

2013

Book Review of Home Equity and Ageing Owners: Between Risk and Regulation by Lorna Fox O'Mahony

Stephanie Ben-Ishai

Osgoode Hall Law School of York University, sbenishai@osgoode.yorku.ca

Source Publication:

Canadian Business Law Journal. Volume 53 (2013), p. 465.

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Recommended Citation

Ben-Ishai, Stephanie. "Book Review of Home Equity and Ageing Owners: Between Risk and Regulation by Lorna Fox O'Mahony." *Canadian Business Law Journal* 53 (2013): 465.

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53 CBLJ 465 - BOOK REVIEW: HOME EQUITY AND AGEING OWNERS BETWEEN RISK AND REGULATION

Home Equity and Ageing Owners Between Risk and Regulation , by Lorna Fox O'Mahony (Oxford, U.K., Hart Publishing, 2012, xxi, 389 pp., £110)

It is not surprising that the fastest growing group in Canada --- older adults ¹--- has attracted considerable attention by legal academics and law reformers in recent years. However, a limited amount of this attention has been directed at the regulation of financial services and products offered to older adults, especially home equity related transactions. The issues raised by older adults' use of home equity touch on broader questions about income, financial management strategies, attitudes to inheritance, as well as political issues that have been the focus of the recent American presidential debates --- pensions, healthcare, housing and welfare support.

In Canada, the demographic and socio-economic context of home equity use can be described simply as follows. Many older adults own significant assets but see a drop in their income. For example, the Law Commission of Ontario's recent report on the law as it affects older adults highlights the number of older adults living in privately owned homes. ²The Older Adults Framework notes that 93% of Canadians aged 65 and older live in private households. ³In most of these cases, older adults own their own homes. However, the Older Adults Framework also highlights that older adults are disproportionately "house rich but cash poor" because they generally live on a fixed income. The source of this fixed income may be subject to political or economic risk. Accordingly, older adults may turn to their home equity to raise capital or income to supplement government transfers, pensions or other savings. Three possibilities exist for cashing in on home equity: trading down and buying a lower value home or renting; ordinary debt secured by the home; or home equity products specifically targeted at older adults such as reverse mortgages.

In the Canadian context, little has been written from a legal perspective about this emerging trend of older adults cashing in on

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home equity. To this end, a recent English monograph is a welcome addition to the literature on over-indebtedness that will undoubtedly inform future Canadian research on the economic well-being of older adults as well as the regulation of the relationship between older adults and financial institutions.

In *Home Equity and Ageing Owners Between Risk and Regulation* , Lorna Fox O'Mahony --- a Professor of Law at Durham Law School --- focuses on the socio-legal aspects of debts attached to the owner-occupied home of older adults, with specific attention given to the use of the owned home as a repository for capital in retirement. O'Mahony considers whether the current legal approaches used in the United Kingdom to regulate and remedy home equity transactions are appropriate in light of the particular risks and vulnerabilities associated with housing equity transactions for older adults. *Home Equity and Ageing Owners Between Risk and Regulation* is structured around three main themes: risk society, older adult as legal subject, and law's response. Each theme is considered in turn in the sections that follow.

1. Risk Society

The first thematic aim of the book is to contextually examine housing equity transactions of older owners through the lens of a risk society. O'Mahony uses the concept of "risk" as a theoretical framework to develop a legal framework for determining who is responsible for adverse outcomes in housing equity transactions. She describes a socio-economic and political environment of ageing where many older adults have no choice but to engage with some form of risk in relation to use of home equity after retirement. The risks can be both positive and negative. Positive aspects include lifestyle, better quality of life and avoiding poverty in old age and the negative are those generally associated with credit market participation. O'Mahony identifies potential responsible candidates for the negative consequences of this risk as including: the older adult, their families, the creditor and/or the state. A range of approaches may be used to determine the appropriate candidate or candidates for risk allocation --- for example, who is best able to absorb the risk at any given point in time given the particular vulnerabilities of the participants involved? O'Mahony's risk-based approach brings the value judgments on the economic and social policy aims underlying a

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given legal system to the forefront of the analysis. For example, one such value judgment is the expectation that people save for their old age through home ownership in their lifetime.

2. Older Adults as Legal Subject

O'Mahony's second thematic aim is to explore the status of older adults as vulnerable subjects, and the corresponding responsibilities imposed by the law on market actors for the risks associated with home equity. The use of a risk society as a theoretical framework brings into focus the importance of the model of legal subjectivity that dominates law and policies in a particular context. On this basis, O'Mahony aims to understand the significance of competing characterizations of the older adult as a legal subject for the parameters within which the law on home equity is formulated, applied and critiqued. A clear tension is identified here between neo-liberal ideals and expectations of older adults and their experiences as vulnerable consumers who face a high level of risk in home equity transactions. O'Mahony identifies how liberal legal theory --- which tends to dominate the law governing private transactions (primarily contract and property law) has characterised older adults as individualised, self-responsible consumers and risk subjects. The homogenous characterization of older adults is unpacked and research from the United Kingdom is used to demonstrate that the cultural capital --- knowledge and financial proficiency --- needed to act as an individually self-responsible, active subject, is spread unequally among the population. Further, this characterization of older adults and its commitment to autonomy and choice has been challenged by critical discourses within private law and also by the growing sphere of regulation over housing equity transactions.

3. Law's Response

The final aim of *Home Equity and Ageing Owners* is to consider how law, through a combination of contract and consumer credit law (for example, the Unfair Terms in Consumer Contract Regulations), ⁴through the Financial Service Authority's (FSA) regulatory regime, through property law and through the equitable remedies of undue influence and the unconscionable bargain has

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provided legal protections for older adults in the context of home equity transactions in the United Kingdom.

O'Mahony documents encouragingly the increased FSA regulatory responsibilities for specified housing equity products. The FSA, through statutory rules and guidance for good practise, has focused on disclosure and suitability requirements. The regime has also operated to build consumer confidence in "safe" housing equity products targeted at older adults. O'Mahony suggests that the FSA's regulatory response effectively displaces the neo-liberal idea of the older adult and harnesses the framework of a risk society. However, the FSA regulations are still based on the "typical" older adult consumer and to this end do not provide necessary legal protection for more vulnerable older adult consumers who are likely to have less financial cushioning to fall back on and for whom the measure of adverse impact could be more significant. In particular, risk remains highest with respect to inappropriate equity release products; high charge/costs; and emotional/psychological harm resulting from equity release transactions.

O'Mahony is less optimistic about the role that private law can play. Relief under these heads, as is always the case but more significant in this context, depends on the older person's willingness and capacity to pursue litigation. However, O'Mahony does suggest a significant role to be played by private law both in the context of the specific circumstances when it applies and also with respect to the bigger picture of how older adults are characterised as legal subjects. She is particularly optimistic about the possibility suggested by recent equitable doctrine decisions where the English courts have shown a willingness to shift from an individual conduct model toward a transactional risk approach of undue influence. Contract law, on the other hand, has been slower to move away from the classical commitment to freedom of contract. However, there is a growing European contract law movement and critical contract law theory movement that is more consistent with the challenge to the construction of the legal subject that O'Mahony sets out. That is, contract law which allows for a consideration of the contextual constraints when some parties "choose" to enter into transactions and the specific vulnerabilities and responsibilities of contracting parties.

Professor O'Mahony concludes with the hope that *Home Equity and Ageing Owners Between Risk and Regulation* will be instructive in "the conceptualisation of older owners as legal subjects and the

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adequacy of the legal frameworks within which they participate in housing equity transactions, with potential implication for the development of a more responsive and realistic model of the (older) consumer as vulnerable legal subject." ⁵She has most certainly succeeded in this goal and has provided a welcome blueprint for beginning this thinking in the Canadian context and beyond.

Stephanie Ben-Ishai *

ENDNOTES

¹ "Older adult" is defined as over 65 years of age for the purpose of this review.

² See Law Commission of Ontario, *A Framework for the Law as It Affects Older Adults: Advancing Substantive Equality for Older Persons through Law, Policy and Practice* (Toronto, April, 2012) ("Older

Adults Framework”). This publication is available online at <<http://www.lco-cdo.org/en/older-adults-final-report4>>.

3 Ibid., at p. 37.

4 The Unfair Terms in Consumer Contracts Regulations 1999, S.I. 1999/2083.

5 O’Mahony, at p. 383.

* Associate Professor, Osgoode Hall Law School, York University.