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## **Living in a policy state: from Trust for Sale to Trust of Land.\***

### **Introduction**

The Trusts of Land and Appointment of Trustees Act 1996, (hereafter 'T.L.A.'), has transformed the nature of co-ownership interests in land. The trust for sale, which governed dealings in co-owned property under the Law of Property Act 1925 (hereafter 'L.P.A.'), and which made *sale* the presumptive object of co-ownership,<sup>1</sup> has been replaced by a 'trust of land', under which co-owners retain an interest in land itself, rather its capital value. The object of this article is to consider the likely impact of this legislative policy departure, with particular regard to judicial willingness to order the sale of co-owned property. The legislative policy of the 1925 provisions, and the effect which this policy had on applications for sale shall be considered. This shall be followed by a review of subsequent attempts at legislative reform, which led to the Insolvency Act 1986, and the T.L.A. 1996.

Section 30 of the L.P.A. enabled a creditor to realise the capital value of jointly owned assets, by allowing him to apply for the sale of co-owned land. The court had a discretionary power to order sale where the creditor's interest in realising his debtor's assets outweighed the non-debtor co-owner's interest in retaining the property for the purpose of occupation. The object of the 1925 provisions was to facilitate the alienability of real property, and this legislative policy characterised the judicial approach towards granting orders for sale under section 30 of the Act. The result was a clear tendency for creditors, whose interest lies in the sale of the debtor's property, to prevail over a co-owning occupier who wished to retain the land for occupation and use as a home.

The introduction of the 'trust of land' in the T.L.A. indicates Parliamentary recognition of the fact that sale is usually the last outcome intended by the homesharers. While the court's power to order sale at the request of creditors has been preserved, the T.L.A. has added some guidelines concerning the exercise of the judicial discretion.<sup>2</sup> This article is intended to chart the policy departure revealed by the T.L.A., and to consider the effect which this will have on judicial willingness to order sale against the wishes of an occupying co-owner.

### **The Law of Property Act 1925 and the Trust for Sale.**

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<sup>1</sup> "...land held upon the 'statutory trusts' shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale.": L.P.A., s.35.

<sup>2</sup> T.L.A., ss.14 and 15.

In 1925, owner-occupation accounted for a small but growing proportion of the housing sector,<sup>3</sup> but the government had already embarked upon a home-ownership campaign which aimed to encourage citizens to buy their own homes.<sup>4</sup> The outcome of these policies was that by 1995-6, approximately 68% of the British population were owner-occupiers.<sup>5</sup> The Government intended that the promotion of home-ownership would not only ameliorate the post-War housing crisis, but also encourage a culture of ‘citizenship’,<sup>6</sup> as owner-occupiers would acquire a ‘stake in the nation’. This policy clearly depended upon occupiers acquiring a personal interest in their homes, both economic and emotional,<sup>7</sup> through ownership.

In 1925, however, this policy was in its infancy,<sup>8</sup> and real property was primarily perceived as a valuable form of capital in an increasingly commercial and industrialised society.<sup>9</sup> As the Law of Property Bill passed through the House of Commons, it was clear that its object was to treat land as a *commercial* asset. To this end, the transfer of co-owned land presented significant difficulties. The *prima facie* owner, the legal title holder, was not always capable of transferring good title, particularly where *equitable interests* had arisen informally. The L.P.A. sought to alleviate the hazards associated with co-ownership by placing the beneficiaries’ interests behind a trust for sale.<sup>10</sup> It was Parliament’s intention to render land as easily transferable as other forms of property, and the trust for sale achieved this goal by converting the co-owner’s interest in land into an interest in the cash sum realisable on sale.

Implicit in this policy was a denial of the special importance that a specific piece of real property was capable of representing to its occupiers. Parliamentary policy did not attribute any particular significance to the ‘emotional’ or subjective ‘use value’ of land.<sup>11</sup> As the Law Commission later noted:

<sup>3</sup> 10% in 1914, which had grown to 32% in 1934; statistics from ‘Housing Policy, UK’, Consultative Document: No 58 (1971).

<sup>4</sup> These initiatives were to continue throughout the century, and included tax relief for mortgagors, the availability of creditor finance from Building Societies, and various ‘right to buy’ schemes.

<sup>5</sup> Social Trends 27 (Office for National Statistics, HMSO, 1997), Table 10.2.

<sup>6</sup> See Merritt, *Owner-Occupation in Britain* (Routledge & Kegan Paul, 1992), p5.

<sup>7</sup> These include ‘hanging on’ to the home: security against eviction; that attachment an occupier may have to a particular piece of property; and the status of the property as a matrimonial or family home.

<sup>8</sup> “The 1925 code was ..neither premised upon the existence of mass owner-occupation, nor aimed at providing a legal framework to govern such a pattern of ownership.”; the legislators of the L.P.A. were therefore: “..not concerned to provide a conveyancing regime tailored to the needs of the modern owner-occupied sector.”; W.T. Murphy & H. Clark, *The Family Home*, (Sweet & Maxwell, 1983), pp18-19.

<sup>9</sup> See 155 H.L. Deb. (5th Series) col. 709-710 (16 June 1922), Sir Donald MacLean.

<sup>10</sup> “One of the consequences of the 1925 property legislation is that the legal estate in any property which is beneficially owned jointly or in common is necessarily held on trust for sale.” In *Re Citro* [1991] Ch. 142 at 150G. Although not specifically included in the statutory provisions, the court in *Bull v Bull* [1955] 1 Q.B. 234 held that land vested in the name of a single owner, where another had a beneficial interest behind a trust, was subject to a trust for sale. It was anticipated that the effect of the trust for sale would be to ensure that: “..whoever owns the land.. when he comes to sell, the law will put him in the position that he is to be the absolute owner and.. the buyer will have nothing to do with what lies behind.” *per* Viscount Haldane, 39 H.L. Deb. (5th Series) col. 265-6 (3 March 1920).

<sup>11</sup> Some members of Parliament were critical of this policy, arguing that it was not possible to place real and personal property on the same footing, and expressing concern that the trust for sale mechanism failed to take account of the individuality of land. See eg 154 H.C. Deb. (5th Series) col. 143 (15 May 1922), (Sir J Butcher); col.

“The defining feature of the trust for sale.. is that the trustees are under a duty to sell the trust land. Implicit in this is the notion that this land should be held primarily as an investment asset rather than as a ‘use’ asset.”<sup>12</sup>

The trust for sale thereby imposed an artificial purpose on co-ownership, where the last outcome intended by the co-owners themselves was sale.

The objects and operation of the L.P.A. were conceived (unavoidably) in the context of their time. The legislative policy of the L.P.A., however, had an enduring effect on judicial policy concerning applications for sale by creditors under section 30. Judicial interpretation of the trust for sale provisions focused on the elevation of sale as the primary goal of the trust, and implemented the policy of treating land as mere capital. The argument of this paper is, that despite statutory intervention in the shape of the Insolvency Act 1986 and the T.L.A., the legislative policy of the L.P.A., and judicial adherence to its principles, continues to influence the exercise of the judicial discretion to order the sale of land.

### **Judicial policy in ordering sale: section 30 L.P.A.**

The terms by which section 30 of the Law of Property Act enabled the court to order the sale of co-owned property were extremely wide. It provided that:

“If the trustees for sale refuse to sell...any person interested may apply to the court for a vesting or other order for giving effect to the proposed transaction...and the court may make such order as it thinks fit.”

This allows the court to enforce the obligation on trustees to sell the land, thus enabling a creditor to access a fund of capital, out of which to recoup the debt. Although the discretion conferred by section 30 was not limited or restricted by the terms of the legislation, nor were guidelines given as to the court’s exercise of its power, the object was clearly to facilitate sale. Section 30 exists to enable the court to order sale of the property against the wishes of the trustees.

The exercise of judicial discretion under section 30 was characterised by the ethos of the ‘trust for sale’, which justified judicial disregard of interests in occupation. This judicial policy remained unaffected by the reformist intentions of the Insolvency Act 1986, which, although launched as a measure to ameliorate the court’s exercise of its section 30 discretion in bankruptcy cases, did not ultimately alter the position for equitable co-owners. The courts continued to follow a more or less consistent policy of ordering sale at the request of a creditor, and against the wishes of the debtor’s co-owner. The following sections examine the manner in which the judiciary exercised its discretion under section 30, particularly between a creditor and a non-debtor co-owning occupier, in order to assess whether any settled policy emerged.

#### *The impact of the trust for sale, and the search for collateral purposes.*

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147 (Lt-Col.. Royds). Although: “You may want one special piece of land.. no one wants one special stock certificate.. There is no magic in one stock certificate.”, 154 H.C. Deb.(5th Series) col. 124 (15 May 1922), (Col.. Wedgewood).

<sup>12</sup> *Transfer of Land: Trusts of Land*, (1989) Law Com. No 181, para 3.1.

The trust for sale, and the doctrine of conversion facilitated the court's portrayal of a beneficial co-owning-occupier's interest in cash terms only. Although the courts held themselves out as considering only:

"..whether or not the person applying for execution of the trust for sale is a person whose voice should be allowed to prevail."<sup>13</sup>

they were clearly influenced, in the exercise of their discretion, by the fact that the property was held on *trust for sale*. Although the court was reluctant to fetter its discretion, the policy of the L.P.A. remained highly persuasive, since:

"The statutory trust for sale is one which must be exercised and was intended by the legislature to be exercised subject to the power of the court to enforce it. That appears in section 30."<sup>14</sup>

The duty to sell persistently governed the manner in which the court's discretion to order sale was exercised.

Although the courts generally followed a policy of ordering sale, there remained, however, some scope for consideration of 'all the circumstances of the case'. On occasion, this enabled courts to consider the effect which an order for sale would have on the debtor's equitable co-owner. In *Stevens v Hutchinson*<sup>15</sup> Upjohn J held that, regardless of the fact that the debtor was a "ne'er-do-well and a waster",<sup>16</sup> his creditors ought not to be allowed an order for sale on his co-owned property. The court laid significant emphasis on the fact that the property was being *used as a matrimonial home*, and claimed that in these circumstances, it did not consider it "right or proper to order a sale of the property in order that the judgment creditor may be satisfied."<sup>17</sup> It is noteworthy, however, that these comments were *obiter dicta*, following the court's finding that a chargee did not have *locus standi* under section 30. Furthermore, the proposed protection was based on the co-owner's position as a spouse in the matrimonial home, rather than on her co-ownership interest.

The prevailing judicial approach was to ask, not whether it was reasonable for an occupier to oppose sale, but whether it was inequitable *not* to allow the applicant to realise his capital share of the property.<sup>18</sup> The purpose of section 30 was to enable an interested party to compel the trustees for sale to execute the trust by ordering the sale against one co-owner's consent, since this gave effect to the statutory object of the trust: the sale of the property. *Stevens v Hutchinson* was therefore exceptional in its consideration of the occupier's perspective, but the reference to the *matrimonial home* is instructive. Although the courts followed a policy of ordering sale when requested, a possible defence for an occupier began to emerge in the context of the matrimonial home.

The court appeared willing to counterbalance its inclination towards allowing sale as the purpose of the trust, with the acceptance of a secondary or 'collateral' purpose where the trust provided a matrimonial home. It was accepted that the *prima facie* purpose of the trust for sale

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<sup>13</sup> *In Re Buchanan-Wollaston's Conveyance* [1939]Ch. 738 at 747, *per* Lord Greene M.R.

<sup>14</sup> *Supra*, n.13.

<sup>15</sup> [1953]2 W.L.R. 545; [1955]Ch. 299.

<sup>16</sup> *Supra*, n.15 at 549, *per* Upjohn J.

<sup>17</sup> *Supra*, n.15.

<sup>18</sup> *Jones v Challenger*, [1960]2 W.L.R. 695 at 701, *per* Devlin L.J.

could be tempered by a collateral purpose of *use and occupation*, which represented the actual intentions of the co-owners.<sup>19</sup> This reasoning was adopted by the Court of Appeal in *Re Evers' Trust*,<sup>20</sup> where the 'underlying purpose' of the trust for sale was considered by the court in the exercise of its section 30 discretion. It was accepted that in many cases, particularly when the disputes property was a matrimonial home, the object of a trust for sale was displaced by a recognition that the property had actually been purchased for use and occupation as a home. In these cases, the Court of Appeal suggested that the court, in exercising the section 30 discretion: "...should regard the primary object as being to provide a home and not a sale."<sup>21</sup>

It is clear that the 'collateral purpose' argument, had it been wholeheartedly accepted by the court, would have represented a significant judicial policy departure as regards the concerns of occupiers. The *obiter* comments of Cross LJ in *Irani Finance Ltd v Singh* suggested that a beneficial occupier would be protected by judicial policy under section 30,<sup>22</sup> since her interests: "cannot be sidestepped by treating her as a mere trespasser."<sup>23</sup> There were, however, a number of restrictions on the applicability of this argument. Firstly, the court's acceptance that:

"...the house is bought as a home in which the family is to be brought up. It is not treated as property to be sold nor as an investment to be realised for cash."<sup>24</sup> was strictly confined to the context of *matrimonial property*. The possibility that other co-owners also eschewed sale as the object of their ownership was not considered.

It is also significant that where the collateral purpose was accepted by the court,<sup>25</sup> the relevant disputes were between the homesharers themselves, and did not involve conflict with a creditor's interests. Furthermore, even within these confines, the court's acceptance of a 'collateral purpose' depended on its continued existence. When spouses enter litigation concerning their co-owned property this is generally because their relationship has broken down, and one party wishes to realise capital contributions. This was the position in *Jones v Challenger*, where the Court of Appeal held that, since the relationship between the spouses had broken down, the collateral purpose of use and occupation as a matrimonial home had ceased to exist. The operation of the collateral purpose argument, therefore, was based on the recognition of use and occupation as the purpose of the trust, which, since the spouses were now in conflict, was in the next breath held to no longer exist. Beyond inter-spousal disputes, and where the applicant for sale was a third party creditor, or more particularly a trustee in bankruptcy, the 'collateral purpose' argument was of little persuasive effect,<sup>26</sup> even where relations remained good between the spouses. In order for joint occupation to remain the object of home ownership,

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<sup>19</sup> The essence of the 'collateral purpose' argument was that: '...you should allow the trust to continue - and there should be no sale - so long as the purpose of the trust continues - that the house should be used as a home for the two of them. But when the purpose of the trust comes to an end the house should be sold.'; *Stott v Radcliffe*, (C.A.), 19 February 1982; Transcript: Lexis.

<sup>20</sup> [1980]1 W.L.R. 1327.

<sup>21</sup> Quoting from *Williams v Williams*, [1976]Ch. 278 at 285.

<sup>22</sup> *Irani Finance*, [1971] Ch. 59 at 80, *per* Cross L.J.

<sup>23</sup> *Supra*, n.22.

<sup>24</sup> *Williams v Williams*, *supra*, n.21 at 285, *per* Lord Denning M.R..

<sup>25</sup> See *Williams v Williams*, *supra*, n.21; *Re Ever's Trust*, *supra*, n.20.

<sup>26</sup> In *Re Solomon, a Bankrupt*, [1967]2 W.L.R. 172 at 183, it was clearly stated by Goff J. that different considerations arose when the litigation involved a creditor, rather than being between the spouses.

it was held that both spouses were required to retain their ownership interests. This excluded cases where one spouse had used his property interest as security.<sup>27</sup>

The limited applicability of the ‘collateral purpose’ argument gave way to a judicial policy in favour of ordering sale, since the courts then proceeded on the assumption that: “..where there are debts outstanding, a sale should be ordered.”<sup>28</sup> Considerations such as the use of the house as a family home for the spouses and their children were subrogated to the ‘grave hardship’ which creditors would suffer if the return of their investment was delayed. The Court of Appeal even went so far as to say that homelessness, and the inability to acquire another mortgage did not constitute the exceptional circumstances which were necessary to justify refusing to grant an order for sale to a trustee for bankruptcy.<sup>29</sup> This stringent approach was not ameliorated by reference to the status of property as a *matrimonial home*, since: “Bankruptcy has, in relation to the matrimonial home, its own claim to protection.”<sup>30</sup> The trustee in bankruptcy’s statutory duty to realise the debtor’s assets in favour of his creditors<sup>31</sup> led to the judicial conclusion that his application for sale should generally be acceded to.<sup>32</sup>

Judicial policy under section 30 was reviewed by the Committee on Insolvency Law and Practice (the Cork Committee) in 1982, and the enactment of the Insolvency Act in 1986 was generally perceived as providing a protection for a bankrupt’s family when faced with the prospect of sale of the Family Home.<sup>33</sup> Although the legislation<sup>34</sup> did not fully implement the Cork Committee’s recommendations, the inclusion of statutory guidelines for the court in the exercise of its discretion was considered beneficial to the bankrupt’s family, albeit to a limited degree. The restricted scope of the Insolvency Act provisions did not, however, reflect the reformist intentions of the Cork Report.<sup>35</sup> The combined effect of the legislative policy of the 1986 Act, and judicial policy following its enactment maintained the *status quo* and ensured that the spirit of the 1925 L.P.A. and that of the trust for sale remained unaltered.

#### *An opportunity for policy review: the path to the Insolvency Act 1986.*

The Cork Committee addressed the effect of the prevailing law and policy relating to bankruptcy on a debtor’s *spouse*. Judicial policy in relation to bankruptcy applications was assessed with regard to the social and housing implications of repossession and sale of a

<sup>27</sup> “As a matter of property law, the basis of their joint occupation is their joint ownership of the beneficial interest in the home. Although the vesting of one of their interest in a trustee for creditors does not in itself destroy the secondary purpose of the trust, the basis for their joint occupation has gone.”, *Re Citro*, [1991]Ch. 142 at 158-9 *per* Nourse L.J.

<sup>28</sup> *Re Lowrie* [1981]3 All E.R. 353 at 355-6, *per* Walton J.

<sup>29</sup> *Re Lowrie*, *supra*, n.28.

<sup>30</sup> *Re Bailey*, [1977]1 W.L.R. 278 at 279, *per* Megarry V-C.

<sup>31</sup> See *In re McCarthy, A Bankrupt*, [1975]1 W.L.R. 807 at 808.

<sup>32</sup> *Re Solomon*, *supra*, n.26; *Re Turner* [1974]1 W.L.R. 1556; *Re McCarthy*, *supra*, n.31; *Re Bailey* *supra*, n.30; *Re Lowrie*, *supra*, n.28; *Re Densham* [1975]1 W.L.R. 1519. The effect of these decision has been commented upon extensively, see Gray, K., ‘*Elements of Land Law*’, (2<sup>nd</sup> Edn, 1993) pp597-607.

<sup>33</sup> See for eg. Miller, ‘Occupation of the Family Home and the Insolvency Act 1986’, [1986] Conv. 393-405.

<sup>34</sup> Insolvency Act 1986, section 336.

<sup>35</sup> *Report of the Committee on Insolvency Law and Practice*, (1982) Cmnd 8558.

bankrupt's family home.<sup>36</sup> The Cork Committee recommended that a more sympathetic approach ought to be taken towards the welfare of the debtor's dependants. The Cork Report suggested that reform should be directed towards:

"..alleviat[ing] the personal hardships of those who are dependent on the debtor but not responsible for his insolvency.. by delaying for an acceptable time the sale of the family home."<sup>37</sup>

It was recommended, therefore, that:

"..any new Insolvency Act should confer on the court a specific power to postpone a trustee's rights of possession and sale of the family home."<sup>38</sup>

It was proposed that additional guidelines, drawing attention to the debtor's spouse and children, ought to be considered by the court where a trustee for bankruptcy applied for the sale of a 'Family Home'<sup>39</sup> under section 30 of the L.P.A.

The essence of the Cork Committee's proposals was a desire to safeguard *property in occupation as a family home, whether the marriage continued to exist or not, and including the domestic occupation of co-habitees*. The issue of co-ownership between the partners was not considered important, since the proposals focused on the *welfare of a bankrupt's dependants* rather than their *property rights*.<sup>40</sup> These considerations proved less persuasive when the Government passed the reform initiative into the hands of the Department of Trade and Industry, which issued a consultation paper. It was later noted that: "...no consultee argued in favour of the [Cork] Committee's proposals."<sup>41</sup> in relation to the family home, and the enactment of guidelines to section 30 L.P.A. was thereafter withdrawn from the Bill.<sup>42</sup>

The questions surrounding sale of the family home in bankruptcy proceedings, were raised once again when the Insolvency Bill (1985) was debated in the House of Lords. Amendments were tabled by Lord Meston and Lord Bruce, with a view to restoring the substance of the Cork Committee's recommendations. It is the extent of these amendments, and that of the section as finally passed, which are of interest for the purposes of this paper. The Lords' amendments proposed a more sympathetic judicial approach when dealing with the:

"..principal residence of the bankrupt or of his spouse or former spouse or any dependent of the bankrupt or of his spouse or former spouse".<sup>43</sup>

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<sup>36</sup> The Committee noted 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 dependents..."; Cork Report, para. 1116.

<sup>37</sup> Cork Report, para. 1118.

<sup>38</sup> Cork Report, para. 1120.

<sup>39</sup> The 'Family Home' was defined as a dwelling house occupied by the bankrupt's spouse, with or without the bankrupt or dependants of his, principally children. 'Spouse' was given to include persons of opposite sex, living together as husband and wife'; Cork Report, paras. 1124-5.

<sup>40</sup> The Cork Committee was more concerned with the welfare of dependants without co-ownership claims, since: "...the proprietary rights of the debtor's spouse make it impossible for the trustee to rely on any claim to evict the debtor and his family as of right."; Cork Report, para. 1117.

<sup>41</sup> See the Government's Working Paper on Insolvency and the Family Home, (1984/85) NS 1533, para. 1.3.

<sup>42</sup> The respondents to the D.T.I.'s consultation paper expressed satisfaction with the prevailing insolvency law and practice in relation to the family home. One comment relied upon the existing case law (*Re Lowrie, supra*, n.28) to submit that the sale of the home was not exceptional hardship in the context of insolvency. Another claimed that: "The courts now exercise great care to ensure a fair balance between the needs of the family and that of creditors.."; *supra*, n.41, para. 1.3(g),(j).

<sup>43</sup> H.L. Bills (1984-5) Nos. 29-II, 29-III, 114-I.



Lord Meston expressed concern that the existing law, by which: “..the creditors almost inevitably prevail, however sympathetic the trustee in bankruptcy and however sympathetic the court”;<sup>44</sup> had “failed to protect the less able victims of bankruptcy.”<sup>45</sup> The object of the amendment was to “simply give a wider discretion to the court to strengthen the really very weak position of the wife and child.”<sup>46</sup>

The basis of the clause was the protection of a *bankrupt’s family*, and the effects of repossession and sale of family property, were repeatedly emphasised.<sup>47</sup> The proposed amendments were intended to ensure that: “..no sale of the bankrupt’s family home - and I am emphasising the term ‘family’ - should be possible without an order of the court.”<sup>48</sup> Lord Bruce noted the personal hardships endured by a bankrupt’s spouse, and concluded that:

“If, added to those anxieties and those difficulties, the wife or the family are faced with eviction from the family home as a result of the bankruptcy, then the results can be very hard indeed.”<sup>49</sup>

The proposal therefore provided for judicial consideration of, *inter alia*, the hardship caused to the debtor’s dependents if the family home was sold by the trustee in bankruptcy.

Although the legislature agreed the principle of the amendments, the Government requested that they be withdrawn pending the issue of a Government working paper on the subject.<sup>50</sup> It is at this point that the extent of the provisions becomes significant. The Cork Committee’s proposals recommended protecting the ‘Family Home’, occupied by ‘the bankrupt’s spouse, with or without the bankrupt or dependents of his, principally children’, and defined ‘spouse’ as including persons of the opposite sex living together as husband and wife. When the House of Lords’ amendments were presented, the proposed guidelines related to ‘the principal residence of the bankrupt or of his spouse or former spouse or any dependent of the bankrupt or of his spouse or former spouse.’ Co-habitees were excluded. The Government presented its preferred policy option in a working paper which reflected the aims of the Lords’ amendments. The Family Home was defined as ‘any dwelling house which is owned *in whole or in part* by the bankrupt and is *occupied* by [the bankrupt’s spouse, former spouse, or a child of the family] *either with or without the co-occupation of the bankrupt.*’;<sup>51</sup> thereby basing the Government’s protective policy on spousal occupation, whether or not a collateral purpose continued to subsist, and whether or not the bankrupt co-owned the home with another.

<sup>44</sup> 458 H.L. Deb.(5th Series) col. 916 (15 January 1985), *per* Lord Meston.

<sup>45</sup> 459 H.L. Deb.(5th Series) col. 1262 (7 February 1985), *per* Lord Meston: “However sympathetic the trustee, and however sympathetic the court, both feel, almost inevitably, that their duty requires them to require the family to give up possession of the home and for it to be sold to realise money for the creditors.”

<sup>46</sup> 459 H.L. Deb.(5th Series) col. 1263 (7 February 1985), *per* Lord Meston.

<sup>47</sup> 458 H.L. Deb.(5th Series) col. 916 (15 January 1985), *per* Lord Meston; 459 H.L. Deb.(5th Series) col. 1264 (7 February 1985), *per* Lord Denning. Lord Lucas added that “with this amendment we were moving into an area where perhaps the heart should rule more than the head.”, 459 H.L. Deb. (5th Series) col. 1266-7 (7 February 1985).

<sup>48</sup> 462 H.L. Deb.(5th Series) col. 161 (2 April 1985), *per* Lord Bruce.

<sup>49</sup> 462 H.L. Deb.(5th Series) col. 162 (2 April 1985), *per* Lord Bruce.

<sup>50</sup> It was later stated in the House of Commons that: “The amendments that were tabled in another place on this subject were unacceptable to the Government, because, in giving too much weight to the interests of the family, they tilted the balance too far away from those of the bankrupt’s creditors.”; 83 H.C. Deb.(6th Series) col. 546 (18 July 1985), *per* Mr Fletcher.

<sup>51</sup> Government Working Paper, (1984/5) NS 1533, para 2.2. (Emphasis added.)

It is unfortunate that the Government's amendment, which was drawn from this policy document at the last-minute, took a different, and more restrictive form. Section 336 of the 1986 Act purported to protect the *occupational rights of the debtor's spouse*, by guiding the court's approach to the exercise of the section 30 discretion in bankruptcy cases. By expressly instructing the court to have regard to factors such as the needs and financial resources of the occupying spouse, and any children of the family, the Government ostensibly appeared to be extending the protection of co-owners in family property. Difficulties with this proposition emerge, however, when the scope of the provision is examined.

Section 336 of the Insolvency Act 1986 took a two-pronged approach to the protection of the Family Home, applying guidelines to two categories of dependent spouses. The guidelines amended section 30 L.P.A. where a wife had *no ownership interest*,<sup>52</sup> and where the bankrupt and his spouse or former spouse: "...are *trustees for sale* of a dwelling house."<sup>53</sup> Although Lord Denning had commented, in an earlier debate, on the frequency with which a spouse was likely to have made *equitable* contributions, and noted with approval that:

"The clause realises that and deals with the situation in which a wife has an interest in the home - a half, a third, or a quarter - so that when the husband goes bankrupt, he cannot or the trustee cannot, turn her or the children out."<sup>54</sup>

the final format of the clause ensured that it was just this situation which was excluded from section 336 of the Insolvency Act. By requiring that *both the bankrupt and his spouse* are trustees for sale, the guidelines attached to section 336 were restricted to cases of *joint legal ownership*, and did not apply to spouses, former spouses, or other co-owners who had acquired equitable ownership interests through contributions to the purchase price or mortgage repayments on the home.

There is no apparent reason for this exclusion of equitable co-owners. The Cork Committee noted that where the matrimonial home was jointly owned by the debtor and his spouse:

"...the proprietary rights of the debtor's spouse make it impossible for the trustee to rely on any claim to evict the debtor and his family as of right; he has to have recourse to the jurisdiction conferred on the Court by section 30 of the Law of Property Act 1925..."<sup>55</sup>

Conversely, when the debtor's dependants had no ownership interests, the court had no such discretion to allow them to remain in possession.<sup>56</sup> The protection in section 336(2), of occupying spouses with no ownership interest reflects this analysis.<sup>57</sup> It may also be added that

<sup>52</sup> I.e., where the spouses had a registered right of occupation under the Matrimonial Homes Act 1983; Insolvency Act 1986, section 336(2).

<sup>53</sup> Insolvency Act 1986, section 336(3), (Emphasis added).

<sup>54</sup> 462 H.L. Deb.(5th Series) col. 163 (2 April 1985), *per* Lord Denning.

<sup>55</sup> Cork Report, para. 1117.

<sup>56</sup> *Supra*, n.55.

<sup>57</sup> "A person... who may have gone through a harrowing experience as a result of her husband's insolvency, who is innocent in these matters, and who has suffered emotionally as well as financially, should be given protection and support similar to that which she would receive in matrimonial proceedings."; 78 H.C. Deb.(6th Series) col. 176 (30 April 1985), *per* Mr John Fraser. Mr Fraser noted that the problem: "...is especially acute when she is not the joint owner.", reflecting the Cork Committee's concerns with the implications of insolvency on a debtor's

this reasoning suggests that the Cork Committee considered section 30 of the L.P.A. to provide a genuine and substantive defence to co-owning occupiers in matrimonial property.

While the legislature clearly intended to safeguard the matrimonial occupation of non-owning spouses, it is not likely that Parliament intended to give them greater rights than co-owning spouses. The legislature anticipated that the outcome of section 336 would be to confer security of occupation in bankruptcy proceedings on owning and non-owning spouses.<sup>58</sup> The exclusion of equitable co-owners in section 336 can only be explained as a drafting oversight.<sup>59</sup> The Government's introduction of the clause in the final stages of the Bill meant that the provision was: "...never subjected to detailed examination, much less discussion."<sup>60</sup>

The position of equitable owner-occupiers in bankruptcy proceedings was therefore unaltered by the Insolvency Act 1986. Although the Act was intended to improve the position of a debtor's dependents, the recommendations of the Cork Committee were progressively eroded as the reform initiative proceeded through Parliament. While the Cork Committee recommended that the guidelines should apply to all homesharers, whether married or co-habiting, by the time the Bill was drafted, the provision was confined to *matrimonial occupation*. By the final stage of the Bill, the scope of the guidelines had been pared down so as to refer only to *spouses with no ownership interests*, or *spouses with legal co-ownership interests*. A spouse with a mere equitable claim, and all non-spousal homesharers were unaffected by the Insolvency Act 1986.

The implications of this omission are less significant than they would *prima facie* appear to be. The subsequent judicial exercise of the section 30 discretion has indicated that the inclusion of guidelines in the Insolvency Act had little effect on the outcome of decisions, as judicial policy remained consistent with the pre-1986 case law. The following section shall consider the prevailing judicial policy in respect of orders for sale between 1986 and the enactment of the Trusts of Land Act in 1996.

*Re Citro: the judicial discretion to order sale since the Insolvency Act 1986.*

Judicial policy with regard to section 30 applications by trustees in bankruptcy since 1986 was epitomised by the decision of the Court of Appeal in *Re Citro (a Bankrupt)*.<sup>61</sup> Two aspects of this decision are of interest. The court's discussion of section 336 of the Insolvency Act 1986 revealed its assumption that *equitable co-owning spouses* were included in the provision. Based on that assumption, the Court of Appeal provided its view as regards the effect of the section. The decision in *Re Citro* was also significant in view of the court's approach to the 'collateral purpose' argument. No distinction was made between cases where the property was still in use as a matrimonial home, and those where the relationship between the spouses had broken down.

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dependents: "...who may not, and often do not, have any legal or beneficial rights in the property which they can enforce."; Cork Report para. 1117.

<sup>58</sup> The effect of section 336 was to place the: 'spouse who has no beneficial interest' in a similar position to the spouse with a beneficial interest.'; 183 H.C. Deb.(6th Series) col. 546 (18 July 1985), *per* Mr Fletcher.

<sup>59</sup> The procedure by which the Insolvency Act 1986 was enacted has attracted continued criticism, see for eg, *Insolvency Law: an agenda for reform*, (Justice, 1994), para 2.13.

<sup>60</sup> *Supra*, n.59.

<sup>61</sup> [1990]3 W.L.R. 880, (C.A.).

*Re Citro* involved applications for sale by the trustees in bankruptcy of two brothers, both of whom co-owned the beneficial interest in their respective Family Homes with their spouses. The Court of Appeal's decision to order sale was based on section 30 of the L.P.A. alone. Although section 336 of the Insolvency Act was not applicable in *Re Citro*, since the bankruptcy proceedings had been initiated before the Act had commenced, it was assumed that the guidelines would apply to "such cases in the future".<sup>62</sup> Nourse LJ relied on the existing authorities to confirm that a trustee in bankruptcy ought to be granted an order for sale of co-owned property unless the circumstances were exceptional.<sup>63</sup> The continued use of the property as a matrimonial home was disregarded.<sup>64</sup>

The court admitted that the task of balancing the interests of the creditors and the co-owner, compounded by the distinctive concerns of the parties,<sup>65</sup> was 'no easy thing', yet it was clear that judicial policy favoured the concerns of the creditors, and the trustee in bankruptcy. Walton J's finding that:

"..the voice of the trustee in bankruptcy, reminding the debtor of the obligation to pay one's debts, should prevail as compared with one's obligations to maintain one's wife and family..";<sup>66</sup>

and the memorable statement that: "..one must be just before one is generous..",<sup>67</sup> remained the touchstone of judicial discretion in dealing with applications for sale by trustees in bankruptcy under section 30 of the L.P.A. The Court of Appeal consolidated the previous authorities by stating as a general rule that a trustee in bankruptcy ought to be granted an order for sale unless the circumstances of the co-owning occupier were exceptional.

Since equitable co-owners are excluded from section 336, it would appear that by retaining a policy of substantial continuity with the pre-1986 case law, the Court of Appeal in *Re Citro*, perhaps inadvertently, reached the correct result. It is interesting, however, to note the comments of the court with regard to the future effect of section 336. In predicting the effect which the provision would have,<sup>68</sup> Nourse LJ drew attention to section 336(5) rather than the welfarist guidelines contained in section 336(4). Section 336(5) requires the court to:

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

While the court assumed that section 336 would apply in cases involving equitable co-ownership, judicial policy preferences were also apparent in the conclusion that, on the assumption that the whole of section 336 was applicable, the effect of section 336(5):

<sup>62</sup> *Re Citro, supra*, n.10 at 894 F, *per* Nourse L.J.

<sup>63</sup> Nourse L.J. relied on the decisions in *Re Turner, supra*, n.32, and *Re Lowrie, supra*, n.28 to conclude that: "..describing the circumstances in which a trustee's voice will not prevail as 'exceptional' stated a correct test."; *Re Citro, supra*, n.10 at 892, *per* Nourse L.J.

<sup>64</sup> *Supra*, n.10 at 883, *per* Nourse L.J.

<sup>65</sup> "On the one hand, one has the financial interests of the Crown.. banking institutions and ..traders, on the other one has the personal and human interests of.. families."; *Re Citro, supra*, n.10 at 150 A-B, *per* Hoffman J.

<sup>66</sup> *Re Bailey, supra*, n.30 at 284, *per* Walton J.

<sup>67</sup> *Supra*, n.30.

<sup>68</sup> It was presumed that section 336 would apply in cases involving equitable co-ownership.

“..was intended to apply the same test as that which has been evolved in the previous bankruptcy decisions, and it is satisfactory to find that it has.”<sup>69</sup>  
If the Court of Appeal had recognised the exclusion of *equitable co-owners* from section 336 of the Insolvency Act, it might also have been added that the presumption in section 336(5) did not extend to such cases.

The Court of Appeal did not believe that the legislation required any modification of judicial policy under section 30. This effectively ensured that non-debtor co-owning occupiers would be subjected to the forced sale of their matrimonial homes whenever bankruptcy proceedings were instituted against the co-owning debtor. The decision in *Re Citro* is also significant in relation to the demise of the ‘collateral purpose’ argument. Both of the properties in dispute had been purchased as matrimonial homes. In one case the co-owned property was still in use as a matrimonial home while for the other property, the collateral purpose of matrimonial occupation was defunct. The court did not distinguish between the two cases. The court held that any collateral purpose of use and occupation ceased to exist where one of the joint owners parted with ownership of their share.

It was held that the continuation of a purpose of use and occupation depended not only on the continued occupation of the property as such, but on enduring co-ownership between the original parties.<sup>70</sup> Nourse LJ concluded that it was:

“implicit in the principle of *Jones v Challenger* that the secondary purpose of the trust can only exist while the spouses are not only joint occupiers of the home but joint owners of it as well.”<sup>71</sup>

The act of one co-owner in granting security, and thereby alienating his share in the property to a creditor, was sufficient to extinguish the collateral purpose, even where the marriage and the joint occupation of the spouses continued.<sup>72</sup> This argument was supported by reference to the ‘commercial obligation’ which arose in bankruptcy cases. The trustee’s statutory duty to realise the bankrupt’s assets prevailed over consideration of the matrimonial interests of the occupiers.<sup>73</sup>

The Insolvency Act 1986 excluded equitable co-owners from the scope of its provisions on the family home. It is submitted, however, that judicial policy under section 30 L.P.A. remained consistent not because of this legislative omission, but because the court was reluctant to alter its position in relation to orders for sale. Although *Re Citro* was not governed by the Insolvency Act 1986, the Court of Appeal made clear its opinion that, even on the assumption that section 336 applied, the judicial approach would be to maintain its policy of granting the sale of co-owned property at the request of one co-owner’s trustee in bankruptcy, unless the circumstances of the case were exceptional.

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<sup>69</sup> *Re Citro, supra*, n.10 at 894, *per* Nourse L.J.

<sup>70</sup> “As a matter of property law, the basis of their joint occupation is their joint ownership of the beneficial interest in the home. Although the vesting of one of their interests in a trustee for creditors does not in itself destroy the secondary purpose of the trust, the basis for their joint occupation has gone.”; *Re Citro, supra*, n.10 at 893H, *per* Nourse L.J.

<sup>71</sup> *Supra*, n.10 at 893-4.

<sup>72</sup> Nourse L.J. noted, however, that neither spouse could demand the sale of the property, since the collateral purpose still existed as between the co-owners. As against a creditor, however, it depended on the beneficial interest remaining vested in the occupants: see *Re Citro, supra*, n.10 at 371 C-D.

<sup>73</sup> *Supra*, n.10 at 888H.

*The Bankruptcy cases extended: Occupiers and Creditors.*

While the courts followed a clear policy in respect of bankruptcy applications under section 30, the judicial approach towards applications for the sale of co-owned property by other classes of creditor was not apparent until the decisions in *Lloyd's Bank Ltd v Byrne*,<sup>74</sup> and *Barclay's Bank Plc v Hendricks*.<sup>75</sup> The stringent approach which had long prevailed in the bankruptcy cases was extended to applications under section 30 by ordinary creditors. The particular reference in *Re Citro* to the unique circumstances of a trustee in bankruptcy did not deter the court from extending the principle that orders for sale ought to be granted against the wishes of a co-owning occupier unless the circumstances were exceptional. The Court of Appeal held that:

“..there is no difference in principle between the case of a trustee in bankruptcy, and that of a chargee.”<sup>76</sup>

Parker LJ concluded that: “The broad effect of the authorities was that the voice of the creditor would prevail over that of the other spouse save in exceptional circumstances.” The suggestion that a ‘collateral purpose’ negated the obligation of sale was dismissed with the statement that:

“..to accept the contention would be to defeat the whole purpose of section 30.. which is to enable the court as a matter of discretion to do what is equitable, fair and just.”<sup>77</sup>

The failure of the collateral purpose argument in *Re Citro* was based on the fact that one of the co-owners had parted with *ownership* of a share, even though the joint object of *occupation* remained intact.

The decision of the Court of Appeal in *Abbey National Plc v Moss*<sup>78</sup> appeared, however, to resurrect the ‘collateral purpose’ doctrine once again, and to suggest that where the collateral purpose continued to exist, it ought to take precedence over the duty to sell. The party requesting the order for sale was a mortgagee, but although the court considered the principles established in the bankruptcy cases to be applicable to mortgagee applications under section 30, *re Citro* and *Lloyds Bank v Byrne* were distinguished. The court's decision turned on the collateral purpose issue. The majority of the Court of Appeal<sup>79</sup> held that:

“..the trust for sale should not be enforced so long as there was a collateral purpose still subsisting requiring the retention of the property. The court would not in those circumstances allow the trust for sale to defeat the purpose, even where there had been an assignment to another who was being kept out of the enjoyment both of the property and the proceeds of sale.”<sup>80</sup>

In the leading judgment, Peter Gibson L.J. reviewed the existing authorities, and concluded that although the decision in *Citro* was based on Nourse L.J.'s conclusion that the collateral purpose had come to an end when one spouse became bankrupt,<sup>81</sup> this was consistent with the:

<sup>74</sup> [1993]1 F.L.R. 369.

<sup>75</sup> [1996]1 F.L.R. 258. See also *Bank of Baroda v Dhillon*, 17 October 1997; Transcript: Lexis.

<sup>76</sup> *Supra*, n.75 at 375.

<sup>77</sup> *Byrne, supra*, n.74, at 375B, *per* Parker L.J.

<sup>78</sup> [1994]1 F.L.R. 307

<sup>79</sup> Ralph Gibson and Peter Gibson L.JJ., Hirst L.J. dissenting.

<sup>80</sup> *Supra*, n.78, at 307-308.

<sup>81</sup> Since the husband and wife were no longer joint owners, the basis for their joint occupation had gone.

"..manifestly correct and principled proposition that where the collateral purpose has not come to an end the court will ordinarily not allow the trust for sale to defeat that purpose, even where there has been an assignment to another by an original party to that purpose."<sup>82</sup> The circumstances in *Moss* were distinguished from the matrimonial home cases, since the collateral purpose in *Moss* was not the joint occupation of husband and wife, but the independent occupation of Mrs Moss for the duration of her life. Although her co-owning daughter had incurred the debt, and was therefore no longer entitled to joint ownership or occupation, the collateral purpose of Mrs Moss's occupation continued to subsist, and was unaffected by the mortgage.

It is significant to note that this approach appears to protect the independent purpose of occupation by a non-debtor co-owner, but not matrimonial occupation by debtor and non-debtor jointly. The decision clearly rested on the peculiar facts of the case, wherein the parties had expressly agreed a purpose, and that purpose related only to the occupation of one co-owner. It would not, therefore, provide any protection to the non-debtor wife, who relied on the collateral purpose of matrimonial occupation with her co-owning debtor husband. It was also clear that the sympathy of the court was with Mrs Moss:

"..if the court considers the wider merits apart from the bare requirement of consent, it is hard to conceive of a stronger case for that requirement not to be overridden than one where the owner of the property is induced to create a joint tenancy by way of gift for the purpose of simplifying the passing of the property on her death and does so on the express condition accepted by the donee that the property is not to be sold in the donor's lifetime without her consent."<sup>83</sup>

Although Hirst L.J. dissented on the basis that the authorities had established that, collateral purpose still existing or not, there must be exceptional circumstances to justify the court in refusing to order sale at the request of a creditor under section 30, he was also influenced by the merits of this particular case.<sup>84</sup>

The subsequent decision of the High Court in *Barclay's Bank Plc v Hendricks* confirmed the approach taken in *Re Citro*,<sup>85</sup> even where a co-owner had parted with ownership of his share involuntarily, through a judicially imposed charging order. Although Laddie LJ described as 'attractive' the defendant's submission that the chargee was in no better position under section 30 than the co-owner he replaced, he considered the court bound by the Court of Appeal's decision in *Byrne*. In addition to this, it had become clear that once the collateral purpose of joint matrimonial occupation had come to an end:

"..there was nothing left to prevent the interests of the trustee in bankruptcy or the chargee, as the case may be, from being pre-eminent."<sup>86</sup>

Although *Re Citro*, *Byrne*, and *Hendricks* all concerned applications for the sale of matrimonial homes, in each case the creditor's interest prevailed over that of the co-owning spouse. The policy of the 1925 Law of Property Act and the spirit of the trust for sale remained paramount.<sup>87</sup>

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<sup>82</sup> *Supra*, n.78, at 316E.

<sup>83</sup> *Supra*, n.78, at 312C.

<sup>84</sup> "...if I had felt free to exercise the discretion afresh I should have been strongly and perhaps decisively influenced by the powerful and exceptional factors in Mrs Moss's favour."; *Supra*, n.78, at 321G.

<sup>85</sup> "...the secondary purpose can only exist while the spouses are not only joint occupiers of the home but joint owners of it as well."; *Hendricks, supra*, n.75 at 263B, *per* Laddie J.

<sup>86</sup> *Hendricks, supra*, n.75 at 263C, *per* Laddie J.

The decision of the Court of Appeal in *Banker's Trust Company v Namdar*,<sup>88</sup> cast an interesting perspective on future judicial policy towards granting orders for sale against equitable co-owning occupiers. The debtor's spouse submitted an argument based on the existence of a 'collateral purpose', and the court's response appeared to indicate judicial dissatisfaction with the demise of that line of argument. Although it was held that the debtor's alienation of his interest had brought to an end the collateral purpose for both himself and his co-owner, Gibson L.J. commented upon the inconsistency of the case law. Having stated that the collateral purpose was brought to an end by Mr Namdar's alienation of his co-ownership interest, the Court of Appeal added that:

"..such a conclusion is inconsistent with the contention that there can exist a separate over-riding collateral purpose to provide a home for the children of the marriage.." <sup>89</sup>

While the Court of Appeal was bound by the decisions in *Re Citro* and *Lloyd's Bank v Byrne*, two factors indicated that it would have preferred an alternative policy approach. Gibson LJ suggested that counsel for the occupier was 'realistic' in: "...recognising that his arguments.. might stand a better chance of success in the House of Lords." The court also demonstrated its sympathy for the occupier (Mrs Namdar) by suggesting that:

"It is unfortunate for Mrs Namdar that the very recent Trusts of Land and Appointment of Trustees Act 1996 was not in force at the relevant time as the result might have been different."

The Court of Appeal clearly anticipated that the T.L.A. would foster a more sympathetic approach towards non-debtor co-owning occupiers where a creditor applied for an order for sale.

### **Trust for Sale to Trust of Land: the T.L.A.**

The 'trust for sale' which governed co-owned property under the L.P.A. has been replaced by a 'trust of land' by the Trusts of Land and Appointment of Trustees Act 1996 (T.L.A.). The tenor of the T.L.A. indicates a significant legislative policy departure. The policy of the L.P.A., which valued land in terms of its 'exchange value', characterised judicial policy under section 30 of the L.P.A., and orders for sale were granted on a creditor's request, unless the circumstances were exceptional. The outlook for a beneficial occupier who co-owned with a debtor was bleak. The T.L.A., however, represents a policy turning point. Furthermore, if the spirit of the T.L.A. were to be adopted with similar judicial enthusiasm as that which attended the L.P.A., the 'trust of land' would have significant implications with regard to the equitable co-owning occupier's defence against forced sale.

Two features of the T.L.A. are of particular interest in relation to security of tenure for co-owning occupiers. Parliament has accepted that co-owners do not consider themselves as

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<sup>87</sup> See also *Abbey National v Moss*: "...where one joint owner has parted with his or her share to an outside creditor, an order under section 30.. should be made unless the other joint owner can demonstrate exceptional circumstances why that order should not be made."; [1994]1 F.L.R. 307 at 318-9.

<sup>88</sup> 14 February 1997; Transcript: Lexis.

<sup>89</sup> *Supra*, n.88, *per* Gibson L.J.



merely holding their land pending sale, thereby indicating a legislative policy departure with regard to the classification of land as an item of property. By declaring that *a co-ownership interest in land is an interest in the land itself*, the T.L.A. has eliminated the fiction which was inherent in the trust for sale with regard to the purpose of co-ownership.<sup>90</sup> In recognising that the object of land co-ownership is usually occupation, the Law Commission also accepted that: “..the property will not be held simply as an investment asset, but as a ‘use’ asset.”<sup>91</sup> The Lord Chancellor indicated that the Parliamentary object of the T.L.A. was to reflect the reality that:

“..most co-ownership of property is for the purpose of providing a home rather than an investment.”<sup>92</sup>

This was contrasted with the policy of the L.P.A., which treated co-owned land: “..as an investment rather than as a home...with the beneficiaries being interested in the proceeds of sale rather than the property for its own sake.”<sup>93</sup> The Act was intended to reform the law of co-owned property so as to coincide with the popular perceptions of co-owners, and with the fact that:

“..the intention of most spouses when purchasing the matrimonial home in joint names is not to hold it as an investment for sale, or as an investment asset pending sale, but to keep it as a home.”<sup>94</sup>

Parliament recognised that occupiers could be personally interested in particular plots of land since: “each piece is in principle, unique”;<sup>95</sup> and the value of land as: “the place where the beneficiaries live, or want to live in the future.”;<sup>96</sup> was acknowledged.

The reversal of the policy of the L.P.A. in relation to orders for sale is indicated by two factors. The presumption of sale which supported applications by creditors under section 30 L.P.A. has been removed.<sup>97</sup> It had been suggested that the section 30 discretion was unduly governed by the ‘duty to sell’, and that this had: “confined the development of judicial doctrine to the formulation of reasons why sale should not take place.”<sup>98</sup> By removing the duty to sell, the T.L.A. would also therefore appear to have removed the *prima facie* advantage heretofore enjoyed by a creditor on a section 30 application.<sup>99</sup> The legislative policy of treating land as mere capital has been displaced by Parliamentary acceptance of the true purpose of land ownership. Real property is no longer valued only in terms of the capital sum which it can raise

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<sup>90</sup> “The trust for sale mechanism is not appropriate to the conditions of modern home-ownership”: Law Com. No. 181 (1989), para. 1.3; the Working Paper which preceded this report had observed that changes in property ownership rendered the imposition of a trust for sale on co-owners occupying domestic property ‘highly artificial’, Law Com. W.P. No. 94, para 6.4. See also Law Com. W.P. No. 106, para 3.2.

<sup>91</sup> Law Com. No. 181, para 3.2.

<sup>92</sup> 569 H.L. Deb.(5th Series) col. 1719 (1 March 1996), *per* Lord Mackay.

<sup>93</sup> *Supra*, n.92.

<sup>94</sup> 569 H.L. Deb.(5th Series) col. 1722 (1 March 1996), *per* Lord Mishcon.

<sup>95</sup> Law Com., *supra*, n.12, para 3.10.

<sup>96</sup> *Supra*, n.12.

<sup>97</sup> Since the purpose of land ownership is accepted to be the retention of the land, the use of a trust for sale is both inappropriate, and wholly artificial; Law Com. No. 106, para 3.2. Under the trust of land: “..land held by co-owners would be held on trust, but there would be no duty to sell.”; Law Com. W.P. No. 94, para 6.4. “Title is vested in the trustees, who are given power both to sell and to retain the land, rather than being under a duty to sell.”; 569 H.L. Deb.(5<sup>th</sup> Series) col. 1718 (1 March 1996), *per* Lord Mackay.

<sup>98</sup> Law Com. No 181, para 3.6.

<sup>99</sup> Law Com. W.P. No 94, para 10.8.

on sale.<sup>100</sup> This has been coupled with the legislative recognition of the non-financial concerns of occupiers. The Law Commission endorsed the proposition that even if co-owning occupiers are financially compensated through receiving a share of the proceeds of sale, that could be inadequate to satisfy their loss.<sup>101</sup> The Commission noted that an owner-occupier's: "...realistic concern is often with enjoyment of the land itself..";<sup>102</sup> and the legislature intended that the T.L.A. would have the effect of adding to the protection of property in use as a home, particularly where children would be affected by an order for sale.<sup>103</sup>

The practical effect of the T.L.A. with regard to co-owning occupiers, faced with the prospect of non-consensual sale at the hands of a creditor, depends upon judicial responses to the legislative policy departure at the heart of the T.L.A.. The judicial discretion to order sale of co-owned property, against the wishes of a joint owner, has been retained, but the T.L.A. contains guidelines as to the factors which ought to be considered in its exercise. The following section will consider whether the operation of the trust of land with regard to creditor applications for sale is likely to reflect the legislative intentions of the T.L.A..

### **From section 30 L.P.A. to section 14 T.L.A.: implications for creditors and occupiers.**

When a creditor wishes to realise the capital value of land which is co-owned on a trust of land, he must now apply for an order for sale under section 14 of the T.L.A.. Section 14 allows:

"[a]ny person who is a trustee of land or has an interest in property subject to a trust of land [to] make an application to the court for an order.. relating to the exercise by the trustees of any of their functions..."

Section 14 is a much wider provision than section 30 of the L.P.A. had been. While section 30 limited the court's power to a 'one-dimensional' discretion,<sup>104</sup> merely allowing a 'person interested' to apply to the court to order the trustees to execute their duty to sell,<sup>105</sup> section 14 of the T.L.A. confers a much wider and more general jurisdiction to make orders in respect of the property. The court may, under section 14, hear applications for judicial intervention to prevent sale, and for orders which deal with other aspects of trust management.<sup>106</sup> The Law Commission anticipated that the general effect of the broader power in section 14 would be to place the beneficiaries: "...in a comparatively better position.. given that the terms governing applications under section 30 will be less restrictive than they are at present.." <sup>107</sup>

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<sup>100</sup> "The main purpose of the trust will no longer be the realisation of the capital value of the land."; Law Com. No. 181, para 3.5.

<sup>101</sup> "...nowadays many beneficiaries may well feel defrauded, even if the trustees do not vanish with the money, through the very fact of losing their land."; Law Com. W.P. No. 106, para 1.5.

<sup>102</sup> *Supra*, n.101, para 3.1.

<sup>103</sup> 569 H.L. Deb.(5th Series) col. 1724 (1 March 1996), *per* Lord Meston.

<sup>104</sup> Law Com. No. 181, para. 12.4.

<sup>105</sup> It: "...[did] not enable anyone to apply to prevent a sale.."; Law Com. W.P. No. 94, para. 10.5.

<sup>106</sup> *Supra*, n.105, para. 12.5.

<sup>107</sup> Law Com. No. 181, para 13.6.

The court's power to make orders under section 14 operates in conjunction with section 15 T.L.A., which contains a list of guidelines to be considered by the judge in the exercise of his discretion. These include regard to the purpose for which the trust was formed, the welfare of any minor occupant, and any secured creditor. Section 15(3) also refers to the interests of persons of full age entitled to interests in possession, with a consideration of the value of their interests.<sup>108</sup> The guidelines in section 15 of the T.L.A. are broadly adapted from the proposals of the Law Commission.<sup>109</sup> It is significant, however, that while the factors referred to in section 15 appear to advocate a more sympathetic judicial policy towards occupiers, comments by the Law Commission and the Lord Chancellor have suggested that their effect may be limited. The Law Commission described the guidelines which became section 15 as: "...consolidat[ing] and rationalis[ing] the current approach,"<sup>110</sup> while the Lord Chancellor stated that they would:

"...carry through the effect of the existing provision under section 30 of the 1925 Act as it has been applied and developed by the courts...";<sup>111</sup> while reflecting the 'nature and purpose' of the trust.

The Law Commission was also adamant that the inclusion of guidelines was not intended to restrict the judicial role in any way, but merely to indicate "some of the more important factors to which the courts should have regard."<sup>112</sup> There remains a certain degree of freedom under the section, as the court has retained a discretion, but the ethos of the legislation as a whole, and the replacement of the trust for sale with a trust of land would certainly appear to indicate a movement away from the commercialism which characterised rulings under section 30. The courts have not, however, been given any guidelines regarding the balancing of the various factors listed in section 15. The purpose of the trust is mentioned, reflecting the existing judicial consideration of collateral purposes, but the court is not told whether sale ought to take place unless circumstances are exceptional once that purpose has come to an end.<sup>113</sup> It is also readily apparent that, where there is a minor occupant, their interests will come into direct conflict with those of creditors, yet section 15 does not indicate the weight to be attached to the competing interests. Furthermore, section 15 does not provide an exhaustive list of the factors to be considered by the court in exercising the section 14 discretion.<sup>114</sup>

The decision in *TSB Bank plc v Marshall*<sup>115</sup> indicated early judicial conservatism regarding the implementation of the T.L.A.. Judge Wroath, sitting in Newport County Court, exercised his discretion to order the sale of a matrimonial home under sections 14 & 15 of the T.L.A. on the application of a creditor, in accordance with principles established under section 30 of the L.P.A., which had emerged from *Byrne*, *Hendricks*, and *Abbey National v Moss*. Although, said the judge: "Those three cases were all decided.. under section 30 of the Law of

<sup>108</sup> Section 15 was described by the Lord Chancellor as providing: 'flexible guidelines reflecting the different purposes for which the property may have been bought.'; 569 H.L. Deb.(5th Series) col. 1719 (1 March 1996), *per* Lord Mackay.

<sup>109</sup> Law Com. W.P. No. 94, para 10.9-10.10.

<sup>110</sup> Law Com. No. 181, para 12.9.

<sup>111</sup> 569 H.L. Deb.(5th Series) col. 1719 (1 March 1996), *per* Lord Mackay.

<sup>112</sup> Law Com. No. 181, para 12.10.

<sup>113</sup> This approach was suggested by Hirst L.J., dissenting, in *Abbey National v Moss*, *supra*, n.78.

<sup>114</sup> It has been judicially commented that: "...the word include means that the four matters set out in the section are not the only considerations to which the court must have regard, and any other relevant matters should be taken into account."; [1998]39 E.G. 208, *per* Judge Wroath.

<sup>115</sup> [1998]39 E.G. 208.

Property Act.”; the court accepted the submission that: “..the principles established are applicable to an application under section 14.”<sup>116</sup> Three factors which were said to have governed decisions under section 30 were identified by the court. Firstly, the proposition that: “..the purpose of section 30 was to enable the court as a matter of discretion to do what was equitable, fair and just.”; was held to apply equally under section 14 of the T.L.A.. The second factor gleaned from the section 30 authorities was the principle that:

“..where there is a conflict between chargee’s interest in a matrimonial home and the interests of an innocent spouse, the interest of the chargee will prevail except where there are exceptional circumstances.”<sup>117</sup>

The court, after indicating that on the facts, the defendant was not in the position of an *innocent* spouse,<sup>118</sup> noted that exceptional circumstances had not been established. The third factor identified related to the defendant’s submission of a ‘collateral purpose’. The court accepted that where a collateral purpose continued to subsist, the court ought not to order sale so as to defeat that purpose.

Although the court accepted that there was a collateral purpose that the property would provided a home for the debtor’s wife and children until they were of full age, the court held that without express words, that purpose could not be taken to extend beyond the children reaching majority. The court was bolstered in this assertion by section 15(1)(c) of the T.L.A., which refers to the welfare of *minor occupants*. Since there were no *exceptional circumstances*, the order for sale was granted. The approach taken in *TSB v Marshall*, and the court’s willingness to apply sections 14 & 15, which do not apply to bankruptcy cases, in accordance with the principles which developed from judicial policy in relation to bankruptcy under section 30, casts doubt on the impact of the T.L.A. with respect to a co-owner’s security of occupation.

A similar approach was taken by the Court of Appeal in *Swain v Foster*,<sup>119</sup> when a co-owner sought to prevent the sale of the property until her youngest son, who was in occupation of the property with her, finished university.<sup>120</sup> There was no creditor involved, the dispute arising between a brother and sister who jointly inherited the property from their father’s estate, yet the judge ordered sale at the brother’s request, and against the sister’s wishes. Holman J., sitting in the Court of Appeal,<sup>121</sup> refused leave to appeal on the basis that the appeal had no chance of success. The guidelines laid out in section 15 were considered, the court paying particular attention to the intentions of the settlor and the purposes of the trust, followed by a consideration of the welfare of the defendant’s son. The Court of Appeal held that the judge had adequately considered all these factors, and there was therefore no realistic basis for the appeal.<sup>122</sup> It is significant, however, that following the T.L.A., and its apparent legislative shift in favour of retaining property, the court has remained willing to order sale at the request of a co-owner, particularly since there was no creditor’s interest to be weighted against the occupier’s wishes. Despite the replacement of the trust for sale with a trust of land, the court has

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<sup>116</sup> *Supra*, n.115, at 210.

<sup>117</sup> *Supra*, n.115.

<sup>118</sup> Mrs Marshall was a co-debtor.

<sup>119</sup> 14 October 1998, Court of Appeal; Transcript: Lexis.

<sup>120</sup> In five years time.

<sup>121</sup> Swinton Thomas L.J. concurring.

<sup>122</sup> The Court of Appeal’s reluctance to interfere with the trial judge’s exercise of his discretion is also apparent in *Laird v Laird* [1999]1 F.L.R. 791.

continued to approach applications under section 14 by looking for a reason *not* to sell, rather than starting from a neutral position as between selling or retaining the land.

*Section 14 T.L.A.: Bankruptcy applications.*

The T.L.A. has also amended the provisions of the Insolvency Act 1986 in relation to applications for the sale of co-owned land by a trustee in bankruptcy,<sup>123</sup> which, unlike the previous section 336, includes beneficial co-owners. This provision (section 335A of the Insolvency Act) covers applications made under section 14 T.L.A. by a trustee in bankruptcy, and allows the court to make:

- “..such order as just and reasonable having regard to -
- (a) the bankrupt’s creditors,
  - (b) where the application is made in respect of land which includes a dwelling house which is or has been the home of the bankrupt or the bankrupt’s spouse or former spouse -
    - (i) the conduct of the spouse or former spouse, so far as contributing to the bankruptcy,
    - (ii) the needs and financial resources of the spouse or former spouse, and
    - (iii) the needs of any children; and
  - (c) all the circumstances of the case other than the needs of the bankrupt.”

Section 335A refers to *matrimonial property*, whether the collateral purpose of matrimonial occupation remains or not, although it remains spouse-based rather than depending on the existence of a co-ownership interest. The presumption that the interests of creditors outweigh all other considerations when an application is made one year after the vesting of the bankrupt’s estate in the trustee, unless the circumstances are exceptional, is also retained.

The recent case law on section 335A has focused on whether the severe ill-health of an occupier ought to be considered an ‘exceptional circumstance’. In *Judd v Brown*<sup>124</sup> it was held that:

“a sudden and serious attack of cancer was an exceptional event.. and was clearly distinguishable from problems such as organising substitute housing or rearranging children’s schooling.”

While circumstances such as the eviction of a young mother and children were regarded as merely the ‘melancholy consequences of debt and improvidence’, Harman J held that: “If the occurrence of life-threatening illness is not an exceptional event I find it difficult to know what such an event can be.”<sup>125</sup> It is significant, however, that the court followed this statement with the observation that the situation would be resolved, one way or another, within a relatively short time, and distinguished Mrs Brown’s illness from a ‘long term illness of indefinite duration’. The illness of an occupier was also accepted as an exceptional circumstance which justified postponing sale indefinitely, in *Claughton v Charalamabous*<sup>126</sup> and in *Re Raval (A Bankrupt)*,<sup>127</sup>

<sup>123</sup> As inserted by T.L.A. Sched. 3, para. 23.

<sup>124</sup> [1998]2 F.L.R. 360. Although some aspects of this decision were reversed in the Court of Appeal, [1999]1 F.L.R. 1191, the case concerned a number of pieces of property, and the appeal was allowed only in respect of other non-matrimonial property.

<sup>125</sup> *Supra*, n. 124, at 364F.

<sup>126</sup> [1999]1 F.L.R. 740. The bankrupt’s wife suffered from renal failure and chronic osteoarthritis, which imposed severe restrictions on her mobility.

where the court allowed a postponement due to the wife's paranoid schizophrenia, notwithstanding that the condition was long term and of indeterminate duration. The court took account of the impact which 'adverse life events' such as moving to less suitable accommodation, could have on Mrs Raval's health, and postponed the order for a year to enable suitable accommodation to be found.<sup>128</sup> It would therefore appear that, when considering bankruptcy applications, severe health problems, whether short term, or of indeterminate duration, may be considered by the court as 'exceptional circumstances' justifying a postponement of an order for sale under section 335A.

## **Conclusion**

The replacement of the trust for sale under the L.P.A. by a trust of land under the T.L.A. affects all co-owners of land. When interim legislative initiatives, such as the Insolvency Act 1986, have in the past attempted to encourage additional consideration of particular categories of co-owners, judicial policy in ordering the sale of co-owned land remained faithful to the spirit of the trust for sale. The T.L.A. has placed the interests of real property co-owners on a new footing, and replaced the rhetoric of the trust for sale with an alternative vocabulary, founded in the legislature's acceptance of the realities of home ownership. The 'trust of land' clearly recognises that co-owners are interested in the land itself.

Much depends however, on judicial attitudes towards what remains inherently a discretionary power. The guidelines contained in section 15 of the T.L.A. include a reference to 'the purpose for which the trust was formed'. This may herald a return to the 'collateral purpose' argument advanced in favour of co-owning occupiers in matrimonial property under the trust for sale. In the past, judicial consideration of the purpose for which the trust was formed depended on the existence of *matrimonial occupation*. There is no such limitation in section 15, but the decision in *Marshall* suggests that the collateral purpose will continue to receive a restrictive interpretation. The return of the collateral purpose may provide the opportunity for a matrimonial protection to emerge, however, the decision in *Abbey National v Moss* suggested that other purposes, such as a non-debtor's independent right to occupation, might prove more enduring than matrimonial or other jointly-based occupation.

Furthermore, the theoretical replacement of the trust for sale with the trust of land may not alleviate antecedent judicial tendencies to limit any principle which threatened the interests of creditors and the alienability of the land. The section 15 guidelines refer to the interests of 'persons of full age entitled to interests in possession', which suggests that all beneficial co-owners ought to be considered by the court when exercising its section 14 discretion. The guidelines are not restricted to matrimonial property, but draw the court's attention to the *property interests of co-owners*. It is possible that the guidelines in section 15 will encourage the court to give greater consideration to the interests of co-owners. It is useful to

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<sup>127</sup> [1998]2 F.L.R 718.

<sup>128</sup> It is noteworthy, however, that the requested postponement of five years was not granted, due to the prejudicial effect which this would have on the creditors.

recall, however, that when similar guidelines were included in section 336 of the Insolvency Act 1986, they were disregarded by the Court of Appeal.<sup>129</sup>

The tone of the Court of Appeal's judgment in *Banker's Trust Company v Namdar*<sup>130</sup> suggested that the court was looking forward towards embracing the ethos of the T.L.A. The Court of Appeal anticipated that the co-owning spouse would have been treated more sympathetically under the T.L.A., and considered that the creditor's application for sale would have had a different outcome under the T.L.A.<sup>131</sup> The policy of the L.P.A., and particularly the emphasis on alienability inherent in the trust for sale, characterised the court's policy in dealing with creditors' requests that the trust be executed through sale. The trust of land is based on a completely different conception of the nature of co-owned property. The trustees' obligation to sell has been removed, and the trust is based on the legislature's acceptance of the fact that co-owners in occupation of domestic property are interested in the land itself, and not merely the capital raised on sale.

If the tendency towards protecting occupation enshrined in the T.L.A.<sup>132</sup> were to be embraced as wholeheartedly by the courts as the trend towards alienability was after 1925, the beneficial occupier would receive greater protection against eviction by creditors than was previously the case. The interest of co-owners in retaining their property for the purposes of use and occupation informed the legislative decision to enact the 'trust of land', just as the object of the trust for sale was to enhance alienability. While the courts, in dealing with requests for sale, were unable to depart from the overriding legislative intention of the L.P.A., by replacing the trust for sale entirely, the advent of a new type of trust based on the Parliamentary acceptance of occupiers' interests has provided an opportunity for a complete overhaul in judicial policy.

The Court of Appeal in the 1990s became increasingly zealous in giving effect to the spirit of the trust for sale,<sup>133</sup> and any change in this policy would represent a significant turning point. The T.L.A. has presented the opportunity for such a departure in judicial policy. Early indications suggest that while the Court of Appeal in *Namdar* anticipated a change in direction, the lower courts may continue to follow judicial policy as established under section 30. As yet, it remains to be seen whether a new set of authorities will emerge to embrace the opportunity presented by the T.L.A., and protect co-owning occupiers against forced sale at the hands of a creditor. It is to be hoped that it will.

<sup>129</sup> See Insolvency Act 1986, section 336, and *Re Citro*, *supra*, n.10, which maintained that the existing judicial policy ought to prevail, notwithstanding the addition of social welfarist guidelines.

<sup>130</sup> *Supra*, n.88.

<sup>131</sup> Although section 14(4) of the T.L.A. gave the provision retroactive effect, the Court of Appeal did not feel free to overrule the decision in *Byrne* at that stage.

<sup>132</sup> See for example, section 13.

<sup>133</sup> See *Re Citro*, *supra*, n.10, *Lloyd's Bank v Byrne*, *supra*, n.74, *Barclay's Bank v Hendricks*, *supra*, n.75.