

# EQUITABLE ACCOUNTING AND THE TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996

### **ZACHARY BREDEMEAR**

#### What is Equitable Accounting? 1

Equitable accounting is the use of the proceeds of sale of jointly owned property to meet certain personal obligations that have arisen between the owners.<sup>1</sup>

Equitable accounting has nothing to do with the calculating the proportion of the co-owners' beneficial interests.

Equitable accounting applies equally between tenants in common and joint tenants<sup>2</sup>.

Since the case of Stack v Dowden<sup>3</sup> it is clear that some matters which were formerly dealt with by way of an equitable account are to be determined under the Trusts of Land and Appointment of Trustees Act 1996 (TLATA).

3 [2007] 2 WLR 831

See E. Cooke, "Equitable Accounting" [1995] Conv. 391

<sup>&</sup>lt;sup>2</sup> See *In Re Pavlou* [1993] 1 WLR 1046

#### 2 Historical Background

The expression "equitable accounting" is of relatively modern usage.

Its origins, however, can be traced back to partition actions. Where the claim for partition was brought in the courts of equity the court would often order an account as to any sums due between the co-owners, for example, where one party had incurred expenditure on improvements or had occupied the property alone.

By the Partition Act of 1868 the courts were given a power to order a sale of the property so that the inconvenience of physical partition might be avoided. When such sales were ordered the courts continued to make orders for accounts to be taken<sup>4</sup>.

The Partition Acts were abolished in 1924 but accounts have continued to be taken when jointly owned property was sold e.g. under section 30 of the Law of Property Act 1925.

The effect of TLATA was to replace trusts for sale under the LPA 1925 with trusts of land. TLATA also provides a statutory code for dealing with the rights of the beneficiaries to occupy the property and their obligations to pay their co-owners for that occupation<sup>5</sup>.

#### 3 Common claims in an equitable account

Claims for an equitable account commonly arise in respect of the following matters

- Claims for an occupation rent where not all the co-owners are occupying the property
- Payment of mortgages or joint debts
- Expenditure on improvements or repairs
- Receipt of rent or other profits from the land

<sup>5</sup> See section 12 and 13

<sup>&</sup>lt;sup>4</sup> See e.g. *Hill v Hickin* [1897] 2 Ch. 579

#### 3.1 Occupation rent

# 3.1.1 Historical background of payments of occupational rents

At common law each co-owner had a right to possession of the entire property and could not be liable to pay for their occupation merely because one of them occupied the whole<sup>6</sup>.

However, a tenant in common could maintain an action in trespass and claim mesne profits where they were ousted by another tenant in common'.

In a partition action an account would often be ordered as to any occupational rent that was payable between co-owners<sup>8</sup>. It does not, however, appear that the occupying co-owner was required to account for his occupation unless:

- There had been an exclusion of one of the co-owners
- There was a contract by which he was required to account to the other coowners for his occupation
- The co-owner in occupation had received more than his "just share"

In Dennis v McDonald that the modern law of equitable accounting adopted the approach of the Court of Chancery in the partition actions. Purchas J. explained the position as follows<sup>10</sup>:

- Where one co-owner is occupying the property to the exclusion of one or more of the other co-owners, for whatever purpose or by whatever means, then if it is necessary to do equity between the parties an occupation rent should be paid
- In cases where the non-occupying party was able to enjoy their right to occupy the property but chose not to do so voluntarily and were not excluded by any relevant factor then no occupational rent would be payable

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<sup>&</sup>lt;sup>6</sup> See M'Mahon v Burchell (1846) 2 Ph. 127; 1 Coop.t.Cott 457 per Lord Cottenham L.C.

<sup>&</sup>lt;sup>7</sup> See Jacobs v Seward [1872] LR 5 HL 464 per Lord Hatherley at p472

<sup>&</sup>lt;sup>8</sup> See e.g. *Hill v Hickin* [1897] 2 Ch 579

<sup>&</sup>lt;sup>9</sup> [1982] Fam. 63 <sup>10</sup> at 71H-72B

More recent authorities explained that an occupation rent may be ordered where this is necessary to do broad justice or equity between the parties<sup>11</sup>.

#### 3.1.2 TLATA

TLATA contains the following provisions

- Section 12(1) gives a beneficiary who is beneficially entitled to an interest in land the right to occupy the land if the purpose of the trust is to make the land available for his occupation.
- Section 13(1) gives the trustees the power to exclude or restrict that entitlement, but under section 13(2) this power must be exercised reasonably.
- The trustees have power under section 13(3) to impose conditions upon the occupier including under section 13(5) paying any outgoings or expenses in respect of the land and under section 13(6) paying compensation to a person whose right to occupy has been excluded or restricted.
- Under section 14(2)(a), both trustees and beneficiaries can apply to the court for an order relating to the exercise of these functions.
- Under section 15(1), the matters to which the court must have regard in making its order include (a) the intentions of the person or person who created the trust, (b) the purposes for which the property subject to the trust is held, (c) the welfare of any minor who occupies or might reasonably be expected to occupy the property as his home, and (d) the interests of any secured creditor of any beneficiary.
- Under section 15(2) the court must also have regard to the circumstances and wishes of each of the beneficiaries who would otherwise be entitled to occupy the property

In Stack v Dowden the House of Lords decided that these statutory provisions replaced the doctrines of equitable accounting under which a beneficiary who remained in occupation might be required to pay occupation rent to a beneficiary who was excluded from the property.

<sup>&</sup>lt;sup>11</sup> See Byford v Butler [2004] 1 FLR 56 at p65 per Lawrence Collins J. E Zachary Bredemear, zbredemear@1chancerylane.com

Lord Neuberger suggested that it would be a "rare case" where application of the statutory principles would produce a different result from that which would have resulted from the application of equitable principles.

The difference between the two approaches was described by Lightman J. *Murphy* v *Gooch* as follows<sup>12</sup>:

"The wider ambit of relevant considerations means that the task of the court must now be, not merely to do justice between the parties, but to do justice between the parties with due regard to the relevant statutory considerations and in particular (where applicable) the welfare of the minor, the interests of secured creditors and the circumstances and wishes of the beneficiaries specified"

The facts and decision of *Stack v Dowden* suggests that the requirement to consider the welfare of minors may tip the balance against the award of an occupation in more than the "rare case". The court made an order for sale but the mother who occupied the property with her four children was not required to pay an occupational rent down to the date of sale because both parents were responsible for providing the children with a home<sup>13</sup>.

#### 3.1.3 Exclusion

A key question when considering an entitlement to an occupational rent for past periods will be whether any beneficiary has been "excluded or restricted" from occupying the land for the purpose of section 13(6) of TLATA. The previous cases on whether there had been an "exclusion" will remain relevant. In the context of a relationship that has broken down the following guidelines have been given<sup>14</sup>

- The fact that there has not been an ouster or forceful exclusion is far from conclusive
- In the context of a marriage the party leaving the matrimonial property will
  normally be treated as being excluded so that an occupational rent is payable
  by the remaining party

<sup>13</sup> Although Lord Neuberger dissented on this question

<sup>12 [2007]</sup> EWCA Civ 603 at para 14

These are taken from *In re Pavlou* [1993] 1 WLR 1046 per Millet J. at p1050

- if one co-owner has left voluntarily and would be welcome back then normally an occupational rent will not be payable
- The presentation of a divorce petition by the party remaining in the matrimonial home should normally be taken to signify a refusal to accept the return of the other party and a willingness to pay an occupational rent

These are only guidelines. Thus in a case where the husband was failing to pay mortgage instalments and make maintenance payments as ordered by the court no occupational rent was payable by the wife<sup>15</sup>.

### 3.1.4 Calculation of the occupational rent

Where an account was ordered in a partition action as to the occupation rent to be paid the court would determine a "reasonable rent" 16.

It is submitted that the occupational rent should be the relevant proportion of the market rent for the property or the cost of the alternative accommodation to the excluded co-owner<sup>17</sup>.

Where the market rent has changed over the period of time in respect of which the account is being taken different rates of occupation rent can be sought for different periods of time<sup>18</sup>.

#### 3.2 Mortgage Payments and Joint Debts

#### 3.2.1 Payment of joint debts

Where co-owners, A and B, are jointly liable under the mortgage or for the relevant debt if A discharges more than his share of the debt he will be entitled to claim a contribution from B for the difference<sup>19</sup>.

The court sometimes has treated only the repayment of capital as being the subject of equitable accounting. However, where the party paying the mortgage

<sup>&</sup>lt;sup>15</sup> See *In re Gorman* 

<sup>&</sup>lt;sup>16</sup> See *Turner v Morgan* (1803) 8 Ves. Jun. 143 at 146

<sup>&</sup>lt;sup>17</sup> See per Lord Neuberger at para 157

<sup>&</sup>lt;sup>18</sup> In *Turner v Morgan* the amount ordered was to assess a reasonable rent for each year in question

has remained in occupation payments of interest are set off against any claim for an occupational rent both parties are liable to repay the mortgage<sup>20</sup>. This will remain the case where the statutory principles contained in TLATA are applied<sup>21</sup>.

The courts have often been willing to treat the occupational rent as being equivalent to the payment of interest under the mortgage and other outgoings. The saving in costs such an approach achieves has frequently been commended<sup>22</sup>.

### 3.2.2 Payments of debts primarily due from only one joint owner

Where one co-owner, A, is discharging a mortgage under which only another co-owner, B, is liable, B will be required to account to A<sup>23</sup>. This can be explained by reference to restitutionary principles on the basis that A has been compelled to make the payment to preserve the property from the mortgagee taking possession under the mortgage<sup>24</sup>.

### 3.2.3 The equity of exoneration

Where there is a charge over jointly owned property which secures the debts of only one of the joint owners, A, the other joint owner, B, in the absence of evidence showing a contrary intention, is presumed to intend to charge his property merely by way of security so that the burden of the secured indebtedness should fall primarily on A's share of the property<sup>25</sup>.

A contrary intention may be found where the indebtedness of A has been incurred to finance the lifestyle of A and B together<sup>26</sup>.

Where the indebtedness which is secured is that of A's business, even though that business might finance the lifestyle of A and B, B will still (in the absence of

<sup>&</sup>lt;sup>19</sup> See Goff & Jones at 14-025

<sup>&</sup>lt;sup>20</sup> See e.g. *Leake v Bruzzi* [1974] 1 WLR 1528, *Suttill v Graham* [1977] 1 WLR 819

<sup>&</sup>lt;sup>21</sup> See Murphy v Gooch

<sup>&</sup>lt;sup>22</sup> See e.g. Suttil v Graham at p821-822,

<sup>&</sup>lt;sup>23</sup> See example of Bagnall J. in *Cowcher v Cowcher* [1972] 1 WLR 425 at p432-433

<sup>&</sup>lt;sup>24</sup> It is submitted that this provides the necessary element of compulsion for a restitutionary claim. By way of analogy see the treatment of cases concerned with payments by parties threatened with distress in Goff & Jones at 15-005 and 15-022 <sup>25</sup> See *In re Pittortou* [1985] 1 WLR 58

<sup>&</sup>lt;sup>26</sup> See *Paget v Paget* [1898] 1 Ch. 470

evidence of a contrary intention) be entitled to rely on the equity of exoneration so that the indebtedness falls primarily on A's share of the property<sup>27</sup>.

Where A's secured indebtedness is used both for A's business and A's and B's lifestyle together (e.g. where an overdraft is used to pay both household and business expenses) it will be necessary to identify the extent to which the equity of exoneration applies to the indebtedness (e.g. by identifying the purpose of each payment made using the overdraft).

#### 3.3 Expenditure on improvements and repairs

The starting point is the principle that a joint owner can not execute improvements or repairs upon the property and then charge his co-owner with the costs<sup>28</sup>.

There are 2 exceptions to this rule.

- The first exception was that in a suit of partition an inquiry would be held as to the expenditure on improvements and repairs that had increased the value of the property<sup>29</sup>
- The second exception applies where money has been spent on works that the co-owners were obliged to carry out<sup>30</sup>

# 3.3.1 Improvement or repairs that have increased the value of the property

Where improvements or repairs have resulted in an increase in the value of the property, after the proceeds of sale have been divided, the co-owner expending the money on improvements is entitled to be credited with the lesser of <sup>31</sup>

- One half of the increase in value of the property
- One half of the sum expended on improvements<sup>32</sup>

30 See Leigh v Dickinson (1884) 15 QBD 60 per North J. at 67

<sup>&</sup>lt;sup>27</sup> See *In re Pittortou* [1985] 1 WLR 58 per Scott J. at p62. This part of the decision appears to be supported by the decision of Royal Bank of Scotland v Etridge (no 2) [2001] 4 All ER 449 that the bank will be put on inquiry where the wife is standing as surety for her husband's business debts.

28 See *Leigh v Dickinson* (1884) 15 QBD 60, per Cotton L.J. at 66

<sup>29</sup> ibid at p67

<sup>&</sup>lt;sup>31</sup> See *Re Cook's Mortgage* [1896] 1 Ch 923 per North J. at 925 and *Re Jones, Farrington v Forrester* [1893] 2 Ch 461 per North J. at 479

The first exception only operates once there is a sale. This gives rise to problems where there has been inflation between the date of the improvements and the date of the sale. Interest cannot be awarded because the right to an account is dependent on their being a sale and so there is no cause of action in respect of which interest might be awarded.

It will often be to the advantage of a party who has expended money on the property to argue that the expenditure is relevant to the determination of the parties' beneficial shares in the property.

### 3.3.2 Work that the co-owners were obliged to carry out

The most likely scenario where co-owners will be obliged to carry out works is where they are under an obligation to a third party to keep the property in repair. Such an obligation may be found in a lease (where the property is leasehold) or in the terms of a mortgage.

This second exception seems to be based on the principle that one who discharges more than their share of a joint obligation can claim a contribution from their co-obligor<sup>33</sup>. There are 2 consequences of this:

- the amount of the claim will be based on the amount actually spent rather than limited by the extent to which the expenditure has increased the value of the property
- the cause of action will arise when the common obligation is discharged so that interest should run from the date of expenditure.

#### 3.4 Rent or profits from the land

Thus if one co-owner receives all the proceeds of the land they must account to the other co-owners for their shares<sup>34</sup>.

<sup>34</sup> See *In re Landi* [1939] Ch. 828

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<sup>32</sup> Assuming that the beneficial interest is held in two equal shares.

<sup>33</sup> See Goff & Jones, The Law of Restitution, 6<sup>th</sup> edition at 14-024

Where one co-owner has retained the profits or rent from the land but has contributed time, energy, skill, assets or paid outgoings they will be entitled to a just allowance for such contributions<sup>35</sup>.

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<sup>&</sup>lt;sup>35</sup> See *Re Landi* [1939] Ch. 828, 840 and *Re Jarvis* [1958] 2 All ER 336