



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No. 48

BETWEEN:-

MERILYN NATALIE POUGH

Petitioner

-v-

(1) BEATRICE JOCELYN RAYNOR

(2) FRANCIS LILETTE JOHNSTON

Respondents

RULING

Date of hearing: 1st May 2013

Date of ruling: 2nd May 2013

Mr Christopher Swan, Christopher E Swan & Co, for the Petitioner

Mr Eugene Johnston, J2 Chambers, for the Respondents

1. This was an application for occupation rent which was claimed as further or other relief on a petition for the partition and sale of a property under the Partition Acts of 1855 and 1914.

2. The application was resolved by consent. However, as there is little local authority on point, I shall give a short judgment on the principles applicable when the court is awarding occupation rent.
3. They were considered recently by the Supreme Court in Young v Young [2013] Sc (Bda) 10 (Civ) (31st January 2013). This, too, concerned issues arising under the Partition Acts. Chief Justice Kawaley stated at para 46:

“It was common ground that the Petitioner was not entitled to claim credit for an ‘occupation rent’ unless he left the Property involuntarily or was excluded: Barlow, ‘Cohabitants and the Law’, [Butterworths: London, 1997] at page 261.”
4. The underlying case law was considered in detail by Mr Justice Blackburne in the Chancery Division in French v Barcham [2009] 1 WLR 1124.
5. Mr Justice Blackburne noted at para 23 that at common law it was undoubtedly a requirement that ouster of one co-owner by another (both having a right to possession of the property in question) had to be shown before the ousted co-owner could bring an action against the ousting co-owner to recover possession and damages, including mesne profits, ie occupation rent. Without an ouster of one co-owner the liability of the other co-owner to pay an occupation rent did not arise. See the decision of the House of Lords in Jacobs v Seward (1872) LR 5 HL 464 at 472.
6. However equity took a broader view as to what would amount to an ouster (or exclusion). As Mr Justice Blackburne noted at para 24, only in cases where the tenants in common not in occupation were in a position to enjoy their right to occupy but chose not to do so voluntarily, and were not excluded by any relevant factor, would the tenant in common in occupation be entitled to do so free of liability to pay an occupation rent. See the summary by the Court of Appeal of England and Wales of the position under the old authorities in Dennis v McDonald [1982] Fam 63 at 70 – 71.

7. In more recent times, Mr Justice Millet (as he then was) stated in In re Pavlou [1993] 1 WLR 1046:

“I take the law to be to the following effect. First, a court of equity will order an inquiry and payment of occupation rent, not only in the case where the co-owner in occupation has ousted the other, but in any other case in which it is necessary in order to do equity between the parties that an occupation rent should be paid. The fact that there has not been an ouster or forceful exclusion therefore is far from conclusive. ... The true position is that if a tenant in common leaves the property voluntarily, but would be welcome back and would be in a position to enjoy his or her right to occupy, it would normally not be fair or equitable to the remaining tenant to charge him or her with an occupation rent which he or she never expected to pay.”

8. Expanding on Mr Justice Millet’s analysis of “*the true position*”, Mr Justice Blackburne stated in French v Barcham at para 34:

“The essential point, in my view, is that 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 a co-owner to take occupation of the property, 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. This proceeds from the fundamental position in law, explained by Lord Denning MR in ... Jones (A E) v Jones (F W) [1977] 1 WLR 438 that as between tenants in common both are equally entitled to occupation and one cannot claim rent from the other, which has the result that the mere fact that the one is in occupation and the other is not does not without more give to the one who is not in occupation any claim to an occupation rent from the one who is in occupation. The underlying assumption is that there is no good reason why the non-occupying co-owner should not take up occupation. But if there is some reason why that 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.”

9. As Mr Justice Lawrence Collins (as he then was) stated in the Chancery Division in In re Byford, decd [2003] BPIR 1089 at para 40:

“What the court is endeavouring to do is broad justice or equity as between co-owners.”

10. I conclude that the Court will order payment of occupation rent where this is necessary to do justice between the parties. This will often but not always

be where the co-owner claiming occupation rent has left the property involuntarily or been excluded.

11. The co-owner in occupation will be entitled to credit for a percentage of the occupation rent proportionate to his interest in the property. See Young v Young at para 47 and the decision of the Court of Appeal of England and Wales in Akhtar v Hussain [2012] EWCA Civ 1762 at paras 4 and 7.

Dated this 2nd day of May, 2013 _____

Hellman J