁴⁶⁵ Otherwise, the creditor is required to apply for a court order upon which the court may continue the proceedings or make any other order that it thinks fit. However, it may not grant the application unless it is satisfied that certain pre-action requirements have been complied with and that it is reasonable in the circumstances of the case to do so.⁴⁶⁶ In reaching a decision, the court must have regard, in particular, to:⁴⁶⁷

- the nature of and reasons for the default;
- the ability of the debtor to fulfil within a reasonable time the obligations under the standard security in respect of which the debtor is in default;
- any actions taken by the creditor to assist the debtor to fulfil those obligations;
- where appropriate, participation by the debtor in a debt repayment programme approved under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002; and
- the ability of the debtor and any other person residing at the security subjects to secure reasonable alternative accommodation.

⁴⁶⁴For example, under the Heritable Securities (Scotland) Act 1894 and the Conveyancing and Feudal Reform (Scotland) Act 1970, a mortgagee could enforce its rights without a court order, and without the consent of the occupiers, and, under the Mortgage Rights (Scotland) Act 2001, although it provided for a court to suspend the exercise of the mortgagee's rights, this could only occur on application by, and the initiative of, the debtor, the owner, or their non-entitled spouse, civil partner or cohabitee. There was no limit to the time period for which the court could suspend the exercise of the mortgagee's rights. On the other hand, under the Bankruptcy (Scotland) Act 1985, the trustee was required to obtain the authority of the court, before he could sell the debtor's home, and the court could, in its discretion, postpone the sale, in appropriate circumstances, but only for a period up to 12 months. For further detail, see the Gretton-St Clair paper.

⁴⁶⁵In addition, certain potentially affected persons must certify in writing that the property is unoccupied. See s 23A of the Conveyancing and Feudal Reform (Scotland) Act 1970, effective 30 September 2010.

⁴⁶⁶See s 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

⁴⁶⁷See s 24(7)(a)-(e) of the Conveyancing and Feudal Reform (Scotland) Act 1970.

The following pre-action requirements apply.⁴⁶⁸

- The creditor must provide the debtor with clear information about the terms of the standard security, the amount due under it, including any arrears and any charges in respect of late payment or redemption, and any other obligation in respect of which the debtor is in default.
- The creditor must make reasonable efforts to agree with the debtor on proposals in respect of future payments and the fulfilment of any other obligation in respect of which the debtor is in default.
- The creditor must not apply for a court order if the debtor is taking steps which are likely to result in the payment, within a reasonable time, of any arrears or the whole amount due, and fulfilment, within a reasonable time, of any other obligation in respect of which the debtor is in default.
- The creditor must provide the debtor with information about sources of advice and assistance in relation to management of debt.
- The creditor must encourage the debtor to contact the local authority in whose area the security subjects are situated.
- The creditor must have regard to any guidance issued by the Scottish Ministers in relation to pre-action requirements.

Similar amendments brought about by the Home Owner and Debtor Protection (Scotland) Act 2010 to the Heritable Securities (Scotland) Act 1894 have the effect that almost identical provisions apply to an action by a secured creditor to eject a person in occupation of land used to any extent for residential purposes.⁴⁶⁹ In addition, certain persons, referred to as "entitled residents",⁴⁷⁰ even though they were not cited as

⁴⁶⁸See 24A of the Conveyancing and Feudal Reform (Scotland) Act 1970.

⁴⁶⁹See s 5 of the Heritable Securities (Scotland) Act 1894.

⁴⁷⁰An "entitled resident" includes the proprietor of the secured property, and the non-entitled spouse, or civil partner, of the debtor or the proprietor, or a cohabitee, living with the debtor or proprietor as husband and wife, or in a relationship which has the characteristics of the relationship between civil partners, and a person who lived with the debtor or proprietor, where the secured property is the sole or main residence of their child aged under 16. "Child" includes a stepchild and any person brought up, or treated, as their child. See s 24C(1) and (2) of the Conveyancing and Feudal Reform (Scotland) Act 1970 and s 5D(1) and (2) of the Heritable Securities (Scotland) Act 1894.

parties to the proceedings,⁴⁷¹ may apply for the postponement of proceedings brought either under the Conveyancing and Feudal Reform (Scotland) Act 1970 or the Heritable Securities (Scotland) Act 1894 or for any other order that the court thinks fit. In such event, the court must have regard, in particular, to the same matters, as set out above, with respect to an application by a debtor.⁴⁷² Further, certain persons⁴⁷³ may apply for the setting aside of a court order granted under section 24(1B) of the Conveyancing and Feudal Reform (Scotland) Act 1970 or section 5A of the Heritable Securities (Scotland) Act 1894.⁴⁷⁴ Provision has also been made for approved lay representation of the debtor and any entitled resident in relevant proceedings.⁴⁷⁵

The Debt Arrangement and Attachment (Scotland) Act 2002 provides debtors with a moratorium from creditor enforcement action through a Debt Arrangement Scheme which allows interest and penalty charges to be frozen and also provides for a measure of debt cancellation. However, it does not affect the claim of a secured creditor. Therefore, a Debt Arrangement Scheme is appropriate for a debtor with a reasonable income, but who has temporary cash flow difficulties, to avert the forced sale of his home. Recent improvements were made to simplify and streamline the system which is now administered by the Accountant in Bankruptcy and debtors may make online applications.⁴⁷⁶

⁴⁷¹This is a reference to proceedings either under sections 24(1B) of the Conveyancing and Feudal Reform (Scotland) Act 1970, or to which section 5A of the Heritable Securities (Scotland) Act 1894 applies.

⁴⁷²See s 24B(2) of the Conveyancing and Feudal Reform (Scotland) Act 1970 and s 5C(2) of the Heritable Securities (Scotland) Act 1894.

⁴⁷³Such persons are: the creditor; the debtor, but only if the debtor did not appear or was not represented in the proceedings, on the application under section 24(1B), or to which section 5A applies, respectively; and an "entitled resident".

⁴⁷⁴Notice of such an application must be given to the creditor, the debtor and every entitled resident. See s 24D of the Conveyancing and Feudal Reform (Scotland) Act 1970 and s 5E of the Heritable Securities (Scotland) Act 1894.

⁴⁷⁵See s 24E of the Conveyancing and Feudal Reform (Scotland) Act 1970 and s 5F of the Heritable Securities (Scotland) Act 1894.

⁴⁷⁶See <http://www.aib.gov.uk/Services/das> [date of use 15 March 2012] and the official Debt Arrangement Scheme website <http://dasscotland.gov.uk> [date of use 15 March 2012].

7.6.3 *The bankruptcy process*

7.6.3.1 Sale of home by trustee

When the Bankruptcy (Scotland) Act 1985 was enacted, its provisions in relation to the sale of an insolvent debtor's home⁴⁷⁷ were very similar to those contained, at the time, in the English Insolvency Act 1986.⁴⁷⁸ However, there were notable differences. One was that, in terms of section 40 of the Bankruptcy (Scotland) Act 1985, before the trustee could sell or dispose of any right or interest in the debtor's home, he was required to obtain the consent of the spouse or former spouse, if the latter was in occupation. Where the spouse was not in occupation, but the home was occupied by the debtor with a child of the family, the consent of the debtor was required.⁴⁷⁹ Where the trustee was unable to obtain the relevant consent, he was required to obtain the authority of the court.⁴⁸⁰ This difference remains, although, in each jurisdiction, the respective provisions have since been extended to apply to civil partners.⁴⁸¹

Another difference is evident in the list of considerations to which the court must have regard before deciding whether to authorise the sale of the bankrupt debtor's home. As mentioned above,⁴⁸² section 336(4) of the English Insolvency Act 1986 requires a court to have regard to:

- (a) the interests of the bankrupt's creditors;
- (b) the conduct of the spouse or civil partner or former spouse or civil partner in contributing to the bankruptcy;
- (c) the needs and financial resources of the spouse or civil partner or former spouse or civil partner;
- (d) the needs of any children; and
- (e) all the circumstances of the case other than the needs of the bankrupt.

⁴⁷⁷"Family home" is defined in s 40(4)(a) of the Bankruptcy (Scotland) Act 1985.

⁴⁷⁸The Bankruptcy (Scotland) Act 1985 came into effect on 29 December 1986, by virtue of SI 1985/1924, on the same day as the English Insolvency Act 1986, discussed at 7.5.2, above.

⁴⁷⁹S 40(1)(a) read with s 40(4)(c) of the Bankruptcy (Scotland) Act 1985.

⁴⁸⁰See s 40(1)(b) of the Bankruptcy (Scotland) Act 1985.

⁴⁸¹This has been the position since the enactment of the Civil Partnership Act 2004 which came into effect on 5 December 2005.

⁴⁸²See 7.5.3.3, above.

On the other hand, section 40 of the Bankruptcy (Scotland) Act 1985 requires the sheriff⁴⁸³ to have regard to all the circumstances of the case, including:⁴⁸⁴

- (a) the needs and financial resources of the debtor's spouse or former spouse;
- (aa) the needs and financial resources of the debtor's civil partner or former civil partner;
- (b) the needs and financial resources of any child of the family;
- (c) the interests of the creditors;
- (d) the length of the period during which the family home was used as a residence by any of the persons referred to in paragraphs (a) to (b) above.

The fact that "the interests of the creditors" feature lower on the list than they do in the equivalent English provision may be regarded as an indication that, in the application of section 40 of the Bankruptcy (Scotland) Act 1985, they carry less weight, relative to the needs of the debtor's family, than in the application of the English provision.⁴⁸⁵

A significant reform was brought about by the Bankruptcy and Diligence etc (Scotland) Act 2007, by the insertion of a new section 39A into the Bankruptcy (Scotland) Act 1985. Section 39A provides for ownership⁴⁸⁶ of the debtor's family home, which forms part of the sequestrated estate, to be returned to the debtor if the trustee has not taken any action in relation to that property within three years of the date of sequestration.⁴⁸⁷ This, in effect, brought the position into line, in this regard, with that in England and Wales, subsequent to the passing of the Enterprise Act 2002.⁴⁸⁸ As is the position in England and Wales, the court may refuse to grant an application by the trustee to sell the debtor's home, or may postpone the granting of the application for a specified period.⁴⁸⁹ The Home Owner and Debtor Protection (Scotland) Act 2010 amended the

⁴⁸³This is a reference to the sheriff's court. The sheriff's courts are the lower courts. The amendments brought about by the Bankruptcy and Diligence etc (Scotland) Act 2007 had the effect that the sheriff's court has jurisdiction.

⁴⁸⁴See s 40(2) read with s 40(4)(d) of the Bankruptcy (Scotland) Act 1985.

⁴⁸⁵Cf Fletcher *Law of Insolvency* 233.

⁴⁸⁶Or other right.

⁴⁸⁷S 39A(3) of the Bankruptcy (Scotland) Act 1985 lists the types of action which the trustee may take which would prevent the home being returned to the debtor.

⁴⁸⁸This provision is similar to s 283A of the Insolvency Act 1986, applicable in England and Wales, which was inserted by a provision of the Enterprise Act 2002; see 7.5.3.3 (d) (iii), above.

⁴⁸⁹The same applies to an action for division and sale of the debtor's family home or to an action for the purpose of obtaining vacant possession of the debtor's family home. See ss 40(2) and 40(3)(a) and (b) of the Bankruptcy (Scotland) Act 1985. In relation to the interpretation of s 40, especially in light of the *Cork*

maximum period for which the sale could be postponed by extending it from 12 months to three years.⁴⁹⁰ Thus, the maximum permissible period now coincides with that in section 39A. The Home Owner and Debtor Protection (Scotland) Act 2010 also introduced a new section in terms of which the trustee must give notice to the local authority in whose area the home is situated before commencing proceedings to obtain authority to sell the debtor's home.⁴⁹¹ The rationale behind this provision is to place the local authority in a position to make timeous arrangements, if necessary, for the accommodation of the debtor and his family.

7.6.3.2 The trust deed

A debtor who wishes to avoid sequestration may grant a "trust deed" in which he transfers his estate to a trustee for the benefit of creditors.⁴⁹² The Bankruptcy (Scotland) Act 1985 provides this as a formal alternative to sequestration. The Bankruptcy and Diligence etc (Scotland) Act 2007 introduced requirements, including a process of registration, for the creation of a "protected trust deed".⁴⁹³ One of the consequences of this is that the creditors are prevented thereafter from applying for the debtor's sequestration. A common practice, in order to avoid the sale of a debtor's family home, is to exclude it from the trust deed.⁴⁹⁴ In the past, this left the debtor more vulnerable as such a trust deed did not fall within the definition of a "protected trust deed" which required the debtor's entire estate, except for specific exempt property, to be included in

Report, see McMahon's Trustees v McMahon 1997 SLT 1090 in which the court noted that there might be cases which would give rise to wide and, possibly, complex inquiry as a result of the variety of circumstances to which the section expressly allows the court to have regard.

⁴⁹⁰See s 11(b) of the Home Owner and Debtor Protection (Scotland) Act 2010.

⁴⁹¹See s 40(3A) of the Bankruptcy (Scotland) Act 1985, inserted by s 11(c) read with s 11(d)(i) of the Home Owner and Debtor Protection (Scotland) Act 2010.

⁴⁹²The relevant provisions were amended in 1993. This may be regarded as the Scottish equivalent of the English individual voluntary arrangement discussed at 7.5.3.3 (d) (iv), above.

⁴⁹³S 73(1) of the Bankruptcy (Scotland) Act 1985 was amended in this respect, by par 60 of Sch 1 to the Bankruptcy and Diligence etc (Scotland) Act 2007, so that a "protected trust deed" means a trust deed which has been granted protected status in accordance with regulations made under par 5 of sch 5 to the Bankruptcy (Scotland) Act 1985 Act.

⁴⁹⁴This generally occurs where the debtor has very little, or no, equity in the home and where its inclusion in the trust deed would not provide any advantage to unsecured creditors. If the debtor does have equity in the home, and it is included in the trust deed, he would generally re-mortgage it, and make the proceeds available for creditors, in order that he might retain the home. See, in this regard, the Gretton-St Clair paper.

it. In recognition of the need to protect the family home, the Home Owner and Debtor Protection (Scotland) Act 2010 amended the definition of a "protected trust deed" to include a trust deed which excludes the debtor's dwelling house. It also extended the application of section 40 of the Bankruptcy (Scotland) Act 1985 to a trustee acting under a trust deed with the effect that he too must obtain a court order before he can sell the debtor's family home. The trustee acting under the trust deed is also required to give notice to the local authority in whose area the home is situated before commencing proceedings to obtain authority to sell the debtor's home.⁴⁹⁵

7.6.4 *The proposed home exemption*

The Scottish Accountant in Bankruptcy disclosed, in its Business Plan 2011/12, that high on the agenda is "to consult on how the family home is treated" in insolvency and to implement the Protected Trust Deed Best Practice guidance.⁴⁹⁶ It should be borne in mind that it is proposed that land attachment⁴⁹⁷ under the Bankruptcy and Diligence etc (Scotland) Act 2007 will not be permissible in respect of a debt of less than £3 000, an amount which will coincide with the minimum amount required for the claim of a sequestrating creditor in the bankruptcy process. In a sense, this may be regarded as posing a "low value" home exemption. However, a proposal was put forward in the Gretton-St Clair paper for an exemption to apply in respect of the claims of unsecured creditors. It would be an exemption of equity in the debtor's main residence of an amount up to £200 000.⁴⁹⁸ This amount was arrived at by studying the average house prices across Scotland. The suggestion is that the home should initially vest in the trustee, upon sequestration, but could thereafter be divested, where appropriate. It has been proposed that, where the debtor holds equity in the home which is less than

⁴⁹⁵See s 40(3A) of the Bankruptcy (Scotland) Act 1985, inserted by s 11(c) read with s 11(d)(i) of the Home Owner and Debtor Protection (Scotland) Act 2010.

⁴⁹⁶See the Accountant in Bankruptcy's *Business Plan 2011/12* <http://www.aib.gov.uk/publications/aib-business-plan-2011-12> [date of use 15 March 2012]. The Protected Trust Deeds (Scotland) Regulations 2008 SSI 2008/143 came into force on 1 April 2008 <http://www.legislation.gov.uk/ssi/2008/143/contents/made> [date of use 15 March 2012].

⁴⁹⁷For more detail in respect of which, see first footnote to text at 7.6.1, above, and relevant sections of the Bankruptcy and Diligence etc (Scotland) Act 2007.

⁴⁹⁸See the proposals contained in the Gretton-St Clair paper. The proposal is also referred to by McKenzie Skene 2011 *Int Insolv Rev* 46.

£200 000, the trustee would abandon the home to the debtor. However, where the debtor's equity is more than £200 000, the trustee could sell the home but pay the debtor an amount of up to £200 000 out of the proceeds, so that the debtor could purchase another average-priced home.⁴⁹⁹ A similar exemption is proposed to apply to land attachment.⁵⁰⁰

The proponents noted that the introduction of the home exemption would supersede largely section 40 of the Bankruptcy (Scotland) Act 1985.⁵⁰¹ On the other hand, it was submitted that it would obviate any need to consider whether section 40 should be amended to provide protection for a debtor's own home, rather than protecting only the home interests of other family members.⁵⁰² McKenzie Skene observes that the proposed home exemption "would be a radical change to existing exemptions".⁵⁰³ However, it is noteworthy that most of the other proposals put forward in the Gretton-St Clair paper have already been implemented. Therefore, thus far, apparently, the Scottish Parliament has agreed largely with the proponents' approach that it would be best to implement the radical changes and then, if it turned out that the reforms went too far, the balance could be redressed. As Gretton and St Clair stated, in their proposals:⁵⁰⁴

This argument has particular force in exceptional circumstances as at present ... the status quo – keeping persons in their homes – is easily reversed on later review with little damage, whereas once homes are lost, the damage may be irreversible.

7.6.5 *Comment*

Scots law, like South Africa, is classified as a mixed legal system,⁵⁰⁵ with English legal influences as well as indirect influences by Roman law and continental law. Under Scots

⁴⁹⁹Gretton-St Clair paper pars 51-52.

⁵⁰⁰Gretton-St Clair paper par 57.

⁵⁰¹Gretton-St Clair paper par 46.

⁵⁰²Gretton-St Clair paper pars 43, 51 n 28. See related criticisms of the position, in England and Wales, for insufficient regard being had to the needs of the debtor, discussed at 7.5.5.1, above.

⁵⁰³McKenzie Skene 2011 *Int Insolv Rev* 46.

⁵⁰⁴See the Gretton-St Clair paper pars 73-76.

⁵⁰⁵See Du Bois *et al Wille's principles* 33ff; Girvin "Mixed Legal System" 138-139.

law, we see the recent recognition of, and emphasis on, the importance of the protection of the family home against action by creditors, including statutory restrictions on the claims of even secured creditors. A significant proposal is to exempt from forced sale, in both individual debt enforcement and bankruptcy procedures, the debtor's home, where he has equity in an amount which is less than £200 000 and, where he has equity of more than £200 000, to exempt such amount so that the debtor may acquire an alternative residence. The amount of £200 000 may be viewed as a more practical, meaningful and effective solution, as opposed to the meagre amount of £1000 exempted, in England and Wales, by the enactment of the Enterprise Act 2002.⁵⁰⁶

In Scotland, as is the recently established position in South Africa, a court order is required before the forced sale of a debtor's home may occur. The exercise of a mortgagee's rights has been modified, from a procedural point of view. As in England and Wales, there are pre-action requirements which must be satisfied, without any need for the debtor or other affected person to initiate consideration of the specific circumstances before a court will entertain an application by a creditor for an order for the sale of the debtor's home. However, in Scotland the pre-action requirements are explicitly enumerated as such in the applicable national legislation, thus providing them with more "teeth" than equivalent provisions which are applicable, in England and Wales, in protocols and codes of practice.⁵⁰⁷ Also, in the individual debt enforcement process, Scottish legislation requires a court to consider the personal circumstances of the debtor and his family as well as the reasons for the default in mortgage obligations, whereas in England and Wales, the applicable legislation requires a court only to consider the debtor's ability to pay the arrears within a reasonable period.⁵⁰⁸

A significant feature is that a creditor who intends to bring an application for an order for the sale of a debtor's home, as well as a trustee of an insolvent estate, and the trustee of an estate transferred in a trust deed, must serve notice on the local authority. This is

⁵⁰⁶See the criticisms levelled at s 283A of the Insolvency Act 1986, mentioned at 7.5.3.3 (d) (iii), above.

⁵⁰⁷See the criticisms levelled at MCOB 13 and the Pre-Action Protocol, discussed at 7.5.5, above.

⁵⁰⁸Cf s 24(7)(a)-(e) of the Conveyancing and Feudal Reform (Scotland) Act 1970 with s 36 of the Administration of Justice Act 1970, applicable in England and Wales. See the criticism of the position in England and Wales by Lindberg 2010 *Denning LJ* 9, discussed at 7.5.3.2 (a), above.

so that, if necessary, timeous arrangements may be made for alternative accommodation of the debtor and other occupants of the home to avoid their being rendered homeless. It is submitted that it would be appropriate for a similar provision to be incorporated in South African legislation. Certainly, it would provide evidence of genuine recognition on the part of the state of its duty to provide access to adequate housing, as confirmed by the Constitutional Court in *Grootboom*.

7.7 Ireland

7.7.1 General

The Family Home Protection Act 1976 and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 provide a measure of protection for the family home against a claim by a mortgagee.⁵⁰⁹ With its economy hard hit by the recent recessions, Ireland introduced a mortgage arrears resolution process in an effort to reduce the forced sale of homes.⁵¹⁰ Various statutory reforms are embodied in the proposed Family Home Bill 2011,⁵¹¹ put forward by Fianna Fáil,⁵¹² and contained in the Personal Insolvency Bill 2010,⁵¹³ drafted by the Irish Law Reform Commission, in order to provide greater protection for the home against creditors' claims both inside and outside of insolvency.

⁵⁰⁹See 7.7.2, below.

⁵¹⁰See 7.7.2, below.

⁵¹¹See *Protecting Family Homes, Reforming Personal Debt* Introduction http://fail.3cdn.net/c4bcb1edd1bd8e136d_02m6iyc4l.PDF [date of use 15 March 2012].

⁵¹²The Republican Party.

⁵¹³See the Law Reform Commission's *Report on Personal Debt Management and Debt Enforcement* LRC 100-2010, published on 16 December 2010, which forms part of the Law Reform Commission's Third Programme of Law Reform 2007-2014 <http://www.lawreform.ie/news/report-on-personal-debt-management-and-debt-enforcement.324.html> [date of use 15 March 2012].

7.7.2 *The individual debt enforcement process*

7.7.2.1 Statutory provision for family home protection

The Family Home Protection Act 1976 and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 each provides that, if it would be just and equitable, in all the circumstances, having regard to the terms of the mortgage, the interests of the mortgagee, and the respective interests of the spouses or civil partners, as the case may be, the court may postpone foreclosure proceedings in order for the spouse or civil partner to pay the arrears. Where, thereafter, on application by the spouse or civil partner, it appears to the court that all arrears have been paid and that mortgage instalments which will subsequently fall due, will continue to be paid, the court may by order make such a declaration.⁵¹⁴ In the case of spouses, the effect of such an order will be that an acceleration clause will be of no effect for the purposes of those, or subsequent, proceedings.⁵¹⁵

7.7.2.2 Mortgage Arrears Resolution Process

In Ireland, the Code of Conduct on Mortgage Arrears⁵¹⁶ applies to mortgage lending activities of all regulated entities in respect of every mortgage loan secured by the borrower's primary residence.⁵¹⁷ Every lender is required to have in place a Mortgage Arrears Resolution Process, commonly referred to as "MARP", which conforms to the

⁵¹⁴See ss 7-8 of the Family Home Protection Act 1976 and ss 32-33 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

⁵¹⁵See s 8(2) of the Family Home Protection Act 1976. There is no equivalent provision in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

⁵¹⁶The Code of Conduct on Mortgage Arrears, issued by the Central Bank of Ireland under s 117 of the Central Bank Act 1989, was issued on 19 February 2010 and revised on 6 December 2010, with effect from 1 January 2011; see <http://www.centralbank.ie/regulation/processes/consumer-protection-code/Documents/Code%20of%20Conduct%20on%20Mortgage%20Arrears%20%201%20January%202011.pdf> [date of use 15 March 2012].

⁵¹⁷See the Code of Conduct on Mortgage Arrears Chapter 1 Introduction. According to the definition, in Chapter 2, a "primary residence" means a property which is the residential property which the borrower occupies as his or her primary residence, in Ireland, or a residential property in Ireland which is the only residential property owned by the borrower.

detailed requirements contained in the Code of Conduct on Mortgage Arrears.⁵¹⁸ A borrower will enter the lender's MARP once he has been in mortgage arrears for 31 days.

The Code of Conduct on Mortgage Arrears prescribes detailed information which must be communicated to the borrower and which thereafter must be updated every three months.⁵¹⁹ After a third full or partial mortgage repayment has been missed, the lender is required to convey a warning to the borrower about the possibility, and consequences, of repossession, as well as advice to the borrower to consult his local Money Advice and Budgeting Service.⁵²⁰ An assessment must be carried out taking into account the "full circumstances of the borrower" including: his personal circumstances; his overall indebtedness; the information provided in the standard financial statement; his current repayment capacity; and his previous payment history.⁵²¹ The alternative repayment arrangements which a lender must consider include: an interest-only arrangement for a specified period; an arrangement whereby the capital element of the repayment is reduced for a specified period; deferring payment of all or part of the instalment repayment for a period; extending the term of the mortgage; changing the type of the mortgage; capitalising the arrears and interest; and any voluntary scheme to which the lender has signed up, such as a Deferred Interest Scheme.⁵²²

⁵¹⁸See the Code of Conduct on Mortgage Arrears Chapter 3 Provision 15. A lender's MARP must consist of five steps pertaining to: the method, and the specific content, of communications with borrowers; a standardised form for obtaining reliable and relevant financial information from borrowers who are in arrears; the examination, and assessment, of the borrower's financial position; the need to explore all options for alternative repayment arrangements; and establishing an appeals process.

⁵¹⁹See the Code of Conduct on Mortgage Arrears Chapter 3 Provisions 22(a) and 24. The information includes, *inter alia*: the date on which the borrower fell into arrears; the number and total amount of full or partial payments missed; the amount of the arrears to date; confirmation that it is being treated as a MARP case; and details of fees, charges and surcharge interest in relation to the arrears which will apply if the borrower does not co-operate.

⁵²⁰See the Code of Conduct on Mortgage Arrears Chapter 3 Provision 25. The Money Advice and Budgeting Service is a private, independent service which is supported by the Irish government and which is publicly funded; see http://www.citizensinformation.ie/en/money_and_tax/personal_finance/debt/mabs_service.html [date of use 15 March 2012].

⁵²¹See the Code of Conduct on Mortgage Arrears Chapter 3 Provision 32.

⁵²²See the Code of Conduct on Mortgage Arrears Chapter 3 Provision 33. Registered lenders are encouraged to participate in the Deferred Interest Scheme whereby borrowers may be allowed to defer up to 34% of interest payable on a mortgage for a limited period; see *Mortgage Arrears: A Consumer Guide to Dealing with your Lender 2011* issued by the Central Bank of Ireland

The Code of Conduct on Mortgage Arrears prohibits a lender from applying to the courts to commence legal action for repossession of the borrower's primary residence until every reasonable effort has been made to agree on an alternative arrangement with the borrower or his nominated representative.⁵²³ It also provides that, where a borrower cooperates with the lender, at least twelve months must elapse, from the date on which the borrower entered the MARP, before the lender may apply to the courts to commence legal action for repossession of a borrower's primary residence.⁵²⁴

7.7.2.3 The proposed Family Home Bill 2011

It may be noted that the Fianna Fáil Working Group on Mortgages and Personal Debt has proposed further legislative reform reflecting policy initiatives which "put the protection of the family home at the centre of the State's approach to mortgage arrears and personal debt", on the basis of its belief that "keeping people in their family home makes for good social policy, and also makes sound financial sense".⁵²⁵ It has proposed for enactment the Family Home Bill 2011. This Bill contains a provision precluding a lender from commencing legal proceedings to repossess a person's family home unless it certifies, in writing, to the court that it has complied with the Code of Conduct on Mortgage Arrears. The lender must also provide an independent report from the Money Advice and Budgeting Service on the borrower's ability, or lack of it, to pay, as well as copies of mortgage documentation.⁵²⁶ Further proposals consist of modifications, including the addition of greater specificity, to the range of possible court orders which

<http://www.centralbank.ie/regulation/processes/consumer-protection-code/documents/consumer%20booklet%20-%20final%20feb%202011.pdf> [date of use 2 September 2011]. The Deferred Interest Scheme was recommended by the expert group on Mortgage Arrears and Personal Debt in its report which led to the current, revised version of the Code on Mortgage Arrears. For further information, see Irish Government's Department of Finance website <http://www.finance.gov.ie/viewdoc.asp?DocID=6583> [date of use 3 September 2011].

⁵²³See the Code of Conduct on Mortgage Arrears Chapter 3 Provision 46.

⁵²⁴See the Code of Conduct on Mortgage Arrears Chapter 3 Provision 47 provides that the 12-month period excludes certain periods such as, for instance, where the borrower is complying with the terms of any alternative repayment arrangement agreed with the lender.

⁵²⁵See Introduction to Fianna Fáil's *Protecting Family Homes, Reforming Personal Debt*.

⁵²⁶See ss 1-2 of the Family Home Bill 2011, contained in Fianna Fáil's *Protecting Family Homes, Reforming Personal Debt*.

may currently be issued as alternatives to an order for repossession.⁵²⁷ A further, significant, proposed provision is to give the court the power to reduce the principal sum in a fair manner, provided the court grants the mortgagee an appropriate share in the mortgagor's equity in the home.⁵²⁸

Fianna Fáil's proposed Family Home Bill 2011 also contains a provision which will give the court the power to rescind the mortgage agreement if the credit was granted in an unlawful or reckless manner, taking into consideration the borrower's financial position at the time.⁵²⁹ Another proposal entails a court refusing to grant an order for repossession but, instead, where appropriate, ordering that the borrower remain in the family home as a "court approved tenant of the lender for a rent and on terms to be fixed by the court." This proposal envisages the mortgagee being entitled to apply for the setting aside of the court approved tenancy in the event of a change in the financial circumstances of the mortgagor which would enable the latter to pay an increased rent or to recommence mortgage payments.⁵³⁰ It also proposed that, where a mortgagor is in arrears, the mortgagee should not have to follow the required process before it may obtain a court order for possession of the family home, if arrangements could readily be made to provide reasonable, long term, alternative living accommodation to the mortgagor. This might occur either by way of a local authority tenancy, the mortgagor's own resources, or the proceeds of the mortgagor's equity in the family home.⁵³¹ Presumably, it is submitted, the underlying intention is that, by making the process more convenient for a mortgagee, it might encourage the latter to opt for this. The result would be that the mortgagor would not be rendered homeless and could retain his family home where his financial position allows it.

⁵²⁷These include an order for: payment of interest only for a period of up to four years; an extension of the mortgage period by up to 20 years; the deferment of all payments for a period of one year; an adjustment to the interest rate; and deferred interest payments, in terms of the Deferred Interest Scheme.

⁵²⁸See s 6(1) of the Family Home Bill 2011.

⁵²⁹See s 6(2) of the Family Home Bill 2011.

⁵³⁰See s 6(3) of the Family Home Bill 2011.

⁵³¹See s 7 of the Family Home Bill 2011.

7.7.3 Proposed insolvency reform

The Irish Law Reform Commission, in its *Report on Personal Debt Management and Debt Enforcement*,⁵³² has made far-reaching recommendations, based on the premise that any debt enforcement mechanism should leave the debtor and his dependants with a minimum standard of living.⁵³³ Its recommendations include the reform of the judicial insolvency processes contained in the Bankruptcy Act 1988.⁵³⁴ The report contains a draft Personal Insolvency Bill 2010 which proposes a new, non-judicial process, called Debt Settlement Arrangement.⁵³⁵ In terms of this process, a debtor may conclude a legally binding agreement⁵³⁶ with his creditors to pay them a certain amount over a period of five years, at the end of which the debtor will be discharged from liability for the unpaid balance.⁵³⁷ A debtor may prevent the enforcement of any debt during the debt settlement arrangement process.⁵³⁸ Registration of a concluded Debt Settlement Arrangement will have the effect that a creditor may not present a bankruptcy petition against a debtor,⁵³⁹ no creditor may commence legal proceedings for the recovery of a debt covered by the arrangement, and no action may be taken by an enforcement officer to enforce a judgment debt owed by a debtor.⁵⁴⁰ The Law Reform Commission's approach is that, "subject to the provisions of other areas of the law, the ability of a creditor to exercise his or her security should not be affected by the Debt Settlement

⁵³²Mentioned at 7.6.1, above.

⁵³³See the *Report on Personal Debt Management and Debt Enforcement* Introduction Part G(3) par 25.

⁵³⁴*Report on Personal Debt Management and Debt Enforcement* Chapter 3.

⁵³⁵To be administered by a new Debt Settlement Office, and a panel of licensed Personal Insolvency Trustees. Debt Settlement Arrangement will apparently perform a similar function to the Individual Voluntary Arrangement, in England and Wales, and the protected trust deed, in Scotland.

⁵³⁶Under s 14(1) of the Personal Insolvency Bill 2010, a majority of 60% in value will be required.

⁵³⁷See s 10(1)(b) of the Personal Insolvency Bill 2010.

⁵³⁸See s 13 of the Personal Insolvency Bill 2010 which provides for the debtor to apply for a "protective order".

⁵³⁹However, s 19 of the Personal Insolvency Bill 2010 does propose to allow for a bankruptcy petition to be brought in the event of it being terminated by a creditor, which may occur on a number of grounds, for instance, where the debtor fails to comply with it, or in the event of its failure.

⁵⁴⁰See s 16 of the Personal Insolvency Bill 2010.

Arrangement procedure".⁵⁴¹ Therefore, the proposed provisions complement the ordinary principles applicable to secured creditors' claims.⁵⁴²

Although a submission had been received suggesting that "equity in the debtor's home that is uneconomical to realise" should not be required to be sold as part of a Debt Settlement Arrangement, the Law Reform Commission decided not to incorporate a "low equity" home exemption in the proposed provisions.⁵⁴³ This, it stated, would be in line with its policy not to specify exempt assets in the draft Personal Insolvency Bill 2010, but rather to leave that for inclusion in secondary legislation or codes of practice. A further reason was to retain flexibility, for appropriate agreements to be reached in relation to repayments which would leave the debtor with a reasonable standard of living, according to the circumstances of each case.⁵⁴⁴ The Law Reform Commission pointed out that, for a debtor to retain a reasonable standard of living, a Debt Settlement Arrangement should make allowance for the debtor's secured debt obligations, and that "[t]he debtor's reasonable living expenses should obviously include the costs of accommodation, in the form of either payments of rent or mortgage repayments".⁵⁴⁵ It explained that creditors, voting on a proposed arrangement, could decide whether to permit the debtor to retain a certain level of income towards mortgage payments⁵⁴⁶ or whether it might be more appropriate for the debtor to find less expensive accommodation. In the latter case, the home would be sold and any equity which the debtor had in it would be available for distribution to creditors.⁵⁴⁷

The Personal Insolvency Bill 2010 also proposes the introduction of a new, low-cost, non-judicial procedure for "no income, no assets" debtors, in terms of which the Debt Settlement Office may make a Debt Relief Order which will discharge the debtor from

⁵⁴¹ See the *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(7)(a) par 1.315.

⁵⁴² *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(7)(b) pars 1.317-1.323. See also s 12 of the Personal Insolvency Bill 2010 for the options available to a secured creditor.

⁵⁴³ *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(4) pars 1.283 and 1.284.

⁵⁴⁴ *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(4) par 1.295.

⁵⁴⁵ *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(7)(c)(i) par 1.325.

⁵⁴⁶ *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(4) par 1.296.

⁵⁴⁷ *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(7)(c) pars 1.325-1.326.

liability for all unsecured debt.⁵⁴⁸ Where a Debt Relief Order is made, a mortgagee's claim, in respect of a debtor's family home, would remain enforceable and the mortgagee would have to follow the prescribed mortgage debt enforcement process, as discussed above.⁵⁴⁹ It may be recalled that Fianna Fáil's⁵⁵⁰ proposed Family Home Bill 2011, discussed above,⁵⁵¹ envisages a solution, in such circumstances, for a mortgagor who has fallen into arrears. It provides that the proposed prescribed process will not be applicable if "arrangements can readily be made to provide reasonable long term alternative living accommodation to the mortgagor whether by way of a local authority tenancy, the mortgagor's own resources, or the proceeds of the mortgagor's equity in the family home."⁵⁵² However, it is submitted that the circumstances in which a Debt Relief Order is likely to be made are not such that the mortgagor would have his own resources, or that he would have any significant amount of equity in the home. Therefore, it is submitted, the local authority will more likely be called upon to provide accommodation for the mortgagor and his family. It goes without saying, it is submitted, that Fianna Fáil's proposed Bill evidently anticipates co-ordinated governmental support, either in the form of supplementation of mortgage interest⁵⁵³ to assist debtors to remain in their mortgaged homes, or through the provision of state housing.⁵⁵⁴

7.7.4 Comment

Significant developments have occurred, and others have been proposed, in Ireland, in relation to protection of the family home against the claims of creditors. It is submitted

⁵⁴⁸See ss 33, 34(1) and 37 of the Personal Insolvency Bill 2010.

⁵⁴⁹See 7.7.2.2, above.

⁵⁵⁰The Fianna Fáil Working Group on Mortgages and Personal Debt, in *Protecting Family Homes, Reforming Personal Debt* par 4, supports adoption of the Law Reform Commission's report and its proposed Personal Insolvency Bill 2010 and other bankruptcy legislative reform recommendations.

⁵⁵¹See 7.7.2.3, above.

⁵⁵²See s 7 of the Family Home Bill 2011.

⁵⁵³The Fianna Fáil Working Group on Mortgages and Personal Debt also supports recommendations made by the Department of Social Protection for reform of the Mortgage Interest Supplement Scheme; see <http://www.welfare.ie/EN/Schemes/SupplementaryWelfareAllowance/Pages/default.aspx> [date of use 15 March 2012].

⁵⁵⁴Housing, in Ireland, is administered, largely through the local authorities, by the Department of Environment, Community and Local Government, which works in collaboration with the Department of Finance, in relation to mortgage interest relief. See the stated policy at <http://www.environ.ie/en/DevelopmentHousing/Housing> [date of use 15 March 2012].

that, evidently, human rights considerations and fairness to both debtors and creditors are in the forefront of these developments and proposed reforms. They signify a commitment to repossession of homes occurring only after specific consideration of all the relevant circumstances, including the personal circumstances of the debtor and, ultimately, as a last resort.

It would appear that the proposed Debt Settlement Arrangement, posed as an alternative to bankruptcy within the bankruptcy legislative framework, is envisaged as playing a significant role, as equivalent provisions do in other jurisdictions, in allowing a debtor to retain his home, where appropriate.

7.8 Other developments within the EU

Comparable recent developments in relation to treatment of a debtor's family home have occurred in various other member states of the European Community. In 2009, the European Commission recognised the severe consequences that mortgage foreclosures may have on individual homeowners in default and "for society as a whole, through their impact on financial and social stability". In an effort to ensure that mortgage foreclosures are avoided wherever possible,⁵⁵⁵ the European Commission services⁵⁵⁶ compiled a working paper examining measures already taken in this regard by member states, at national level. It formulated a proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property.⁵⁵⁷ The proposal focuses, primarily, on the promotion of responsible lending

⁵⁵⁵See *Communication for the Spring European Council* COM(2009) 114 final, 4 March 2009 Vol 2 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0114:FIN:EN:PDF> [date of use 15 March 2012].

⁵⁵⁶See *Commission Staff Working Paper National measures and practices to avoid foreclosure procedures for residential mortgage loans* SEC(2011) 357 final (31 March 2011) http://ec.europa.eu/internal_market/finances-retail/docs/credit/mortgage/sec_2011_357_en.pdf [date of use 15 March 2012], hereafter referred to as "the Working Paper".

⁵⁵⁷A *proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property* COM(2011) 142 final, 2011/0062 (COD), 31 March 2011, hereafter referred to as "the EC services proposal", par 1 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0142:FIN:EN:PDF> [date of use 15 March 2012].

and borrowing practices with the aim of creating a lower level of credit risk and thus reducing the need for recourse to foreclosure against debtors' homes.⁵⁵⁸

The Working Paper reveals that, in certain member states of the European Community, creditors have voluntarily adopted certain internal practices to avoid foreclosures while, in others, certain measures have been imposed on them.⁵⁵⁹ In Belgium, the Netherlands, and Hungary, creditors are obliged to explore alternative solutions before they may institute proceedings for foreclosure.⁵⁶⁰ A number of member states, such as France, for example, rely on specialised mediation mechanisms.⁵⁶¹ A number of member states provide for modification of mortgage loan terms. For example, in France, the court may suspend a borrower's payment obligations at his request, for a maximum period of two years. In Cyprus, the Committee of Cooperative Credit Institutions may extend the loan repayment period if there are reasonable arguments for doing so. In Belgium, the borrower may ask the judge to allow him to pay lower instalments over a longer period. In Romania, the parties involved are encouraged to discuss solutions, such as modifying the amount of the instalments, delaying payment, reducing the interest rate for a given period, changing the type of interest rate, capitalisation of arrears, or refinancing the loan, prior to institution of any measures for mortgage enforcement. In Finland, the applicable legislation provides examples of envisaged modifications, such as consolidation of different loans, a moratorium, or changes in the reference rate, in order to bring down the borrowing rate. In Italy, members of the Italian Banking Association have signed the "Piano Famiglie", committing to considering suspensions of mortgage instalments for families in difficulty under certain circumstances.⁵⁶²

The European Commission services note that to require a minimum period to lapse, before a creditor may initiate foreclosure proceedings, provides the opportunity for conciliation, mediation, and loan term modifications to occur and may even assist

⁵⁵⁸ See the Working Paper par 1 and the EC services proposal par 1.

⁵⁵⁹ See the Working Paper par 3.

⁵⁶⁰ See the Working Paper par 3.1.

⁵⁶¹ See the Working Paper par 3.2.

⁵⁶² See the Working Paper par 3.3.

borrowers to settle outstanding payments. The Working Paper reflects that, in Italy, the Banking Code requires the borrower's payment to have been "delayed" at least seven times and for between one and six months to have elapsed, before a foreclosure can be launched. In the Netherlands, in terms of the Code of Conduct on Mortgage Credit, foreclosure proceedings cannot commence unless there has been consultation with the borrower and two months have elapsed since the borrower defaulted.⁵⁶³

In the Working Paper, final considerations expressed were that it is essential for member states to introduce, where appropriate, rules aimed at either preventing foreclosures or limiting their social and economic impact. It was observed that several steps and initiatives may be attempted before opting for repossession and that, where it is clear that a borrower is entering into difficulties, "a dialogue should take place with the lender either bilaterally or through a mediator ... to explore alternative repayment measures ... [such as] a renegotiation of the loan terms and/or duration."⁵⁶⁴ It was observed that creditors "have an interest in avoiding expensive foreclosure procedures, the proceeds of which are almost always lower than from an unforced sale" and that "foreclosures should constitute a measure of last resort for a lender."⁵⁶⁵

7.9 Conclusion

Comparative analysis reveals that there are largely two approaches. One is to adopt a formal statutory home exemption, which may be capped, such as in the United States of America⁵⁶⁶ and Canada.⁵⁶⁷ The other is to have a combination of legislative provisions and rules, such as in England and Wales, and in Scotland, which protect occupiers against each other, as opposed to third parties, and, in relation to claims by third parties, provide for the delay of the sale of the home, in appropriate circumstances.⁵⁶⁸ In a number of systems, modifications to the substantive and procedural requirements

⁵⁶³See the Working Paper par 3.4.

⁵⁶⁴See the Working Paper par 5.

⁵⁶⁵See the Working Paper par 5.

⁵⁶⁶See 7.2, above.

⁵⁶⁷See 7.3, above.

⁵⁶⁸See 7.5 and 7.6

have been introduced as emergency measures to deal with the high rate of foreclosures, or repossessions, as they are referred to in various jurisdictions, as a result of the recent global recessions.⁵⁶⁹ It is submitted that the traditionally clear distinction between the two approaches has diminished, largely in light of these modifications as, for example, in some states of the United States of America, pre-action conferences and negotiation are now required. On the other hand, in other systems which have traditionally provided statutory protection for an occupier spouse's interests and for the delay, where appropriate, of the sale of the home in insolvency, now types of home exemption are also beginning to feature. A provision which bars the sale of a "low equity" home has been introduced in England and Wales⁵⁷⁰ and an eminently more far-reaching home exemption has been proposed for Scotland.⁵⁷¹

Concerning the power of the court to delay the forced sale of the home, in appropriate circumstances, in England, in the individual debt enforcement process, considerations to be taken into account by the court involve the debtor's ability to repay the arrears and to fulfil the contractual obligations.⁵⁷² In Scotland, legislation requires a court to take the personal circumstances of the debtor into account and the reasons for the default.⁵⁷³ In England, the Mortgage Conduct of Business Rules and the Pre-Action Protocol require the creditor to make reasonable efforts to accommodate the debtor by negotiating alternative payment arrangements, in order to ensure that forced sale occurs only as a last resort.⁵⁷⁴ Scotland has included similar pre-action requirements in legislation.⁵⁷⁵ This, it is submitted, is an indication that they have become a permanent part of the civil process. In Ireland, the proposed Family Home Bill 2011 is predicated on the mortgage arrears resolution process having been followed before commencement of repossession proceedings by a creditor.⁵⁷⁶ It is submitted that similar compulsory pre-action requirements and procedures should be implemented in South Africa. A more

⁵⁶⁹ See 7.2.4, 7.5.4, 7.6.2, 7.7.2.2 and 7.8, above.

⁵⁷⁰ See 7.5.3.3 (d) (ii), above.

⁵⁷¹ See 7.6.4, above.

⁵⁷² See 7.5.3.2, above.

⁵⁷³ See 7.6.2, above.

⁵⁷⁴ See 7.5.4.2 and 7.5.4.5, above.

⁵⁷⁵ See 7.6.2, above.

⁵⁷⁶ See 7.7.2.2 and 7.7.2.3, above.

explicit process is required to be mapped out for practitioners and for courts to follow, as is done by the English Pre-Action Protocol, through its tool, the Mortgage pre-action checklist.⁵⁷⁷ It is submitted that a similar checklist ought to be compiled for use, and applied, in South Africa.

A common feature is that, as a rule, the home exemption does not affect the claim of a mortgagee but is only effective against the claims of unsecured creditors. In jurisdictions where there is an exemption of equity in the home, it is often insufficient for the debtor to retain the home but the proceeds of the sale of the home, up to the exempted limit, are available to purchase other, more affordable, accommodation or to contribute towards payment of rent.⁵⁷⁸ What is often more useful, from a practical point of view, is for the debtor to resort to a debt repayment plan, often spanning a period of up to five years, and to maintain mortgage payments during that period. Some jurisdictions make provision for the refinancing of the home in order for the benefit of any equity, accumulated during the period of the payment plan, to be transferred to the unsecured creditors. This is a feature of Chapter 13 bankruptcies, in the United States of America,⁵⁷⁹ consumer proposals, in Canada,⁵⁸⁰ an Individual Voluntary Arrangement, in England and Wales,⁵⁸¹ and the grant of a trust deed, in Scotland.⁵⁸² In Ireland, Debt Settlement Arrangement⁵⁸³ has been proposed and, presumably, it would serve as a means for the debtor to retain his home.

In all of the foreign jurisdictions considered, these alternative debt relief mechanisms, involving repayment plans, form part of their bankruptcy legislation. A mortgagee's claim is not included in the payment plan which should cater for payment of the required regular mortgage instalment to the mortgagee. Indeed the success of the plan depends on sufficient income being left with the debtor to meet his and his dependants' needs. Significantly, typically, before the debtor completes the payment plan, he is required to

⁵⁷⁷See Annexure A to this thesis manuscript.

⁵⁷⁸See, for example, 7.2.2, above, with reference Ferriell and Janger *Understanding Bankruptcy* 430-431.

⁵⁷⁹See 7.2.3 and 7.2.5, above.

⁵⁸⁰See 7.3.4 and 7.3.5, above.

⁵⁸¹See 7.5.3.3 (d) (iv), above.

⁵⁸²See 7.6.3.2, above.

⁵⁸³See 7.7.3, above.

provide the unsecured creditors with the proceeds of any equity, or at least some of it, and when the debtor completes the payment plan, he receives a measure of discharge from his debts in line with the policy of affording him a "fresh start".⁵⁸⁴

Comparing these systems with the South African position, we see that the process most equivalent to this is not, as one might expect, the composition process which is provided for in the Insolvency Act, but the debt review process under the NCA. Further, more significant even than the fact that it is not an insolvency process and does not form part of the insolvency regime, is that these two pieces of legislation do not cater for one another and, what is more, there is confusion about the interaction between their respective provisions. Under the Insolvency Act, a debtor ultimately receives discharge from liability for pre-sequestration debt. In contrast, a debtor who resorts to debt review in terms of the NCA must satisfy all of his debts in full, over an extended period, with no discharge whatsoever.⁵⁸⁵

A significant difference between the position in South Africa and in other jurisdictions is that the debt review system, in terms of the NCA, allows modification of terms of the mortgage bond in respect of the debtor's primary residence without the consent of the mortgagee. On the other hand, in the United States of America, the Chapter 13 bankruptcy process does not allow this and, when it was sought to introduce cram down provisions to Chapter 13, this was very contentious.⁵⁸⁶ Thus, a debtor will often have to rely on the lender voluntarily "forgiving" part of the capital sum and interest. It may be noted that, in practice, this occurs quite frequently in order for the lender to qualify for federal government financial support. In England and Wales, the Insolvency Act 1986 provides that an IVA may not contain terms which affect the rights of secured creditors to enforce their security, or the treatment of preferential creditors, unless they expressly consent to the specific modification of their rights.⁵⁸⁷ It may be noted that government-backed mortgage assistance schemes also operate in England and Wales and this may

⁵⁸⁴See 7.2.3 and 7.5.3.3 (d) (iv), above.

⁵⁸⁵See 4.5, 6.2 and 6.10, above.

⁵⁸⁶See 7.2.4, above.

⁵⁸⁷See 7.5.3.3 (d) (iv), above.

tend to favour specific consent by lenders to modification of mortgage bond terms. However, South Africa does not have any similar government-backed mortgage modification incentive schemes and government forbearance initiatives which would ameliorate the situation of the mortgagee in the event of the modification of mortgage bond terms. It is submitted that modification by a court of a debtor's mortgage bond repayment obligations, without the express consent of the mortgagee, as the NCA permits, reduces the efficacy of its debt review and restructuring process as an alternative debt relief option. Certainly, it bars its functioning as a tool, in the same way as repayment plans are used in overseas jurisdictions, to prevent the forced sale of a debtor's home.

Another notable difference concerns the entitlement of a creditor to obtain an order for the sequestration of the debtor's estate while the latter is subject to a debt rearrangement order. In South Africa, a creditor is not precluded from obtaining an order for the sequestration of the estate of a debtor who is under administration in terms of section 74 of the Magistrates' Courts Act.⁵⁸⁸ Further, although there is no specific provision in the NCA regulating the position, in *FirstRand Bank v Evans*, the KwaZulu-Natal High Court granted a provisional order of sequestration after a debt rearrangement order had been made even though the debtor had allegedly been complying with it.⁵⁸⁹ By contrast, in the United States of America, for example, in a Chapter 13 bankruptcy, the creditors are precluded from bringing an application for a Chapter 7 liquidation process to be instituted against the debtor. This may only occur if the debtor defaults in respect of the Chapter 13 repayment plan, or if it cannot be completed, or if, for some other reason, it is converted to a Chapter 7 bankruptcy.⁵⁹⁰ Likewise, in England and Wales, an approved IVA will ordinarily provide for a stay on debt enforcement proceedings by individual creditors during the operation of the payment plan. Further, the Insolvency Act 1986 imposes clear restrictions so that a court may allow a bankruptcy petition to be brought against the debtor only where he has committed a breach in respect of the required payments, or some other obligation,

⁵⁸⁸See s 74R of the Magistrates' Courts Act.

⁵⁸⁹See 6.10.3, above.

⁵⁹⁰See 7.2.3, above.

in terms of the payment plan.⁵⁹¹ It was submitted, in earlier chapters, that legislative provisions along the lines of section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill should be implemented in South Africa. In the circumstances, it is submitted that comparative analysis tends to confirm that this might bring about more effective protection of the debtor's home from forced sale and at the same time consider the rights of a mortgagee.⁵⁹²

There are interesting parallels to be drawn in relation to the law and its application, in England and Wales, and in South Africa, from which we may learn. An important feature is the application of the European Convention on Human Rights, in England and Wales, through the Human Rights Act 1998. This means that similar issues apply, in English law, in relation to the First Protocol to the Convention, and in South Africa, in relation to section 25, the property clause. Interestingly, there has been the same tendency to shy away from decisive pronouncements on the applicability of these rights to the issue of forced sale of a debtor's home. The striking similarities are apparent in relation to Article 8 of the Convention, which affords every person respect for his home and family life, and in relation to section 26 of the South African Constitution, which gives every person the right to have access to adequate housing. Although the basis for protection is not identical, nevertheless there are lessons to be learnt from England and Wales, and the European Court of Human Rights, in relation to recognition of a person's rights to a home, or accommodation.⁵⁹³ The English courts' interpretation of "exceptional circumstances", for the purposes of sections 335A, 336 and 337 of the Insolvency Act 1986, in their evaluation of whether the sale of the family home by a trustee should be delayed, especially in light of the Human Rights Act 1998, provides useful pointers for potential application in the South African context.

For England and Wales, the lesson is that there is a need to acknowledge more dimensions of the right to respect for the home as a socio-economic right.⁵⁹⁴ For South

⁵⁹¹ See 7.5.3.3 (d) (iv), above.

⁵⁹² See 4.4.3.6, 4.7.4, 5.6.8, 6.4.3, 6.10.6 and 6.12, above.

⁵⁹³ See 7.5.2 and 7.5.3.3 (c), above.

⁵⁹⁴ See 7.5.5.2, above.

Africa, there is a need to recognise the need for modification of social security and housing programmes to accommodate persons affected by forced sale of their homes, both inside and outside of the insolvency context. Bearing in mind the Constitutional Court's approach in *Blue Moonlight Properties (CC)*,⁵⁹⁵ ideally, a more systematic approach is called for in South Africa, with the inclusion in housing policies and programmes of indigent debtors and insolvent persons who lose their homes through forced sale. It is submitted that such an approach should become part and parcel of the effective application of the state's duty to provide adequate housing, as recognised by the Constitutional Court in *Grootboom*.

A current tendency, apparent in all of the jurisdictions considered in this chapter, is to regard it as important even in insolvency to save the debtor's home from sale, where possible. The clear purpose is to ensure that forced sale of a person's home occurs only as "a last resort". These precise words have been employed in the South African jurisprudence. The Constitutional Court, in upholding section 26 of the Constitution, as recognised in *Grootboom*, held, in relation to the forced sale of an unmortgaged home in *Jaftha v Schoeman*, that "[e]very effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort".⁵⁹⁶ In relation to execution against the home of a mortgagor in *Gundwana v Steko*, the Constitutional Court stated "[i]f the judgment debt can be satisfied in a reasonable manner without involving these drastic consequences that alternative course should be judicially considered before granting execution orders."⁵⁹⁷

Thus, commonality of purpose is evident in South Africa and in jurisdictions abroad. It is submitted that emulating practices, methods, processes, and mechanisms employed in overseas systems to provide appropriate protection for a debtor's home against the claims of creditors, suitably modified, where necessary, for application in the local context, may address inadequacies in our system in order more effectively to achieve the balance sought between the competing interests of all concerned.

⁵⁹⁵See 3.3.1.4 (c), above.

⁵⁹⁶See 5.2.3 and 6.12, above, with reference to *Jaftha v Schoeman* par 59.

⁵⁹⁷See 5.6.2.3 and 6.12, above, with reference to *Gundwana v Steko* pars 53-54.