

TOLATA Applications

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Headings

1. What is TOLATA?
2. Overview of Trusts
3. Provisions of the Act
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Key references

- Oxley v Hiscock [2004] EWCA Civ 546
Court of Appeal – Chadwick, Mance and Scott Baker
- Stack v Dowden [2007] 2 AC 432
House of Lords - Hoffman, Hope, Walker, Hale and Neuberger
- Jones v Kernott [2012] 1 AC 776
Supreme Court – Walker, Hale, Kerr, Wilson and Collins

What is TOLATA?

- The Trusts of Land and Appointment of Trustees Act 1996 (“TOLATA”)
- Page 1295 of Family Court Practice 2020
- Deals with issues arising from the ownership of land by those who are not married, including co-habiting couples, family members and commercial relationships

When not to use a TOLATA claim?

- Not for use with married couples/civil partners.
- Miller Smith v Miller Smith [2009] EWCA Civ 1297 – Court of Appeal. Not appropriate for resolution of issues between Husband and Wife.
- Cannot rely on strict trust and legal principles when dealing with the distribution of matrimonial assets.

Disadvantages of TOLATA claim

- Principles of the land law and law of trusts apply
- There is no re-distributive jurisdiction akin to that of the Matrimonial Causes Act 1973 (see Baroness Hale in *Stack v Dowden* at 61). It is not for the Court to impose its own view of what is fair upon the situation.
- Evolution over recent years, but still a number of restrictions

TOLATA Claims

- Can be in conjunction with a Schedule 1 Children Act 1989 application.
- Can have other monetary claims
- Can be stand alone

Types of Trust

- Express Trust
- Constructive Trust
- Resulting Trust
- Estoppel claims – in reliance upon a promise by D, C acts to his detriment

Express Trust

- Joint Tenants
- Tenants in common
- After 1st April 1998, Form TR1 provides for an express declaration of trust where a purchase in joint names
- Severance – does not require agreement of both parties, merely notice to the other party – section 36(2) of the Law of Property Act 1925

Express Trusts

- Rebuttable presumption that beneficial ownership is the same as legal ownership.
- Burden is upon the party seeking to demonstrate otherwise (Baroness Hale in Stack at para 56)
- “Cases in which the joint legal owners are to be taken to have intended their beneficial interest should be different from their legal interest will be very unusual.” - para 68

Express Trusts

- Jones v Kernott – Where a family home in joint names of cohabiting couple and both responsible for the mortgage, without any express declaration;
 - (i) They are joint tenants in law and equity;
 - (ii) The presumption may be displaced by a different common intention expressed when the home was purchased or at a later stage;
 - (iii) Otherwise, a common intention may be inferred from their conduct.
 - (iv) Where there is no evidence of common intention at the outset, each is entitled to such share as the court thinks fit, having regard to the whole course of dealings and
 - (v) Each case turns on its facts.

Constructive Trust

- If there was an express agreement, understanding or arrangement between the parties that the claimant was to have an interest in the property, then a constructive trust in favour of the claimant will arise.
- “Common intention constructive trust”
- Two stage analysis – 1 Agreement and 2 Size of interest

Constructive Trust – Size of Interest

- If the agreement, understanding or arrangement also quantified the claimant's interest, that will determine the nature and extent of the beneficial interest (*Lloyds Bank v Rosset* [1991] 1 AC 107)
- If not quantified, then the court will consider the entire course of dealing of the parties in relation to the property is assessing what the parties intended as to the nature and extent of the beneficial interest (*Oxley*, Chadwick LJ)

Resulting Trust

- A resulting trust may arise solely by operation of law.
- If the claimant provides the purchase money and the property is registered in the sole name of the defendant, there is a presumption of a resulting trust in favour of the claimant.
- Can be rebutted by the relationship between the two or other circumstances, such as establishing that a gift was intended.
- Share is calculated as a percentage of the purchase price of the property.

Provisions of the Act

Section 12

“A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land **is entitled by reason of his interest to occupy the land at any time** if at that time—

- (a) the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of a class of which he is a member or of beneficiaries in general), or
- (b) the land is held by the trustees so as to be so available.”

Provisions of the Act

Section 13

- Exclusions and restrictions on the right to occupy
- Where two or more people are entitled to occupy, the trustees may exclude or restrict the entitlement of one or more (but not all)
- Trustees can impose reasonable conditions – such as certain bill payments
- Where entitlement to occupy is restricted, the trustees can impose conditions on the other beneficiary to make payments of compensation (“occupation rent”) or forego any other benefit.
- Equitable accounting exercise – balancing the books

Provisions of the Act

Section 14

- The powers of the court
- Any person who is a trustee or has an interest in the property may make an application
- The court may, on such application, make any such order;
 - (i) relating to the exercise by the trustees of any of their functions as trustees or
 - (ii) declaring the nature and extent of a person's interest in property subject to a trust

Provisions of the Act

Section 15

- When determining a section 14 application, the Court must have regard to
 - (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 beneficiaryAny person who is a trustee or has an interest in the property may make an application
- Does not apply to section 335A of the Insolvency Act 1986

Provisions of the Act

- Common orders include;
 - Declarations as to the beneficial ownership of the property.
 - Equitable accounting, giving credit for mortgage payments, occupation rent, improvements etc.
 - Order for sale.
- **No power** to order a buy-out or lump sum.

TOLATA Procedure

- Civil Procedure Rules apply!
- Often issued as a Part 8 claim
 - Alternative procedure for claims
 - Simplified
 - “Unlikely to involve a substantial dispute as to facts”
- Part 7 – where contentious, other claims, needs detailed pleadings
- Court may at any stage order the claim to continue as if C had not used the Part 8 procedure (rule 8.1(3))

Part 8 Procedure - 1

- Use a Part 8 Claim Form
- State that Part 8 applies
- State the question which C wants the Court to decide or the remedy sought and the legal basis
- Must state brought under section 14 TOLATA
- Observe the Pre-action Protocol

Part 8 Procedure - 2

- No Particulars of Claim
- No Defence is required
- No default judgment
- Treated as allocated to the Multi-Track (rule 8.9(c))
- Claimant must serve any written evidence upon which he intend to rely when he files his claim form (Rule 8.5(1))

Part 8 Procedure - 3

- Acknowledgment of Service – N210
- Must be not more than 14 days after service of the claim form (rule 8.3)
- File and serve
- State whether the claim is defended and if the defendant seeks a different remedy
- If fail to file an A of S, the defendant may attend the hearing “but may not take part in the hearing unless the court gives permission” (rule 8.4(2))

Part 8 Procedure - 4

- A defendant who wishes to rely on written evidence **MUST** file it when he files his Acknowledgment of Service (rule 8.5(3))
- Can apply for an extension of time – PD8A, para 7.4.
- Can agree an extension, but only for 14 days after the A of S – PD8A, para 7.5
- **A defendant may not rely on any written evidence at the hearing UNLESS it has been served in accordance with rule 8.5 or the court gives permission (rule 8.6(1))**

Part 8 Procedure - 5

- Needs an application for relief from sanction
- Claimant can file further evidence within 14 days of service of the defendant's evidence upon him (rule 8.5(5))

Part 8 Procedure - 6

- Court may issue directions or may list for a first hearing.
- Very rare to achieve a substantive decision at the first hearing, but the Court can “proceed to hear the case and dispose of the claim” (PD8A, para 8.1)
- Directions for progression of claim – can be agreed and the hearing vacated.
- Listed for “Early Neutral Evaluation” hearing
- Possible mediation or other ADR

Part 7 Procedure

- Formal pleadings – claim form, defence and reply
- Listed for CMC or CCMC (Costs and Case Management hearing)
- Standard directions for disclosure, witness statements, experts etc.
- Allocation to track
- Mediation, alternative dispute resolution
- Costs budgeting, unless dispensed with
- Overall, likely higher legal costs

Costs

- An application under TOLATA is not for a financial order or remedy. Therefore it is not governed by FPR 2010
- Civil Procedure Rules, rule 44.2 applies.
- Court has discretion as to whether costs are payable by one party, the amount and when

Costs

- General rule – 44.2(2) – an unsuccessful party will be ordered to pay the costs of the successful party (“Costs follow the event”)
- Consider the impact of Part 36 and other offers.
- Compliance with the Pre-action Protocol

Conclusion

- Don't be afraid!
- BUT do be conscious that TOLATA claims are different from family proceedings
- Be alive to the fact that different rules apply
- Use counsel or other specialists in your own team early in the process

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It's time for Questions & Answers

Questions Welcome