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Housing Wealth and the 'Ageing Society'

(1) Introduction

Issues relating to older owners, their homes and the transactions they enter into have attracted considerable attention in recent years.[1] A key aspect of the 'ageing society' in developed countries concerns the ways in which ageing owners use—and are expected to use—their housing equity to support various activities and needs in later life. There has been an exponential growth in recognition of the potential for housing equity to be used

[1] Much of the policy discussion in England and Wales has focused on regulation of the financial services market targeted at the elderly, as discussed in ch 9. In Ireland, the Law Reform Commission (LRC) has published a Consultation Paper on *Law and the Elderly* which included a section on 'Protection against Financial Abuse' in relation to both products aimed at elderly people, and issues relating to undue influence and unconscionable transactions in other contracts involving property; further work in this area was identified in the Commission's 'Third Programme of Work (2007–2014)'. The Commission's 2003 Consultation Paper, *Consultation Paper on Law and the Elderly* (LRC CP 23—2003), formed part of its second programme of law reform (2000–2007) and identified, under 'Vulnerable Groups and the Law', consideration of 'law and the elderly, including the legal protection of older persons transferring assets and "advance care directives"'; see 'Second Programme for Examination of Certain Branches of the Law with a View to their Reform: 2000–2007', available online at <http://www.lawreform.ie/lawunderreview/secondproglawreform.htm>. Although the *Report on Vulnerable Adults and the Law* (LRC 83—2006) was published in 2006, this focused primarily on issues relating to capacity and assisted decision-making amongst vulnerable adults, and did not specifically address issues of financial abuse. The LRC's work in respect of vulnerable adults has continued to focus on mental capacity and the wards of court system (see ch 6 of this book). A recent upsurge in the use of equity release products in Australia also prompted the Australian Securities and Investments Commission to publish a report in 2005 to highlight the risk associated with trading-in the equity in one's owner-occupied home; see Australian Securities and Investment Commission, *Equity release products* (Report 59, November 2005), available online at <http://www.asic.gov.au/fido/fido.nsf/lkuppdf/FIDO+PDFW?opendocument&key=Equity_release_report_pdf>. In the US, considerable academic attention has focused on the use of reverse mortgage products and other forms of equity release amongst the elderly—see, eg, NK Kutty, 'The Scope for Poverty Alleviation among Elderly Home-owners in the United States through Reverse Mortgages' (1998) 35 *Urban Studies* 113–29; IF Megbolugbe, J Sa-Aadu and JD Shilling, 'Oh, Yes, the Elderly Will Reduce Housing Equity under the Right Circumstances' (1999) 9 *Journal of Housing Research* 53; RG Quercia, 'House Value Appreciation among Older Homeowners: Implications for Reverse Mortgage Programs' (1999) 9 *Journal of Housing Research* 201; S Merrill, M Finkel and N Kutty, 'Beneficiaries from reverse mortgage products for elderly home-owners: an analysis of American housing survey data' (1994) 22 *Journal of the American Real Estate and Urban Economics Association* 257; US Department of Housing and Urban Development, *No Place Like Home: A Report to Congress on FHA's Home Equity Conversion Mortgage Program* (Washington, DC, 2000). Although the overriding impetus in US policy since the enactment of the FHA Reverse Mortgage Legislation, the Housing and Community Development Act of 1987 (s 825), has been to facilitate equity release through reverse mortgages to elderly homeowners, following the crash in the sub-prime mortgage lending business in the US which began in 2007, consumer advocates began to call for Congress to investigate the degree of legal protection afforded to elderly consumers by unscrupulous lenders; see US Senate Special Committee on Aging December hearing on 'Foreclosure Aftermath: Preying on Senior Homeowners', available online at < http://aging.senate.gov/hearing_detail.cfm?id=316277&>.

in later life to alleviate poverty rates,[2] subsidise living expenses,[3] cover the costs of housing needs,[4] or fund healthcare or welfare needs after retirement.[5] The growth in opportunities for equity release, and changing expectations regarding the use of housing wealth, have also, crucially, been accompanied by an attitude shift amongst UK homeowners, away from the idea that the owned home provides a repository of wealth to pass on through inheritance, and towards the idea that it will provide a resource of capital and income to spend during the life-course ‘either on high days and holidays, or to meet a more sobering array of welfare needs’.[6] This book sets out to consider whether current legal approaches to regulate and, in some cases, remedy these transactions are appropriate in light of the particular risks and vulnerabilities associated with housing equity transactions for (marginal) older owners. This chapter opens the discussion by setting out the demographic and socio-economic policy contexts of housing equity use by a growing population of ageing homeowners, and highlighting the urgent need for socio-legal analysis of the issues which have emerged concerning the use of home equity by older owners.

Official statistics emphasise the need to ensure that governmental and legal policy-makers are sensitive to the issues affecting Britain’s ageing population. With birth rates falling and increasing numbers of people living into very old age, the proportion of the population of England aged over 65 years of age is set to grow from 15.6 per cent in 2000 to 19.2 per cent by 2021.[7] Globally, the ‘oldest old’ (those aged 80 years or over) are the fastest-growing population, currently increasing at 3.9 per cent per year.[8] In Britain, the number of centenarians has been increasing at a more rapid rate than any other population group since the 1950s.[9] As the ‘baby-boomer generation’ reaches retirement age, policy analysts are increasingly concerned with the implications of this ‘Agequake’ for economic and social policies,[10] and it is likely that scholarly interest in issues affecting, and affected by, older people will continue to grow in the decades to come. As Kutty has noted

[2] R Hancock, ‘Can Housing Wealth Alleviate Poverty among Britain’s Older Population?’ (2005) 19 *Fiscal Studies* 249; NK Kutty, ‘The Scope for Poverty Alleviation among Elderly Home-owners in the United States through Reverse Mortgages’ (1998) 35 *Urban Studies* 113.

[3] E Hurst and F Stafford, ‘Home Is Where the Equity Is: Mortgage Refinancing and Household Consumption’ (2004) 36 *Journal of Money, Credit and Banking* 985.

[4] SF Venti and DA Wise, ‘Aging and Housing Equity: Another Look’, *NBER Working Paper No W8608*, November 2001, available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=240728>.

[5] S Lowe, ‘Capital accumulation in home-ownership and family welfare’ in N Manning and C Ungerson (eds), *Social Policy Review 1989–90* (London, Longman, 1990); S Lowe, ‘Home-ownership, wealth and welfare: new connections’ in A Corden, E Robertson and K Tolley (eds), *Meeting Needs in an Affluent Society* (Aldershot, Avebury, 1992).

[6] SJ Smith, BA Searle and N Cook, ‘Rethinking the Risks of Home Ownership’ (2009) 38 *Journal of Social Policy* 83, 89; see also K Rowlingson and S McKay, *Attitudes to Inheritance in Britain* (Bristol, Policy Press, 2005); J Smith, ‘Exploring attitudes to housing wealth and retirement’ (2004) 63 *Housing Finance* 34; SJ Smith, ‘Owner-occupation: living with a hybrid of money and materials’ (2008) 40 *Environment and Planning A* 520; see further discussion in ch 5.

[7] Statistics available online at http://www.statistics.gov.uk/cci/nugget.asp?id=949.

[8] United Nations Department of Economic and Social Affairs, Population Division, *World Population Aging 2007* (New York, UN, 2007), Executive Summary, xxvii. In 2007, those aged 80 years or over made up about 12.5% of the 60-plus population, but this is set to grow to about 20% by 2050 (*ibid*).

[9] Official statistics available online at <www.statistics.gov.uk/cci/nugget.asp?id=1875>.

[10] See, eg, SA Nyce and SJ Schieber, *The Economic Implications of Aging Societies: The Costs of Living Happily Ever After* (Cambridge, CUP, 2005); A Tinker, ‘The Social Implications of an Aging Population’ (2002) 123 *Mechanisms of Aging and Development* 729; P Wallace, *Agequake: Riding the Demographic Rollercoaster Shaking Business, Finance and Our World* (London, N Brearley Publishing 1999); J Tavares Alvarez, *Reflections on an Agequake* (New York, UN–NGO Committee on Aging, 1999).

in the US context, 'The economic and social wellbeing of the growing elderly population is … an important issue for society in general and for policy-makers in particular.'[11]

The demographic and socio-economic contexts set out in this chapter are central to the 'situational' context of older owners in housing equity transactions. In a policy context which is primed for increasing use of housing equity by older owners,[12] it is important to assess the legal protections, regulations and remedies available to older consumers. The analysis in this book starts from the view that in any assessment of the *appropriateness* of legal protections and procedures governing home equity transactions—including when and why law protects, or does not protect, older owners in particular types of home equity transaction—the *context* of financial decision-making by older owners is crucial. The older owner's personal context or situation is central not only to the decision to release equity, but also to the options and products available to any given owner to enable equity release. This is particularly the case for 'marginal owners', owners in lower-value properties, who are also likely to have lower incomes, pensions and savings, and to face multiple demands on their housing wealth, which makes spending housing equity more 'high-risk' for them than for the general population. The growth and diversification of the home-ownership sector has included the substantial growth of marginal ownership.[13] Marginal owners are increasingly likely to face multiple and complex demands on their housing equity,[14] which—with home ownership seen as a proxy for active citizenship, and housing equity a store of wealth to meet a range of welfare needs—they are politically constructed, as 'owners', as 'responsible' for meeting through their own resources.[15]

In assessing the nature and extent of legal protections, regulations and remedies for older owners, the focus of this analysis is on those who are most vulnerable or 'at risk'. In keeping with the importance of affordability in financial transactions, the term 'older owners' is interpreted as referring to those who have passed the 'normal' age for retirement.[16] Although recognising that the point at which a retirement age is set may be viewed as arbitrary, and imposes a particular perspective which treats ageing as the 'problem',[17] the age at which people retire has a significant impact on their income, which in turn drives housing equity transactions. In the UK at present the normal retirement age is usually 65 years of age for men and 60 for women, although some may retire earlier[18]

[11] Kutty, above n 2.

[12] See further ch 2.

[13] See R Burrows, *Home-ownership and poverty in Britain*, *Findings* (York, Joseph Rowntree Foundation, 2003), indicating that half of the people 'living in poverty' in the UK were homeowners.

[14] Eg, maintenance and repair costs for what are often older properties; R Burrows and S Wilcox, *Half the poor: Home-owners with low incomes* (London, Council of Mortgage Lenders, 2000).

[15] See, eg, Department of Communities and Local Government, *Homes for the Future: More affordable, more sustainable*, Cm 7191 (London, DCLG, 2007); for further discussion of the political and policy contexts of housing equity transactions, see ch 2.

[16] This is the most commonly used definition of 'old age'; see NS Walford and S Kurek 'A comparative analysis of population ageing in urban and rural areas of England and Wales, and Poland over the last three census intervals' (2008) 14 *Population, Space and Place* 365.

[17] Rather than an overall shortage of employment, or a shortage of younger people contributing to the economy, which could be solved by changing immigration policies, or a shortage of suitable and affordable housing; see F Heywood, C Oldman and R Means, *Housing and Home in Later Life* (Milton Keynes, Open University Press, 2002) 43.

[18] Banks and Smith describe 'two distinct groups with very different "retirement" experiences. At the top of the wealth distribution, early retirement has typically been influenced by private, occupational pensions; at the bottom of the wealth distribution, individuals are even more likely to be not working in their 50s, but do not

and some later.[19] Retirement age in the UK has traditionally been influenced by the State Pension Age, which was to be revised upwards from 2010, towards a targeted retirement age of 68 for both men and women by 2046.[20] However, this plan has been displaced by legal challenges to the default retirement age: the Employment Equality (Age) Regulations 2006, which made it lawful for UK employers to impose a mandatory retirement age of 65[21] have been challenged in the European Court of Justice,[22] leading the Coalition Government to publish proposals which will seek to phase out the default retirement age by October 2011.[23] At the time of writing it is not yet clear what the outcome of this initiative will be, or, if the default retirement age is phased out, what the effects will be on real income levels for older people. While the proposals would remove this age-based discriminatory barrier, the conventional retirement age continues to provide a useful rule of thumb for determining when an owner may be designated as 'older' for the purposes of the analysis in this book, based on two linked premises. First, since the proposed changes in legal status would make retirement a matter of choice rather than compulsion, it is not yet clear how dramatic an effect they would have on employment patterns, and particularly on income in old age for marginal as compared to affluent owners, and for the 'older old' as compared to the 'younger old'. Meanwhile, for those who have already retired, for those who will still choose to do so or for those whose transition into older old age makes

typically define themselves as retired and draw on income support or, more usually, disability benefits': J Banks and S Smith, 'Retirement in the UK' (2006) 22 *Oxford Review of Economic Policy* 40.

[19] The Department of Work and Pensions (DWP) has commissioned a number of research projects through its Extending Working Life Social Research Division, which has responsibility for undertaking research in this area; see, eg, A Hedges and W Sykes in association with C Groom, 'Extending working life: changing the culture. Qualitative research into effective messages', *Research Report No 557* (London, DWP, 2009), which was commissioned to help the DWP 'develop messages with the potential to change the way people think about when and how they should retire from paid work, and to encourage them to stay in work up to and beyond State Pension Age (SPA)' (*ibid*, at 1). See also C Phillipson and A Smith, 'Extending working life: A review of the research literature', *Research Report No 299* (London, DWP, 2005).

[20] See The Pension Service (DWP), State Pension forecast, available online at <http://www.thepensionservice.gov.uk/state-pension/forecast/home.asp>.

[21] The Employment Equality (Age) Regulations 2006 (SI 2006/1031) came into force in October 2006 to comply with the EU Framework Equal Treatment Directive (2000/78/EC). These Regulations render age discrimination in employment unlawful in the same way as discrimination on grounds of sex, race, disability, sexual orientation, or religion and belief. The Regulations also set a national default retirement age of 65, which makes compulsory retirement below the age of 65 unlawful unless it is objectively justified.

[22] This aspect of the Regulations has been described as 'an unfortunate and unnecessary step on the road to dealing with the relationship between dismissal and age'—C Kilpatrick, 'The New UK Retirement Regime, Employment Law and Pensions' (2008) 37 *Industrial Law Journal* 1—and was challenged at the European level, with the European Court of Justice finding an interference with the right to non-discrimination and referring the case back to the UK High Court to justify the legitimacy of the aim: see *R (on behalf of the Incorporated Trustees of the National Council on Ageing) v Secretary of State for Business, Enterprise and Regulatory Reform*, Case no C-388/07, 5 March 2009. In September 2009, Mr Justice Blake in the UK High Court deemed the Regulations proportionate, and so lawful, based on the policy environment in place when they were adopted in 2006, so giving the Government some breathing-space to review its policy. For a critique of the Employment Equality (Age) Regulations which describes the UK model as weaker than US, Canadian and Australian counterparts, see R Filinson, 'Age Discrimination Legislation in the UK: A Comparative and Gerontological Analysis' (2008) 23 *Journal of Cross-Cultural Gerontology* 225; for the arguments against mandatory retirement, see PA Lawrence, 'Retiring Retirement' (2008) 453 *Nature* 588.

[23] See, eg, Department for Business Innovation and Skills, *Phasing out the Default Retirement Age: Government Response to Consultation* (London, BIS, January 2011); available online at <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/p/11–536-phasing-out-default-retirement-age-government-response.pdf>.

it impracticable to continue working, the shift from income generation through employment to decreased opportunities for future earnings will continue to feed the need to release housing equity. Furthermore, those who are no longer earning a regular salary are likely to suffer particular harm from disadvantageous financial transactions, when compared, for example, to younger owners who have a greater opportunity to 'recover' from a financial setback[24]—in the terminology of bankruptcy, to have a 'fresh start'.[25]

Chapter two places the housing equity transactions of older owners in their political and policy contexts, while chapters three and four explore the range of risks associated with home equity transactions for older owners, locating these risks within the sensitising framework of risk theories and considering the older owner first as a risk subject and then as a legal subject. Chapter five considers the intersection of a range of competing demands on the older owner's home: as *investment* to yield capital or income for various activities, from lifestyle wants to welfare needs, property maintenance to payment for long-term care; as *housing*, both for the older owner and as housing stock; and as *inheritance* to pass wealth to the next generation. Chapter six builds on these contextual analyses to consider the arguments surrounding the recognition of older (marginal) owners as 'vulnerable' in the context of housing equity transactions, and so in need of 'special protection'. The legal frameworks that regulate housing equity transactions—which range from trading down and 'ordinary' secured and unsecured debt to specialised housing equity products—are analysed in chapters seven to ten. In conclusion, the issues raised in the book are reviewed through a lens of risk and responsibility, to evaluate the appropriateness of the current approaches for marginal older owners and to reconsider law's role in responding to new types of risk related to housing equity use for older owners.

(2) Ageing Owners: the Demographic Context

In 1999, Paul Wallace published the book *Agequake: Riding the Demographic Rollercoaster Shaking Business, Finance and our World*,[26] which highlighted the implications of the unprecedented global population dynamics that have created an 'ageing society'. Falling birth rates, resulting from control over fertility and the tendency to have smaller families, and rising life spans due to advances in health and medical care,[27] have led to population projections showing that

> [t]oday in the developed world, 15 percent of the population is elderly. By 2030, according to the latest UN projections, the share will be closing in on 25 percent; by 2050, it will be closing in on

[24] Notwithstanding the adverse consequences of mortgage default and the threat of repossession, discussed in L Fox, *Conceptualising Home: Theories, Laws and Policies* (Oxford, Hart Publishing, 2006) ch 3.

[25] See Insolvency Act 1986, s 281 on discharge of bankrupts for details of this legislative policy.

[26] Wallace, above n 10.

[27] 'Since World War II, life expectancy at birth has risen from around age 45 to 65—a greater gain over the past 50 years than over the previous 5,000. In the developed countries, it has risen from around age 65 to between 75 and 80. Life expectancy at older ages has also improved dramatically.': R Jackson, *The Global Retirement Crisis: The Threat to World Stability and What to do about it* (Washington DC, Centre for Strategic and International Studies, 2002) 10.