Calculating the Quantum of an Occupation Fee

Generally, as occupation rent is a form of mesne profits, it is restitutionary in nature and designed to disgorge any benefit that one owner has derived from the property where it was meant to be shared with another. Hence, it may be relevant to determining occupation rent to first determine the nature of the property interest (i.e is the interest held as joint tenants or tenants in common and in what shares). Thus, where the occupying co-owner and the non-occupying co-owner held the property in equal shares, the occupation fee will usually be half the rental value of the land: *Biviano v Natoli; Callow v Rupchev*.

A and B are tenants in Common in Whiteacre. A's beneficial share in the property is 4/10 and B's beneficial share in the property is 6/10. B is ousted from the property and makes a claim for occupation rents from A. The rent per week on the property is $100. A will be liable to pay B $60 per week for the period for which they have been ousted.

→

I.E A is not paying B for their own occupation of the property, but compensating B for their non-use of the property.

A and B are co-owners in equal shares of a property in which A resides, but B does not. A makes $50K worth of improvements to the property and brings a claim for improvements against B. B cross-claims for occupation rent. The calculated value of the occupation rent to which B is entitled is 25K. The effect of B's cross-claim will be that A's claim for improvement is reduced to an entitlement of 50K [the improvement amount – the occupation rent]. However, B's cross-claim will only have the effect that the improvement claim is reduced to 0. It is not possible that B receives a positive contribution from A in respect of the occupation rent, even if it is the case that the occupation rent was worth more than 50K.

The calculation of occupation rents, will however, vary where the occupation fee is payable by way of set-off against a claim for improvements which are being made by the occupying owner. In such a case, the fee cannot exceed the amount which was allowed for improvements: *Brickwood v Young; Foregard v Shanahan; Ryan v Dries*

In calculating this amount, some allowances may be made however for various factors. See the discussion in *Butt* for more information.

Where the relationship between co-owners is such that both are in possession, but one is in a greater degree of possession than the other and a claim for occupation rent is made to offset a claim for improvements, the formula for calculating the extent of the set off is: *Ryan v Dries*

Value of Occupying Co-Owners Possession (VO) – Value of Non-Occupancy Owners Possession (VN)

x

VN's share in beneficial title (VNBT)

Mortgage Repayments

In a situation where the claim for improvements that is made pertains to mortgage instalments, the calculation is again different. The co-owner in occupation will be entitled to recover the capital amount which they have contributed to the mortgage, however cannot make a claim for the interest. As a consequence of this limitation, the co-owner out of occupation is estopped from claiming an occupation fee: *Callow v Rupchev*

A and B are co-owners in equal shares of a property in which A resides, but B does not. A makes an additional 50K in contributions to the mortgage which C holds over the property. 45K of this is a capital contribution to repaying the principal, whilst 5K is payments made in interest. A then claims against B for improvements. Whilst A will be entitled to receive only 45K [not the 5K in interest], B will be ineligible to claim for any

★ Relevant Case: *Ryan v Dries*

Facts: The appellant (Ryan) and the respondent (Dries) bought a house together in unequal shares of 43/100 and 57/100 the Appellant paying more. The respondent resided there on weekends with him. The appellant paid the majority of duties and costs and repaid the entirety of the loan himself. The relationship broke down and the Appellant changed the locks thus excluding the Respondent from the property. The respondent claimed occupation rent.

Allowance for Improvements

Although at common law, little recognition is afforded to moneys spent on improvements (*Leigh v Dickeson*), in Equity, the position is different. Where an individual spends funds improving the land, this may be taken into account when determining the distribution of funds from an eventual sale. Any improvements in this respect will constitute a charge on the land, such that they form a proprietary right in the land, not merely a personal right against a co-owner. An account for improvements may be made in proceedings which relate to:

- *S 66G*
- Resumption
- Private Sale
- Declaration (and termination) of beneficial entitlement

KEY LIMITATION: Any entitlement for compensation however, cannot exceed the lesser of the amount spent or the increased value of the property: *Squire v Rogers*

Additionally, any improvements must have been made in a capacity where an individual has possession: *Brickwood v Young*.

★ Relevant Case: *Squire v Rogers*

Facts: In 1962 a lease was granted to the appellant and respondent jointly. In 1963, the respondent left Australia and returned to the US. The lease contained a covenant requiring that certain construction and repairs be carried out on the land, with which the appellant alone complied. The first improvements so made by him were largely destroyed by Cyclone Tracey in 1974. Subsequently, the appellant expended further moneys in improvements and, on the land he carried on the business of providing accommodation in flats, rooms and caravans. The respondent had made no contribution to the improvements and all outgoings had been paid by the appellant. Upon an application by the respondent for an order for the sale of the land and for an account, the sale was ordered and accounts were ordered to be taken. It was further ordered that there be an adjustment on the sale in favour of the appellant to the extent to which the value of the land had been increased by the appellants expenditure on improvements. The unchallenged evidence was that the appellants expenditure on the improvements before and after the cyclone was 100K. A valuation placed in evidence by the appellant indicated that the total increment in value of the land as a result of the improvements did not exceed 15K.

Relevant Principles

- The receipts for which the appellant should be liable to account on the respondent's claim were limited to those receipts which could properly be regarded as rents and revenue of the common property itself as distinct from profits which the appellant might have made by his use and occupation of the common property.
- Where a co-owner in occupation has been in receipt of rent and profits from the property and used them to finance improvements, in seeking an allowance for the proportion of the rent and profits they must make the occupying owner an allowance in respect of the moneys spent, not simply as much of them as results in an advancement of the value of the land.

COVENANTS: ARE THEY ENFORCABLE AGAINST A SIT?

Question 1: Does the Covenant comply with the formalities under <u>S88(1)</u> <u>*Conveyancing Act*</u> ?
NB: If not, the covenant will not be enforceable against any SIT.

Question 2: If the land is <u>Torrens,</u> is the Covenant recorded in the folio of the burdened land?
If YES: The covenant may be enforceable against a SIT, turn to Question 3.
If NO: The covenant is not enforceable against a SIT [unless some other exception to indefeasibility arises]

Question 3: Do the burden and/or the benefit run [as required → see below] ?
If YES: The covenant is enforceable
If NO: The covenant is not enforceable

<u>QUESTION 3: DO THE BURDEN AND BENEFIT RUN AS REQUIRED</u>

1. Whether or not a covenant is enforceable against a successor in title to the dominant or servient tenement depends upon whether the burden or benefit has 'run with the land'. These benefits and burdens may run at law or in equity.
    a. However, where reliance is placed in Equity or Law for the running of the benefit, reliance must also be placed in that area for the running of the burden: <u>*Re Union Club Conveyance.*</u>
    b. **NB: Where a covenant arises under Torrens and is not recorded it will not be enforceable [because it will be defeated by indefeasibility provisions with the RPA].**
        i. **Where it is recorded, the question of whether it is enforceable depends**
2. Three situations arise to determine whether a covenant will be enforceable against a successor in title (SIT):
    a. Where the owner of the servient tenement has changed: Prove the **<u>BURDEN</u>** runs
    b. Where the owner of the dominant tenement has changed: Prove the **<u>BENEFIT</u>** runs
    c. Where both owners have changed: Prove the **<u>BURDEN</u>** and **<u>BENEFIT</u>** run

HAS THE COVENANT RUN AT LAW?

HAS THE BURDEN RUN?

1. **The burden of a covenant, whether negative or positive does not run at Common Law: <u>*Austerberry v Oldham Corporation*</u>**
    i. I.E There is no obligation on the successor-in-title to the covenantor to perform any obligation under the covenant **<u>unless</u>** they have agreed to it.
    ii. NB: This presumption is not displaced by <u>*S70A(1)*</u> of the <u>*Conveyancing Act*</u>
    b. There are however a number of exceptions to this rule such that a burden may run:
        i. Benefit and Burden Principle
            1. Where a **<u>deed or other document</u>** gives a benefit to one party but makes enjoyment of that benefit conditional on the adoption of a burden **<u>then</u>** the burden may run.
                a. The benefit and the burden must be reciprocal in nature: <u>*Halsall v Brizell*</u>
                    i. I.E They must relate to the same subject matter
                        1. E.G in *Halsall* an arrangement whereby a fee was paid to use the roads etc was sufficiently conceptually linked.
                        2. E.G In <u>*Rhone v Stephens*</u> an arrangement to keep the roof in repair was not reciprocal to a promise not to interfere with the structural integrity of the adjoining wall.
                b. The grantee must be in a position to elect to take the benefit or not take the benefit: <u>*Rhone v Stephens; Halsall v Brizell*</u>
                    i. I.E They must be in a position to give up the benefit, thereby escaping the burden.
                        1. In <u>*Rhone v Stephens*</u>: The benefit of the structural integrity of the wall was not one that the owner was free to eject from.

ii. The Essential Fabric of an Easement Option

1. Where a covenant is made by the grantor or grantee of an easement so as to contribute to the cost of its maintenance [the burden of it] it will run with the easement: *Frater v Finlay*
    a. Includes where a covenant is an easement, part of an easement or incident to an easement.
    b. NB: In such a case, you would be required to prove that the easement was also valid and in effect.
2. In NSW enabled by *s88BA* of the *Conveyancing Act*
    a. *88BA:* A covenant may be imposed requiring the maintenance or repair or the maintenance and repair of land that is the site of an easement or other land that is subject to the burden of the easement by any one or more of the persons having the benefit or burden of the easement.
        i. [thus once registered, the obligation is enforceable/indefeasible].
    b. How does the provision have statutory effect?
        i. S88BA deems any such obligation to be a positive obligation per S87A and that under S88F any positive covenants are considered to be negative and therefore enforceable [i.e reverses the CL presumption under statute].

HAS THE BENEFIT RUN?

2. A benefit will only run at law provided that:

i. The benefit **'touched and concerned'** the land owned by the covenantee [dominant land] at the time the covenant was entered into: *Re Ballard's Conveyance; Kerridge v Foley*

1. The covenant must be for the benefit of the land [for its better enjoyment/to enhance its value] rather than merely for the benefit of the owner.

2. It is presumed that the covenant relates to the dominant land as a whole rather than each part unless the covenant is intended to benefit each and every part of the dominant land: *Ellison v O'Neill*

a. The dominant land must therefore not be too large to benefit from the covenant: *Re Ballard's Conveyance*

i. I.E Where the land is subdivided there is a presumption that the subdivided parts will not receive the benefit of the covenant: *Ellison v O'Neill*

ii. The covenantor and covenantee **intended that the benefit of the covenant** would run with the dominant land so as to be enforceable by successors in title.

1. *S70* deems this intention [without the proviso that a contrary intention be expressed].
2. In *Smith & Snipes Hall* 'for all time' amounted to an implied intention for the benefit to run with the land.

iii. The successor in title to the dominant land has received a LEGAL estate in the land

1. This may be a different legal interest to that of the original covenantee where the covenant is **restrictive**: *S70 CA*
    a. Thus where there is a positive covenant, the legal estate in land must be the same as the original covenantee.

HAS THE COVENANT RUN IN EQUITY?

HAS THE BURDEN RUN?

1. For the burden to run in Equity, five criteria must be satisfied:
    a. The covenant must be **negative** in substance: *Rhone v Stephens*
        i. This is determined in relation to the substance of the covenant, not its wording.
        ii. Equity regards a breach of a negative covenant as unconscionable as it allows one party to profit at the expense of another: *Forestview Nominees v Perpetual Trustees*
        iii. Where a covenant has both positive and negative obligations, the positive obligations may be severed in order to enforce the negative obligations.

b. The benefit must benefit the land owned by the covenantee [dominant land] at the time the covenant was entered into: *Forestview Nominees v Perpetual Trustees*
    i. NB: A reframing of the test in *Re Ballard's Conveyance* to ask instead whether the land is reasonable capable of being affected by a breach of the covenant.
        1. The covenant must be for the benefit of the land [for its better enjoyment/to enhance its value] rather than merely for the benefit of the owner.
        2. It is presumed that the covenant relates to the dominant land as a whole rather than each part unless the covenant is intended to benefit each and every part of the dominant land: *Ellison v O'Neill*
            a. The dominant land must therefore not be too large to benefit from the covenant: *Re Ballard's Conveyance*
                i. I.E Where the land is subdivided there is a presumption that the subdivided parts will not receive the benefit of the covenant: *Ellison v O'Neill*
c. The Covenantor and Covenantee **intended that the burden of the Covenant** would run with the dominant land.
    i. Under S70A, this intention is deemed unless an intention to the contrary is expressed.
d. There must be no interference from a bona fide purchaser for value without notice
    i. Where a successor in title to the servient land is a BFPVWN they will not be bound by the covenant.
e. The covenant must comply with the requirements of S88(1) of the Conveyancing Act: *Kerridge v Foley*

HAS THE BENEFIT RUN?

1. For the benefit to run in Equity it is necessary to establish that:
    a. [1] The benefit **benefits** the land owned by the covenantee [dominant] land at the time the covenant was entered into: *Forestview Nominees*
        i. Equitable test of whether the land is reasonably capable of being affected by the breach of a covenant.
            1. However, CL considerations still relevant in practice.
    b. [2] The covenantor and the covenantee **intended that the benefit of the covenant** would run with the dominant land.
        i. This intention is deemed by S70 of the CA, however it is possible for parties to agree that the benefit runs in favour of owners but not lessees of the land: *Forestview Nominees*
        ii. There is some debate about whether express words of annexation are required to exhibit this intent, however there is no concluded authority on this matter.