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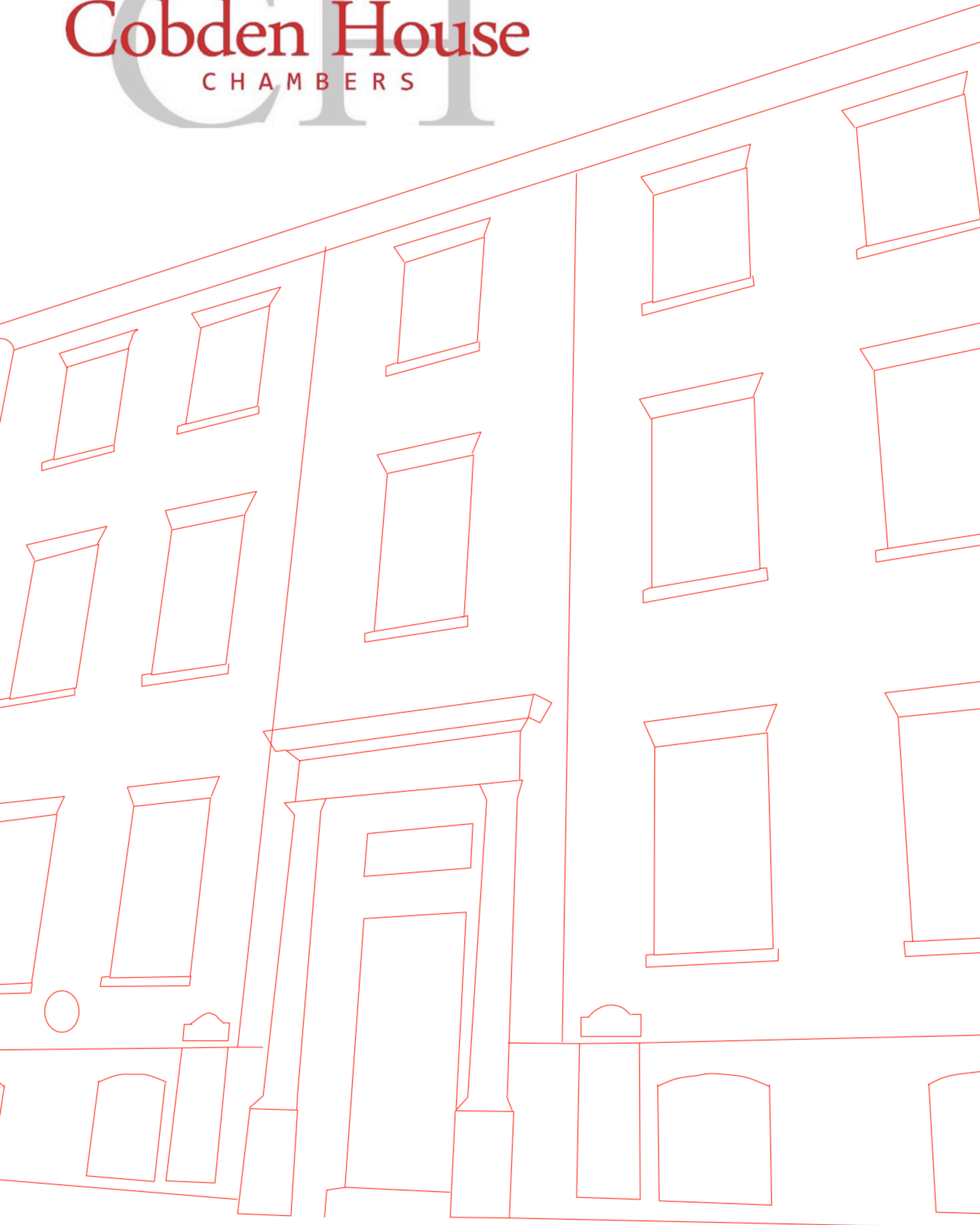

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CHANCERY AND COMMERCIAL

The Department

The Chancery and Commercial Department at Cobden House provides expertise in every area of Chancery and Commercial law, including company law, construction, contract, insolvency, landlord and tenant, private client, taxation, probate and family provision, property, partnerships, professional negligence and trusts.

The Department prides itself on delivering accurate legal analysis, practical advice and a high standard of advocacy. Members can also deliver CPD accredited seminars at solicitors' offices on request.

Richard Oughton TEP
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Robert Sterling

Colin Green

Lucy Wilson-Barnes

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Arron Walthall TEP

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Sam Keeling-Roberts

Civil Procedure

Changes to statements of truth: pitfalls to avoid

From Monday 6th April 2020, the 113th update to the Practice Direction Amendments introduced a new form of the statement of truth required to be part of any document listed in CPR 22.1. These documents include a statement of case, a witness statement and an application notice.

The new form of words is as follows:

"I believe that the facts stated in this [*name document being verified*] are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."

It remains permissible for a legal representative or litigation friend to sign a statement of case, a response, an application notice or a notice of objections on behalf of the party – but they must be aware of their obligations and duty to inform and consult the client. Witness statements cannot be signed by anyone other than the maker.

CPR 22.2 provides that a failure to verify a statement of case with a statement of truth means that the party cannot rely on the same as evidence in their case, and the court has the power to strike out the statement of case. Similarly, CPR 22.3 provides that if a witness statement is not verified by a statement of truth the court may direct that it shall not be admissible as evidence.

The obvious effect of continuing to use the old form statement of truth is that a document will not be properly verified and will be liable to being inadmissible as evidence. Applications for relief from that sanction will, embarrassingly, have to state that the legal representative did not know of the change; but that is unlikely to be considered a "good reason" under the *Denton* test.

The change has come about, in part at least, from cases such as *Recovery Partners GP Ltd & Anor v Rukhadze & Ors* [2018] EWHC 2918 (Comm), where Mrs Justice Cockerill observed that the defendants' approach in that case was of concern, because

"*it indicates that a sense of the very real importance of statements of truth may have been lost in the years which have passed since they were introduced".*

Further changes include, at 22PD2.4, that the statement of truth must be in a witness's own language; and, at 22PD2.5, that the statement of truth must be dated with the date on which it was signed. There are also minor amendments to 32PD, including the requirement that a witness statement must state *"the process by which it has been prepared, for example, face-to-face, over the telephone, and/or through an interpreter".*

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Gary Lewis

Landlord and Tenant

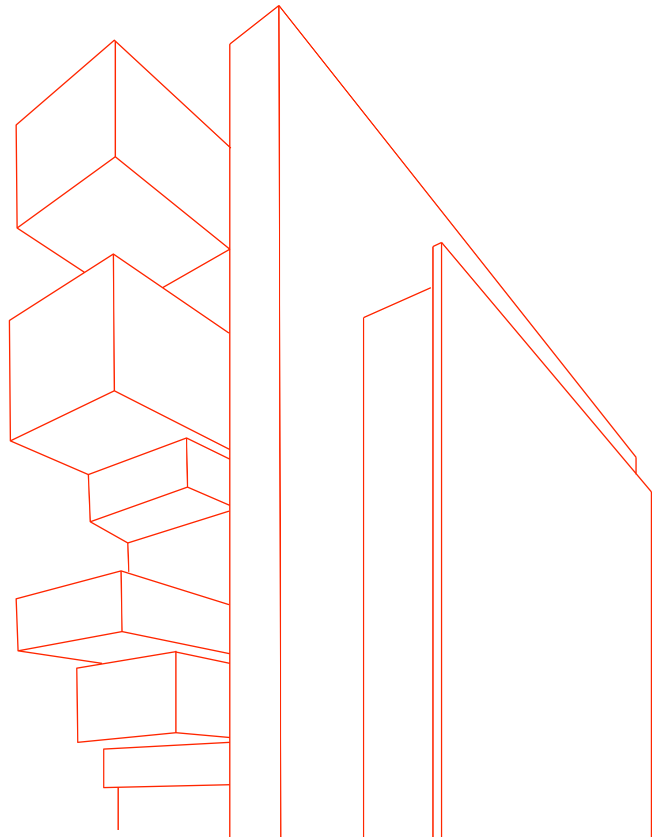
Pease v Carter [2020] EWCA Civ 175

On 17th February 2020, the Court of Appeal handed down judgment in a case which considered whether the "reasonable recipient" test set out in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19 applied to notices served under Section 8 of the Housing Act 1988.

The facts of the case and issues on appeal were relatively straightforward. The landlord had served a Section 8 notice on 7th November 2018 relying upon the usual rent arrears grounds; 8, 10 and 11. In doing so, the notice erroneously stated that court proceedings would not begin until after 26th November 2017 (that is, the preceding year). The landlord argued – and, in fact, the judge at first instance agreed – that it was an obvious typographical error and the reasonable recipient of the notice would have realised that the intended date was 26th November 2018. However, the judge at first instance went on to hold that the "reasonable recipient" test did not apply to Section 8 notices in reliance upon the reasoning provided in *McDonal v Fernandez* [2003] EWCA Civ 1219.

The question for the Court of Appeal was as to whether the "reasonable recipient" test applied to Section 8 notices so as to remedy the obvious defect?

Helpfully for landlords, the Court answered "yes" to that question and overturned the judge's decision. It did so because, if a reasonable recipient of a notice knew that it contained an obvious error, that notice would nonetheless have fulfilled its statutory purpose of warning the tenant and giving him or her the time to take steps to deal with the threatened proceedings whether by remedying the breach(es), taking legal advice or seeking alternative accommodation.



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Sarah Jameson

Landlord and Tenant

Luton Community Housing Ltd v Durdana

(2020) EWCA Civ 445

The Claimant sought possession of the Defendant's home (the 'Property') on Ground 17 of Schedule 2 of the Housing Act 1988 (that the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by the tenant or someone acting on the tenant's behalf).

In application for the Property, both the Defendant and her husband had misrepresented the size of the household's income, the extent of the Defendant's savings and their then current address. The Defendant stated that she was living with her parents and had been asked to leave because of overcrowding. In fact, the couple were living together in a flat with their children pursuant to an AST.

The Defendant's daughter suffered from cerebral palsy and as a result of the child's birth, the Defendant suffered from PTSD.

The Defendant's defence was that (1) it was not reasonable to make a possession order owing to the effect that it would upon her and her daughter; and (2) that the Claimant had failed to perform its duties under s.149 of the Equality Act 2010 by properly considering in advance the impact upon the Defendant and her daughter of seeking and obtaining possession of the Property.

The Claimant had completed a two page 'Equality Act Review', but this post dated the issue of proceedings. The officer who completed the review told the court that she had no previous experience of dealing with Equality Act assessments; did not know what s.149 provided or what the PSED comprised of; and had not previously considered the PSED in relation to these proceedings. She accepted in cross-examination that she did not know what the effect of the daughter's disability was on her day-to-day living or what impact their eviction would have on either the daughter or her mother.

The Judge at first instance held that the Claimant was in breach of the PSED. For this reason she held that the claim must be dismissed. In these circumstances, it was not strictly necessary to consider whether the claim should also fail because it was not reasonable to make the possession order. However, the Judge indicated that in her view the fact of the breach of the PSED did make it unreasonable to order possession because it was at least a possibility that on a proper consideration by the claimant of all relevant factors the possession proceedings might not have gone ahead.

The appeal concerned whether or not the Judge had been right to dismiss the possession claim for breach of the PSED.

The Claimant's first argument was that the Review met the PSED requirements in substance. It argued that the fact that the officer who carried out the Review did not know anything about the PSED made no difference to the substantive content of it. The Court of Appeal dismissed this argument. The officer had not taken into account the likely effect of the disabilities of the Defendant and her daughter in relation to their proposed eviction from the

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Property, although at the time when the decision was made the Claimant knew what the disabilities were; knew that they were being relied on as a defence to the proceedings; and had received copies of the medical reports.

However the Court of Appeal held that it was possible for a review to discharge the PSED where the officer was ignorant of the duty, but "such cases are likely to be rare". The review must be an "open-minded conscientious enquiry".

The Claimant's second argument was that "even had the officer scrupulously carried out the enquiry which she should have done, the ultimate decision is highly likely to have been the same". In this regard the Court of Appeal agreed that the Judge had misdirected herself as to the test.

The Court of Appeal held that in this case the test was met: "Housing authorities operate under severe constraints in terms of available accommodation. There is no question that had the [Defendant] and her husband provided honest answers to the questions in the application form they would not have been granted this tenancy. The [Property] would have been allocated to other qualifying applicants of whom there were and are many. The [Defendant] could have afforded to have rented accommodation in the private sector and should have done so." The Claimant "is justified in operating a policy of seeking to remove tenants who have obtained their accommodation by deception. The duties owed to other homeless applicants support and justify that policy." It was "completely unrealistic to suggest that the balance of reasonableness would in this case have come down in favour of the [Defendant]". The medical evidence did not suggest that the effect of the eviction would be acute or disproportionate. Further, "nothing else could have acted as a sufficient counterbalance to the social objectives which underpinned the policies of [the Claimant]. Even after paying due regard to these disabilities [the Claimant] could lawfully have decided to continue with the claim for possession and are highly likely to have done so.

The appeal was therefore allowed.

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Lucie Wood

Financial Penalty Notices

I R Management Services Ltd v Salford City Council
[2020] UKUT 0081 (LC)

Sutton & Anor v Norwich City Council
[2020] UKUT 0090 (LC)

Two recent decisions from the Upper Tribunal (Lands Chamber) have set out the scope of the 'reasonable excuse' defence and given substantial guidance on the law and procedure applicable to Financial Penalty Notices imposed under s.249A of the Housing Act 2004 ('the Act') for a range of offences under the Act.

The decisions in *I R Management Services Ltd v Salford City Council [2020] UKUT 0081 (LC)* and *Sutton & Anor v Norwich City Council [2020] UKUT 0090 (LC)* are the primary subject of a free webinar aimed at Local Authorities that will be delivered by Paul Whatley and Lucie Wood within the next few weeks. Please keep in touch for further details on how to participate.

In *I R Management Services Ltd v Salford City Council [2020] UKUT 0081 (LC)* Paul Whatley, Head of the Housing Department, acted for Salford City Council to successfully resist an appeal to the Upper Tribunal (Lands Chamber) from a decision of the First Tier Tribunal (Property Chamber), upholding a substantial financial penalty imposed under s.249A of the Act for breaches of the management regulations applicable to Houses in Multiple Occupation.

Before the FTT, the Appellant contended that it had a 'reasonable excuse' defence for the breaches, because it did not know that the property in question was an HMO. The FTT rejected the defence and upheld the penalties.

The appeal to the Upper Tribunal raised a simple, but very important question: upon which party does the burden of proving (or disproving) the defence of reasonable excuse fall in relation to a relevant housing offence under section 249A of the Act?

The housing offence, which was the subject of this appeal, arose out of section 234 of the Act; the offence is contained within subsection (3) and the defence at subsection (4), set out below, respectively:

'(3) A person commits an offence if he fails to comply with a regulation under this section.

(4) In proceedings against a person for an offence under subsection (3) it is a defence that he had a reasonable excuse for not complying with the regulation.'

At first instance, the FTT held that the Appellant had failed to make out the defence of reasonable excuse. The Appellant sought to appeal this decision on two bases. The first ground of appeal was rejected on the basis of written evidence, and it was the second ground which formed the substance of the appeal. The question was whether the FTT had

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applied the wrong burden and standard of proof to the defence under section 234(4) of the Act.

The approach taken by the FTT can be seen in the following paragraph taken from the Judgment:

'It is for the Appellant to establish that the statutory defence is made out. Whilst the Tribunal must be satisfied, beyond reasonable doubt, that each element of the relevant offence has been established on the facts, the Appellant who pleaded the statutory defence must then prove, on the balance of probabilities, that the defence applies.'

The Appellant maintained that the above approach was wrong and that, instead, the correct approach was for the appellant to only have the evidential burden in relation to the defence; in particular, it only had to produce evidence which properly raised the subject matter of the defence. Once an appellant has satisfied that burden, it then falls to the Respondent to satisfy the FTT, to the criminal standard, that the Appellant did not have the reasonable excuse raised.

In this case, it would have meant the Local Authority having to prove to the criminal standard that the Appellant did know that the property was being occupied as an HMO.

The Appellant argued that the absence of reasonable excuse should be construed as an element of the offence and the combined effect of subsections (3) and (4) (set out above) leads to it being an offence for an individual not to comply with their duties under the regulations without a reasonable excuse.

The Appellant relied upon case law in support of his contention regarding the correct interpretation. However, his arguments relied upon the acceptance of the above proposition – i.e. that the absence of reasonable excuse should be construed as an element of the offence.

The Respondent highlighted the fact that the case law relied upon could only assist the Appellant if the above proposition was accepted. It was maintained that the proposition should be rejected and therefore the case law cited was of no assistance.

The Respondent maintained that, in this case, the defence is identified as a separate statutory provision 'which a defendant must set up and prove if he wishes to avail himself of it'.

Martin Rodger QC, Deputy Chamber President, agreed with the Respondent and held that 'there is no justification for ignoring the separation of the elements of the offence and the defence'.

The appeal was dismissed and it was held that the burden of proving reasonable excuse falls upon the person seeking to rely upon it and that it must be established on the balance of probabilities.

It is also worth noting Martin Rodger QC's comments made obiter, in particular, that it is not necessary for an appellant to specifically plead the defence of reasonable excuse, the tribunal should consider whether an explanation given by an appellant could constitute a reasonable excuse defence.

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Arron Walthall

Bankruptcy & Trusts of Land

Shilabeer v Lanceley [2019] EWHC 3380 (QB)

It is common in bankruptcies for the trustee to find that the bankrupt owns a share in a property and for the trustee to apply to sell it in order to realise that share under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 and section 335A of the Insolvency Act 1986. If the property is the family or matrimonial home, a question may then arise as to whether or not the bankrupt's spouse or co-habitee should be liable for an occupation rent in the period between the share vesting in the trustee and the property being sold.

The power to award an occupation rent by way of equitable accounting is firmly established and the Court has the discretion to do so in order to achieve broad justice or equity between co-owners. Precisely when it is required in a bankruptcy context is not, however, entirely clear.

In *French v Barcham* [2008] EWHC 1505 (Ch), [2009] 1 W.L.R. 1124, the general principle was said to be that an occupation rent is payable whenever "*it would be unreasonable, looking at the matter practically, to expect the co-owner who is not in occupation to exercise his right as a co-owner to take occupation of the property.*" The underlying justification is that, "*fairness requires the occupying co-owner to compensate the other for the fact that the one has enjoyment of the property while the other does not*" [34]. Applying that to the bankruptcy context, Blackburne J held that it will, "*ordinarily, if not invariably, result in the occupying co-owner having to account to the trustee… for an occupation rent. This is because it is not reasonable to expect — even if it were otherwise practicable for him to do so — the trustee in bankruptcy to exercise the right of occupation*" [35].

Snowdon J cast some doubt on that position, however, in the case of *Davis v Jackson* [2017] EWHC 698 (Ch), [2017] 1 W.L.R. 4005. In his view, the analysis in *French v Barcham* was "*not entirely convincing*" because the authorities made it "*very clear*" that the default position should be to refuse requests for an occupation rent [61]. Consequently, "*the default position where a trustee in bankruptcy is not in occupation and the co-owner is in occupation should be that no occupation rent is payable*" [63]. In order to persuade the Court otherwise, a trustee might have to show, "*some conduct by the occupying party, or at least some other feature of the case relating to the occupying party, to justify a court concluding that it was appropriate or fair to depart from that default position*" [61].

Any hope that *Davis v Jackson* heralded a change in approach was dashed, however, by the recent case of *Shilabeer v Lanceley* [2019] EWHC 3380 (QB). In her judgment, Foster J rejected the submission that *Davis v Jackson* had changed the law [43, 47] and commented that it was "*readily distinguishable*" due to its "*unusual facts*" - [50]. The Court did not, however, go so far as to endorse Blackburne J's comments in *French v Barcham*. Instead, Foster J preferred to rely on the overarching test "*that the court has a broad, equitable jurisdiction to do justice between co-owners on the facts of each case*" [47].

These cases suggest that no occupation rent will be payable: when the bankrupt has never

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resided, or intended to reside, in the property; when the occupying co-owner was given by the trustee to understand that no occupation rent would be charged; or when the occupying co-owner was unaware of, and had no reasonable means of discovering, the other co-owner's bankruptcy. Beyond those examples, however, it remains unclear whether an occupation rent should be the norm or the exception.

In short, when considering whether or not to order an occupation rent, the Court must endeavour to achieve justice between the parties. There remain, however, contrary views and a lack of specific guidance as to how it should do so in the bankruptcy context.

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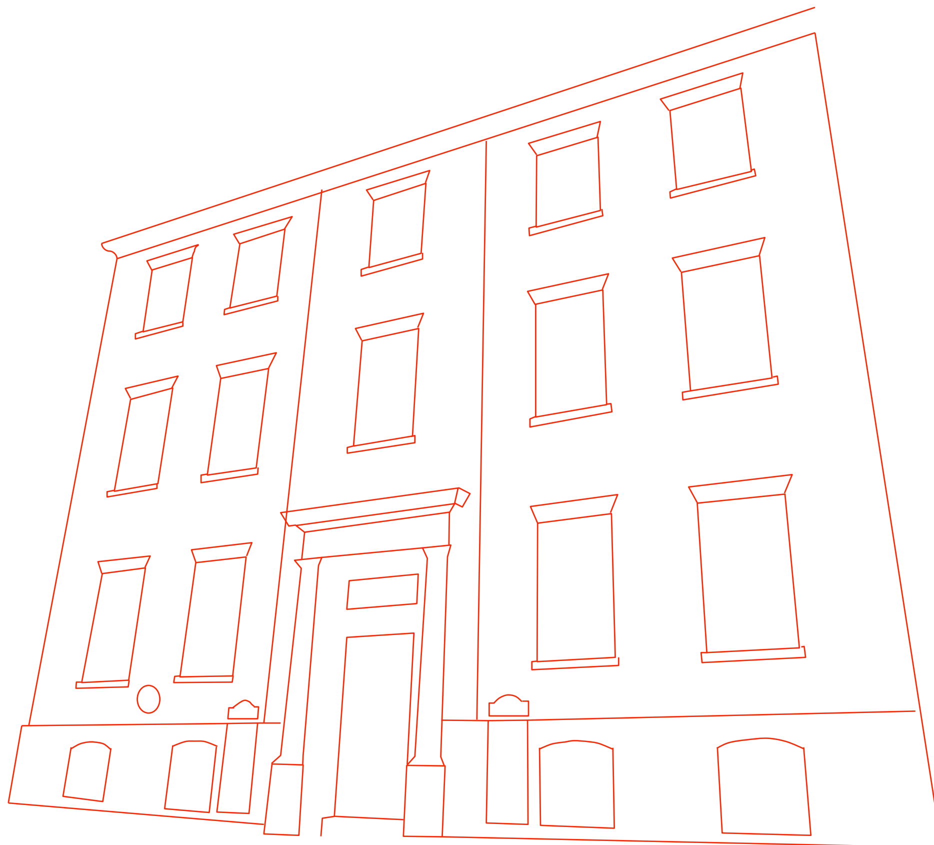

If you have any questions about this newsletter or wish to discover ways in which Cobden House can assist you or your firm, please contact our Director of Clerking, Martin Leech, on 0161 833 6880 or 07791 519 124 or by email at: Martin.Leech@cobden.co.uk