

PROPERTY

A just claim?

Can a trustee in bankruptcy be entitled to claim an occupation rent from an occupying co-owner? Mark Pawlowski investigates



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'Pre-1996 case law tended to award an occupation rent as a matter of course in cases where there had been a breakdown of the relationship and one party had left the joint home with no prospect of return.'

The modern law of equitable accounting makes clear that the payment of an occupation rent (essentially, compensation for the loss of the benefit of being able to live in jointly owned property) is no longer dependent upon the requirement of an ouster by the occupying co-owner. The obligation to make such payment is now based primarily on an application of the statutory criteria set out in the Trusts of Land and Appointment of Trustees Act 1996 (the 1996 Act). Only where the Act is not applicable will the court resort to its equitable jurisdiction of ordering an occupation rent so as to do 'broad justice' between the parties.

This was the approach taken by Blackburne J in the recent case of *French v Barcham* [2008], which involved a claim for an occupation rent by the husband's trustee in bankruptcy. The case forms the basis of this article.

Statutory background

Section 13(3) of the 1996 Act gives co-owners (as trustees of land) the power to impose reasonable conditions on the occupier, including the payment of outgoings or expenses in respect of the land and compensation to a person whose right to occupy has been excluded or restricted (s13(5) and (6)). In addition, the court has wide powers (under s14) to make a variety of orders in relation to the exercise by the trustees of any of their functions including declaring the nature or extent of a person's interest, having regard to a number of factors, which are listed in s15(1). These include:

- the intentions of the persons who created the trust;
- the purpose for which the property is held;

- the welfare of any children occupying the property; and
- the interests of any secured creditor or any beneficiary.

The upshot of this is that the court is no longer concerned only with considerations relevant to achieving justice between the parties (as under the pre-1996 case law), but must consider (in achieving a just result) the various criteria set out in s15.

Application of statutory criteria

It is against this statutory background that brief mention may be made of *Stack v Dowden* [2007] and *Murphy v Gooch* [2007] (for more on which, see my earlier article in *FLJ*69, p12). It will be recalled that in *Stack* the majority of the House of Lords refused to grant an order requiring Miss Dowden to pay her outgoing partner (Mr Stack) an occupation rent on the ground that her children needed to remain in the family home until the property was sold. She had the conduct of the sale and there was no suggestion that she was delaying this or otherwise acting obstructively.

In *Murphy*, which again involved an unmarried couple, Lightman J held that Miss Murphy's claim for an occupation rent was not barred simply because she was not excluded from the home by her former partner. The principle was that the court could order credit for occupation rent if it was just to do so regardless of whether there was proof of ouster. Applying the statutory criteria set out in s15 of the 1996 Act, his Lordship ordered that Miss Murphy was entitled to a set off (by way of an occupation rent) against all the costs, expenses and outgoings met by Mr Gooch during the whole period of his sole occupation of the parties' former home.

Most recently, in *Rahnema v Ansari* [2008] the court, applying *Murphy*, ordered the payment of an occupation rent by the former wife (who remained in the property with her mother) in order to do 'broad justice between the parties'. Interestingly, both parties accepted in this case that the criteria set out in s15 of the 1996 Act had no significance to the facts, so the court was inevitably thrown back on its equitable jurisdiction to do what was just in the circumstances.

Significantly, all three cases illustrate the trend of the earlier (pre-1996) case law of awarding an occupation rent as a matter of course in cases where there had been a breakdown of the relationship and one party had (for all practical purposes) left the joint home with no prospect of return, leaving the other co-owner in sole occupation thereof.

Earlier cases

Do the same principles apply where the applicant is not a former partner or spouse but a trustee in bankruptcy acting on behalf of the non-occupying owner? The case law prior to the 1996 Act suggested that the more relaxed approach towards charging an occupation rent between parties also applied in the specific context of a partner's bankruptcy.

Thus in *Re Byford* [2003] the court ordered the payment of an occupation rent in favour of the husband's trustee in bankruptcy despite there being no marriage breakdown or ouster. Lawrence Collins J held that it was enough that the trustee in bankruptcy could not reside in the property or derive any financial benefit from it while the wife remained in occupation. Although the trustee could have exercised his remedies (eg of sale) earlier, the fact that he had not done so benefited the wife

considerably by allowing her to have continued use of the property with her husband. His Lordship said:

What the court is endeavouring to do is broad justice or equity as between co-owners... [The] fact that there has not been an ouster or forcible exclusion is not conclusive.

Significantly, although there was nothing to prevent the trustee from

equitable share vested in his trustee in bankruptcy who (some 12 years later) applied to the court for an order for sale of the home. The primary issue was whether the trustee was entitled to set off against the wife's claim for outgoings on the property a sum for her occupation of the premises since her husband's bankruptcy. The problem was that the trustee was not a beneficiary who was entitled to occupy land within the meaning of s12 of the 1996 Act and, therefore, was not

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applying to realise the property, this did not alter the fact that, from a realistic point of view, he could not occupy the premises himself.

The French case

Despite the fact that the ruling in *Re Byford*, above, has been criticised academically as extending equitable accounting to 'a virtual presumption that equity requires the payment of occupation rent to a trustee in bankruptcy' (see N Berry, (2005) *NLJ* 486, at 487) the continuing judicial trend is to allow the trustee to charge an occupation rent on the basis that they cannot reasonably be expected to exercise a right of occupation while the other beneficiary remains in residence.

In *French* the family home (comprising a semi-detached bungalow) had been acquired by the parties as beneficial tenants in common in equal shares. Following the husband's bankruptcy, his

eligible to any compensation under s13(6) of the Act.

In Blackburne J's view, there was a short answer to this problem. The 1996 Act did not provide an exhaustive regime for compensation for the exclusion of a

Re Byford
[2003] EWHC 1267 (Ch)
Dennis v McDonald
[1982] Fam 63
French v Barcham
[2008] EWHC 1505 (Ch)
Murphy v Gooch
[2007] EWCA 603
Re Pavlou
[1993] 1 WLR 1046
Rahnema v Ansari
(Unreported, 20 March 2008)
Stack v Dowden
[2007] UKHL 17

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beneficiary from occupation of property held subject to a trust of land. In his Lordship's words:

Where the scheme applies, it must be applied. But where it plainly does not I do not see why the party who is not in occupation of the land in question should be denied any compensation at all if recourse to the court's equitable jurisdiction would justly compensate him.

Statutory jurisdiction applies only where the co-owner claiming occupation rent is excluded from a property that they would otherwise be entitled to occupy.

The statutory power to award compensation (under s13(6)) was only exercisable as a condition to be imposed on the occupying beneficiary in relation to their occupation of the property in question. An essential prerequisite here was the entitlement (under s12) of the beneficiary claiming compensation to occupy the property at any time by reason of that interest. In other words, what triggered the award of compensation was the exclusion or restriction of that interest. A trustee in bankruptcy, on the other hand, had no right of occupation and so there was no scope for the operation of s13.

Although there was not entitlement under the 1996 Act, this did not, however, preclude the trustee from charging the wife an occupation rent under the court's equitable jurisdiction. The governing principle here was that, if there was some reason why the co-owner was not in occupation and it would be unreasonable (from a practical point of view) to expect that co-owner to take occupation of the property, it would normally be fair and equitable to charge the occupying owner an occupation rent. In the instant case, it was not reasonable to expect the trustee in bankruptcy to exercise his right of occupation and, consequently, it was proper to order the payment of compensation. The result was that, on a sale of the home, the wife's half-share in the property would be reduced by a sum equal to one-half of the land's letting value from the time of the husband's bankruptcy.

Exceptions

In *French* Blackburne J suggested that there may be circumstances in which the

payment of an occupation rent would not be justified. For example, the occupying co-owner may have been given to understand by the trustee in bankruptcy that no rent would, in fact, be payable during the relevant period of occupation. Alternatively, the co-owner in occupation may have no knowledge (or no means of discovering) the other co-owner's bankruptcy. Short of such circumstances, however, Blackburne J

was of the view that there is no reason why the occupying owner should not be charged an occupation rent.

Conclusions

In *Stack* Baroness Hale opined that the statutory powers under the 1996 Act had now replaced the doctrine of equitable accounting. In her view:

... the criteria laid down in the statute should be applied, rather than in cases decided under the old law.

In *French*, however, Blackburne J was keen to emphasise that these remarks had been made in the specific context of a case where both parties had a right of occupation of the family home. They did not, therefore, govern the situation where (as in *French*) one of the parties had no statutory right of occupation. Similarly, in Blackburne J's view, Lord Neuberger in *Stack* had been equally careful to emphasise that the statutory jurisdiction applies only where the co-owner claiming the occupation rent has been excluded from the property that they would otherwise be entitled to occupy. There is, therefore, no inconsistency in these decisions.

As to the applicability of the doctrine of equitable accounting where the claim for an occupation rent is brought by a trustee in bankruptcy, the ruling in *French* reiterates the current judicial trend of not insisting strictly on an ouster to justify an entitlement to equitable compensation. In *Dennis v McDonald* [1982], Purchas J concluded that the occupying co-owner would only be free of any liability to pay an occupation rent if the outgoing owner was in a position to enjoy the right to occupy but voluntarily chose not to do so. This approach was followed in *Re Pavlou* [1993], where Millett J felt that, in the context of a matrimonial home where the relationship had ended, the party who leaves will, in most cases, be regarded as excluded from the home. But again, even in this context, if the outgoing partner leaves voluntarily and would be welcome back so as to enjoy their right to occupy, then it would not be equitable to demand an occupation rent. Similarly now in *French*, Blackburne J has expressed a view that:

... if there is some reason why [a] co-owner is not in occupation and it would be unreasonable in the circumstances for him to take up occupation fairness requires the occupying co-owner to compensate the other for the fact that the one has enjoyment of the property while the other does not.

It seems, therefore, that the previous concept of 'ouster' has now given way to a wider notion of 'reasonableness of occupation' – the question now is whether, in all the circumstances, it is reasonable for the non-occupying owner to exercise their right as a co-owner to take up occupation of the property. This move away from a narrow concept of exclusion is to be welcomed as providing an important element of flexibility (as illustrated by *French* itself) in awarding equitable compensation in cases which, strictly speaking, fall outside the statutory ambit of the 1996 Act. ■

Key points

- The Trusts of Land and Appointment of Trustees Act 1996 does not provide an exhaustive code for claiming an occupation rent against an occupying co-owner of land.
- Although a trustee in bankruptcy cannot establish such a claim under the 1996 Act, this did not preclude them from seeking an occupational rent under the court's equitable jurisdiction.
- If it is not reasonable to expect the trustee to exercise a right of occupation, it will be fair to charge the occupying co-owner an occupation rent.