Neutral Citation Number: [2022] EWCA Civ 481

Case No: CA-2021-000710
(Formerly A3/2021/1383)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE AT CARDIFF
BUSINESS AND PROPERTY COURTS IN ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE (ChD)
His Honour Judge Milwyn Jarman QC
PT-2020-CDF-000001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2022

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE STUART-SMITH
and
LADY JUSTICE ANDREWS

- -

Between :

BILAL ALI (AS PERSONAL REPRESENTATIVE OF FARZAND ALI (DECEASED))	**Appellant/ Claimant**
- and -	
(1) LAITH KHATIB (AS PERSONAL REPRESENTATIVE OF FATEH BIBI (DECEASED))	**Respondents/ Defendants**
(2) SHANAZ AKHTAR RAMZAN (AS PERSONAL REPRESENTATIVE OF MOHAMMED RAMZAN (DECEASED) AND PERSONALLY)	
(3) MOHAMMED IQBAL	
(4) PARVEEN IQBAL	

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Clifford Darton QC (instructed by **Berry Smith LLP**) for the **Appellant**
John Sharples (instructed by **Petersons Solicitors**) for the **2nd, 3rd and 4th Respondents**
The 1st Respondent did not appear and was not represented

Hearing date: 17 March 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email, and release to BAILII. The date and time for hand down is deemed to be 11.30 a.m. on Friday 8 April 2022.

Lady Justice Asplin:

1. This appeal raises issues in relation to when occupation rent is payable and the circumstances in which new points can be argued on appeal.

Background

2. The issues arise in the context of a long-running family dispute about the administration of the estate of Mrs Fateh Bibi ("Mrs Bibi") and, in particular, a property comprised within that estate. The property at 149 Corporation Road, Newport, South Wales, (the "Property"), was the family home of Mrs Bibi and her husband, Mr Mohammed Ali ("Mr Ali"). They lived there with their children, Farzand Ali, Mohammed Ramzan, Mohammed Iqbal, the Third Respondent, and Parveen Iqbal, the Fourth Respondent. The children all moved out except for Mohammed Ramzan. He and his wife, Mrs Shanaz Akhtar Ramzan, the Second Respondent, continued to live at the Property, with Mohammed Ramzan's parents, and brought up their children there.

3. Mr Ali died on 22 August 2003 and Mrs Bibi died on 11 July 2006. Their son, Farzand Ali, died in March 2020. His estate is represented by his son who is his personal representative, the Appellant, Dr Bilal Ali. Mohammed Ramzan, Mr Ali and Mrs Bibi's third son, died in May 2013. Shanaz Ramzan is a party to these proceedings, both as her husband's personal representative and in her personal capacity.

4. Title to the Property was transferred to Mr Ali by his son Farzand Ali, in 1986. On Mr Ali's death in 2003, title to the Property passed to his wife, Mrs Bibi. As I have already mentioned, she died in 2006. Under Mrs Bibi's will dated 2 October 2003, (the "2003 Will") the Property was bequeathed and devised to her son Mohammed Ramzan absolutely. It was not until 2011, however, that the legal title to the Property was registered in Mohammed Ramzan's name. The Ramzan family have remained in occupation of the Property throughout.

5. In 2012, Farzand Ali commenced probate proceedings in relation to Mrs Bibi's estate. The 2003 Will was raised in the Defence and was subsequently alleged to be invalid. On 24 January 2014, His Honour Judge Milwyn Jarman QC (the "judge") made an order in those proceedings pronouncing against the 2003 Will and in favour of Mrs Bibi's previous will dated 7 January 1997 (respectively the "2014 Order" and the "1997 Will"). The 2014 Order also provided, amongst other things, that there be liberty to apply for an account for use and occupation of the Property.

6. In April 2016, the judge made a further order appointing the First Respondent, Mr Laith Khatib, as Mrs Bibi's personal representative in place of the Third Respondent, Mohammed Iqbal. Probate was granted to Mr Khatib in respect of the 1997 Will in March 2017. Mr Khatib has not been represented before us, nor did he appear in person.

7. Under the 1997 Will, after payment of her debts, taxes, funeral and testamentary expenses, Mrs Bibi left all her real and personal property whatsoever and wheresoever absolutely to her husband. If he predeceased her, which he did, she gave all her property absolutely and in equal shares to her children, each of whom were named.

8. The Part 8 proceedings which give rise to this appeal were commenced by Farzand Ali in January 2020. Orders were sought, amongst other things, for the sale of the Property with vacant possession, that Shanaz Ramzan deliver up vacant possession of the Property to enable the sale to take place and that she account to Mr Khatib, as Mrs Bibi's personal representative, in respect of the occupation of the Property by Mohammed Ramzan and by herself from the date of Mrs Bibi's death until vacant possession was delivered up.

9. Part of the claim was settled on the terms set out in a Memorandum of Agreement dated 29 January 2020. It provides, amongst other things that: the Second, Third and Fourth Defendants (Shanaz Ramzan, Mohammed Iqbal and Parveen Iqbal) would pay £80,000 to the First Defendant (Mr Khatib) in consideration for their purchase of the Property from Mrs Bibi's estate; and Mr Khatib would pay that sum to Farzand Ali. It was stated that that sum would "satisfy the Claimant's [Farzand Ali's] capital entitlement to the Property as an heir of the estate" and "compromise his claim to purchase the Property from the estate". However, the Memorandum also provides that: "It [the payment of £80,000] shall not prejudice any beneficial entitlement the Claimant [Farzand Ali] has to occupation rent (if any) owed by the Second Defendant [Shanaz Ramzan] to the estate to which he may be entitled as an heir."

10. The terms of that agreement were set out in the schedule to an order dated 17 February 2020 which was sealed the following day. It is referred to in the first recital to a consent order dated 10 September 2020, (the "2020 Order"). The second and third recitals were in the following form:

> "AND UPON the Second Defendant acknowledging that she is liable on behalf of herself and of the Estate of Mohammed Ramzan Deceased, to account to the Estate of Fateh Bibi Deceased for use and occupation of the property situated at 149 Corporation Road in Newport, for a period and in an amount to be determined by the Court if not agreed
>
> AND UPON the parties agreeing to instruct a Single Joint Expert to determine the level of occupation rent which should be paid in respect of the property . . ."

By the 2020 Order, the proceedings were stayed to enable the parties to instruct a single joint expert to give effect to the terms already agreed and to attempt to settle those issues which remained outstanding. The Claimant's solicitors were required to write to the court by a prescribed date, stating whether the case had settled in full and if not, whether a further stay was sought or that the matter be set down for a costs and case management conference. The case did not settle. An expert's report was duly obtained and the matter was heard by the judge. He gave judgment orally on 15 July 2021, having heard the evidence and submissions the previous day.

The judgment

11. In the light of the nature of the grounds of appeal, it is important to have a good grasp of the judgment.

12. Having recorded that part of the claim had been settled, the judge stated that the settlement payment of £80,000 "was expressed to be without prejudice to any beneficial entitlement to occupation rent "if any" owed by Mrs Ramzan to Mrs Bibi's estate to which he [Farzand Ali] may be entitled to as an heir". He then addressed the second recital to the 2020 Order at [9], in the following way:

> "The recital to that order referring to that agreement recorded that Mrs Ramzan acknowledged that she is liable on behalf of herself and her late husband's estate to account to Mrs Bibi's estate for use and occupation of the property for a period and in an amount to be determined by the Court if not agreed. The former solicitor of the Second to Fourth Defendants signed that agreement on her behalf, but she says that was done without her knowledge or authority because her family was in Pakistan at the time. However, Mr Sharples, on her behalf, accepts that there was ostensible authority on the part of the solicitor, as solicitor on record, to sign on her behalf but, if necessary, she now seeks to withdraw that acknowledgement."

13. The judge then noted that the main principles in relation to the award of occupation rent were not in dispute, although their application was, and went straight on to consider the case law in relation to occupation rent in the context of occupiers of jointly owned property and their trustees in bankruptcy ([11] – [18]).

14. The judge's conclusions were that: occupation rent is a form of equitable accounting ([11]) ; that at common law, one tenant in common is not entitled to rent as against the other unless there has been an ouster ([12] – [14]) - *Jones (AE) v Jones (FW)* [1977] 1 WLR 438 and *Dennis v McDonald* [1982] Fam 63; the issue has arisen in the context of bankruptcy where trustees in bankruptcy have sought rent from the occupier of property jointly owned with the bankrupt ([15]); a court of equity will order an enquiry and payment of occupation rent not only where a co-owner has been ousted but also in any case in which it is necessary to do equity between the parties ([16] –[17] – *Re Pavlou* [1993] 1 WLR 1046 and *Murphy v Gooch* [2007] EWCA Civ 603); and that the default position is that occupation rent is not payable and, accordingly, there should be some conduct by the occupying party, or feature relating to them which makes it fair to depart from the default position ([18] - *Davis v Jackson* [2017] EWHC 698). The judge then recorded that counsel for the Claimant accepted that the facts were not that of a "classic constructive ouster" [19].

15. Having set out parts of section 12, 13 and 14 of the Trustees of Land and Trustees Act 1996 (the "1996 Act") and noted the relationship between the principles of equitable accounting and the payment of compensation under the statutory regime ([20] – [26]), the judge recorded at [27] that counsel agreed that the statutory regime was prospective but that even under the equitable jurisdiction the factors in section 13(4) of the 1996 Act were relevant - (*Amin v Amin* [2009] EWHC 3356.)

16. He then directed himself that the starting point was to consider whether the circumstances giving rise to the award of occupation rent or statutory compensation were made out and noted that in relation to occupation rent:

> ". . . whilst ouster in the classic sense is no longer necessary, in the words of Snowden J:
>
> > "There ought to be some conduct by the occupying party or at least some other feature of the case relating to the occupying party to justify the court concluding that it is appropriate or fair to order the occupying party to start paying rent. In respect of statutory compensation, there must be an exclusion or restriction of the beneficiary's right to occupy.""

([28]).

He returned to the same point at [33] reminding himself that the "question that must be answered first . . . is whether there is any conduct on the part of Mr or Mrs Ramzan which justifies an award of occupation rent or an exclusion or restriction of the right of occupation of Farzand Ali of the property so as to give rise to statutory compensation".

17. The judge concluded that he was not satisfied on the facts that there was such conduct or exclusion or restriction of Farzand Ali's right of occupation. All that had happened was that the siblings had moved out of the Property when they became adults and Mohammed and Shanaz Ramzan had stayed and looked after the parents. On the death of Mrs Bibi, the situation in terms of occupation continued [34]. The judge also noted that under the 2003 Will, the Property was left to Mohammed Ramzan, that it was not until 2014 that that will was set aside and that the Ramzans had not been involved in the making of the 2003 Will. He also stated that the deterioration in the relationship between Farzand Ali and his siblings as a result of the proceedings commenced in 2012 and business litigation did not amount to conduct by the Ramzans which justified the payment of occupation rent [35].

18. Furthermore, he held that it did not amount to an exclusion or restriction of Farzand Ali's right to occupy under the statutory regime. "He and his siblings had such a right but such a right was not an exclusive one, it was a right to share occupation but, in all the circumstances, that was unrealistic, given that he had his own family home and that Mr Ramzan, who had a similar right even under the 1997 [w]ill, continued to occupy with his family." [36]

19. The judge held, accordingly, that the first requirement for an award of occupation rent or statutory compensation was not made out. He also decided that it could not arise under the recitals to the 2020 Order because: "[R]ead as a whole, it is clear that the liability referred to is in respect of occupation rent "if any"." [37].

20. The judge went on to state that even if he was wrong in concluding that the first requirement was not made out, he would have declined to award occupation rent [37]. He noted that £80,000 was paid under the 2020 Order and referred to the various valuations of the Property, the earliest being in 2010 and the most recent in 2019 and to the various figures given by the single joint expert in relation to rental values. He also quoted Snowden J in *Davis v Jackson* at [69] as follows:

> "The assumption that a trustee in bankruptcy is entitled to an immediate order for sale and the creditors should be compensated in some way for any delay may not always be the case. For example, if the property market is rising the trustee may benefit from a delay, especially if he has not had to contribute to the payment of the mortgage."

21. The Property had been valued: at £160,000 to £165,000 for probate purposes in June 2010; at £190,000 in an unimproved state or £220,000 in its current state in 2014; at £225,000 in May 2018; and at £220,000 in April 2019 in an unimproved state and £250,000 in its current state. Further, the works carried out after Mrs Bibi's death were valued at around £30,000 in the April 2019 report of Mr Graham (Graham & Co.) and the July 2014 report of Mr Parker (Nuttal Parker). The valuation of rental values varied from £500 to £950 between 2006 and 2018, although the evidence of the single joint expert was that the rental value was £800 in 2006 and £1,200 in 2019.

22. The judge also accepted submissions that Mrs Bibi intended that the Ramzans should live in the house until it was sold, and that the house was held for two purposes: to realise the interests of the four siblings but also to house the Ramzans until then, and that the house was intended to be a home for their minor children which was necessary for their welfare [42].

23. He concluded that it was not necessary to carry out an exact comparison of how the £80,000 received by Farzand Ali in 2020 in respect of his quarter interest in the Property compared with what might have been awarded by way of market rent but, taking a broad view, even if the question of occupation rent or statutory compensation arose, he was not satisfied that it would be just to make an award. To do so would be to over-compensate Farzand Ali and not to do "broad justice" [43].

The judge proceeded on the wrong basis – raising a new point on appeal

24. The first ground of appeal is that the judge applied the wrong test because: Shanaz Ramzan had never enjoyed a right of occupation of the Property after the death of Mrs Bibi; and her husband had only been entitled to a right to a quarter share of Mrs Bibi's residuary estate under the 1997 Will, not a right to a share in the Property itself. Accordingly, it is said that as neither Mr nor Mrs Ramzan was a co-owner of the Property for the purposes of the 1996 Act or in equity, neither of them was liable for occupation rent at all. On the contrary, it is said that Shanaz Ramzan is strictly liable to Mrs Bibi's estate for her occupation of the Property and that of her husband, since the date of Mrs Bibi's death as a trespasser.

25. Reliance was placed upon the explanation of the nature of the residue of an estate in *Dr. Barnardo's Homes National Incorporated Association v Commissioners for Special Purposes of the Income Tax Acts* [1921] 2 AC 1. That was a case in which a testator left the residue of his property, which comprised stocks and shares, to a charity absolutely. In the period between the testator's death and the date on which the residue was finally ascertained and distributed, the executors received income upon which income tax was deducted at source. The income was part of the fund handed over to the charity and in due course, the charity claimed the return of the income tax which had been deducted. Viscount Finlay, with whom Lord Atkinson, Lord Sumner and Viscount Cave concurred, pointed out that a legatee of a share in

residue has no interest in any property of the testator until the residue is ascertained and that, accordingly, the income was that of the executors. See pages 8, 10 and 11.

26. It is said, therefore, that: until the claims against a testator's estate for debts, legacies, testamentary expenses etc. have been satisfied, the residue does not come into existence; accordingly, neither Mohammed Ramzan nor his wife had an interest in the Property or a right to occupy it; and that the analysis of the application of the 1996 Act in relation to interests under a will in undivided shares in land in *Creasey v Sole* [2013] EWHC 1410 (Ch) applies.

27. Mr Darton QC, on behalf of Dr Ali, accepted that the matter had not proceeded on this basis before the judge and that the point was new. He was referred to *FII Group v HMRC* [2020] UKSC 47, [2020] 3 WLR 1369, a case in which the Supreme Court considered the basis upon which the discretion to allow the withdrawal of a concession and new points to be taken on appeal should be exercised.

28. The background to the *FII Group* case is complex and it is unnecessary to rehearse it here. The appeal itself concerned the correctness of two of the most important decisions of the House of Lords on the law of limitation. It arose in the course of long-running proceedings known as the Franked Investment Income Group Litigation. One of the issues which was addressed was the exercise of the court's discretion in deciding whether to allow Her Majesty's Revenue and Customs ("HMRC") to advance the arguments they wished to deploy in the Supreme Court. In the second phase of the FII Group Litigation HMRC had not stated that they wished to reserve the right to mount a broader attack in their limitation defence. On the contrary, they had admitted in pleadings in one of the cases that that party's mistake claims were not time barred. HMRC's proposed broader challenge involved the withdrawal of a concession and a pleaded admission and also raised a new point of law on appeal [85].

29. Lords Reed and Hodge, with whom Lord Lloyd-Jones and Lord Hamblen agreed, referred to several cases illustrating the approach of the courts to the exercise of discretion in such circumstances. The first was *Pittalis v Grant* [1989] QB 605. It was concerned with an application by the landlord appellants to withdraw a legal concession made at first instance and to amend their grounds of appeal to argue for a different interpretation of a provision in the Rent Act 1977. The Court of Appeal allowed the application. Lords Reed and Hodge noted at [86] that:

> ". . . Nourse LJ, who delivered the judgment of the court, stated the rule of procedure which operates as a norm, by quoting from the judgment of Sir George Jessel MR in *Ex p Firth, In re Cowburn* (1882) 19 Ch D 419, 429 as follows:
>
> > "the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence."
>
> Nourse LJ stated that although the court has a discretion to refuse an application to raise on appeal a pure question of law

> not raised at first instance, the normal practice was to allow the legal point to be taken where the court could be confident that the other party (i) had had an opportunity of meeting it, (ii) had not acted to his detriment by reason of the earlier omission to take the point and (iii) could be adequately compensated in costs: p 611C-F per Nourse LJ."

30. The second case to which their Lordships referred was *Jones v MBNA International Bank* (30 June 2000) [2000] EWCA Civ 514; [2000] Lexis citation 3292. At [87], their Lordships noted that Peter Gibson LJ summarised the practice of the Court of Appeal at para 38, in the following way:

> "It is not in dispute that to withdraw a concession or take a point not argued in the lower court requires the leave of this court. In general the court expects each party to advance his whole case at the trial. In the interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this court. That consideration is the weightier if further evidence might have been adduced at the trial, had the point been taken then, or if the decision on the point requires an evaluation of all the evidence and could be affected by the impression which the trial judge receives from seeing and hearing the witnesses. Indeed it is hard to see how, if those circumstances obtained, this court, having regard to the overriding objective of dealing with cases justly, could allow that new point to be taken."

They commented in these terms:

> "87 . . . That summary, and particularly the reference to the difficulty of allowing a new point to be taken if further evidence would have been adduced at the trial, reflects longstanding practice: see, for example, *The Tasmania* (1890) 15 App Cas 223, 225 per Lord Herschell; *Ex p Firth, In re Cowburn* (above) per Sir George Jessel MR. As May LJ also made clear in his concurring judgment in *Jones* (para 52), the court has established a general procedural principle in the interests of efficiency, expediency and cost and in the interest of substantial justice in the particular case. There is no absolute bar against the raising of a new point of law even if a ruling on a new point of law necessitates the leading of further evidence, but, as the case law reveals, the court will act with great caution."

31. They went on at [89] and [90] as follows:

> "89. A similar note of appellate caution was sounded in *Singh v Dass* [2019] EWCA Civ 360 in which a claimant sought to raise a new argument under the 1980 Act which he

had not advanced at first instance. Haddon-Cave LJ, who gave the judgment of the court, summarised the relevant principles in these terms:

> "16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
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> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b) had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2, paras 30 and 49).
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> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs (*R (Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24; [2017] PTR 22, para 29)."

Haddon-Cave LJ's second principle reflects the judgment of the Court of Appeal in *Jones* (above), paras 38 and 52, and his third principle is a paraphrase of what Nourse LJ stated in *Pittalis v Grant* (above) p 611.

90. In *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337; [2019] 4 WLR 146 the Court of Appeal, in a judgment delivered by Snowden J, stated that an appellate court has a general discretion whether to allow a new point to be taken on appeal (para 21) and considered and analysed the practice set out in *Pittalis* and *Singh*:

> "26. These authorities show that there is no general rule that a case needs to be 'exceptional' before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken."

The court then spoke of a spectrum of cases. At one end, where there had been a full trial involving live evidence and the new

> point might have changed the course of the evidence or required further factual enquiry, there was likely to be significant prejudice to the opposing party and the policy arguments in favour of finality would be likely to carry great weight. At the other end, where the point to be taken was a pure point of law which could be argued on the facts as found by the judge, the appeal court was far more likely to permit the point to be taken, provided that the other party had had time to meet the new argument and had not suffered any irremediable prejudice in the meantime (paras 27 and 28)."

Their Lordships concluded at [100] that: "[I]n the end, the task for the court is to make an evaluation of what justice requires in the circumstances. . ."

32. In the light of the guidance in *FII*, in summary, Mr Darton submitted that in this case, he should be allowed to argue the appeal on the new basis because: matters had been confused before the judge; *Creasey v Sole* had not been cited at all and the issue was a pure point of law; the matter would not have been argued differently; the evidence would not have been different; there has been no detrimental reliance upon the approach which was adopted; and it would be just to allow it. He added that the claim for relief in the Part 8 Claim was wide enough to encompass a claim for mesne profits.

33. Mr Sharples, on the other hand, submits that amongst other things the new basis: would lead to the need to re-cast the proceedings entirely and amend the pleadings; would have changed the course of the evidence and the way in which the matter was argued; and accordingly, would require further evidence to be adduced and for there to be a re-trial. He also points out that the settlement in January 2020 proceeded on the basis that all of the siblings had a right of occupation.

34. For all the reasons which Mr Sharples gives, I would refuse to exercise the court's discretion in order to enable Dr Ali to raise the proposed new point on appeal. It seems to me that this case is at the end of the spectrum at which it would not be just to allow the new point to be taken.

35. As Mr Sharples submitted, the new basis would require a complete re-casting of the claim. It would be necessary to abandon the claim in the form in which it came before the judge altogether. A claim for damages in trespass/mesne profits is different from the relief which was sought in the Part 8 Claim. At paragraph 2.3 of that claim an order is sought that Mrs Ramzan "do account" to Mr Khatib in respect of the occupation of the Property and the supporting witness statements proceed on the premise that all the siblings had a right of occupation. They make no mention of trespass.

36. This is much more than a matter of nomenclature. Had the claim been in trespass, it would be more natural for it to have been pursued by Mr Khatib, as claimant in his capacity as Mrs Bibi's personal representative and both the evidence and the argument would have been different. It would have been necessary for the court to determine whether and, if so, at what stage Mrs Bibi's residuary estate had been administered, the nature of Mohammed Ramzan's interest in that estate after

administration was complete and whether the analysis in *Creasey v Sole* could be distinguished.

37. Furthermore, as Mr Sharples pointed out, the defences to a claim in trespass would have been different. The Limitation Act 1980 would apply and questions would have arisen as to whether consent had been given to Mr Ramzan and, thereafter, to Mrs Ramzan's occupation of the Property and if so, by whom and in respect of which periods. Questions might also have arisen as to whether the Ramzans were granted a licence to occupy the Property or whether there had been acquiescence. It is likely, therefore, that the evidence before the judge would have been different and, it seems to me, that it is inevitable that the trial would have been conducted differently.

38. As Lords Reed and Hodge pointed out in the *FII* case at [93] in the interests of justice, an appellate court "will normally seek strenuously to avoid an outcome which results in the parties, who have already gone to trial on the quantification of a claim, having to amend their pleadings and to adduce further evidence to apply its ruling on a new issue of law to the facts of their case. In a normal litigation, the need for a re-trial would be a strong and normally determinative pointer against allowing a party to withdraw a concession which had influenced the way in which a litigation had been conducted." It seems to me that the point applies with equal force to the exercise of discretion to allow a new point to be run.

39. In this case, the proposed new basis is more than a new point of law. It changes the nature and landscape of the proceedings altogether and would require a re-trial. In all the circumstances, therefore, it cannot be consistent with the overriding objective to allow Mr Darton to proceed with the first ground of appeal.

The effect of the recitals to the 2020 Order and the Memorandum of Agreement

40. The second ground of appeal is that, in any event, the terms of the Consent Order and recitals to that Order obliged the judge to find that Mrs Ramzan was liable to pay for her use and occupation of the Property because she had agreed to do so or because they gave rise to an evidential estoppel which prevented Mrs Ramzan from arguing otherwise. In effect, therefore, it is said that the only issue before the court was quantum.

41. Before us, Mr Darton, on behalf of Dr Ali, accepted that this issue could not stand as a separate ground of appeal and that it merely explained how the matter came before the judge in the way that it did. He also accepted that it would have been open to the judge, in appropriate circumstances, to determine quantum at nil. He was right to do so. It seems to me that it is clear from the judgment itself and from the parts of the transcript of the hearing to which we were referred, that an application was made to withdraw what was considered to have been a concession in the terms of the recitals to the 2020 Order and that the judge heard submissions in that regard. In his judgment, the judge approached the matter as one of construction. He concluded that when the 2020 Order was read as a whole, (together with the Memorandum of Agreement) the liability in respect of occupation rent which was referred to was a liability "if any" [37]. Accordingly, he did not address the issue of whether the concession, so called, could be withdrawn because it did not arise on his interpretation of the relevant documents. It was open to him, therefore, to decide that the payment of occupation rent did not arise in the circumstances or that if it arose as a matter of

principle, nevertheless, it should not be awarded. He was fully entitled to approach the matter as one of construction and it seems to me that he was right to conclude as he did. There is no appeal against his decision in that regard. In the circumstances, therefore, the recitals cannot now form the basis of a ground of appeal.

The judge was wrong to find that there was no exclusion

42. In any event, it is said that if the approach to occupation rent in *Davis v Jackson* is correct, the judge erred, nevertheless, in finding that the Ramzans' occupation of the Property did not exclude Farzand Ali. Mr Darton submits that this was not a case in which Farzand Ali had been in a position to enjoy the right to occupy but had chosen voluntarily not to do so. On the contrary, it would have been unreasonable to have expected him to do so in the circumstances. It is said that the judge was bound to come to that conclusion given: Mohammed Ramzan's registration as sole proprietor of the Property in 2011 (in reliance upon the 2003 Will); that Mohammed Ramzan remained as sole proprietor until the 2020 Order; the fact that Farzand Ali was "stymied" from realising his legacy under the 1997 Will first by the first probate proceedings in 2012 and then by Mr Khatib's failure to apply for a sale of the Property; and the difficult relationship between Farzand Ali and his siblings which the judge recorded in his judgment in the first probate proceedings.

43. Mr Darton did not place any emphasis upon the difficult relationship between Farzand Ali and his siblings in oral argument and I consider that he was right not to do so. In these proceedings, the judge found that the relationship did not deteriorate until 2012 as a result of the first probate proceedings and business litigation and that the deterioration did not amount to conduct by the Ramzans which justified the payment of occupation rent. It is clear, therefore, that he had the sibling relationship in mind and there is no appeal against his evaluative finding.

44. What of having been "stymied" from realising his legacy under the 1997 Will by the first probate proceedings, in which the validity of the 2003 Will was addressed, and then by Mr Khatib's failure to seek to sell the Property? In this regard, Mr Sharples pointed out that reliance was not placed upon the effect of the 2003 Will and the dispute in relation to it before the judge.

45. In any event, it seems to me that it does not assist Mr Darton. It was not suggested that Farzand Ali knew of the 2003 Will until it was pleaded in the defence to the first probate proceedings in 2012. In the circumstances, it could not have affected his ability to realise his legacy under the 1997 Will, prior to that time, or after the outcome of those proceedings was known, in 2014. He could have applied to have Mrs Bibi's estate administered and, in fact, he did so, but not until 2020. Furthermore, it is difficult to see that the judge should have found that Farzand Ali was excluded from the Property by the conduct of the Ramzans whilst the probate proceedings were ongoing from 2012-2014, in the light of the fact that he found that the Ramzans had not been involved in the making of the 2003 Will. It is true that after that, Mohammed Iqbal was removed as Mrs Bibi's personal representative and replaced by Mr Khatib but it is difficult to see how that change, of which the judge was fully aware, was a matter which the judge left out of account or which should have led to the conclusion that Farzand Ali had been excluded from the Property.

46. What of Mohammed Ramzan's registration as legal owner of the Property in reliance upon the 2003 Will? It is said that after the registration in 2011, Mohammed Ramzan was, on any view, occupying the Property to the exclusion of the other beneficiaries of the 1997 Will. If he had a joint right to occupy the Property under the 1997 Will, it is said that he chose not to exercise it. He elected, instead, to occupy as sole registered proprietor and as a result, became liable to pay occupation rent, at least from the date of the registration. Alternatively, the registration gave rise to a presumption of ouster.

47. Mr Darton relied upon *Kingsley v Kingsley* [2020] 1 WLR 1909. That was a case in which a brother and sister held farmland on trust for themselves as tenants in common in equal shares and farmed the land in partnership. On the brother's death, the sister remained in occupation and continued farming the land. The executors brought proceedings against her for possession under section 14 of the 1996 Act. The sister did not oppose the order but contended that she should be allowed to purchase the land at a value to be determined by the court. An order to that effect was made and the executors appealed on the basis that there should have been an open market sale. On appeal it was held that there was nothing which drove the court to require full market testing of the value of the land. However, it was held that the deputy judge's order in relation to occupation rent was flawed. He had decided that the sister should not be required to pay occupation rent since her brother's death.

48. Mann J, with whom Moylan and Patten LJJ agreed, stated at [62] that the deputy judge's "root error" was a failure to consider the real question which was a question of fact. Was the sister occupying the farm in order to wind up the partnership or was she occupying it in her own right? That issue was not addressed. Mann J held, however, that the answer to the occupation rent question was straightforward because there was an admission of liability on the pleadings [64]. Having considered the sister's witness statement and an open offer, Mann J went on at [68] to conclude that it was quite clear that the sister was not disputing that her occupation of the farm since her brother's death had been for her own benefit. He concluded, therefore, that the matter was covered by the concession [70]. I agree with Mr Sharples, therefore, that *Kingsley* is not authority for the proposition that a co-owner who subsequently purports to occupy property in another capacity has inevitably excluded the other co-owner, although that may be the case. In this case, Mohammed Ramzan's registration as sole proprietor of the Property was as a result of a mistake about the validity of the 2003 Will.

49. Furthermore, as Mr Sharples points out, Mohammed Ramzan's status as registered legal proprietor would have limited practical impact in this case, if any. It took place in May 2011 and was based erroneously on the 2003 Will. It was not until 2014 that the court pronounced against the 2003 Will and for the 1997 Will. In fact, the legal title to the Property was always held on the terms of the 1997 Will. Accordingly, after 2011, Mr Ramzan, as registered proprietor, held the legal title on trust for himself and his siblings. Thus, it was not inevitable that his status as sole registered proprietor, based erroneously upon the 2003 Will, amounted to an exclusion of his co-owners.

50. Lastly, under this ground, it seems to me that it cannot be said that the judge erred in failing to take account of Mr Khatib's failure to sell the Property in the period after he was granted probate of Mrs Bibi's estate in 2017. It was accepted by Mr Darton that Mr Khatib should be given a two-year period of grace. The Part 8 proceedings seeking an order for sale were commenced shortly after the expiry of that period, in

January 2020. In any event, it does not appear that Mr Khatib's failure to seek an order for sale was relied upon below.

51. It is well known that the questions of whether there was jurisdiction to award occupation rent and whether the court should exercise its discretion to make such an award are highly fact-sensitive. The judge found that it was unrealistic for Farzand Ali to occupy the Property as he had his own family home [36]. He was also not satisfied that Farzand Ali intended to live there or would have done so but for the Ramzans' presence. Those findings are not appealed. They justify the approach which the judge adopted in relation to exclusion.

The judge was wrong not to make an order for occupation rent given the other features of this case

52. In the further alternative, it is said that even if the test in *Davis v Jackson* is applicable and the Ramzans did not exclude Farzand Ali from the Property, the judge should still have made an order for the payment of occupation rent because Farzand Ali had not been in a position to apply for an order for sale. He was obliged to bring probate proceedings and then wait a reasonable period for Mr Khatib to act. Having succeeded in the probate proceedings and realised his "share" by means of the 2020 Order it was unjust for him not to recover an occupation rent.

53. It seems to me that this ground is no more than an attempt to seek a re-exercise of the court's discretion as to whether to award occupation rent and a repetition of the matters which have already been addressed. It does not amount to a factor which the judge failed to take into account when the discretion was exercised. As I have already explained, it is accepted that save for the period from 2011/12 until 2014, Farzand Ali knew of the basis upon which he might claim an occupation right and rent and in relation to the period from 2011 to 2014, the judge found that Mr Ramzan had not been involved in the making of the 2003 Will.

54. In any event, Mr Darton accepted that the argument based upon an inability to sell the Property was not raised before the judge. He submitted, nevertheless, that the judge had taken into account the rise in the value of the Property and the capital amount paid to Farzand Ali when deciding whether he would have awarded occupation rent but, when doing so, had ignored Farzand Ali's inability to realise his interest. This argument is to the effect that the judge was wrong to take account of the increase in the value of the Property and the effect it had on the settlement sum, because Farzand Ali was not at fault in having failed to realise his interest in the Property sooner. As a result, it is said that the judge should have considered occupation rent separately from capital value.

55. It seems to me that this argument is not open to Mr Darton. There is no reference to the treatment of the £80,000 settlement sum in any of the grounds of appeal, nor is there reference to the effect of rising property values upon the payment of occupation rent.

56. In any event, in my judgment, it does not assist him. It is not apparent from the authorities that it is necessary for there to have been some fault in failing to realise an interest in property at an earlier date before any increase in capital value can be taken into account. As Snowden J pointed out at [68] in *Davis v Jackson*, there may well be

a legitimate expectation that a bankrupt's interest in a property will be realised quickly and that consideration may go a long way towards justifying a conclusion that it would be unfair to allow an occupying co-owner to resist an order for sale for a substantial period whilst also refusing to pay rent in the meantime. As Snowden J put it, however, at [69]:

> "Whilst plainly relevant, I do not think that these arguments can be conclusive. They seem to pre-suppose that a trustee in bankruptcy is entitled to an immediate order for sale and that creditors should be compensated in some way for any delay. That may not always be the case: eg. if the property market is rising the trustee may benefit from a delay, especially if he has also not had contribute to payment of the mortgage. "

There is no rule, even in the case of a trustee in bankruptcy, therefore, that an increase in the capital value of a property cannot be taken into consideration or that a trustee in bankruptcy or other co-owner must be awarded occupation rent in addition to the benefit they may derive from an increase in the value of the property. It all depends upon the relevant circumstances and what would be fair.

57. It seems to me that on the facts of this case it is impossible to contend that the judge was in error in doing broad justice on the basis of the figures available to him and in taking into account the £80,000 received by Farzand Ali in doing so. Furthermore, he cannot be required to do the precise maths as Mr Darton put it and to set out his calculations. Having taken account of the valuations and the expert evidence as to rental values, he was entitled to take a broad view and conclude that, had it been necessary, he would not have exercised his discretion to award occupation rent.

The judge was wrong not to award occupation rent because it is invariably awarded in the case of trustees in bankruptcy

58. Lastly, it is said that Farzand Ali's position was analogous to that of a trustee in bankruptcy who does not enjoy a right to occupy property jointly owned by the bankrupt. In such a case, Blackburne J held that the court will "ordinarily if not invariably" order the payment of occupation rent: *French v Barcham* [2009] 1 WLR 1124 at [35]. Mr Darton submits that the same approach should have been adopted in this case. He goes as far as to say that the judge should have proceeded on the basis that there is a presumption that occupation rent will be payable in such circumstances.

59. In *French v Barcham,* Mr and Mrs Barcham occupied a property which they owned as tenants in common. A bankruptcy order was made against Mr Barcham with the result that his equitable half interest in the property vested in his trustee in bankruptcy. Twelve years later, the trustee in bankruptcy sought an order for sale of the property and to set off against Mrs Barcham's half share of the net proceeds, an occupation rent in respect of her occupation of the property. On appeal, Blackburne J held that the trustee in bankruptcy was entitled to recover occupation rent. He approached the question in the following way:

> "34. . . . [Counsel for Mrs Barcham] submitted that the trustee was allowed to claim an occupation rent because he stood in succession to and in place of the husband who was to be

regarded as excluded from the house. I do not think that this is a correct understanding of why the wife's obligation to pay an occupation rent continued after the husband's bankruptcy. Material to this is to note how, in *Dennis's* case, Purchas J stated the underlying principle. It is that the occupying tenant in common is only free of any liability to pay an occupation rent if the tenant in common not in occupation is in a position to enjoy the right to occupy but voluntarily chooses not to do so. This approach was followed by Millett J in *In re Pavlou* [1993] 1 WLR 1046 in his reference to what he described as "the true position". 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 the passage from *Jones (A E) v Jones (F W)* [1977] 1 WLR 438 set out above, 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.

35. When a trustee in bankruptcy has been appointed of the estate of a co-owner so that that co-owner's interest vests in the trustee, but the other co-owner remains in occupation of the property, application of the principle will ordinarily, if not invariably, result in the occupying co-owner having to account to the trustee of the beneficial interest to which the bankrupt co-owner was formally entitled for an occupation rent. This is because it is not reasonable to expect – even if it were otherwise practicable for him to do so – the trustee in bankruptcy to exercise the right of occupation attaching to the interest in the property that vested in him on his appointment as trustee of the bankrupt co-owner. If it could be shown that the occupying co-owner was given by the trustee to understand that no occupation rent would be charged or was unaware of, and had no reasonable means of discovering, the other co-owner's bankruptcy, the court might take the view that it would not be

> just to require the occupying co-owner to pay an occupation rent. But short of such circumstances it is difficult to see why the occupying co-owner should not be charged an occupation rent."

60. Snowden J approached the matter differently in *Davis v Jackson.* In that case, Mrs Jackson used her own funds to purchase a property for the purpose of occupying it with her children. Subsequently, Mr and Mrs Jackson executed a deed of trust stating that Mrs Jackson held the property on trust for both of them in equal shares. She fell behind on mortgage repayments and the property was re-mortgaged in the joint names of Mr and Mrs Jackson. As a condition stipulated by the mortgagee, Mr and Mrs Jackson executed a TR1 which declared that they held the property on trust for themselves as joint tenants. Mr Jackson never lived in the house, paid any mortgage instalments or contributed to any of the outgoings. He was adjudged bankrupt, and Mr Davis was appointed his trustee in bankruptcy.

61. Mr Davis sought a declaration that he was entitled to one half of the equity in the property and an order for sale. The District Judge made the declaration and the order for sale, with the net proceeds of sale to be divided equally between Mrs Jackson and Mr Davis. Mrs Jackson applied to appeal against the District Judge's order but her application was rejected by Snowden J. In rejecting her application, however, Snowden J varied the order to provide that it should be subject to an equitable account in respect of the division of the anticipated proceeds of sale. He concluded that he was not bound by the 1996 Act and went on to consider occupation rent under general equitable principles ([48]).

62. He set out those principles derived from the authorities since *Jones (AE) v Jones (FW)* [1977] 1 WLR 438 and commented in relation to *French v Barcham* as follows:

> "61. With respect to Blackburne J, I do not find this analysis entirely convincing. The earlier authorities of *Jones (AE) v Jones (FW)* [1977] 1 WLR 438 and *Dennis v McDonald* [1982] Fam 63 made it very clear that at law, the default position when one co-owner is in occupation and the other is not, is that occupation rent is not payable. It therefore seems to me that there ought to be some conduct by the occupying party, or at least some other feature of the case relating to the occupying party, to justify a court of equity concluding that it is appropriate or fair to depart from the default position and to order the occupying party to start paying rent. "
>
> 62. In *French v Barcham,* Blackburne J rejected a similar argument, suggesting (at paragraph 40) that *Dennis v McDonald* and *Re Pavlou* had explained the concept of exclusion as a "state of affairs"+ in which the question was whether it was reasonable for the non-occupying party to exercise his right of occupation or not. His approach seems to have been that if it was reasonable for the non-occupying party to exercise his right of occupation, but that he had voluntarily chosen not to do so, he should not be able to claim an occupation rent: whereas if it was unreasonable for the non-

> occupying party to go into occupation, he should be entitled to rent.
>
> 63. Whilst I agree that cases such as *Dennis's* case and *Pavlou's* case 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. According to *Jones's* case and *Dennis's* case, 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.
>
> 64. 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. I do not think that is consistent with cases such as *Jones's* case, where Lord Denning MR plainly thought that the stepmother, who had inherited her husband's interest in the property and had become a tenant in common with her stepson, should not be entitled to claim an occupation rent because of the agreements between her deceased husband and the son."

63. Snowden J concluded, nevertheless, that it was not necessary to reach a firm conclusion about whether Blackburne J had been right because the court has a broad equitable jurisdiction to do justice between co-owners on the facts of each case and the unusual facts of that case made it readily distinguishable [70] – [72].

64. It seems to me that the position is the same here. The judge was exercising a broad equitable jurisdiction to do justice between co-owners having also taken the statutory provisions in the 1996 Act into account. The issue before him was fact-sensitive and he was entitled to decide as he did. The *Barcham* case does not give rise to any kind of presumption as Mr Darton would have it. If it did and if Mr Darton were correct that an analogy can be drawn between a trustee in bankruptcy and a person in Farzand Ali's position, the court would be required to order the payment of occupation rent in all cases in which one co-owner is not in possession. It would also be unable to have regard to the position prior to bankruptcy or the circumstances of the co-owner in possession. That is not the law and cannot be correct.

65. As Snowden J pointed out, Lord Denning MR made it very clear in *Jones (AE) v Jones (FW)* [1977] 1 WLR 438 at 441 – 2, that the default position at common law where one co-owner was in occupation and the other was not was that occupation rent was not payable. The position was the same in equity unless there was an ouster or a letting to a stranger for rent. The same approach was taken in the Court of Appeal in *Dennis v McDonald* [1982] Fam 63.

66. This approach is consistent with *In re Pavlou* [1993] 1 WLR 1046 and *Chhokar v Chhokar* [1984] FLR 313 in which a broader approach was adopted. In the *Pavlou* case, a husband and wife bought a house and occupied it as their matrimonial home. It was held by them as beneficial tenants in common. The husband left the wife who remained in sole occupation and paid the outgoings. They were divorced and the husband was subsequently made bankrupt. The trustee in bankruptcy brought proceedings for the sale of the property and equitable accounting. The question arose as to whether the wife was liable for occupation rent for any period prior to the husband's bankruptcy. Millett J approached the matter as follows at 1050:

> "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. Secondly, where it is a matrimonial home and the marriage has broken down, the party who leaves the property will, in most cases, be regarded as excluded from the family home, so that an occupation rent should be paid by the co-owner who remains. But that is not a rule of law; that is merely a statement of the prima facie conclusion to be drawn from the facts. 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 in common to charge him or her with a occupation rent which he or she never expected to pay. "

67. In *Chhokar v Chhokar* the facts were quite extreme. Title to the matrimonial home was held by the husband on trust for himself and his wife as tenants in common in equal shares. After the husband had abandoned his wife in India she managed to return to the matrimonial home. Whilst she was in hospital giving birth to their child, the husband tried to sell the house to a third party at an undervalue in order to attempt to override the wife's equitable interest. She returned to the property and petitioned for matrimonial and ancillary relief. The Court of Appeal allowed the wife's appeal, setting aside an order for sale and the requirement that she pay occupation rent, save for a period during which she had a tenant. Cumming-Bruce LJ stated at 332:

> "[Counsel for the purchaser] submits that he has a right in law to occupy the property, but he goes on in the next breath to concede that it is a right that cannot be exercised because he succeeded to the rights of the husband in the matrimonial home . . . But, for this purpose, he stands in the shoes of the [husband] and I have been unable to find anything in the authorities which should lead the court to hold that it would be fair, which I regard as the test, to require the petitioner to pay occupation rent to the purchaser] by way of payment for her occupation of the matrimonial home."

68. There is no doubt, therefore, that the court is required to do broad justice between co-owners and to determine what would be fair: *In re Pavlou*, *Byford v Butler* [2004] 1 FLR 56 *Murphy v Gooch* and *Chhokar v Chhokar*. The position is no different where one co-owner has become bankrupt. His trustee in bankruptcy cannot be in a better position. It seems to me, therefore, that Snowden J's approach in *Davis v Jackson* was correct. 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. Furthermore, as Snowden J explains 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. 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.

69. It follows that I do not consider that the judge erred in not taking the approach in the *Barcham* case. He was entitled to make the findings he did in relation to conduct, to evaluate those matters and exercise his discretion in the way he did in order to do broad justice. This includes taking into account the increase in the capital value of Farzand Ali's interest in the Property and the amount he was paid for it.

70. For all the reasons to which I have referred, I would dismiss the appeal.

Lord Justice Stuart-Smith:

71. I agree with both judgments.

Lady Justice Andrews:

72. I agree that the appeal should be dismissed for the reasons given by my Lady, Lady Justice Asplin. I simply wish to add my own endorsement of the observations made by Snowden J in the passage at [61]-[64] of his judgment in *Davis v Jackson*. 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. Something more has to be shown which makes it just and equitable that he should pay that other owner for his use and occupation of the property – for example, that he is exploiting the property for his own financial gain, or that he has precluded the co-owner from exercising a right of occupation that he (or she) wished to exercise. The focus should therefore be on the behaviour of the person in occupation.

73. It follows it cannot be right, as 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. Yet that is the effect of Blackburne J's analysis in *French v Barcham*, which appears to me, with the greatest respect, to be based on a mischaracterisation of the underlying rationale of earlier authorities such as *In re Pavlou*. 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.

74. Snowden J rightly pointed out in *Davis v Jackson* that Blackburne J's approach would have the result, as a virtually immutable rule, that an occupation rent should be payable to a trustee in bankruptcy, thus reversing the default position in bankruptcy cases. Mr Darton's submissions involved an extension of that approach, which would reverse the default position in all, or virtually all, other cases. I respectfully agree with what my Lady says in paragraph 68. There is no special rule in bankruptcy cases; *French v Barcham* is best regarded as turning on its own particular facts and not as laying down any principle of wider application.

75. At the end of the day, the question for the court is what fairness requires on the facts of the individual case. In the present case, the judge took into account all relevant factors, and concluded that justice and equity did not require a departure from the default position. He was entitled to do so, for the reasons that he gave.