



Neutral Citation Number: [2021] EWHC 2971 (QB)

Appeal Ref: QB-2021-001

Case No: F00MB219

THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT MIDDLESBROUGH
ORDER OF MR RECORDER MURPHY DATED 10 DECEMBER 2020

Remote hearing from the
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 November 2021

Before :

THE HONOURABLE MR JUSTICE SAINI

Between :

SARAH CATHERINE BAILEY

Appellant

- and -

BARRY JOHN DIXON

Respondent

Chris Hegarty (instructed by **Mortons Law**) for the **Appellant**
Collette Price (instructed by **Punch Robson Solicitors**) for the **Respondent**

Hearing date: 4 November 2021 by Microsoft Teams

Approved Judgment

MR JUSTICE SAINI :

This judgment is in 5 main parts as follows:

I.	Overview:	paras. [1-10]
II.	Legal Framework:	paras. [11-19]
III.	The Recorder's judgment:	paras. [20-24]
IV.	Occupation Rent under section 13(6) of TOLATA:	paras. [25-39]
V.	Conclusion:	para. [40].

I. Overview

1. This appeal concerns a property known as 3 Chestnut Road, Eaglescliffe, Stockton-on-Tees ("the Property"). On conclusion of oral argument, I informed the parties that I would allow the appeal and provide my reasons in due course.
2. The Property is jointly owned by the Respondent (the Claimant below) and the Appellant (the Defendant below), who were at one point in a relationship and the carers of the Respondent's grandson, Joey (born on 20 April 2005). Joey's mother had died when he was a few weeks old, and the Appellant and Respondent effectively became Joey's parents, and the Property became the family's home.
3. The Property had originally been in the sole ownership of the Appellant (purchased in 2000) but came to be jointly owned by 2005 between the Appellant and the Respondent. The Property was subject to a mortgage. The relationship between the Appellant and the Respondent deteriorated and the Appellant left the Property. It is not clear when exactly the Appellant left the Property but it was around 2006. The joint tenancy was severed in October 2016.
4. In due course, by a Part 8 Claim Form issued in the County Court at Middlesbrough, the Respondent sought an order for sale of the Property and various ancillary orders under the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA") as well as the type of accounting and inquiries common in this form of claim. The Appellant served a Defence and Counterclaim which resisted sale of the Property, on the basis that it should be preserved for the benefit of Joey. She made an application for an occupation order under section 33 of the Family Law Act 1996.
5. Of relevance to the appeal however is the fact that the Appellant also included a pleaded claim for an "occupation rent to reflect [the Respondent's] exclusive occupation of the trust property to reflect her exclusion from such date as the court determines to the date of judgment". This claim was based on what was pleaded as a "constructive ouster" of the Appellant from the property. It was said to give rise to a credit of about £45,000.00 by way of occupation rent (reflecting the Respondent's sole occupation of the Property for a number of years) to be brought into the account in her favour.
6. The trial of the claim came before Mr Recorder Murphy ("the Recorder") in the County Court at Middlesbrough. The Recorder heard evidence and submissions over 2 days and gave an *ex tempore* judgment on 10 December 2020 ("the judgment"). The trial bundle below (which is before me) shows that he was faced with a mass of witness

statements and accusations and cross-accusations. His task was clearly not straightforward and he produced a commendably succinct judgment in what was clearly a hard-fought case with strong feelings on both sides. It also appears that perhaps he was not given as much assistance on the law as has been provided to me.

7. The Respondent was very largely successful on the issues determined by the Recorder. The Recorder made a number of orders on 21 January 2021 consequent on the judgment, including an order for the sale of the Property. He refused to make an occupation order in the Appellant's favour. He also refused to make an order in favour of the Appellant for occupation rent, or compensation, under section 13(6) of TOLATA. The Appellant had argued below that when an accounting and determination of net equity as between the parties was calculated following sale, a credit for such occupation rent should be applied in her favour. The issue on the appeal before me is whether the Recorder was wrong in law in rejecting this occupation rent claim. Permission to appeal on this issue was granted by Stacey J on 1 June 2021.
8. I will need refer to the detail of the Recorder's judgment below, but for introductory purposes, I identify that the Recorder found that there had been a breakdown in the relationship between the parties but ultimately concluded that an occupation rent was not payable because the Respondent had not denied the legal rights of occupation of the Appellant. In argument before me there has been a focus on para. [79] of the judgment in which the Recorder observed as follows when considering the test to be applied in determining whether there had been exclusion by the Respondent of the Appellant:

“In a landlord and tenant situation it is not much different to the landlord coming in and changing the locks and throwing all your stuff onto the streets. In those circumstances you are obviously entitled to damages because they are not allowed to do that without a court order. Well, this is the equivalent of that. In other words, she would otherwise have effectively been living there but the claimant prevented her from doing so, ie. exercising her rights.”

I will refer to this below as the “landlord analogy”.

9. In summary, Counsel for the Appellant argues that use of this analogy shows that the Recorder interpreted exclusion as too high a threshold by holding that it was necessary for his client to effectively show that she had been locked out of the Property, as opposed to satisfying the court that there had been constructive exclusion of the Appellant at the end of a relationship. It is said by Counsel for the Appellant that there had in fact been such constructive exclusion of his client arising no later than 2011 (but possibly even earlier). I pause there to note that there is a lack of clarity as to precisely when it is said that there was exclusion.
10. Against this, Counsel for the Respondent argues that there was no misdirection in law and this is an appeal which effectively seeks to overturn factual findings made on evidence heard by the Recorder. Emphasis is placed on how the Recorder found the Appellant to be in certain respects an unsatisfactory witness.

II. Legal Framework

11. Section 13 of TOLATA provides as follows:

“13 Exclusion and restriction of right to occupy.

(1) Where two or more beneficiaries are (or apart from this subsection would be) entitled under section 12 to occupy land, the trustees of land may exclude or restrict the entitlement of any one or more (but not all) of them.

(2) Trustees may not under subsection (1)—

(a) unreasonably exclude any beneficiary’s entitlement to occupy land, or

(b) restrict any such entitlement to an unreasonable extent.

(3) The trustees of land may from time to time impose reasonable conditions on any beneficiary in relation to his occupation of land by reason of his entitlement under section 12.

(4) The matters to which trustees are to have regard in exercising the powers conferred by this section include—

(a) the intentions of the person or persons (if any) who created the trust,

(b) the purposes for which the land is held, and

(c) the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.

(5) The conditions which may be imposed on a beneficiary under subsection (3) include, in particular, conditions requiring him—

(a) to pay any outgoings or expenses in respect of the land, or

(b) to assume any other obligation in relation to the land or to any activity which is or is proposed to be conducted there.

(6) Where the entitlement of any beneficiary to occupy land under section 12 has been excluded or restricted, the conditions which may be imposed on any other beneficiary under subsection (3) include, in particular, conditions requiring him to—

(a) make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted, or

(b) forgo any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary.

(7) The powers conferred on trustees by this section may not be exercised—

(a) so as prevent any person who is in occupation of land (whether or not by reason of an entitlement under section 12) from continuing to occupy the land, or

(b) in a manner likely to result in any such person ceasing to occupy the land,

unless he consents or the court has given approval.

(8) The matters to which the court is to have regard in determining whether to give approval under subsection (7) include the matters mentioned in subsection (4)(a) to (c)”.

12. This section falls to be applied together with sections 12, 14 and 15 of TOLATA which I will not recite. I will however summarise their effect (insofar as relevant) below.

13. In Stack v Dowden [2007] UK HL 17 one of the issues which arose concerned the principles to be adopted on the taking of accounts between co-owners and in determining claims by a co-owner out of occupation for an occupation rent from a co-owner in occupation. The House of Lords was unanimously of the view that the court’s power to order payment to a co-owner of an occupation rent is no longer governed by the historic doctrine of equitable accounting but is instead governed by sections 12-15 TOLATA (and in particular the statutory principles laid down in section 15 of that Act) It was said however that the results may often be the same. I refer to the speech of Baroness Hale at [93]-[94] with whom three of the law lords agreed. It was also said that it would be a rare case when the equitable and statutory principles would produce a different result: Lord Neuberger at [150]. But it is the statutory principles that must be applied.

14. Baroness Hale summarised the statutory provisions as follows at [93]:

“... 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 also have power under section 13(3) to impose conditions upon the occupier. These include, under section 13(5), paying any outgoing 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 persons 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), in a case such as this, 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.”

15. Section 12 of TOLATA confers on beneficiaries entitled to an interest in possession a right to occupy land available for her occupation. Section 13 confers on trustees, where there are two or more such beneficiaries, the power (1) to exclude or restrict the entitlement to occupation of any one or more (but not all) of such beneficiaries; (2) to impose conditions on any beneficiary in relation to her entitlement to occupy, including conditions requiring him: (a) to pay outgoings and expenses in relation to the land; and (b) where the entitlement of another beneficiary to occupy land under section 12 has been excluded or restricted, to make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted and to forego any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary.
16. It is clear that this section is designed to confer on trustees power to regulate and set the terms for future occupation of trust land. Section 14 confers power on the court on application by trustees or others interested to make such orders as it thinks fit: (a) relating to any of the trustees’ functions (which includes their functions under section 13); and (b) to declare the nature or extent of a person’s interest in property subject to the trust. It is under the latter of these two powers that the statutory jurisdiction is conferred on the court to take accounts between co-owners.
17. As explained in Murphy v Gooch [2007] EWCA Civ 693 (“Murphy”) at [14], under the previous equitable doctrine the court was concerned only with considerations relevant to achieving a just result between the parties. Statute now governs. Section 15 of TOLATA requires the court in determining all applications for an order under section 14 to include amongst the other matters to which it has regard: (1) in all cases (so far as applicable) the four matters referred to by Baroness Hale in Stack v Dowden; (2) in the case of applications relating to the exercise by trustees of the powers conferred by section 13 the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees would be) entitled to occupy the land under section 12; and (3) in case of any other application (other than one relating to the conveyance of land to beneficiaries absolutely entitled) the circumstances and wishes of any beneficiaries of full age entitled to an interest in possession.
18. The wider ambit of relevant considerations means that the task of the court is now 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.
19. I will need to return to Murphy in more detail below. It is a highly significant decision in the context of this appeal. It is not referred to by the Recorder in his judgment (nor

indeed are any cases referred to by him). Both Counsel before me (who appeared below) confirmed however that it had been cited to the Recorder.

III. The Recorder's judgment

20. Although the focus of this appeal is the Recorder's rejection of the occupation rent claim, it is appropriate to record some of his earlier findings. He found the relationship between the Appellant and the Defendant had broken down, and that the purpose of the trust of the Property was to provide a family home for them and Joey (the family unit). He recorded that the Appellant said she had been excluded from the Property (on various differing dates) but did not in the event make any findings as to when this occurred. The lack of clarity as regards this aspect of the case remains. Counsel for the Appellant was not able to give a confident answer to my question as to which date was being put forward by his client.

21. The following passages of the judgment encapsulate what I have sought to summarise above:

“15. [...] I do want to flag up and illustrate two pieces of the oral evidence I heard that I found illustrative, informative and actually true. One was from the [Respondent] when describing the situation between himself and the defendant. He essentially said, and the context does not matter for this purpose, that it has been a difficult turbulent relationship that had come to an end. That is plainly true and in fact it had been a difficult and turbulent relationship that had come to an end many years ago in my judgment...”

“16. There was also a very informative and illustrative piece of evidence given by the [Appellant] which I entirely accept as being true and I think it explains much of what has happened over the past 14 years, which is when the defendant said her primary motivation was and remains to give Joey a safe and secure home and she did see initially the purpose of the home was that the claimant and the defendant to give Joey such stability and security...”

“19. [...] At some stage the property was put into joint names. In 2006 [the Appellant] moved out. [The Appellant] denies it and said this did not happen until 2010 at the earliest. I prefer [the Respondent]'s evidence about that.”

22. In considering the parties' evidence the Recorder said:

“44. As to Mr Dixon's oral evidence [...] it can be stated here briefly. He says the defendant has not lived at the house since 2006. [...] he accepted it was to be for a family of three but he did not agree the descriptions effectively that the purpose, the entire purpose of this Trust was to provide Joey with a home. He

said the purpose of it, and I find it exactly if not obvious, was indeed to provide a family home for the three of them. [...] Anyways, their relationship stopped before or principally stopped by about 2006 but in any event, he says the defendant stopped living there from 2006 anyway.”

“46. The defendant in contract wants to live at 3 Chestnut Road with Joey for the principle [SIC] reason orally stated which is to provide him the security that he requires to complete his schooling and possibly into the longer term. [...] She says she was excluded from the property from either 2010, 2011, or 2013, it was not entirely clear to me which, because there was some conflict with her suggestion that she was still sort of living there for period of time in 2011 and 2013. I think she said they still had a physical relationship in 2013 but candidly I will come on to that under the section of occupation rent in a moment...”

23. As to the occupation rent claim, the following passages of the judgment were the focus of submissions of Counsel:

“74. A much more troubling issue of this claim is the question of occupation rent for the time which the defendant says she has been excluded or restricted in her occupation of her own property. I have had various dates suggested for this from 2010, 2013, 2016, possibly 2017, when the occupational order was sought, but it seems to me, and I did have some discussion with counsel about this, that the cornerstone of this application for an occupational rent must be that it is by reason of the claimant excluding the defendant, not by reason of the defendant's choice.”

“78. There was undoubtedly obviously a breakdown in the relationship between the two of them. [...] But the touchstone for the exclusion of your legal rights to occupy your own premises which effectively is this point within these proceedings, does not necessarily turn and is not determined by whether the relationship has broken down between them and/or whose fault that is, but it has to be one party denying the legal rights of occupation of the other such that they are entitled in the absence to an occupation rent.”

“79. In a landlord and tenant situation it is not particularly different to the landlord coming in and changing the locks and throwing all your stuff onto the streets. In those circumstances you are obviously entitled to damages because they are not allowed to do that without a court order. **Well, this is the equivalent of that.** In other words, she would otherwise have effectively been living there but the claimant prevented her from doing so, ie. Exercising her rights.”

“82. [...] it is about whether you have been in fact prevented from exercising your own legal right to live in your own property.”

“84. Anyway, if I am wrong about all that, I postulate it in a different way. The defendant has not proven on the balance of probabilities that she has been so excluded by the claimant at any time and in fact I do so find that she has chosen not to be in occupation of her own premises and the reason for that is a matter entirely for her but the explanation for her continuing to pay the mortgage on that and indeed to still own the property just to use common parlance, is because her principle [SIC] motivation was to ensure Joey had a safe and stable roof over his head...”.

24. It is fair to observe that the Recorder’s approach was to the effect that the Appellant had to show she had been barred from exercising her legal right to occupy. That was to be assessed using the landlord analogy – the Appellant had to show something like a landlord changing the locks in a forcible eviction of a tenant.

IV. Occupation Rent: section 13(6) of TOLATA

Submissions

25. On behalf of the Appellant, Counsel made cogent and attractive submissions to the effect that underlying the Recorder’s rejection of the occupation rent claim was a basic legal error. He argued that the Recorder had applied too high a test of exclusion and ignored the caselaw which made clear that breakdown of a relationship may suffice to create an entitlement to an occupation rent.
26. On behalf of the Respondent, Counsel made forceful and persuasive submissions seeking to uphold the Recorder’s judgment. She argued that it is clear from the Recorder’s judgment that in using the landlord analogy, he was he was considering the concept of “exclusion” and what that meant rather than applying a direct analogy. She submitted the Recorder properly considered that some form of exclusion was required as *per* the wording of the statute. It was said to be equally clear from the judgment that the court made findings of fact in relation to whether the Appellant had satisfied him as to the “exclusion” and determined that she had not. She submitted that the court’s decision amounts to no more than this: there must be some evidence of the fact that there has been exclusion and not mere choice. She reminded me that the Recorder had considered whether it was unreasonable to expect the Appellant to continue to reside at the property or whether there had been some form of “*constructive exclusion*”. She submitted that the mere fact alone of the end of a relationship cannot give rise to an occupation rent. In this regard, reliance was placed on the Appellant’s own evidence that she chose to move out at the conclusion of the relationship and thereafter came and went from the property. Strong reliance was placed by Counsel for the Respondent on findings that the Appellant had not satisfied the Recorder that she had been excluded; she had not satisfied him of the date of any exclusion; and she had not discharged her evidential burden of proof in relation to that aspect of the claim. I was reminded that

the Recorder, as the trial judge, was in the unique position of having had the opportunity, over 2 days, of evaluating not only the documentary evidence but also the oral evidence of the parties.

27. Counsel for the Respondent submitted that although the Recorder had “tied himself in knots” with his landlord analogy, he had overall made findings of fact which showed that he was considering whether in all the circumstances it was just to award an occupation rent. She accepted however that the Recorder did not in terms address the statute or the case law. Both Counsel submitted they had directed the Recorder to the terms of section 13 of TOLATA.

Analysis and conclusions

28. Although the Respondent’s submissions were very well presented, in my judgment, the Recorder did indeed fall into legal error. It is related to (but not the same as) the legal error which has been the focus of the Appellant’s submissions. I identified this apparent error for Counsel when they began oral submissions so they could address it (it not being a point which had been the subject of their skeletons). It was adopted by Counsel for the Appellant. I set it out at [34]-[35] below.
29. It is clear from a consideration of the entirety of the Recorder’s reasons for refusing the claim for occupation rent that he considered a single issue to be determinative. That was the requirement of the Appellant to prove as a condition of making a claim under TOLATA that she had been excluded by the Respondent from enjoying legal rights to occupation of the Property. That was an error, as I describe below. The Recorder also considered that this required her to prove something like a landlord’s lockout. That was also plainly a legal error.
30. Applying this limited test, the Recorder found that the Appellant had not been excluded [81], and (in the alternative) the Appellant “...has not proven on the balance of probabilities that she has been so excluded by the [Respondent] at any time and in fact I do so find that she has chosen not to be in occupation of her own premises and the reason for that is a matter entirely for her...” [84].
31. I note that the Recorder described this necessity for proof of exclusion as the “cornerstone” issue [74] and said this was to be determined by identifying whether one party had denied “...the legal rights of occupation of the other...”: [78]. The Recorder clearly considered that an ouster of occupation was a condition precedent to any claim for an occupation rent.
32. In my judgment, there was a clear and material misdirection of law which infected the Recorder’s entire approach to the occupation rent issue. The law is clear that under TOLATA a court may order credit for an occupation rent if it was just to do so, whether or not there was any proof of ouster. Indeed, that is the *ratio* of Murphy which is a Court of Appeal decision deciding this very issue under TOLATA (and not under equitable accounting: see [15]. This is a decision which reviews the equitable accounting case law and the then recent decision in Stack v Dowden [2007] UKHL 17.
33. Having undertaken that review, Lightman J said at [18] of Murphy:

“I turn to the second question whether there was a need on her part to prove ouster from occupation. In my judgment, it was open to the Judge and it is open to this court to order credit for an occupation rent if it was or is just to do so, whether or not there was proof of any ouster. What (if any) credit could or should be given is a separate matter to be determined in accordance with the statutory principles. But even if ouster were necessary, it is quite clear that Ms Murphy left the Property on the breakdown of her relationship with Mr Gooch and I am satisfied (as the Judge was clearly satisfied) that, when she left the Property, she should be regarded (in the same way as a wife leaving a joint home on a breakdown of the marriage) as constructively excluded from the Property.”

34. It is accordingly well-established law which bound the Recorder (and which binds me) that ouster is not a condition precedent and in any event it can be established on a constructive basis. Although this appeal has been argued on the basis that there was in fact constructive exclusion (and the Recorder should have so found), I consider that the Appellant can advance a more basic complaint.
35. That is that the test which the Recorder should have applied is whether it was “just” in all the circumstances to order credit for an occupation rent and having regard to the statutory factors. That is the ultimate question and it was not addressed by the Recorder although Counsel inform me that Murphy was cited to him. The Recorder’s error may however have arisen because the parties’ submissions focussed on the relevant (but not determinative) sub-issue of ouster.
36. I note that the approach taken by Lightman J in Murphy was supported by the older caselaw he cited, although those cases were decided in the context of equitable accounting (and not under TOLATA). As explained by Lightman J at [10]:

“...more recent authorities made plain that an occupation rent may be ordered in any case where this is necessary to do broad justice or equity between the parties: see Lawrence Collins J in Byford v. Butler [2004] 1 FLR 56 at 65. Lawrence Collins J cited with approval the judgment of Millett J in the case of In Re Pavlou [1993] 1 WLR 1046 at 1050 C-D where Millett J said:

“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 an occupation rent which he or she never expected to pay.””

37. Lightman J further explained that although these observations were made in an equitable accounting and not in relation to the application of sections 12-15 of TOLATA, the view had been expressed in the Supreme Court that it will be a rare case when the equitable and statutory principles would produce a different result. I have referred to this point above.
38. Re Pavlou describes a *prima facie* position that a person who leaves a matrimonial home after a breakdown “may” be regarded as having been excluded. I do not accept that there is any rebuttable presumption to this effect, as submitted by Counsel for the Appellant. It is no more than a conclusion which might be drawn on the facts but it is not any form of legal rule and Millett J made that clear.
39. I allow the appeal on the grounds as reformulated above. It was agreed that the other grounds of appeal did not arise in this situation.

V. Conclusion

40. It follows that the Recorder’s decision on the occupation rent issue cannot stand. I will set that decision aside and the costs order below. I direct that the issue of occupation rent and costs of the claim be freshly determined by a judge other than the Recorder.