

# A Brief Introduction to TOLATA

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# What happens when unmarried couples break up?

This talk is an introduction to the tools you can use to make a claim against assets held by the ex-partner, including s.2 Law Reform (Miscellaneous Provisions) Act 1970, resulting and constructive trusts, and promissory estoppel.

# What in the world is S2 LRMPA 1970???

- ▶ S 2 provides that when a couple terminates their agreement to marry, property in which either or both had a beneficial interest during the engagement is subject to the same rules as determine the rights of husbands and wives in equivalent circumstances, including S37 of the Matrimonial Proceedings and Property Act 1970. S 37 provides that where a spouse contributes in money or money's worth to the improvement of real or personal property in which either party has a beneficial interest, the contributing spouse acquires a share or an enlarged share in the property.
- ▶ So... the effect of this piece of legislation is to permit a party to an engagement to recover their investment in a property owned by the other party, regardless of strict legal ownership.
- ▶ Limitation: 3 years from when the engagement was terminated.

# Why use it?

- ▶ Proving the existence of the entitlement can be much simpler, given you just have to show the agreement to marry, that it has been terminated and a contribution in money, *or monies worth*
- ▶ It should therefore be simpler and thereby cheaper to bring the claim, and because the legal principles involved are simpler, easier to settle

# Trusts- some brief definitions

## ▶ Express Trust:

- ▶ Terms of the trust are expressly agreed by the parties, which are then determinative

## ▶ Resulting Trust:

- ▶ When B has made a direct financial contribution to the purchase of the property registered solely in A's name. Evidence of payment required. Not a gift or loan.

## ▶ Constructive Trust:

- ▶ An agreement, arrangement, understanding or promise between the two parties. The court can also impute a common intention.

## ▶ Proprietary estoppel:

- ▶ A doctrine that stops a person from going back on a promise even if a legal contract does not exist.

# S14 Applications

- ▶ Applications under section 14 of **TOLATA** 1996 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. A co-habitee whose name is not on the legal title of the property can make a court application under section 14 of **TOLATA** 1996 for an appropriate order to protect its beneficial interest. This would apply where the property is subject to an implied, constructive or resulting trust and the sole legal owner holds it on trust for itself and the other party as beneficiaries.
- ▶ To determine whether property subject to a trust of land should be sold on the application of a creditor of a beneficiary.

# Who is it for?

- ▶ Any of the following can make a court application under section 14 of **TOLATA** 1996:
  - ▶ A person who is a trustee of land.
  - ▶ A person who has an interest in property subject to a trust of land.
- ▶ In addition to trustees and beneficiaries under a trust of land, the following parties are able to make an application to the court under section 14 of **TOLATA** 1996 are:
  - ▶ A personal representative of a beneficiary.
  - ▶ A trustee in bankruptcy of a beneficiary.
  - ▶ A judgment creditor with a charging order over a debtor's share of the beneficial interest in the property.

# Express declarations of trust

- ▶ If the parties enter into an express declaration of trust that complies with the requirements of section 53(1) of the Law of Property Act 1925, that is determinative of the parties' beneficial interests in the property.
- ▶ At paragraph 10 of the TR1 there is a box which asks the parties whether the property is being held on trust and, if so, in what shares. It cannot be said clearly enough that this is conclusive and cannot be undone (in the absence of fraud or mistake). (See Goodman v Gallant [1986] 1 FLFR 513).
- ▶ It is not true that Stack v Dowden 2007 and Jones and Kernott 2011 have somehow undermined this fundamental principle. Although joint names cases, neither dealt with an express declaration of trust. In fact, in Stack, Baroness Hale said, *"no one now doubts that such an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel"*.
- ▶ Put to bed in recent case of Pankhania v Chandegra [2012] EWCA Civ 1438.
- ▶ Principles equally applicable to property owned in 1 person's name with an express declaration of trust between 2.



# No express declaration (joint names)

- ▶ 2 stages:
  - ▶ Ownership
  - ▶ Quantification of interest
- ▶ There is a presumption that equity will follow the law. Therefore in joint name cases, there is a presumption that each party intended to share the beneficial interest (and the responsibilities) in the property equally.
- ▶ The presumption can be rebutted by showing:
  - ▶ The parties had a different common intention at the time they acquired a home; or
  - ▶ That they later formed the common intention that their respective shares would change.
- ▶ This is only relevant to stage 1.

# No express declaration (sole name)

- ▶ In sole name cases (bought in sole name but as family home with joint money for both parties), the presumption is that the sole legal owner is the sole beneficial owner.
- ▶ The other party has to displace this presumption. This is a difficult burden to establish.
- ▶ The Claimant must either prove there was an express common intention that the property was to be shared beneficially, or the court must be able to infer a common intention from the parties conduct (constructive trust by mortgage payments or purchase payment but also “the parties whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership” Baroness Hale in *Abbott v Abbott* [2008] 1 FLR 1451).
- ▶ Whilst the law has moved on from taking account of simply mortgage or purchase contributions, it is fair to say that your case will be a hard one in the absence of such payments or an express agreement.
- ▶ Remember that in addition to showing actual or imputed intention, the party must also have acted to their detriment in reliance on the agreement.

# Quantification in both joint and sole

- ▶ If one's case gets over stage 1, there is a huge benefit to the party seeking to maximise their interest in the property. The court will consider what is fair, having regard to the whole course of dealing between the parties.
- ▶ The court will attempt to deduce objectively the parties' actual common intention as to the quantification of their beneficial interest from their conduct.
- ▶ Each case will turn on its own facts!
- ▶ Consider their views changing after one party finances a considerable extension to the property, where at the outset they considered themselves to have no interest.
- ▶ Why was the house bought? Who lived there? What contributions to the household did each party make? What jobs did each party have? Other assets they owned? Very fact specific.
- ▶ If not possible to work out the share from the evidence, the court can conclude that "each party is entitled to the share 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]
- ▶ See *Barnes v Phillips* [2016] HLR 3 – court imputed intention as to how the property was held.

# Which approach to take?

- ▶ Resulting trusts
  - ▶ Distinct advantage of simplicity- you get out what you put in
  - ▶ Simpler, less evidence, greater certainty, cheaper to litigate and easier to settle
  - ▶ Disadvantages- will now rarely be appropriate in domestic circumstances, you only get out what you put in
- ▶ Constructive trusts
  - ▶ Involve the consideration of what would be fair in the context of the relationship as a whole, non-financial contributions will be considered
  - ▶ Much harder to prove, complex in law and evidence, uncertain, likely to be expensive to litigate and hard to settle
- ▶ Proprietary estoppel
  - ▶ Often pleaded as an alternative to a constructive trust, can also work to undermine an express trust
  - ▶ Maybe circumstances were it works better- no financial contribution but gave up secure accommodation on the promise of a share of ownership

# Evidence

- ▶ Where the property is registered, official copies should be obtained from the Land Registry to confirm the registered proprietor(s) of the property which is the subject of the dispute, and to show what notices or restrictions have been placed on the registered title.
- ▶ The original purchase file must be checked in detail, in particular the TRI (transfer of whole) or TP1 (transfer of part), or copies of those obtained from the Land Registry. Any express declarations of trust should also be checked in detail.
- ▶ Correspondence from the time of the purchase relating to the parties? intentions, any advice given to the parties or any agreements made should also be checked. It can also be useful to obtain a copy of the mortgage application form, as well as evidence of contributions to the purchase price in the form of bank statements. This may include any contributions to the purchase price from third parties (such as parents). For example, this may explain why any of the following circumstances may exist:
  - ▶ The property was purchased in the sole name of one party.
  - ▶ The property was purchased in joint names but without an express declaration of trust.
  - ▶ The property was purchased in joint names but one party made a much greater contribution to the purchase price than the other.

# Contact Details

- ▶ Any Questions?
- ▶ THANK YOU

**You've been listening to Oliver Newman and Joanna Gillan**



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