



B A R R I S T E R S

CHAMBERS OF RICHARD TYSON

# Family Group Newsletter

## April 2009 Edition

### Contents

Application for Leave to Oppose Adoption

-

Imogen Robins

TOLATA Application under Section 14: Practice and  
Procedure

-

Hamish Dunlop

**London - Bournemouth - Bristol - Oxford - Winchester**

Welcome to our first publication of 2009.

This newsletter's subject matters are *Application for Leave to Oppose the Making of an Adoption Order* by Imogen Robins and *Trusts of Land and Appointment of Trustees Act Application under Section 14* by Hamish Dunlop. I hope that you find these informative and useful.

Meanwhile – Latest News:

- As of the 27<sup>th</sup> April 2009 new rules were implemented allowing media representatives the right to attend hearings involving family proceedings. This is subject to the discretion of the Court which can exclude representatives on specific grounds; as you can imagine this initiative is receiving very mixed responses from those involved.

You may find the following web pages of assistance as they direct you to the Statutory Instruments and the Practice Direction directive: -

[www.opsi.gov.uk/si/si2009/uksi\\_20090857\\_en\\_1](http://www.opsi.gov.uk/si/si2009/uksi_20090857_en_1)

[www.opsi.gov.uk/si/si2009/uksi\\_20090858\\_en\\_1](http://www.opsi.gov.uk/si/si2009/uksi_20090858_en_1)

[www.judiciary.gov.uk/judgment\\_guidance/practice\\_directions/family-media.htm](http://www.judiciary.gov.uk/judgment_guidance/practice_directions/family-media.htm)

- In light to the LSC's proposals for restructuring the funding of family work dealing with Private Family Law (levels 3 and 4) and the family advocacy scheme dealing with both public and private family cases, the FLBA have submitted its response. The LSC proposals, if implemented, will fundamentally change the entire Family legal profession as we know it so we keenly await the LSC's announcements planned for August and hope that common sense prevails.
- 3PB Family has recently produced a Private Law update lecture (Miss Elisabeth Hudson and Miss Tanya Zabihi) incorporating recent case law updates; practical aspects and preparation for finding of fact hearings; an adoption and special guardianship update and contact and the new enforcement powers.
- Mr. Hamish Dunlop will also be lecturing in June on "*Stack -v- Dowden 2 years on*".

As 3PB Family continues to evolve Lee Giles has been brought in to lead the family clerking team who, with the assistance of Robert Leonard, will be able to answer all your questions. I also encourage you to look at our web page for news updates and copies of previous newsletters.

We do appreciate all the feedback and remind you that if there are any specific topics that you would like covered in future editions please contact us.

*Stuart Pringle*

### Applications for leave to oppose adoption under the Adoption and Children Act 2002

This article is intended to give an outline of the law relating to applications for leave to oppose the making of an adoption order. For ease of reference I have included the relevant part of the statute.

Skeleton Arguments will generally be ordered and evidence may be called in support of the application. It may also be acceptable to conduct the leave application on the basis of submissions only, depending on the nature of case.

### The Law

The conditions for making an adoption order are contained in S 47 ACA 2002. An order cannot be made unless one of the following three conditions is met. That is:

S 47 (2) The **first condition** is that, in the case of each parent or guardian of the child, the court is satisfied –

- (a) that a parent or guardian consents to the making of the adoption order,
- (b) that the parent or guardian has consented under section 20 (and has not withdrawn the consent) and does not oppose the making of the adoption order, or
- (c) that the parent's or guardian's consent should be dispensed with.

(3) A parent or guardian may not oppose the making of an adoption order under subsection (2)(b) without the court's leave.

(4) The **second condition** is that –

- (a) the child has been placed for adoption by an adoption agency with the prospective adopters in whose favour the order is proposed to be made,
- (b) either –
  - (i) the child was placed for adoption with the consent of each parent or guardian and the consent of the mother was given when the child was at least six weeks old, or
  - (ii) the child was placed for adoption under a placement order, and
- (c) no parent or guardian opposes the making of the adoption order.

(5) A parent or guardian may not oppose the making of an adoption order under the second condition without the court's leave.

(6) The third condition relates to orders made in Scotland and Northern Ireland.

(7) The court cannot give leave under subsection (3) or (5) unless satisfied that there has been a change in circumstances since the consent of the parents or guardian was given, or as the case may be, the placement order was made.

### Leave to oppose adoption

Under the **first condition**, where a parent has consented to adoption they can only oppose the making of an adoption order by seeking leave to oppose from the court. In order for the court to grant leave to oppose they must demonstrate a change of circumstance. This will be considered later in this article.

Under the **second condition**, above, the parents require leave under S47(5) to oppose the making of the adoption order. They will need to satisfy the court that there has been a change of circumstance under S47(7).

Two stage process

The case of Re P (Child) [2007] EWCA Civ 616, was the first case to consider the 'leave' provisions in s47 of ACA 2002. The Court of Appeal gave guidance on how the leave provisions should be interpreted by the court.

The court should adopt a two stage process when determining whether to give leave to oppose an adoption. First of all, the court has to be satisfied, on the facts of the case that there has been a change in circumstances within S47(7). If there has been no change in circumstances, that is the end of the matter, and the application fails.

If, however, there has been a change in circumstances within in S47(7) then the door to the exercise of judicial discretion to permit the parents to defend the adoption proceedings is opened, and the decision whether or not to grant leave is governed by S1 of the 2002 Act. In other words, "the paramount consideration of the court must be the child's welfare throughout his life"

The meaning of "change in circumstance"

The meaning of change of circumstance was argued before the Court of Appeal. Eleanor Platt QC made reference in her submissions to the fact that any change of circumstance had to be relevant or material to the question of whether or not leave should be granted. She invited the court not to put any further gloss on the statute. Parliament had not attached an adjective such as "significant" to the phrase "change in circumstances".

The Court of Appeal accepted that those submissions Wall LJ @ para 30 states

*"We agree with Miss Platt's submissions on this point. We do not think it permissible to put any gloss on the statute, or to read into it words which are not there."*

@ para 31 the judgement continues

*"Furthermore, in our judgement, the importation of the word "significant" puts the test too high. Self-evidently, a change in circumstances can embrace a wide range of different factual situations. Section 47(7) does not relate the change to the circumstances of the parents. The only limiting factor is that it must be a change in circumstances "since the placement order was made". Against this background, we do not think that any further definition of the change in circumstances involved is either possible or sensible."*

Wall LJ also makes some pertinent comments about the test @ para 31:

*"We do however, take the view that the test should not be set too high, because, as this case demonstrates, parents in the position of S's parents should not be discouraged either from bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable. We therefore take the view that whether or not there has been a relevant change in circumstances must be a matter of fact to be decided by the good sense and sound judgement of the tribunal hearing the application."*

The exercise of discretion

Wall LJ in his judgement emphasised that the exercise of discretion was a far more important consideration. Even if a change of circumstance could be demonstrated it would always be subject to the check-list in sub-sections (3) and (4). For ease of reference the check-list is set out below:-

- (3) *The court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare.*
- (4) *The court or adoption agency must have regard to the following matters (among others)-*

- (a) *the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),*
- (b) *the child's particular needs,*
- (c) *the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,*
- (d) *the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,*
- (e) *any harm (within the meaning of the (1989 Act) which the child has suffered or is at risk of suffering,*
- (f) *the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including-*
  - (i) *the likelihood of any such relationship continuing and the value to the child of its doing so,*
  - (ii) *the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,*
  - (iii) *the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.*

Summary

To summarise, the court will follow the two stage process outlined above in any application for leave under the ACA 2002. It will be necessary for practitioners to assess whether there has been a change of circumstance in any particular case. However, even in the most powerful cases where a change of circumstance can be demonstrated, the court will undertake a careful analysis of the child's welfare throughout their life. This will be the paramount consideration of the court in determining leave applications and it is important that any client is aware of the nature of the hurdle to be crossed.

**Imogen Robins**  
**3 PB**

## TOLATA Applications under section 14: Practice and Procedure

### The Court's Powers under Section 14

1. **Section 14 of the Trusts of Land and Appointment of Trustees Act 1996** ('TOLATA') is the cornerstone of the provisions relating to cohabiting couples under the 1996 Act. It provides the mechanism by which a beneficial owner can apply to the Court for an order:
  - (a) *relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or*
  - (b) *declaring the nature or extent of a person's interest in property subject to the trust as the Court thinks fit.*
2. Section 14 is therefore the power by which the Court defines *inter alia* what share each co-habitee owns in a home and whether the property should be sold or not. In doing so, the Court must have regard to the criteria in section 15. Section 14 also allows the Court to make additional orders about which beneficiaries may occupy the land and which may not; whether the occupying party may only do so upon terms which might, for instance include payment of rent or compensation to the excluded party<sup>1</sup>. For a recent application of the appropriate principles concerning occupational rent, see *Re; Barcham (in Bankruptcy) ([2008] EWHC 1505)* in which Blackburn J. concluded that:
  - 2.1. If there was some reason why the co-owner was not in occupation and it would be unreasonable, looking at the matter practically, to expect that co-owner to take occupation of the property in question, it would normally be fair and equitable to charge the occupying co-owner an occupation rent.
  - 2.2. If it could be shown that the occupying co-owner was given by the trustee to understand that no occupation rent would be charged, the court might be inclined to take the view that it would not be just to require the occupying co-owner to pay an occupation rent. But short of such circumstances it was difficult to see why the occupying co-owner should not be charged an occupation rent.
3. In making an order under section 14, the Court must have regard to the relevant factors contained in **Section 15 of TOLATA** which are (under subsection 1):
  - (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.*
4. Where the Court is giving consideration to exclusion of one co-habitee or restricting their right to occupy (under section 13 TOLATA), the Court must also consider the circumstances and wishes of each beneficiary who is or who would be entitled to occupy the land<sup>2</sup>. In all other cases, the Court must consider the circumstances and wishes of any beneficiaries of full age and

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<sup>1</sup> By virtue of its interrelation with sections 12 and 13 of TOLATA. See the way that the House of Lords used the statutory regime to govern their judgement in *Stack – v – Dowden* ([2007] UKHL 17) at paras 93 and 151.

<sup>2</sup> Section 15 (2) TOLATA

entitled to an interest in possession in the property<sup>3</sup>. Section 15 does not apply to applications brought by a Trustee in Bankruptcy under section 335A Insolvency Act 1986.

5. Prior to the implementation of TOLATA<sup>4</sup>, there was no corresponding checklist. Co-owned property was held on a trust for sale pursuant to s. 30 of the Law of Property Act 1925. This meant that the trustees had a power to sell the property immediately with discretion to postpone; self-evidently, this model encouraged a sale over postponement. In 1997, the TOLATA regime replaced the trust for sale with the section 15 criteria; to that extent, case law prior to 1<sup>st</sup> January that year has to be considered with some caution.
6. **TOLATA s15 (1) (a) and (b)** are usually considered together. Cases under the ‘old’ LPA regime were by and large decided on the basis that where a marriage or relationship came to an end, the Court would usually order sale<sup>5</sup>. However, if there were specific agreements made by the legal owners about when the property should sold, those agreements were to be binding<sup>6</sup>.
7. To a considerable degree, the section 15 (1) (a) and (b) criteria codified the existing approach. The Court will be looking to the purpose of the trust and what discussions were had between the parties at inception (and thereafter, to a lesser extent); not just about ‘who owned what’ but also about ‘the circumstances in which the property might be sold’. Practitioners will show themselves to be properly acquainted with the law if pleadings, written and oral submissions in TOLATA cases refer to the section 15 criteria or are obviously orientated around them.
8. **TOLATA s15 (1) (c)**. The presence of children in the home now has statutory relevance. Under the old LPA regime, the Courts often referred to the presence of children as part of the discretionary exercise with differing results<sup>7</sup>. The presence of this consideration as an express criterion now gives it an obvious importance such that it is to be ranked equally with other considerations such as what the parties originally intended. This raises the assumption that a Court might conclude that the original intentions of the parties had been superseded by the presence of children. It is also worth remembering that the criterion refers to the *welfare of any minor who might reasonably be expected to occupy the land as his/her home*; the net is cast wide.
9. **TOLATA s15 (1) (d)**. Prior to the introduction of TOLATA, the Courts would order sale upon application by a bank or other secured creditor unless there were exceptional circumstances. The introduction of section 15 (1) (d) means that there is no presumption of priority. This represents a real change in the law according to Neuberger J. in *Mortgage Corporation – v – Shaire* ([2001] 3 WLR 639) who concluded that:
  - 9.1. There is no suggestion that any one of the four section 15 criteria should be given a priority above the other;
  - 9.2. The Court must decide what weight to give which factor;
  - 9.3. The section 15 (1) list is not exhaustive and therefore the Court may give consideration to other facts.
10. A powerful consideration will be whether a creditor is being recompensed for being kept out of its money<sup>8</sup>
11. **The circumstances and wishes of each beneficiary (sections 15 (2) and (3) TOLATA)**. It is likely that the wishes of the beneficiaries will be represented in the opposing cases of the parties. Having said that, it is all of the beneficiaries who must be considered whether by consideration of intervener proceedings or in the form of a written statement. As to the beneficiaries’ circumstances, the Court is likely to give considerable weight to the respective parties’ ability to fund alternative housing if a property is to be sold.

<sup>3</sup> section 15 (3) TOLATA

<sup>4</sup> TOLATA came into force on 1<sup>st</sup> January 1997.

<sup>5</sup> See, for instance, *Jones – v – Challenger* ([1961] 1 QB 176)

<sup>6</sup> *Buchanan-Wollaston’s Conveyance* ([1939] 1 Ch 738; *Abbey National –v– Moss and others* ([1994] 1 FLR 307).

<sup>7</sup> For cases where an order for sale was made despite the presence of children; see *Jones – v – Challenger* ([1961] 1 QB) and *Burke – v – Burke* ([1974] 1 WLR 1063 at 1067). For those where orders for sale were not made, see; *Williams – v – Williams* ([1976] 1 Ch 276) and *Re; Evers Trust* ([1980] 1 WLR 1327).

<sup>8</sup> *Bank of Ireland Home Mortgages – v – Bell and Bell* ([2001] 2FLR 809)

### Pre-action Steps

#### Registering a Restriction

12. In the event that a potential Claimant does not have an interest in land recorded with the Land Registry, it is advisable to register a Restriction on the Register. This is done by completing Land Registry form RX/1<sup>9</sup>. Where an applicant for a Restriction does not have the agreement of the registered proprietor, he will need to satisfy the registry that he has a 'sufficient interest' to make such an entry. Practitioners will need to establish that this criterion is made out. An application for a Restriction without reasonable excuse which results in a person suffering loss or damage may result in an action for damages against the Claimant.

#### Evidence Gathering

13. TOLATA cases are inherently fact-sensitive. They rely on people's recollections but often important areas have been documented.
14. Therefore, preparation must begin with procuring the Land Registry office copy entry and the Transfer Document for the property (whether Deed, Land Registry Form TR/1 or one of its earlier manifestations). The conveyancing file will be required. It is likely that a mortgage was taken out at the time of purchase in which case that mortgage file will be required (and any re-mortgage documents). Often, parties see an IFA at the time of purchasing a property; their records will be needed as well.
15. Such material will form the backbone of a detailed statement from the client which should be taken at an early stage in the case preparation.
16. If a party's case depends on financial contributions, then the raw material relating to that contribution should be obtained.

#### Pre-Action Protocol

17. TOLATA claims are, in the eyes of the Court process, civil actions and governed by the Civil Procedure Rules (CPR) and the Civil Pre-action Protocols. The applicant is therefore the 'Claimant' and the respondent to the claim is the 'Defendant'. There is currently no protocol for TOLATA claims. The Civil Justice Council is currently consulting on a General Pre-action Protocol for all claims where no specific protocol applies. In the meantime, para 4.1 of the Protocol Practice Direction will apply, namely:

4.1. *...the court will expect the parties, in accordance with the overriding objective and the matters referred to in CPR 1.1(2) (a), (b) and (c) in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings.*

4.2. *Parties to a potential dispute should follow a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation. The procedure should not be regarded as a prelude to inevitable litigation. It should normally include –*

*(a) the claimant writing to give details of the claim (in accordance with para 4.3 (a));*

*(b) the defendant acknowledging the claim letter promptly (usually 21 days; para 4.4.);*

*(c) the defendant giving within a reasonable time a detailed written response (paras 4.5. to 4.6.); and*

*(d) the parties conducting genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings*

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<sup>9</sup> Available on the Land Registry website at [www.landreg.gov.uk](http://www.landreg.gov.uk)

18. By para 4.7 of the Directions, the parties should consider alternative dispute resolution. The paragraph records that:

*'Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if this paragraph is not followed then the court must have regard to such conduct when determining costs'*

19. ADR has attractions in TOLATA claims because it allows the parties to explore more flexible means of achieving resolution than those defined by section 14 TOLATA (or Sched 1 CA 1989) particularly in multi-party disputes. If there are children involved, it also encourages the parties towards an agreed conclusion thereby preserving relationships for the future.

### **Venue and Form of Proceedings**

20. A proper interpretation of the CPR prescribes that TOLATA claims should be brought using the **Part 8 CPR** procedure.<sup>10</sup> The originating documentation is therefore a Part 8 Claim Form (**N208**) without any pleadings in the form of Particulars of Claim. The Part 8 procedure is conveniently codified in **CPR Part 8 and its Practice Direction (PD8)**; any detailed reference must be made there. In summary, the position is this.

20.1. The Part 8 Claim Form must contain certain information and it must be verified by a Statement of Truth (**CPR 8.2**).

20.2. The Claimant must file any written evidence on which he intends to rely when he files his Claim Form (**CPR 8.5**); this will be in the form of a sworn statement or affidavit. No party will be entitled to rely on written evidence at the final hearing unless it has been so served or unless the court gives permission (**CPR 8.6**).

21. The Defendant must file an Acknowledgement of Service Form no later than 14 days from service of the Claim Form which indicates whether the Defendant contests the claim and/or whether a different remedy is sought from the Court (**CPR 8.3. (1) and (2)**). The Defendant must file his evidence with the Acknowledgement (**CPR 8.5**). If the Defendant fails to file an Acknowledgement of Service in time, the Defendant may attend the return day but not take part in the hearing (**CPR 8.4**). A Defendant wishing to rely on written evidence should file it with his Acknowledgement of Service (**PD 8.5.3**).

22. So far as Court hearings are concerned, the Court has a number of options available to it (**PD 8.4.1**). The most common procedure is that immediately upon issue of a Part 8 claim, the Court sets a 1<sup>st</sup> hearing date. Assuming that the claim is contested, the Court is likely to make this a directions appointment. If it is not, it has the power to make a final order on that day. Alternatively, the Court can make directions without a hearing so as to progress the case without a need for parties to attend.

23. However, there are a number of problems in using the Part 8 procedure in TOLATA claims:

23.1. The procedure is principally reserved for cases where the Claimant seeks the Court's decision on a question which is unlikely to involve a substantial dispute of fact (**CPR 8.1. (2)**). Most TOLATA claims are highly fact-sensitive and involve many factual issues;

23.2. In contradistinction to Part 7, Part 8 involves no legal pleadings. Pleadings help to define (and tie down) parties' cases; accordingly, they are a great advantage in legally and factually complex cases.

23.3. The Claimant cannot secure **CPR Part 12** Default Judgment against a non-co-operative Defendant in Part 8 claims.

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<sup>10</sup> The effect of PD 8B para A1 and A2. TOLATA claims were issued as originating applications under the old County Court Rules.

24. The alternative procedure is governed by Part 7. The proceedings must be started by a Part 7 Claim Form (**N1**) containing the information prescribed by **CPR 16.2 and 16.3** and accompanied by a Statement of Truth. In contradistinction to Part 8, Part 7 Claim Forms are usually accompanied by Particulars of Claim containing the information required by **Part 16.4** and setting out the legal and factual ‘blueprint’ of the claim.
25. The Defendant then has three options: file and serve an admission; file a defence; or file an acknowledgement of service form and then file a Defence later (**CPR 9.2**). The Defence must be a blueprint of the factual and legal contentions raised by the Defendant; it must contain the information prescribed in **PD 16.5**.
26. In my view, Part 8 is the less satisfactory procedure for most TOLATA claims; Part 7 is preferable. That creates a dilemma in issuing these claims. The Court has the power to order the claim to continue as if the Claimant had not used the Part 8 procedure (**PD 8.1.6**). A party could initiate Part 8 proceedings and then invite the Court to transfer to Part 7. The disadvantage of that is that the Claimant will have ‘shown his hand’ with witness evidence before he commits his case to pleadings and is potentially thereby at a disadvantage. The alternative is to issue under Part 7. However, in my local Court, one of the District Judges will stay TOLATA proceedings if issued under Part 7 and summon the parties for a directions appointment. This tends to put the Claimant on the back foot. One solution as a Claimant might be to agree with the other side to issue under the Part 7 procedure before doing so. If that cannot be done, then save in the most straightforward cases, I would advise issuing under Part 7, with an accompanying letter explaining why the case is unsuitable for Part 8.
27. A Defendant who has a strong case may feel that there is a tactical advantage in having pleadings. The Part 8 Acknowledgement of Service form allows a Defendant to object to the Part 8 procedure; (s)he may endorse the form to the effect that the action should be a Part 7 claim because it involves substantial issues of fact. The Defendant may then attach his fully pleaded defence to the claim. This may prove an impressive foil to the Claimant’s statement of evidence and it allows the Defendant to spell out a counterclaim (if appropriate); for example, where in answer to a legal owner’s claim for an order for sale, the Defendant seeks a declaration of an equitable share.
28. Where, however, the Part 8 procedure is used, it is essential that the supporting witness statements are as detailed as they can be. The Court will expect to see a high degree of particularity especially when pleading relevant discussions which underpin a party’s case on ownership. Useful guidance on the importance of detail in this respect can be found in *H -v -M (Beneficial Interest) ([1992] 1 FLR 229) per Waite, J.*
29. As to choice of venue, the County Court has jurisdiction to hear claims under section 14 TOLATA whatever the amount involved.<sup>11</sup> The claim should be issued out of the Court for the district in which the Defendant resides (or has his place of work) or in which the property is situated).
30. The High Court similarly has universal jurisdiction but should be used only where: (1) the financial value of the claim is significant; (2) the complexity of the facts, issues, remedies or procedures are such as require it and/or (3) the importance of the outcome of the claim to the public in general warrants it (**7A PD 2.4**). The Claimant can use the Family or Chancery Divisions.

### **Case Management**

31. If the claim has been commenced under Part 8, the Court has a broad range of powers under **PD8.4**, as to how it manages the case by directions (see para 22 above). If it is a Part 7 Claim, the Court will serve an allocation Questionnaire on each party in form N150 (**CPR 26.3 (1)**). This invites the parties to prepare their own proposed directions. Either party can request a stay for settlement (**CPR 26.4 (1)**). There is no doubt that at some stage a real effort to settle the case must be made. If the parties are ready to negotiate at an early stage, an early initiative will obviously keep costs down (if successful) and stops the parties

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<sup>11</sup> High Court and County Courts Jurisdiction Order 1991 (SI 1991/724).

becoming too polarised. If the parties have minor children, the parent with care will have considered **Schedule 1 Children Act** proceedings; if applicable, the cases can be heard together (although not consolidated) and thought must be given as to how to case manage them.

32. The Court will need to allocate a Part 7 case to a track; small claim; fast track or multi track. Most TOLATA claims have a financial value of more than £15,000 or will last more than 1 day; therefore the multi track is appropriate. This automatically provides the facility of a Case Management Conference before trial which facilitates compromise. That is a further advantage of the Part 7 procedure.

33. Whether directions are given under the Part 7 or Part 8 regime, they will need to address:

- A direction for filling any reply or amended statement of case. This includes an opportunity for a party to commit to pleadings if they have not done so already;
- The appointment of experts in accordance with **CPR 35**. Most TOLATA cases will warrant the use of a single joint expert (**CPR 35.7**) to value the property as a whole and, if relevant, the value of any additional works carried out exclusively by a party.
- Standard Disclosure by Form **N265** or by providing the documents in copy form (**CPR 31**).
- Listing the matter for a CMC or Trial.

34. In addition, a party will want to consider:

34.1. *Whether to settle a **CPR Part 18 Questionnaire for the other side to answer**.* This useful provision is leads ultimately to Court sanction as follows:

34.1.1. A party may ask questions of another at any time which are designed to: clarify any matter which is in dispute in the proceedings or give additional information in relation to any matter whether or not the matter is contained or referred to in a statement of case (**CPR 18.1**).

34.1.2. A request should first be made in writing (**PD18.1.1**). If it is brief then it may be settled in the form of a letter (**PD18 1.4**) but it must make it clear that the request is made in accordance with the Part. If not brief, it should be a formal document. In either event, the other party must be given a reasonable chance to respond.

34.1.3. If an inadequate response is received, then the party seeking the information may make an application to the Court for the answer/information to be given.

Part 18 Requests are extremely useful (and often under-used) devices for testing the strength of the other side's case. They can be combined with Requests for Specific Disclosure under **CPR 31.12**. They are not limited to issues as disclosed on the pleadings but may relate to matters of a more peripheral nature in the witness statements. An important stricture is that of **PD18.1.3**, which provides that Requests should be made as far as possible in a single comprehensive document and not piecemeal.

34.2. *Whether an application for strike out (**CPR Part 3**) or summary judgment should be made (**CPR Part 24**).* TOLATA claims tend to be fact sensitive and it may well be that a Court will show reluctance to summarily dispose of a cause of action (or entire proceedings) without hearing the evidence at Trial. However, if (for example) there is an express declaration of trust (and no evidence realistically deployed to undermine it), then it is worth considering whether such application may be made.

- 34.3. **CPR Part 3.4**, provides that the Court may strike out a statement of case if it appears that:
- (a) the statement of case discloses no reasonable grounds for bringing or defending the claim;
  - (b) the statement of case is an abuse of the Court's process or is otherwise obstructing the just disposal of the proceedings; or
  - (c) there has been a failure to comply with a rule, practice direction or Court order.
- 34.4. **CPR Part 24** provides that the Court may give summary judgment against a Claimant or Defendant on the whole of the claim or on a particular issue if:
- (a) It considers that:
    - (i) The Claimant has no real prospect of succeeding on the claim or issue: or
    - (ii) The Defendant has no real prospect of successfully defending the claim or issue; and
  - (b) there is no other compelling reason why the case or issue should be disposed of at trial.

**Compromise**

35. Because of the fact sensitive nature of TOLATA cases, it can be difficult to predict their outcome and this dynamic should encourage settlement. Furthermore, there is an important distinction between proceedings for ancillary relief in divorce and TOLATA claims; that is the approach of the Courts to the issue of costs. It is essential to understand the different approach in order to manage the issue of compromise.

Costs

36. Whether the claim is commenced under Part 7 or Part 8, the provisions of **CPR 44.3** lie at the heart of the Court's discretionary powers on costs;
- (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) The general rule does not apply to the following proceedings-

- (a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or
  - (b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.
- (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –
- (a) the conduct of all the parties;
  - (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
  - (c) any payment into court or 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.
- (5) 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 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 his case or a particular allegation or issue; and
  - (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.
- (6) 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;
  - (a) 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.
- (7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).
- (8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.
- (9) Where a party entitled to costs is also liable to pay costs the court may assess the costs which that party is liable to pay and either –

- (a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or
  - (b) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay.
37. Therefore, by virtue of CPR 44.3(2), the general rule is that if a TOLATA claimant is successful, then the Defendant should pay the Claimant's costs; if he fails, he must pay the Defendant's costs. Put another way, the usual rule is that costs follow the event.<sup>12</sup>
38. Although other CPR costs provisions have been adopted into the ancillary relief rules, the provisions of **CPR 44.3. (1) to (5)** are expressly excluded from matrimonial finance proceedings.<sup>13</sup> Ancillary relief practitioners recognise that, as regards all claims commenced on or after 3<sup>rd</sup> April 2006, the general rule is that there will be no order for costs.<sup>14</sup> In the circumstances, a spouse who seeks specific financial relief on their divorce and issues a Form A should not expect to have their costs paid because an order is made in their favour at the conclusion of the case. However, if (for example) a TOLATA Claimant files a Claim Form seeking a declaration of beneficial interest in the face of a denial from the Defendant and subsequently establishes the existence of that interest, then the Claimant has been successful<sup>15</sup>.
39. The general rule is not, of course, inflexible and further rules provide for a discretionary process which will take into account other features of the litigation (**44.3 (4)**);
- 39.1. *Conduct of the parties.* This principally refers to litigation conduct although on their proper construction **CPR 44.3 (4) (a) and (5) (a)** do not contain any limitation such as would shut out reliance, in an appropriate case, on misconduct in and about the matters which triggered the litigation<sup>16</sup>.
  - 39.2. *Whether a party has succeeded on part of his case, even if he has not been wholly successful.*
  - 39.3. *Any payment into Court or 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.* **Part 36** concerns offers to settle made in accordance with its provisions and the consequences which flow if such offers do so comply. There is no prohibition against a party making an offer to settle in any way that he chooses but if the offer does not comply with the provisions of Part 36, the consequences specified in **36.10, 36.11 and 36.14** will not apply (**CPR 36.1**).
  - 39.4. A Part 36 offer must be in writing; state on the face of it that it is intended to have the consequences of Part 36; specify a period of not less than 21 days within which the Defendant will be liable for the Claimant's costs in accordance with 36.10 if the offer is accepted; state whether it relates to all or part of the claim and whether it takes into account any counterclaim (if relevant) (**CPR 36.2**). It may be withdrawn after 21 days on notice to the other side. (**36.3 (5)**). A Part 36 Offer can only be accepted by written notice; (subject to certain minor exceptions where the Court's permission is required), it may be accepted anytime until it is withdrawn (**36.9**). Provided that the Claimant accepts the offer within 21 days of it being made, the Claimant is entitled to his costs up to the date on which notice of acceptance was served on the offeror (**CPR 36.10 (1)**); this is automatic and it is a powerful litigation weapon. Where a Part 36 offer is made less than 21 days before trial or it is accepted more than 21 days after it is made, the Court will decide the issue of costs unless the parties can agree it (**CPR 36.10 (4)**). If it is accepted more than 21 days after it is made, the usual rule (i.e. unless the Court orders otherwise) is that: (1) the Claimant is entitled to his costs up until the end of the 21 day period; thereafter the offeree must pay offeror's costs (**CPR 36.10 (5)**). The effect of accepting an offer is to stay the claim (**CPR 36.11. (1)**). If the offer is not accepted and subsequently the offeror beats the offer at Trial, then (unless the Court considers it just to order otherwise), the offeree must pay the

<sup>12</sup> Daniels –v– Commissioner of Police for the Metropolis ([2005] EWCA Civ 1312; LTL 20/10/05; The Times October 28<sup>th</sup> 2005.

<sup>13</sup> FPR 2.71 (1) and 10.27 (1) (c) (added by the Family Proceedings (Amendment) Rules 2006 (SI 2006/352))

<sup>14</sup> FPR 2.71 (4) (a).

<sup>15</sup> See, for example, Day –v– Day ([2006] EWCA 415).

<sup>16</sup> Groupama Insurance Co Ltd –v– Overseas Partners Limited (Costs) ([2003] EWCA 1846).

offeror's costs from 21 days after the offer was made together with interest on those costs (36.14 (2))<sup>17</sup>. A Part 36 offer is to be treated as 'without prejudice save as to costs'.

- 39.5. Parties can continue to make Calderbank offers<sup>18</sup> and the Court will take them into account under CPR 44.3. (c) but they will not be necessarily binding as under the Part 36 regime.

### Compromise

40. The potentially punitive cost provisions of the CPR provide a further incentive to compromise. It is self-evident that the rules encourage parties: to make early realistic offers to settle the case least they are punished in costs at the conclusion of the trial; and to consider carefully and promptly offers that are made of them (particularly if those offers are Part 36 compliant).
41. Throughout this paper, I have referred to the various stages in the litigation when settlement is actively encouraged:
- 41.1. At the pre-action protocol stage (paragraph 19);
  - 41.2. In considering a stay for the purposes of negotiation at the Allocation stage (paragraph 31);
  - 41.3. Through the medium of the case management conference prior to trial (if one has been listed).
42. Furthermore, the Court must always strive to give effect to the 'overriding objective' and in doing so, must: help the parties to settle the whole or part of their case.<sup>19</sup> By virtue of CPR 1.3 the parties must help the Court to further that objective.
43. Furthering the overriding objective also includes; encouraging the parties to use an alternative dispute resolution (ADR) if the Court thinks that to be appropriate.<sup>20</sup> Parties may choose diverse media through which to broker a deal: simply in *inter partes* discussion or correspondence (including Part 36 exchanges) or by round table meetings. ADR is a specific resolution medium, involving shuttle diplomacy and its role in civil litigation has been given specific consideration by the Court of Appeal. Where a successful party had refused to agree to ADR, despite the Court's encouragement, that was a fact that the Court would take into account when deciding whether his refusal was unreasonable (*Halsey –v- Milton Keynes General NHS Trust* ([2004] EWCA Civ 576 4 All ER 920). However, in *Halsey*, the Court of Appeal indicated that the burden was on the unsuccessful party to show why there should be a departure from the general rule on costs, in the form of an order to deprive the successful party of some or all of his costs on the grounds that he refused ADR. In deciding whether a party had acted unreasonably, the Court should bear in mind the advantages of ADR over the Court process and have regard to all of the circumstances of the case. The factors that could be relevant included:
- 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 setting up the ADR would have been prejudicial;
  - vi. Whether the ADR had a reasonable prospect of success.

<sup>17</sup> See also CPR 36.14 (3) for further penalties in relation to a Claimant's offer.

<sup>18</sup> [1975] FLR Rep. 113.

<sup>19</sup> CPR 1.4 (1) (f).

<sup>20</sup> CPR 1.4 (20) (e)

**Trial**

44. Different Court Centres have their individual practices for listing trials. Assuming that the case has been allocated to the multi-track, the parties are likely to receive pro-forma pre-trial checklists to complete. The forms provide an opportunity for the parties to consider: which witnesses will be called (including experts); length of trial and whether the Court's previous directions have been complied with. Failure to complete the pre-trial checklist will lead either to the claim being struck out (if both parties fail - **29PD 8.3 (1)**) or list a hearing (if one party does - **29PD 8.3 (2)**), the assumption being that the defaulting party will bear the costs of that.
45. Once the pre-trial checklists are complete, the Court will fix the trial date or week, giving a time estimate and trial venue (**29PD 9.1**). The parties should strive to agree draft directions for the trial itself in their pre-trial checklists including (**29PD 9.2. (2)**); how the evidence is to be provided (including experts); trial timetable, preparation of a trial bundle and any other matter needed to prepare the case for trial. Although not prescribed in the rules, best practice would encourage a provision for a case summary and/or skeleton arguments in the trial bundle.
46. As to the trial itself, **29PD 10.2.** records that the judge 'will generally have read the papers in the trial bundle and may dispense with an opening address'. Witness statements stand as the party's evidence in chief (**CPR 32.5. (2)**) and a party may only give oral evidence of any matter not dealt with in a witness statement with permission of the Court.
47. On a final note, the Court may (particularly in a straight forward case) be prepared to summarily assess costs on the conclusion of the trial in accordance with CPR 44.7. (**29PD.10**). In the circumstances, parties should be armed with their schedules of costs and advocates prepared to make submissions on the size of those costs.

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