EQUITABLE ACCOUNTING BETWEEN CO-OWNERS OF REAL PROPERTY: HAVE WE LOST SIGHT OF THE CO-OWNERSHIP RELATIONSHIP?

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CHAPTER I - INTRODUCTION

Courts continue to encounter difficulties when accounting for the rights and liabilities of co-owners of real property when co-ownership relationships come to an end and the shared property is sold or partitioned. The courts’ role is to use the proceeds of the jointly owned property to meet the legal and personal obligations that have arisen between the co-owners during the course of the co-ownership relationship. The three primary areas which have presented particular difficulty to the courts are occupation fees, improvements and repairs and rents and profits and will be considered respectively by this paper in Chapters II, III and IV. The questions with which the courts have had to grapple with include: Under what circumstances should co-owners who do not occupy the shared property during the term of the co-ownership (herein referred to as ‘absentee co-owners’) be allowed to seek an occupation fee from the co-owners who remain in occupation (herein referred to as ‘occupying co-owners’)? Furthermore, under what circumstances should an occupying co-owner who incurs outgoings in relation to the property, be allowed a contribution from the absentee co-owner? Finally, if the occupying co-owner receives rental income or derives profit from the shared property, do they need to account to the absentee co-owners for a proportion of the sums received?

Disputes of this nature have been described as ‘acrimonious’ by Professor Butt,¹ and

in answering the questions above, the common law and equity courts developed principles that aimed to achieve fairness or justice between the parties. It has been widely accepted that courts should approach equitable accounting flexibly so as to achieve broad justice between the parties. In this regard, cases discussing equitable accounting principles often turn to the principles found in the judgments of Muschinski v Dodds and Baumgartner v Baumgartner, where it was held that equity will give the minimal equity necessary to relieve the conscience of the legal owners. Courts have also upheld the maxim of a co-owner seeking equity having to do equity.

For example, an absentee co-owner cannot take a proportion of the increase in value to the property without contributing to the expenditures made by the occupying co-owner. In giving effect to this theme of fairness, Griffiths L.J. in Bernard v Josephs reasoned that:

‘If one co-owner has kept up all the mortgage payments, he is entitled to credit for the other co-owner’s share of the payments; if he has spent on recent decoration which results in a much better sale price, he should have credit for that.’

However, the guidance of fairness offered by Anglo-Australian cases becomes too much of a formal enquiry into the financial position of the parties in the aftermath of

2 See for example, Dennis v McDonald [1982] Fam 63, 1050-1051 (Purchas J).
3 (1985) 160 CLR 583.
5 Hogan v Baseden (24 November 1997, Butterworths Unreported Cases BC9706190).
6 Teasdale v Sanderson (1864) 33 Beav 534; 55 ER 476.
7 [1982] 1 Ch. 391.
8 Ibid, 405.
the co-ownership relationship. For example, the rules concerning occupation fees have been unwavering in the requirement of a finding of fault. The rules concerning improvements and repairs focus on drawing an artificial and narrow distinction whether an expenditure made by an occupying co-owner has improved the value of the property or not and in respect of rents and profits, the rules find the same narrow distinction between rental payments received from third parties and income earned from labour. Ironically, an application of the rules following such a rigid framework may compromise a result that would otherwise have been fairer to both parties if the underlying co-ownership relationship was viewed holistically.

The purpose of this paper is to evaluate the development of the equitable accounting rules in Australia by identifying potential weaknesses in the rules, especially in addressing the issues that have come to light due to the changing context of co-ownership arrangements. For example, Kourakis CJ in the recent South Australian case of W v D,\(^9\) explained that the rules were not designed to resolve disputes in the context of a domestic relationship breakdown, which is a relatively recent phenomenon brought about by, as one factor, the increasing ownership of land by women and by sale on the open market as opposed to acquisition through inheritance.\(^10\)

This paper will argue that there should be a reformulation of the framework under

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\(^9\) [2012] SASCFC 142.
which co-ownership disputes are settled, so that the rules engage in a substantive enquiry of the co-ownership relationship viewed holistically as opposed to a formal one. In order to be effective, this framework must exhibit a unifying theme or guiding principle that is more specific than fairness but still sufficiently broad enough to allow courts to resolve disputes on a case-by-case basis. In developing this theme, this paper will consider the rules developed in the US, which differ in a number of respects to the Anglo-Australian approach.

CHAPTER II - OCCUPATION FEES

A Introduction - The Primary Rule

The primary rule with respect to liability to pay occupation rent is that ‘a co-owner in sole occupation is not liable at law or in equity to pay an occupation rent to the non-occupying co-owners.’\textsuperscript{11} The rule is premised on the touchstone principle of co-ownership, that co-owners each have a right to possession of the whole property (subject to a similar right on the part of other co-owners) and that simply by exercising this right, it would be ‘unfair’ for a co-owner to be burdened by a claim for compensation at the suit of another co-owner who has failed to exercise their same right.\textsuperscript{12} The US rule is similar in effect, with an occupying co-owner not accountable to the absentee co-owner for use of the property since their occupancy was presumed

\textsuperscript{12} Roger J. Smith, \textit{Plural ownership} (Oxford University Press, 2005), 120.
to be their own right as the owner of one half of all and every part of the common property. The whole basis against making a co-owner in occupation liable to account is that if such liability were to exist, a co-owner could, by abstaining from entering into occupation, turn his co-owner into an involuntary bailiff. Non-occupation by a co-owner was thus presumed to be voluntary by the primary rule and virtually without remedy, unless one of three exceptions (agreement, ouster or a claim for improvements or lasting repairs) could be shown.

B The First Exception: Agreement

Firstly, if there is an agreement between the co-owners, the court treats one party as having constituted him or herself as a bailiff, in which ‘they would be liable in an action of account, like any other bailiff’. US courts have adopted the terminology of landlord and tenant by treating the occupying co-owner as a tenant who is accountable to the landlord for their occupation by way of rent. Evidence of either a written or verbal agreement is clearly the most concrete evidence to demonstrate the parties’ intentions to not follow the primary rule.

C The Second Exception: The ‘Ouster’ Exception

13 Wolley v Schrader, 116 Ill. 29, 39, 4 N.E. 658 [1886].
15 The term ‘bailiff’ is derived from the language of Statute of Anne (1705) 4 & 5 c16, where a co-owner could maintain an account against the other as bailiff. See Re Tolman’s Estate (1928) 23 Tas LR 29, 31; Rees v Rees [1931] SASR 78, 80-81.
16 Davies v Skinner, 58 Wis. 638, 17 N.W. 427 (1883).
17 Forgeard v Shanahan (1994) 35 NSWLR 206, 298 (Meagher JA).
Secondly, if a co-owner could demonstrate that there was a wrongful exclusion or ‘ouster’ by the other co-owners, the excluding co-owner will be liable in mesne profits.\(^{18}\) The concept of ‘ouster’ developed as an exception to the primary rule at common law on equitable lines of reasoning developed by the Court of Chancery\(^{19}\) which have been subsequently adopted by the common law courts. A co-owner could not wrongfully exclude other co-owners from the property and thereby deny them their common law right to possession of the whole property without being liable for an occupation rent.\(^{20}\) The excluding co-owner is deemed to have committed the tort of trespass on the excluded co-owner’s right of occupation of the shared property.\(^{21}\) The exclusion that amounts to an ouster must be wrongful in the sense of a legal wrong. When referring to the concept of a ‘legal wrong’ in \textit{Luke v Luke},\(^{22}\) Long Innes J did not differentiate between a positive legal wrong (actual ouster), and the denial of a legal right (constructive ouster). However, in \textit{Biviano v Natoli},\(^{23}\) an occupying co-owner who obtained an order for exclusive occupation or an AVO was held to do no legal wrong, even though the practical consequence of the AVO was to deny the legal rights of the other co-owner to occupy the shared property.\(^{24}\)

Earlier cases started with the ‘underlying assumption…that there is no good reason

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\(^{18}\) \textit{Dunlop v Macedo} (1891) 8 TLR 43.  
\(^{20}\) Peter Butt, \textit{Land law} (Thomson Reuters, 2010), 239.  
\(^{22}\) (1936) 36 SR (NSW) 310.  
\(^{23}\) (1998) 43 NSWLR 695.  
\(^{24}\) \textit{Biviano v Natoli} (1998) 43 NSWLR 695.
why the non-occupying co-owner should not take up occupation'. To this end, the onus of establishing that the behavior of the occupying co-owner amounted to an ouster rested on the non-occupying co-owner. The prima facie position in the US is similarly that entry into the shared property is a permissive entry on behalf of all co-tenants, with the onus on the co-owner claiming an occupation fee to disprove this. Because the ouster concept takes its meaning from the common law, the types of behavior that constituted an ouster and recent changes will now be discussed.

1 ‘Actual’ Ouster

Under traditional principles, an actual ouster by the occupying co-owner involved a civil wrong, either a trespass to the person by assault or battery, or a physical obstruction which prevented the absent co-owner from exercising his right to occupy the property. This gave rise to what Galloway critically regards as a long line of limited cases which required ‘some element of the occupant excluding the other co-owners or refusing to allow them to exercise their right to possession’. Unambiguous examples of actual ousters include if a co-owner leaves as a result of violence or threats of violence, proven for example, by threats of calling the police.

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28 Jacobs v Seward (1872) LR 5 HL 464, 472-473.
31 Re Thurgood (1986) Q ConR 54.
Physical obstructions include locking the means of access to the property with the intention of exclusion,\textsuperscript{32} or changing the locks to the property\textsuperscript{33}. Conversely, no ouster was found to exist when there were merely feelings of animosity between the parties.\textsuperscript{34} The latter cases proceed on the assumption that the absent co-owners have abandoned the property ‘voluntarily’ and ‘chosen not to exercise their legal rights to occupy the land’.\textsuperscript{35} These concepts of implicit voluntariness and choice to not occupy the land have been the subject of much debate between commentators and judges,\textsuperscript{36} with the result that there has been a gradual expansion from what was a narrow interpretation of the requirement of ouster being in an actual or physical sense.

2 ‘Constructive’ Ouster

A ‘constructive’ ouster’ captures situations in which an ouster is implied because shared occupation is no longer deemed to be possible as a result of the wrongful actions of the occupying co-owner.\textsuperscript{37} But they are not wrongful actions that amount to trespass or exclusion as above. For example, in \textit{Biviano v Natoli}, the occupying co-owner persisted in her denial of the respondent’s title, which amounted to an express denial of his rights and constituted an ouster.\textsuperscript{38} A more implicit denial will also suffice for the definition. For example, a co-owner’s exercise of the right to possession over

\begin{footnotesize}
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\item \textsuperscript{32} \textit{Jacobs v Seward} (1872) LR 5 HL 464, 472 (Lord Hatherley LC).
\item \textsuperscript{33} \textit{Ryan v Dries} (2002) 10 BPR 19.
\item \textsuperscript{34} \textit{Marriott v Franklin} (1993) 60 SASR 457.
\item \textsuperscript{35} \textit{Re Thurgood} [1987] ANZ ConvR 44.
\item \textsuperscript{36} See for example, the opposing dicta between Meagher J and Kirby P in \textit{Forgeard v Shanahan} (1994) 35 NSWLR 206, 212.
\item \textsuperscript{37} \textit{Chieco v Evans} (1990) BC 900 2356 [6].
\item \textsuperscript{38} \textit{Biviano v Natoli} (1998) 43 NSWLR 695, 703 (Powell JA, Beazley JA and Stein JA).
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the whole of the land in a way which compromises the capacity of another co-owner
to equally enjoy the land might constitute exclusion and amount to a trespass.\textsuperscript{39} In the
Queensland case of \textit{Paroz v Paroz},\textsuperscript{40} one party, in breach of an interlocutory
injunction, conducted grazing activities beyond the capacity of the shared farm and
slashed grassland for the purpose of ploughing a substantial area of land without the
consent of the other co-owners. The Queensland Court of Appeal found a constructive
ouster on the basis that the conduct of the excluding co-owner had exceed their rights
as co-owner of the land.\textsuperscript{41}

The case clearly represents a significant factual development from the original
meaning of ouster as a denial of the right to physical occupation of the property. The
trespass is no longer physical in the sense of an obstruction preventing entry; rather, it
is a trespass on the rights of the other co-owners to enjoy the land. This reasoning
clearly implies that co-owners have an obligation to respect each other’s rights and by
not respecting such rights, a co-owner will be acting wrongfully and thus liable for an
occupation fee. However, the crucial finding of fault on behalf of the excluding party
means that the case is still consistent with the underlying reasoning of the trespass
exception and the traditional approach of the rules, that is, a measure designed to
punish the trespassing co-owners (more than to compensate the excluded co-owner).\textsuperscript{42}

Although not explicitly referred to in the case, the finding of ouster can also be

\textsuperscript{39} \textit{Paroz v Paroz} [2010] QSC 203 [33]-[36] (Peter Lyons J).
\textsuperscript{40} [2010] QCA 203.
\textsuperscript{41} \textit{Paroz v Paroz} [2010] QSC 203 [38] (Fraser and Chesterman JJA and Jones J).
\textsuperscript{42} This is because a co-owner who is excluded by an AVO receives no occupation fee as no legal wrong has been committed.
framed as an enquiry into the reasonableness of the excluding party’s actions. A reasonable co-owner would not ignore an interlocutory injunction, nor use the property in a way that blatantly denies the other co-owner’s rights to use the same.

The US cases extend the concept of constructive ouster to include ‘circumstances as to evince a claim of exclusive right and a denial of the right of the other (owner) to participate in the profits’\textsuperscript{43}. For example, in \textit{Neubeck v Neubeck},\textsuperscript{44} there was no ouster where a wife left her husband and he continued to inhabit their previous marital abode. The husband was merely required to reimburse the wife for the rent taken in from the boarder the husband took on after the wife left. However, the unlawfulness of the excluding co-owner’s actions which has been the touchstone for the cases so far, appears to be losing relevance in light of the “relationship breakdown” cases, which will now be discussed.

3 ‘\textit{No Fault}’ Ouster

There are essentially three possible scenarios during the course of the co-ownership relationship that is able to engage this area of the law. Up to this point, it has been established that no occupation fee is payable to a co-owner who departs the property voluntarily. Conversely, an occupation fee is payable by an occupying co-owner if they have ‘ousted’ the other. The third situation is the most difficult to explain and

\textsuperscript{43} \textit{Mastbaum v Mastbaum}, 126 N.J. Eq. 366, 9 A.2d 51 (Ch.Ct. 1939).
\textsuperscript{44} 94 N.J. Eq. 167, 119 A.26.
justify, and concerns whether in the absence of wrongdoing, an occupying co-owner should pay an occupation fee where the co-ownership relationship has broken down due to general unpleasantness and in the absence of any wrongdoing on the part of either co-owner. Because there is no legal wrongdoing, the traditional approach would hold that no occupation fee is payable by the occupying co-owner.

The problem with the traditional approach was, as Kirby P emphatically noted in his dissent in *Forgeard v Shanahan*,\(^{45}\) that it ignored the ‘multitude of reasons which may explain a withdrawal from land held in co-ownership after the breakdown of the personal relationship’\(^{46}\). His Honour was referring to the changing social trends giving rise to the high incidence in contemporary Australian society of home ownership, including co-ownership by women which was largely unknown a few centuries ago.\(^{47}\) Another significant development has been the high levels of de facto married relationships, the high incidence of breakdown of such relationships and the subsequent necessity for the courts to adjust the claims of the parties.

This doctrine is an independent ground for claiming an occupation fee and does not depend on the traditional requirements of an ouster. The doctrine took form with earlier decisions such as *Dennis v McDonald*,\(^{48}\) in which the court recognized that it was often ‘the breakdown in an association’ which causes one party, for practical

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\(^{45}\) (1994) 35 NSWLR 206.
\(^{46}\) *Forgeard v Shanahan* 18 Fam LR 281, 287.
\(^{47}\) 18 Fam LR 281, 285.
\(^{48}\) [1982] Fam 63.
purposes, to be excluded from the family home.\textsuperscript{49} Although the context of the relationship breakdown was still one of violence and this was the basis of the court’s decision, the court conceded in obiter, that the underlying reason behind the wrongful exclusion was attributable to general unpleasantness beyond the violence viewed in isolation.\textsuperscript{50} However, the court was unwilling to deviate from the traditional approach by basing their finding of an ouster on reasons that went beyond the violence.\textsuperscript{51}

As a further development, the Court of Appeal in Callow v Rupchev\textsuperscript{52} found that there was ‘no need to identify violence or threat of violence to justify a finding that departure of the one co-tenant was involuntary\textsuperscript{53}. The Court agreed with Kirby P’s dissent in Forgeard v Shanahan\textsuperscript{54}, which lamented the changes in society which required a reformulation of ‘old’ principles to recognize the reality behind the breakdown of relationships in the context of contemporary property ownership.\textsuperscript{55} This decision has given rise to an array cases where no violence or threatened violence could be found but which held that an occupation fee was payable by the co-owner in occupation.\textsuperscript{56}

In responding to cases of this nature, Kirby P’s recommendations that an occupation rent be payable in all cases where one co-owner has been in exclusive occupation of

\textsuperscript{49} Ibid, 71.
\textsuperscript{50} Ibid, 70-71.
\textsuperscript{51} Ibid.
\textsuperscript{52} [2009] NSWCA 146.
\textsuperscript{53} Ibid [30].
\textsuperscript{54} Ibid [55] – [61].
\textsuperscript{55} Forgeard v Shanahan (1994) 35 NSWLR 206, 211.
\textsuperscript{56} See for example, Payne v Rowe [2012] NSWSC 685; W v D [2012] SASCFC 142; Maio v Sacco [2009] NSWSC 413.
the land, \(^5\) has been heavily criticized by various commentators. For example, Brereton J\(^8\) argued that it offends the basic precept of co-ownership, being that co-owners have an equal right to share in the occupation of the land. Indeed, as Long Innes CJ noted in *Luke v Luke*\(^9\), endorsing the comments of Kindersley VC in *Griffies v Griffies*\(^{10}\) and Salmond J in *McCormick v McCormick*,\(^{11}\) the imposition of a general occupation rent in the absence of an ouster or other circumstances giving rise to an occupation rent has not received notable support.\(^{12}\) Courts were wary of the injustice that would be suffered by a co-owner who is forced to assume sole responsibility of the land when their co-owner merely abandons the land and is further punished by being liable for an occupation fee.\(^{13}\) Instead, unreasonableness of continued occupation appears to be the factual enquiry that the courts must undertake. The Full Court in *Callow v Rupchev*\(^{14}\) approved the comments of Brereton J in *McKay v McKay*\(^{15}\) and held that:

‘If it becomes no longer reasonable or practically sensible to expect the partners to co-occupy the one property, the one who remains in possession may be taken to do so to the exclusion of the other, and to be liable to pay an occupation fee.’\(^{16}\)

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\(^{5}\) *Forgeard v Shanahan* (1994) 35 NSWLR 206, 214.


\(^{9}\) (1936) 36 SR (NSW) 310.

\(^{10}\) (1863) 8 LT 758.

\(^{11}\) (OH) 1994 SCLR 958.


\(^{13}\) Ibid.

\(^{14}\) [2009] NSWCA 148, [59].

\(^{15}\) [2008] NSWSC 177 [51].

\(^{16}\) *McKay v McKay* [2008] NSWSC 177 [51] (Brereton J).
Butt P has suggested that the principle should not be limited to matrimonial or domestic relationships because the rationale is that the occupying co-owner cannot be liable for an occupation fee where the non-occupying co-owner is free to take up occupation but chooses not to. This has been confirmed in the NSW Supreme Court decision of *Payne v Rowe & Anor*, which held that an occupation fee was payable between a brother (Jeremy), sister (Jo) and mother (Helen) who shared the property in common but whose domestic relationship had broken down to the extent that the sister, Jo had to leave. The breakdown was the result of the parties’ differing expectations which made it intolerable for them to continue to live together. For example, Jo expected Jeremy to give her an interest in his business when she had provided considerable assistance in relation to the business, but he did not. Ball J concluded that Jo wasn’t excluded from the property but chose to leave because of the breakdown of her relationship with Jeremy. He focused instead, on the unreasonableness of expecting Jo to return to the property as the basis for the imposition of an occupation fee.

4  *The Erosion of Well-Established Property Rights?*

It cannot be doubted that this ‘new principle’ acknowledges and is able to better
accommodate for the array of personal and circumstantial reasons that may give rise to the breakdown of a co-ownership relationship. Certainly, it is easier for a non-occupying co-owner to bring a successful accounting action for occupation fees as there is no longer a requirement to establish wrongdoing on behalf of the occupying co-owner. In fact, it must be doubted whether the new doctrine requires any element of exclusion at all, because departure is more likely to be a choice for a co-owner in the face of general unpleasantness in a relationship, than if they were ousted by a blameworthy and trespassing co-owner. The difference between a departure that is forced and one that is a result of choice may become difficult to distinguish. It is doubtful whether this distinction needs to be proven at all, given that in McKay v McKay,74 the departure of one co-owner from the property was considered voluntarily, albeit in circumstances where it was desirable if not inevitable that one or other of the parties would do so.75 While the cases have held that an occupation fee is payable by the occupying co-owner in this context, there has been some reservations about the scope of this principle.76 If not properly confined, the ramifications of this expansion could mean that all a co-owner in occupation will be liable in all situations when a relationship breaks down. For example, Kourakis CJ is convinced that “treating all relationship breakdowns as constructive exclusions by reason of a legal fiction is not a satisfactory solution”77.

74 [2008] NSWSC 177.
75 Ibid [53] (Brereton J).
76 See for example, the comments of Kourakis CJ in W v D [2012] SASCFC 142 [70].
77 Ibid.
In order to propose a satisfactory framework to resolve these cases, it is helpful to consider the concept of ‘attributable blame’, which in the context of co-ownership has been described by Bryson J in *Bennett v Horgan*\(^78\) to have a broad meaning and ‘does not call for a judgment attributing blame among members of a family for the continuing relationship becoming intolerable’\(^79\). With no elaboration on what constitutes intolerable, it appears the broad construction given to relationship breakdowns has reversed the traditional onus on the departing co-owner to establish exclusion by the occupying co-owner. Instead, it is arguable that the prima facie position now appears to be in favour of an occupation fee, with the onus on the occupying co-owner to argue that it was reasonable for the non-occupying co-owner to return and that they were not merely ‘voluntarily abstinent’\(^80\). However, to date, there have been no cases in which an argument has been advanced as to the reasonableness of return to the property. The New South Wales Supreme Court has recently expressed concerns regarding the intricacies of the options available to co-owners upon the breakdown of a relationship in *Barel v Segal*\(^81\):

> ‘The plaintiff is not in occupation to the exclusion of the defendant. The defendant has been free to come and go as he pleases ... it cannot matter that the defendant is

\[^{78}\text{*Bennett v Horgan* Unreported, NSWSC, 3 June 1994}
\[^{79}\text{Ibid, [11].}
\[^{80}\text{Kate Galloway, ‘Liability for occupation rent: ‘No fault ouster’ of a co-tenant’ (2010) 19 APLJ 23, 27.}
\[^{81}\text{[2012] NSWSC 1054.}
understandably not welcome in the home. The defendant has expressed no desire to enter the house, or has any reason for doing so. There is no injustice and no occasion or need to require the plaintiff to pay an occupation fee to prevent injustice to the defendant.\(^8\)

Galloway notes this development as introducing an ‘interesting element’ which arguably represents a shift in the approach of the courts to the nature and right of possession and remedies for interference.\(^9\) In this regard, she is referring to the diminished importance placed on the interference in the right of possession as the basis for the imposition of an occupation fee, because there is a conscious decision to depart the property that can be ascribed to the departing co-owner. In this regard, the purpose of the award is clearly compensatory on the absentee co-owner and not punitive on the occupying co-owner.

At this point, it seems appropriate to reflect on the value that can be attributed to the traditional rules as identified by Meagher J in *Forgeard v Shanahan*\(^9\). Although the stringent requirement of finding fault in the actions of the remaining co-owner may have precluded some accounting claims, the rules were sourced from well-entrenched, albeit limited property rights that set a clear boundary on the rights and liabilities of co-owners. On one hand, it can be said they were deficient in responding to the reality of relationship breakdowns, but on the other, they presented a clear basis on which to

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\(^8\) *Barel v Segal* [2012] NSWSC 1054 [28] (Pembroke J).
\(^9\) Galloway, above 80, 25.
\(^9\) (1994) 35 NSWLR 206, 221-222.
impose an occupation fee.

The premise of the discussion so far has been the association of a liability to pay an occupation fee with fault. In light of the incongruence of fault with the new line of relationship breakdown cases, it may be helpful to consider the basis of liability to pay occupation fee from a different perspective. This basis, for example, can be an enquiry into the reasonableness of a co-owner’s actions in respecting fellow co-owners and the co-ownership relationship. This proposed basis would not change the traditional rules regarding ouster as it would be unreasonable for an occupying co-owner to actually or constructively exclude their fellow co-owner from the shared property.

In the context of a relationship breakdown however, the proposed basis gives the rules more consistency and shifts the focus away from the stringent fault requirement so as give courts sufficient discretion to consider the co-ownership relationship holistically. For example, the courts role would be to enquire into whether the circumstances of the relationship breakdown were such that a reasonable co-owner in the position of the absentee co-owner would have departed the property, or whether the departure was mutually agreed, either expressly or implicitly. In other words, the enquiry is into whether a reasonable co-owner would have treated the co-ownership relationship as coming to an end. If the absentee co-owner’s departure is reasonable, then it is also reasonable to expect an occupying co-owner to compensate their fellow co-owner for
this mutually agreed departure by way of an occupation fee. In this regard, the purpose of the award is purely compensatory on the absentee co-owner who has to find alternative accommodation. However, if the court finds that the departure is not consistent with the rights and obligations imposed by the co-ownership relationship, no occupation fee should be awarded. For example, in the case of *Barel v Segal*, no occupation fee would be awarded as there was no definitive evidence that suggested the parties had treated the co-ownership relationship as having ended.

The benefit of this proposed framework is its ability to give effect to the implied intention of co-owners. In this regard, it is important to view the co-ownership relationship as an agreement where upon entry, co-owners impliedly subscribe to respect each others’ property rights and to jointly honour the shared obligations that arise from the property. Where the property is inherited and the co-owners choose to continue the relationship, an implicit acceptance of and agreement arises between the co-owners to respect the co-ownership relationship. The proposed framework reflects this agreement in the sense that a co-owner who deviates from their agreement may not recoup their full share of the proceeds of the property as they would otherwise be entitled. Although co-owners do not have fiduciary obligations to fellow co-owners, there should be a standard of behavior that can be reasonably expected from a party to a co-ownership relationship which would forms the benchmark of the proposed framework under which the behavior of litigating co-owners is assessed.

86 *Kennedy v De Trafford* [1897] AC 180, 186.
The US has not recognized relationship breakdowns as an independent ground for charging an occupation fee. The absentee co-owner must still demonstrate that acts by the occupying co-owner ‘were openly adverse to the concept of co-(ownership)’\(^{87}\) i.e. an actual or constructive exclusion. For example, in *Reitmeier v Kalinoski*, \(^{88}\) the mere fact Ms Kalinoski (the absentee co-owner) did not wish to live with Mr Reitmeier (the occupying co-owner) was of no import. What the courts considered was whether she could physically live on the premises. However, there is no injustice done to the absentee co-owner because as will be seen in Chapter III, the US approach is to award occupying co-owners with a credit for necessary outgoings they have incurred to preserve the value of the property. In most of the “relationship breakdown” cases, while not all occupying co-owners will make improvements, they will bear the burden of making necessary expenditures e.g. taxes, insurance costs. A claim for necessary expenditures brought by an occupying co-owner entitles the absentee co-owner to bring a claim for occupation fees. \(^{89}\) If able to be adopted in Australia, the US approach represents an alternative to the framework suggested above, but requires a reformulation of the rules regarding improvements and repairs.


\(^{88}\) 631 F. Supp. 565.

\(^{89}\) Ibid.
The measure of an occupation fee has not been approached consistently by both Australian and English courts. The differences can be attributed to the range of purposes the award is designed to achieve given the factual background of the cases. This is especially true in light of the broader interpretation given to an ‘ouster’ as an independent ground of claiming an occupation fee in the context of a relationship breakdown.

Earlier cases\textsuperscript{90} have held an occupation rent to be payable on the basis of the wrongful denial of title, upon which it would be appropriate to quantify the fee as a proportionate percentage of the market rent of the home. For example, if there are two co-owners and one has been ousted, a fee of 50\% of the market rent would supposedly recompense the excluded co-owner for their lost opportunity to occupation of the shared property. Such was the approach adopted by the Court of Appeal of NSW in \textit{Biviano v Natoli},\textsuperscript{91} notwithstanding the concession suggested by Beazley JA in obiter, that the market rent was not the appropriate measure of a fee because a stranger renting the home would have to share it with the occupying co-owner.\textsuperscript{92} Subsequent cases such as \textit{McKay v McKay}\textsuperscript{93} have accepted half the market rent for the period of exclusion as the proper measure of an occupation fee, with no allowance for interest as the value is in ‘today’s values’ and no need to consider inflation.\textsuperscript{94}

\textsuperscript{90} See for example, \textit{Biviano v Natoli} (1998) 43 NSWLR 695, 704.
\textsuperscript{91} (1998) 43 NSWLR 695
\textsuperscript{92} Ibid, 704.
\textsuperscript{93} [2008] NSWSC 177, [54]
\textsuperscript{94} Ibid.
agent or valuer’s evidence must be relied upon to determine the value of the rent during the period of exclusion. However, the position is far from settled and the confusing state of authorities was captured in the following submission of the respondent in Biviano:

‘In French v Barcham, the amount was assessed at ‘one half of the letting value. In Dennis v McDonald, the amount was assessed at ‘one half of a fair rent’. In Bernard v Josephs, the amount was to be worked out by reference to mortgage payments’.

The financial ramifications of the different measurements and their alignment with the purpose of finding an ouster are important considerations so as to ensure the measurements are able to account for the co-ownership relationship holistically. It appears that the courts have been afforded some discretion in quantifying the measure of an occupation fee in order to fairly account between the parties. In Dennis v McDonald, the basis of calculation was the full market rent, but this was too high due to the property’s scarcity in the market. A fairer value would have been the value of the rent in an unfurnished state.

Furthermore, the timing of the award of occupation fee is when the property is sold
and partitioned, but its value is with reference to the relevant period of exclusion. In the interests of fairness to the occupying co-owner, Beazley JA proposed as an alternative in *Biviano v Natoli*, mesne profits (damages awarded for trespass), calculated\(^\text{101}\) by reference to the open market and not rent.\(^\text{102}\) This value would be discounted to take into account that a lessee must share the property with the co-owner who remains in occupation. Kourakis CJ in the subsequent South Australian case of *W v D*,\(^\text{103}\) in obiter, accepts this lower rental value attributable to the obligation to share the property with another, but only if the appropriate measure is the lost opportunity to lease the joint interest in the land.\(^\text{104}\) Hence, this is not appropriate in the context of a relationship breakdown because the purpose of the award is to compensate the absentee co-owner for the cost of seeking alternative accommodation. In this context, Kourakis CJ expressed his preference for the measure to be the cost of obtaining alternative accommodation which reasonably replaces the standard of accommodation lost, as a measure that ‘more closely compensates the excluded owner’.\(^\text{105}\)

The US cases have preferred to hold the remaining co-tenant liable for all charges assessable against the property as well as owing the ousted co-owner one half of the

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\(^{101}\) The calculation would involve a valuation by a real estate agent or valuer as to how much the property would be worth if sold in the open market.

\(^{102}\) At 704A citing *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17, 39; *Rock Bottom Fashion Market Pty Ltd (In Liq) v HR & CE Griffiths Pty Ltd* (unreported, Court of Appeal Queensland, 6 March 1998, 10-12 (Dowsett J); *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, 252 (Somervell LJ).

\(^{103}\) [2012] SASCFC 142.

\(^{104}\) Ibid, [50]

\(^{105}\) Ibid.
reasonable rental value of the property (assuming 50% ownership each).\textsuperscript{106} The term ‘reasonable’ effectively affords the court a wide discretion in determining the measure in the context of each individual case. With respect to judicial discretion, the US approach is not so different from the Anglo-Australian one.

CHAPTER III - IMPROVEMENTS AND REPAIRS

A Introduction – The Primary Rule

A claim for an allowance for improvements made to the property by an occupying co-owner is the third exception to the primary rule against occupation fees. Equity will permit such an allowance only on terms that the occupying co-owner is accountable for an occupation fee. At common law, co-ownership and the entitlement to use and occupy the entire property alone did not carry with it, an obligation on the part of a co-owner to contribute to the cost of an improvement of the land undertaken by another co-owner.\textsuperscript{107} An exception arose if the co-owners contract as to the basis on which improvements will be paid for and used.\textsuperscript{108} The Court of Chancery took a more equitable approach, by allowing an occupying co-owner who had paid for an improvement to bring the costs of the improvement into account if it has enhanced the

\textsuperscript{106} C.Y., 16 Misc. 3d 1102 [1], 2007 WL 1775506.
\textsuperscript{107} Forgeard v Shanahan (1994) 35 NSWLR 206, 223-224; Teasdale v Saunderson (1864) 33 Beav 534; 55 ER 476, 478.
\textsuperscript{108} Leigh v Dickeson (1884) 15 QBD 60, 65.
value of the land on partition or sale of the property.\textsuperscript{109}

\section*{B Improvement or Repair?}

The basic principle draws a distinction between activities that are improvements or repairs. Improvements are generally understood as expenditures that increase the value of the property, while expenditures in the nature of repairs and maintenance do not.\textsuperscript{110} For example, the construction of a pergola in the garden is an improvement.\textsuperscript{111} The provision of a new side fence,\textsuperscript{112} painting the original house and landscaping,\textsuperscript{113} mowing lawns, general gardening work, general maintenance jobs, replacing taps and hoses, replacing sewer pipes, clearing tree roots, and washing and painting walls and ceiling\textsuperscript{114} are not improvements. However, the antithesis drawn between improvements and repairs is deceptive in the sense that if a repair increases the value of the property, it will be treated analogously to improvements and the improving co-owner is entitled to an allowance for such repairs.\textsuperscript{115} Although the same distinction in terminology is found in the US, the meanings given to the terms are very different. For example, repairs are framed as ‘expenditures necessary to protect or preserve the property’,\textsuperscript{116} without reference to whether the expenditures increase the capital value

\begin{thebibliography}{9}
\item In NSW, co-owners have a right to contribution in equity arising on the sale of a property following the appointment of trustees for sale pursuant to ss66G of the \textit{Conveyancing Act} 1919 or where the property is resumed. See \textit{Leigh v Dickeson} (1884) 15 QBD 60, 65 - 67; \textit{Forgeard v Shanahan} 1994 35 NSWLR 206.
\item \textit{Forgeard v Shanahan} (1994) 35 NSWLR 206, 224 (Meagher JA).
\item \textit{Senno v Bailey} [2011] NSWSC 679, [38] (Macready ASJ).
\item \textit{Forgeard v Shanahan} (1994) 35 NSWLR 206, 298 (Meagher JA).
\item \textit{McKay v McKay} [2008] NSWSC 177 [44] (Brereton J).
\item \textit{Ibid.}
\item Worthing, 462 N.Y.S.2d at 923.
\end{thebibliography}
of the property. Improvements will not be allowed if they are not in the nature of repairs or restoration and are made for the occupying co-owner’s own purposes without the agreement or consent of the other co-owners.117

C   Express or Implied Request

If the expenditures do not increase the value of the property, the occupying co-owner may still seek relief if there is an express contract to contribute, or if the expenditure is made on behalf of both owners at the express or implied request of the other co-owner.118 This principle is clearly consistent with the communication and respect between co-owners that is at the crux of the co-ownership relationship. There is no difficulty in implying a request when expenditures are made to discharge a debt or liability for or to which both co-owners are subject.119 The more controversial position is that a request would not be implied from the fact that the property would fall into dilapidation if the expenditure were not made, or from the fact that the non-occupying co-owner showed no interest in the maintenance of the property.

D   ‘Enhanced Value’ Rule

The guiding principle for courts exercising equitable jurisdiction is that a division of proceeds of the property ‘must have regard to any increase in its value which has been

118 Batard v Hawes [1853] 118 ER 775, 296.
119 Dines v Arden (1836) 6 N&M 494; Leigh v Dickeson [1884] 15 QBD 60, 68 – 69.
brought about by means of expenditure by one (co-owner).\textsuperscript{120} This equitable rule has influenced common law cases, with Cotton LJ explaining its rationale in \textit{Leigh v Dickeson},\textsuperscript{121} that it would be ‘unconscionable for a co-owner, who has not expended money on an improvement, to insist on the full measure of his or her rights in law to the enhanced proceeds of the improved land without accounting for a proper share of the costs of achieving that higher value.\textsuperscript{122}\textsuperscript{122} Furthermore, reimbursement is only allowed for the lower of the amount expended and the amount by which the value of the property has been increased.\textsuperscript{123} This limitation is justified by equitable reasoning; that the non-improving co-owner only has to reimburse the claimant insofar as he or she has benefited from the work.\textsuperscript{124}

This can be contrasted to the US position, where on partition and with respect to improvements, US courts have held the occupying co-owner has no right to be reimbursed for any improvements which he has made, on the ground that this would constitute imposing liability upon his co-owner without his consent. Consent can be express, in the form of a written or oral agreement, or implied, as in an understanding that may be reasonably inferred from the conduct and declarations of the co-owners.\textsuperscript{125} As an example, in \textit{Ashley v Chinen},\textsuperscript{126} the Californian Court of Appeal concluded that when Chinen (the absentee co-owner) moved out, evidence supported

\textsuperscript{120} \textit{Re Pavlou} [1993] 1 WLR 1046, 1050.
\textsuperscript{121} \textit{Leigh v Dickeson} (1884) 15 QBD 60, 67.
\textsuperscript{122} \textit{Biviano v Natoli; Forgeard v Shanahan} (1994) 35 NSWLR 206.
\textsuperscript{123} \textit{Teasdale v Sanderson} [1864] EngR 349; (1864) 33 Beav 534, 55 ER 476.
\textsuperscript{124} \textit{Farrington v Forrester} [1893] 2 Ch. 461, 463.
\textsuperscript{125} \textit{Kershman v Kershman}, supra, 192 Cal. App. 2d, 26.
\textsuperscript{126} 2002 Cal. App. Unpub. LEXIS 2306.
the reasonable inference that he allowed Ashley (the occupying co-owner) to exclusively possess and reside at the property without paying rent provided all the property’s expenses, including mortgage installments.\textsuperscript{127}

The US approach appears to ignore the financial benefit derived by a non-improving co-owner from the increase to the value of the property brought about by the improvements in partition or sale proceedings as equity’s reason for recognizing a claim for improvements. In this regard, perhaps the approach will not be able to achieve the financially fair outcome as currently understood by Australian and English rules. For example, under the US rules, the outcome of \textit{Ryan v Dries} would be the same as the case held that an allowance should be made for repairs regardless of whether they increase the value of the property.\textsuperscript{128} In \textit{Forgeard v Shanahan}, the outcome would be the approach suggested by Kirby P who allowed the occupying co-owner an allowance for expenditure on necessary payments such as water rates, pest control, council rates. The issue of consent was not discussed in the case. However, the outcome of \textit{Squire v Rogers} would be different. No allowance would be made for the cost of improvements effected as the improving co-owner did not seek the consent of the other. But considered from another perspective, the result is fair in the sense that co-owners who improve the property without the consent of others are seen to infringe upon the absent co-owners’ property rights and are thereby unable to seek compensation. This result would encourage the mutual collaboration of co-owners

\textsuperscript{127} \textit{Ashley v Chinen}, 2002 Cal. App. Unpub. LEXIS 2306, 20 (McDonald J).
and thereby ensure that each co-owner’s respective property rights are respected by the others.

E ‘Necessary’ Expenditures

The enhanced value rule does not appreciate that some expenditures are necessarily incurred to preserve and protect the property in order to prevent the decline in its value. Such expenditures include insurance premiums, taxes, pest control, re-painting, water and council rates. A occupying co-owner who incurs these costs has traditionally been held to have no remedy by way of a proportionate contribution by fellow co-owners on the basis that they do not improve the underlying value of the property.\textsuperscript{129} However, this principle appears to offend the primary rule regarding occupation fees. That is, by voluntarily abstaining from occupation of the shared property, a departing co-owner could force the remaining co-owner to become an involuntary bailiff. These expenditures arise as part of the general obligations of any owners of real property and a co-owner should not be able to escape these obligations by simply by departing the property.

In contrast, the position in the US is different. With respect to repairs, it has long been established in the US, on principles of ‘good conscience,’\textsuperscript{130} that the duty and burden of repairing the property, including paying taxes and interest on the mortgage

\textsuperscript{129} Leigh \textit{v} Dickeson (1884) 15 QBD 60, 65.; McMahon \textit{v} Public Curator (Qld) [1952] QSR 197, 198.
\textsuperscript{130} Stewart \textit{v} Stewart, 90 Wis. 516, 63 N.W. 886 (1895).
devolves equally upon all co-owners.\textsuperscript{131} This rule applies regardless of the fact that only one tenant may be in actual possession of the property because such expenditures protect the property from loss or damage and thus all cotenants benefit.\textsuperscript{132} But where one co-owner is in fact, in sole possession, there is a presumption at law that he or she incurred the outgoings at the request of the others and for their benefit as a joint owner of the property,\textsuperscript{133} and a promise to reimburse will be implied.\textsuperscript{134} Reimbursement will only be warranted however, if the expenditures ‘were made in good faith and were necessary to protect or preserve the property’.\textsuperscript{135} In this regard, the claimant must prove the circumstances and need for the restoration work. For example, in \textit{Newman v Chase},\textsuperscript{136} the absentee co-owner was ordered to contribute to mortgage payments (both principal and interest), homeowners insurance, taxes, fire insurance, and municipal utility assessments. While contribution for the sewage bill was granted because it was owed to a municipally owned utility company which could establish a lien on the property, the water bill was not as it was owed to a private utility.

The US approach further diverges from its English and Australian counterparts by entrusting a heavier responsibility to the co-owner who is in sole possession on the basis they are considered the agent of the others.\textsuperscript{137} Not only are they authorized to do

\textsuperscript{131} \textit{Willmon v Koyer}, 168 Cal. 369, 143 Pac. 694 (1914).
\textsuperscript{133} \textit{Kites v Church}, 142 Mass. 586, 8 N.E. 743 (1886).
\textsuperscript{134} \textit{Fowler v Fowler}, 50 Conn. 256 (1882).
\textsuperscript{135} \textit{Worthing}, 462 N.Y.S.2d, 923.
\textsuperscript{136} 70 N.J. 254, 359 A. 2d 474 (1976).
\textsuperscript{137} \textit{Clute v Clute}, 197 N.Y. 439, 90 N.E. 988 (1910).
that which is necessary to preserve the estate, but they are under a duty to do so.  

This would include seeking reasonable tax advice to minimise expenditure on taxes during the whole occupancy, paying the mortgage installments and insurance.  

When such duties are discharged, the occupying co-owner becomes subrogated to an equitable lien to secure contribution from the absent co-owner. The onerous obligations imposed on the occupying co-owner is further negated by the greater rights they are afforded. Not only do they have the right to contribution in an independent suit, that is, one not dependent on the increase to the value to the property or on the other co-owners’ claim for an occupation fee, this right extends as far as being able to compel the noncontributing coowner to abandon his share of the property as an alternative to compensation.

1. **Pest Control, Maintenance and Repairs, Re-painting, Insurance Payments, Council and Water Rates**

  Meagher JA held in **Forgeard**, that maintenance and repairs (in the form of provision of a new side fence), insurance premiums, pest control were not improvements for the purpose of the enhanced rule because they were not permanent and additional improvements to the land. Professor Butt also agrees that no allowance should be made for expenditure for ordinary maintenance, such as periodical painting

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138 Ibid.  
140 *Connell v Welch*, 101 Wis. 8, 76 N.W. 596 (1898); *Hogan v McMahon*, 115 Md. 195, 80 Atl. 695 (1911).  
142 *Duson v Roos*, 123 La. 835, 49 So. 590 (1909).  
or pest spraying because ‘the value of the expenditure is exhausted each time it is renewed’. But this interpretation ignores the reality of the decline in value to the property and the subsequent detriment to both co-owners which would occur if such expenditures were not made. It is for this reason that Hodgson JA in *Ryan v Dries* disagreed\(^{145}\) with the reasoning of Meagher JA, preferred the reasoning of Kirby P in *Forgeard*, and held that the occupying co-owner was entitled to an allowance for repairs and not just additional or new improvements which increased the value of the property. Rein J in *Ryan v Dries*, was also of the opinion that in the absence of an express agreement, a co-owner ‘cannot leave the whole burden of repaying the loan obtained to purchase the property and other ongoing necessary expenditures such as council rates and insurance to the other co-owner without eroding his beneficial interest in the property’\(^ {146}\). In this regard, the Australian approach appears to be moving towards that of the US.

2 *Cosmetic ‘Repairs’*

However, the expenditures to be claimed must actually be ‘necessary to protect or preserve the property’\(^ {147}\). Following the US line of reasoning if they were made for ‘personal convenience and enjoyment of the property’, any claim by the tenant in possession for reimbursement will be disallowed\(^ {148}\). For example, in the case of

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\(^{144}\) Peter Butt, *Land law* (Thomson Reuters, 2010), 235.

\(^{145}\) *Ryan v Dries* (2002) 10 BPR 19 [70]-[71].

\(^{146}\) *Ly v Ly* [2012] NSWSC 643 [19].

\(^{147}\) *Worthing v Cossar*, 93 AD2d 515, 462 N.Y.S.2d (920 (4th Dept, 1983).

\(^{148}\) Ibid.
Melnick v Press,\textsuperscript{149} expenditures disallowed included replacement of the living room floor, renovation of the kitchen counter and repairing cracks on the sidewalk (which were functional and not dangerous). These expenditures were described as ‘cosmetic repairs or repairs intended to fix minor problems with the property’\textsuperscript{150}. Furthermore, in Palanza v Lufkin,\textsuperscript{151} the court found that the purchase of a wood stove was not a necessary expenditure.\textsuperscript{152} Although this outcome may appear to be harsh on the occupying co-owner, it must not be forgotten that they are enjoying the benefits of sole occupation of the property without having to account by way of an occupation fee (assuming voluntary departure of the absentee co-owner). Occupying co-owners should be compensated for payments necessary for retaining their ongoing and sole use of the property because the occupying co-owner is able to discharge their obligations to the property by retaining its value, while respecting the co-ownership relationship by ensuring the other co-owner has a home to come back to.

3 Mortgage Payments

It is settled by cases such as Ryan v Dries and Callow v Rupchev, that once an occupier is required to do equity because he or she is seeking equity, there is no reason to distinguish mortgage payments and improvements or repairs made to the property. However, there is inconsistent treatment of whether the amount is just the

\textsuperscript{149} 809 F. Supp. 2d 43 (E.D. N.Y. 2011).
\textsuperscript{150} Melnick v Press, 809 F. Supp. 2d 43 (E.D.N.Y. 2011)
\textsuperscript{151} 804 A.2d 1141.
\textsuperscript{152} Palanza v Lufkin 804 A.2d 1141, 1143.
capital element of the installments or whether interest should be included. Millett J
opined that repayment of only the capital element (and not the interest) of each
mortgage installment increases the value of the equity of redemption which inures to
the benefit of both joint tenants. 153

The US position offers an alternate view and prefers to treat mortgage payments as a
necessary expenditure rather than an improvement. The reasoning is twofold; firstly,
the payment of mortgage installments by the occupying co-owner does not increase
that co-owner’s interest in the property. 154 However, to the extent the occupying co-
owner has made payments beyond his or her share, he or she stands in the shoes of the
creditor to whom the payments have been made. 155 Therefore, the occupying co-
owner who pays obligations such as mortgage payments, taxes, liens and repairs is
entitled to credit from the proceeds of sale for their proportionate share of those
obligations. 156 In this regard, both payment of principal and interest is necessary to
prevent default and therefore inured to the benefit of all co-owners, thereby entitling
the paying co-owner to reimbursement for both elements.

4 Miscellaneous Expenditures

It is not often clear the value that expenditures add to the property. For example in

154 Oliver v Lansing (1899) 57 Neb. 352, 358-359, 77 N.W. 802, 804.
155 Burnett v Burnett (Fla. App. 1999) 742 So. 2d 859, 861.
earlier mentioned case of *Payne v Rowe & Anor*, Jeremy spent a substantial amount of money to construct a helipad on the occupying property. Another example in the case is the construction of driveways and retaining walls and pillars at the entrance to the property. Ball J considered that the costs of these improvements were disproportionately large compared to the increase in value that has resulted from it, and he seriously questioned whether any value had been added at all. In the absence of the other co-owners’ consent, it is even arguable that the expenditures have detracted from the utility of occupation of the shared property. The conclusion of Ball J was for Jeremy and Jo to be ‘entitled to the value of the improvements that each has made to the property…’.

It appears that the decision deviates from the traditional approach by holding that co-owners can be entitled to the sale proceeds of the property attributable to the improvements that each has made to the property. This approach would not infringe the primary rule as it would not be unconscionable for a co-owner to take the proceeds of the sale price that is the result of the work they have done. Similarly, there would be no need to account for the expenditures that they have incurred.

F \textit{Offsets}

1 \textit{Offsetting Expenditures with Occupation Fee}

\[^{157}\text{Ibid, 108.}\]
\[^{158}\text{Ibid, 116.}\]
Assuming that a value is ascertained for the amount of improvements or repairs, the next issue is offsetting a claim for occupation fees by the occupying co-owner. A claim for improvements is an exception to the primary rule regarding occupation fees whilst simultaneously, the claim for an occupation fee is spoken of as a ‘passive’ or ‘defensive’ equity, that is, one able to repel a claim for improvements.\(^{159}\) Each claim is a potential incident of a partition or sale action and in this context, Master McLaughlin observed that the ‘no rent if no improvements’ doctrine makes good sense. This principle however, should be extended to include necessary outgoings incurred to derive rental income, a topic of discussion in chapter III.

It should be noted that the offsetting occupation fee cannot exceed the claim for improvements because this would place the occupying co-owner who improves the land at a disadvantage relative to a co-owner who enjoys the whole of the land in the absence of his or her co-owner and does not improve the land.\(^{160}\) In the context of a relationship breakdown where the occupying co-owner has not infringed the rights of the departing co-owner, it appears that the rights and obligations derived from the rules favour of the absentee co-owner. In essence, the absentee co-owner is able to claim an occupation fee as compensation for non-occupation while the remaining co-owner takes the initiative to work on the property and is unable to derive any financial benefit for doing so, on the presumption that the occupation fee will offset any claim

\(^{159}\) *Nielson v Letch* [2004] NSWSC 1246 [47] (Master McLaughlin).

\(^{160}\) *W v D* [2012] SASCFC 142 [72] (Kourakis J).
made by the occupying co-owner. Perhaps a more favourable approach would be to allow the offsetting occupation fee to exceed the claim for improvements only if there is fault that can be attributed to the occupying co-owner. This of course, would not apply to cases of relationship breakdowns.

2 Off-setting Mortgage Payments with Occupation Fee

Many cases have simply set off the interest element of the mortgage against an occupation fee, which Vinelott J pointed out in In re Gorman (A Bankrupt),\textsuperscript{161} was ‘more a rule of convenience than between a spouse and a trustee in bankruptcy of the other co-owner‘. Further considerations must be given to whether the capital share of the occupying co-owner should be charged with an occupation if it exceeded mortgage payments made to the property. As with the claim for improvements, it would be equally as unconscionable for a occupying co-owner to claim a contribution to repayments of a joint loan without bringing to account the benefit he or she has received from remaining in occupation of the residence. However, while the occupying co-owner is left with the benefit of sole occupation, they are also burdened with meeting joint liabilities to which the departing co-owner presumably no longer contributes. Of course, no issue arises if contributions continue to be made. In accounting for this burden on the remaining co-owner, Callow v Rupchev, following the majority decision in Forgeard v Shanahan, held that occupation rent should not

\textsuperscript{161} [1990] 1 WLR 616, 626.
exceed the contribution claimed for mortgage payments. If it did, the occupying co-owner would be in a financially worse position than the departing co-owner even though they met the joint obligations of the property during the period.

On the flip side, an absentee co-owner is not entitled to bring to account the benefit of the continuing occupation enjoyed by the occupying co-owner if the latter fails to make any mortgage repayments. In failing to meet the liability, the occupying co-owner obviously is not able to enjoy the benefit of occupation as the mortgagee would be likely to assert a charge over the property. The only remedy of the occupying co-owner would be to bring and prosecute a partition or sale application expeditiously.

In quantifying the off-setting occupation fee when contribution for mortgage payments is sought, Kourakis CJ opined that no discount should be allowed for the burden of the occupancy being a joint one. This refers to the discount of the rental value payable by a third party who rents the property because they would have to share it with the occupying co-owner, as discussed in chapter II. If a discount is allowed, the occupying co-owner will be financially worse off than if no discount was allowed. The rental value should not be discounted because the occupying co-owner who continues to pay the mortgage does so in order to enjoy the occupation of the entire property in the knowledge that the breakdown of the domestic relationship

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162 Callow v Rupchev [2009] NSWCA 148 [73].
163 W v D [2012] SASCFC 142 [76].
164 Ibid.
165 Ibid [79].
makes it unlikely that he or she will again be bound to share it with his or her former partner.

G Reconciliation with Rights and Obligations of Co-ownership

In determining whether improvements and repairs should be accounted for, the most important consideration should be the underlying property rights and responsibilities of co-ownership. In the context of improvements, this would include the right and responsibility of co-owners to mutually collaborate in deciding what to do with the property. In so far as the purpose of the rules are to protect property rights, they are not so different from the trespass exception; a co-owner who does not seek the permission of others and makes changes to the property can be said to trespass on the interests of the other co-owners who have an equal right to decide on whether improvements should be made to the property. The only difference is the financial gain potentially derived by the non-improving co-owner on partition or sale, which justifies the non-collaboration.

In giving effect to the mutual respect that co-owners should have towards each others’ property rights, an improving co-owner should only be allowed a credit for improvements if a reasonable effort was made to seek the consent of the other co-owners. This is consistent with the emphasis of the US approach on implying a promise to share the expenses before any relief can be awarded to the improving co-
owner. In implying consent, while mere silence will not suffice, the good faith of the co-owners will be enquired into. For example, equity will go to great lengths to give relief where cotenants have knowledge about the improvements being made but choose not to respond to the improving co-owners who seek their consent to them.166

**H Conclusion**

The distinction between improvements and repairs appears often arbitrary with little utility, especially in respect of repairs that are necessary in preserving the value of the property or preventing its decline. The US position should be adopted in respect of repairs so that joint tenants are equally liable for the cost of necessary repairs because such expenditures are incurred to protect the property from loss or damage with the result that all co-owners benefit.167 With respect to improvements, it must first be enquired whether the co-owner in occupation made reasonable enquiries to seek the consent of the other co-owners before incurring large outgoings to effect improvements. This act would be consistent with the respect that co-owners have to one another to seek agreement on expenditures related to the property.

It is equally necessary to enquire as to the reasonableness of the absentee co-owners’ response. For example, if they knowingly and deliberately do not respond and improvements are made, the absentee co-owners should be ordered to contribute to a

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166 Crest v Jack, 3 Watts (Pa.) 238 (1834).
proportion of the costs of such improvements. However, if they are unable to be contacted, the next enquiry should be whether the improvements are made reasonably, that is, whether the costs of the improvements are proportionate to the increase to the value of the property. If they are not and the improvements are made unreasonably e.g. the construction of a helipad in circumstances where the utility of such an improvement is seriously questionable, no contribution should be payable by the absentee co-owners. This would change the approach of Ball J in *Payne v Rowe*. If however, the expenditures were incurred reasonably and the value to the property has increased by more than the expenditure, the absentee co-owners should be made to contribute to the costs of the improvements.

The proposed amendments to the framework requires a more detailed investigation into the factual circumstances during the co-ownership relationship and the reasonableness of the co-owners’ behaviour during the term of the relationship. In some respects, this is more complicated than the hard and fast rules in place currently which focus only on the outcome of expenditures made and whether they increase the capital value of the shared property. A more detailed enquiry as suggested is better able to account for the rights and liabilities of co-owners in accordance to the reasonableness of their behaviour.
Cooke notes that there are few cases post 1925\textsuperscript{168} (after important amendments to the \textit{Law of Property Act 1925}) which discuss a co-owner’s obligation to account for rent and profits, suggesting that perhaps the matter is ‘too obvious to be litigated’\textsuperscript{169}. In the UK, joint owners are now trustees and if one fails to account to the other for his share of rent or profits, the other may bring an action for breach of trust.\textsuperscript{170} Similarly, the US cases hold that the occupying co-owners are accountable for rents received from third parties in their capacity as trustee for their co-owners.\textsuperscript{171} However, an analysis of the historical development of the rules in Australia gives rise to some complexities.

\section*{A Under Common Law}

Prior to 1705, a co-owner who took more than their share of the profits accruing from the land, by itself,\textsuperscript{172} was not accountable to the other co-owners at common law.\textsuperscript{173} The common law operated under the theory that the co-owners were, in effect, partners,\textsuperscript{174} and possession by one was therefore possession by all. By treating the co-owners as one entity, the result is that ‘no man can sue himself or be both plaintiff and

\textsuperscript{168} After the repeal of the Administration of Justice Act 1705 (otherwise known as Statutes 4 and 5 Anne, c3, s27) by the \textit{Law of Property (Amendment) Act 1924} s 10.


\textsuperscript{170} See s10 of the \textit{Law of Property (Amendment) Act 1924}.

\textsuperscript{171} \textit{Neubeck v Neubeck} 94 N.J. Eq. 167, 119 Atl. 26 (1922).

\textsuperscript{172} Circumstances where an occupying co-owner would have an obligation to pay compensation include if the occupying co-owner had been constituted bailiff or receiver of the other co-owners.

\textsuperscript{173} \textit{Peacock v Hanson} (1864) 3 S.C.R. (NSW) 191.

\textsuperscript{174} \textit{Hamilton v Conine}, 28 Md. 635 (1868).
defendant in the same action. In the absence of an agreement as to the sharing of profits, the aggrieved co-owner could only seek redress in equity. Similarly in the US, an occupying co-owner was not accountable for anything received from the common estate and could lawfully appropriate all rents and profits to his own benefit. Although simple in its application and operation, this presumption of seamless co-operation between co-owners and their treatment as one entity is unrealistic in circumstances where they do not in fact consider themselves as partners or where there is no conversation between the absentee and occupying co-owners.

The common law treatment of co-owners does not take into account the obligations that partners have towards each other. For example, s 44 of the Partnership Act NSW (1892) deals with business partners and provides that in settling accounts between partners after a dissolution of partnership, losses will be paid out of firm profits before net profits are paid to each partner ratably. This can be applied to the context of co-ownership where the business can be viewed as the shared property and the profits as the rental income. Despite their voluntary non-occupation (i.e. not by an ouster), an absentee co-owner is still a joint owner and thus should be entitled to profits arising from the property while being simultaneously liable for obligations or liabilities that accrue. This accountability mechanism would be a way in which an absentee co-owner who wishes to claim rental income from the shared property can be made to

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175 Kennedy v M’Fadon, 3H. & J. 194 (1810).
176 Browne on Actions at Law, 132 (45 Law Lb., 99).
177 Hill v Jones, 118 Conn. 12, 17, 170A 154 (1934).
178 Leigh v Dickeson (1884) 15 QBD 60; Williams v Williams (1899) 81 LT 163; Noack v Noack (1959) VR 137.
respect the co-ownership relationship.

B **Under the Statute of Anne**

To resolve the lack of general redress, Parliament enacted Statutes 4 and 5 Anne, c3, s27 ('the Statute of Anne'). This statute provided that an action might be brought and maintained by one co-owner against another, as bailiff,\(^{179}\) for receiving more than their just share or portion. The statutory action applied both at law and in equity but only for rents actually received from third parties.\(^{180}\) The US has also awarded an absentee co-owner rents actually received from third parties, treating their claim as an implied agreement that the occupying co-owner should manage the property and collect rentals.\(^{181}\) This is analogous to the UK approach in which the occupying co-owner is deemed to be a trustee for the absentee co-owner.

However, the English courts construed the provision in a way that if benefits are received by the occupying co-owner as a result of his or her own exertions, there is no requirement to account to fellow co-owners.\(^{182}\) For example, the occupying co-owner of the shared farm in *Henderson v Eason*\(^ {183}\) who had managed it and received all the produce which he marketed, was able to retain for himself the proceeds of sale.\(^ {184}\)

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\(^{179}\) In this context, ‘bailiff’ means ‘a servant that has the administration and charge of lands, goods and chattels, to make the best benefit for the owner, against whom an action of account lies, for the profits which he has raised or made, or might by his industry or care have raised or made’. See *Barnum v Landon*, 25 Conn. 137, 149 (1856).

\(^{180}\) *Squire v Rogers* [1979] 39 FLR 106, 121-122.

\(^{181}\) *Hill v Jones*, 118 Conn. 12, 17, 170A 154 (1934).

\(^{182}\) *Henderson v Eason* (1851) 17 Q.B. 701.

\(^{183}\) (1851) 17 QB 701; 117 ER 1451.

\(^{184}\) *Henderson v Eason* [1851] 17 Q.B. 701, 721.
This is subject to the qualification that if the occupying co-owner’s act amounts to the complete destruction of the common property, he or she will be liable in an action in trespass to the other co-owners, as discussed in chapter II. 185

A similar principle has been adopted by the US. For example, in Fazzio v Rarick (in re Fazzio), 186 the occupying co-owner who was in exclusive possession and who used his own labor and expenditures to farm the land did not have to account to the co-owner out of possession for profits or any federal government farming subsidies received along similar lines of reasoning to Henderson v Eason. 187 Although this paper does not deal with the Canadian jurisdiction, an interesting Canadian case worth noting is Spelman v Spelman, 188 which held that an occupying co-owner need not account for income arising from using the premises as a boarding-house (since there was provision of services e.g. meals, laundry generated by his own labour), as opposed to the rental income generated by leasing property. 189 An application of these principles however, produces a commercial outcome where the only consideration becomes whether the benefits are conferred by third parties or a result of the labour of the occupying co-owner. The rights and obligations that govern the co-ownership relationship are blatantly overlooked. For example, the principle ignores that the occupying co-owner had the benefit of sole occupation in order to work the land and thereby derive profits. As no occupation fee would be payable (assuming that none of

185 Jacobs v Seward (1872) L.R. 5 H.L. 464.
188 [1944] 2 DLR 74.
189 See for example, Spelman v Spelman [1944] 2 DLR 74; King v King [1944] 4 DLR 796; Reid v Reid (1978) 87 DLR 370.
the four exceptions discussed above apply) there appears to be some injustice done to the absentee co-owner.

Instead, the rules should focus on the extent to which there is co-operation between co-owners, not in the form of a partnership so that there is no need for accounting, but on the assumption that there is an implicit obligation that arises incidentally to the co-ownership relationship under which co-owners agree to account to the others. The first question should be whether the occupying co-owner has sought the consent of the absentee co-owner for using the shared property. If there is no reasonable explanation for not seeking consent (such as the co-owners agreeing to treat the relationship as a partnership), then the income derived from the property should be fully accountable according to share of ownership in the property, notwithstanding that it may have been the result of the occupying co-owner’s labour because they must account for the use of that property. For example, in Squire v Rogers, the shared property was used by the occupying co-owner, Mr Squire, as a business of ‘a caravan and cabin park’. Mr Squire did not contact Ms Rogers to request her consent to his use of the property because he believed that ‘she would not be entitled to any income from that property’. The court noted that the submission may have been intended to raise an equitable defence of laches or estoppel by conduct, but was not made out.

190 (1979) 39 FLR 106.
191 As in the case of Squire v Rogers (1979) 39 FLR 106, 124.
193 Ibid.
If Ms Rogers did not know about Mr Squire’s activities on the property (which she did)\(^\text{194}\), the case could very well have held that Mr Squire’s failure to communicate with Ms Rogers about his use of the property was unreasonable, thereby entitling Ms Rogers not only to the rents and revenue of the common property itself, but also the profits which Mr Rogers may have made by use and occupation of the property common (e.g., fees for his services in running the cabin park).\(^\text{195}\) But this is under the proviso that Ms Rogers contribute to all necessary outgoings (and not just the whole amount expended on improvements\(^\text{196}\)) of the property.

C \textit{Off-setting Rents with Improvements and Repairs}

In the case where the absentee co-owner makes a claim for rent, this will be offset by the full amount of the improvements made by the occupying co-owner (not just the lower of the amount expended and the increase in value), assuming that the absentee co-owner acquiesced in the making of the improvements.\(^\text{197}\) This acquiescence was implied in \textit{Squire v Rogers}, from Ms Rogers’ knowledge that Mr Squire was managing the property and making improvements to it.\(^\text{198}\) If no consent can be implied, the absentee co-owner should be allowed a share of the rental income without having to account for the expenditure on improvements.

\(^{194}\) Ibid, 125.
\(^{195}\) Ibid, 124.
\(^{196}\) Ibid, 127-128.
\(^{197}\) Ibid, 127-128.
\(^{198}\) Ibid, 125.
However, while improvements may affect the value of the rent, outgoings incurred for the maintenance of the property, in the nature of necessary repairs as described in chapter II, are arguably essential expenditures to derive any rental income at all. This amount should be off-set against the rental income to more accurately reflect the absentee co-owner’s contribution to the gain of rental income, than just the amount for improvements. While the law currently takes into consideration improvements, it is not considering the use of the property by the occupying co-owner, nor the non-lasting repairs made to the property adequately.

In contrast in the US, there is an acknowledgment of the importance of maintenance in the accounting of rents and profits. An occupying co-owner who collects rents and profits from third persons is able to deduct the amounts paid for preservation and protection of the property such as taxes and other common obligations and necessary repairs and additions, during the period the rents are collected. It is reasonable to assume that in making a claim for the rental income, an absentee co-owner will agree to contribute to the expenses necessary in obtaining that income. For example, in the US case of *Palanza v Lufkin*, the occupying co-owner made repairs of a non-lasting nature e.g. replacing fixtures and appliances in the kitchen and bathroom and making repairs to the roof. The amount for these repairs were off-set against the rental income owed so that no net amount was payable to the absentee co-owner. The

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200 804 A.2d 1141.
201 *Palanza v Lufkin* 2002 ME 804 A.2d 1141, 1143 (Dana J).
202 Ibid, 1146.
rationale can be treated analogously to the Anglo-Australian position regarding improvements; that is, a co-owner should not be able to take the benefit of the increased value of the property (or here, the benefit of rents derived from third parties) without contributing to the expenses incurred to derive that increase in value (or here, rental income).203

D    Repeal of the Statute of Anne

Although the Statute of Anne now does not formally apply in some Australian jurisdictions, it appears that the substantive effect has not changed. In South Australia, Tasmania and Western Australia, the Statute of Anne continues to apply. The Northern Territory, Queensland and Victoria, however, have repealed the Statute of Anne but enacted specific statutory provisions which operate in a similar manner to it but without the concepts of trustee or bailiff. In NSW and the ACT, the Statute of Anne has been repealed but not been replaced with a substitute provision.207 There have been conflicting interpretations as to the effect of the repeal in these states. For example, Meagher J (with whom Mahoney JA agreed), held in Forgeard v Shanahan208 that apart from statute, there existed no liability in a co-owner to account

203 Leigh v Dickeson (1884) 15 QBD 60; Williams v Williams (1899) 81 LT 163; Farrington v Forrester (1893) 2 Ch 461; Noack v Noack (1959) VR 137.
204 See s45 of the Law of Property Act 2000 (NT).
205 See s43 of the Property Law Act 1974 (Qld).
206 See s28A of the Property Law Act 1958 (Vic). S28A applies to accounting in respect of all property, not simply land and goods e.g. intellectual property.
207 In NSW, the Act was repealed by the Imperial Acts Application Act 1969.
for rents received from third parties.\(^{209}\) The repeal (on recommendation of Law Reform Commissioners with whom His Honour described as ‘high-minded but ignorant’\(^{210}\)), meant that co-owners seeking an account in these circumstances would be in the same position prior to the enactment of the Statute of Anne.\(^{211}\)

But it seems the preferred view is that an account nevertheless lies in equity under equity’s inherent jurisdiction to order an account between co-owners.\(^{212}\) This view was expounded by Hodgson JA in the case of *Ryan v Dries*,\(^ {213}\) who did not agree with Meagher J in *Forgeard v Shanahan* and suggested that a court exercising equitable principles would treat a co-owner of property who had collected rents paid for the use of the property as having done so as agent for all co-owners. In NSW at least, agency appears to be the preferred legal vehicle on which an accounting for rents and profits is based.

**CHAPTER V – CONCLUSION**

A review of the framework under which the equitable accounting rules were developed has revealed inconsistencies and deficiencies in the rules, especially in respect of their rigidity and inability to adapt to circumstances introduced by the

\(^{209}\) Ibid, 222.

\(^{210}\) *Forgeard v Shanahan* (1994) 35 NSWLR 206, 222.

\(^{211}\) Ibid, 297.


‘modern realities of co-ownership’. In applying the equitable accounting rules, the primary purpose of the courts should be to give effect to the intention of the parties, which of course, would be most unequivocally shown by a written or oral agreement. In this regard, co-owners should be encouraged to, as Young suggests, anticipate issues that are almost certain to arise during their ownership of the property, seek legal advice and to reach an agreement. This is especially true of co-owners who are not married, as they ‘lack the benefit of a clear body of law and must instead search through the statutes and general case law for guidance in resolving their dispute’.

But where equitable accounting rules are engaged to resolve disputes where no agreement has been reached, the courts have favoured financial fairness over the intention of the parties. To achieve ‘fairness’ or ‘do equity between the parties,’ the rules have arguably taken a wrong turn by adopting a form over substance approach whereby the focus on narrow aspects of the dispute e.g. the heavily criticized distinction between improvements and repairs have detracted from the just outcomes purported to be achieved. The courts have attempted to introduce exceptions to traditional rules, but some exceptions have resulted in deficiencies and reasoning gaps. For example, it is difficult to reconcile the ‘relationship breakdown’ cases with the traditional rules of ouster that require fault on behalf of the occupying co-owner. Rather, the courts now have a unique opportunity to redesign the framework in which

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214 Conway, above 95, 210.
216 Ibid, 250.
217 Dennis v McDonald [1982] Fam 63, 1050-1051 (Purchas J).
the rules are couched, an approach which may be more desirable (and easier) than creating exceptions to traditional rules.

This paper has suggested that a more substantive approach should be adopted, which emphasizes the actual or implicit intention of the co-owners over financial fairness, but which would still form part of the co-owners’ implicit intention. This can be achieved by viewing the co-ownership relationship holistically and enquiring into the extent to which the behaviour of the co-owners conforms to a standard of behaviour that can be expected from a reasonable co-owner. The purpose of the proposed framework is to allocate the proceeds from the property that is consistent with the behavior of co-owners to each other and the respect shown to the co-ownership relationship. This paper has also taken the opportunity to consider the US approach which has particularly advocated for collaboration between co-owners as a primary consideration when accounting for their rights and liabilities. It will be interesting to monitor developments in the area of equitable accounting, particularly to see whether courts choose to redefine the framework of the current rules by, for example, adopting elements of the US approach.
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