



Neutral Citation Number: [2017] EWHC 698 (Ch)

County Court Case No. 266 of 2013  
High Court Case No. BR-2016-1662

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**IN BANKRUPTCY**  
**ON APPEAL FROM THE COUNTY COURT SITTING AT ST ALBANS**  
**ORDER OF DISTRICT JUDGE CROSS DATED 22 DECEMBER 2015**

Royal Courts of Justice  
7 Rolls Building, Fetter Lane,  
London, EC4A 1NL  
Date: 7 April 2017

**Before :**

**MR JUSTICE SNOWDEN**

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**Between :**

**PAUL MICHAEL DAVIS**  
**(As trustee in bankruptcy of**  
**Audley Glendon Jackson)**  
**- and -**

**Applicant**

**(1) AUDLEY GLENDON JACKSON**  
**(2) HAZEL ROSE JACKSON**

**Respondents**

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**Daisy Brown** (instructed by **Harrison Clark Rickerbys**) for the **Applicant**  
**The Second Respondent** appeared in person, assisted by her daughter, Miss Monique Lewis  
**The First Respondent** did not appear and was not represented

Hearing date: 19 January 2017  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
MR JUSTICE SNOWDEN

**MR JUSTICE SNOWDEN :**Introduction

1. This case raises issues in relation to the equitable accounting which should occur between the parties on the sale of a house which was declared in a Land Registry TR1 transfer form to be held on trust for a husband and wife as joint tenants. The facts are unusual, because the parties have at all relevant times been estranged and lived apart when the house was originally acquired by the wife in her sole name, and the husband was never intended to live in the house and has not done so at any time. The property was only transferred into joint names when the house was re-mortgaged, but at no time did the husband pay any of the instalments of either mortgage or contribute to any of the outgoings. The issues have arisen because the husband has been subsequently been made bankrupt and an order for sale is sought by the trustee in bankruptcy.

Factual background

2. Mr. and Mrs. Jackson are a married couple, but at all times after 2001 they were estranged and lived apart. Mr. Jackson was a mortgage broker. In January 2003, Mrs. Jackson re-mortgaged the property which she then owned, and in which she lived with her four children. This released £36,180.21, which Mrs. Jackson put towards the purchase of a second property at 194 Harrington Road, London SE25 4NE (the "Property") on 14 March 2003 for £196,000. The remainder of the purchase price was borrowed by Mrs. Jackson on an interest-only mortgage. The title to the Property and the mortgage were in Mrs. Jackson's sole name, and she moved to live in the Property with her children. Mr. Jackson has never lived at the Property.
3. Shortly after the purchase, on 17 April 2003, Mrs. Jackson executed a deed entitled "Declaration of Trust" (the "Trust Deed") concerning the Property. The Trust Deed was drafted by solicitors who had previously acted for Mr. Jackson, but appear in this instance to have been acting for both Mr. and Mrs. Jackson. In the Trust Deed Mrs. Jackson declared, among other things, that:
  - i) she held the Property on trust for herself and Mr. Jackson in equal shares;
  - ii) she would, at the request of Mr. Jackson, assign, transfer or convey the Property to such persons as Mr. Jackson might direct and would apply to the Land Registry to register his interest in the Property; and
  - iii) both parties had full power to sell or charge the Property with the consent of the other with all the power of an absolute owner.
4. The Trust Deed then contained a clause stating,
 

"Consequently I the said Audley Jackson agree to pay half of the mortgage payments in favour of [the mortgagee] or any subsequent mortgagee of the Property in consideration of my being entitled to half of the equity of the Property.

The Trust Deed was countersigned by Mr. Jackson.

5. The purposes for which the Trust Deed was executed are wholly unclear. In evidence, Mrs. Jackson's explanation for this document was simply that,
 

"I was advised [by solicitors] that this was in order to protect the interests of my children if anything should happen to me."
6. Notwithstanding the terms of the Trust Deed, Mrs. Jackson continued to pay all of the interest payments under the mortgage and all of the household costs alone. Mr. Jackson never made any interest payments under the mortgage or any contribution towards the Property or its maintenance.
7. After a relatively short period of time, Mrs. Jackson started to experience cash flow problems and could not keep up with the repayments under the mortgage as they fell due. The mortgagee took proceedings and obtained an order for possession of the Property in April 2005. The threat of Mrs. Jackson and the children being evicted from their home led to Mr. Jackson arranging for the Property to be re-mortgaged with a new mortgage lender in March 2007. The new lender required the title to the Property to be transferred into Mr. and Mrs. Jackson's joint names and for both of them to be liable for repayment of the new mortgage loan.
8. The transfer of the Property into Mr. and Mrs. Jackson's joint names was achieved by execution of a Land Registry TR1 form on 6 March 2007. That form contained a box in which an "X" was inserted by Mr. and Mrs. Jackson, signifying that they held the Property on trust for themselves as joint tenants.
9. After the re-mortgage, Mrs. Jackson continued to make all of the payments under the new mortgage and in respect of the running and up-keep of the Property as before. Mr. Jackson paid nothing and never occupied the Property. Any contact between Mr. and Mrs. Jackson was sporadic and confined to telephone calls concerning the children.
10. Five years' later, on 29 June 2012, a bankruptcy petition was presented against Mr. Jackson by Her Majesty's Revenue and Customs. A bankruptcy order was made against him on 6 August 2013 at the Central London County Court. The Applicant, Mr. Davis, was appointed as trustee in bankruptcy ("the Trustee") with effect from 18 November 2013. The amount required to pay the debts and expenses of Mr. Jackson's bankruptcy was, as at 26 October 2016, £83,636.12.
11. Following his appointment, the Trustee wrote to Mrs. Jackson on 22 November 2013 and again on 28 August 2014 asserting that the Property was held beneficially in equal shares by himself and Mrs. Jackson, but inviting Mrs. Jackson to provide evidence if she believed that she had a greater share in the Property than 50%. The Trustee also asked whether, rather than the Property being sold, Mrs. Jackson was interested in making an offer to buy out Mr. Jackson's interest in the Property.
12. Mrs. Jackson did not respond, and so on 19 November 2015, the Trustee issued an application in the County Court in which Mr. Jackson's bankruptcy was being administered seeking: (i) a declaration that the Trustee was entitled to one half of the equity in the Property; and (ii) an order for sale of the Property.
13. On 22 December 2015, District Judge Cross made an order declaring that the Trustee was entitled to one half of the equity in the Property (the "Declaration") and granting an order for sale and a direction that the net proceeds of sale be divided equally

between the Trustee and Mrs. Jackson (the “Order for Sale”). Mr. and Mrs. Jackson attended the hearing before District Judge Cross as litigants in person but did not make any substantive submissions. They were granted a limited suspension of the Order for Sale to allow time for Mr. Jackson to take advice and make an application to annul his bankruptcy, and for Mrs. Jackson to take her own legal advice.

14. Mr. Jackson did not apply for an annulment of his bankruptcy and Mrs. Jackson did not make any application by the date upon which the suspension of the Order for Sale expired, with the result that a warrant for possession was granted to the Trustee on 15 March 2016. This prompted solicitors instructed by Mrs. Jackson to file a lengthy witness statement advancing a case to the effect that Mr. Jackson could have had no beneficial interest in the Property, as he had not complied with his obligations under the Trust Deed (which document had not been in evidence before the District Judge). A stay was sought of the warrant for possession pending an application for permission to appeal out of time against the Declaration and Order for Sale.
15. The solicitors’ involvement was, however, short-lived, because the SRA intervened in the practice on 11 April 2016, after which time Mrs. Jackson was again unrepresented. Nonetheless, on 18 April 2016 the warrant for possession was suspended pending appeal, and on 22 April 2016 Mrs. Jackson formally applied for permission to appeal out of time. Her argument was that if District Judge Cross had known about Mr. Jackson’s failure to comply with his promise in the Trust Deed to make half of the mortgage payments, he would not have made the Declaration that the Trustee had a 50% beneficial interest in the Property. Mrs. Jackson contended that in the absence of any contributions having been made by Mr. Jackson towards the mortgage(s) of the Property, the District Judge ought to have held that she was entitled to the entire equitable interest in the Property.

#### The first decision

16. After a hearing on 26 October 2016, I refused Mrs. Jackson permission to appeal against the Declaration and ordered her to pay costs, summarily assessed in the sum of £7,200. I did so on the grounds that the relevant TR1 form executed in 2007 contained an express declaration of trust signed by Mr. and Mrs. Jackson, which had been made in full knowledge of Mr. Jackson’s failure to make any contribution to the first mortgage, and which nonetheless expressly declared that they held the Property on trust for themselves as joint tenants in equity.
17. In Stack v Dowden [2007] 2 AC 432 at paragraphs 49 - 52, Baroness Hale considered the effect of such an express declaration,

“49. In the olden days, before registration of title on certain events, including a conveyance on sale, became compulsory all over England and Wales, conveyances of unregistered land into joint names would in practice declare the purchasers' beneficial as well as their legal interests. No one now doubts that such an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel: see Goodman v Gallant [1986] Fam 106. That case also establishes that severance of a beneficial joint tenancy results in a beneficial tenancy in common in equal shares. Lord Denning MR's attempt in Hine v Hine [1962] 1 WLR 1124, to use

section 17 of the Married Women's Property Act 1882 to interfere even with express declarations of trust was firmly rejected by this House in Pettitt v Pettitt [1970] AC 777; his suggestion, in Bedson v Bedson [1965] 2 QB 666, that severance might not automatically lead to a tenancy in common in equal shares was rightly rejected in Goodman v Gallant [1986] Fam 106. The effect of such a conveyance is clear, irrespective of why the property was conveyed into joint names and of the parties' later dealings in relation to it.

50. The question with which we are concerned has become apparent with the spread of registration of title. The formalities required for the transfer of registered land were designed to meet the concerns of the Land Registry rather than the parties. The Land Registry is not concerned with the equities. It is concerned with whether the registered proprietor or proprietors can give a good title to a later transferee. This is entirely consistent with the simplification of conveyancing in the 1925 property legislation, which was designed to allow the legal owners of land to pass a good title to bona fide purchasers for value without notice of the equities existing behind the legal title. But it meant that the form of transfer prescribed by the Land Registry did not require, or even give an obvious opportunity to, the transferees to state their beneficial interests as well as their legal title....

....

52. The Land Registry form has since changed. Form TR1, in use from 1 April 1998, provides a box for the transferees to declare whether they are to hold the property on trust for themselves as joint tenants, or on trust for themselves as tenants in common in equal shares, or on some other trusts which are inserted on the form. If this is invariably complied with, the problem confronting us here will eventually disappear..."

18. On the basis of Baroness Hale's analysis, I held that the declaration by Mr. and Mrs. Jackson on the TR1 form was conclusive as to the parties' beneficial interests in the Property. There was no evidence of any subsequent variation of the beneficial interests declared in the TR1 form, or any facts that could have given rise to an estoppel against Mr. Jackson. Nor did I consider that there was any evidence that Mrs. Jackson signed the TR1 form as a result of any undue influence by Mr. Jackson. Indeed, no such contentions were advanced in the witness statement of the solicitors prepared on behalf of Mrs. Jackson when seeking a stay of the warrant for possession.
19. Instead, it seemed to me that by the time of execution of the TR1 form in 2007, Mrs. Jackson had known that Mr. Jackson had not made any payments towards the mortgage as promised in the Trust Deed, but she reaffirmed his beneficial interest in executing the TR1 form nonetheless. Moreover, the evidence was that rather than exercising undue influence over Mrs. Jackson in 2007, if anything Mr. Jackson had assisted her by agreeing to assume joint personal liability with her to the new mortgage lender for the new mortgage loan.

20. Whilst rejecting Mrs. Jackson's appeal against the Declaration, I did, however, vary the Order for Sale to provide that it should be subject to an equitable account to be taken between the Trustee and Mrs. Jackson in relation to the division of the anticipated proceeds of sale of the Property. The Trustee also acknowledged that the Court retained a power to review the Order for Sale under section 375 of the Insolvency Act 1986 or CPR 3.1(7). To that end I continued the stay of the Order for Sale and the suspension of the warrant for possession until after finalisation of the equitable account. In so doing, I envisaged that it might be possible for the parties to reach an agreement on the value of the Property and, depending upon the outcome of the account, Mrs. Jackson might have the opportunity to buy out the Trustee's interest, so avoiding a sale of her family home. Such a course appears to have been followed in Re Gorman [1990] 1 WLR 616 at 624H. For convenience, and with the consent of both parties, I also directed that any issues arising in relation to the equitable account should be transferred to the High Court.

#### The value of the Property and the payments made

21. After the hearing in October 2016, and having obtained independent valuations, the parties agreed a figure of £450,000 for the value of the Property. As at 19 January 2017 the redemption figure for the mortgage was £203,619.
22. In the interim, Mrs. Jackson also demonstrated to the satisfaction of the Trustee that she had paid a total of £101,370.38 in interest payments towards the mortgage between the date of purchase of the Property and the date of Mr. Jackson's bankruptcy on 6 August 2013. Since the date of bankruptcy, Mrs. Jackson has continued to make further payments towards the mortgage. I was told at the adjourned hearing that Mrs. Jackson contended that the amount that she had paid between 6 August 2013 and the date of the hearing was about a further £22,535 giving total mortgage payments of about £123,906. The Trustee had not, however, verified that figure.

#### Submissions by the parties

23. At the hearing on 19 January 2017, the Trustee was represented by counsel (Ms. Daisy Brown) and submissions were made on Mrs. Jackson's behalf by her daughter, Ms. Monique Lewis, acting as her litigation friend.
24. Ms. Brown referred to the decision in Re Gorman and submitted that the appropriate manner of taking the account in this case would be to start with an equal division of the net proceeds of sale, and then to credit Mrs. Jackson and to debit the Trustee with one-half of all of the mortgage interest payments made by Mrs. Jackson until the date of Mr. Jackson's bankruptcy. Ignoring the minor difference in time between the date of purchase of the Property, and the date of execution of the Trust Deed, this would reflect the payments that Mr. Jackson should have made under the Trust Deed and joint mortgage, but had not done so.
25. Ms. Brown also submitted that Mrs. Jackson should not be given any credit for any payments made in relation to the running and maintenance of the Property, since there was no evidence that these contributed to any increase in its capital value.
26. As regards payments in respect of occupation of the Property, Ms. Brown referred to the provisions of sections 12-15 of the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA") and indicated that in light of the fact that it was never anticipated that Mr. Jackson should live at the Property, the Trustee did not contend

that Mrs. Jackson should pay any compensation for her sole occupation of the Property up to the date of Mr. Jackson's bankruptcy.

27. However, relying upon Re Gorman and French v Barcham [2009] 1 WLR 1124, Ms. Brown submitted that the position as regards payments for occupation of the Property fundamentally changed as a result of Mr. Jackson's bankruptcy. The key elements of Ms. Brown's argument were as follows:
- i) on bankruptcy, the beneficial joint tenancy of the Property was severed and Mr. and Mrs. Jackson held the Property as tenants in common in equal shares;
  - ii) upon the appointment of the Trustee, Mr. Jackson's share in the Property vested in the Trustee;
  - iii) the TOLATA regime did not exclude the principles of equitable accounting in cases involving trustees in bankruptcy;
  - iv) as tenants in common, Mrs. Jackson had no right to claim exclusive possession of the Property as against the Trustee; and
  - v) although the Trustee had not been excluded from the Property, the fact that it would be unreasonable for him to exercise his right of occupation as a tenant in common meant that he was entitled to claim rent in respect of Mrs. Jackson's occupation of the Property.

Ms. Brown therefore concluded that it would be inequitable for Mrs. Jackson to claim credit for the mortgage interest payments against the Trustee after Mrs. Jackson's bankruptcy, without paying an occupation rent. She suggested that the court should adopt the common practice of simply treating these two items in the account as cancelling each other out.

28. On behalf of Mrs. Jackson, Ms. Lewis submitted that any equitable account should reflect all of the financial contributions that her mother had made to the Property by way of mortgage payments and other expenses. Ms. Lewis implicitly denied that her mother should pay any occupation rent.
29. Further, Ms. Lewis sought to rely upon the Scottish case of McKenzie v Nutter [2007] SLT (Sh Ct) 17 and submitted that if one co-owner makes all the contributions to a property, and the other co-owner breaks a promise to make equal contributions, the former should be entitled to a payment of all of the proceeds of sale so as to ensure that the non-payer is not unjustly enriched. She argued that since Mr. Jackson had made a promise in the Trust Deed to contribute to the mortgage(s), but had not done so, his creditors would be unjustly enriched if the Trustee was entitled to any share of the proceeds of sale of the Property.

#### Equitable accounting

30. The principles of equitable accounting were developed by the courts of equity to enable an adjustment to be made to the division of the net proceeds of sale of a co-owned property in appropriate cases. The general position was explained by Lightman J giving the only substantive judgment of the Court of Appeal in Murphy v Gooch [2007] EWCA Civ 603 at para 10,

“10. To resolve questions between co-owners of the character raised in this case Equity developed the doctrine of "equitable accounting" to facilitate the striking of the balance between the co-owners. This consisted of a body of (non-binding) guidelines or rules of convenience aimed at achieving justice between the co-owners. The thrust of these guidelines was that, where it is just to do so, co-owners may be given credit for monies paid and expenditure incurred on the jointly owned property, a co-owner in sole occupation of property may be charged with or required to give credit to his co-owner for an occupation rent and these credits may be offset against each other.”

31. Although there is an issue as to the extent to which the provisions of sections 12-15 of TOLATA have replaced the doctrines of equitable accounting in respect of occupation rent (to which I shall return below), it is clear that the general principles of equitable accounting continue to apply as regards monies paid and expenditure incurred on jointly owned property.

*Monies paid*

32. As regards monies paid, the general position is that a credit will be allowed to a party who has made payments in respect of repairs or improvements that have increased the capital value of the property. In Re Pavlou [1993] 1 WLR 1046 at 1048G-1049B, Millett J stated,

“On a partition suit or an order for sale adjustments could be made between the co-owners, the guiding principle being that neither party could take the benefit of an increase in the value of the property without making an allowance for what had been expended by the other in order to obtain it: see Leigh v. Dickeson (1884) 15 Q.B.D. 60. That was a case of tenants in common, but in my judgment the same principle must apply as between joint tenants; the question only arose on a partition or on the division of the proceeds of sale, the very point of time at which severance occurred if there was a joint tenancy. The guiding principle of the Court of Equity is that the proportions in which the entirety should be divided between former co-owners must have regard to any increase in its value which has been brought about by means of expenditure by one of them.

I must make it clear of course that, in deciding as I do that the wife is entitled as against the trustee in bankruptcy to credit for one half of any repairs or improvements, there has to be an inquiry as to the amount expended and the increase, if any, in the value of the property thereby realised. Much expenditure on property is not reflected in any increase in value, and most expenditure on property results in a much smaller increase in value than the amount expended. The wife will be entitled, as against the trustee in bankruptcy, to credit only for one half of the lesser of the actual expenditure and any increase in the value realised thereby.”



33. In the instant case, although Mrs. Jackson has paid all of the outgoings and some items of repair and maintenance in relation to the Property whilst in occupation, she did not contend that any of them had contributed to any increase in the capital value of the Property. I therefore accept Ms. Brown's submissions on this point and do not propose to give Mrs. Jackson any credit for such payments.
34. The position as regards payment of mortgage instalments was explained by Lawrence Collins J in Re Byford, Byford v Butler [2004] 1 FLR 56 at paras 22-23,
- “22. The principles of equitable accounting apply equally to beneficial tenancies in common and beneficial joint tenancies. The guiding principle is that neither party can take the benefit of an increase in the value of the property without making an allowance for what had been expended by the other in order to obtain it: see Re Pavlou [1993] 1 WLR 1046, 1048, citing Leigh v Dickeson (1884) 15 QBD 60; Snell's Equity (13th ed. McGhee, 2000), paras 44–10 *et seq.*
23. There is no doubt that credit will normally be given for mortgage payments in respect of capital, and, as Snell points out (para.44–16) credit has sometimes been given for the interest element. In Re Gorman [1990] 1 WLR 616, 626, Vinelott J. said:
- “I can see no reason why, if an account is taken, the party paying the instalments should not be entitled to set a due proportion of the whole of the instalments paid against the share of the other party. The mortgagee will normally have a charge on the property for principal and interest and a right to possession and sale to enforce his charge. The payment of instalments due under the mortgage operates to relieve the property from the charge and gives rise to an equitable right of contribution by the co-owner who has not paid his due proportion of the instalments.”
35. On this basis, I accept that Mrs. Jackson should be entitled to claim an additional credit of one-half of the payments of interest which she has made under the mortgage(s) of the Property. Although, technically, such credits should probably only commence from the date of the Trust Deed which conferred a beneficial interest upon Mr. Jackson, rather than from the date upon which the Property was acquired in Mrs. Jackson's sole name, the difference is only a month or so, and Ms. Brown did not take any issue on this. Likewise, although I only have the figures until the date of the hearing, I see no reason in principle why the credits should not include all monies that Mrs. Jackson continues to pay until any sale of the Property or agreement between the parties. All such payments have been made on behalf of both parties in order to ensure that the mortgagee does not take possession.
36. As I have indicated, Ms. Brown did not dispute that Mrs. Jackson was entitled to some credit for mortgage payments made, but she submitted that such credit should be limited to payments made before Mr. Jackson became bankrupt. She suggested that after Mr. Jackson became bankrupt, any credit for further mortgage interest payments should in effect be off-set by a liability of Mrs. Jackson to pay an occupation rent to

the Trustee. As such, the critical issue is whether, and if so, for what period, Mrs. Jackson should be charged a rent for her occupation of the Property.

### *Occupation rent*

37. In Stack v Dowden, an unmarried couple had lived together as man and wife, together with their children, in a property that was registered in their joint names. There was no express declaration of trust, and the main issue in the case (later re-considered in Jones v Kernott [2012] 1 AC 276) was the proportions in which they should divide the net proceeds of sale. However, a subsidiary issue was whether any credit should be given to one of the parties who had been excluded from the property. At an earlier stage in the proceedings the party who had remained in the property had given an undertaking to the court to give an allowance to the excluded party of £900 per month to cover his costs of renting alternative accommodation, but that undertaking had not been continued. However, the judge who eventually ordered that the property be sold also made an order that a similar sum of £900 per month should be paid from the date of his order until the property was sold. The party who remained in the property appealed against that order.
38. Dealing with this point in the House of Lords, Baroness Hale treated the issue as governed by the provisions of TOLATA. At paragraphs 93-94 of her speech she referred to the provisions of sections 12-15 of TOLATA as regards the right of a beneficiary who is entitled to an interest in land to occupy that land if the purpose of the trust is to make the land available for his occupation, and to claim compensation for any exclusion or restriction of that right.
39. The two relevant sections of TOLATA for present purposes are sections 12 and 13 which give the right to a beneficiary with an interest in land to occupy, and provide for the terms upon which that right can be excluded or restricted. Section 12 of TOLATA provides,
  - “12. The right to occupy
    - (1) A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled by reason of his interest to occupy the land at any time if at that time -
      - (a) the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of a class of which he is a member or of beneficiaries in general), or
      - (b) the land is held by the trustees so as to be so available.
    - (2) Subsection (1) does not confer on a beneficiary a right to occupy land if it is either unavailable or unsuitable for occupation by him.
    - (3) This section is subject to section 13.”

40. Section 13 then provides,

“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).”

41. In paragraph 94 of her judgment, Baroness Hale observed that,

“These statutory powers replaced the old doctrines of equitable accounting under which a beneficiary who remained in occupation might be required to pay an occupation rent to a beneficiary who was excluded from the property. The criteria laid down in the statute should be applied, rather than in the cases decided under the old law, although the results may often be the same. In this case the judge applied neither.”

On the facts, and applying the considerations in TOLATA, Baroness Hale agreed with the Court of Appeal who had reversed the decision at first instance.

42. Lord Neuberger made a similar comment as regards the applicable regime at paragraph 150,

“150. The court's power to order payment to a beneficiary, excluded from property he would otherwise be entitled to occupy, by the beneficiary who retains occupation, is now governed by sections 12 to 15 of the Trusts of Land and Appointment of Trustees Act 1996, having been formerly equitable in origin. However, I think that it would be a rare case where the statutory principles would produce a different result from that which would have resulted from the equitable principles.”

On the facts, however, Lord Neuberger dissented, because he took the view that although both parties had the right in principle to occupy the property, the claimant had been excluded against his will, and payment of his costs of alternative accommodation would be appropriate compensation for such exclusion of his right.

43. On one view, the statements by Baroness Hale and Lord Neuberger in Stack v Dowden might be taken to have decided that TOLATA provides an exhaustive regime

to determine whether a payment in respect of occupation of property by a co-owner is to be made in any case, and that the older principles developed in the case law on equitable accounting are no longer applicable in any circumstances.

44. That is not, however, the view that has been taken in subsequent cases.
45. In particular, in French v Barcham [2009] 1 WLR 124, Blackburne J expressly rejected the argument, run by a spouse against a claim for an occupation rent by her husband's trustee in bankruptcy, that Stack v Dowden had decided that TOLATA amounted to an exhaustive regime. After referring to Baroness Hale's speech, Blackburne J continued, at paragraphs 19-20,
 

“19. ...But it is important to note that she referred to both parties having a right of occupation. It was in that context that she was addressing her remarks. I do not understand her to have been suggesting that in cases where one of the parties has no statutory right of occupation, the statutory provisions have the effect that that party can no longer claim an occupation rent in any circumstances whatever. Lord Neuberger of Abbotsbury, who was the only other member of the House in Stack's case to express any view on the question of compensation under section 13 referred, at para 150, to “The court's power to order payment to a beneficiary, *excluded from property he would otherwise be entitled to occupy*, by the beneficiary who retains occupation” (emphasis added) as being governed by sections 12 to 15 of the 1996 Act. He was, in my view, careful to emphasise that the jurisdiction applies only where the beneficiary claiming the compensation has been excluded from the property that he would otherwise be entitled to occupy.

20. Finally, I do not accept Mr Learmonth's submission that it would make nonsense of the statutory regime contained in the 1996 Act if the regime were not exhaustive of the entitlement to compensation for exclusion from occupation. As worded the power to award compensation under section 13(6) is only exercisable as a condition to be imposed on the occupying beneficiary in relation to his occupation of the property in question. See section 13(3). It appears to look at the matter prospectively in the context of the occupying beneficiary's continued occupation. It is not difficult, especially if that view of section 13(6) is correct, to envisage cases of exclusion where both beneficiaries had a right of occupation yet where the statutory regime would not seem to be applicable. Where the scheme applies, it must be applied. But where it plainly does not I do not see why the party who is not in occupation of the land in question should be denied any compensation at all if recourse to the court's equitable jurisdiction would justly compensate him.”
46. Some commentators have supported this approach, pointing out that there is nothing in the preamble to TOLATA to suggest that it was intended entirely to abolish the principles of equitable accounting entirely in relation to the payment of occupation

rent, and suggesting that it would be an undesirable result if it were taken to have done so: see e.g. *Susan Bright, Occupation Rents and TOLATA: From property to welfare?* [2009] 73 Conv. 378. I find those arguments persuasive.

47. I also note that neither Stack v Dowden nor the Court of Appeal decision in Murphy v Gooch that followed it, were cases involving trustees in bankruptcy. In such cases, if sections 12-15 of TOLATA were held to be an exhaustive regime, it would have the surprising result in practice that neither a bankrupt nor the trustee in bankruptcy would ever be able to claim a credit or payment under section 13 in respect of the occupation by a co-owner of jointly-owned domestic property for the period after the appointment of the trustee in bankruptcy, because neither would be able to establish a statutory right to occupy under section 12. The bankrupt would no longer have any beneficial interest in the house so as to fall within section 12(1) because his interest would have vested in the trustee. And a claim by the trustee would inevitably be defeated by section 12(2) which provides that a beneficiary does not have a right to occupy land if it is “unsuitable for occupation by him”. It is difficult to envisage any circumstance in which it would be “suitable” for a trustee in bankruptcy to take up occupation of a domestic house with the bankrupt and/or their co-habitee. When compared to the result in pre-TOLATA cases such as Re Gorman and Re Pavlou, this would undoubtedly have amounted to a major change in the law in a very obvious category of cases, which plainly neither Baroness Hale nor Lord Neuberger had in mind when they both commented that they thought that it would be a rare case in which application of the TOLATA regime would have any different result than under the old equitable principles.
48. I therefore do not accept that I am bound to apply the statutory regime under TOLATA to this case. Accordingly, I turn to consider the question of occupation rent under general equitable principles.
49. The common law position was summarised by Lord Denning MR in Jones (AE) v Jones (FW) [1977] 1 WLR 438. In 1968 the defendant's father had bought a house near his own home for the defendant, who left a job and his council house and moved with his family into the house. The defendant gave his father sums amounting to one-quarter of the purchase price of the house. The defendant understood from his father that the house was his, and he lived there with his wife and family. He paid the rates at his father's request, but no rent. When the father died in 1972 the house vested in the plaintiff, the defendant's stepmother. In possession proceedings by the stepmother, the defendant having refused to pay rent for the house, the judge held that the defendant had a one-quarter equitable interest in the house and he refused to make a possession order. In 1975 the stepmother brought proceedings for an order that the house be sold, alternatively, for payment in the nature of rent. The judge ordered the defendant to pay three-quarters of a fair rent for the house, and the house to be sold if the defendant failed to do so.
50. The Court of Appeal allowed the defendant's appeal. Lord Denning MR was clearly of the view that the mere fact that the stepmother and the son had become tenants in common when she had inherited her husband's interest in the property was insufficient to require the son to pay rent. He said, at pages 441-442,

“It is quite plain that these two people were in equity tenants in common having a three-quarter and one-quarter share respectively. One was in occupation of the house. The other

not. Now the common law said clearly that one tenant in common is not entitled to rent from another tenant in common, even though that other occupies the whole. That appears from M'Mahon v Burchell (1846) 2 Ph 127, 134–135 per Lord Cottenham L.C., and Henderson v. Eason (1851) 17 Q.B. 701, 720. Of course if one of the tenants let the premises at a rent to a stranger and received the rent, there would have to be an account, but the mere fact that one tenant was in possession and the other out of possession did not give the one that is out any claim for rent. It did not do so in the old days of legal tenants in common. Nor does it in modern times of equitable tenants in common...As between tenants in common, they are both equally entitled to occupation and one cannot claim rent from the other. Of course, if there was an ouster, that would be another matter: or if there was a letting to a stranger for rent that would be different, but there can be no claim for rent by one tenant in common against the other whether at law or in equity.”

51. The question of what might amount to ouster or exclusion of one co-tenant so as to trigger the other's obligation to pay an occupation rent was considered in the context of a matrimonial home in Dennis v McDonald [1982] Fam 63. The parties had lived together as man and wife for a number of years before buying a house together with the intention that it would be their family home. They made equal financial contributions towards the purchase and the house was conveyed to them as tenants in common in equal shares. The relationship was a stormy one, and four years after the purchase of the property, the plaintiff left the house with the children and went into rented property. After a time, some of the children returned and continued to live in the house with the defendant, who continued to make the mortgage payments. The plaintiff sought an order for sale of the house and payment by the defendant of an occupation rent.
52. At first instance Purchas J declined to order a sale of the house which was still serving its purpose as a family home. However, he did order payment of an occupation rent by the defendant. After referring to Jones (AE) v Jones (FW), Purchas J said, at page 70-71,

“Mr. Walker submitted, I think correctly, that when one looks at the judgment in M'Mahon v Burchell 2 Ph 127 together with the extract from the judgment of Stirling J. in Hill v Hickin [1897] 2 Ch 579 the true position under the old authorities was that the Court of Chancery and Chancery Division would always be ready to inquire into the position as between co-owners being tenants in common either at law or in equity to see whether a tenant in common in occupation of the premises was doing so to the exclusion of one or more of the other tenants in common for whatever purpose or by whatever means. If this was found to be the case, then if in order to do equity between the parties an occupation rent should be paid, this would be declared and the appropriate inquiry ordered. Only in cases where the tenants in common not in occupation were in a position to enjoy their right to occupy but chose not to do so

voluntarily, and were not excluded by any relevant factor, would the tenant in common in occupation be entitled to do so free of liability to pay an occupation rent.

In the instant case the plaintiff is clearly not a free agent. She was caused to leave the family home as a result of the violence or threatened violence of the defendant. In any event, whatever might have been the cause of the breakdown of the association, it would be quite unreasonable to expect the plaintiff to exercise her rights as a tenant in common to occupy the property as she had done before the breakdown of her association with the defendant. In my judgment she falls into exactly the kind of category of person excluded from the property in the way envisaged by Lord Cottenham L.C. in *M'Mahon v Burchell*. Therefore, the basic principle that a tenant in common is not liable to pay an occupation rent by virtue merely of his being in sole occupation of the property 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."

53. There was an appeal to the Court of Appeal as regards the quantification of the occupation rent payable, but the principle was not disputed. Sir John Arnold P summarised the position at pages 79-80,

"In 1974, after some ups and downs, the plaintiff finally left. She took all the children with her and under various vicissitudes three of them have come back to live with the defendant who, ever since 1974, has lived at the house and the plaintiff has not. The reason for that state of things, as the judge found and as has to be accepted for the purposes of the appeal, was that owing to violence exercised upon her by the defendant in the past, the plaintiff was afraid to go back. The judge came to the conclusion that, in those circumstances, the case was equivalent to what, in the reported cases, is called an "ouster" by one tenant in common of another and it is plain on the authorities that in such a case there is an exception from the general rule that each tenant in common has the right of occupation of the property in respect of which the tenancy subsists, while if one of them occupies that property to the exclusion of the other that does not give rise to any right of compensation. In the exceptional case of an ouster it plainly, in my view, does. That matter is not contested in this court."

54. A number of cases then considered the effect of bankruptcy of one of the co-owners in such situations.
55. In *Re Gorman* the parties had acquired the house jointly and lived together in it before encountering matrimonial difficulties and eventually divorcing, following which Mr. Gorman moved out and Mrs. Gorman had occupied the former matrimonial home. Mr. Gorman then failed to make payments of the mortgage or maintenance as ordered by the Court for several years and was eventually made bankrupt. To avoid losing her



home, Mrs. Gorman made all of the payments on the mortgage. Mr. Gorman's trustee in bankruptcy then sought an order for sale. Vinelott J (sitting with Mervyn Davies J) held that Mr. and Mrs. Gorman had been joint tenants of the property when it was transferred to them and remained joint tenants until the joint tenancy was severed by operation of law when Mr. Gorman's interest vested in his trustee in bankruptcy, whereupon the trustee and Mrs. Gorman became tenants in common in equal shares: see [1990] 1 WLR 616 at 624B.

56. On the issue of equitable accounting, it was conceded by counsel for Mrs. Gorman that she should be liable for an occupation rent after the severance of the joint tenancy, but not for the period before. Albeit without contrary argument, Vinelott J appeared to accept this position, (page 627D-E),

“The position prior to the making of the receiving order was that Mr. Gorman had been ordered to pay maintenance to Mrs. Gorman and to pay the mortgage instalments and other outgoings on the house. Clearly he could not have asserted any equity to charge her an occupation rent on taking an account following the sale of the house, and the trustee in bankruptcy can be in no better position. The position after the making of the receiving order is different, because Mrs. Gorman could assert no right against the trustee to remain in exclusive occupation of the property.”

57. In Re Pavlou, a husband and wife bought a house with the help of a mortgage, which they occupied as their matrimonial home. The property was transferred to them as beneficial joint tenants. Ten years later, in 1983, the husband left and the wife remained in sole occupation of the property and paid the mortgage instalments as they fell due together with all other outgoings. In March 1986 she petitioned for divorce and in July 1986 obtained a decree nisi. The husband was subsequently made bankrupt in March 1987 and a trustee in bankruptcy was appointed.
58. In proceedings brought by the trustee in bankruptcy for sale of the property and equitable accounting, the issue arose as to whether the wife was chargeable with an occupation rent in respect of any period prior to the date of the husband's bankruptcy. Millett J referred to the judgment of Purchas J in Dennis v McDonald and continued ([1993] 1 WLR 1046 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 an occupation rent which he or she never expected to pay.

I have not the material in the present case to judge whether, in the present case, it would be just for the wife to pay an occupation rent in respect of the period between January 1983, when the husband left the property, and March 1986, when she presented a petition for divorce. I acknowledge that her presentation of the petition for divorce may well have been no more than a reluctant recognition of a *fait accompli*. Without deciding the point, but hoping to be of some assistance to the parties, I would express the view that, *prima facie* at any rate, the presentation of a petition for divorce by the party remaining in occupation of the matrimonial home should normally be taken to signify a refusal to take the other party back into the matrimonial home and a willingness to pay an occupation rent thereafter.

I am unable to decide on the material before me whether it would be just or not to order the wife to pay an occupation rent in the period between January 1983 and March 1986 but, from March 1986 onwards, the wife is *prima facie* liable to pay an occupation rent.”

59. In French v Barcham, a house had been bought with the assistance of a mortgage by a co-habiting couple who lived in it together as their family home. After three years of joint ownership, the man became bankrupt and a trustee in bankruptcy was appointed, but the couple continued to live together in the house and married after a further seven years. Over twelve years after the commencement of the bankruptcy, the trustee applied for a declaration that the property was held in equal proportions and for an order for sale.
60. After concluding that TOLATA was not an exhaustive regime and considering the earlier authorities to which I have referred, Blackburne J noted that Millett J appeared to have decided that the wife in Re Pavlou continued to be liable to pay an occupation rent after the bankruptcy of her husband, but had not explained why. Blackburne J then considered why that might have been the case,

“34. Mr Learmonth 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 re Pavlou 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 (AE) v Jones (FW) [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.”

61. With respect to Blackburne J, I do not find this analysis entirely convincing. The earlier authorities of Jones (AE) v Jones (FW) and Dennis v McDonald 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 v McDonald and Re Pavlou 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 (AE) v Jones (FW) and Dennis v McDonald, 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 (AE) v Jones (FW), 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.
65. Likewise, in Chhokar v Chhokar [1984] FLR 313, a matrimonial home was held in the name of the husband but upon trust for himself and his wife as equal tenants in common. After the husband took his wife to India and abandoned her there, she managed to return to the matrimonial home, but whilst she was in hospital giving birth to their second child, the husband dishonestly sought to sell the house at an undervalue to a third-party with whom he had conspired in an attempt to override the wife’s equitable interest. The wife managed to return to the house before the conveyance was registered, and remained there with her children before petitioning for various matrimonial and ancillary relief. The judge in the Family Division declared that the purchaser held the property on trust for himself and the wife as tenants in common, and ordered the wife to pay an occupation rent until the property was sold.
66. The Court of Appeal allowed an appeal, reversing the order for sale and setting aside the requirement for payment of an occupation rent by the wife. Cumming-Bruce LJ confirmed that the purchaser and the wife were tenants in common of the property, but continued,

“[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.”

67. Jones (AE) v Jones (FW) and Chhokar v Chhokar might be thought to be extreme cases on their facts, but I think that they do illustrate that the court can have regard to the circumstances in existence before the tenant in common seeking payment of an occupation rent acquired his interest.
68. I of course accept that in most bankruptcies, the unpaid creditors of the bankrupt will be innocent parties who have not chosen to become involved in a dispute with the bankrupt’s spouse over a matrimonial home. They may well also have a legitimate expectation that the bankrupt’s interest in the property should either be realised quickly or in some way used to raise money to pay their debts. In many cases this consideration may go a long way to justify 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. An example of this may be the decision of Lawrence Collins J in Re Byford, where the bankrupt and his wife had continued to live in their house for almost ten years after his bankruptcy, with the wife paying all of the mortgage. The bankrupt then died and his widow sought to buy out the trustee in bankruptcy’s share in the property. Lawrence Collins J upheld the decision of the district judge that the trustee should be entitled to set-off an occupation rent against the mortgage payments made throughout the period of the bankruptcy. He explained,
- “40. What the court is endeavouring to do is broad justice or equity as between co-owners. As Millett J. said in Re Pavlou, the fact that there has not been an ouster or forcible exclusion is not conclusive. The trustee cannot reside in the property nor can he derive any financial enjoyment from the property while the bankrupt's spouse resides in it, and the bankrupt spouse's creditors can derive no benefit from it until he exercises his remedies...It is true that the trustee could have realised his remedies earlier, but Mrs Byford benefited to a considerable degree by his inaction, while Mr Byford enjoyed the use of the property with Mrs Byford, without any benefit to his creditors.
41. In these circumstances, where Mrs Byford seeks and obtains an account of interest payments, the trustee is entitled to a set-off for occupation rent...”
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: e.g. if the property market is rising, the trustee may benefit from a delay, especially if he has also not had to contribute to payment of the mortgage.

70. In the end, I do not think that I need to reach a firm conclusion as to whether Blackburne J's analysis in French v Barcham or Lawrence Collins J's decision in Re Byford are correct or not.
71. I say that, first, because it is apparent from the authorities to which I have referred, and in particular Re Pavlou, Re Byford and Murphy v Gooch that the court has a broad equitable jurisdiction to do justice between co-owners on the facts of each case. I would prefer to found my decision upon that overriding principle, which in my view entitles the court to have regard to the position prior to bankruptcy, including any agreements and understandings to which the non-occupying owner was a party before his bankruptcy; as well as the effect of an order for payment of rent on both sides to the argument.
72. Secondly, and in any event, I think that the unusual facts of this case make it readily distinguishable from each of the other authorities to which I have referred and which Blackburne J considered. Each of the other bankruptcy cases to which I have referred were dealing with a situation in which the trustee in bankruptcy obtained his interest in the relevant property by operation of law from a co-owner who at some point at least had a right to occupy the property. In each of those cases the original co-owners acquired their jointly owned property with the common intention and purpose that they would live in it together as their family home, and they all did so for some period. The joint acquisition of a matrimonial home to be lived in by both parties was also the situation in the non-bankruptcy case of Dennis v McDonald.
73. I think that the position as regards occupation rent may be materially different where, as in the instant case, the property in question was acquired to provide a home for one co-owner alone, and the bankrupt never had, nor was intended to have, any right of occupation of the property at all.
74. In the instant case, Mrs. Jackson bought the Property using her own money and for the sole purpose of occupying it with her children. She plainly never intended or expected that Mr. Jackson would ever live at the Property with her, and there is no suggestion of any sort that Mr. Jackson ever expected to do so either. It is of course true that Mrs. Jackson executed the Trust Deed and the express declaration in the TR1 form, but those documents made no difference whatever to the position as regards occupation between the parties. Whether or not Mr. Jackson might have honoured his promise to contribute to the mortgage, it is plain that he never intended to occupy the Property with Mrs. Jackson. Moreover, although the Trust Deed gave Mr. Jackson some defined rights in respect of the Property, taking up occupation or charging Mrs. Jackson a rent for her occupation was not included within them.
75. In other words, at no time during the entire history of ownership of the Property, prior to the bankruptcy, was there any agreement or expectation either that Mr. Jackson would have a right to occupy the Property, or that Mrs. Jackson would have to pay rent to anyone for her occupation of it. That being so, for my part I simply cannot see how it could be in accordance with equity or justice for the Trustee, who has simply had Mr. Jackson's interest in the Property vested in him, automatically to become entitled to claim an occupation rent from Mrs. Jackson. The Trustee has in no sense been excluded from the Property; and it is not merely that it is unreasonable for the Trustee to start occupying the Property with Mrs. Jackson and her children; the true position is that Mr. Jackson never had such a right at all. I therefore do not see how

the Trustee can in effect claim to stand in a better position and charge Mrs. Jackson rent in place of seeking to occupy the property.

76. In reaching that conclusion I have not ignored the fact that the Trustee adopted an entirely reasonable approach and did not push for an order for sale immediately that he might have been entitled to do, that he very properly sought to ascertain whether Mrs. Jackson was interested in buying out his interest, and that Mrs. Jackson did not engage with that suggestion but resisted possession proceedings. The result has been that sale of the Property has been delayed and creditors might think that they should be compensated in some way for that. But against the very unusual factual background to which I have referred, I simply do not think that these factors make it equitable to charge Mrs. Jackson a rent for continuing to occupy the Property that she alone was always intended to occupy without charge.
77. Moreover, Mrs. Jackson has paid all of the mortgage instalments and all of the other outgoings in respect of the Property. The simple fact is that Mr. Jackson has contributed nothing other than his willingness to assume personal liability for the re-mortgage of the Property in 2007 – which has never been called upon. On the figures that I have given above, the Property has increased in value by something in the region of £254,000 since its acquisition, the equity on sale would be about £246,000, and Mrs. Jackson has alone paid mortgage instalments of about £123,906 to achieve that result. If Mrs. Jackson were to be charged occupation rent for the period since the vesting in the Trustee of Mr. Jackson's interest in the Property, so as to offset the substantial mortgage payments which she has continued to make after that time, the result will, to my mind, represent an unjust windfall for Mr. Jackson's creditors. As I see it, the extremely limited involvement that Mr. Jackson and the Trustee have had with the Property will be fully and properly reflected in a limited share in the increased equity once Mrs. Jackson has been given credit for all of the mortgage payments that she has made.

### Restitution

78. I turn, finally, to the additional argument advanced by Ms. Lewis based upon the Scottish case of McKenzie v Nutter [2007] SLT (Sh Ct) 17. That case was referred to by Lord Hope in his speech in Stack v Dowden to illustrate how the law of Scotland might approach the type of questions that arose in that case.
79. In paragraphs 7-8, Lord Hope set the scene as regards the different legal principles that apply in such cases in Scotland as opposed to England,

“7. Scots family law does not provide the answer to how the value of the home of a cohabiting couple is to be divided between them when their relationship terminates...So the solution in their case must, in the first instance, be found in Scots property law. Except in cases where it can be shown that a title was held in trust although it is ex facie absolute, Scots property law does not distinguish between the legal and the beneficial interests in heritable property.

8. Where the title to a dwelling house is taken in one name only, the presumption is that there is sole ownership in the named proprietor. Where it is taken in joint names those named are common owners and, if the grant does not indicate

otherwise, there is a presumption of equality of shares ... The rights that are thus divided from the outset between those named in the title in the Land Register are rights of ownership. There are no intervening equitable interests. The presumption that the common owners are entitled to share the value of the property equally is however capable of being displaced by evidence to the contrary. The analysis now moves from the law of property to the law of obligations. This opens the door to evidence of an agreement that the title was to be held in trust or to an examination of the contributions which each party made to the purchase of the house and to its upkeep and improvement during their relationship ... But cases where this exercise is attempted are rare, in view of the weight that is attached to the state of the title as evidence of the beneficial ownership of the property.”

80. Lord Hope then outlined the facts and result in McKenzie v Nutter,

“9. More recently resort has been had to restitutionary remedies. In McKenzie v Nutter [2007] SLT (Sh Ct) 17 the title was taken in joint names. The intention of the cohabiting couple was that they would live together as a couple in the property, and that they would both sell their own separate houses and apply the proceeds towards the purchase of their new home. In the event only one party contributed the proceeds of his house towards its purchase and paid the costs associated with maintaining and improving the property. The other party continued to reside in her own house, which due to her bad faith she did not sell. She then insisted on a division and sale of the property. Following the state of the title, the expectation was that when the property was sold the proceeds would be paid to the parties equally. But an order was made that the party who had contributed everything towards its purchase and upkeep was to be entitled to recover the other party's share of the proceeds. As Sheriff Principal Lockhart explained in his judgment, this was on the ground that she had been unjustly enriched because the condition on which the enrichment was given, due to her bad faith, did not materialise.”

81. Lord Hope did not comment further on the validity of the reasoning in McKenzie v Nutter. It has, however, since been doubted and distinguished in Scotland. In Gibson v Gibson and Gavryluk (unreported, 4 August 2010), Sheriff Principal Sir Stephen ST Young Bt QC commented, at paragraph 19 of his judgment,

“19. Counsel for the pursuer also founded strongly on the decision of Sheriff Principal Lockhart in McKenzie v Nutter. For present purposes I do not think that it is necessary to go into the details of that case which are readily distinguishable from those of the present case. Suffice it to say that, in contrast to the present case, no argument was advanced (nor perhaps could it have been) to the effect that the agreement between the parties which preceded the title to the property in question being taken



in their joint names was invalid and unenforceable. Moreover, it respectfully appears to me that, in considering ... whether the enrichment of the appellant in that case had been unjust, Sheriff Principal Lockhart did not address the argument which had been presented for the appellant ... to the effect that the appellant had by virtue of the title, taken jointly with the respondent, a right in law to a one half share of the property and on sale to a one half share of the net free proceeds, that this right carried with it the consequence of sharing in the benefit of any increase in the value of the property, and that any benefit which accrued to the appellant, beyond the extent of the conceded claim based on repetition and recompense, was one which she was legally entitled to retain and could not be regarded as unjust.”

82. For my part, whatever application it might be thought that principles of restitution could have in Scotland, I do not think that the application of principles of restitution for unjust enrichment under English law can assist Mrs. Jackson to establish a claim to the whole of the proceeds of sale of the Property in this case.
83. The essential requirements to establish a claim in unjust enrichment were set out by the Supreme Court in Benedetti v Sawiris [2004] AC 938 and reaffirmed in Menelaou v Bank of Cyprus [2016] AC 176. At paragraph 18 of his judgment in Menelaou, Lord Clarke identified the four questions that the Court needs to ask itself: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?
84. In the instant case, it seems to me that the claim in unjust enrichment by Mrs. Jackson to all of the net proceeds of sale of the Property must fail under questions (2) and (3).
85. For the reasons that I have already set out, the effect of the express declaration of trust in the Trust Deed and the TR1 form was to vest a beneficial interest in property in Mr. Jackson. It is inherent in the nature of a proprietary interest in land that the owner of the interest can sit back and do nothing and yet still be entitled to benefit from any appreciation in the capital value of the property. Accordingly, it cannot be said that, without more, a beneficial co-owner of land who shares in the increased value of the land has thereby been *unjustly* enriched. The retention of such benefit would not be unjust, because it is what the owner of an interest in property is entitled to.
86. What might bring the principles of unjust enrichment into play would be if the property had been bought on mortgage, and a co-owner was to seek to retain all of the benefits of an increase in value of the property in circumstances in which he had not made a proportionate contribution to the mortgage payments that prevented the property from being repossessed and sold whilst its value increased. That would be an unjust enrichment, but in my view the extent of the enrichment *at the claimant's expense* would be limited to the mortgage payments which had in effect been made on behalf of the defendant, and any remedy in unjust enrichment would be limited to those amounts.
87. This conclusion also follows the fundamental point made in *Goff & Jones, The Law of Unjust Enrichment* (9<sup>th</sup> ed) at para 6-01 and endorsed by Lord Clarke in paragraph 23

of Menelaou that the requirement that the defendant's enrichment must have been gained at the claimant's expense,

“reflects the principle that the law of unjust enrichment's essential concern is not with the disgorgement of gains made by defendants, nor with the compensation of losses sustained by claimants, but with the reversal of transfers of value between claimants and defendants”.

88. In the instant case, applying these principles gives the same result as I have reached applying equitable principles. To my mind the relevant transfer of value between Mrs. Jackson and Mr. Jackson which a restitutionary remedy should be designed to reverse must be limited to the payments which Mrs. Jackson effectively made on behalf of Mr. Jackson. It is not the concern of the English law of restitution to strip the Trustee of the gain that has resulted to him purely from the rise in value of Mr. Jackson's beneficial interest in the Property.

### Conclusion

89. For the reasons explained above, I consider that the correct apportionment of the proceeds of sale of the Property would be first to split the net proceeds equally between the Trustee and Mrs. Jackson, and then to give Mrs. Jackson additional credit for one half of all the payments she has made under the mortgage(s) from the date the Property was purchased to the date upon which the Property is sold. There should be no credits in respect of other payments which Mrs. Jackson has made, and no debits in respect of her occupation of the Property.
90. At the hearing upon which this judgment is handed down, in addition to any other consequential matters, I shall invite submissions as to whether, in light of the financial impact of this judgment, the parties believe that it might be possible for them to reach an agreement for the purchase by Mrs. Jackson of the Trustee's interest so as to avoid a sale of the Property, and whether, and if so, for how long I should continue the stay of the Order for Sale and warrant for possession for that purpose. If no such agreement is capable of being reached, in light of the terms of section 335A(3) of the Insolvency Act 1986 it is likely that the Order for Sale and warrant for possession will be reinstated.
91. Finally, I wish to commend and thank Ms. Brown and Ms. Lewis for their assistance in this matter. Ms. Brown, counsel for the Trustee and faced with a litigant in person, conducted the case in an exemplary manner, which reflects the stance taken by the Trustee and his solicitors. But I must also pay particular tribute to Ms. Lewis, who does not have any legal training, but who assisted and represented her mother in difficult circumstances with remarkable ability, poise and confidence, both in written submissions and by way of oral submissions at the hearings before me.