

Issues of company co-ownership



MEMORANDUM 1

i.

When in a state of co-ownership, the decision to make alterations and repairs is one in which it is necessary, that both parties must have made a common agreement before any changes are made to a property.[1]It should also be noted that in previous cases where exceptional circumstances arise and the property is in need of necessary repairs that any one of the co-owners is able to make changes to the property.[2].

This can be determined by firstly and very basically establishing that they are in a co ownership,[3]and also that the case provided sees changes made to the property are not repairs as defined as necessary operations in rebuilding, repairing.[4]This means a unanimous agreement was therefore necessary and that the only other way Victor would be entitled to make the changes are seen in Rafique v Amin in which personal bar is referred which would only be relevant if Jack already knew about the changes that were going to be made but chose to do nothing as even though no agreement was reached yet no objection was made.

This is also seen not to be the case as Jack was not present or notified at the time of the alterations. Since alterations (not repairs) have been made to the property and not minor changes that are permissible, it can be quite clearly stated that Victor was not permitted to carry out such alterations on the flat. On the one hand there is room for Victor to plead that what is being proposed is so trivial as to fall within the principle enshrined in the brocard ...'[5], on the other hand it seems that the changes made could be classified

as more than trivial so it seems that Victor was not entitled to carry out the changes made to the property.

ii.

The issue of whether Jack can do anything to prevent Victor from making more changes can be rather complex. As found in *Barkley v Scott*(1983) 10 Sh Ct Rep 23 and owner is quite entitled to make changes to a property as long as they are regarded as *de minimis* meaning that they are minimal such as previously mentioned above.[6]This would be a an ordinary use of the property in which Jack could not prevent although would need further enquiry.

It should also be noted that unauthorised actions will become subject to an interdict. This would prevent Victor from carrying out any more alterations to the property. Such action would require court action which in multiple cases sees declarator granted along with interdict and on occasion a reinstatement in favour of the pursuer who at the time was not contacted.[7]It seems that in this case to stop Jack making further amendments an indictment would have to be placed upon him with the penalties for breaking such indictment becoming ever more serious.[8]

So, it can be said with absolute certainty that the common proprietor has the right to veto that will therefore prevent further alterations on the property regardless of whether the property they are disputing over is able to be sold or not.[9]On occasion the pursuer often seeks for a financial return through damages. This would see Victor have to pay for the damage he has done, although often the amount to pay out through damages is hard to

quantify[10]and it has been said that for a breach there has to be shown to have suffered material damage from such a breach[11]. For that reason, sometimes the repayment of damage maybe in this case is not suitable.

So, it can be said that perhaps indictment is one of the most feasible routes here to prevent Victor from making further changes to the flat. Often, this results in Jack who has been greatly inconvenienced to look to dispone his shares of the flat. This would be at Jacks discretion as whilst not directly linked to preventing Victor from making further unwanted changes to the flat this often occurs when there is a break down in cooperation and in practice the best remedy for this is actually the sale and division of the property.

iii.

Despite it being clear that Victor does not want Jack to sell the property it can be hard to prevent. The selling of a property is of thought to often depend on, “ mutual compatibility goodwill, and understanding.”[12]Providing that this still exists between Jack and Victor the usual step would be to sell shares of the property or sell the property as a whole.

It is said in Latin that both in communionem... nemo compellitur invitus detineri[13]and that regardless of the relationship communion est mater rixarum.[14]This is particularly significant in Victors case as it means that if the issue is raised in court each party as pro indiviso owners has an absolute entitlement to the right of division and sale.[15]

When the division and sale takes place the property will either be sold all together and then split between co-owners or the property is physically divided into the extent of the shares so in this case it would be evenly split. This does seem to then favour division of the property which would prevent sale however, in a situation where it is seen as far from practical or grossly unsuitable it will end in the sale of a property.[16] This is very much so relevant to issues involving common property that cannot be sold at all such as a commonly used stairwell,[17] or that the co-owners are married in which case would have separate rules or that one of the co-owners has been sequestered, both are irrelevant to Jack and Victor.[18]

It is even possible that it is not sold on the market and that Jack can ask Victor to transfer his share of the of the property to him for half its value, however this is the right to buy out is a contentious one but entirely plausible. It seems therefore, that there is very little Victor can do to prevent Jack from selling the flat.

iV.

As said previously situations in which property is sold is entirely different for married couples as they follow a separate set of rules regarding the sale of property between co owners. In Jack and Victor's current situation at common law both cohabitants initially had no legally recognised status. Although unmarried separation rights are the exact same in property terms when the relationship breaks down it is then they are both distinguishable. Due to Jack and Victor not being married if their relationship was to break down their property would be divided into “ his his and theirs”[19] where each couple

will claim exactly what is they individually own. This is different if Jack and Victor were married as if they were then the property would be divided into what it is felt each party needs, like in some cases for example, the husband will leave the matrimonial home to be transferred to his ex-wife, along with the fact that matrimonial couples are seen as one unit rather than being treated as complete strangers. As at the end of a relationship in divorce it is to be shared equally ^[20] as special circumstances can be accounted for and these decisions are generally fully down to judicial discretion as it is then that it is decided to what property the property can be valued as. to what value it has. As at the end of divorce it is all calculated towards a figure as matrimonial property seems to only have significant importance during divorce proceedings which can lead to money being exchanged to make a property transfer order. ^[21] These are considerations Jack and Victor don't need to currently make as they are not married and the only Act that would apply to cohabitants would be the Family Law Scotland Act.^[22] This only goes as far as giving the option of financial provisions and also to make sure that goods are perceived as co owned, cohabitants have similar but not entirely equal occupancy rights (such as occupancy rights only up to 6 months) as contained in the Matrimonial Homes Act 1981. This highlights the problems of couples who live together outside of marriage (such as Jack and Victor) face when their relationship breaks down as while they have some rights protected by some Acts they are not as greatly protected as married couples are.

i

1. A lease can be defined as a contract between one person who grants permission for the other to use their property for a set amount of time in return for payment, which is known as rent. There are 3 types commercial, agricultural and residential property. Navid seemingly falls into the commercial property bracket.

There are 4 main elements for a valid lease to be present. The first is that there must be a general agreement between the two parties the lessor and the lessee. Secondly, there must be property. The lessee must be given possession of the property and unless in special cases such as shooting rights which can be leased although this must be clarified so the subject of the lease is found.[23]Rent is another which is usual paid periodically and in most circumstance on a monthly basis but can be paid in various different ways such as through services and not only through money.[24]The court may also find a lease exists as long as the other three elements are found. [25]Finally for a lease to be valid there has to be a duration on the lease. So in theory it is allowed for a lease to last for many years.[26]So far it can easily be established that both Navid and Isa have a valid lease in place.

Furthermore, the formality of whether or not the lease was signed is irrelevant if the lease lasts one year or less, and longer and both parties must have a written agreement.[27]So, if Navid has entered into a lease for over with Isa for it to be valid it is hoped that there was a written agreement in place along with the other four elements listed above.

0. In most cases a lease will contain the rights of both the tenant and the landlord. This is because the lease is recognised by the law with its own set of terms. The first is possession and that the landlord is

obligated (so in this case Isa) to give the tenant what is known as natural possession, one that the landlord should not interfere with.

[28]The tenant as a consequence must be present in the property with only short absences allowed as without such a possession of the property the lease can be regarded as a material breach such as when a tenant was absent from a prison due to detention in prison.[29]

The second reason is that rent must be paid by the tenant when it is due.

The reason leases are so short and are often changed is due to changes in external factors such as inflation, if the new rate set is not agreed on it is for the third party to decide, which will see the rent set in line with market rates.

Thirdly, the property must be sufficiently plished by the landlord to a reasonable standard in which it would be expected to be equitable for the payment of rent, as without this an interdict can be put in place against the land lord.[30]The tenant is also obligated to use the property for the purposes of let and may not alter or invert this which will cause a breach of the lease, however, The Landlord is obliged to make sure that the property in question is fit for the circumstances under in which it will be let, which can lead Isa to be questioned on her upkeep of her property.

Finally, the property must be maintained by the landlord, so the landlord must carry out the maintenance to the property within a reasonable time and if he does not he is liable.[31]The landlord however is not liable if an “ Act of God” occurs such as a flood, a third party causes damage (in which case they are liable) or the tenant will be liable if they breach the obligation to take care of a property in which case they will be made to pay.

0. There are reasons for either Landlord or tenant in this situation to bring the lease to an end. Firstly, Isa could feel the need for the lease to end due to the fact Navid has not paid rent for the past 6 months. This is a clear obligation of a lease, and the onus is very much on Navid to pay that money. Without Navid paying that money it can be cause for Isa to take action against Navid the remedies available include what is known as action for payment. This remedy is typically used for situations including this one in which rent is not paid, this results in the execution of the lease which is often found as a clause within the lease. This enables a judge to carry out what is known as summary diligence which sometimes does not even need court action.[32]Isa is also entitled to rescind the lease due to a material breach of a monetary obligation in which it would require her to give Navid a 14 day notice to pay the unpaid rent. Furthermore, Isa herself as a landlord has a right to the goods brought into the property by the tenant known as *invecta et illata* for rent. It however, seems Navid has the stronger case as Isa has quite clearly fell short of providing a suitable standard of property due to the dampness that has ruined Navids stock. This entitles him to either; seek damages for the fact the landlord has failed to carry out the required repairs that will lead to Navid suffering monetary loss although defining the quantification of such a breach is difficult to determine. He is also able to seek the remedy of specific implement which sees the landlord required by the courts to carry out repairs on Navid's shop. This is a remedy specific to Scottish courts which unlike England do not offer such a remedy to the 'keep open" clause. A final option for Navid is to keep suspending his obligation to pay rent due to

Isa breaching her obligation to repair the dampness on the premises as he is very much allowed to continue to retain the rent from Isa as long as he has not been paying her for months when she has been failing to meet her obligations.

[1]Rafique v Amin 1997 SLT 1385

[2]Rafique v Amin 1997 SLT 1385

[3]Cargill v Muir 1837

[4]Bell Principles 1075

[5]Rafique v Amin 1997 SLT 1385

[6]Kleyn, D and Wortley, S Co ownership on Zimmerman, Visser and Reid
Mixed Legal Systems.

[7]Rafique v Amin 1997 SLT 1385

[8]<http://www.lawscot.org.uk/news/2015/02/prison-sentence-for-john-odonnell/>

[9]Deans V Woolfson 1922 SLT 165

[10]Barkley v Scott

[11]<http://www.jandhmitchell.com/pdf/Title%20Conditions%20Fact%20Sheet.pdf>

[12]Mclead v Cedar Holding Ltd. 1989 SLT 620.

[13]No one can be forced to remain in co ownership

[14]Common property is the mother of quarrels.

[15]Upper Crathes Fishing Ltd v Bailey’s Exrs 1991 SLT 747

[16]Thom v Macbeth 1875 3 R 161.

[17]Bells Principle 1082

[18]Bankruptcy (Scotland) Act 1985, s 40

[19]<http://www.terry.co.uk/cohabs.html>

[20]

[21]

[22]

[23]Conway v Glasgow City Council 1999 SCLR 248

[24]Paisley Land Laww para 79

[25]Glen v Roy (1882) 10 R 239

[26]Welwood v Husband (1874) I R 507

[27]RoW(S) A 1995, S 1

[28]Graham v Black and Stevenson

[29]Blair Trust Co v Gilbert

[30]Co-operative Insurance Society v Halford Ltd 1998 SLT 90

[31]Wolfson v Forrester 1910 SC 675

[32]Cowie v Martalo 2011 GWD 32-676