WESTGATE
CHAMBERS

A whistle stop tour of TOLATA

Cerys Sayer

1. Some people will have extensive knowledge of this area but I have been asked to provide the basics as well as more in depth – whistle stop tour of TOLATA.

2. At a distance, cohabitation disputes involving constructive trusts, proprietary estoppel and applications under the Trusts of Land and Appointment of Trustees Act 1996, TOLATA looks very much like a 'family law' dispute. However, close up, they are very different creatures indeed.

3. Whereas in a financial remedy claim (on divorce) you can (broadly speaking) tot up the assets and divide by two, a TOLATA case can end up being all or nothing. Few financial remedy cases depend upon who said what years ago – they are largely forward looking and the court paints justice with a broad brush. This means that family lawyers are not generally used to preparing statements in which minute levels of detail need be recorded. It is enough to give a broad picture. A TOLATA case is backward looking and cares little for fairness. It often turns on who is to be believed about who said what. The fine detail of evidence can paint a picture which may make the difference between winning and losing. This requires a different approach to a financial remedy case.

4. As is well documented, there is no such thing as a common law wife and the absence of a statutory scheme for cohabitees has been described as the black hole of family law. However, the consequence of this is that cohabitants must fall back on the general law, in particular relying upon equitable doctrines. Unlike the Matrimonial Causes Act which simply enjoins the court to be 'fair' to the parties, a TOLATA application is, generally, seeking to discern the parties' 'intentions'. So, family lawyers need to stop thinking about what is fair in-the-round and concentrate instead on what intentions can actually be proved on the balance of probabilities. The vast majority of TOLATA claims involve an argument over the parties' respective beneficial interests in the disputed property. These claims are generally the more

troubling to litigate given the reliance on often years old discussions about each parties' respective interests.

Why was it introduced?

5. TOLATA 1996 was introduced as a result of a recognised need for reform of the part of the Law of Property Act 1925, which dealt with trusts.

6. Issues often arose when non-married cohabitees separated and disagreed as to when and how to sell a property - often leading to ex-partners and children becoming homeless.
7. Under the Law of Property Act 1925 co-owners of property were considered to have beneficial interests in the proceeds of sale – ie the money, not the land.
8. This was not reflective of the reality on the ground - that most co-ownership of property was for the purposes of providing a home, not for the purposes of investment.
9. It increasingly became recognised that the occupier of property may have an attachment to a specific piece of land that cannot be properly compensated for by payment of money, especially if their real concern was the enjoyment of the land itself.

When do TOLATA claims arise?

10. TOLATA claims arise where the there is uncertainty as to intentions.
11. TOLATA claims can even arise if neither party has ever lived in the property!

12. Consequently, TOLATA claims are not just for cohabiting couples and may arise in many scenarios:

    - Where one person/legal entity claims a beneficial interest in land
    - As a preliminary issue in matrimonial disputes with intervening parents/children/siblings who claim to have interest in 'matrimonial property'
    - In Inheritance Act claims
    - Between elderly adult parent and financially independent adult child with mortgage capacity in a Right to Buy case
    - Between two friends who purchase property together because financially viable to do so
    - Between previously engaged couples if three years beyond MWPA 1882 time limit since engagement terminated

TOLATA cases do not necessarily arise in isolation:

13. In addition to 'cohabitee' disputes under TOLATA certain claims may need to take place in conjunction with other claims;
    i. An application within a financial remedy claim for an interim sale; and
    ii. An intervenor claim (see *TL v ML* [2006] 1 FLR 1263 at [34], [36]).
    iii. A dual claim involving Schedule 1 to the Children Act and TOLATA.

TOLTA is an interface of at least four different areas of law

Trust law

cOnveyancing

Land law

And Civil Procedure

(Trust Law – again)

(And Civil Procedure again)

14. LJ Carwath's description of TOLTA at paragraph 75 of her Court of Appeal Judgement in ***Stack* v *Dowden [2007] UKHL*** 17: https://www.bailii.org/uk/cases/UKHL/2007/17.html

> ***"To the detached observer, the result may seem like a witch's brew, into which various esoteric ingredients have been stirred over the years, and in which different ideas bubble to the surface at different times. They include implied trust, constructive trust, resulting trust, presumption of advancement, proprietary estoppel, unjust enrichment, and so on. These ideas are likely to mean nothing to laymen, and often little more to the lawyers who use them."***

How does TOLATA engage with these other areas of law?

15. TOLATA introduced changes in the substantive and procedural law relating to applications for orders of the court relating to property that is in shared ownership

16. However, it enshrines trust law and avails the court with no discretion to adjust beneficial interests according to the statutory checklist contained in TOLATA 1996, section 15.

Section 15 of TOLTA: Matters relevant in determining applications.

(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,

(c)the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and

(d)the interests of any secured creditor of any beneficiary

17. Consequently, beneficial interests remain determined and declared according to the established principles of trust law.

<u>The poignant principles of Trust Law</u>

18. The leading case being the House of Lords decision in ***Stack*** v ***Dowden*** [***2007***] UKHL 17 which was then clarified in the Supreme Court decision in ***Jones v Kernott [2011] UKSC 53***, *[2012] 1 AC 776* the principles of which were most recently cited in the case of **Bhura v Bhura & Others [2014] EWHC 727 (Fam):**

i*) If there is an express declaration of beneficial interests then that is, almost invariably, the end of the matter. Such an express declaration can only be displaced if it has been procured by fraudulent conduct. In this case it is said by the wife that the signed TR1 for Mayfield Avenue is a sham. A sham is of course a species of fraud. It involves the parties entering into a dishonest compact, i.e. a conspiracy, to express the true state of affairs falsely in the written agreement. I will analyse the law relating to sham transactions a little later.*

ii) If there is no express agreement about the beneficial interests then there is likely to be (at least) a tacit understanding. This is hardly surprising as one would expect that when people enter into what may very well be the most important economic transaction in their lives – buying a home – they would have a pretty clear understanding of who owned what share of it. In determining whether there was such a tacit understanding, and if so what it was, the court will look at all the evidence holistically and will examine the whole course of the parties' conduct in relation to the property.

iii) In the rare case where the evidence does not reveal a tacit understanding about ownership the court can reach for the presumptions. An obvious presumption is that beneficial ownership is the same as legal title (see Jones v Kernott at paras 17 and 51(1)).

iv) Another is the presumption of the resulting trust. In Pettitt v Pettitt [1970] AC 777 at 824 Lord Diplock doubted that it was of much relevance in the modern era. In his view it would be "an abuse of the legal technique for ascertaining or imputing intention to apply

to transactions between the post-war generation of married couples 'presumptions' which are based upon inferences of fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era." Some commentators believe that the doctrine has a medieval origin. The principal problem with it is that that it allows the "solid tug of money" (as Woodhouse J evocatively put it (echoing George Eliot) in Hofman v Hofman [1965] NZLR 795 at 800) "to submerge any faint suggestion that other [non-financial] contributions play a valuable part in the acquisition of family assets".

v) A further presumption is the presumption of advancement but this can be regarded as being on its death-bed given that it is abolished by s199 Equality Act 2010.

vi) But presumptions are only presumptions. In a memorable dictum Lamm J in Mackowick v Kansas City St. J. & C.B. Ry., 196 Mo. 550, 571, 94 S.W. 256, 262 (1906) stated that "presumptions may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts".

vii) "Actual facts" are those which suggest that a result steered by a presumption is unfair. Although there are different degrees of emphasis and nuance all of the Justices in Jones v Kernott accepted that where a tacit agreement could not be found by a process of inference the court could impute to the parties a fair agreement which they never in fact made but which they should "be taken" as having made (see paras 45, 60, 72, 85(2))). Of course, as Woodhouse J pointed out, this involves a "fictional attribution of intention", but

the process has a long pedigree. One only needs to remind oneself of Lord Denning MR's statement in Appleton v Appleton [1965] 1 WLR 25 at 28 to see how the wheel has turned full circle. There he said "A judge can only do what is fair and reasonable in the circumstances. Sometimes this test has been put in the cases: What term is to be implied? What would the parties have stipulated had they thought about it? That is one way of putting it. But, as they never did think about it at all, I prefer to take the simple test: What is reasonable and fair in the circumstances as they have developed, seeing that they are circumstances which no one contemplated before?" I cannot see any difference between that statement and that of Lord Wilson in para 87 where he rhetorically asked "where equity is driven to impute the common intention, how can it do so other than by search for the result which the court itself considers fair?"

Applying the legal principles to the different scenarios:

19.

i. The parties are legal co-owners, and have completed an express declaration of trust which is signed and in writing

e.g. ticking the box on the Form TR1 to confirm the owners hold on trust as joint tenants or tenants in common in equal or other shares

- Such a declaration will be conclusive unless grounds to rectify/rescind on basis of fraud, mistake etc;
- Meaning that where such an express declaration exists, there is 'no room' for the court to consider whether a constructive trust may arise;
- A declaration that the parties hold the property as joint tenants creates a beneficial joint tenancy which on severance creates a tenancy in common in equal shares;

Once the main issue is decided there may remain satellite issues over the timing of sale, compensatory payments (where one party has paid for improvements, mortgage, generally post-separation), and where there is a minor child, a Schedule 1 claim may be vital.

ii. The parties are legal co-owners but did not enter into an express declaration of trust

There is no signed declaration of trust or they entered into a declaration of trust confirming they held the property in unequal shares

Constructive trust principles. As per *Stack v Dowden* [2007] 2 AC 432, as summarised by the Supreme Court in *Jones v Kernott* [2011] 3 WLR 1121 at [51] apply

- Joint legal ownership amounts to presumed equal beneficial ownership
- This may be displaced by showing the parties had a different common intention when they acquired the home or they later formed a common intention that their shares would change

  and they relied upon it to their detriment*.
- Common intention will be deduced objectively from their conduct, taking a broad view of the co-owners' dealings with one another, not simply restricted to financial arrangements.
- Context is everything.

iii. One party is the sole legal owner

– Again, in these circumstances, the court will approach issues of beneficial ownership on a constructive trust basis (*Abbott v Abbott* [2008] 1 FLR 1451 at [4]);

– The essential components are

(1) a common intention (which may be express or implied),

(2) that the claimant acted to her detriment in reliance of that common understanding, and that it would be unconscionable to deny the claimant's interest;

- Previously: detrimental reliance was very much a necessary component: *Curran v Collins* [2015] EWCA Civ 404 at [77], [78];*
- Claims frequently turn on the meaning of words – which may be ambiguous and/ or do not necessarily connote ownership ('our home', 'you'll have a roof over your head', 'this'll benefit us both')
- While it is possible that the common intention arises after the purchase the court will be 'slow to infer' from conduct alone (i.e. without clear evidence of discussion): *James v Thomas* [2008] 1 FLR 1598 at [24].

*: ***Hudson v Hathway*** [2022] Very recent case of High Court **may have an impact given that the Wife succeeded in her application that detriment was not a necessary ingredient to establish an ambulatory constructive trust and highlighted that the key cases of *Stack v Dowden* and *Jones v Kernott*** omit reference to detrimental reliance.

iv. The parties are joint legal owners but as an investment and not as their home:

- Traditional resulting trust approach may apply instead of common intention.
- See *Laskar v Laskar* [2008] 2 FLR 589; i.e. ownership in shares commensurate with the parties' financial contributions.

v. Proprietary estoppel

- Sometimes pleaded alongside (or instead of) constructive trust.
- This doctrine has three main elements:
- i. A representation or assurance made to the claimant,
- ii. Reliance on it by the claimant,
- iii. and detriment to the claimant due to this reasonable reliance.

- The leading case of *Thorner v Majors [2009] 2 FLR 405*, i.e. the relevant assurance should be 'clear enough', depending on the context where the parties subjective understanding of what they agreed was admissible.
- Where an estoppel arises, the court's powers are wider in terms of satisfying the equity and can, in some cases, include provision for a lump sum payment or even a transfer of ownership.
- ***Guest V Guest [2020] EWCA Civ 387*** – Judgment appealed and Supreme Court ruling is awaited. The appeal raises questions about the proper approach to granting relief under the doctrine of proprietary estoppel. Expected imminently.

What can TOLATA achieve?

20. Relief is narrower than you might think:

i. Declaration as to beneficial interests.

ii. Quantification of beneficial interests:

-The court achieves this by way of direct evidence or by inference, their actual intentions as to how the home would be held, '**…the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property**': Chadwick LJ in Oxley v Hiscock [2005] Fam 211 [69].

-(Somewhat controversially, in Jones v Kernott the Supreme Court held that such an intention (fair shares) could be imputed to the co-owners even where there was no evidence to support an inference to that effect.) The court may only consider imputation at the stage of quantifying interests; not the primary stage of establishing

whether a party has an interest or whether there has been a change of intention: Barnes v Phillips [2016] 2 FLR 1292).

21. Order for sale/ Order preventing a sale
22. Orders related to exercise of the trustees' functions - make orders by way of an account/compensatory orders.
23. The court has no jurisdiction to order a Buy-Out/transfer by one party to the other but is possible to do so by agreement

- The outcome is often binary with the losing party normally paying the winning party's costs (cf. FPR Pt. 28.3)

- Consequently, a well-pitched without prejudice offer is critical and how you conduct your case so that it is economically viable is essential.

Pre-Action

24. Therefore, think very carefully before launching into litigation try to avoid court altogether!
25. Consider ADR: Mediation, Arbitration
26. If litigation is unavoidable then make sure your case is clear as these sorts of cases are civil and require a great deal of frontloading which therefore incurs a great deal of expense at the outset.
27. There is no designated TOLATA pre-action protocol but failure to follow the general Practice Direction on Pre-Action Conduct will likely be taken into account when it comes to costs.
28. The relevant Practice Direction is at paragraphs 1 – 18: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct
29. It requires parties to exchange sufficient information to comply with the PD objectives.

30. Disclosure of any key documents is normally achieved by sending a Letter of Claim to the Defendant containing: The basis of the claim; A summary of the relevant facts; The Claimant's objective; Where money is sought, how this has been calculated. The defendant should respond between 14 days and 3 months.
31. Key documents that might shed light on intentions are:

    - Parties' emails/texts/other communications and correspondence including bank statements.
    - HMLR OCEs
    - TR1, TP1
    - Form 19 if prior to 1998
    - Form JO
    - Conveyancing File
    - IFA Attendance notes
    - Bank and Credit Card statements
    - Mortgage Application Forms
    - Mortgage Waiver Forms
    - Receipts for building works/improvements

******Prevention: Take precautionary measures to avoid such a claim being possible in the first place!******

32. *It is becoming more common for purchasers to declare on the transfer form itself how they intend to hold the property, and in ticking this box this creates an express declaration of trust. As such, cases involving properties where no express declaration of trust has been entered into will become increasingly less frequent.*

Practical pointers

- Contributions are often an indication of what the parties' intentions may have been. The law is seeking to discern what the contributions say about intentions, they are not an end in themselves. Clients can sometimes be woolly and/or contradictory in how they categorise a sum of money. It may have been a contribution to purchase price, it may have been a gift or a loan. These three types of 'contribution' are likely to have profoundly differing effects on the outcome. Make sure that the lay client understands the difference between these and is absolutely clear in their instructions to you.

- Too often open correspondence limps on for months in which various assertions and counter assertions are developed. It is a cross-examiner's paradise. The account needs to be correct from day one. Consistency matters.

- The detail matters. Countless instructions, open letters, and (more grievously) statements of case and/or evidence baldly assert, 'the parties agreed that …' This is not good enough – the law here requires particularity. What precisely was said, when was it said, how was it said, where was it said, what else was going on, was anyone else there, what was the reply? This can take hours to properly iron out. Too often a letter before action makes vague assertions which will not come anywhere near meeting the evidential hurdle to persuade a court on the balance of probabilities and to which no meaningful reply can be given. Such vague assertions do not provide the foundation of any negotiation. Detail, detail, detail.

- Whether it be a constructive trust or estoppel claim, the law is looking for detrimental reliance, in light of agreements and/or representations and/or a common understanding. The detrimental reliance needs to be made out on the evidence. It is not enough to simply have a representation left swinging in the wind.

- A clear view needs to be had about what discussions post-separation are admissible and those which benefit from the cloak of without prejudice privilege.

- There is sometimes a misconception about how complicated these proceedings can be and when the costs need to be incurred. In financial remedy proceedings, there is often a flurry of activity after the case has started, just before a First Appointment or a FDR. In a TOLATA case the thinking needs to be front-loaded and undertaken prior to commencement of proceedings (and preferably before the sending of a pre-action protocol letter).

- Solicitors unfamiliar with this area of work can be surprised by quotes emanating from chambers for a pre-action conference. It is often the case that the issues are someway more knotty than the instructions give credit for. Counsel might be seeing problems (eg consequences of illegality) which are not yet fully appreciated. In that conference, aside from all the legal and procedural issues, counsel needs to see and hear what the client has to say? What kind of impression is the client going to make to a judge? Is this is case which will stand up in court? What are the risks? As they say, a stitch in time…

- This is risky litigation. Your client may come away with nothing but a huge costs bill for your costs and the other side's costs. Detailed attendance notes are absolutely

essential. They need to accurately record the substance and detail of what has been discussed. Counsel's written advice, with the benefit of a conference, should be on the file. It will cover the bases and make clear the risks. No client should ever be allowed to go into the witness box without having been comprehensively and clearly warned as to the potential consequences of what they are doing.

Part 7 or 8?

33. TOLATA claims can be brought under Civil Procedure Rules 1998 either Part 7 or Part 8 depending on the circumstances. Pre-action conduct practice direction applies regardless of whether part 7 or 8 and must be adhered to. There is no specific protocol for these claims.

34. Too often, in the 'family/civil' domain, cases get issued without enough thought as to what is required for a Part 7 or Part 8 claim.

Part 7 procedure

35. Part 7 claims are commenced in the typical civil litigation fashion with a claim form and a particular of claim.

36. A Part 7 claim if your case involves a significant dispute of fact

37. They are most commonly used in ‘sole name’ TOLATA cases where one party is seeking to establish a beneficial share in a property in which the legal title is held by the other or where one party is contending that there has been a change of intentions which the other party does not accept has happened.

38. The normal requirements of CPR Part 15 apply (defence and reply, rules about statement of case) apply to part 7 claims.

39. This procedure requires service of a claim form and particulars of claim. Witness statements are ordered to be simultaneously exchanged at a later date.

40. In outline the Part 7 procedure involves the issue of a claim form, the service of a particulars of claim and defence, followed by disclosure, the exchange of witness statements and the trial. Under Part 8 the claimant serves with the claim form his evidence. When the defendant files his acknowledgment of service he must serve his evidence at the same time.

41. When drafting a particular of claim under Part 7 it is important to set out the facts relied upon to show why it is said that a trust exists, be it, for instance, constructive, resulting or by estoppel. The witness statement must deal with all the factors set out in the judgement in Stack v Dowden.

42. Part 7 entails a more formal approach with the filing of statements of case (particulars of claim, defence, counterclaim, etc.) in accordance with the strict procedural timelines and requirements outlined in the CPR.

43. Please note that there cannot be a default judgement in a contentious TOLATA claim under CPR part 12. ie if a claimant is seeking a beneficial share of the property in a sole name case and the Defendant does not file his/her judgement in time, the court will not enter default judgement. This is because the claim is not for a monetary sum but rather it is for declaratory relief.

44. In reality cohabitation cases are likely by their very nature to involve significant disputes as to the facts of the case. If such differences are identified in pre-action negotiations, the proper course is to commence proceedings using Part 7 of the C.P.R.

45. The difference between the Part 7 and Part 8 procedure is Part 7 is to resolve issues of fact and the second to determine the answer to questions or to seek a remedy where there is no dispute as to fact.

Part 8 procedure

46. Part 8.2 provides that Part 8 proceedings are reserved for cases which require the court to come to a decision on questions which are unlikely to involve any factual dispute.

47. When a T.O.L.A.T.A. application is brought under Part 8 on the basis that a factual dispute is unlikely, if the defendant believes that it is inappropriate because there will be a substantial dispute as to the facts, he must state his reason when filing his acknowledgment of service.

48. A Part 8 claim requires all evidence to be filed in support. So important to ensure that the necessary detail is there; subsequent attempts at amendment can just look like to you are trying to backtrack. If a family department is not used to drafting such claims then approach counsel before you have taken significant steps, and not after.

49. A claimant may use Part 8 where:

"he [or she] seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact"

50. Examples of Part 8 cases

- Where the claim is simply an order for sale;
- Issue over timing of sale rather than proportions of beneficial interest;
- No dispute over beneficial interest but equitable account claimed;
- Query whether minor dispute over beneficial interest and Part 7 disproportionate

51. Part 8 claims are likely to be dealt with quicker and are simpler to issue, but a Part 7 claim can be extremely useful and, indeed, necessary if the facts require it.

52. The Defendant can, however, object to the use of Part 8 if there is a substantial dispute of fact (CPR 8.8). The consequence of this is that the claim will normally be transferred to Part 7 and be subject to the relevant case management directions thereafter.

53. Beware of costs – will come onto that but adverse costs orders are likely to be made where a party issues Part 8 proceedings and they know there are likely to be substantial disputes of fact and it should therefore be under Part 7.

54. Provided that you are able to evidence appropriate consideration of which procedure to use, the court is unlikely to penalise your client even if it takes the view the wrong procedure was adopted.

55. Nevertheless, it is essential that the right procedure is adopted when issuing a TOLATA claim. Well-particularised statements of case can significantly narrow the issues in difficult cases of

complex family arrangements and emotions; whilst a quick Part 8 claim form and witness statement can relatively swiftly dispose of a straightforward dispute.

56. Conclusion TOLATA claims are by their nature legally and procedurally complex. Coupled with the stricter civil costs regime and rules in respect of without prejudice offers, it is essential to have the client's house in order before issuing. If finances allow, it is useful to involve counsel at the earliest possible stage. If not, it is hoped this talk provides a useful, albeit brief, summary of the factors to consider when issuing a TOLATA claim.

Costs

57. A somewhat rude awakening for family practitioners is the application of CPR 44 and the general rule that costs follow the event.

58. TOLATA claims must be pursued with the utmost precision given the very real possibility that, if your client loses, they will be paying not only your costs but the costs of the other party.

59. TOLATA proceedings are very expensive if fought through to a trial.

60. The usual order is that costs follow the event.

61. In civil proceedings the costs matter almost as much (and sometimes more) than the substantive dispute. Family lawyers, whose natural environment usually starts with a 'no order as to costs' presumption, need to think at every point in the case 'and what may be the costs' consequences of this?'

62. The completion of Precedent H (not the FPR 2010 Form H!) is a complicated art. Family departments/firms do not usually have the necessary experience to do this properly. Often

costs are under-estimated, which runs the risk that costs may not be recovered in due course. Please consider whether they should be sending their Precedent Hs to costs' draughtsmen.

63. The five-page form requires a detailed budget to be provided for each of the following stages or phases of the proceedings:

i. pre-action costs;
ii. issue/statements of case;
iii. case management conference;
iv. disclosure;
v. witness statements;
vi. expert reports;
vii. pre-trial review;
viii. trial preparation;
ix. trial;
x. ADR/settlement discussions.

64. In all Part 7 claims which are allocated to the multi-track and all parties who are legally represented must file costs budgets 21 days before the first case management conference unless the court orders that they are to be filed by a different date.

65. Parties in Part 8 proceedings are not automatically required to file costs budgets by the rules but the court may nevertheless direct them to do so, or a party may apply for a direction requiring costs budgets to be filed. An order for the filing of costs budgets is expressly considered to be appropriate in TOLATA proceedings.

66. The costs budget must be in the form of Precedent H annexed to CPR PD 3E (Not Form H) and must be dated and verified by a statement of truth signed by a senior legal representative of the party concerned.

67. Where costs budgets have been filed, the legally represented parties are required to file an agreed 'budget discussion report', setting out which figures or phases are agreed, which figures are in dispute, and a brief summary of the disagreements.

68. At the case management conference (or at a separate costs management hearing), court will ordinarily make a 'Costs Management Order' either:

(i) recording that the budgeted costs are agreed between the parties; or

(ii) if the budgets are not agreed, recording the court's approval after making any necessary revisions.

69. The costs budgets enable the court to control the extent of the parties' recoverable costs and are extremely important documents:

(i) unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees

(ii) when assessing costs on a standard basis in a case where a costs management order has been made, the court:

— will have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and

— will not depart from such approved or agreed budget unless satisfied that there is good reason to do so

(iii) where there is a difference of 20% or more between a party's costs budget and the costs ultimately claimed by that party in a bill of costs:

— the receiving party must provide a statement of the reasons for the difference; and

— the court may restrict the recoverable costs to such sum as is reasonable for the paying party to pay in the light of that party's reliance on the budget notwithstanding that such sum is less than the amount of costs reasonably incurred by the receiving party

70. Most cases do not fight through to a trial and are resolved by ADR commonly civil style mediation.

71. It is for this reason that realistic and persuasive without prejudice offers should be considered at the earliest opportunity.

72. The general rule in TOLATA proceedings is that costs follow the event whether the claim is made under Part 7 or Part 8. The court's discretion in relation to costs is set out in CPR 44.2:

(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

(3) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(4) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(5) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(6) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.

Offers

73. Generally, offers under the CPR should be sent in accordance with Part 36, a complex self-contained procedural code governing the consequences, timing and validity of such offers.

74. The earlier a Calderbank or Part 36 offer is made, the greater will be its potential protection and costs' potency.

75. To protect yourselves, make sure costs' advice is recorded in writing.

76. The Calderbank regime has not applied to financial remedy proceedings following divorce since new costs rules were introduced in April 2006. However, It is open to parties to make Calderbank (without prejudice save as to costs) offers

77. It possible to use both Part 36 and Calderbank

78. The practitioner should have regard to the detailed terms of CPR Part 36 which govern the form such offers should take, when such offers should be made, when such offers may be withdrawn or changed and how such offers should be accepted.

79. Formal requirements of Part 36 offer: r.36.5 (use Form N242A or a letter. Strongly advise use of form)

80. A well-judged Part 36 offer does not, however, give the offeror licence to conduct the proceedings thereafter in whatever way the offeror thinks. The conduct of a successful offeror may disentitle him to his costs, as the case of *Walsh v Singh* 1 demonstrates. In that case (which concerned TOLATA proceedings), notwithstanding the court's order was more advantageous to 'S' than his Part 36 offer, the Court of Appeal upheld the trial judge's refusal to order 'W' to pay his costs and interest since the date of his offer due to his 'disgraceful' conduct in using spyware, in alleging that 'W' was mentally unstable, in embellishing his evidence with untruths, in conducting unnecessary and hurtful cross-examination and in losing no opportunity to belittle and discredit 'W'.

81. The Court of Appeal emphasised that in deciding whether to make a costs order, a party's conduct would ordinarily be relevant if it was causative of wasted costs (eg a failure to give proper disclosure), but there may be occasions where the it would be appropriate for the court to mark its disapproval of a party's conduct by disallowing costs even if the conduct was not causative of any significant waste of costs. Such disallowance must, however, be proportionate to the conduct in question.

82. If a TOLATA dispute between a third party and a spouse is determined within financial remedy proceedings, CPR Part 44 does not apply in relation to the costs of that issue since the proceedings are family and not civil proceedings. The costs rules contained in FPR 2010, Pt

28 apply, although the general rule in FPR 2010, 28.3(5) that each party should bear their own costs does not apply because the resolution of a dispute about the beneficial ownership of a property is not a 'financial remedy proceeding'. Accordingly, the court starts with a 'clean sheet' in relation to costs. Whether a party succeeds in the application is, however, a highly relevant or even decisive matter

83. Part 36 – prepare from day one as if the case will end up as a trial/ Calderbank – use as a device to settle

84. Remember to be admissible at the costs' stage the words "…save as to costs" need to be included in the Calderbank offer "Without prejudice, save as to costs."

85. The primary point of offers is to insulate the client against a costs order and, in the best-case scenario, to net your client a more favourable costs order than what would otherwise have been available.

ADR

86. With costs and the risk of costs many of these cases will never fight through to a trial. There is too much at stake on either side. ADR is the order of the day. However, in order to avoid litigation and bring matters to a speedier conclusion, a great deal of front-loaded work must be undertaken to properly understand a party's case.

87. A party's failure to comply with the 'Practice Direction Pre-Action Conduct and Protocols' is conduct which the court will take into account, under CPR 44.2(5)(a), when considering what order to make in relation to costs.

88. That Practice Direction requires the parties to give genuine consideration to the use of ADR. In deciding whether a successful party should be denied his costs due to a failure to engage in ADR, the burden is on the unsuccessful party to demonstrate that the successful party acted unreasonably in refusing to agree to ADR. Factors which the court will take into account include:

    (i) the nature of the dispute;

    (ii) the merits of the case;

    (iii) the extent to which other settlement methods have been attempted;

    (iv) whether the costs of the ADR were disproportionately high;

    (v) whether any delay in arranging the ADR would have been prejudicial;

    (vi) whether the ADR had a reasonable prospect of success.

Interplay between TOLATA cases and schedule 1 Children Act 1989 cases

89. It is increasingly common to see proceedings under schedule 1, or the threat of the same arising in a dispute under TOLATA.

90. The most common example of this is where one party seeks an order for sale of jointly owned property and the other who has remained at the property seeks to keep it until the parties child has reached majority. Reported cases tend to only involve the super wealthy.

91. There is very little guidance on the courts approach on a more typical ‘every day’ case. One reported case is W v W [2004] 2 FLR 321 https://familylawhub.co.uk/default.aspx?i=ce1008 concerning the timing for an order for sale. In that case a formerly cohabiting couple with a single property between them, They had 2 children 13 and 11.

92. The Mother expecting that she would be the primary carer sought an order uner TOLATA formally deferring the realisation of the Father’s half share until after the children’s 18th birthday. The father applied for an immediate order for sale. The F was then awarded the primary care of the children and each parent reversed their position. The F sought to keep the property and the M sought to sell it. In the end the trial judge did order a sale of the property. Judgement was described as far from perfect, but it was not overturned on appeal.

93. Judge concluded that they could be rehoused in a smaller purchased property.

94. This case demonstrates that such cases have fine margins. It is quite conceivable that one Judge exercising his discretion may order a sale and another may not. It is also quite normal for one party to make a claim under TOLATA to sell (or defer a sale of) property and for the other party to challenge this either under s15 TOLATA in its own right or additionally by bringing a cross schedule 1 application to retain a property until the children reach 18 or in some cases finishes tertiary education.

95. How should any cross application under schedule 1 be dealt with?

96. Again W v W can be of some assistance. Thorpe LJ noted a para 5:

> “ ….As a matter of sensible management in the county court, if one co-owner invokes one statutory power and the other invokes a different statutory power, sensible management

demands that the competing applications be conjoined. If one had to be given leading status, I would have myself assumed that it would be the application under Schedule 1, since that statute confers upon the court a much more extensive power, namely the power to make adjustive orders between the co-owners".

97. This does not necessarily mean heard under 1 case number more likely 'heard together'.

98. The rules and costs consequences relating to family and civil disputes are different and finding a Judge that can sit with both a civil and a family ticket can prove difficult in practice, particularly in more complex cases.

99. In the case of W v W there was no dispute about beneficial ownership. They both claimed a 50% share and therefore the real issue was the timing of the sale.

100. It is more difficult to assess the interplay when the quantum of theparties beneficial interests are disputed. In N v D [2008] 1 FLR 1629 a DJ made an order under Schedule 1 requiring a father to pay inter alia a lump sum to repair, renovate and enhance a property which housed his child and the mother, but in which he had a deferred beneficial interest.

MWPA

101. Don't forget Married Women's Property Act! Little used piece of legislation but can be really handy. Beware of deadlines though as they have to have been engaged within 3 years of starting a claim…. https://www.legislation.gov.uk/ukpga/Vict/45-46/75/enacted

UPDATING CASELAW

Very recent case of High Court: ***Hudson v Hathway*** [2022] https://www.bailii.org/ew/cases/EWHC/QB/2022/631.html

This may have an impact given that the Wife succeeded in her application that detriment was not a necessary ingredient to establish an ambulatory constructive trust and highlighted that the key cases of *Stack v Dowden* and *Jones v Kernott* omit reference to detrimental reliance.

Facts

Mr Hudson and Ms Hathway were in an unmarried relationship. During the course of their relationship they purchased Picnic House, where they went on to live as a family with their two children. At the point of purchase, they did not enter into an express declaration of trust. As such, the legal presumption that 'equity follows the law' applied, meaning that they were presumed to hold the property in equal shares. This was not disputed.

The relationship subsequently broke down and Mr Hudson moved out, leaving Ms Hathway in occupation of the property with the children.

Shortly thereafter, the parties discussed their financial arrangements and reached a deal on their assets with a view to achieving a clean break. A key part of the deal was that Ms Hathway would get to keep Picnic House in exchange for waiving any claim that she might have against Mr Hudson's pension and shares. It was accepted by both parties at the hearing that a deal had indeed been struck on these terms.

Nevertheless, Mr Hudson later sought to go back on the agreement, issuing a claim under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) for an order that the property be sold and a declaration that the proceeds of sale be shared equally between them. The thrust of his argument was as follows:

- The deal was not legally binding as it did not satisfy the formal requirements for transferring property or creating a declaration of trust (namely, that the agreement must be contained in writing and signed by both parties).
- Although a change in beneficial ownership could arise under a constructive trust (which is exempt from the above formalities), an essential ingredient of a constructive trust (namely, detrimental reliance) was missing, such that no such trust could have arisen.

Ms Hathway's position was that:

- The change in beneficial ownership arose under a constructive trust.
- It was not necessary to show detrimental reliance in these particular circumstances.
- Even if the court disagreed with her on this, she had suffered detrimental reliance in any case; for example, she did not pursue a claim against Mr Hudson's pension and shares.)

- *However, the case* will only be a relevant authority for cases which fall within the 'domestic consumer context', so there would likely have been a different outcome had the parties not been in a cohabiting relationship.
- Similarly, *Hudson* will only apply where the property was bought in the joint names of both parties. If the property is bought in one party's sole name, different considerations apply.

- If there had been an express declaration of trust when they purchased the property the outcome would have been different because an express declaration of trust is conclusive in the absence of a vitiating factor such as mistake, undue influence, fraud or duress. It may be possible to establish that an express declaration of trust has been superseded by a subsequent agreement, but such cases are usually brought on the basis of proprietary estoppel, where detrimental reliance is needed.

Guest V Guest [2020] EWCA Civ 387 : https://www.supremecourt.uk/cases/uksc-2020-0107.html

Issue

The appeal raises questions about the proper approach to granting relief under the doctrine of proprietary estoppel. The Supreme Court is asked to decide: (1) Whether a successful claimant's expectation, in this case of inheritance of a family farm, was an appropriate starting point when considering a remedy; and (2) Whether the remedy granted, namely payment of a lump sum which would in effect result in the sale of the farm, went beyond what was necessary in the circumstances.

Facts

Tump Farm is a working dairy farm which has been farmed by the Guest family since 1938. The first appellant, David is married to the second appellant, Josephine. The respondent, Andrew is their eldest son. Andrew left school in 1982, aged 16 and worked full time at the farm for 33 years until 2015. Relations between Andrew and his parents deteriorated. In 2014, David and Josephine made wills excluding any entitlement for Andrew. In 2015, David and Josephine offered Andrew terms for carrying on farming Tump Farm under a farming business tenancy. Andrew

rejected those terms on grounds of affordability and left the farm that year. In 2017, Andrew started legal proceedings seeking a declaration of entitlement to a beneficial interest in Tump Farm under the principles of proprietary estoppel. The judge at first instance ruled in his favour finding that an assurance was made to Andrew over many years that he would inherit a substantial share of the farm which he had relied on, working hard on the farm for little financial reward. He ordered that David and Josephine make a lump sum payment to Andrew of 50% of the market value of the farming business and 40% of the market value of Tump Farm. The consequence of that order was that Tump Farm would have to be sold in order to realise the lump sum payable to Andrew. David and Josephine appealed to the Court of Appeal where their appeal was dismissed.

Judgment appealed and Supreme Court ruling is awaited.

Rowland v. Blades [2021] EWHC 2928 (Ch)
https://www.bailii.org/ew/cases/EWHC/Ch/2021/2928.html

The court's readiness to award occupation rent has developed significantly since Re Pavalou [1993]1 WLR 1046 and post the introduction of TLTA

Facts

The parties had commenced a relationship in 2006. They each already owned their own homes. In early 2009, the parties purchased Tadmarton House. The property was purchased with the intention to spend their free time together (Per Dr Rowland), and at weekends and holidays, share with family and friends, and to live in when they retired (Per Ms Blades). (HHJ Jarmon QC

held that for the purpose of this judgment, there was no material difference between the descriptions for purchase given by each party [2]).The property was purchased for just over £1.5 million. The purchase monies and associated costs were supplied by Dr Rowland [3]. The property was registered in the names of both parties. Later in 2009, Ms B discovered that Dr R had formed a relationship with another person. She told Dr R she did not want him to take his new partner to Tadmarton House. Dr R agreed not to do so. Ms B spent most weekends at the property during the period. In October 2015, Dr R's new relationship broke down and thereafter there was nothing to stop him spending time at the property. However, he chose not to do so after this time

Courts decision:

i. The court at first instance had ordered that the property should be sold and the net sale proceeds be divided equally between the parties

ii. Such conduct was considered an unreasonable restriction of his right to occupy pursuant to s12 of TOLATA and market rental compensation was awarded on the finding that Ms B had excluded Dr R from the property, for 3 days per week over weekends in a period from 01 November 2009 to 31 October 2015.

The Single Joint Expert had provided valuations for the period 2009 to 2018 on three different basis: (1) annual rent value; (2) the rental that would have been paid for 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" [9].

Dr R argued the appropriate rate was £650 per day for three days per weekend, and then divided by 2 to reflect Ms B's use, therefore seeking a compensation figure of £288,800. [12].

Ms B argued that the appropriate figure was £36,000. She submitted this was the appropriate figure to compensate H for loss of opportunity of enjoying alternate weekends at Tadmarton House for 6 years (2009-2015). In the alternative, that £36,000 was the appropriate figure by taking the valuation (3) figure for the relevant period of £59,958, but with an additional discount because Ms B argued that not every opportunity to use the property at the weekend would have the value to Dr R which equated to the rent different people would pay for a weekend break [13].

HHJ Jarman QC went on to conclude that:

- Dr R lost a grand weekend country home, not just an "occasional weekend and short usage" rental [41].

- It was the loss of a grand holiday home which was in question [41.

- However, when determining the appropriate compensation for exclusion, account must be given for the fact that Dr R would not have stayed in the property for 4 days during the week [41].

- That there should not be a deduction to reflect the possibility that Dr R would not go to the property on every weekend he could have [42].

- That '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' [43].

HHJ Jarman QC therefore allowed Dr R's appeal, ordering a total award of £120,000. Ms B was given permission to bring her cross-appeal but it was dismissed