WESTGATE
CHAMBERS

Trust of Land and Appointment of Trustees Act 1996.

Scott Sharp.

Introduction

Applications under the Trusts of Land and Appointment of Trustees Act 1996 or TOLATA, deal with the asset disputes between non-married couples and/or persons. This can include unmarried life partners, to brother and sisters, and to some extent business partners.

Unlike financial remedies proceedings, where the Court are focusing on separation with a broad brush and often seeking equality between the parties; TOLATA is sometimes an all or nothing scenario, and reliance of evidence of past agreement, particularly at the creation of a trust, will largely fall on the believability of the parties' own evidence.

This note will aim to provide an overview of TOLATA, and hopefully some tips and advice on how to approach such claims as they require a slightly different mindset to financial remedies.

Why was it introduced?

1. 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.
2. 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.
3. 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.
4. 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.
5. 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?

6. TOLATA claims arise where the there is uncertainty as to intentions.
7. TOLATA claims can even arise if neither party has ever lived in the property!
8. 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

When might a court application be made?

9. Applications under section 14 of TOLATA are usually made in the following circumstances:

- To determine whether jointly-owned property should be sold.
- To quantify the respective beneficial shares that each co-owner or co-habitee is entitled to.
- To determine whether a party has a beneficial interest in the property, usually where that party's name is not on the legal title and the legal owner is disputing the claim.
- To determine whether property subject to a trust of land should be sold on the application of a creditor of a beneficiary

Civil procedure rules

10. Claims under TOLATA are civil claims, and therefore the Civil Procedure Rules apply (CPR). This includes pre-action protocols and the need for appropriate pre-actions conduct.
11. Practitioner need to always consider ADR as there can be serious costs implications for not doing so. If litigation is the likely route, there is no specific pre-action protocol for TOLATA claims and the general protocol should be followed.
12. This protocol sets out the needs and expectations of the Court from the parties prior to issuing proceedings.

13. A critical element of this would be the pre-action protocol letter. In short, this is a concise and clear letter detailing the claim, and legal basis of the same, with appropriate supporting documentation be provided to be considered, and a specifying a suitable period of time between 14 days-3 months for a response.
14. As a good practice point, it can be easy for litigators to fall into the 'one and done' approach of the pre-action protocol letter. However, as relative engagement as well as 'reasonable and realistic' attempts at alternative resolution are considered in the whole later in proceedings, I would advise the pre-action protocol letter should, as a minimum and dependant on engagement, be followed with a chaser prior to the expiry of the response period, and a final post-expiry litigation warning.

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, section 15.

Section 15 of TOLATA: 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.

The poignant principles of Trust Law

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?"

Proprietary estoppel

19. This is a further legal principle based on effectively a promise of future gain or benefit. It is 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.

20. 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.

21. 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.

22. Guest V Guest [2020] EWCA Civ 387 – Judgment from the Supreme Court was handed down in October 2022 *([2022] UKSC 27):*

23. The Court found that the Claimant's parents should have been given the option to choose from two appropriate remedies: they could put the farm into a life interest trust for the Claimant to inherit on their deaths or they could sell the farm during their lifetimes to pay the Claimant a lump sum. Any such sum however needed to be significantly discounted to take account of the Claimant's accelerated receipt ie to reflect the benefit gained by the Claimant in receiving the sum sooner than he otherwise would have done, the Court does not have the power to award a claimant more than they have been promised or expected to receive.

What can TOLATA achieve?

24. 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*).

25. Order for sale/ Order preventing a sale;

26. Orders related to exercise of the trustees' functions - make orders by way of an account/compensatory orders;

27. 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

28. 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 – this all starts from day one with the pre-action letter.

Issuing proceeding: Part 7 or 8?

29. 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.

30. 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

31. Part 7 claims are commenced in the typical civil litigation fashion with a claim form and a particulars of claim, which it is critical is accurately pleaded and drafted. Whilst there are provision for amending a statement of case prior to service, post service this may only be done with permission from the other side or permission of the Court (CPR 17) and is a tough sell, particularly if the party was legally represented.

32. A Part 7 claim if your case involves a significant dispute of fact, or legal challenge.

33. 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.

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

35. This procedure requires service of a claim form and particulars of claim. Witness statements are ordered to be simultaneously exchanged at a later date, following a case management hearing.

36. 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.

37. 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.

38. 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.

39. 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.

40. 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. If there is no engagement to the pre-action letter, Part 7 would also be appropriate procedure to use.

41. 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

42. 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.

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

43. When a TOLATA 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.

44. 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.

45. 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

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

47. 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.

48. 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. Adverse costs can be order at any point in a civil claim either in whole or in part!

49. 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.

50. 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.

Costs:

51. 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.

52. TOLATA proceedings are very expensive if fought through to a trial. CPR 44 deals with costs in more detail but the general principle is costs follow the event and are awarded to the successful party.

53. 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?'

54. The completion of Precedent H (not the FPR 2010 Form H!) is a complicated art. 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 H’s to

costs' draughtsmen – in Multi-track cases I would always advise of the use of a costs draftsman as this is typically recognised by the Court as an appropriate recoverable cost.

Offers

55. 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.

56. The earlier a Calderbank or Part 36 offer is made, the greater will be its potential protection and costs' potency – and possibility of indemnity costs!

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

58. 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

59. It possible to use both Part 36 and Calderbank, however practitioners should consider carefully the applicable rules and consider if one or the other is better suited for case management.

60. 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.

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

62. 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* demonstrates.

63. 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'.

64. 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.

65. 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

66. 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."

67. 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. However, when timed and used correctly they can be a powerful negotiating tool to bring proceedings to an end swiftly, keeping the overriding objective in mind.

68. I would advise that there is at least one formal part 36 off made in any proceedings in which part 36 apply, and a good measure of when to send this is between exchange of disclosure and witness statement.

Summary

69. TOLATA claims are by their nature legally and procedurally complex. Coupled with the stricter civil cost's regime and rules in respect of without prejudice offers, it is essential to have the client's house in order before issuing.

70. 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.

TLATA 1996: terminology

The following are terms used throughout the provisions of TLATA 1996.

Beneficiary	In relation to a trust, a person who has an interest in property subject to the trust, including a person who has such an interest as a trustee or a personal representative (*section 22(1), TLATA 1996*).
Beneficially entitled	A reference to a beneficiary who is beneficially entitled does not include a beneficiary who has an interest in property subject to the trust only by reason of being a trustee or personal representative (*section 22(2), TLATA 1996*).
Interest in possession	This includes the receipt of rents and profits or the right to receive the same, if any (*section 23(2), TLATA 1996* and *section 205(1)(xix), Law of Property Act 1925*). A person who is a beneficiary only by reason of being an annuitant is not to be regarded as entitled to an interest in possession in land subject to the trust (*section 22(3), TLATA 1996*).
Trust of land	A trust of property that consists of, or includes, land (*section 1(1)(a), TLATA 1996*). Trusts of land can be express, implied, resulting or constructive and include bare trusts and trusts for sale. The definition includes a trust created or arising before or after 1 January 1997, when TLATA 1996 came into force.
Trustees of land	Trustees of a trust of land (*section 1(1)(b), TLATA 1996*).