

## **Occupation Rent, Co-owners and Bankruptcy**

*Mark Pawlowski examines the principles to be applied in claiming an occupation rent by a co-owner or his trustee in bankruptcy*

The obligation to make a payment for occupation rent (essentially, compensation for the loss of the benefit of being able to live in jointly owned property) is now based primarily on an application of the statutory criteria set out in the Trusts of Land and Appointment of Trustees Act 1996 - 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.

### **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: s.13(5) and (6). In addition, the court has wide powers (under s.14) to make a variety of orders in relation to the exercise by the trustees of any of their functions or declaring the nature or extent of a person’s interest having regard to a number of factors which are listed in s.15(1). These include (1) the intentions of the persons who created the trust (2) the purpose for which the property is held (3) the welfare of any children occupying the property and (4) 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 s.15.

### **Earlier case law**

It is apparent from earlier decisions that liability to pay an occupation rent is not restricted to the so-called “ouster” cases in which a marital association has broken down and one party is deliberately driven out from the family home. Thus, in *Re Pavlou*, [1993] 1 WLR 1046, at 1050, Millett J, following the observations of Purchas J in *Dennis v McDonald* [1982] Fam 63, at 71, concluded that an inquiry into the payment of an occupation rent could be made in any case where it was necessary to do broad justice or equity as between the parties. In his view, a “forceful exclusion” was by no means conclusive and, in the context of the matrimonial home where the marriage had ended “the party who leaves the property will, in most cases, be regarded as excluded from the home, so that an occupation rent should be paid by the co-owner who remains.” Thus, in his Lordship's view, the presentation of a divorce petition by the occupying spouse would normally be enough to signify a refusal to take the outgoing partner back into the matrimonial home and, therefore, a willingness

to pay an occupational rent from the date of its issue. On the other hand, such a liability would be inappropriate in circumstances where a spouse has left voluntarily and would be welcome back by the occupying partner so as to be able to enjoy their right to occupy.

This more relaxed approach is also evident in *Re Byford* [2003] EWHC 1267 (Ch), where 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. Similarly, in *Murphy v Gooch* [2007] EWCA 603, the parties (an unmarried couple) had bought a house as their family home in 1991. Two years later, their relationship broke down and Miss Murphy left the property. Since then, Mr Gooch had made all payments under the mortgage, rent paid to a housing association (which owned a share in the property) and payments under a mortgage policy. The main issue was whether Miss Murphy's claim for an occupation rent was barred by reason of an absence of any ouster from the premises. On this point, Lightman J (giving the judgment of the court) concluded that a court could order credit for occupation rent if it was just to do so, regardless whether there was proof of ouster. In reaching this conclusion, his Lordship was mindful of the earlier cases, notably, *Pavlou* and *Byford*, which made it clear that "an occupation rent may be ordered in any case where this is necessary to do broad justice or equity between the parties". Applying the statutory criteria set out in s.15 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.

### **Bankruptcy 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 *Byford*, mentioned earlier, 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 (e.g., 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 stated, at [40]:

“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”.

In *French v Barcham* [2008] EWHC 1505 (Ch), 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 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 s.12 of the 1996

Act and, therefore, was not eligible to any compensation under s.13(6) of the Act. In Blackburne J's view, however, there was a short answer to this problem. The 1996 Act did not provide an exhaustive regime for compensation for the exclusion of a beneficiary from occupation of property held subject to a trust of land. In his Lordship's words, at [20]:

“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.”

The statutory power to award compensation (under s.13(6)) was only exercisable as a condition to be imposed on the occupying beneficiary in relation to his occupation of the property in question. An essential prerequisite here was the entitlement (under s.12) 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 s.13.

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, in his Lordship's view, 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 was reduced by a sum equal to one-half of the land's letting value from the time of the husband's bankruptcy. Blackburne J also 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, his Lordship was of the view that there would be no reason why the occupying owner should not be charged an occupation rent.

Significantly, however, in *Davis v Jackson* [2017] EWHC 698, Snowden J adopted a different approach. In his Lordship's view, the default position when one co-owner was in occupation and the other was not, was that occupation rent was not payable - there had to be some conduct by the occupying party, or at least some other feature relating to that party, to justify a court of equity concluding that it was appropriate or fair to order an occupation rent. The unusual facts of the case, however, made it readily distinguishable from other cases as the bankrupt husband never had, nor had he been intended to have, any right of occupation of the property at all and there was no agreement or expectation that the wife would have to pay rent to anyone for her occupation of it. It could not be in accordance with equity or justice, therefore, for the trustee, who had simply had the husband's interest vested in him, automatically to

become entitled to claim an occupation rent from the wife. Indeed, to charge the wife an occupation rent would represent an unjustified windfall for the creditors.

The point has also been addressed most recently in *Ali v Khatib* [2022] EWCA Civ 481, where the Court of Appeal concluded that the starting point in every case was that a co-owner in occupation was not obliged to pay occupation rent merely because he was living in the property and the other co-owner was not. Something more had to be shown to make it just and equitable for him to pay, for example, if he was exploiting the property for his own financial gain or preventing the other co-owner from exercising a right of occupation. Interestingly, the approach taken in *French*, notably, that there was a presumption in favour of an occupation rent becoming payable, was rejected. In the words of Asplin LJ, at [63]-[64]:

"Whilst I agree that [the] cases . . . have moved away from any need to show forcible or active exclusion as a requirement for rent to be paid, I do not think that they have moved as far as Blackburne J suggested . . . the default position where a trustee in bankruptcy is not in occupation and the co-owner is in occupation should be that no occupation rent is payable. But because it would invariably be unreasonable for a trustee in bankruptcy to seek to take up occupation, Blackburne J's approach would have the result, as a virtually immutable rule, that an occupation rent should be payable. It therefore seems to me that the effect of Blackburne J's approach is to reverse the default position in any case involving a trustee in bankruptcy. It also seems to me that Blackburne J's approach excludes the possibility of the court having any regard to the position that existed prior to the bankruptcy, or to the conduct or circumstances of the non-bankrupt party."

In endorsing the approach taken by Snowden J in *Davis*, the Court of Appeal concluded that the fact that a trustee in bankruptcy cannot reside in the property, nor enjoy any financial benefit from it, whilst the other co-owner is in occupation and the creditors can derive no benefit until the trustee exercises his remedies, is not conclusive of the right to claim an occupational rent. As Snowden J explained in *Davis*, at [69], it may not always be the case that the creditors should be compensated for any delay in obtaining an order for sale. In a rising market, they may benefit from that delay as a result of an increase in the value of the property. Moreover, there is nothing to suggest that a co-owner, or that person's trustee in bankruptcy, must be blameworthy in relation to the delay before its effects can be taken into account.

## **Conclusion**

It is apparent that the starting point in every case is that a co-owner in occupation is not obliged to pay occupation rent merely because he is living in the property and the co-owner is not. The decision in *Ali* makes it clear that something more has to be shown which makes it just and equitable that he should pay the other owner for his use and occupation of the property. There may be all kinds of scenarios in which it is reasonable for a co-owner of property not to exercise his right of occupation, but it does not follow that this automatically provides justification for making the co-owner who is in occupation of that property pay him rent. Ultimately, the question for the court is what fairness requires on the facts of each individual case.

### **Points for the practitioner**

1. The court may order payment of an occupation rent regardless of whether there is proof of ouster.
2. The court is required to do broad justice between co-owners and to determine what would be fair on the facts of each case.
3. 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.
4. Although a trustee in bankruptcy cannot establish such a claim under the 1996 Act, this did not preclude him from seeking an occupational rent under the court's equitable jurisdiction.
5. There is no special rule in bankruptcy cases. The case of *French v Barcham* is best regarded as turning on its own particular facts and not as laying down any principle of wider application. Ultimately, the question for the court is what fairness requires on the facts of the individual case.
6. The default position when one co-owner was in occupation and the other was not, was that occupation rent was not payable - there has to be some conduct by the occupying party, or at least some other feature relating to that party, to justify a court of equity concluding that it was just and equitable to order an occupation rent.

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