'NO FAULT OUSTER': TRANSITION TO A MORE CONTEMPORARY UNDERSTANDING OF SOCIETY?

KATE GALLOWAY*

I INTRODUCTION

When I first started working as an articled clerk in 1990, it was the accepted practice in a purchase of land by husband and wife (or man and woman) to cite the interests to be held as joint tenants if no instructions were forthcoming – this was the default interest and there was little concern over the implications for the parties. Instructions were almost always obtained from the husband, leaving the woman as a silent partner in the transaction. This always struck me as old-fashioned – it was problematic and I went to great lengths with my long-suffering clients to seek explicit instructions from each party.

Subsequently, President Kirby's dissent in *Foregeard v Shanahan* resonated with me. This case involved the competing rights of disputing co-owners. Kirby criticized the law's approach to co-owners, saying that '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.'[1]

He cited widespread ownership of real property by working people and by women, availability of credit and high numbers of de facto married relationships. In these contemporary social circumstances, he argued against a replication of the old rules that were developed in another era.

His comments have shown themselves to be prescient with the handing down of the decision in *Callow v Rupchev*[2] almost exactly 12 months ago.

Callow v Rupchev involved co-owners seeking an order for sale of their property. What was in dispute was whether occupation rent would be payable by the occupying party to the non-occupying party. As a general principle, the law is that an occupying co-owner has no such liability. This reflects the unity of possession of co-owners – there can be no trespass where each co-owner has a

* B Econ, LLB, LLM, Lecturer, School of Law, James Cook University, Cairns.

1 *Foregeard v Shanahan* (1994) 35 NSWLR 206, 211.

2 [2009] NSWCA 148 (unreported, Beazley JA, Basten JA, Handley AJA, 17 June 2009).

right of occupation of the whole in common with the other. The two exceptions to this were an ouster – a wrongful exclusion by one of the other – and a claim for expenditure on improvements. In the latter case, equity would require the occupying party seeking equity also to do equity.

Callow v Rupchev found what it described as a 'new' principle: that where it was not reasonable to expect the parties to continue to occupy the property jointly, the occupying party would be liable for occupation rent to the non-occupying party.

What I seek to do today is to assess the extent to which this is indeed a 'new' principle. I am interested in understanding the type of approach the court is suggesting. Traditionally, the court looks at the parties' rights solely in terms of proprietary interests. However what Callow v Rupchev is suggesting, is that it is relevant to look instead at the parties' personal circumstances – personalizing the impersonal.

First, some background.

I've said that traditionally the court looks at proprietary interests in determining rights as between an occupying and a non-occupying co-owner. Because the of the nature of the parties' interests, namely a right to possession in common, one party foregoing possession is not entitled to compensation.

This is based on an assumption that there is no reason why the non-occupying owner would stay away. The exception that interests us is that of ouster. Where the occupying party has wrongfully excluded the other, then liability for occupation rent will arise.

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.[3]

The idea of wrongful exclusion has however, in a long line of cases, been a fairly limited one.

The most oft-cited reason for exclusion is 'force, violence or threats of violence'[4]. And it's easy to understand this as a 'legal wrong' resulting in compensation. Another example is the occupying party changing the locks thus denying access.

There have however been a couple of cases that seem a little at odds with this interpretation. The first is the English case of Dennis v McDonald, which is usually cited as authority in support of violence as wrongful exclusion.

In *Dennis v McDonald*, 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.[5]

The context in this case 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. However 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*.[6] Here, the court said that it was not a case where the applicant 'voluntarily abstains from using commonly owned property'[7] – the respondent 'intended to exclude him from the house by whatever means were available to her.'[8]

---

[3] *Beresford v Booth* [1999] SASC 166 (unreported, Martin J, 16 April 1999), [43].
[4] Halsbury's *Laws of Australia* (para 355-11620), cited in *Beresford v Booth* [1999] SASC 166 (Unreported, Martin J, 16 April, 1999), [49].
[5] [1982] Fam 63, 71.
[6] (1987) QConvR 54-239, 57,631.
[7] Ibid, 57,632.
[8] Ibid, 57,630.

In *Re Thurgood*, the court emphasized the 'continued unpleasantness', coupled with the threat of the male applicant being 'submitted to the indignity of having the police' called in.[9] This decision is often represented as authority for exclusion via threats of violence[10] and indeed there were threats of violence that resulted in the applicant ceasing to occupy the premises. However in citing *Dennis v McDonald*, the court instead focuses on 'breakdown of the association'.[11]

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…' [12] In this case, the 'practical effect' of the plaintiff changing the locks, amounted to an ouster.[13]

It is this 'blurring of legal rights and obligations' that interests me. As I have read these cases over the years it has always struck me that the courts have seemed to struggle with relationship breakdown inevitably involved in these 'ouster' cases. While there has been an acknowledgement of the parties' personal circumstances, short of violence the courts have seemed to be reluctant to adjust the parties' accounts to recognise the financial implications of relationship breakdown.

While this is understandable in a context that requires determination of rights consequent on proprietary interests, in another sense it doesn't work. Property after all is a construct of the times and there are many other contexts within which the law (usually through the application of equitable principles) has found a way to do justice. And this is indeed what the NSW Court of Appeal has now clearly articulated in *Callow v Rupchev*.

---

[9] Ibid.
[10] See eg Peter Butt, *Land Law* (2010) 239
[11] *Re Thurgood* (1987) Q ConvR 54-239, 57,631, citing *Dennis v McDonald* [1982] Fam 63, 70-71. Cf *Chieco v Evans* (1990) 5 BPR 11,297, where Young J rejected this approach. Young J's approach was itself rejected by the court in *Biviano v Natoli* (1998) 43 NSWLR 695.
[12] [2006] NSWSC 120 (Unreported, McLaughlin AJ, 7 March 2006), [23].
[13] *Hummelstad v Hicks* [2006] NSWSC 120 (Unreported, McLaughlin AJ, 7 March 2006), [45].

In this case, as in so many other 'ouster' cases, each party made allegations as to violent behaviour of the other. However the trial judge found that the relationship was instead 'tempestuous'. Importantly, 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'.[14] 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.[15]

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. It does recognise the reality of personal relationships and contemporary property ownership.

This decision can be contrasted with *Re Thurgood* and *Dennis v McDonald*. While the facts in *Callow v Rupchev* also occurred in the context of alleged violence, this aspect of the case was explicitly ignored by the court. This decision 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.

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

There is another interesting aspect to this decision: and that is how far this principle can be applied.

In the 2009 English decision of *French v Barcham*, 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 and got an order for sale. The question

[14] Ibid, [30].
[15] Ibid [30].

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*,[16] 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.

I 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*.[17] 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'.[18] 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

---

[16] (1936) 36 SRNSW 310; or *Henderson v Eason* (1851) 17 QB 701.
[17] [2009] NSWCA 148 (unreported, Beazley JA, Basten JA, Handley AJA, 17 June 2009).
[18] *French v Barcham* [2009] 1 WLR 1124, 1138.

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'.[19]

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.

Whether further development of the law in this direction represents a response to ongoing changes in social conditions or public policy is another question.

[19] *Callow v Rupchev* [2009] NSWCA 148 (Unreported, Beazley, Basten JJA, Handley AJA, 17 June 2009), [46].