OCCUPATION RENT

Trusts of land: What justifies the award of occupation rent?

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John Sharples outlines a case that clarifies occupation rights

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In what circumstances can a beneficiary of a trust of land who does not occupy it claim occupation rent from a beneficiary who does? And what factors can a court take into account in deciding whether to order one? The Court of Appeal in *Ali v Khatib* [2022] provides helpful guidance on both issues.

Background

Is an occupation rent the correct claim?

It is important as a first step to ask whether the occupier is one against whom occupation rent can be ordered. Occupation rent is a form of equitable account between beneficiaries. However, it is only claimable against a beneficiary who has an interest in possession and has occupation rights (applying the statutory test in s12 Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996)). If they do not, it is not the appropriate remedy, which is – assuming the person do not have the trustees' permission to be there – a claim for damages for trespass, which should be brought by the trustees: *Creasey v Sole* [2013]. For example, until the claims against a testator's estate for debts, legacies, testamentary expenses etc have been met, a residuary beneficiary does not have an interest in the assets that may comprise the residue: *Barnardo's Homes v Special Income Tax Commissioners* [1921]. And so they are not liable to pay occupation rent for having occupied one of those assets until the residue is ascertained.

The two jurisdictions to award an occupation rent

If the correct remedy is occupation rent, the next issue is: on what basis should it be claimed – under statute or the court's equitable jurisdiction? These are mutually exclusive. Where the circumstances in s13(3) TOLATA 1996 apply, the court must apply the statutory scheme: see *Stack v Dowden* [2007]; *Murphy v Gooch* [2007]. That is, where one beneficiary has a right to occupation of land but the trustees, acting *as such*, have excluded them. In the more usual circumstances – where partners hold land on trust for themselves and one of them either vacates as a result of their relationship ending or goes bankrupt,

and occupation rent is claimed retrospectively from then until their interest is realised – the equitable jurisdiction continues to apply: see *French v Barcham* [2008]; *Davis v Jackson* [2017].

Similarities and differences between the two

Where the statutory jurisdiction applies, the trustees' powers under s13(3) – and the court's powers to direct how they should be exercised under s14(2) – are subject to three main limits. First it seems they can only be exercised prospectively (*French*). That is, occupation rent can only be claimed from the date when those powers are exercised. This contrasts with the court's equitable jurisdiction. Second, these powers must not be exercised so as to prevent an occupying beneficiary from continuing to occupy or in a manner likely to result in them ceasing to do so unless they consent or the court orders otherwise. Third, they must be exercised having regard to the list of (non-exclusive) factors set out in s13(4) (trustees) and s15(1) and (2) (court).

Despite first impressions, however, there is much common ground between the two jurisdictions. First, in either case occupation rent can only be awarded against an occupying beneficiary who has a right of occupation. Second, even when exercising its equitable jurisdiction, the court should take into account the statutory factors in s13(4) and s15(1)-(2): *Amin v Amin* [2009]. And so, as Lord Neuberger said in *Stack:*

> *… it would be a rare case where the statutory principles would produce a different result from that which would have resulted from the equitable principles.*

The threshold requirements

That said, the trigger for liability is different: under s13(1) TOLATA 1996 there must be an exclusion or restriction of a beneficiary's right of occupation. The position in equity is more complex. In cases of relationship breakdown, actual or constructive ouster was originally thought to be essential: see *Dennis v McDonald* [1982]. However, in cases where one partner has gone bankrupt and their share vests in their trustee, it has been said that a court of equity will order the other occupying partner to pay occupation rent where that is necessary to do equity between the parties: see *Re Pavlou* [1993]*; Murphy*. So, for example, an occupation rent can be ordered in the trustee's favour even if the bankrupt former-beneficiary continues to occupy the property with their partner.

In *French* the court rejected the argument that the trustee could claim an occupation rent (only) if the bankrupt former-beneficiary could have done so. The trustee's entitlement had to be considered on its own merits and (at 34):

> *… when on inquiry it would be unreasonable, looking at the matter practically, to expect the co-owner who is not in occupation to exercise his right as co-owner to take occupation… for example because of the nature of the property or the identity and relationship to each other of the co-owners, it would normally be fair or equitable to charge the occupying co-owner an occupation rent.*

So in claims by trustees (at 35):

> *… application of the principle will ordinarily, if not invariably, result in the occupying co-owner having to account to the trustee… for an occupational rent.*

However at (61) in *Davis* Snowden J (as he was then) said he did 'not find this analysis entirely convincing'. He reiterated that the default position is that an occupation rent is not payable. Nor is it sufficient merely that one beneficiary is in occupation and the other is not. He considered that while *Re Pavlou* and *Dennis* had moved away from the need to show forcible or active exclusion, they had not gone as far as *French* suggested. There:

> *… had to be some conduct by the occupying party, or some other feature of the case, to justify a court concluding that it was appropriate or fair to depart from the default position…*

whereas *French* appeared to reverse this default position for claims by trustees and lead to a 'virtually immutable rule' that a trustee was entitled to one. However, Snowden J did not feel it necessary to reach a conclusion because the unusual facts in *Davis* made it distinguishable from *French*.

The court in *Ali* has now clarified the law by preferring the approach in *Davis* to that in *French*.

Discretion

Where the threshold for an award is met the court may – not must – order one. The court has a broad equitable jurisdiction to do justice between the beneficiaries. In particular there may be discretionary factors militating against an award. For example, if the occupying co-owner was given by the other to understand that no occupation rent would be charged – or if the parties never intended the claiming beneficiary to occupy the property: see *Chhokar v Chhokar* [1983]; *Davis*. And there is a legitimate expectation that a bankrupt beneficiary's interest will be realised quickly and this will often justify awarding occupation rent against the other beneficiary if they resist a sale:

> *… [t]hat may not always be the case e.g. if the property market is rising, the trustee may benefit from a delay especially if he has also not had to contribute to payment of the mortgage.*

Also, if the amount of rent broadly equates to the mortgage payments which the occupying beneficiary is making, the court can simply decline to make an award instead of calculating each and then setting one off one against the other.

Calculating the amount

The rate of occupation rent is normally the letting value of the property during the period of occupation but sometimes it is the rent which the non-occupying beneficiaries have had to pay to accommodate themselves elsewhere. Against this, occupying beneficiaries are

entitled to credit for certain payments. The two most often encountered are mortgage payments (at least as regards capital but sometimes also interest) and the cost of improvements undertaken to the property or the resulting increase in value, whichever is less. Once the net figure is calculated, the claimant's share is proportionate to their interest in the property: see *Akhtar v Hussain* [2012]. So a beneficiary with a quarter share of the equity is entitled to 25% of that amount.

Ali v Khatib [2022]

Facts

The parties were four siblings (C, D2, D3 and D4). Their late mother died in 2006 and under her 1997 will she left the residue, including the family home, to them equally. During her lifetime, all the siblings except D2 moved out and bought their own homes. D2 continued to live there with his wife, their children and, until 2006, his mother. In 2011 his mother's personal representatives transferred the house to D2 in the belief that he had inherited it under her 2003 will. However that will was declared invalid in 2014 although legal title remained vested in him. On D2's death in 2012 his wife and children continued to live there. In 2019 C sought an order for sale and occupation rent from D2's estate (and, oddly, his wife who was a stranger to the trust). The following year, D2's wife, D3 and D4 agreed to buy out C's share for £80,000 which, on the evidence, was about 50% more than it was worth at the time and about double what C would have received had the property been sold on the open market in 2010. On the facts, C's share of the sum claimed for occupation rent was roughly equivalent to the latter increase. C died in March 2020 and his estate was represented by his son.

The decision below

At the trial C's estate accepted D2 had occupation rights and that one of the purposes of the trust was to house him and his family pending sale. However, the estate argued the circumstances were akin to a constructive ouster because the property was unsuitable to be occupied by both C's and D2's family at the same time and because relations between the siblings were poor. The trial judge however applied the guidance in *Davis* and decided C's estate had not made out a sufficient basis for an award; but, in any event, he would have declined to make one given what C's estate had received for his share (over and above what he might otherwise have received had it been sold earlier on the open market) compared to the sum claimed.

Appeal

C's estate appealed on various grounds. First, C's estate argued it was entitled to claim an occupation rent because D2 had no right of occupation as a mere residuary beneficiary of their late mother's will. Second, D2's wife was bound by the admission of liability to pay an occupation rent in the recital to the order giving effect to the agreement for sale of C's share. Third, C had been ousted because, among other things, D2 purported to occupy as the sole legal owner (as a result of the 2011 transfer) and not by virtue of his interest under his mother's will, by analogy with *Kingsley v Kingsley* [2020]. Fourth, the court should not have taken into account the increase in property value as C was not to blame for the delay, having done all he reasonably could to realise his interest earlier. Finally, it was

argued C's estate's position was analogous to that of a trustee in bankruptcy who, according to *French*, was ordinarily if not invariably entitled to an occupation rent.

The Court of Appeal decision and its implications

The Court of Appeal rejected each of these arguments and it is instructive to see why it did so, as the judgment contains useful guidance for other occupation rent claims, particularly as to the threshold test which claimants must meet.

First, the court held it was not open to C's estate to argue that D2 had no occupation rights, given the concessions it made below. Even if C's estate was correct, the proper claim would be damages for trespass, not an occupation rent. That had not been claimed and it would be unfair to allow C's estate to do so now, applying the recent guidance in *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs* [2020], as that would involve recasting the claim entirely. This finding illustrates the importance of properly analysing the nature of the occupying beneficiary's interest at the outset and seeking the proper relief (damages or occupation rent) on behalf of the proper claimant (trustees or beneficiary) for the correct amount.

Second, the apparently unqualified 'admission' in the recital in the order had to be read in light of the agreement, which said that it was without prejudice to C's entitlement to occupation rent 'if any'. The recital was held to be impliedly subject to the same qualification. This illustrates the need for practitioners to be careful in interpreting what appears, on its face, to be an admission of liability.

Third, *Kingsley* was not authority that a beneficiary who purports to occupy property in a different capacity necessarily excludes the other beneficiaries by doing so. In *Kingsley* there were two bases on which the occupier could have occupied: as beneficiary of the owner's estate or as the surviving partner who was winding up a partnership that had a licence to use the property. Only in the former case could she have been liable to pay occupation rent. The court in *Kingsley* held she was precluded from arguing she occupied in the latter capacity, having formally (and unqualifiedly) admitted she occupied on the former basis and was liable to pay an occupation rent. Those, however, were not the facts in *Ali*. The case illustrates that a mistaken assertion by a beneficiary of some other right of occupation does not necessarily amount to an ouster.

Fourth, the court decided that it was open to the lower courts to take into account increases in capital values when exercising their broad judgemental discretion whether to award occupation rent, even if the claimant was not at fault in failing to realise their interest sooner. The important point for practitioners to note is that even if there has been conduct or other circumstances otherwise warranting an award, other factors may justify the court in refusing to order one. And these factors can include the fact the claimant has benefited from the delay in realising their interest if that is the crux of the complaint.

Finally – and most importantly – the court clarified the circumstances in which occupation rent is payable. It rejected the argument that C's estate's position was analogous to that of a trustee in bankruptcy. And it held that the fact a trustee cannot reside in the property or enjoy any financial benefit from it while the other beneficiary remains in occupation is not conclusive in favour of an award. It noted that C's estate's argument, if correct, would mean that occupation rent would be payable in virtually every case. Whereas, the court

reiterated, the default position is that no rent is payable even in claims by trustees in bankruptcy. The mere fact one beneficiary is in occupation and the other is not, is not sufficient. Something more is needed, for example, if the occupying beneficiary is exploiting the property for financial gain or has precluded the other from exercising a right of occupation which (s)he wished to exercise. The court preferred the narrower casting of the threshold test in *Davis* to that in *French*. As Andrews LJ said at (72-73):

> *The focus should… be on the behaviour of the person in occupation. It follows it cannot be right a matter of principle that the obligation to pay occupation rent should turn on the reasonableness or otherwise of the behaviour of the non-occupying party in not occupying the property.*

At the end of the day, the court must do broad justice and decide what is fair.

Conclusion for practitioners

Ali then clarifies the law on what conduct or circumstances justify the award of occupation rent. It returns the law to orthodoxy by rejecting the more absorbent approach in *French* – which would have resulted in non-occupying beneficiaries being entitled to occupation rent in all (or virtually all) cases – in favour of the more focused analysis in *Davis*. It also illustrates that even if the threshold for an award is met, discretionary factors may militate against making one.

Cases Referenced

- Akhtar v Hussain [2012] EWCA Civ 1762
- Ali v Khatib & ors [2022] EWCA Civ 481 (to be reported in a future issue of the Wills and Trusts Law Reports)
- Amin & anor v Amin & ors [2009] EWHC 3356 (Ch); WTLR(w) 2010-01
- Barnardo's Homes v Special Income Tax Commissioners [1921] UKHL T/7/646
- Chhokar v Chhokar [1983] EWCA Civ 7
- Creasey & anr v Sole & ors [2013] EWHC 1410 (Ch); [2013] WTLR 931 ChD
- Davis v Jackson [2017] EWHC 698 (Ch); [2017] WTLR 495 ChD
- Dennis v McDonald [1982] Fam 63
- French v Barcham & anor [2008] EWHC 1505 (Ch); [2008] WTLR 1813 ChD
- Kingsley & anor v Kingsley [2020] EWCA Civ 297; [2020] WTLR 593 CA
- Murphy v Gooch [2007] EWCA Civ 603; [2008] WTLR 257 CA
- Re Pavlou (a bankrupt) [1993] 3 All ER 955
- Stack v Dowden [2007] UKHL 17; [2007] WTLR 1053 HL
- Test Claimants in the Franked Investment Income Group Litigation & ors v Revenue and Customs [2020] UKSC 47