TOLATA 1996: A PRACTITIONER'S GUIDE

TOM HYNES

ORIEL CHAMBERS

1. INTRODUCTION

1.1 This guide is intended to assist you in navigating the complex area of trusts of land in the family context. You should be able to dip in and out depending upon the issue you encounter – whether you are trying to ascertain the correct approach to pre-action conduct; or looking for some pointers on costs, you can use this guide as a roadmap or at least a starting point. **It is no substitute for specialist advice.**

1.2 This guide focuses upon cases arising after the separation of unmarried cohabitants (**the cohabitation context**). Upon cohabiting couples separating, the question often arises as to how the equity in their home should be shared. Was it purchased by both of them, with an agreement as to how it would be divided on separation? Was it purchased pre-relationship by one, but with subsequent promises about a "forever home"? Fundamentally, what did the parties intend to do with regards to ownership of the home? Such questions give rise to disputes which are resolved by way of **§§12 – 15 of the Trusts of Land and Appointment of Trustees Act 1996** (TOLATA). It will help you to focus upon not just the outcome your client seeks (which will normally be an order for sale, and / or a declaration of who owns what), but also on how the court acts to achieve such an outcome. In making an application under TOLATA, what you are actually doing is inviting the court to step into the shoes of the trustees, and to exercise the powers of the trustees concerning the subject property.

1.3 Within such applications, the court may receive written pleadings and evidence, hear oral evidence and submissions, and ultimately determine who owns what share of a property (by way of a **declaration**) and whether the property ought to be sold (**order for sale**).

1.4 As family practitioners, we are used to dealing with people, with the breakdown of their relationships, and the emotive issues that arise. We are guided by the Family Procedure Rules, a handful of statutes, and a patchwork quilt of case law. We are less used to the often more prescriptive and restrictive regime of the **Civil Procedure Rules (CPR)**, which govern applications under TOLATA. These are not applications in which practitioners can or should "dabble". The consequences of

non-compliance with the CPR are often severe and swift; and one must have a good understanding of the strategic management of claims (including how and when to make **Part 36 offers to settle**).

2. THE BASICS

2.1 What type of case are you dealing with? It is important to be clear at the outset and tailor your initial meetings and letter of claim accordingly. This also helps to focus the mind on what documents you need to produce. Until you are entirely clear as to what type of case you have, you should not proceed further.

2.2 Firstly, you should understand the distinction between the **legal interest** in a property and the **beneficial interest** in the property. The legal interest is determined very easily by reference to the **title deeds / office copy entry**. The **proprietorship register** on the office copy entry will identify one or several **legal owners**.

2.3 Disagreement as to the beneficial interest is what most commonly gives rise to TOLATA litigation. The starting point is that the beneficial interest will match the legal interest (maxim of equity: "**equity follows the law**"). Disputes arise where one or more parties contend that the beneficial interest should be held differently to the legal interest, such that there is a **trust of land**.

2.4 **EXAMPLE**: Mr A and Ms B are in a relationship but they are not married. They decide to purchase a property. It is put in Mr A's name and he appears on the title as the **sole proprietor**. On separation, Mr A says that the property is his, because he is the legal owner. The burden is placed on Ms B to show that in fact, the beneficial interest should be held in a different way to the legal interest. She will want the court to determine the **beneficial interest** in a way different to the **legal interest**.

2.5 Secondly, you should look for any evidence of the manner in which the parties **intended** to hold the legal and beneficial interests. If your case is that the beneficial interest matches the legal interest, you have an easier time. The **burden of proof** rests upon the party seeking to demonstrate that the beneficial interest is being held **other than** in accordance with the legal interest. That party is inviting the court to

make a **declaration** as to the beneficial interest in the property. You are seeking to establish the existence of a trust whereby the beneficial interest is held other than in accordance with the legal title.

2.6 **EXAMPLE:** Ms B instructs her solicitor to write a **Letter of Claim** to Mr A. In it, she sets out the details at 2.4 above. She explains that the parties each contributed 50% to the deposit on the property, with the remainder funded by mortgage. She sets out that the parties thereafter split bills including mortgage and upkeep equally. She acknowledges that Mr A is the **legal owner** but asserts that the parties **intended** for the **beneficial interest** to be shared equally. She invites Mr A to agree to a **declaration** that he holds the beneficial interest **on trust to the parties as tenants in common in equal shares**, followed by either a **sale** or alternatively for one party to **purchase** the other's 50% share in the property.

3. TYPES OF TRUST

3.1 For our purposes, there are three types of trusts in a cohabitation context – **express** declaration of trust; **resulting** trust; and most importantly for us, **constructive** trust.

3.2 **Express declaration of trust**: You should seek to identify at the earliest stage of your case whether there is an express trust. Most commonly, upon purchase, parties may complete a **TR1** which identifies clearly how the beneficial interest is to be held. If a TR1 sets out the beneficial interest, that is determinative and is more than likely the end of the road for any party trying to argue that the interests in the property should be held differently.

3.3 An express trust, formulated in writing, is unlikely to be capable of variation orally, and would have to be defeated by a further express trust. There are three routes to defeating an written express declaration of trust:

a. Fraud, duress or undue influence at the time the trust was entered into;
b. A further written express declaration of trust, in compliance with **section 53(1)(b) of the Law of Property Act 1925,** at any time after the originating trust deed was signed;

c. In rare circumstances, by the formation of a common intention constructive trust after the originating trust deed was signed.

3.4 At the time of writing, practitioners have had to grapple with the implications of a recent High Court appeal - Nilsson and another v Cynberg [2024] EWHC 2164 (Ch). That case challenged what many regarded as the conventional wisdom – that a TR1, properly completed and signed by all parties to it, absent fraud or duress, is binding for all time and incapable of being varied save by a further express trust, in writing.

3.5 In brief, in Nilsson, on appeal it was held that (in accordance with the dicta of Baroness Hale in Stack v Dowden) an express declaration of trust can be varied after it is made by **subsequent agreement. NOTE** that such an agreement does not need to be in writing, but may be by way of a **common intention constructive trust**.

3.6 **EXAMPLE:** Mr A is now in receipt of Ms B's Letter of Claim. He confirms to his solicitor that the parties entered into an **express declaration of trust.** He produces to his solicitor a **TR1**, which is signed by both parties, confirming that they are to hold the property as **tenants in common in unequal shares**, 60:40 to him. His solicitors rightly advise him that unless Ms B suggests that the document is **fraudulent**; or was signed under **undue pressure**; or was superseded by a **later** express declaration of trust which she can produce, the TR1 shows the existence of an **express trust** which is likely to be **determinative of the parties' interests for all time**. His solicitors enquire as to whether the parties discussed changing the way in which they owned the property. He confirms that they did no such thing. Therefore, Mr A's solicitor responds to Ms B's solicitor providing her with the TR1 and inviting them to agree either to sell the property and divide it in accordance with their interests; or pay him a sum representing his 60% share.

3.7 It is important to identify at an early stage if there is an express declaration of trust. To do so, you should obtain land registry documents/TR1 at the earliest opportunity. An express declaration is **conclusive** of ownership unless you can provide evidence of f**raud, duress, or undue influence OR novel circumstances giving rise to a common intention constructive trust**.

3.8 **Resulting trust**: A trust which **results** from the parties' respective **contributions** to the purchase price. However, this is unusual in a domestic cohabitation context, and absent an express declaration the court is likely to determine the application on the exercise of constructive trust principles.

3.9 **EXAMPLE:** Mr A contributes £80k and Ms B contributes £20k to the mortgage-free purchase of the property. A resulting trust would give rise to an 80:20 split.

4. CONSTRUCTIVE TRUSTS

4.1 **Constructive trusts** deserve a category of their own due to their ubiquity within cohabitation TOLATA applications. Where there is no express declaration of trust, but one party nonetheless wants to argue about the way in which the equitable interest in the property is held, most commonly such cases are run on **constructive trust principles**. The Claimant will have to prove both the **existence** of an equitable interest and the **size** of that interest.

4.2 In working out the type of case you are dealing with and the evidence you require to prove that case, it is helpful to think of 2 categories of constructive trust available in a cohabitation context: 1. A **common intention** that the beneficial interest was to be shared, either expressly agreed **or** understood **OR** 2. **Inferred** from the parties' conduct.

4.3 Those cases falling into the first category are typically proved by the production of **evidence of express discussions** between the parties. You should work with your client in these cases to identify old emails, text messages, WhatsApp messages, and even that data which may be forgotten but of no less relevance – for example an old Facebook post: "**We** just purchased **our** first home!!"

4.4 The absence of any express discussion is not necessarily the end of the road. Many cases will fall into the second category – whereby a trust can be **inferred** from the parties conduct. Did they both contribute to the deposit? Who paid the mortgage? Did they undertake any renovations/extension works? If so, who paid? Etc.

4.5 You will note the highly fact specific nature of the exercise in both Category 1 and Category 2. The court is trying to work out, from their conduct if not their words, what the parties intended, often many years after the fact. The fallibility of human memory, and the parties' vested interests in the outcome, tend to cloud this exercise.

4.6 Under constructive trust principles, it is not enough to show that the parties intended to share in the beneficial interest. The claimant must also demonstrate **detrimental reliance.** The Claimant must demonstrate that they acted to their detriment because of the parties' common intention. Examples of detriment include:

a. **Contribution to the deposit or mortgage**: this is the most common type of contribution which satisfies the court as to detriment;
b. **Home improvements**: general home maintenance, repairs, DIY etc are unlikely to suffice. However, if a party funds the construction of an extension, or assists materially in the renovation of a dilapidated property, they are likely to prove detriment.

4.7 Practitioners sometimes make the error of assuming that once a common intention constructive trust is found to exist, division of a property is going to be 50:50 as a consequence. On the contrary, the court must also determine the shares in which the property is to be beneficially owned. There will be those cases in which the court's findings as to the parties' intentions extend beyond an intention to share in the equitable interest, into the proportions of their respective shares.

4.8 In determining the quantum of the parties' shares, the court will consider the same sort of things they consider when determining whether there is a trust at all. Did the parties **expressly** discuss how the house would be owned? E.g. "This house is **ours, 50:50 all the way."** More commonly, the court will be left to infer the parties' intentions from the **whole course of dealings** regarding the property. Did they pay the mortgage 50:50? Was there an extension, where the parties split the cost 70:30? It would be impossible to set out here every possible permutation of circumstances that might lead to the court inferring the intention as to the parties' respective shares.

4.9 In determining shares, the court clearly cannot refuse to make a finding. The parties need to know the extent of their respective interests. What happens in a case where the court struggles to draw any inference from the parties' conduct? In that instance, the court retreats to its last limb of analysis: **imputation**. Inference is about working out what the parties **actually** intended; whereas imputation is about working out what the parties **would have** intended.

4.10 In imputing a common intention as to shares, the court seeks to identify what is **fair** having regard to the parties' whole **course of dealings** regarding the property. Clearly this is a somewhat fluid and very case specific notion. Fairness in a case where one party has paid the entirety of the mortgage and all bills will differ from a case where both parties pool money and share in the payment of outgoings.

5. INITIAL MEETING

5.1 Your initial meeting with the client is of huge importance. You must identify the issues and the extent of the claim at the outset. Full instructions will help to achieve a settlement rather than fighting to trial, which has **cost implications**. You should look to **front load** work on such cases – taking detailed instructions, obtaining the **conveyancing file**, obtaining **advice from counsel** if necessary, and securing all evidence as early in the process as possible. It is much more difficult to admit new evidence the later you are in the procedural timetable, and so you must get it right at the outset.

5.2 You should obtain from the client all of the following:

a. Title docs
b. Joint or sole owner?
c. **TR1** – declaration or not?
d. Separate trust deed?
e. **Conveyance file**? Hugely important but maybe in other sides name so may have to await disclosure;
f. Collate **evidence of contributions**? All bank and credit card statements for relevant periods, mortgage apps, Forms E previous divorces, proof of income for whole period;

g. Registration since 15 October 2012: Form JO and Public Guide 18.

5.3 You should only make contact with the other side when you feel you have a good grasp of the nature of your client's claim, the merits of that claim, and the evidence you have available in support of or contrary to the case they want to advance.

6. PRE ACTION PROTOCOL

6.1 Having spoken to the client and obtained detailed instructions, you should write to the other side and engage in good **pre-action conduct**.

6.2 There is no specific pre-action protocol for TOLATA claims. As such, we must use the generic **Practice Direction: Pre-Action Conduct and Protocols**.

6.3 **Compliance with the pre-action protocol**: although not conducted under the watchful eye of the courts, pre-action conduct can come back to haunt you. Compliance is important for many reasons, but most importantly:

a. The court will consider pre-action conduct when giving case management directions (see CPR 3.1(4) – (6)); and
b. The court will consider pre-action conduct when making orders for costs (see CPR 44.2(4)(a) and 44.2(5)(a)).

6.4 **Letter of claim**: This is your opportunity to set out your stall from the outset. It does not require you go into as much detail as will be required once proceedings are issued. However, it is still important to give the other side sufficient information to commence investigations of their own. It must cover:

a. The basis on which the claim is made;
b. A summary of the facts;
c. What you want from the other side;
d. How the amount you are seeking has been calculated.

6.5 The proposed defendant has 14 days to acknowledge receipt and respond (**3 months** in the most complex case). The letter of response should include a clear indication

as to whether or not the claim is accepted. If it is not accepted one would expect the letter of response to address:

a. The reasons why the claim is not accepted;
b. An explanation of the parts of the claim/facts which are disputed;
c. An indication of whether there is to be a counterclaim and any details of any such counterclaim.

6.6 What happens even at this early stage in the litigation can and will be used both as a **sword and a shield** in later arguments about party **conduct**. A well-drafted Letter of Claim or Response ensures that both sides know the nature of the case they must meet, and perhaps more importantly protects you from suggestions that you have withheld important aspects of the case. Equally, a poorly drafted pre-action letter allows later attacks on costs, with the ever-looming **threat of costs** on the indemnity basis for the worst offenders.

6.7 Requests for further info should be responded to if reasonable: specifically, the parties are expected to disclose key documents relevant to the issues in dispute.

6.8 Consider ADR: although it may not always seem to be the case in our adversarial system, litigation is supposed to be a last resort. With the sums of money regularly in issue in TOLATA cases, it is an area ripe for the consideration of settlement. Although ADR is raised here in the context of pre-action work, parties are under a continuing obligation to consider whether settlement might be on the horizon – even post-issue. Just a handful of options:

a. Mediation – a third party shuttles between parties, facilitating settlement;
b. Arbitration – an agreed upon authority figure – possibly an experienced quantity surveyor in the context of TOLATA – decides the dispute;
c. Early neutral evaluation: a third party gives an informed opinion on the dispute – a good way to get a feel for how a judge might view your case down the line.

6.9 **BE WARNED**: Cost consequences – as indicated, it will not suffice to simply pay lip service to ADR. The court may require the parties to **evidence** the fact that ADR has been attempted (even if the net result was to no avail).

6.10 Note that increasingly courts consider the listing of **Early Neutral Evaluation** within the case management of TOLATA cases. ENE is effectively a form of FDR. It will not be suited to those TOLATA cases in which there is some substantial dispute of fact.

"A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay ***additional court costs.****"*

- Practice Direction: Pre-Action Conduct and Protocols, paragraph 11

6.11 Some implications:

a. It creates a clear **strategic advantage** to "extending the olive branch": if the other side does nothing – remains silent – there is a good argument to be made in due course that they ought to pay additional court costs, irrespective of the outcome;
b. Parties refuse offers to engage in ADR at their peril;
c. Even in the event that one side considers it unsuitable for ADR, they would do well to respond to any offer of ADR by the other side, lest they be accused of remain silent in response to an offer made in good faith.

7. ISSUING PROCEEDINGS

7.1 **Part 7 or part 8?** It is normally good practice to issue a TOLATA claim under Part 8. In the event that there proves to be a substantial dispute of fact, the court can give directions for the claim to proceed under Part 7.

7.2 **Pleadings** – it is advisable to involve Counsel in drafting the pleadings (particularly Particulars of Claim or Defence) as amendments have consequences.

7.3 **Case Management Conference** – the Court will give focussed tailor-made directions for disclosure and evidence. It is important to have identified your case and your opponents (ie; valuations, improvements, capital reductions to mortgage). Costs budgeting, CPR 3.12-3.18. Only "with good reason" will a Court depart from a costs management order. If court insists on costs budgeting will be listed for CCMC with no directions at all.

7.4 **FDR or not?** Some Courts do, some Courts don't. There is no formal requirement and it may be pointless if it is a sole name case due to substantial dispute of fact not likely to be determined at a without prejudice negotiation hearing. It is very useful if there is equitable accounting or disputes as to the % size of share. Don't be afraid to request one especially in a joint names case where quantification is the main issue.

7.5 **Evidence**: Witness statement. State what the basis of your claim is. Set out clearly any conversations in as much detail as possible. Set out how the "family" finances were conducted, if it's a family case. Refer to the § 15 factors:

a. Intentions of parties who created the trust;
b. Purposes for which the trust is held;
c. Welfare of a minor who occupies or who might reasonably be expected to occupy any land subject to the trust as his home;
d. The interests of any secured creditor of any beneficiary;
e. Circumstances and wishes of beneficiaries entitled to occupy.

7.6 The available **disclosure options are at CPR 31.5(7)**.

a. No disclosure
b. Party disclose documents on which it relies and at same time request any specific disclosure from another party
c. Issue by issue disclosure
d. An order that each party disclose any document which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other, or which leads to an enquiry which has either of those consequences

e. Standard disclosure

f. Any other order which the court considers appropriate.

7.7 Not less than seven days before the first case management conference, and on any other occasion as the court may direct, the parties must, at a meeting or by telephone, discuss and seek to agree a proposal in relation to disclosure that meets the overriding objective (CPR 31.5.(5)).

8. THE COURTS POWERS ON THE CLAIM

8.1 Sale, deferred sale or dismissal of claim.

8.2 Note that the court cannot order a transfer of the property. The court can, however, make a "Begum order" whereby a party may have the 1st right of refusal to purchase the property prior to it being listed for sale.

8.3 Court may defer sale to permit Mr A a period of time to buy out Ms B's share at a market value or agreed sum.

9. THE COURT'S CONSIDERATIONS UNDER THE STATUTE

9.1 The section 15 factors:

a. Intentions of parties who created the trust;

b. Purposes for which the trust is held;

c. Welfare of a minor who occupies or who might reasonably be expected to occupy any land subject to the trust as his home;

d. The interests of any secured creditor of any beneficiary;

e. Circumstances and wishes of beneficiaries entitled to occupy.

10. PROPRIETARY ESTOPPEL

10.1 Did Mr A make a promise at the time of the acquisition that Ms B relied upon to her detriment and would it now be inequitable for Mr A to avoid his promise?

10.2 If you cannot establish an implied trust (constructive or resulting) you may establish that proprietary estoppel operates so as to assist you.

10.3 Leading cases Thorner v Major 2009 and Guest and another v Guest [2023] 1 All ER 695.

11. EQUITABLE ACCOUNTING

11.1 Equitable accounting is very important and is often overlooked. Claims tend to arise at the end of a relationship, when A remains in the property and B leaves. A may take over payment of the mortgage. They might undertake significant renovations (depending upon the passage of time). When B argues that they have a beneficial interest, that benefit comes with the burden of ownership of which we are all aware. For example, in a 50:50 case, strictly speaking they ought to be continuing to contribute their 50% share to the mortgage – it is a joint burden.

11.2 Practically, think about these issues at your initial meeting. Ask yourself- are the shares fixed- say at 50/50 or 60/40 but does A owe B some money which should be deducted from A's share? This must be pleaded. Part 7 is much more appropriate for claiming an account as it can be set out in your Defence and Counterclaim or your Claim.

11.3 Remember it has no effect on the shares; it adjusts the amounts payable after sale to each party.

11.4 Occupation rent is itself a species of equitable accounting. It is always worth including in your claim/defence. More commonly, it is used as a bargaining tool and will be off-set against any reductions to mortgage. However, occasionally a person remaining in occupation has nothing to offset against the claim for occupation rent. Perhaps the person leaving has continued to pay their share of the mortgage. Perhaps there is no mortgage.

12. COSTS

12.1 CPR 44. Discretion on costs

12.2 Costs will follow the event

12.3 N260

12.4 Make Offers under Part 36 to protect. Use Form N242A

12.5 Costs to trial £15,000 plus the other sides if you lose.

12.6 Cost benefit analysis- constant.

12.7 **Part 36** - It is a code. Common law rules don't apply.

12.8 Court can take into account Content of an offer- check the up to date rules. Frequent changes.

12.9 49.5% offers

12.10 Costs- bear your own or they pay.

12.11 Beating a Part 36 offer.

12.12 Court will impose part 36 penalties unless considers unjust to do so.

TOM HYNES
ORIEL CHAMBERS
JANUARY 2025
tom.hynes@orielchambers.co.uk

APPENDIX 1: CASE LAW SUMMARIES

LLOYDS BANK PLC v ROSSET [1991] 1 AC 107

Under *Rosset* the House of Lords set down a two stage enquiry:

(i) Was there a common intention for the ownership of the property to be shared?
(ii) If so, what was the parties' common intention as to the quantum of shares?

There was also a need for the claimant to establish detrimental reliance. It was important to keep the above two stages of enquiry separate. At the first stage , whilst it was relatively easy to infer an intention to share ownership where the legal title was shared, where the property was in the sole name of one party Lord Bridge held that the common intention to share ownership might be established either:

(a) By express discussions evidencing an agreement or understanding (*Rosset I*); or
(b) By drawing inferences from conduct (*Rosset II*).

The necessary conduct, in Lord Bridge's view consisted of direct contributions to the purchase price of the property, whether initially or by assuming liability under a mortgage and / or by payment of mortgage instalments. It was, he said, "extremely doubtful whether anything less will do". This was a strict test. However, Stack said the hurdle was set rather too high. this **first** stage of the enquiry was not in issue in *Stack v Dowden* because in *Stack* the property was in joint names.

STACK V DOWDEN [2005] EWCA CIV 857

The majority view:

The majority came to the following conclusions:

(1) Just as the starting point where there was sole legal ownership was sole beneficial ownership, the starting point, in the domestic context, where there was joint legal ownership, was joint beneficial ownership. The onus was on the party contending that the beneficial interests were divided otherwise than as the title showed to demonstrate this on the facts. A conveyance of a domestic property into joint names indicated both legal and beneficial joint tenancy, unless and until thecontrarywasproven.

(2) In identifying the extent of the parties' beneficial interest in a property, the court was seeking to ascertain the parties' shared intentions, actual, inferred or **imputed**, with respect to the property, in the light of their whole course of conduct in relation to it *(note that this is stage two of the Rosset enquiry as stage one is not usually engaged where the property is in joint names).*

(3) In the context of homes conveyed into the name of one party only, a more flexible approach to quantification of an established beneficial interest had emerged; curiously, in the context of homes conveyed into joint names, but without an express declaration of trust, the courts had sometimes reverted to the strict application of the principle of resulting trust. The approach to quantification in cases in which the home was conveyed

into joint names should certainly be no stricter than the approach to quantification in cases in which it had been conveyed into the name of one only and to the extent that cases such as *Walker –v- Hall* [1984] 1 FLR 126, *Springette –v- Defoe* [1992] 2 FLR 388 and *Huntingford – v- Hobbs* [1993] 1 FLR 736 held otherwise they should not be followed. When quantifying an established beneficial interest, the court should take a wide view of what contributions were to be taken into account (*note again this is stage two of the "Rosset enquiry"*), while remaining sceptical of the value of alleged improvements that were really insignificant, or elaborate arguments, suggestive of creative accounting, as to how the family finances were arranged.

(4) In a joint names case, the questions were not simply "what is the extent of the parties' beneficial interests?" but "did the parties intend their beneficial interests to be different from their legal interests?" and "if they did, in what way and to what extent?" There were differences between sole and joint names cases when trying to divine the common intentions or understanding between the parties, including the fact that the decision to put the property into joint names would almost always have been a conscious decision.

(5) The burden would be on the person seeking to show that the parties had intended their beneficial interests to be different from their legal interests, and in the ordinary domestic case it would be difficult to establish to the court's satisfaction that an intention to keep a sort of balance sheet of contributions existed or should be inferred or **imputed** to joint owners. The domestic context was very different from the commercial world. Many factors other than financial contributions were likely to be relevant. Ultimately, cases in which joint legal owners would be taken to have intended that their beneficial interests should be different from their legal interests would be very unusual.

(6) *Stack –v- Dowden* was a very unusual case in that, although the couple had cohabited for a long time and had four children together, they had kept their financial affairs rigidly separate. This was strongly indicative that they did not intend their share, even in the property in joint names, to be held equally. Ms Dowden had made good her claim for 65% of the property, having contributed far more to the acquisition of the house than Mr Stack

The minority view in Stack –v- Dowden

It is important to stress that Lord Neuberger's view is not the law insofar as it is in conflict with the view of the majority. Lord Neuberger argued for a stricter more "Chancery based" approach which would lead to greater certainty and clarity in the law. The approach should be the same in the commercial context as it was in the domestic context albeit that the different factual circumstances could lead to different results. Where cohabitants had made different contributions to the purchase price of a property, the beneficial ownership, *in the absence of relevant evidence to the contrary*, would be held in the same proportions as the contributions to the purchase price under a resulting trust, because, given that the presumption of advancement did not apply, this was the practical and most consistent approach. If there was other relevant evidence enabling the court to deduce the intention of the parties, the resulting trust could be rebutted and replaced by a constructive trust. Such an intention could be express or inferred, **but not imputed**. Where the resulting trust presumption applied at the date of acquisition, only subsequent discussions, statements or actions which could fairly be said to imply a positive intention to depart from

the apportionment would justify a change in the way in which the beneficial interest was held.

The linguistic argument around the words "impute" and "infer" may have considerable significance. Lord Neuberger identified the difference thus at paragraph 126:

"An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements and even though they had no such intention. Imputation involves concluding what the parties would have intended whereas inference involves concluding what they did intend."

It is not, however, clear that Baroness Hale, who gave the main speech for the majority, differed in substance from Lord Neuberger's conclusion as to the court's task. Although she referred to "actual, inferred or imputed" at paragraph 60 she said at paragraph 61, having referred to the Law Commission's Discussion Paper on Sharing Homes (which suggested a holistic approach to quantifying a beneficial share with the court undertaking a survey of the whole course of dealing between the parties and taking into account all conduct which throws light on the question of what shares were intended):

"That may be the preferable way of expressing what is essentially the same thought for two reasons. First, it emphasises the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable to the court to abandon that search in favour of the result which the court itself considers fair. For the court to impose its own view of what is fair upon the situation in which the parties find themselves would be to return to the days before *Pettitt –v- Pettitt* [1970] AC 777 without even the fig leaf of section 17 of the Married Women's Property Act 1882."

If the court is entitled to *impute* a common intention it can insert its own views as to what the parties intended even though, as a matter of fact, that was never their intention. The court could, therefore, impose its own view of what would be fair.

It is difficult, when reading paragraphs 60 and 61 of her speech together to know what Baroness Hale meant by "imputation". It is perhaps unfortunate that in subsequent cases the mantra "actual, inferred or imputed" has been adopted by the Courts without much analysis of what that is intended to mean. Taking matters slightly out of turn in *Kernott –v- Jones* [2010] EWCA Civ 578 Rimer LJ was moved to say at paragraph 77 – with somewhat forced politeness – after analysing Baroness Hale's opinion on this point:

"As for Baroness Hale's statement in [60] that the court must or can also look for the parties' *imputed* intention, I do not, with the greatest respect, understand what she meant."

The House of Lords was plainly intending to discourage cohabitation disputes where the title was in joint names. However, there was a strong argument for saying that *Stack –v- Dowden* itself was not an exceptional case. Furthermore, Baroness Hale, at paragraph 69 of her judgment set out a non-exhaustive list of the factors which might persuade a court to

conclude that the beneficial interests should not follow the legal title. Potentially, therefore, there was plenty of ammunition for litigation going forward.

Stack was concerned with stage two of the *Rosset* enquiry and so anything said on stage one was strictly obiter. However, they did indicate that Lord Bridge's test, summarised above, was too narrow and potentially productive of injustice. The law, they said, had moved on.

Fortunately, the Privy Council was able to consider stage one only a few months later in *Abbott –v- Abbott* **[2007] UKPC 53** (26 July 2007). *Abbott* was an appeal from the Eastern Caribbean Court of Appeal where there is no statutory ancillary relief regime operating on divorce and property disputes are resolved under the general law of property and trusts. The case concerned the beneficial ownership of a former matrimonial home in the husband's sole name. The Eastern Caribbean Court of Appeal relied heavily on Lord Bridge's dicta as a reason for strictly limiting the wife's claims. The Privy Council followed up on their disapproval (as Law Lords) of the narrow *Rosset* test and concluded that the court had to ascertain the parties' shared intentions "actual, inferred or imputed with respect to the property in the light of their whole course of conduct in relation to it." In other words, *Rosset II* has been significantly widened. There was, however, also a concern that the way in which the Board dealt with the point in *Abbot* tended to blur the distinction between stage one and stage two of the *Rosset* enquiry[2].

JONES V KERNOTT [2011] UKSC 53

This case concerns the correct approach to calculating beneficial interests in property where the legal title to the property is held in joint names by an unmarried couple but there is no express statement of how it is to be shared.

Ms Jones and Mr Kernott met in 1981. They had two children together. In 1985 they purchased a house in Thundersley, Essex in their joint names. The price paid was £30,000 with a £6,000 deposit paid exclusively by the proceeds of sale from Ms Jones's previous home. No declaration was made as to how the beneficial interest in the property was to be held. The mortgage and upkeep on the house was shared between them. In 1986 they jointly took out a loan of £2000 to build an extension. Mr Kernott did some of the work himself.

The relationship deteriorated and in 1993 Mr Kernott moved out. From that point onwards Ms Jones lived in the Thundersley property with both children. In 1996 Mr Kernott bought his own house in Benfleet, Essex. Over the years, the value of the Thundersley property increased and in 2006 Mr Kernott indicated that he wished to claim a beneficial share in it. In response, Ms Jones, in 2007, applied to the county court for a declaration under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 that she owned the entire beneficial interest in the property. By 2008 the property was valued at £245,000.

The county court judge noted that the house was first purchased to set up a family home. It was bought in joint names and a presumption arose that they intended to jointly share the beneficial ownership of it as well. Up until 1993 there was no evidence to rebut that presumption. Ms Jones claimed however that in the 14 and a half years following there was evidence that their common intention had changed. Mr Kernott had ceased to make

contributions towards the running of the house and had made only very limited contributions towards the support of their children. Furthermore it was mostly during that latter period that the value of the property had increased.

The judge held that their common intention had indeed changed. In reliance upon the decision of the House of Lords in *Stack v Dowden*[2007] UKHL 17, [2007] 2 AC 432, he held that once the initial presumption of joint beneficial ownership is displaced and there is no further clear evidence as to the division of shares in the property it falls upon the court to infer or impute an intention to the parties as to the division of the property that they, as reasonable and fair people, would have intended. He decided that Mr Kernott was entitled to only a 10% share.

Mr Kernott appealed to the High Court arguing that it was wrong for the court to infer or impute a change of common intention and further wrong for the judge, in effect, to substitute a division that he considered to be fair as between the parties. Mr Nicholas Straus, QC sitting as a High Court judge dismissed his appeal. Mr Kernott appealed to the Court of Appeal which, by a majority (Jacob, LJ dissenting), allowed his appeal.

Judgment
The Supreme Court unanimously allows the appeal and restores the order of the county court. Lord Walker and Lady Hale give the lead judgment. Lord Collins agrees with Lord Walker and Lady Hale and adds some reflections of his own. Lord Kerr and Lord Wilson agree in the result but reach it by a different route.

SOUTHWELL V BLACKBURN [2014] EWCA CIV 1347

The Court of Appeal in Southwell v Blackburn upheld the order of a lump sum payment from a businessman to his ex-partner. The female partner had brought a claim based on both constructive trust and proprietary estoppel in respect of a property in Droitwich. The claim for a beneficial interest based on constructive trust was dismissed, but the claim based on proprietary estoppel was upheld on appeal and the Claimant received £28,500.

The facts were that the parties met when she was 40 and he was 41. She had 2 daughters aged 11 and 12 from a previous marriage. He was single. She was living in secure rented accommodation on which she had spent between £15,000 and £20,000 fitting out and furnishing. About 2 into the relationship they sought to set up home together. 6 Charlotte Bronte Drive, Droitwich was purchased in his sole name. It was financed solely by him (£100,000 mortgage and £140,000 equity from his previous property). The judge found that it was a joint decision to live in Droitwich and that she was involved in looking for houses. She also claimed that it was intended that they would purchase the house together and the only reason that it was not was because she was in Manchester and it was inconvenient for her to sign the documents. This was rejected by the Judge, he found that Mr Southwell had been scrupulous to ensure that she did not become involved in the legal and financial side of the property as he was mindful that she may achieve a beneficial interest.

However, he was satisfied that the decision to purchase the house was made jointly with the intention that it would become their home where they would live together effectively as man and wife. The Judge was also sure that there was discussion about her move and the

consequences for her. He assured her that she would always have a home and be secure in this one. He thought he was taking on a long term commitment to provide her with a secure home and said so to her. She was taking a big risk, moving from a secure rented house on which she had spent a lot of money, leaving her job and moving her children. The documents that she saw at the time which provided for her to receive a lump sum and pension in the event of the Defendant's death, suggested a real commitment from him and were intended to and did, encourage the Claimant. The Judge at first instance found: "The discussions they had were not specific as to ownership of the home they were moving into. They were specific as to the nature and extent of his commitment to her and the provision of secure accommodation for her."

An award of £28,500 was made on the basis that it would be unconscionable for the Defendant to do anything other than seek to put her back in much the same position she was in before she gave up her own house.

The Judge found that she had spent about £15,000 on her own house and had spent the remaining £4,000 -£5,000 she had as her contribution to the setting up of the new house with the Defendant. The Judge updated the figure of £20,000 to £28,500 to take account of inflation.

The Court of Appeal upheld the decision. The first ground of appeal concerned the quality of the necessary representation. It was contended that "providing her with a secure home" was not sufficiently clear and precise. This was rejected. He said that "she would always have a home and be secure in this one."

The Court then considered detriment. It was held that detriment must be assessed and evaluated over the course of the relationship. Regard was had to the benefit that each derived. She had had rent free accommodation and completed a 3 year degree. He was supported by her in the successful pursuit of his career in which he achieved a promotion and an increase in earnings.

The final question was one of unconscionability. Having regard to the detriment to the claimant when she abandoned her secure home in which she had invested and invested what little else she had in a home to which she had no legal, this made the promise irrevocable and repudiation of that promise would be unconscionable.

APPENDIX 2: SOME KEY CASES

1. How Stack v Dowden is applied in practice

(i) Abbott –v- Abbott *[2007] UKPC 53 (26 July 2007)*
(ii) Laskar –v- Laskar *[2008] EWCA Civ 347*
(iii) James –v- Thomas *[2007] EWCA Civ 1212*
(iv) Morris –v- Morris *[2008] EWCA Civ 257*
(v) Holman –v- Howes *[2007] EWCA Civ 877*
(vi) Fowler –v- Barron *[2008] EWCA Civ 377*
(vii) Q –v- Q *[2008] EWHC 1874 Fam*
(viii) Webster –v- Webster *[2009] 1 FLR 1240*
(ix) Mirza –v- Mirza *[2009] 2 FLR 115*
(x) Qayyum –v- Hameed *[2009] 2 FLR 962*
(xi) Walsh –v- Singh *[2010] 1 FLR 1658*
(xii) Thomson –v- Humphrey *[2010] 2 FLR 107*
(xiii) Amin –v- Amin *[2009] EWHC 3356 (Ch)*
(xiv) Kernott –v- Jones *[2010] EWCA Civ 578*

2. Detrimental reliance

(i) Hudson v Hathway [2022] EWCA Civ 1648

3. Imputation or Inference

(i) Abbott –v- Abbott *[2007] UKPC 53 (26 July 2007)*
(ii) James –v- Thomas *[2007] EWCA Civ 1212*
(iii) Kernott –v- Jones *[2010] EWCA Civ 578*

3. Investment properties

(i) Laskar –v- Laskar *[2008] EWCA Civ 347*
(ii) Adekunle –v- Ritchie *[2007] EW Misc 5 (EWCC)*
(iii) Amin –v- Amin *[2009] EWHC 3356 (Ch)*

4. Proprietary Estoppel

(i) Negus –v- Bahouse *[2008] 1 FLR 381*
(ii) Yeoman's Row –v- Cobbe *[2008] 1 WLR 1752*
(iii) Thorner –v- Majors *[2009] 2 FLR 405*
(iv) Powell –v- Benney *[2007] EWCA Civ 1283*
(v) Negus –v- Bahouse *[2008] 1 FLR 381*
(vi) Holman –v- Howes *[2007] EWCA Civ 877*
(vii) Herbert –v- Doyle *[2008] EWHC 1950 (Ch)*
(viii) Q –v- Q *[2008] EWHC 1874 Fam*
(ix) Stallion –v- ASH & Stallion *[2009] [2010] 2 FLR 78*

(x) MacDonald & Bannigan –v- Frost *[2009] EWHC 2276 (Ch)*
(xi) Gill –v- Woodall & RSPCA
(xii) Cook –v- Thomas *[2010] EWCA Civ 227 (an appeal on the facts)*
(xiii) Henry –v- Henry *[2010] UKPC 3*
(xiv) Lester –v- Woodgate *[2010] EWCA Civ 199*
(xv) Ashby –v- Killduff *[2010] EWHC 2034 (Ch)*
(xvi) Southwell -v- Blackburn [2014] EWCA CIV 1347
(xvii) Guest and another -v- Guest [2023] 1 All ER 695

5. Equitable Accounting

(i) Wilcox –v- Tait *[2007] 2 FLR 871*
(ii) Young –v- Lauretani *[2007] 2 FLR 1211*
(iii) Murphy –v- Gooch *[2007] 2 FLR 934*
(iv) Re Barcham (In Bankruptcy) *[2008] EWHC 1505 (Ch)*
(v) Amin –v- Amin *[2009] EWHC 3356 (Ch)*

6. Creditors and the family home

(i) Close Invoice Finance Ltd –v- Pile *[2009] 1 FLR 873*
(ii) Re Haghighat (A Bankrupt) *[2009] 1 FLR 1271*
(iii) National Westminster Bank Plc –v- Rushmer *[2010] 2 FLR 362*

7. Undue Influence

(i) Wallbank & Wallbank –v- Price *[2008] 2 FLR 501*
(ii) Hewett –v- First Plus Financial Group Plc *[2010] EWCA Civ 312*
(iii) Smith –v- Cooper *[2010] EWCA Civ 722*

8. Interference with an express declaration

(i) Clarke v Meadus [2010] EWHC 3117 (Ch)
(ii) Bahia v Sidhu [2022] EWHC 875 (Ch)
(iii) Nilsson and another v Cynberg [2024] EWHC 2164 (Ch)

APPENDIX 4: CV

oriel
EST 1965

YEAR OF CALL

Tom Hynes

EMAIL

tom.hynes@orielchambers.co.uk

YEAR OF CALL

2015

AREAS OF LAW

Commercial & Chancery Law, Family Law,

OVERVIEW

Tom acts in cases arising out of the breakdown of relationships. He specialises in financial remedies, ranging from the most straightforward matters up to those concerning business/company assets, reviewable dispositions, family trusts / farming cases, non-disclosure, and TLATA. He also enjoys a busy private family practice.

Tom delivers lectures annually at the extremely well-regarded Oriel Chambers Family Law Seminar Day (Chester and Preston). He is a repeat invitee to the Liverpool Law Society Private Child Conference, and this year will also speak at the Society's Family Finance Conference. He also offers bespoke in-house training to solicitors upon request, having delivered such training upon (inter alia) TLATA (a beginner's guide), costs in the civil jurisdiction for family practitioners, and ever-popular case law updates.

EDUCATION

- University of Liverpool LLB University of Liverpool LLM (Law, Medicine and Healthcare)
- Nottingham Trent University BPTC

APPOINTMENTS AND AWARDS

- Junior Counsel to the CrownRegional C Panel (2020)
- All-Ireland Scholarship (2008 Recipient)
- Inner Temple Major Scholarship (2013)

PROFESSIONAL MEMBERSHIPS

- **Family Law** Bar Association
- Northern Circuit

LECTURES

Tom is able to deliver bespoke talks on a range of topics; all enquiries are welcomed.

FINANCIAL REMEDIES

Tom works collaboratively with instructing solicitors to identify pragmatic, settlement-oriented routes to conclude proceedings swiftly where possible. He offers grounded advice pre-issue as to strategy, settlement offers, and the drafting of documents.

In the event that proceedings must be issued, he is a robust and well-prepared advocate. He is extremely comfortable and happy in the courtroom environment. He is forensic in his preparation.

Tom is available to advise and represent all the way from pre-issue to final hearing and where necessary appeal.

COHABITATION DISPUTES

Tom's practice originally focused upon civil law. Upon moving into the family arena, he carried over his knowledge of civil procedure and practice. Accordingly he is adept at advising and representing parties in conflicts arising out of unmarried cohabitation.

He advises as to offers, pre- and post-issue strategy, merits, and quantum. He can assist instructing solicitors at an early stage in proceedings in identifying the existence of any express or implied trusts, with a view to saving clients the cost of expensive and emotionally difficult legal proceedings unless absolutely necessary.

PRIVATE LAW (CHILDREN)

Tom accepts instructions in private law proceedings, including contested applications for Child Arrangement Orders and injunctive relief proceedings.

In a domestic abuse context, he offers a confident voice in the courtroom on behalf of parties who may be in fear or subject to serious accusations.

PUBLIC ACCESS

Normally Tom only accepts instructions from solicitors, who act on behalf of their lay clients. In the event that you require advice or representation, but have decided not to instruct a solicitor, in certain circumstances you may instruct Tom directly.

PUBLICATIONS

Limited assets: meeting reasonable needs – is there enough to go around? [2020] Fam Law 618

The Former Matrimonial Home: Is it invariably matrimonial? (May 2023, Oriel Chambers Knowledge Hub)