OCCUPATION OF "PRE-OWNED" LAND UNDER SCHEDULE 15 TO THE FINANCE ACT 2004

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Introduction to the Regime

Under Schedule 15 to the Finance Act 2004, an individual will find himself chargeable to income tax on relevant land which he occupies (alone or with others) where either the "disposal" or the "contribution" conditions are met. Broadly, those conditions apply where, at any time after 17 March 1986, the individual either

(1) owned an interest in land, or

(2) an interest in other property, the proceeds of which were used to acquire an interest in land,

and the individual has disposed of the interest in land or in other property other than by an "excluded transaction". The contribution condition mirrors the above, and applies where, other than by excluded transaction, at any time after 17 March 1986 the individual provided directly or indirectly any consideration given by another person for the acquisition of an interest in land, or of other property the proceeds of which were applied by another person to acquire an interest in land. It is plain that the carving out of a new interest in land is to be treated as disposal of part of an existing interest (see para 3(4)); "interest in land" is to bear the same meaning as under the IHTA 1984.

Paragraphs 4 and 5 outline the chargeable amount. To a property lawyer's mind, Schedule 15 raises a number of different questions. The one which this article addresses is "what amounts to occupation".

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"Occupies any land"

What is meant when it is said that a chargeable person must "occupy" the relevant land? Its ordinary English meaning is "to take up, use, fill, be situate in" (*Oxford Shorter English Dictionary*). Occupation for the purposes of the case law stretches beyond this definition. The term has been considered in a number of contexts, and, as will be seen, its meaning is both context-specific and highly fact-sensitive. For those reasons, all this article can do is attempt to capture some of the flavour of the cases. Reference is made to more detailed discussions in key works. The majority of what follows is drawn from the landlord and tenant context. The reason for this is that "occupation" is usually one of the prerequisites for triggering a statutory security of tenure regime for business or residential tenancies and has been most fully considered there. Other statutory regimes obviously also make use of the word "occupation". No attempt is, or can be, made to direct the reader to a complete list of sources, which will doubtless shed further light on the issue of what constitutes occupation for the purposes of Schedule 15 to the Finance Act 2004. It is hoped that what follows will give some indication of the classic issues which arise in cases where occupation is in dispute.

It is as well to start with a warning. In *Graysim Holdings Limited v P&O Property Holdings Limited* [1996] A.C. 329, at p 334 F-G, Lord Nicholls stated as follows:

> "*As has been said on many occasions, the concept of occupation is not a legal term of art, with one single and precise legal meaning applicable in all circumstances. Its meaning varies according to the subject matter. Like most ordinary English words "occupied", and corresponding expressions such as occupier and occupation, have different shades of meaning according to the context in which they are being used. Their meaning in the context of the Rent Acts, for instance, is not in all respects the same as in the context of the Occupiers' Liability Act 1957.*"

Further, the House of Lords has stated (in the rather different context of section 70(1)(g) of the Land Registration Act 1925) that

> "*It is, perhaps, dangerous to suggest any test for what is essentially a question of fact, for 'occupation' is a concept which may have different connotations according to the nature and purpose of the property which is claimed to be occupied. It does not necessarily, I think, involve the personal presence of the person claiming to occupy. A caretaker or the representative of a company can occupy, I should have thought, on behalf of his employer. On the other hand, it does, in my judgment, involve some*

> *presence degree of permanence and continuity which rule out mere fleeting presence.*"[2]

Analogies are dangerous.[3] Regard must be had to the statutory context in which a particular decision has been made, and the factual matrix of the case under consideration. It will, no doubt, be relevant that the cases below on landlord and tenant use occupation as a test to confer a benefit on the occupier (statutory protection), whereas the effect of the occupation test in Schedule 15 will be to impose liability.

Occupation in Various Contexts

Land Registration Act 1925

Although the LRA 1925 has now been replaced by the new and improved Land Registration Act 2002, some useful guidance may still be derived from the authorities on the meaning of "actual occupation" within section 70(1)(g), the decisions under which have been largely preserved the 2002 Act.[4] It should be noted that the Courts have regularly refused to "lay down a code or catalogue of situations" in which a person was held to be in actual occupation.[5] Further, there are three peculiarities in relation to the occupation under the land registration regime. First, occupation must be "actual". The function of the qualification is purpose is "to distinguish the person who is in fact there, occupying the property, from someone who is not in fact occupying it, but who stands in such a relation to the property for the purpose of exercising certain rights or being subjected to certain duties".[6] The contrast would appear to be with such statutes as the Occupiers' Liability Acts, discussed in brief below. Second, the notion of occupation is wedded to an ability on the part of the occupier to respond to inquiries made of him by a potential disponee, which might limit the range of persons able to occupy for the purposes of the statute.[7] Thirdly, some early

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2 *Abbey National v Cann* [1991] 1 A.C. 56, at p. 93 *per* Lord Oliver of Aylmerton.

3 See also the admonition of Mustill L.J. in *Lloyd's Bank v Rosset* [1989] Ch 350, at pp. 393 – 394.

4 See Law Commission, Law Com 271, paras 8.53-8.61 but note the emphasis now that the occupation must have been "obvious on a reasonably careful inspection of the land" at the time of the disposition: Schedule 3 para. 2 of the Land Registration Act 2002.

5 *Hodgson v Marks* [1971] Ch 892, 932 *per* Russell L.J.

6 See *Rosset*, above, *per* Mustill L.J. at p. 394.

7 *Hypo-Mortgages v Robinson* [1997] 2 F.C.R. 422, at 426.

authorities under the 1925 Act are "contaminated" by the doctrine of notice in unregistered land. Nonetheless, always keeping in mind the context of the cases, some useful guidance can be extracted from the authorities.

Actual occupation has been considered on a number of occasions by the Courts. It is well settled that the requirement can be satisfied not merely by the physical presence of a person on land, but also by shared occupation.[8] Further, occupation can also be "by proxy". So, for instance, it has been suggested that a person may be in actual occupation via his wife (though not a step-daughter),[9] via a caretaker, employee, servant or other agent.[10] The rationale would appear to be that these are not occupying for their own benefit and on their own behalf. It has been held, however, that a licensee *per se* does not occupy on behalf of his licensor.[11]

It is equally well-settled that occupation also implies a degree of continuity and permanence under the land registration regime. Fleeting or temporary physical use will not be enough to amount to occupation.[12] Obviously this does not mean that constant physical occupation is required. An explicable absence combined with some physical trace of the occupier on the premises can be enough to maintain occupation.[13] Undoubtedly regard would have to be had to the nature of the premises too. That said, however, absence for a prolonged period of time will negate occupation.[14]

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8 Thus in *Hodgson v Marks* [1971] Ch 892 the registered proprietor shared occupation with the beneficiary under a resulting trust; see too *Lloyd v Dugdale* [2002] 2 P. & C.R. 13, at para 43 and the authorities cited therein.

9 *Strand Securities v Caswell* [1965] Ch 958, esp. pp. 984 – 985.

10 See the discussions of this in *Caswell* at p. 981; *Abbey National v Cann* [1991] 1 A.C. 56, 93; *Rosset* at p. 377; *Strand Securities* at pp. 984 – 985; *Rosset* at pp. 981, 984.

11 *Hodgson*, at p. 932. The statement that a lodger is not occupying on behalf of the licensor does seem strange, however, and is doubted by C. Harpum, *Megarry and Wade's Law of Real Property* (6th ed., 2000), at 6 – 053 Fn 54.

12 *Cann* being an extreme example of this.

13 See, for instance, *Chokhar v Chokhar* [1984] F.L.R. 313 (wife in hospital having baby); *Kling v Keston Properties Limited* (1983) 49 P. & C.R. 212 (car left in car park). See too the cases under what is now section 30 of the Family Law Act 1996: *Hoggett v Hoggett* (1979) 39 P. & C.R. 121, at 127.

14 E.g. *Stockholm Finance Ltd v Garden Holdings Inc* [1995] N.P.C. 162 (Saudi Princess had "not set foot in" her home in London for over a year).

Occupiers Liability Acts 1957 and 1984

Perhaps of least assistance, but nonetheless considered here briefly, is the occupier's liability legislation. The leading case on the meaning of the word "occupier" for the purposes of the O.L.A.s remains the decision of the House of Lords in *Wheat v E. Lacon & Co* [1966] A.C. 552. There, Lord Denning stated that

> "*wherever a person has a sufficient degree of control over the premises to realise that any failure on his part to use care may result in injury to a person coming lawfully on the land, then he is an 'occupier'*".

It seems readily apparent that control, rather than physical presence on the land, as the "badge of occupation" makes this a very special meaning of occupier. The comments of Mustill L.J. in *Rosset* on the use of occupation in these acts have been referred to above.

Landlord and Tenant Act 1954

Under Part II of the Landlord and Tenant Act 1954, "occupation" confers the security of tenure on tenancies of premises "occupied for the purposes of a business". The Courts have wisely rejected any definition of occupation for these purposes, save to note that "the circumstances of two cases are never identical and seldom close enough to make comparison of much value" (see *Graysim*, above). Nevertheless, it is possible to identify certain *indicia* for occupation (see, in particular, Ralph Gibson L.J. in *Wandsworth LBC v Singh* (1991) 62 P. & C.R. 219, at 227). These include:

(1) the physical presence on the premises of the occupier;

(2) the exercise of control, for instance of entrance and egress, over the premises;

(3) the provision of services on the premises which require physical presence;

In *Linden v D.H.S.S.* [1986] 1 W.L.R. 164, a "borderline" case, it was found that a local authority was occupying a block of flats the occupants of which only had the benefit of occupational licences. The basis for this was that the function of the local authority could only be discharged by its providing management services in respect of the flat, for instance by provision of crockery and blankets, as well as by reason of carrying out trivial day-to-day running repairs. Further, it has been held that occupation need not be continuous to bring a tenancy within the act. Thus provision of services for only a few weeks in a year (*Wandsworth v Singh*, above)

was held to be occupation having regard, amongst other factors, to the nature of the site in question, which only required occasional attention by gardening contractors. It has also been held that business tenants occupy premises all year round even where the business they are engaged in is seasonal only (see *Artemiou v Procopiou* [1966] 1 Q.B. 878).

Residential Security of Tenure Legislation

As one might anticipate, and perhaps most relevantly, the question of occupation has been well-ventilated under the various statutory regimes granting residential tenants security of tenure. Regard must be had to the differences between the regime operating under the Rent Act 1977 and the Housing Act 1988, which have a differing statutory test for occupation. It is accepted that the test under the 1988 test is stricter (*Ujima Housing Association v Ansah* (1998) 30 H.L.R. 831),[15] so that, once again, care must be taken to ascertain under which statutory code the case in question has been decided. The "residence" test, as it was called under the Rent Act 1977, required the tenant to show occupation as one ingredient for protection under the Act. The difficulty with drawing analogies here is that the cases entwine occupation with other matters, such as whether use is residential or not. Nonetheless, it is possible to draw out two helpful general principles which indicate two key factors for assessing whether any given person was in occupation:

(1) There was no requirement that a tenant use premises constantly in order to be in occupation. This made it possible for a tenant to share his time between two homes and still be in occupation of the premises in question for statutory protection purposes: see *Lungford Property Co Ltd v Tureman* [1949] 1 K.B. 29; *Menzies v Mackay* 1938 S.C. 74, at p. 78; *Hallwood Estates Limited v Flack* (1950) 66 (2) T.L.R. 368. See generally the detailed account in R.E. Megarry and J. S. Colyer, *The Rent Acts* (11th ed., 1988 at pp. 239 – 241 for a digest of the cases);

(2) Temporary absence from the premises would not mean that occupation was lost. In the leading case on the subject, *Brown v Brash* [1948] 2 K.B. 247, it was held that, borrowing from the related but distinct concept of possession, in order for occupation to be lost the *corpus* and *animus* need to have disappeared (see *ibid.* at p. 255).

15 Compare section 1(1) of the Housing Act 1988 ("occupies the dwelling-house as his only or principal home") with section 2(1) of the Rent Act 1977 ("occupies the dwelling-house as his residence").

(a) *Animus*

An absentee tenant may be able to prove that he intended to return to the premises ("*animus revertendi*"). If, on the other hand, he did not intend to return, then he would not be able to maintain that he was still in occupation (see Megarry and Colyer, *supra*, pp. 245 – 248). Any other tenant had to show an *animus habitandi*, that is, an intention to treat the premises as a residence (*Haines v Herbert* [1963] 1 W.L.R. 1401, 1408)

(b) *Corpus*

Perhaps the most helpful element to be derived from the Rent Act cases is related to the *corpus* element, being the physical manifestation of the appropriate intention. This element was defined as "some visible state of affairs in which the *animus possideni* (*sic*) finds expression" (see the *Brown* case, at p. 255). Thus it has been held that use by the following might constitute occupation by the tenant:

(i) Occupation by a licensee with the function of preserving the premises for the tenant's homecoming (*Thompson v Ward* [1953] 2 Q.B. 153, at 157, 165 – 167, and Megarry and Colyer at pp. 248 – 249; and cases in T.M. Fancourt Q.C., Third Cumulative Supplement thereto. Note the limitations on these cases placed by the learned editors at p. 249);

(ii) "Deliberate symbols of occupation" in the nature of furniture (the *Brown* case, p. 255).

As has been stated above, the Housing Act 1988's occupancy test is differently formulated (see Footnote 15 above). It is materially the same as that under the Housing Act 1985. The cases are more sparse, but confirm that one may occupy via one's spouse, and that occupation, as a matter of fact, is to be assessed objectively (see in general T.M. Fancourt QC, *Megarry's Assured Tenancies* (2nd ed, 1999) paragraphs 3-24 – 3-26, and the *Ujima* case referred to above).

Occupation and Schedule 15

Schedule 15 is likely to raise a number of different questions. What amount to an interest in land, and whether, for instance, proprietary estoppels may trigger the

regime, is a matter calling for detailed interpretation of the relevant provisions of the Inheritance Tax Act 1984 and the cases thereunder. This lies outside the scope of this article. A second question may be according to what principles indirect contributions are to be identified. Property lawyers have some experience of this through the doctrines of tracing, but the notorious rules relating to implied constructive trusts according to the principles laid out in *Lloyd's Bank v Rosset* [1991] 1 A.C. 107 may also be applicable here. This article has considered the third question arising: when will a person be occupying for the purposes of Schedule 15? It has been repeatedly noted that there is no litmus test which allows one definitively to identify occupation. What is apparent, however, is that, while the core meaning may be clear, there is a sufficient penumbra of doubt, conditioned by the factual context and the statutory framework applying, which means that there is a risk that the unwary, who have simply sought to maintain what they consider to be a tenuous foothold in their former property, may still find themselves classed as chargeable persons.