

# **Mortgage possession at a crossroads: which way should we turn?**

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## **Abstract**

The unification of the regulation of first and second mortgages in 2016 has raised the question as to the appropriate route for possession claims: is it the Administration of Justice Act 1970 or the Consumer Credit Act 1974? In making the case for the latter, this article evidences the disparity in the resilience experienced by the parties and the potential for the CCA 1974 to offer an effective response to it.

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# Mortgage possession at a crossroads: which way should we turn?

## A. Introduction

The long awaited unification of mortgage regulation in March 2016 turned out to be little more than a damp squib. Those hoping that the ‘overtly borrower friendly ethos’<sup>1</sup> of the Consumer Credit Act 1974 (CCA 1974) would be extended to all mortgagors will have been disappointed at the loss of the ‘unfair relationships test’<sup>2</sup> and the reduction in the remedies available to mortgagors.<sup>3</sup> This article, however, offers a glimmer of hope to campaigners and mortgagors alike by identifying an (as yet unnoticed and perhaps unintended) opportunity for a seismic shift in the way possession cases are handled in the County Courts. This shift involves the replacement of the narrow ‘affordability’ test applied under the Administration of Justice Act 1970 (AJA 1970) with the more flexible and ‘consumerist’ approach offered by the time order process under the CCA 1974. There are, however, a number of hurdles that stand in the way, not least of which is lack of knowledge regarding the time order process<sup>4</sup> and reticence on the part of the judiciary to ‘unleash the full potential’<sup>5</sup> of the CCA 1974. It is the aim of this article to demonstrate how those hurdles might be overcome and, perhaps more importantly, to justify why that should be so.

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<sup>1</sup> L. McMurtry, ‘Consumer Credit Act Mortgages: Unfair Terms, Time Orders and Judicial Discretion’, (2010) *Journal of Business Law* 107, 122.

<sup>2</sup> Consumer Credit Act 1974, ss 140A-140C. See Money Advice Trust, *Consultation Response: FCA Review of Retained Provisions of the CCA*, (May 2016) 4, 5 and S. Nield, ‘Responsible Lending and Borrowing: Whereto Low-Cost Home Ownership?’ (2010) 30 *Legal Studies* 610, 615-616.

<sup>3</sup> For an account of the remedies available to the mortgagor under the previous two regimes see Nield, n 2 above, 613-616.

<sup>4</sup> As Lord Bingham noted, “Where problems arise in practice, it appears to be because borrowers do not know of the effect of sections 129 and 136; neither the procedure for giving notice of default to the borrower nor the prescribed county court forms draw attention to them; and judgments will routinely be entered in the county court without the court considering whether to exercise its power under the sections” *Director General of Fair Trading v First National Bank* [2001] UKHL 52 [23].

<sup>5</sup> McMurtry, n 1 above, 122.

The rejection of the AJA 1970 in favour of the CCA 1974 is justified on two grounds. The first is that such a move will replace the blunt tool offered by the AJA 1970 with a more nuanced process that recognises and responds to the differing levels of ‘risk’<sup>6</sup> and ‘resilience’<sup>7</sup> experienced by the parties to the claim. The second is that it has the potential to realign the inherently unequal relationship between creditor and debtor<sup>8</sup> by allowing for the consideration of the unique and potentially significant consequences arising from loss of ‘home’<sup>9</sup>. Previous attempts to propose alternatives to the AJA 1970 process have been thwarted by what Bright describes as the ‘difficulty of weighing incommensurable interests.’<sup>10</sup> Non-economic concerns arising from loss of home including the impact on the health and wellbeing<sup>11</sup> of the household concerned and the community around them<sup>12</sup> are difficult to quantify and hence to weigh against the economic concerns of the mortgagee, ‘economic interests are readily quantifiable and the tools for measurement are well

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<sup>6</sup> For a detailed account of risk, particularly within debates regarding the regulation of the financial services industry, see L. Fox O’Mahony, *Home Equity and Ageing Owners: Between Risk and Regulation* (Oxford: Hart Publishing, 2012), chapter 3.

<sup>7</sup> M. Bollig, ‘Resilience – Analytical Tool, Bridging Concept or Development Goal? Anthropological Perspectives on the Use of a Border Concept’ (2014) 139 *Zeitschrift für Ethnologie* 253, M. De Bruijne, A. Boin and M. Van Eeten, ‘Resilience: Exploring the Concept and its Meanings’ in L. K. Comfort, A. Boin and C. C. Demchak (eds) *Designing Resilience: Preparing for Extreme Events* (Pittsburgh: University of Pittsburgh Press, 2010) 13, and M. Lotz, ‘Vulnerability and resilience: a critical nexus’, (2016) 37 *Theor Med Bioeth* 45.

<sup>8</sup> M.A. Fineman, ‘Fineman on Vulnerability and Law’ (November 30, 2015) *New Legal Realism Conversations: Seeking to develop a rigorous, genuinely interdisciplinary approach to the empirical study of law* at <https://newlegalrealism.wordpress.com/2015/11/> (last visited 7 May 2019).

<sup>9</sup> See, for example, S. J. Bright, ‘Dispossession for Arrears: The Weight of Home in English Law’ in L. Fox O’Mahony and J. A. Sweeney (eds.), *The Idea of Home in law: Displacement and Dispossession* (London: Ashgate, 2011); L. Fox, *Conceptualising Home: Theories, Law and Policies* (Oxford: Hart, 2007); and L. Fox O’Mahony and J.A. Sweeney, ‘Re-thinking Responses to Displacement and Dispossession’ in L. Fox O’Mahony and J.A. Sweeney (eds), *The Idea of Home in Law: Displacement and Dispossession* (Surrey: Ashgate, 2011), 223.

<sup>10</sup> Bright, n 9 above, 39. See also *Re Citro* [1991] Ch 142, 150 per Hoffman J.

<sup>11</sup> See, for example, K. Libman, D. Fields and S. Saegert, ‘Housing and Health: A Social Ecological Perspective on the US Foreclosure Crisis’ (2012) 29.1 *Housing, Theory and Society* 1 and S. Nettleton and R. Burrows, ‘When a Capital Investment Becomes an Emotional Loss: The Health Consequences of the Experience of Mortgage Possession in England’ (2000) 15:3 *Housing Studies* 463.

<sup>12</sup> Repossessions have the potential to impact on the local community, in terms of reducing property values and increasing crime levels, see R. Waldron & D. Redmond, ‘Stress in Suburbia: Counting the Costs of Ireland’s Property Crash and Mortgage Arrears Crisis,’ (2016) 107.4 *Tijdschrift voor Economische en Sociale Geografie* 484, 487.

established. The same cannot be said of social interests. Social measures involve contested value judgments and are not as readily given to quantitative assessment.’<sup>13</sup>

While social factors may be difficult to quantify, any attempt to put a price on the social aspects of loss of home has been eschewed by the AJA 1970. In focusing solely on the mortgagor’s ability to repay any sums due within a reasonable period it avoids any attempt to measure what is truly valuable, valuing instead only that which is measurable. Such an approach will be unremarkable to the land lawyer familiar with the ‘strict logic’<sup>14</sup> of property law and its pursuit of the ‘mechanical and morally neutral operation of logical deduction.’<sup>15</sup> Critics, however, argue that it does not necessarily lead to ‘neutral’ decision making. Rather, it rather reinforces and upholds the ‘presumptive power of ownership’.<sup>16</sup> The CCA 1974 process, however, with its focus on what the court considers ‘just’, does not exclude the consideration of interests beyond the economic. Therefore, by allowing the judge to weigh both social and economic interests in determining the question of possession, the CCA 1974 has the potential to solve the apparently insurmountable problem of making the divergent interests of the parties commensurate.

In defence of these claims, this article begins with an account of the regulatory changes implemented in recent years and the impact on the enforcement processes available in respect of (what were previously known as) first and second mortgages. In highlighting the apparent choice now available between the AJA 1970 and the CCA 1974, the second section makes

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<sup>13</sup> Bright, n 9 above, 39.

<sup>14</sup> See K. Gray & S.F. Gray, ‘The Rhetoric of Realty,’ in J. Getzler, ed., *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: LexisNexis, 2003) and Fox O’Mahony, n 6 above, 100.

<sup>15</sup> Gray and Gray, n 14 above, 216.

<sup>16</sup> L.S. Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford: Oxford University Press, 2003) and A.J. van der Walt, ‘Housing Rights in the Intersection between Expropriation and Eviction Law’ in L. Fox O’Mahony and J. A. Sweeney (eds), *The Idea of Home in Law: Displacement and Dispossession* (Surrey: Ashgate, 2011).

the case for the adoption of the latter by highlighting the disparity in the social and economic risks faced by the parties to the possession claim and their resilience in coping with them.

The third section evaluates, through the use of a case study in the form of *Green v Southern Pacific Mortgage Ltd*,<sup>17</sup> the extent to which the practical operation of the AJA 1970 and the CCA 1974 recognise and address this imbalance. The article concludes by arguing that the weight of evidence in favour of the CCA 1974 process suggests that we are duty bound to choose this path.

### **A. The unified regulatory regime and its implications**

In March 2016 the UK government transferred second mortgages from the ‘protective confines’<sup>18</sup> of the consumer credit framework to the regime covered by the Financial Services and Markets Act 2000 (FSMA 2000). The previous ‘awkward regulatory split’<sup>19</sup> between ‘first’ and ‘second’ mortgages became untenable following the implementation of the Mortgage Credit Directive (MCD)<sup>20</sup> which had to be applied equally to both. As a result, the government reclassified second mortgages as ‘regulated mortgage contracts’ (RMCs)<sup>21</sup> thereby ‘switching off’<sup>22</sup> many of the provisions of the CCA 1974 and making them instead

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<sup>17</sup> [2018] EWCA Civ 854. Particular focus will be given to the County Court judgment of Ms Recorder Rowlands, see *Southern Pacific Mortgage Limited v Jacqueline Vera Green* 2015 WL 7692940.

<sup>18</sup> L. Whitehouse, ‘The First Legal Mortgagor: A Consumer Without Adequate Protection?’ (2015) 38.2 *Journal of Consumer Policy* 161, 162.

<sup>19</sup> D. Cowan, *Housing Law & Policy* (Cambridge: Cambridge University Press, 2011) 45.

<sup>20</sup> *Mortgage Credit Directive on credit agreements for consumers relating to residential immovable property* (2014/17/EU).

<sup>21</sup> Defined in FCA’s Perimeter Guidance Manual 4.4 at

<https://www.handbook.fca.org.uk/handbook/PERG/4/4.html> (last visited 7 May 2019). Article 2(18) of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2016 amends article 61(3) of the FSMA 2000 (Regulated Activities) Order 2001 so as to include contracts that were regulated credit agreements immediately before 21st March 2016.

<sup>22</sup> FCA, *Implementation of the Mortgage Credit Directive and the new regime for second charge mortgages* (London, Financial Conduct Authority, 2014) Consultation Paper CP14/20, Annexe 1, para. 59.

subject to the FSMA 2000 and the *Mortgages and Home Finance Conduct of Business Sourcebook* (MCOB).

While the unification and consequent simplification of mortgage regulation will be welcomed by many,<sup>23</sup> others, particularly those who have for many years called for first mortgagors to receive the same level of consumer protection as second mortgagors, are likely to consider this a perverse move.<sup>24</sup> Such an interpretation is supported by the fact that the government implemented the MCD, a measure intended to enhance consumer protection within mortgage markets across Europe, by removing the ‘unfair relationships’ provisions in ss. 140A-C of the CCA 1974 (which no longer apply to second mortgages by virtue of their classification as RMCs).<sup>25</sup>

Concerns have also been raised regarding the reduction in the remedies available to consumers.<sup>26</sup> Under the new regime, second mortgagors can no longer seek direct action under the CCA 1974 but rather must now rely on a complaint to the Financial Ombudsman Service (FOS) or a private action for damages under the FSMA 2000. Similarly, under MCOB (as opposed to the CCA 1974), there is ‘no explicit role... provided for the court as part of its protective jurisdiction to deny possession to a mortgagee on the basis of breach of

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<sup>23</sup> See, for example, Law Commission, *Transfer of Land – Land Mortgages*, Law Com 204 (1991) and McMurtry, n 1 above.

<sup>24</sup> See, for example, M. T. Partington, ‘Citizenship and Housing’ in R. Blackburn (ed), *Rights of Citizenship* (London: Mansell, 1993), A. Stewart, *Rethinking Housing Law* (London: Sweet & Maxwell, 1996), 268-275, and Whitehouse, n 18 above.

<sup>25</sup> s. 140A(5) of the CCA 1974 makes it clear that the unfair relationships test does not apply to RMCs. Also, by virtue of s. 16(6C) of the CCA 1974 (inserted by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, now replaced by s. 60C(2) FSMA 2000), regulated mortgage agreements are exempt from the vast majority of the provisions of the CCA 1974. See, for example, S. Brown, ‘The Consumer Credit Act 2006; Real Additional Mortgagor Protection’ (Jul/Aug 2007) *Conv* 316, 329; A. Burrows, *English Private Law* (Oxford: Oxford University Press, 2013) para. 5.33; and M. Dixon, *Modern Land Law* (Abingdon: Routledge, 2014) 438. For concerns about these changes see Money Advice Trust, n 2 above, 5 and Nield, n 2 above, 615-616.

<sup>26</sup> For an account of the remedies available to the mortgagor under the previous two regimes see Nield, n 2 above, 613-616.

MCOB alone.’<sup>27</sup> These moves have been criticised by the Money Advice Trust<sup>28</sup> and Nield who noted at the time these reforms were mooted that, ‘... in an exercise which is intended to curb irresponsible lending, it is counterproductive to remove protective measures which could have real consequences for an abused mortgagor.’<sup>29</sup> It seems, however, that all mortgagors will now be reliant upon FOS, MCOB and the effective enforcement of it by the Financial Conduct Authority (FCA).

In response to these concerns, the FCA and the Treasury have sought to offer reassurance by claiming that MCOB offers adequate protection for those in payment difficulties and that some measures available under the CCA 1974, such as time orders, remain available.<sup>30</sup> The Treasury confirmed also that time orders do (and apparently always did)<sup>31</sup> apply to what were previously known as first mortgages,<sup>32</sup> a revelation that many might find surprising.<sup>33</sup>

While it seems clear that the ‘unfair relationships’ test has been lost and that time orders continue to apply to all mortgages, what has not yet been clarified is the question regarding which process should be used when a mortgagee seeks possession under a RMC. Prior to these reforms, a clear distinction existed. Acquisition or first legal mortgages were dealt with under the AJA 1970 whereas second mortgages, due to their explicit exclusion from the AJA 1970,<sup>34</sup> were dealt with under the CCA 1974. The reclassification of second mortgages as

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<sup>27</sup> McMurtry, n 1 above, 124.

<sup>28</sup> Money Advice Trust, n 2 above, 5.

<sup>29</sup> Nield, n 2 above, 615-616.

<sup>30</sup> FCA, n 22 above, Annexe 1, para. 59.

<sup>31</sup> Rosenberg notes that some may be surprised at this, see R. Rosenberg ‘Call Time on Time Orders?’, (Spring 2016) *Quarterly Account* 18, 19.

<sup>32</sup> Treasury Consultation, ‘Implementation of the EU Mortgage Credit Directive’ (January 2015), section 2.3 at <https://www.gov.uk/government/consultations/implementation-of-the-eu-mortgage-credit-directive/implementation-of-the-eu-mortgage-credit-directive> (last visited 7 May 2019). See also FCA’s Perimeter Guidance Manual, n 21 above, 4.17.2 PERG.

<sup>33</sup> Rosenberg n 31 above, 19.

<sup>34</sup> Administration of Justice Act, s 38A excludes regulated agreements within the meaning of the Consumer Credit Act 1974.

RMCs now brings them within the boundaries of the AJA 1970 but, the time order process under the CCA 1974 also remains open to RMCs. The question therefore is, which process should be used and under what circumstances? Additionally and perhaps more importantly, which process should be preferred? The answer to these questions has the potential to impact significantly on mortgagors at risk of losing their home.

With the law of mortgage at an apparent crossroads, the next section of this article, in an attempt to inform and persuade reformers and practitioners as to which path to choose, evaluates the social and economic risks associated with loss of home for both the mortgagor and mortgagee and their resilience in coping with them. The argument, put simply, is that if significant inequality exists in the position of the parties to the possession claim, then we are duty bound to choose the path that most effectively remedies such ‘structural privilege and disadvantage.’<sup>35</sup> In pursuit of this claim, the next section begins with a brief exploration of the concept of ‘resilience’.

## **A. Resilience**

While resilience is a term as ‘ubiquitous’<sup>36</sup> and pliable as vulnerability (a term often associated with it) if left undefined,<sup>37</sup> it is beyond the confines of this article to offer an in-depth analysis of it. Suffice to say that it relates to ‘having some means with which to address and confront misfortune’<sup>38</sup> or, as Lotz puts it, ‘a capacity to confront, absorb, withstand, accommodate, reconcile, and/or adjust to conditions of adversity, setback, and challenge...’.<sup>39</sup>

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<sup>35</sup> Fineman, n 8 above.

<sup>36</sup> D. Chandler, *Resilience: The Governance of Complexity* (Abingdon: Routledge, 2014), 2.

<sup>37</sup> De Bruijne, Boin and Van Eeten, n 7 above, 14.

<sup>38</sup> M.A. Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60 *Emory L.J.* 251, 269.

<sup>39</sup> Lotz, n 7 above, 50.



Fineman's substantial analysis of the concept reveals that resilience is 'not something we are born with'<sup>40</sup> but rather is 'accrued over the course of our lifetimes within an array of social structures and institutions over which individuals may have little, if any control.'<sup>41</sup> This is important for it suggests that our resilience in coping with adversity is influenced by both internal and external factors and can be weakened or bolstered by our interaction with other individuals and institutions. Our attention therefore must not only be on the internal resilience of mortgagors, but also on how their resilience is affected by external factors, including the operation of societal norms and processes including the legal process of possession, for as Fineman notes, '... resilience is produced within and through institutions and relationships that confer privilege and power. Those institutions and relationships, whether deemed public or private, are at least partially defined and reinforced by law.'<sup>42</sup>

In an effort to avoid the pitfalls associated with classifying individuals or groups as 'vulnerable',<sup>43</sup> Fineman's assertion is that while we are all vulnerable, we each 'experience the world with differing levels of resilience.'<sup>44</sup> This is important for it avoids the stigma of particular groups or individuals with particular characteristics being classified as 'them' rather than 'us'.<sup>45</sup> The different regulatory treatment previously afforded to second mortgagors, for example, was justified on the basis that they were deserving of 'special protection'<sup>46</sup> under the CCA 1974 as a result of their vulnerability to high pressure

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<sup>40</sup> M. A. Fineman, 'Vulnerability, Resilience, and LGBT Youth' (2014) 23 *Temp. Pol. & Civ. Rts. L. Rev.* 307, 320.

<sup>41</sup> M. A. Fineman, 'Equality and Difference – The Restrained State' (2015) 66 *Ala. L. Rev.* 609, 623.

<sup>42</sup> Fineman, n 8 above.

<sup>43</sup> Concerns regarding the labelling of individuals as 'vulnerable' are well known, see Fox O'Mahony, n 6 above, chapter 3.

<sup>44</sup> Fineman, n 8 above.

<sup>45</sup> P. Cartwright, 'Understanding and Protecting Vulnerable Financial Consumers' (2015) 38 *Journal of Consumer Policy* 119, 120. See also FCA, *Consumer Vulnerability* (February 2015) Occasional Paper No. 8, 17.

<sup>46</sup> Committee on Consumer Credit, 'Consumer Credit: Report of the Committee' (Cmnd 4596, 1971), para. 1.1.6 and Brown, n 25 above, 318.

salesmanship within the second mortgage market.<sup>47</sup> As the Financial Services Panel notes, however, it is ‘unrealistic and, arguably, patronising’<sup>48</sup> to assume that consumers experience markets in the same way, or that first mortgagors would not be open to similar forms of exploitation.

It follows therefore that it is not the role of the state to introduce provisions targeted at those characterised as ‘vulnerable’ but rather to ensure that institutions such as the legal system recognise the degree of resilience individuals enjoy in coping with inevitable harms. In other words, it is not sufficient for first and second mortgages to be integrated under a unified regime of regulation if that regime fails to recognise and respond to the differing levels of resilience of each and every mortgagor and mortgagee. It seems reasonable to suggest that it would be considered unfair, for example, for a mortgagor who has been subject to illness, bereavement, mental health issues or the unethical behaviour of their mortgagee to be assessed under the same criterion of ‘affordability’ as a mortgagor who has not been subject to such factors. In an effort to assess which of the two approaches available to the judiciary, namely the AJA 1970 and the CCA 1974, best recognises and responds to the level (or lack) of resilience enjoyed by the parties, the following section identifies the potential harms faced by the mortgagee and the mortgagor (whether under a first or second mortgage), their capacity to cope with them and, any disparity therein.

## **B. Risks and consequences: the mortgagee**

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<sup>47</sup> McMurtry, n 1 above, 109. See also See FCA, n 22 above, para. 1.13; K. Gray and S. F. Gray, *Elements of Land Law* (Oxford: Oxford University Press, 2009), 736; and Money Advice Trust, n 2 above, 4.

<sup>48</sup> Financial Services Consumer Panel, ‘Defining Consumer Vulnerability and Disadvantage’ (December 2012) 1.

The mortgagee's susceptibility to risk within the possession process takes two forms, economic and reputational. The financial crisis of 2008 serves as evidence of the economic impairment that mortgagees can suffer as a result of mortgage default. The reasons underlying that crisis are complex but a combination of lenders' willingness to extend mortgage finance to lower-income households and to accept 'greater levels of lending risk to achieve higher profits'<sup>49</sup> alongside the securitisation of mortgage debt resulted in catastrophic consequences for the mortgage industry in the US, UK and Ireland.<sup>50</sup>

Under less dramatic circumstances, the possession process has the potential to leave the mortgagee with unpaid loans. Statistics produced by the Bank of England indicate that in the fourth quarter of 2018, the value of outstanding balances with some arrears amounted to £14.4 billion, 1% of total balances.<sup>51</sup> Figures on the number of repossessed properties that are sold are difficult to find but the Bank of England indicated that in third quarter of 2016, 4,086 repossessed properties remained on mortgagees' books.<sup>52</sup> The sale of repossessed properties is, of course, designed to recoup the money owed to the mortgagee but there is the potential for the property to be sold at a price less than the outstanding mortgage debt. Evidence indicates, for example, that between 2008-2013, 87 per cent of properties taken into possession were sold at a loss compared with only 34 per cent prior to 2008.<sup>53</sup> Obviously any shortfall in sale price is not irrecoverable for a mortgagee is entitled to pursue the mortgagor for any amount outstanding after possession and sale for up to 12 years after the right to

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<sup>49</sup> Waldron and Redmond, n 12 above, 484.

<sup>50</sup> In Ireland, for example, the result was a 'mortgage arrears crisis' which gave rise to €2.4bn outstanding in mortgage arrears payments by 2014, *ibid* 485.

<sup>51</sup> Bank of England, 'Mortgage Lenders and Administrators Statistics for 2018 Q4' (12 March 2019), available at <https://www.bankofengland.co.uk/statistics/mortgage-lenders-and-administrators/2018/2018-q4>.

<sup>52</sup> Bank of England, 'Mortgage Lenders and Administrators Statistics for 2016 Q3' (13 December 2016), available at <https://www.bankofengland.co.uk/statistics/mortgage-lenders-and-administrators/2016/2016-q3>

<sup>53</sup> FitchRatings, 'Peak Vintage Originations Drive Higher UK Loss Severities' (28 March 2013) at [https://www.fitchratings.com/gws/en/fitchwire/fitchwirearticle/Peak-Vintage-Originations?pr\\_id=787118](https://www.fitchratings.com/gws/en/fitchwire/fitchwirearticle/Peak-Vintage-Originations?pr_id=787118) (last visited 7 May 2019).

receive the money accrued<sup>54</sup> but there are costs associated with doing so and a mortgagor may be unable to pay in any event. The extent to which mortgagees go on to recover such losses from the mortgagor is not known.

The other major source of potential impairment arising out of the possession process for the mortgagee is loss of reputation. Reputational risk ‘is the potential that negative publicity regarding an institution’s business practices, whether true or not, will cause a decline in the customer base, costly litigation, or revenue reductions.’<sup>55</sup> It is to be assumed that a mortgagee who fails to treat their customers fairly or who undertakes a disproportionate number of possessions may suffer from negative publicity or a decline in customer base.<sup>56</sup> As Brown notes, however, ‘while it is a defined risk, reputational risk is often difficult to identify and quantify’<sup>57</sup> which accounts, in part perhaps, for the lack of attention many financial institutions paid to the issue prior to 2008.<sup>58</sup> There are examples, however, of where otherwise reputable lenders have suffered negative publicity as a result of their handling of mortgage default. Yorkshire Building Society, for example, was fined £4.1m by the FCA in 2014 for failing to deal with customers in default in an appropriate and prompt manner<sup>59</sup> and this was covered in a range of media outlets.<sup>60</sup> In addition, research by Armour et al suggests that the reputational damage caused by such sanctions can be on average nine times larger

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<sup>54</sup> Limitation Act 1980, s 20.

<sup>55</sup> Board of Governors of the Federal Reserve System, *Commercial Bank Examination Manual* (April 2016) 4, 7.

<sup>56</sup> Office of the Comptroller of the Currency, ‘Safety and Soundness: Mortgage Banking’ (Washington D.C., February 2014).

<sup>57</sup> W. J. Brown, ‘Understanding Reputational Risk: Identify, Measure, and Mitigate the Risk’ (2007) *SRC Insights*.

<sup>58</sup> T. Squires, ‘Banking On a Reputation’ (6 February 2011) *Financial Risks Today*, at [http://www.financialriskstoday.com/reputation\\_june.php](http://www.financialriskstoday.com/reputation_june.php) (last visited 7 May 2019).

<sup>59</sup> FCA, ‘FCA fines Yorkshire Building Society £4,135,600 for failings in dealing with customers in mortgage arrears’ (29 October 2014) *Press Releases*.

<sup>60</sup> See, for example, BBC, ‘Yorkshire Building Society fined £4.1m over mortgages’ (29 October 2014) BBC Business website, at <http://www.bbc.co.uk/news/business-29817714> (last visited 7 May 2019) and S. Farrell, ‘Yorkshire Building Society fined £4m for unfair treatment of borrowers’ (29 October 2014) *The Guardian*, at <https://www.theguardian.com/business/2014/oct/29/yorkshire-building-society-fine-4m> (last visited 7 May 2019).

than the financial penalties imposed by the regulator.<sup>61</sup> To this extent, therefore, reputational risk is of concern to mortgagees for the reason that it can lead to financial loss hence all risks faced by a mortgagee are, in practice, economic.

### **C. The ‘resilience’ of the mortgagee**

As regards the ability of mortgagees to counter the risk of economic and reputational loss, the regulatory framework and state funded bailouts offer significant support. By virtue of the First Pillar of the Basel II Accord, for example, lenders are obliged to maintain minimum capital levels in order to enable them to absorb any losses arising from credit risks such as mortgagors defaulting on their loans.<sup>62</sup> The economic vulnerability of mortgagees is therefore constrained to the extent that the risk lies in reduced profits rather than insolvency.<sup>63</sup> It seems also that at times of particular crisis financial institutions have access to a safety net in the form of bailout loans from the state, ‘consider how the state responded to the increasingly vulnerable position of certain big businesses caused by the failing market during the recession. Their heightened vulnerability was met with loans to the auto industry and bailouts for the financial industry.’<sup>64</sup> During times of greater economic stability, however, it should be noted that arrears and repossessions constitute a tiny percentage of mortgage business. Of the

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<sup>61</sup> J. Armour, C. Mayer and A. Polo, ‘Regulatory Sanctions and Reputational Damage in Financial Markets’ (2010) *Oxford Legal Studies Research Paper* No. 62/2010, 3.

<sup>62</sup> Basel Committee on Banking Supervision, ‘International Convergence of Capital Measurement and Capital Standards’ (June 2006), Part 2. See M. Leow and C. Mues, ‘The economy and loss given default: evidence from two UK retail lending data sets’ (2014) 65.3 *Journal of the Operational Research Society* 363, 375.

<sup>63</sup> M. Leow and C. Mues, ‘The economy and loss given default: evidence from two UK retail lending data sets’ (2014) 65.3 *Journal of the Operational Research Society* 363, 375.

<sup>64</sup> M.A. Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ in M.A. Fineman and A. Grear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Surrey: Ashgate, 2013) 25-26.

9 million mortgaged properties in the UK, only 0.86 per cent were in arrears over 2.5% of the outstanding balance in the fourth quarter of 2018.<sup>65</sup>

As regards reputational risk, this is significantly reduced by the fact that information regarding the arrears management practices of individual mortgage lenders is not made publicly available.<sup>66</sup> It is difficult to know, therefore, whether some mortgagees undertake more possession actions than others. While mortgagees are exposed to economic risk factors, therefore, their resilience is strong.

## **B. Risks and consequences: the mortgagor**

For some mortgagors, the potential harm arising out of the possession process may manifest itself in the form of economic loss, such as in the case of the possession of investment properties. For others, loss of home may impact adversely on their health, creditworthiness and status.<sup>67</sup> Libman et al, for example, note that losing a home ‘represents a significant disruption to the ontological security of homeowners and their families as it is afforded by... the home as a site of refuge and control.’<sup>68</sup> This may explain, in part, the adverse impact that the possession process can have on the physical and mental health of some mortgagors.<sup>69</sup> The Royal College of Psychiatrists, for example, suggest that the impact of mortgage debt can

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<sup>65</sup> UK Finance, ‘Mortgage Arrears and Possessions Update Quarter 4 2018’, (14 February 2019), available at <https://www.ukfinance.org.uk/data-and-research/data/mortgages/arrears-and-possession>.

<sup>66</sup> See, for example, Whitehouse, n 18 above, M. Leow and C. Mues, ‘Predicting loss given default (LGD) for residential mortgage loans: A two-stage model and empirical evidence for UK bank data’ (2012) 28 *International Journal of Forecasting* 183, 184, J. Aron and J. Muelbauer, ‘Modelling and forecasting mortgage delinquency and foreclosure in the UK’ (2016) 94 *Journal of Urban Economics* 32, 32.

<sup>67</sup> See S. Nettleton, J. England, R. Burrows and J. Seavers, ‘The social consequences of mortgage repossession for parents and their children’ (Joseph Rowntree Foundation, August 1999) and Nettleton and Burrows, n 11 above.

<sup>68</sup> Libman, Fields and Saegert, n 11 above, 6-7.

<sup>69</sup> Nettleton and Burrows, n 11 above, 478. See also S. Nettleton and R. Burrows, ‘Families Coping with the Experience of Mortgage Repossession in the “New Landscape of Precariousness”’ (2001) 4:3 *Community, Work & Family* 253.

include, ‘a negative impact on personal identity, invoking uncertainty and impacting on a sense of self; heightened levels of uncertainty; and feelings of stigma, shame and biographical disruption.’<sup>70</sup> These impacts can also extend to the family of the mortgagor. Nettleton’s interviews with children who have experienced repossession, for example, highlight several issues of concern for them including uncertainty, worry and lack of control.<sup>71</sup>

Lack of control is also evident in the causes underlying the threat of possession. In essence, a mortgagor can lose their home not through fecklessness but as a result of ‘social force majeure’.<sup>72</sup> Circumstances prevalent at the current time, including a combination of labour market flexibility,<sup>73</sup> job insecurity,<sup>74</sup> a reduction in social welfare provision,<sup>75</sup> and reduced access to legal advice,<sup>76</sup> have given rise to what Forrest describes as a ‘landscape of precariousness’<sup>77</sup> in which individuals, regardless of age or status, are capable of falling into debt. Within this landscape it takes only one or two ‘affordability shocks’ to impact significantly on a mortgagor’s ability to meet their mortgage payments.<sup>78</sup>

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<sup>70</sup> Royal College of Psychiatrists, ‘Debt and Mental Health: What Do We Know? What Should We Do?’ (2010) 3, 8.

<sup>71</sup> S. Nettleton, ‘Losing a Home through Mortgage Repossession: The Views of Children’ (2001) 15 *Children and Society* 82, 92.

<sup>72</sup> T. Wilhelmsson, ‘“Social Force Majeure” – A New Concept in Nordic Consumer Law’ (1990) 13 *Journal of Consumer Policy* 1, 2.

<sup>73</sup> Y. McCarthy, *Dis-entangling the mortgage arrears crisis: The role of the labour market, income volatility and housing equity*, (Dublin: Central Bank of Ireland, 2014) 6, 13.

<sup>74</sup> StepChange, ‘Navigating the New Normal: Why Working Families Fall into Problem Debt and How We Need to Respond’ (December 2015), 34. See also Waldron and Redmond, n 12 above, 496.

<sup>75</sup> Nettleton and Burrows, n 69 above.

<sup>76</sup> The availability of early legal advice was significantly reduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. See, for example, M. Fouzder, ‘Society exposes “catastrophic” housing advice deserts’ (25 April 2019) *The Law Society Gazette*, available at [https://www.lawgazette.co.uk/practice/society-exposes-catastrophic-housing-advice-deserts/5070051.article?utm\\_source=dispatch&utm\\_medium=email&utm\\_campaign=%20GAZ141016](https://www.lawgazette.co.uk/practice/society-exposes-catastrophic-housing-advice-deserts/5070051.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016) (last visited 7 May 2019). See also evidence from Citizens Advice Bureaux, Civil Justice Council and Shelter at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2010/laspo/?type=Written#pnlPublicationFilter> (last visited 7 May 2019).

<sup>77</sup> R. Forrest, ‘The new landscape of precariousness’ in P. Kennett and A. Marsh (eds) *Homelessness: Exploring the New Terrain* (Bristol: Policy Press, 1999).

<sup>78</sup> StepChange, n 74 above, 10. See also, McCarthy, n 73 above, 6.

### C. The resilience of the mortgagor

The factors noted above explain the harms that may arise for the mortgagor and their family as a result of loss of home and the reasons why they may find themselves susceptible to them. If we focus on resilience, however, the question becomes not simply whether mortgagors are subject to those risks but rather the extent to which they are able to ameliorate their effects. As StepChange note, for example, income shocks in and of themselves are unlikely to lead to problem debt if coupled with strong financial resilience.<sup>79</sup> Figures in respect of the personal savings of home buyers, however, does not bode well for those trying to navigate the current ‘landscape of precariousness’. The English Housing Survey found that 54 per cent of first time buyers had no savings and 19 per cent had less than £5000 in savings.<sup>80</sup>

A mortgagor’s resilience in dealing with harm can also be bolstered or weakened by external factors including market conditions, the behaviour of firms, social welfare provision, regulation and access to advice. As Wallace notes, ‘the accrual or consequences of mortgage arrears are determined by the degree of social protection offered to people through a country’s welfare system and labour market and the regulation of the mortgage market.’<sup>81</sup> In offering a detailed but concise account of the support offered to mortgagors in financial difficulty since the 1990s, she goes on to suggest, perhaps with a hint of understatement, that ‘support for low-income mortgage borrowers suffering mortgage shocks has been weak for

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<sup>79</sup> StepChange, n 74 above, 10.

<sup>80</sup> Department for Communities and Local Government, ‘English Housing Survey: First Time Buyers and Potential Home Owners Report, 2014-15’, para 1.16, at <https://www.gov.uk/government/collections/english-housing-survey> (last visited 7 May 2019).

<sup>81</sup> A. Wallace, ‘Homeowners and Poverty: A Literature Review’ (York: Joseph Rowntree Foundation, July 2016) 32. See also, J. Ford and A. Wallace, ‘Mortgage default: consequences’ (2012) *International Encyclopaedia of Housing and the Home*, 346.



many years.’<sup>82</sup> To summarise, the state has relied on a ‘variety pack’ of initiatives including state funded welfare, private insurance, regulatory measures, enhanced forbearance by lenders, mortgage rescue schemes and increased funding for ‘emergency’ advice services. The amount of support offered by the state has fluctuated in response to macro-economic factors including unprecedented levels of possessions during the early 1990s and the financial crisis of 2008. This is perhaps best demonstrated by the roller coaster ride of Support for Mortgage Interest (SMI) which has varied in terms of the waiting time for payments (originally eight weeks, then 39 weeks then 13 weeks and now back to 39 weeks), the recipient of the payment (switching from mortgagors to mortgagees in the mid-1990s) and the calculations used for arriving at the payment amount (moving from payment of the actual interest payable to a fixed amount in 1995).<sup>83</sup>

There have been moves, however, to withdraw state support for mortgagors evidenced by the return in April 2016 to the 39 week waiting period for SMI and the transition in SMI from April 2018 from a benefit to an interest-bearing loan secured against the property.<sup>84</sup> The impact of these and other measures, including the introduction of Universal Credit, is awaited but ‘given the substantial impact of policy interventions, it follows that withdrawal of such policy support would cause a serious deterioration in mortgage defaults unless offset by remarkably benign economic circumstances.’<sup>85</sup>

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<sup>82</sup> Wallace, n 81 above, 32.

<sup>83</sup> C. Murphy, S. Kennedy and R. Keen, ‘Support for Mortgage Interest (SMI) Scheme’ (House of Commons Library, Briefing Paper 06618, 3 May 2016), Wallace, n 81 above, 31, S. Wilcox and P. Williams, ‘Building an Effective Safety Net for Home Owners and the Housing Market: Unfinished Business’ (York: Joseph Rowntree Foundation, July 2013), 12.

<sup>84</sup> Welfare Reform and Work Act 2016, s 18.

<sup>85</sup> J. Aron and J. Muelbauer, ‘2014 Forecast Scenarios for UK Mortgage Arrears and Possessions’ (Department for Communities and Local Government, November 2014) 13.

As regards the regulation of the mortgage industry, RMCs created after 31 October 2004 are subject to regulation by the FCA<sup>86</sup> which has overseen a long running change of emphasis in the regulation of mortgage providers. Based on a comprehensive review of the mortgage market known as the Mortgage Market Review (MMR), regulation has transitioned from the ‘principled based approach’<sup>87</sup> evident before the 2008 crisis to a ‘proportionate regulatory approach’.<sup>88</sup> The latter has given rise to new responsible lending rules (which focus in particular on affordability checks),<sup>89</sup> a number of ‘thematic reviews’<sup>90</sup> and recently guidance on the treatment of customers with mortgage payment shortfalls.<sup>91</sup>

As regards mortgagors in default, the FCA’s main regulatory instrument is MCOB which have been amended following the MMR.<sup>92</sup> This requires that possession should be undertaken only ‘where all other reasonable attempts to resolve the position have failed’<sup>93</sup> and that the equivalent of at least two months’ arrears must have accumulated before court proceedings should be initiated.<sup>94</sup> A similar layer of protection is afforded to mortgagors who took out their mortgage prior to October 2004 in the form of the ‘Pre-Action Protocol for Possession Claims Based on Mortgage or Home Purchase Plan Arrears in Respect of

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<sup>86</sup> Financial Services and Markets Act 2000.

<sup>87</sup> See, for example, J. Black, ‘The Rise, Fall and Fate of Principles Based Regulation’ (2010) LSE Law, Society and Economy Working Papers 17/2010.

<sup>88</sup> FCA, ‘The FCA’s approach to advancing its objectives 2015’ December 2015.

<sup>89</sup> Implemented in April 2014. See MCOB 11.

<sup>90</sup> FCA, ‘Embedding the Mortgage Market Review: Responsible Lending Review’ Thematic Review TR16/4, (May 2016); FCA, ‘Mortgage Lenders’ Arrears Management and Forbearance: Thematic Review’ (February 2014) TR14/3; and FCA, ‘Vulnerability Exposed: The Consumer Experience of Vulnerability in Financial Services’ (December 2014).

<sup>91</sup> FCA, ‘GC16/6 - The fair treatment of mortgage customers in payment shortfall: impact of automatic capitalisations’ Guidance Consultation (October 2016); FCA, ‘FG17/4 - The fair treatment of mortgage customers in payment shortfall: impact of automatic capitalisations’ Finalised Guidance (April 2017); and FCA, ‘TR18/5: Management of long-term mortgage arrears and forbearance’ Thematic Reviews (6 December 2018).

<sup>92</sup> See <http://fshandbook.info/FS/html/FCA> (last visited 7 May 2019).

<sup>93</sup> MCOB 13.3.2AR(6).

<sup>94</sup> The FCA defines ‘arrears’ as a shortfall equivalent to two or more regular payments in the accumulated total payments actually made by the borrower see FCA, Handbook – Glossary at <https://www.handbook.fca.org.uk/handbook/glossary/?starts-with=A> (last visited 7 May 2019).

Residential Property’ (the MPAP)<sup>95</sup> which seeks to ensure that the parties ‘act fairly and reasonably’ with each other in addressing any concerns relating to the mortgage.<sup>96</sup> Sanctions for non-compliance include an order to pay the costs of the proceedings and if the mortgagee is awarded a sum of money, an order depriving them of interest on that sum.<sup>97</sup> Since the introduction of the MPAP, the number of claims made by mortgagees has dropped sharply, falling from 142,741 claims in 2008 to 19,507 in 2018.<sup>98</sup> The role played by the Protocol in this decline is difficult to assess, as the Ministry of Justice indicates,

The historical fall in the number of mortgage possession actions since 2008 coincides with lower interest rates, a proactive approach from lenders in managing consumers in financial difficulties and other interventions, such as the Mortgage Rescue Scheme and the introduction of the Mortgage Pre-Action Protocol.<sup>99</sup>

Carr in particular is critical of the assistance that has been provided to mortgagors during times of turmoil including the MPAP which she argues is indicative of the state’s unwillingness to take responsibility for assisting marginal home owners.<sup>100</sup> Support for Carr’s view is offered by a comparison between the £20 million package introduced in 2012 by the then coalition government to support struggling home owners and the £1,162 billion offered

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<sup>95</sup> See [http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot\\_mha](http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha) (last visited 7 May 2019). MPAP repeats much of what is already contained in MCOB but it applies equally to all residential mortgages except ‘buy-to-let’ loans as these are regarded as commercial transactions, para 4.3.

<sup>96</sup> MPAP, para 2.1.

<sup>97</sup> Practice Direction – Pre-Action Conduct and Protocols, para 16.

<sup>98</sup> Ministry of Justice, ‘Mortgage and landlord possession statistical tables: October - December 2018’, Table 1.

<sup>99</sup> Ministry of Justice, ‘Mortgage and Landlord Possession Statistics in England and Wales, October to December 2018 (Provisional)’, (14 February 2019), 3.

<sup>100</sup> H. Carr, ‘Housing the Vulnerable Subject: The English Context’ in M.A. Fineman and A. Grear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Surrey: Ashgate, 2013) 108, 116. See also L. Whitehouse, ‘The Mortgage Arrears Pre-Action Protocol: An Opportunity Lost’ (2009) 72 MLR 793.

to the banks following the 2008 crisis.<sup>101</sup> As Fineman notes, in contrast to the bailout offered to the banks, ‘the heightened vulnerability of the individual mortgage holder created in the wake of the same crisis was ignored – his plight assigned to the realm of individual responsibility and the pleas for governmental aid deflected with cries of “moral hazard”.’<sup>102</sup>

In combination, the light regulation of mortgagees, a lack of accessible legal and debt advice, exposure to inappropriate lending practices and poor social welfare provision means that the resilience of some mortgagors in avoiding the threat of loss of home is likely to be weak, particularly when compared to that enjoyed by the mortgagee.

Having identified the significant imbalance in the resilience experienced by the parties to the possession claim, the following section evaluates the extent to which the practical operation of the AJA 1970 and the CCA 1974 recognises and addresses that disparity. It does so by offering two accounts of *Southern Pacific Mortgage Limited v Jacqueline Vera Green*.<sup>103</sup> The first highlights the approach adopted within the possession process under s. 36 AJA 1970. The second assesses how that approach could have differed had the case been heard under the CCA 1974. The distinction, as will become apparent, is quite marked.

The facts of *Green*<sup>104</sup> will be revealed in full as these two accounts progress but it is perhaps worth noting at this stage that while one case is unlikely to give rise to credible

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<sup>101</sup> National Audit Office, ‘Taxpayer support for UK banks: FAQs’ at <https://www.nao.org.uk/highlights/taxpayer-support-for-uk-banks-faqs/> (last visited 7 May 2019).

<sup>102</sup> Fineman, n 64 above, 25-26.

<sup>103</sup> WL 7692940 heard on 19 November 2015 by Ms Recorder Rowlands at Bristol County Court. On appeal at *Green v Southern Pacific Mortgage Ltd & Anor* [2018] EWCA Civ 854.

<sup>104</sup> *ibid.*

generalisations, this case is worthy of close scrutiny for three reasons. The first is that it is reflective of the majority of possession claims in that the mortgagee was claiming possession on the basis of mortgage arrears. The second is that part of the reasoning, at both County Court and Court of Appeal level, is based on a flawed assumption about the similarity between the Disability Discrimination Act 1995 (DDA 1995) and the Equality Act 2010 (EA 2010). Finally, for a mortgage nerd (such as me) it is the equivalent of gold dust; the reporting of County Court decisions in housing possession cases being virtually unheard of. What this case offers us, therefore, is a tantalising insight into the ‘evidential black hole’<sup>105</sup> of housing possession cases.

## **B. The AJA 1970 in practice**

The aim of this section is not to offer a description of how the AJA 1970 process operates in practice, a task already completed in any event,<sup>106</sup> but rather to examine whether it offers an adequate response to the imbalance evident in the resilience of the parties to the claim. The answer, as evidenced by the case of *Green*, is that it does not. As regards the facts of *Green*, the only features that are salient for the purposes of s. 36 of the AJA 1970 are that the mortgagee was entitled to seek possession by virtue of its inherent right to possession<sup>107</sup> and that the equivalent of two months arrears had accrued (by the date of the County Court hearing, the mortgagee was claiming £181,703 in arrears and legal fees).<sup>108</sup> Given the

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<sup>105</sup> I. Loveland, ‘Twenty years later - assessing the significance of the Human Rights Act 1998 to residential possession proceedings’ (2017) *Conv* 174, 190.

<sup>106</sup> S. Bright and L. Whitehouse, *Information, Advice & Representation in Housing Possession Cases* (April 2014), 63, at [https://www.law.ox.ac.uk/sites/files/oxlaw/housing\\_possession\\_report\\_april2014.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/housing_possession_report_april2014.pdf) (last visited 7 May 2019).

<sup>107</sup> See, for example, M. Conaglen, ‘Mortgagee Powers Rhetoric’ (2006) 69(4) *MLR* 583 and *Four-Maids Ltd. v Dudley Marshall (Properties) Ltd* [1957] Ch 317.

<sup>108</sup> *Southern Pacific Mortgage Limited v Jacqueline Vera Green* 2015 WL 7692940, para. 27.

mortgagee's inherent right to possession, the mortgagor could not deny that the mortgagee was entitled to seek a possession order but she was able to request that the order be suspended under s. 36 of the AJA 1970. By virtue of this section, a judge has discretion to suspend an order for possession upon specified payment terms if, 'it appears to the court that in the event of its exercising the power the borrower is likely to be able within a reasonable period to pay any sums due under the mortgage.'<sup>109</sup> In considering whether to exercise this discretion, the judge held that, given the mortgagor's financial position and inability to afford the contractual payments, it was not possible to suspend the possession order (other than to allow time for an appeal following the decision of the Supreme Court in a related case).<sup>110</sup> The mortgagor's appeal was later rejected by the Court of Appeal.<sup>111</sup>

The significance of this account, for the purposes of this article, lies in what it fails to reveal. The focus given to affordability within the AJA 1970 means that there is little if any room for assessing the reason for the arrears, the impact of losing the home,<sup>112</sup> the behaviour of the parties, or other non-economic factors such as the mortgagor's 'personal home story'.<sup>113</sup> As the following analysis reveals, however, issues of this kind were evident in this case and could (and arguably should) have been taken into consideration had this case been heard under the CCA 1974.

## **B. The CCA 1974 in theory and practice**

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<sup>109</sup> The term 'any sums due' applies only to the arrears outstanding at the time in addition to normal contractual payments, Administration of Justice Act 1973, s 8.

<sup>110</sup> *McDonald v McDonald and others* [2016] UKSC 28.

<sup>111</sup> *Green v Southern Pacific Mortgage Ltd & Anor* [2018] EWCA Civ 854.

<sup>112</sup> Fox O'Mahony and Sweeney, n 9 above, 223. For evidence of the impact possession can have see, for example, Libman, Fields and Saegert, n 11 above, and Nettleton and Burrows, n 11 above.

<sup>113</sup> Bright, n 9 above, 13.

By virtue of s. 129(2) of the CCA 1974, the court can, if it considers it just, order the debtor to pay ‘any sum owed under a regulated agreement... by such instalments, payable at such times, as the court, having regard to the means of the debtor... considers reasonable.’ In addition, the court may also, by virtue of s. 136 of the CCA 1974, tag on to a time order ‘such provision as it considers just for amending any agreement or security in consequence of a term of the order.’ Unfortunately, information relating to how these provisions are implemented in practice is scant with only two cases of any real note.<sup>114</sup> A detailed account of these cases is not offered here for the reason that it is the *potential* that the CCA 1974 offers, rather than the judiciary’s previous approach to it, that is significant for the purposes of this article.

The difference between this and the AJA 1970 may at first appear to be relatively subtle. Under both, the court has discretion to effectively suspend possession provided the mortgagor keeps to the payments terms stipulated by the court. Neither provision is open to a mortgagor who does not currently have the means to repay at least some of what is owed<sup>115</sup> hence the mortgagee’s economic concerns remain a priority. However, if one digs a little deeper, one can begin to identify significant variation in the two processes and nuance in the language used.

First, as noted above, the AJA 1970 is based entirely on an ‘if you can pay, you can stay’ approach with possession determined solely by what the borrower can afford. The CCA 1974, however, is based on what is just, taking into account the interests and positions of both

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<sup>114</sup> *First National Bank v Syed* [1991] 2 All ER 250 CA (Civ Div) and *Southern & District Finance Plc v Barnes, J & J Securities Ltd v Ewart, and Equity Homes Loans Ltd v Lewis* (1995) 27 HLR 691, CA.

<sup>115</sup> *First National Bank v Syed* [1991] 2 All ER 250 CA (Civ Div).

parties including the means of the mortgagor.<sup>116</sup> As Dunn argues, ‘this is the correct approach to an area in need of pliancy.’<sup>117</sup> This has potential therefore to allow for the inclusion of non-economic concerns and for both to be weighed against each other.

Second, research suggests that the ‘reasonable period’ under the AJA 1970 rarely extends to the ‘remaining term of the mortgage’<sup>118</sup> for a number of reasons, not least that the judiciary’s concern to ensure that the mortgagee does not have to wait for a disproportionately long time for contractually agreed payments to be honoured.<sup>119</sup> However, under the CCA 1974, ‘the court retains a wide discretion in deciding the period of repayment – not being limited to [a] reasonable period as under the AJA provisions.’<sup>120</sup>

Finally, under the AJA 1970 the court does not have the ability to alter the interest rate charged under the agreement, whereas under the CCA 1974, such a power exists and has been exercised on occasion so as to reduce the interest rate to nil.<sup>121</sup> The more expansive nature of the CCA 1974 discretion compared to that offered by the AJA 1970 is highlighted by McMurtry who notes that, ‘the attraction and flexibility of time orders under the 2006 consumerist code stands in marked contrast to the limited statutory relief against possession afforded to the mortgagor under s. 36 of the Administration of Justice Act 1970.’<sup>122</sup> There is potential therefore for mortgagors who would not qualify for relief under the AJA 1970 to

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<sup>116</sup> A. Dunn, ‘“Footprints on the sands of time”: sections 129 and 136 Consumer Credit Act 1974’, (1996) *Conv* 209, 212.

<sup>117</sup> *Ibid* 216.

<sup>118</sup> *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 All ER 449, at 458C.

<sup>119</sup> L. Whitehouse, ‘A Longitudinal Analysis of the Mortgage Repossession Process 1995-2010: Stability, Regulation and Reform’ in S. Bright (Ed.), *Modern Studies in Property Law* (Oxford: Hart Publishing, 2011) 151-174 and L. Whitehouse, ‘The Malleability of the Law of Mortgage’ in C. Twigg-Flesner & G. Villalta-Puig (Eds.), *The Boundaries of Commercial and Trade Law* (Munich: Sellier, 2011) 51-74.

<sup>120</sup> Dunn, n 116, text to fn 17.

<sup>121</sup> *Equity Homes Loans Ltd v Lewis* (1995) 27 HLR 691, CA.

<sup>122</sup> McMurtry, n 1 above, 108-109.



avail themselves of a time order by indicating an ability to repay the debt over a longer period and at a lower rate of interest.

To highlight the differences in the two approaches we can look again to the case of *Green*.

There were, for example, a number of factors that might have been considered in determining whether it was ‘just’ to make an order, taking into account the interests of both parties. Such factors might have included that the reason for the arrears derived from the mortgagor’s disability and that possession arose in part from the mortgagee’s refusal to convert the mortgage to interest only. Unlike the majority of possession hearings, the mortgagor in *Green* raised a defence to the mortgagee’s claim on the basis that the refusal to convert to interest only amounted to unlawful discrimination under the DDA 1995<sup>123</sup> and the EA 2010<sup>124</sup>.

Defences to a claim for possession are rare given that they are limited to situations in which the mortgage contract can be shown to be unlawful or unenforceable, for example, where fraud or undue influence was used to secure the agreement of the mortgagor. The position is different, however, in relation to the DDA 1995 and EA 2010. Claims arising under these provisions do constitute a defence to possession claims for the reason that, as Lord Bingham of Cornhill explains, ‘Parliament has enacted that discriminatory acts... are unlawful. The courts cannot be required to give legal effect to acts proscribed as unlawful. But I would not expect such a defence, in this field, to be made out very often.’<sup>125</sup>

The main question here was whether the mortgagee should have taken into consideration the mortgagor’s request to change the mortgage from repayment to interest only before starting

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<sup>123</sup> ss 19(1)(b) and 20(2).

<sup>124</sup> ss 15, 19 and 21.

<sup>125</sup> *Lewisham LBC v Malcolm* [2008] UKHL 43 at [19]. See also *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15 at [17] per Lady Hale.

possession proceedings.<sup>126</sup> Unusually, the mortgagor had been awarded payments by the Department for Work and Pensions (DWP) that were sufficient to cover the interest payments (and more) so, as the judge noted, ‘had the mortgage been changed to an interest only mortgage, the Defendant would have been able to meet the interest payments and paid off the arrears over a relatively short period of time.’<sup>127</sup> In questioning whether the mortgagee was allowed to convert the mortgage the judge offers a summary of the mortgage lending industry noting that the original loan was taken out at time when there existed ‘a much laxer attitude towards lending.’<sup>128</sup> Having considered regulatory requirements including MCOB<sup>129</sup> the judge concluded that it had been open to the mortgagee to convert the mortgagor’s loan to an interest only mortgage.

As regards the mortgagor’s claim in respect of disability discrimination, by virtue of s. 20 of the DDA 1995, a provider of services (which includes mortgage lenders)<sup>130</sup> discriminates against a disabled person if for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply and he cannot show that the treatment in question is justified. After 1 October 2010 this was replaced by section 15 of the EA 2010 which states that a service provider is said to discriminate against a ‘disabled’<sup>131</sup> person if they treat the disabled person unfavourably because of something arising in consequence of the disability, and the service provider cannot show that the treatment is a proportionate means of achieving a legitimate

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<sup>126</sup> *Southern Pacific Mortgage Limited v Jacqueline Vera Green* 2015 WL 7692940, para 17.

<sup>127</sup> *Southern Pacific Mortgage Limited v Jacqueline Vera Green* 2015 WL 7692940, para 15.

<sup>128</sup> *Southern Pacific Mortgage Limited v Jacqueline Vera Green* 2015 WL 7692940, para 5.

<sup>129</sup> MCOB 13.3.4A.

<sup>130</sup> The DDA 1995 and EA 2010 apply to the providers of goods and services whether in the private or public sector and hence mortgage lenders are included within that definition. See for example the Equality Act 2010, s 29.

<sup>131</sup> Defined in Equality Act 2010, s 6.

aim.<sup>132</sup> The section does not apply if the service provider did not know, and could not reasonably have been expected to know, that the individual had the disability.

As regards the decision to commence possession proceedings, undertaken in March 2009, the judge found that the defendant was not discriminated unlawfully against as she had been treated in the same manner as any other individual in arrears. The judge relied on *Lewisham LBC v Malcolm*<sup>133</sup> where it was held that the defendant had not been discriminated against as he had been treated in exactly the same manner as any other tenant who had sublet his accommodation. The fact that the tenant had sublet his accommodation as a result of his mental health difficulties had not swayed the court.

Here it must be assumed that the judge was treating the commencement of proceedings as a 'one off' event that took place before the introduction of the EA 2010. However, the treatment received by the mortgagor (i.e. the continued threat of possession) continued well beyond the introduction of the EA 2010. According to the transitional arrangements governing the introduction of the EA 2010, provided the act in question would have been considered unlawful under the DDA 1995 and it continues on or after 1st October 2010 and is considered unlawful under the 2010 Act then the EA 2010 applies.<sup>134</sup> This is extremely significant in this case for the reason that the case of *Malcolm* was later the subject of criticism as it had effectively rendered 'disability-related discrimination' useless.<sup>135</sup> In response, section 15 of the EA 2010 was introduced so as to reverse the decision and remedy

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<sup>132</sup> See *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15.

<sup>133</sup> [2008] UKHL 43

<sup>134</sup> The Equality Act 2010 (Commencement No. 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010, s 7.

<sup>135</sup> D. Cabrelli, *Employment Law in Context* (Oxford: Oxford University Press, 2nd ed, 2016) 499.

the problems caused by it by removing the need for a comparator. The judge in *Green* muddies the waters somewhat by claiming that ‘there is no real difference in the effect of the statutes in the facts of this case’<sup>136</sup> but according to section 15 of the EA 2010, the key issue is not whether the defendant had been treated in the same manner as any other individual in arrears but rather whether she was treated unfavourably because of something arising in consequence of the disability. As Lady Hale made clear in *Akerman-Livingstone v Aster Communities Ltd*, ‘there was no need for a comparison with how [the provider] would treat any other person; [the provider] might have to behave differently towards a disabled tenant from the way in which it would behave towards a non-disabled tenant.’<sup>137</sup>

By virtue of the EA 2010, the first question to be answered is whether the claim for possession is ‘because of something arising in consequence of the disability’. Here it may have been argued that the mortgagor’s mental health issues had led to an inability to work which in turn had led to default and hence possession. The next step would have been to question whether the mortgagee could show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.<sup>138</sup> Given the mortgagee could have converted the mortgage to interest only thereby receiving payment while avoiding the need for possession it may have proven difficult to argue that possession was proportionate. The judge, however, considered the commencement of proceedings in March 2009 under the DDA 1995 and not the EA 2010. Given the ongoing nature of the action, with the court hearing not taking place until November 2015, it seems reasonable to argue that the judge could have applied section 15 of the EA 2010 instead. Had she done so, she may have

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<sup>136</sup> *Southern Pacific Mortgage Limited v Jacqueline Vera Green* 2015 WL 7692940, para 55.

<sup>137</sup> [2015] UKSC 15 at [18].

<sup>138</sup> Guidance on determining this issue was provided by Lord Wilson in *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15 at [68-73].

answered the first question in the affirmative and then gone on to seek an answer to the second question.

The judge does consider the request to change to an interest only mortgage to be an ongoing event and so considers whether it is was unlawful under the old DDA 1995 and if so, whether it would be unlawful under the new EA 2010. The question came down to whether the mortgagee's refusal to convert the mortgage to interest only was a breach of the duty to make reasonable adjustments.<sup>139</sup> The judge held that it was not and this therefore rendered the EA 2010 inapplicable. The judge's reasoning was that a repayment mortgage was fundamentally different to an interest only one and hence, by virtue of section 21(6) of the DDA 1995, the mortgagee was not be required to make reasonable adjustments that would alter fundamentally the nature of its business. The judge held that, 'it would mean imposing on the lender a riskier, more unsatisfactory repayment vehicle'<sup>140</sup> and cautioned mortgagees against engaging in such practices, 'it is not good practice to lend on an interest only basis.'<sup>141</sup> This caution reflects the practice since 2008 when the number of interest only mortgages dropped dramatically.<sup>142</sup> However, it has come too late for the 1.7 million mortgagors who currently have an interest only mortgage<sup>143</sup> and does not appear to be being heeded by mortgagees given evidence to suggest that these products are making a come-back.<sup>144</sup>

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<sup>139</sup> Disability Discrimination Act 1995, s 21.

<sup>140</sup> *Southern Pacific Mortgage Limited v Jacqueline Vera Green* 2015 WL 7692940, para 70.

<sup>141</sup> *Southern Pacific Mortgage Limited v Jacqueline Vera Green* 2015 WL 7692940, para 71.

<sup>142</sup> S. Read, 'Interest-only mortgages return to give more flexibility to borrowers' (26 June 2015) *The Independent*.

<sup>143</sup> Council of Mortgage Lenders, 'Interest-Only: Taking Stock' (May 2016) at <https://www.cml.org.uk/news/news-and-views/interest-only-taking-stock/> (last visited 7 May 2019).

<sup>144</sup> H. Thomas, 'Interest-only mortgages are back, but you have to be wealthy to get one' (12 October 2015) *The Guardian*. By virtue of MCOB 11.6.41R mortgagees are allowed to sell interest only mortgages on the basis of stringent affordability checks.

The Court of Appeal, despite being highly critical of the mortgagee's approach,<sup>145</sup> dismissed the mortgagor's appeal, finding that the mortgagee's blanket refusal to convert any of its existing repayment mortgages to interest only mortgages did not make it impossible or unreasonably difficult for disabled people to access the service (when compared to the access offered to other members of the public).<sup>146</sup> In effect, the fact that the mortgagee treated all of its customers in an equally unfair manner by refusing to consider a conversion to interest only, despite an obligation to do so under the regulatory framework,<sup>147</sup> meant that it could not be held to be in breach of the DDA 1995. However, as noted above, *Akerman* makes it clear that it is inappropriate when applying s. 15 of the EA 2010 to compare the treatment received by a disabled person with the treatment received by a non-disabled person. Interestingly, however, the Court of Appeal heard arguments based exclusively on the 1995 Act, noting that 'it is common ground that there is no meaningful difference for these purposes between the relevant provisions of the 1995 Act and those of the 2010 Act.'<sup>148</sup> I would, for the reason noted above, beg to differ.

### **C. Would the decision have been different under the CCA 1974?**

During her deliberations, the County Court judge offered a practical example of the 'difficulty of weighing incommensurable interests.'<sup>149</sup> In relation to the mortgagor the judge noted that,

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<sup>145</sup> See Lord Justice Jackson's opinion, *Green v Southern Pacific Mortgage Ltd & Anor* [2018] EWCA Civ 854 at [85 - 97].

<sup>146</sup> *Green v Southern Pacific Mortgage Ltd & Anor* [2018] EWCA Civ 854 at [53].

<sup>147</sup> *Green v Southern Pacific Mortgage Ltd & Anor* [2018] EWCA Civ 854 at [72].

<sup>148</sup> *Green v Southern Pacific Mortgage Ltd & Anor* [2018] EWCA Civ 854 at [4].

<sup>149</sup> S. Bright, n 9 above 39. See also *Re Citro* [1991] Ch 142 (CA), 150 per Hoffman J.

she would lose the house that she has occupied for a long time, over 20 years, and the loss of her home would clearly be distressing and stressful for her, with a concomitant exacerbation of her mental health problems. She would also lose the chance to recover from her depression in her own home without the stress of losing that home.<sup>150</sup>

As regards the mortgagee's claim, however, the judge argued that the right to enforce one's security is legitimate and that, 'the need for a properly regulated, but at the same time widely available, mortgage market, needs no spelling out.'<sup>151</sup> Having rejected the discrimination claim, however, the judge was obliged to consider only whether the mortgagor could repay any sums due within a reasonable period. As she could not do so, the judge was obliged to grant possession. Had this case been heard under the CCA 1974 however, the judge would have been able to consider whether it was 'just' to grant the mortgagor more time to repay the loan at a much reduced rate of interest or to grant any other order she considered just.

In so doing, the court might have been swayed by the fact that the mortgagee had been irresponsible in the first instance in granting the loan on a self-certified basis, thus increasing the likelihood that the mortgagor would fall into arrears.<sup>152</sup> Once in arrears, the mortgagee had given no consideration to the defendant's disability<sup>153</sup> and their conduct towards the defendant had 'been unsympathetic in the extreme.'<sup>154</sup> It might also have mattered that the

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<sup>150</sup> *Southern Pacific Mortgage Limited v Jacqueline Vera Green* 2015 WL 7692940, para 45.

<sup>151</sup> *Southern Pacific Mortgage Limited v Jacqueline Vera Green* 2015 WL 7692940, para 45.

<sup>152</sup> *Southern Pacific Mortgage Limited v Jacqueline Vera Green* 2015 WL 7692940, para. 7.

<sup>153</sup> *Ibid*, para 39.

<sup>154</sup> *Ibid*, para 86.

reason for the arrears derived from the defendant's disability, that possession could have been avoided had the mortgagee acceded to the request to transfer to interest only and that the mortgagee had continually denied that the mortgagor was disabled.<sup>155</sup> On these facts, the court might have been able to offer the mortgagor some means of avoiding possession by allowing her more time to pay at a reduced rate of interest (while also reducing the mortgagee's claim of £269,000 for legal costs by finding that they were not 'reasonable incurred').<sup>156</sup>

### **C. The AJA 1970 or the CCA 1974?**

This account of *Green* demonstrates that the CCA 1974 should be preferred over and above the AJA 1970 for three reasons. The first is that had the case been heard under the CCA 1974, the mortgagor's disability might not have been rendered irrelevant to the outcome of the case and she might not have been placed in exactly the same position as any other mortgagor, regardless of the low level of resilience she exhibited. Second, it demonstrates that the AJA process has the potential to undermine a mortgagor's resilience in avoiding loss of home. Evidence submitted by a medical practitioner to the court in *Green*, for example, suggested that 'the threat of and prosecution of, the possession proceedings has had a significant effect on the Defendant's mental state'<sup>157</sup> while the judge noted that the defendant 'has found the proceedings more stressful than they needed to be. The evidence shows that there has been deterioration in her mental health.'<sup>158</sup> Finally, the AJA 1970 process exhibits bias towards the

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<sup>155</sup> *Green v Southern Pacific Mortgage Ltd & Anor* [2018] EWCA Civ 854 [95].

<sup>156</sup> *Ibid* [97].

<sup>157</sup> *Ibid*, para 24.

<sup>158</sup> *Ibid*, para 86.



economic interests of the mortgagee leading to the conclusion that the process is inadequate in realigning the inherently unequal relationship between creditor and debtor.<sup>159</sup>

It is for these reasons that, according to Fineman, reform of the possession process is justified for the (responsive) state has a responsibility to adjust societal institutions if they function in ‘ways harmful to individuals and society’.<sup>160</sup> While it is unrealistic to suggest that a mortgagee should be prevented from enforcing the security in all cases involving the possession of a home occupied by the mortgagor, it seems equally unrealistic and unreasonable to allow for such in cases where the mortgagee is in any way causally responsible for the arrears. What is needed, therefore, is a process that allows for the consideration of the interests, conduct and resilience of both parties. This article argues that the CCA 1974 offers such an alternative. Unfortunately, as the following section attests, significant barriers stand in the way of its application and practical usefulness.

## **B. The limits of the CCA 1974 process**

Unfortunately, anyone holding out hope that the Treasury’s confirmation, that time orders continue to apply to all forms of mortgage, will lead to (what were previously known as) first mortgagors experiencing a radical improvement in their chances of avoiding possession will be sadly disappointed. Despite efforts in 2006 to reinvigorate a process that was being chronically under used,<sup>161</sup> time orders appear to remain few and far between.<sup>162</sup> A

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<sup>159</sup> Fineman, n 8 above.

<sup>160</sup> Fineman, n 64 above, 25.

<sup>161</sup> The CCA 2006 was designed to iron out some of the difficulties in using the time order process, see McMurtry, n 1 above.

<sup>162</sup> Dunn, n 116, 209.

combination of a lack of knowledge among mortgagors of the availability of time orders<sup>163</sup> and a restrictive approach to statutory interpretation appear to have ‘contributed to the infrequent use of time orders.’<sup>164</sup> This situation will not be assisted by the recent reforms implemented by the FCA. It would seem, in particular, that time orders can now only be sought after the mortgagee has initiated possession proceedings.<sup>165</sup> This removes one of the reforms implemented by the Consumer Credit Act 2006 (CCA 2006) which was designed to increase the use of time orders by enabling second mortgagors to seek more time to repay their debts *before* their level of indebtedness made such a request futile, that is, upon receipt of a notice of sums in arrears.<sup>166</sup> These provisions are not now available as default notices and a notice of sums in arrears do not apply under the RMC regime.<sup>167</sup> The implication therefore must be that for some mortgagors, the ability to apply for a time order will simply come too late, particularly given the clear indication by the Court of Appeal in *First National Bank v Syed*,<sup>168</sup> that the discretion available under the CCA 1974 will not be available where mortgagor’s financial circumstances cannot support the repayments necessary to clear the debt by instalments.

According to the FCA, however, the impact of these changes is reduced by the application and operation of MCOB which, in their view, means that, ‘consumers should not need to rely on time orders to agree forbearance with the lender.’<sup>169</sup> Evidence suggests that the FCA may be overstating the extent to which MCOB constrains the arrears management practices of

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<sup>163</sup> *Director General of Fair Trading v First National Bank* [2001] UKHL 52 at 23 per Lord Bingham and Department for Trade and Industry, *Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century* Cm 6040 (2003), para. 5.74.

<sup>164</sup> McMurtry, n 1 above, 120-121.

<sup>165</sup> Money Advice Trust, n 2 above, 11.

<sup>166</sup> s. 129(1)(ba) of the CCA 1974. See McMurtry, n 1 above, 120-121.

<sup>167</sup> Rosenberg n 31 above, 19-20.

<sup>168</sup> [1991] 2 All ER 250 CA (Civ Div).

<sup>169</sup> FCA, n 22 above, para. 3.87.

mortgagees;<sup>170</sup> it certainly did not assist the mortgagor in *Green*. Recently, for example, the FCA identified 750,000 customers who had been subject to ‘automatic capitalisation’<sup>171</sup> leading to fees being imposed inappropriately and arrears taking longer to repay. This means that time orders remain a necessary failsafe to protect mortgagors where forbearance cannot be agreed but as noted above, the change in the timing as to when an order can be requested means that they are now of more limited effect.

### **A. Proposals for reform**

In order for the CCA 1974 process to reach its full potential, it is not necessary for formal reform processes to be invoked, other than to reverse the timing as to when a time order can be applied for. Rather, a programme of measures which inform, cajole and nudge should be sufficient to effect change. The first step in initiating this shift needs to come from the FCA and the FOS. A programme designed to ‘educate’ mortgagors, legal practitioners and debt advisors of the availability and benefits of seeking a time order under the CCA 1974 is needed. Fundamental revision of the ‘defence form’<sup>172</sup> is also required as it currently advises mortgagors that they may only apply for a time order ‘if the loan secured by the mortgage (or part of it) is a regulated consumer credit agreement’.<sup>173</sup>

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<sup>170</sup> See, for example, FCA, *Complaints Data Analysis: 2017 H1* at <https://www.fca.org.uk/publication/data/complaints-data-analysis-2017-h1.pdf> (last visited 7 May 2019) and Financial Ombudsman Service, ‘Ombudsman News’ at <http://www.financial-ombudsman.org.uk/publications/ombudsman.htm> (last visited 7 May 2019).

<sup>171</sup> This involves mortgagees automatically including payment shortfall balances within contractual monthly instalment calculations, see FCA, ‘FG17/4 - The fair treatment of mortgage customers in payment shortfall: impact of automatic capitalisations’ Finalised Guidance (April 2017) para. 1.5.

<sup>172</sup> Form N11M available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/702924/n11m-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702924/n11m-eng.pdf).

<sup>173</sup> See text prior to question 5 on the N11M form.

Second, the judiciary need to be encouraged to flex their judicial muscle by employing the wider discretion afforded to them so as to take account of and redress the imbalance in the resilience of the parties involved. As McMurtry notes, the effectiveness of measures such as the CCA 1974 depends upon ‘the extent to which they are utilised by the courts.’<sup>174</sup> It remains open therefore for the judiciary to consider factors (such as the social interests of the mortgagor) and to implement measures (such as extending the mortgage term or reducing interest rates) which would not be available to them to the same extent under the AJA 1970.

The consideration of issues beyond the economic is not unheard of within loss of home cases. The judiciary will, for example, be familiar with the process regarding possession claims in respect of social tenants in England who are in rent arrears. In such cases, the court must consider all relevant factors in determining whether it is reasonable to order possession.<sup>175</sup> Similarly, by virtue of the Renting Home (Wales) Act 2016 the court must consider the probable effect of the decision on the occupier (and on any permitted occupiers of the dwelling)<sup>176</sup> and on the landlord’s interests, including their financial interests.<sup>177</sup> It does not seem too great a leap therefore to propose that judges consider these and other relevant issues in deciding whether to exercise their discretion under the CCA 1974.

## **A. Conclusions**

This article has sought to highlight and some might argue exploit what appears to be an unremarked and possibly unintended consequence of the recent reform of mortgage

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<sup>174</sup> McMurtry, n 1 above, 125.

<sup>175</sup> Housing Act 1985, Sched 2, Ground 1 (local authority), Housing Act 1988 Sched 2, Part II, Ground 10 (Housing Association). See for example *Cumming v Danson* [1942] 2 All ER 653 (CA).

<sup>176</sup> Renting Homes (Wales) Act 2016 Sched 10, para. 4.

<sup>177</sup> *Ibid*, para. 6.

regulation. The reclassification of second mortgages as RMCs and confirmation that the time order process remains available in respect of all mortgages opens up the possibility of possession cases being heard under either the AJA 1970 or the CCA 1974. In making the case for the rejection of the former in favour of the latter this article has revealed that the AJA 1970 process demonstrates a clear preference for protecting the economic interests of the mortgagee to the disadvantage of the mortgagor. It does so by focusing solely on the ability of the mortgagor to repay the debt. Other non-economic concerns such as the unethical behaviour of mortgagees, the unique impact of loss of 'home'<sup>178</sup> or the adverse impact of such on health<sup>179</sup> simply do not feature. It is the more expansive discretion given to judges under the CCA 1974 that offers an opportunity for the consideration of these social interests. It is possible, therefore, that a mortgagor who has suffered bereavement, ill health, relationship breakdown and/or been exposed to unethical practices at the hands of their mortgagee, and who would fail the affordability test under the AJA 1970, might be able to convince the court to exercise its discretion under the CCA 1974.

These changes it is argued have the potential to temper the 'privilege and favour'<sup>180</sup> conferred on mortgagees by the AJA 1970, to make mortgagor and mortgagee interests commensurate and ultimately to offer a more proportionate and appropriate response to the differing levels of risk and resilience experienced by mortgagors and mortgagees. This cultural shift in judicial practice may offend against the rational tendencies of land law,<sup>181</sup> but it is absolutely necessary in order to reduce harm and enhance resilience.

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<sup>178</sup> See, for example, Bright, n 9 above and Fox O'Mahony and Sweeney, n 9 above, 223.

<sup>179</sup> See, for example, Libman, Fields and Saegert, n 11 above and Nettleton and Burrows, n 11 above.

<sup>180</sup> M. A. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20.1 *Yale Journal of Law & Feminism* 1, 1.

<sup>181</sup> Fox O'Mahony and Sweeney, n 9 above, 10 and Gray and Gray, n 14 above, 243.