

TOLATA: a brief guide to issuing proceedings

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TOLATA work can be the bane of many family practitioners' lives. Whether it presents itself by way of an intervenor action in FR proceedings, as a response to a claim under Sch.1 of the Children Act or as a 'plain' cohabitee claim, distinct procedural and, more importantly, costs implications arise. This article will provide an overview of the procedural elements of starting a standalone TOLATA claim and (hopefully) provides some useful practical advice for this stage.

The court's powers in respect of TOLATA claims are somewhat more limited than the Financial Remedies Court. In TOLATA matters, the court cannot make property adjustment orders to reflect what it sees as a fair outcome for the parties, nor can it adopt a quasi-inquisitorial approach to do so. The court's powers in respect of beneficial ownership extend only so far as a declaration of an existing beneficial interest, save for cases of proprietary estoppel where the court may declare the existence of a beneficial interest to avoid the otherwise unjust result of an unremedied estoppel.

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. I focus on those claims in this article for the sake of convenience.

Pre-issue

Given most TOLATA claims turn on historical conversations, obtaining a detailed factual background including the following, if possible: dates of conversations and details of exactly what was said; copies of any emails/messages, etc. sent between the parties; photocopies of any handwritten letters or "family-meeting notes". It is absolutely key that as much detail as possible is gleaned about the circumstances of the trust as early as possible in the case. Your

initial meetings with the client will inform your advice as to prospects and any without prejudice offers, dealt with below.

Obtain Office Copies as soon as possible and any other Land Registry documentation, in particular, any TR1 (express declaration of trust) forms registered on the property. The existence of a TR1 will often complicate matters for a party wishing to assert the existence of an implied trust and will inform your advice as to prospects of success.

Regardless of prospects, alternative dispute resolution (ADR) is often the most prudent solution in respect of TOLATA claims. The majority of cases do not boast significant equity and it is simply disproportionate to litigate matters rather than taking a sensible and pragmatic approach at mediation, private FDR or arbitration.

Costs and offers

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

It is for this reason that realistic and persuasive without prejudice offers should be considered at the earliest opportunity. 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. It is open to parties to make *Calderbank* (without prejudice save as to costs) offers instead, though your client won't benefit from the positive consequences of a successful Part 36 offer if you do so. The primary point of offers, whether Part 36 or *Calderbank* 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.

Issue

If ADR hasn't been successful or isn't suitable for the case for whatever reason, the next question is under which procedure to issue.

TOLATA claims can be brought under CPR Part 7 or Part 8 depending on the circumstances. 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.

CPR 64 specifically provides that cases concerning the execution of a trust (which necessarily include claims under TOLATA) must be started using the Part 8 procedure (CPR 64.2 & 64.3). Part 8 claims are started with a claim form and supporting witness evidence. If the Defendant wishes to defend the matter, they must serve and acknowledgement of service along with any witness evidence. 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.

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. Though Part 64 appears to militate against issuing under Part 7, if it is likely that there will be a substantial dispute of fact then the best course of action in the writer's view is to issue under Part 7. Indeed, the White Book makes clear that 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. Given the somewhat contradictory guidance, 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.

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.

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 article provides a useful, albeit brief, summary of the factors to consider when issuing a TOLATA claim.

July 2021

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