Neutral Citation Number: [2021] EWHC 2928 (Ch)

Case No: CH-2021-000077

IN THE HIGH COURT OF JUSTICE
IN THE BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
On appeal from the order of Deputy Master Hansen
Dated 12 March 2021

Rolls Building
Fetter Lane, London, EC4A 1NC

Date: 04/11/2021

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court
Between :

CHRISTOPHER ALAN ROWLAND	**Appellant**
- and -	
SHARON MARGARET BLADES	**Respondent**

- -
- -

Mr Paul Dipré (instructed on direct access) for the **appellant**
Mr Thomas Roe QC and Mr Simon Lillington (instructed on direct access) for the **respondent**

Hearing dates: 29 October 2021
- -

Judgment Approved

This judgment was handed down remotely and deemed to be at 10.30 am 4 November 2021

HHJ JARMAN QC:

1. Dr Christopher Rowland appeals, with permission granted by Michael Green J, against the judgment of Deputy Master Hansen, concerning the amount his former partner, Ms Sharon Blades, should pay for having excluded him from the use of a jointly-owned weekend home from November 2009 to October 2015. The master awarded £59,958 as compensation for the exclusion based on expert evidence of rental values as a weekend holiday let. Dr Rowland contends that he ought to have been awarded £216,199. Ms Blades served in time a respondent's notice saying the award should be compensatory and based not on rental values but upon Dr Rowland's loss of enjoyment and that the appropriate figure on that basis is £36,000. Alternatively, the award of £59,958 is

justified for the reasons given by the master on this basis and on its own terms. For reasons which are not clear the issue of permission for the cross-appeal was not dealt with until shortly before the hearing of the appeal was listed. I was asked to grant the same. I indicated I would deal with permission and the cross-appeal if permission were granted on a rolled-up basis at the hearing, and that is how it was dealt with.

2. The parties commenced their relationship in 2006. Each of them already had their own homes. Dr Rowland had a flat in West London and a country house in Surrey and Ms Blades had a house in Wooburn Green, Buckinghamshire. In 2008 they discussed purchasing a property in the countryside at which to spend their free time together, as Dr Rowland put it in his particulars of claim, or to use at weekends, holidays, to share with family and friends and for them to live in when they retired, as Ms Blades put it in her defence. In my judgment for present purposes there is no material difference between these two descriptions.

3. The property which they found is known as Tadmarton House. It is a large Grade II listed Italianate villa built in about 1830. It is set in 24 acres of grounds on a hill top with far reaching views of the surrounding countryside near to Banbury, Oxfordshire. It had been fully restored some years previously. The couple purchased it early in 2009 and it was registered in the names of both Dr Rowland and Ms Blades. The purchase monies of just over £1.5 million and associated costs were supplied by Dr Rowland.

4. The main issue before the master was how the beneficial ownership of Tadmarton House was held. Dr Rowland contended that it was held solely for him. Ms Blades contended that it was held for both of them as joint tenants in equity. On this issue the master found for Ms Blades. He found that Dr Rowland paid about £208,000 toward the structural upkeep of the property and that Ms Blades made a substantial financial contribution to its upkeep and running costs which was over £100,000. He ordered that it be sold and that the net proceeds of sale be divided equally between the couple. That part of the order is not challenged on appeal.

5. Later in 2009, Dr Rowland formed a relationship with another person. After Ms Blades discovered this she told Dr Rowland that she did not want him to take his new partner to Tadmarton House. Dr Rowland agreed not to do so, and kept to his word. Ms Blades spent most weekends there during this period. In October 2015 Dr Rowland's new relationship broke down and there was nothing thereafter to stop Dr Rowland also spending time there. The master found however that he chose not to do so. Accordingly, after buying such a grand property, Dr Rowland had the use of it for only a few months.

6. Before the master, Dr Rowland contended that his entitlement to occupy Tadmarton House had been excluded or restricted by Ms Blades from September 2009 until the end of October 2018. Ms Blades contended that the agreement between the two of them in 2009 that he should not take his new partner there did not amount to such exclusion or restriction. The master found that Ms Blades had excluded Dr Rowland, but only for 3 days per week over weekends as he also found that it was unlikely that Dr Rowland would have gone there during the week. He further found that the period of exclusion ran from 1 November 2009 to 31 October 2015. Again, those findings are not challenged on appeal.

7. At paragraph 149 of his judgment, the master said this, referring to Tadmarton House as the Property:

> "It is the duty of the court applying the statutory principles to do justice between the parties with due regard to the statutory considerations. The first and second of these considerations are the intentions of Dr Rowland and Ms Blades as creators of the trust and the purposes for which the Property is held. The trust was created so that the Property should be their joint weekend/holiday home (a purpose that had failed by November 2009) and from that date I am satisfied that Ms Blades used the Property to the effective or constructive exclusion of Dr Rowland, at least so far as weekend usage is concerned. I say that for the following reasons. Ms Blades accepted in evidence that she "*made it plain from November 2009 that [the new partner] would not be welcome*". True it is, that on occasion she "invited" Dr Rowland to provide her with dates when he might want to visit the Property, but Ms Blades was very much in control of the agenda and in situ at the Property, certainly at weekends (which was the only time that Dr Rowland could realistically go), and any invitation was always subject to the clear proviso that Dr Rowland was not to attend at the Property with the new partner. That stipulation is perhaps understandable on one level, given Ms Blades' strong feelings on the subject, but I consider it to have been an unreasonable restriction and Ms Blades never withdrew it. I accept that Dr Rowland acknowledged Ms Blades' sensitivity around this subject, and agreed not to take the new partner to the Property, but I do not believe that I should hold this against Dr Rowland and find that he thereby voluntarily excluded himself. It seems reasonably clear that had Dr Rowland ignored Ms Blades' wishes and taken the new partner to the Property, there is every risk that there would have been another altercation of the kind that occurred in early 2011 when Ms Blades turned up at Dr Rowland's flat unexpectedly."

8. Those findings were set out in a draft judgment which the master sent out to the parties. He invited written submissions as to the proper sum to award based on those findings. Dr Rowland based his written submissions on the report of the jointly-instructed expert, Mr Edward Briggs FRICS, dated November 2020.

9. The parties chose to ask the expert to provide three valuations in respect of the period 2009 to 2018, namely (1) the annual rent value, (2) the rental that would have been paid for the occasional weekend and holiday use at any time of choice based on daily rent by day of the week, and (3) the rental payable for "occasional weekend and short usage."

10. The expert set out detailed calculations for each of the figures he arrived at, which were respectively; (1) £570,000; (2) £260 per day for weekends of 3 days and bank holiday use, and £104 per day for other days; (3) £485,000.

11. In calculating the latter figure, the expert concluded that the property could probably have been let for 26 weekends a year during the period April-September at £3,000 per weekend and for 10 weekends a year during the rest of the year at £2,000. He rounded

the total to £100,000 and then applied a discount of 25% for letting agent charges, cleaning and laundry and of a further £10,000 for utility and insurance costs. Finally he applied a further adjustment downwards to arrive at appropriate figures for the period in question.

12. Dr Rowland in his written submissions to the master submitted that the appropriate rate was £650 per day three days per weekend, and then dividing by two to reflect Ms Blades' use, giving a figure for compensation of £288,800. The £650 figure was arrived at by taking a midpoint between high and low season rents of £2,500 for a three day weekend as calculated by the expert, giving a daily rate of £833, and then discounted for saved expenses.

13. Ms Blades' written submission was that the appropriate figure was £36,000, being compensation based on the loss of opportunity of enjoying going to Tadmarton House every other weekend for 6 years. Further or in the alternative, if the figure of the expert were adopted, namely £59,958, that should be discounted to £36,000 because not every opportunity to use Tadmarton House at the weekend would have had a value to Dr Rowland which equated to the rent that different people would pay for a weekend break.

14. The master dealt with these submissions in paragraphs 153-161 of his judgment as subsequently handed down.

15. At paragraph 155-6 he said this:

> "I am bound to say that I was unpersuaded by either of the parties' submissions in relation to quantum. In my judgment, [Dr Rowland's] figures were unrealistically high contending for a daily rate of £650 per day and a total figure of £288,800 and [Ms Blades'] figure were unrealistically low, contending for a daily rate of £83.34 (or £250 per 3-day weekend) and a total figure of £36,000."
>
> "I remind myself that having found that Ms Blades should pay an occupation rent to Dr Rowland, my task in ascertaining the amount of such rent is to do justice between the parties with due regard to the relevant statutory considerations and having regard to my findings of fact above. It seems to me that the fairest way to arrive at the appropriate figure in the particular circumstances of this case, dealing as we are with a holiday home (albeit a very grand one) and an exclusion at weekends (including a Monday or a Friday) only, and having regard to the principles on which mesne profits are calculated by way of analogy, is to ascertain a daily rate for such weekend usage that reflects the open market value of such usage."

16. At paragraph 158, the master set out his conclusions on the appropriate daily rate as follows, with the original italics:

> "In arriving at the appropriate daily rate, I must have regard to the expert evidence of the joint expert, Mr Briggs. In considering the evidence of the joint expert, I consider that Mr Briggs'

Valuation 3 is the most relevant and helpful in the present circumstances. This valuation considers "*the rent that would be payable for occasional weekend and short usage of Tadmarton House from September 2009 to October 2018*". At paragraph 24.3.1 of his Report Mr Briggs says this:"

"I am of the opinion that the Rental Value that would have been payable over the period September 2009 – October 2018 for the occasional weekend and short usage of the Property over the period is as set out in the table below:

Date	Yearly	Monthly	Daily
Sep-18	£62,550	£5,212	£171
Sep-17	£60,191	£5,016	£165
Sep-16	£57,922	£4,827	£159
Sep-15	£55,739	£4,645	£153
Sep-14	£53,637	£4,470	£147
Sep-13	£51,615	£4,301	£141
Sep-12	£49,669	£4,139	£136
Sep-11	£47,797	£3,983	£131
Sep-10	£45,995	£3,833	£126"

17. The master then went on to reject Dr Rowland's figure of £650 per day. He said at paragraph 159 that that figure was based on a starting point of £2,500 for a 3 day weekend which gave a daily rate of £833 and then discounted. He accepted Ms Blades' alternative submission based on the daily rates in the expert's table. However, he did not accept that this should be further discounted in the way contended by Ms Blades. It is clear from paragraph 159 of his judgment that he regarded the open market rate as the appropriate rate. He referred to the expert's figures set out in the above table and said:

"It seems to me that that these are the figures I should adopt... I consider the open market rate to be the appropriate rate, having regard to the analogy with mesne profits."

18. In the following paragraph, the master then applied the daily figures for the period of exclusion which he had found, namely six years from 2009 to 2015 (rather than to 2018 as contended for by Dr Rowland), as follows:

"2009-2010: £126 per day x 3 days = £378 x 2 per month = £756 x 12 = £9,072

2010-2011: £131 per day x 3 days = £393 x 2 per month = £786 x 12 = £9,432

2011-2012: £136 per day x 3 days = £408 x 2 per month = £816 x 12 = £9,792

2012-2013: £141 per day x 3 days = £423 x 2 per month = £846 x 12 = £10,152

2013-2014: £147 per day x 3 days = £441 x 2 per month = £882 x 12 = £10,584

2014-2015: £153 per day x 3 days =£459 x 2 per month = £918 x 12 = £11,016"

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Total £59,958."

19. It is clear that the master took the daily rate of the expert in what he termed valuation 3, namely "the rent that would be payable for occasional weekend and short usage of Tadmarton House." It is also clear that that rate was applied to a stay of three days over two weekends each month, to reflect the fact that after the breakdown of their relationship it was unlikely that Dr Rowland and Ms Blades would spend the same weekends there.

20. It was common ground before the master and before me that in assessing the amount of compensation for the exclusion of Dr Rowland as found by the master, regard must be had to four sections of the Trusts of Land and Appointment of Trustees Act 1996 (the 1996 Act), which so far as material are set out below. Section 12 provides:

> "(1) A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled by reason of his interest to occupy the land at any time if at that time—
>
> (a) the purposes of the trust include making the land available for his occupation
>
> […].
>
> (3) This section is subject to section 13."

21. Section 13 provides:

> "(1) Where two or more beneficiaries are (or apart from this subsection would be) entitled under section 12 to occupy land, the trustees of land may exclude or restrict the entitlement of any one or more (but not all) of them.
>
> (2) Trustees may not under subsection (1)—
>
> (a) unreasonably exclude any beneficiary's entitlement to occupy land, or
>
> (b) restrict any such entitlement to an unreasonable extent.

(3) The trustees of land may from time to time impose reasonable conditions on any beneficiary in relation to his occupation of land by reason of his entitlement under section 12.

[…]

(6) Where the entitlement of any beneficiary to occupy land under section 12 has been excluded or restricted, the conditions which may be imposed on any other beneficiary under subsection (3) include, in particular, conditions requiring him to—

(a) make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted, […].”

22. Under section 14:

“(1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section.

(2) On an application for an order under this section the court may make any such order—

(a) relating to the exercise by the trustees of any of their functions […]

as the court thinks fit.

[…].”

23. Section 15 provides:

“(1) The matters to which the court is to have regard in determining an application for an order under section 14 include—

(a) the intentions of the person or persons (if any) who created the trust,

(b) the purposes for which the property subject to the trust is held,

[…]

(2) In the case of an application relating to the exercise in relation to any land of the powers conferred on the trustees by section 13, the matters to which the court is to have regard also include the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.

> […].”

24. The extent to which these provisions replaced the former doctrine of equitable accounting in the context of beneficial owners with a right of occupation under the 1996 Act was considered by the House of Lords in the well-known case of *Stack v Dowden* [2007] UKHL 17. Lady Hale, having referred to the provisions set out above, said at paragraph 94 of her opinion (with which Lords Hoffmann, Hope and Walker agreed):

> “These statutory powers replaced the old doctrines of equitable accounting under which a beneficiary who remained in occupation might be required to pay an occupation rent to a beneficiary who was excluded from the property. The criteria laid down in the statute should be applied, rather than in the cases decided under the old law, although the results may often be the same.”

25. On the particular facts of that case, the majority declined to order such payment, as the property there was still being used as a home for the couple’s four children. Lord Neuberger disagreed with this result, but there was no difference between him and the other members of the court on the principle. At paragraph 150 he said this:

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

26. The master referred to this authority and then to further authorities which dealt with whether the principles of equitable accounting should be applied in contexts where there was no statutory right of occupation, notably where a trustee in bankruptcy is kept out of occupation of domestic property of the bankrupt by a co-owner after the bankruptcy. The master then said this:

> “It seems to me that that discussion is very much directed to bankruptcy cases and should not cause me to take a different approach to this case than that provided for under TOLATA. In fact, as I understood their submissions, neither party suggested that I should discard the statutory regime in favour of the general equitable principles or that the result would be any different if I did.”

27. In my judgment, it follows from the reference in section 13(6)(a) of the 1996 Act to ‘payments by way of compensation’ that in deciding the amount of such payments the court should seek to place the excluded beneficiary in the position he or she would have been in if he or she had not been excluded, so far as this may be achieved by a monetary award.

28. Often this will be a relatively straightforward exercise of assessment. If, for example, the excluded beneficiary had to pay rent on an alternative property then the compensation may be calculated on the basis of the expenses of so doing. This is what happened in *Stack*, and it was upon that basis that Lord Neuberger would have calculated the compensation.

29. However, it was not in dispute before me that Dr Rowland did not suffer financial loss as a result of his exclusion. It was accepted by both sides that what he lost was the opportunity to enjoy the special amenity of using Tadmarton House at weekends and holidays as his own home in his free time. In my judgment this is something different from renting someone else's property for a weekend break.

30. The facts of this case are unusual. As Mr Roe QC for Ms Blades accepted, the case does not fit neatly into any of the scenarios which the expert was asked to value. The master had to do the best he could on the evidence before him.

31. In her written submissions before the master, Ms Blades relied upon examples of the assessment of compensation for loss of enjoyment. In *Farley v Skinner* [2002] 2 A.C. 732 the House of Lords upheld an award of £10,000 (the equivalent of about £15,000 today) for a claimant who had purchased a country home for his retirement not knowing, because the defendant surveyor had negligently failed to warn him, about significant aircraft noise from Gatwick Airport which would continue for the rest of his retirement. In *Milner v Carnival Plc* [2010] EWCA Civ 389, the Court of Appeal awarded a couple £4,000 and £4,500 for a spoilt month long cruise because of excessive engine noise. Mr Roe realistically acknowledges that these authorities are of little assistance to the exercise in hand.

32. Mr Dipré, on behalf of Dr Rowland, submits in this appeal that the master was wrong to reject the daily figure of £650. That was based on the expert's figures of £3,000 per 3 day weekend in the mid/high season and £2,000 in the low season and on the assumption that the property could be let for 26 weeks in the former season and 10 weeks in the latter, producing a daily figure of £833. The deductions which were allowed for cleaning and laundry costs brought the figure down to £650. Mr Dipré also submits that the master misunderstood the expert's daily rates, being the annual figure divided by 365. That is the rent which would have been paid every day of the year and not just the occupied days.

33. Furthermore, submits Mr Dipré, the master erred by multiplying such a daily rate by the number of days Dr Rowland was excluded. The resultant figure is below one-half of the rent assessed by the expert for 3 day weekend use under valuation 3. In the expert's addendum he deals with rentals for a whole week under valuation 3 and with an additional assessment under that valuation where the tenant did not pay for such costs as utilities or insurance, which is more apposite because Dr Rowland continued to pay such costs.

34. Finally, Mr Dipré submits that the master found that Tadmarton House would have been used over 48 weekends, whereas the expert assumed only 36. All of these adjustments should be taken into account, resulting in a figure of £216,199. Alternatively, if that figure is considered too high, then a figure of £176,561 is arrived at on the basis of 36 weekend usage.

35. The difficulty I see in Mr Dipré's figures is that they exceed or come close to the expert's figure for an annual rental. His figure for the 6 year period on this basis is £366,793, which divided by two in order to allow for separate use by the parties amounts to £183,396. Mr Dipré's principal figure far exceeds this, and even his alternative figure comes very close to it. In my judgment this would overcompensate Dr Rowland for loss of the enjoyment which the master found, namely the loss of long weekends rather than loss of full time enjoyment.

36. Mr Roe submits that the daily rates in the expert's table on which the master based the assessment of the award of compensation are not the daily rates that would have been payable by someone renting Tadmarton House as a holiday venue for a long weekend. Rather, they are the average daily net income that the expert considered that the parties would have earned over a year if they had made the place available every weekend as a holiday venue, based on his estimate as to how many weekends would have seen the place occupied and how much the hypothetical holidaymakers would have paid per weekend.

37. Neither party suggested to me or to the master that their intention in purchasing Tadmarton House in their joint names was anything other but to enjoy it as a holiday home together. As the master observed, when Dr Rowland commenced a new relationship such a purpose was no longer practicable. Still less was it suggested by either party that it was his or her wish at any time to let the property out or that any financial loss was suffered as a result of the exclusion.

38. Accordingly, whilst the market value may be a good starting point, it is not necessarily the appropriate finishing point if it does not appropriately reflect what Dr Rowland has lost as a result of the exclusion.

39. In my judgment, the difficulty in this case is deciding which valuation given by the expert, or which combination of valuation, most accurately reflects Dr Rowland's loss as a result of the exclusion as found. Such an exercise needs to take account of fact that the purpose of purchase was to provide a weekend home for this couple which purpose had come to an end and neither enjoyed it during the period in question in the way that had been intended. However, in my judgment, the exercise also has to take into account the fact that Dr Rowland was deprived of a weekend holiday home, rather than a weekend rental. It had been chosen and intended as such, not as a place to rent for the odd weekend.

40. I accept there is some force in the points about the daily rate adopted by the master being produced by a division of 365 rather than on the occupied days, being based on seasonal variations in both the rate and the frequency to be expected from rentals, and that the daily rate applied by the master does not sufficiently take into account what Dr Rowland lost during those years. He lost a grand weekend country home, not just an "occasional weekend and short usage" let. Whilst the rate was applied to half of the weekends in the year, the rate itself was calculated having regard to seasonal variations in both the rate and the frequency to be expected from rentals.

41. In my judgment, Dr Rowland's loss is the loss of a grand weekend and holiday home than rather than a holiday let. Many people stay somewhere else during the week for work purposes and return home for the weekend, and this is similar to what the parties intended when buying Tadmarton House. Having said that, in determining the right

amount of compensation for exclusion, some account must be made for the fact that Dr Rowland would not have stayed there for 4 days during the week.

42. I do not accept that there should be a deduction to reflect the possibility that Dr Rowland might not have gone to Tadmarton House on every weekend that he could have. Mr Roe accepts that such a possibility was not canvassed in great deal in the evidence before the master. He might not have done. However, when the calculation is over a six year period, it is just as possible in my judgment there would have been longer stays during holidays. It is unlikely that stays over this period would have been regimented and there is an element of balancing out involved in the exercise.

43. Where, as here, such loss is not financial, the exercise of assessment inevitably includes an evaluative element rather than being purely arithmetical. In my judgment the loss is more than occasional weekend and short usage but less than the loss of a home, and falls roughly at the midpoint between the two. To put a figure on such loss regard must be had to the expert's figures, not only to the weekend and short usage rental but also to the annual rental. A figure on the mid-point between the two, that is between the figure allowed by the master and the figure for half of the annual rental, amounts to a total over the six year period in the region of £120,000.

44. In my judgment that is the figure, having regard to the way the expert was asked to produce his valuations and to the valuations which were produced, which comes closest to the loss which Dr Rowland has suffered on the available evidence.

45. Accordingly the appeal is allowed and the total award of £120,000 is substituted. Permission is given to bring the cross-appeal but it is dismissed. The parties should attempt to agreed a draft order and file it within 14 days of hand down, together with written submissions on any consequential matters which cannot be agreed. A decision will be given in writing on such matters on the basis of those submissions.