Liability for occupation rent: 'No fault ouster' of a co-tenant

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*Before the 2009 decision in **Callow v Rupchev**, there were three circumstances in which an occupation fee would be payable by a co-owner to another co-owner. In **Callow v Rupchev** the NSW Court of Appeal found a further circumstance in which occupation rent can be claimed — cases of relationship breakdown where there is no 'attributable fault' by either party. This further ground is to be distinguished from actual ouster and constructive ouster. This article explores the context in which this decision was made, and reviews previous decisions relating to claims for occupation rent occurring within a relationship breakdown. To the extent that the doctrine of ouster has traditionally represented a particular understanding of the nature of an undivided proprietary interest in land, this article assesses whether this approach flags a transition in our understanding of the concept of property to mirror a more contemporary picture of society.*

I Introduction

The overarching principle involved in co-ownership is that each party owns an undivided interest in the whole. 'A division of the property is repugnant to the nature of a tenancy in common, for it is an essential characteristic of a tenancy in common that each of the tenants has the right to occupy the whole of the property in common with the others.'[1] On this basis, there can be no trespass by a co-owner. Payment by one co-owner to the other of compensation for their sole occupation of whole or part of the property therefore would run counter to the very nature of the proprietary interest of the occupying co-owner therefore 'as between tenants in common, they are both equally entitled to occupation and one cannot claim rent from the other'.[2]

There are circumstances however in which the court will allow compensation for sole occupation of co-owned property: in the case of an application for compensation for improvements upon a sale or partition of the property (on the application of equitable principles) and in the case of an ouster.[3]

Ouster tends to arise in support of a claim for occupation rent, in cases involving a multitude of issues upon apparently irretrievable relationship breakdown. Leading Australian and UK cases such as *Foregeard v Shanahan*,[4]

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1 *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 643; 116 ALR 26; BC9303589. Likewise in respect of a joint tenancy, see *Wright v Gibbons* (1949) 78 CLR 313 at 330; [1949] ALR 287; (1949) 23 ALJR 104; BC4900100 'each [joint tenant] has a right shared with his co-tenants to the whole common property, but no individual right to any undivided share in it'.

2 *Jones v Jones* [1977] 2 All ER 231; [1977] 1 WLR 438 at 441; (1976) 33 P & CR 147.

3 *Luke v Luke* (1936) 36 SR NSW 310 at 313; (1936) 53 WN (NSW) 101.

4 (1994) 35 NSWLR 206; (1994) 18 Fam LR 281; (1994) NSW ConvR 55-723; BC9405016.

Biviano v Natoli,[5] *Dennis v McDonald*[6] and *Davis v Johnson*[7] all involve fundamental differences between co-owners in familial or domestic relationships, and a desire for an account of expenditure and benefits including sole occupation. In these cases, ouster is one in a series of claims made for a financial reckoning apparently to represent the parties' proprietary interests.

Each case, in its consideration of the parties' respective entitlements, turns on its facts.[8] However the common thread in the courts' thinking in these cases is the emphasis on the parties' *property* interests, rather than their relationships. The law's construction of proprietary interests have traditionally trumped those involving the reality of co-habitation.

Kirby P's dissent in *Foregeard v Shanahan* offers a rebuke to the law's approach to resolution of the rights of disputing co-owners. 'Most of the "rules" were developed long before the existence of the phenomena to which the statute (the Conveyancing Act partition provisions) must now typically apply.'[9] He cited widespread ownership of real property by working people and by women, availability of credit and high levels of de facto married relationships. These comments provide a useful backdrop against which to consider the decision in *Callow v Rupchev*[10] — which also cites changes in social conditions, and in response claims to add another basis on which occupation rent might be awarded against an occupying co-owner.

As a backdrop to assessing the novelty of the 'new' principle, this article will first discuss the right of possession as a proprietary interest through a review of the courts' approach to ascertaining liability for occupation rent. It will then review the courts' traditional approach to ouster — as wrongful exclusion — to assess the extent to which it may have developed over time. Finally, this article will discuss the recent NSW decision of *Callow v Rupchev*[11] to assess the extent to which its approach to the question of compensation for sole occupation differs from the 'ouster cases'. It will assess whether the *Callow v Rupchev*[12] approach redefines the law in this area from one focusing on proprietary interests, to one that reflects changed social conditions flagged by Kirby P — and perhaps as a recognition of the parties' personal realities, rather than a strictly proprietary construct.

II Right of possession as a proprietary interest

While unity of possession is a clear right attendant on ownership in common, the nature of the right of possession as a proprietary interest is highlighted by the courts' approach to compensating for its loss where that occurs as a result of ouster.

In the context of co-ownership, ouster refers to a wrongful act of exclusion

5 (1998) 43 NSWLR 695; (1998) 9 BPR 16,469; (1998) NSW ConvR 55-865; BC9803168.
6 [1982] Fam 63; [1982] 2 WLR 275.
7 [1979] AC 264; [1978] 1 All ER 1132; [1978] 2 WLR 553.
8 *Hummelstad v Hicks* (2006) NSW ConvR 56-150; [2006] NSWSC 120; BC200601062 at [45].
9 *Foregeard v Shanahan* (1994) 35 NSWLR 206 at 211; (1994) 18 Fam LR 281; (1994) NSW ConvR 55-723; BC9405016.
10 [2009] NSWCA 148; BC200905098.
11 Ibid.
12 Ibid.

of one co-owner by another — voluntary absence from the property does not constitute exclusion.[13] Ouster constitutes an interference with the right of possession attendant on ownership. Accordingly, changing the locks,[14] denying the ousted party's title to the land,[15] and threats of violence[16] have all been found to constitute ouster, and have resulted in an award of occupation rent against the occupying party.

The courts' traditional approach to occupation rent is based on the foundation that no compensation will be provided for co-owners who do not remain in possession of jointly owned property.[17] In support of the nature of a joint interest or interest in common as an undivided proprietary interest in land, the character of occupation rent awarded upon a finding of ouster is that of compensation: for 'whatever occupation rent might be, it is not rent'.[18]

The courts have characterised the nature of the payment in a variety of ways: 'akin to the sort of protection given to a protected tenant';[19] 'some sort of compensation to be paid by a trustee . . . to a beneficiary . . . for an exclusive enjoyment of the trust property';[20] 'mesne profits arising from the occupying co-tenant's wrongful ouster. Mesne profits are not rent . . .'.[21]

Martin J in *Beresford v Booth* pointed out that:

> whichever way the matter is approached, it is clear that the law seeks to ensure that the respondent is not unfairly prejudiced by reason of being excluded or ousted from the property. Either she should not be obliged to contribute any amount toward the expenses incurred during the relevant period, or the applicant should be required to pay half a reasonable rent which would then, in theory, be available to the respondent to pay for or contribute to her share of the expenses.[22]

While all slightly different, these approaches to the reference for calculation of occupation rent all reinforce the proprietary nature of the co-tenancy relationship. In the case of ouster (broadly termed), they recognise that a proprietary right has been interfered with, and consequently that loss of right must be compensated. There is no reference however to compensation for the expenditure the ousted party bears in finding a new home — this would represent a more personal approach, rather than the proprietary approach taken by the courts.

The courts define the circumstances in which compensation will arise in various ways. Arguably, these vary from the narrowest of circumstances (violence) through 'exclusion by whatever means', to the broader circumstances of the 'unreasonableness' of a party remaining in occupation.

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13 *Re Thurgood* [1987] ANZ ConvR 44; (1987) QConvR 54-239.
14 *Hummelstad v Hicks* (2006) NSW ConvR 56-150; [2006] NSWSC 120; BC200601062.
15 *Biviano v Natoli* (1998) 43 NSWLR 695; 9 BPR 16,469; (1998) NSW ConvR 55-865; BC9803168.
16 *Dennis v McDonald* [1982] Fam 63; [1982] 2 WLR 275.
17 *Re Thurgood* [1987] ANZ ConvR 44; (1987) QConvR 54-239 at 57,631.
18 (1999) 202 LSJS 160; [1999] SASC 166; BC9902155 at [40].
19 *Dennis v McDonald* [1982] Fam 63 at 75 per Purchas J; [1982] 2 WLR 275.
20 Ibid at Fam 80 per Sir John Arnold P.
21 *Biviano v Natoli* (1998) 43 NSWLR 695 at 704; 9 BPR 16,469; (1998) NSW ConvR 55-865; BC9803168.
22 *Beresford v Booth* (1999) 202 LSJS 160; [1999] SASC 166; BC9902155 at [43].

This latter, broader interpretation seems to be the upshot of the recent decisions.

III Ouster as wrongful exclusion

In most of the cases on ouster of a co-tenant, the court is clear in stating the general rule (no rent payable) and the exceptions — at law, in cases of ouster, and in equity, in a claim for expenditure on improvements. It is ouster that is the focus of this article, and the question of whether *Callow v Rupchev*[23] has truly introduced an expanded notion of ouster.

There is a clearly stated traditional understanding that ouster, as 'wrongful exclusion' involves 'force, violence or threats of violence'[24] against the non-occupying party by the occupying party. In many cases, the parties' relationship has become violent and this forms the background circumstances within which the court determines whether there has been an ouster.[25] Careful observation of the decisions in these cases however, reveals that the court takes a somewhat wider approach to the nature of wrongful exclusion.

In *Dennis v McDonald*, for example, the court said that 'the basic principle . . . [no liability for occupation rent] does not apply in the case where an association similar to a matrimonial association has broken down and one party is, for practical purposes, excluded from the family home'.[26] Although the context here was one of violence, and the court found that the defendant's acts of violence were the cause of the defendant's expulsion from the property, the underlying principle cited was wider than finding wrongful exclusion through violence itself.

This decision was cited with approval in the Queensland decision *Re Thurgood*.[27] Here, the court said that it was not a case where the applicant 'voluntarily abstains from using commonly owned property'[28] — the respondent 'intended to exclude him from the house by whatever means were available to her'.[29] The court emphasised the 'continued unpleasantness', coupled with the threat of being 'submitted to the indignity of having the police' called in.[30] The decision is often represented as authority for exclusion via threats of violence[31] however in citing *Dennis v McDonald*, the court arguably focuses more on 'breakdown of the association'.[32]

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23 [2009] NSWCA 148; BC200905098.

24 *Halsbury's Laws of Australia*, LexisNexis, para 355–11620, cited in *Beresford v Booth* (1999) 202 LSJS 160; [1999] SASC 166; BC9902155 at [49].

25 *Davis v Johnson* [1979] AC 264; [1978] 1 All ER 1132; [1978] 2 WLR 553; *Dennis v McDonald* [1982] Fam 63; [1982] 2 WLR 275; *Re Thurgood* [1987] ANZ ConvR 44; (1987) QConvR 54-239; *Callow v Rupchev* [2009] NSWCA 148; BC200905098.

26 [1982] Fam 63 at 71; [1982] 2 WLR 275.

27 [1987] ANZ ConvR 44; (1987) QConvR 54-239 at 57,631.

28 Ibid, at QConvR 57,632.

29 Ibid, at QConvR 57,630.

30 Ibid.

31 See, eg, P Butt, *Land Law* Lawbook Co, Sydney, 2010, p 239.

32 *Re Thurgood* [1987] ANZ ConvR 44; (1987) Q ConvR 54-239 at 57,631, citing *Dennis v McDonald* [1982] Fam 63 at 70–1; [1982] 2 WLR 275. Cf *Chieco v Evans* (1990) 5 BPR 11,297; BC9002356, where Young J rejected this approach. Young J's approach was itself rejected by the court in *Biviano v Natoli* (1998) 43 NSWLR 695; 9 BPR 16,469; (1998) NSW ConvR 55-865; BC9803168.

Likewise, in *Hummelstad v Hicks* the court recognised that 'unfortunately the personal and social problems resulting from the fact that both [parties shared] occupancy . . . have [blurred] the legal rights and obligations of the parties arising out of their co-ownership . . .'.[33] In this case, the 'practical effect' of the plaintiff changing the locks, amounted to an ouster.[34]

In this case, the court focused on 'whether there had been an ouster', which was a 'question of fact which must be decided upon the evidence'.[35] In contrast, the court in *Re Thurgood* seemed to focus on whether it was reasonable for the non-occupying co-owner to return: whether it was 'voluntary abstinence'. This element of 'voluntariness' introduces an interesting element — it certainly moves away from our traditional understanding of ouster as 'violence of a threat of violence' (behaviour by the occupying party), moving into 'unpleasantness and indignity' (responses by the excluded party). Arguably, this represents a shift in the approach of the courts to the nature of the right of possession and remedies for interference.

This focus on whether the excluded party left 'voluntarily' is not applied consistently. In decisions involving actual violence or threats of violence where one party is subject to an apprehended violence order, the non-occupying party could not be said to be 'voluntarily abstaining'. And yet applying *Re Thurgood*,[36] these parties would be entitled therefore to compensation. Obviously this would be against public policy. The courts have instead found alternative ways to characterise the parties' rights.

In *Biviano v Natoli*, for example, the court did not find that an award of an apprehended violence order constituted an ouster. It did find however that the occupying party's denial of the title of the other was a constructive ouster.[37] Likewise, the court in *Davis v Johnson* found that the apprehended violence order against the excluded co-owner did not confer a property right on the occupying party, but did suspend or restrict the property right of the other to preserve the occupying party's right. In this way, the exclusion was removed from the scope of entitlements in terms of ouster, but preserved the concept of proprietary interests.

Luke v Luke offers a different perspective on voluntariness. In this case, an elderly woman (of 'enfeebled mind')[38] jointly owned property with three next of kin, but occupied the property solely. The next of kin brought an application for partition, and in addition sought to charge her with occupation rent. Long Innes CJ rejected the idea that a co-owner who remained in sole possession was by that reason alone subject to an occupation fee.[39]

French v Barcham takes the idea of voluntariness to another level. In this case, one joint owner of property was declared bankrupt. The joint owners remained in occupation of the property for some 12 years following the appointment of a trustee in bankruptcy after which time the trustee applied for

33 (2006) NSW ConvR 56-150; [2006] NSWSC 120; BC200601062 at [23].
34 *Hummelstad v Hicks* (2006) NSW ConvR 56-150; [2006] NSWSC 120; BC200601062 at [45].
35 (2006) NSW ConvR 56-150; [2006] NSWSC 120; BC200601062 at [42], [45].
36 [1987] ANZ ConvR 44; (1987) Q ConvR 54-239.
37 (1998) NSW Lexis 1843 at 24.
38 (1936) 36 SRNSW 310 at 311; (1936) 53 WN (NSW) 101
39 Ibid, at SRNSW 314.

and got an order for sale. The question before the court was whether an adjustment would be made for occupation rent in favour of the trustee — as the bankrupt and the remaining co-owner had been in occupation all that time.

Applying the 'traditional' rule, there could be no suggestion of ouster (wrongful exclusion) of the trustee. There were no threats, there was no actual violence, there was no denial of title. Applying *Luke v Luke*,[40] there should be no suggestion that being in occupation alone would give rise to an occupation fee. And yet the court found that there was liability for occupation rent. The court's focus was on the 'reasonableness of taking occupation' rather than the causation of the exclusion. It was obviously not reasonable to expect the trustee to occupy the property in common with the bankrupt's wife.

This case considered *Re Pavlou* where the court found that:

> where the property was a matrimonial home and the marriage had broken down the party who left the property would in most cases be regarded as excluded from the family home, so that an occupation rent was payable by the co-owner who remained.[41]

This case was applied in the context of whether it is reasonable to expect a co-owner not in occupation to take up occupation of the premises — deemed to be the 'essential' question.[42] *Re Pavou* was also considered in *Callow v Rupchev*.[43]

IV *Callow v Rupchev*[44]

Callow v Rupchev is another case involving violence. Both parties made allegations as to violent behaviour of the other, however the trial judge found that the relationship was instead 'tempestuous'. Regardless, the Court of Appeal found that there was 'no need to identify violence or a threat of violence sufficient to justify a finding that departure of one co-tenant was involuntary'.[45] In applying *Dennis v McDonald*, the court identified this reasoning as formulation of a 'new' principle that an:

> occupation fee may be set off against the claim of the tenant in occupation for a contribution to expenses or improvements where the co-ownership arose out of a domestic relationship which has broken down rendering departure of one party reasonable in the circumstances.[46]

In so finding, like Kirby P before them, the court reflected on the changes in society that required a reformulation of the 'old' principles. While it can be suggested that the court simply followed precedent, it can also be said that it has made the existing principles more explicit. Perhaps not going so far as *Re Pavlou*, it does recognise the reality of personal relationships and contemporary property ownership.

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40 Ibid, at SRNSW 310; or *Henderson v Eason* (1851) 17 QB 701; (1851) 117 ER 1451.
41 [1993] 3 All ER 955; [1993] 1 WLR 1046.
42 *French v Barcham* [2009] 1 All ER 145; [2009] 1 WLR 1124 at 1138; [2008] 2 P & CR D49; [2008] EWHC 1505 (Ch).
43 [2009] NSWCA 148; BC200905098.
44 Ibid.
45 Ibid, at [30].
46 Ibid, at [30].

While also occurring in the context of alleged violence, this aspect of the case was explicitly ignored by the court. *Callow v Rupchev* explicitly shifts the focus of inquiry from whether there has been behaviour that amounts to ouster so as to interfere with a property right, to the state of the parties' personal relationship.

On the other hand, *Re Thurgood* and *Dennis v McDonald* only went part of the way. Each of these cases alluded to the behaviour of the occupying party in the context of the relationship breakdown — so that the ('new') principle of relationship breakdown was supported by the ('old') principle of violence or threats of violence.

To this extent, it is submitted that the decision does indeed espouse a 'new' principle.

V Conclusion

More than one Australian court has identified that the genesis of principles of co-ownership lies in another age — most recently in *Callow v Rupchev*.[47] The courts' response to this has been to shift their approach to determining disputes over loss of a right of possession to co-owned property. Earlier cases started with the proposition that there was no liability of an occupying co-owner to the other. This was based on what Blackburne J described as 'the underlying assumption ... that there is no good reason why the non-occupying co-owner should not take up occupation'.[48] If this is the assumption, and coupled with an understanding of the nature of the proprietary interest, it is understandable that the next issue would be to establish wrongful exclusion — particularly focusing on violence.

However if one assumes instead that property ownership in common is in one sense an extension of a personal or domestic relationship, then where that relationship ends, there is no longer any underlying valid assumption that the non-occupying party should take up occupation. And this seems to be what the court is now saying — having identified that 'to describe such a [relationship breakdown] as an actual ouster involves a fiction and it is better to recognise such a breakdown as an independent ground for charging ... an occupation rent'.[49]

The UK decisions have however highlighted where this reasoning can lead. If the underlying principle is one of the reasonableness of co-occupation, *French v Barcham* illustrates how this principle would work outside a relationship breakdown. It is likely that cases involving trustees in bankruptcy will see the next developments in this area. Certainly *Re Pavlou*[50] has been cited in *Draper v Official Trustee in Bankruptcy*[51] — though only in the context of payment of occupation rent as an offset to a claim for improvements. Whether further development of the law in this direction represents a response to ongoing changes in social conditions or public policy is another question.

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47 [2009] NSWCA 148; BC200905098.

48 *French v Barcham* [2009] 1 All ER 145; [2009] 1 WLR 1124 at 1138; [2008] 2 P & CR D49; [2008] EWHC 1505 (Ch).

49 *Callow v Rupchev* [2009] NSWCA 148; BC200905098 at [46].

50 [1993] 3 All ER 955; [1993] 1 WLR 1046.

51 (2006) 156 FCR 53; 236 ALR 499; [2006] FCAFC 157; BC200609063.