

## **Assembling a TOLATA case – a crib sheet**

*This is intended to be an aide memoire for obtaining instructions and gathering together all of the relevant information, rather than an explainer on the law.*

### **The starting point**

1. In whose name was the property purchased? Joint names (assuming no express declaration, presumption that equity follows the law) / sole name (burden of proof on claimant to establish a share).
  - a. Why was the property purchased in the way it was?
  - b. Who liaised with solicitors? Did both parties engage with the process?
  - c. Has the conveyancing file been obtained? Do you need the cooperation of the other side to obtain a copy?
  - d. Are there any attendance notes on the conveyancing file or letters of advice concerning the ownership of the property and the parties' shares?
  - e. Joint name cases: is there a tenancy in common or a joint tenancy?
    - i. Did the conveyancing solicitor properly explain the nature of a joint tenancy to the parties?
    - ii. Has the joint tenancy subsequently been severed?
  
2. Was there any written declaration of trust or declaration of the beneficial shares either at the time of purchase or subsequently?
  - a. Have you checked the TR1? What does Box 10 say?
  - b. Is the TR1 signed only by the vendor or also by the parties? Note conflicting authorities on who needs to sign: *Insol v Cowlam* [2017] EWHC 1822; *Taylor v Taylor* [2017] EWHC 1080.
  - c. If the declaration appears unfair, is there any reason to suspect undue influence, fraud or mistake? Was there a conflict of interest, was either party advised to seek independent advice and did they do so?
  - d. Did the client think they had a different beneficial interest? Have you interrogated the conveyancing file to see who did and knew what?
  - e. Has there been any subsequent attempt to vary the beneficial interests?

NB. If there is an express declaration of trust, that will be determinative of the parties shares unless:

- there is some vitiating factor justifying set aside or rectification [eg forgery, lack of authority, mistake, undue influence etc];
- s.2(1) of the Law Reform (Miscellaneous Provisions) Act 1970 / s. 37 of the Matrimonial Proceedings and Property Act 1970 (engaged couples) applies;
- proceeds can be adjusted on equitable accounting principles;
- shares can be varied on the basis that a proprietary estoppel / constructive trust has subsequently arisen, but note no clear authority that this is possible (Hale in *Stack* suggests yes, Norris J in *Arif v Anwar & Rehan* [2015] EWHC 124 suggests no).

### **Assuming scope for inferred, constructive or resulting trusts remains**

*Context of purchase / discussions*

3. What is the context of the purchase? Wholly domestic (in which instance constructive trust analysis applies) or investment property (in which instance

resulting trust analysis focused on financial contributions may apply see *Laskar v Laskar* [2008] EWCA Civ 347 and *Marr v Collie* [2017] UKPC 17).

4. Was anything said about the beneficial ownership of the property (especially immediately before the purchase)?
  - a. What was said and by whom, where, when?
  - b. Did the discussions truly concern ownership or just making a home together?
  - c. Were there any witnesses?
  - d. Is there any subsequent corroboration, e.g. by conduct?
5. What was the client's understanding as to the beneficial ownership of the property at the time it was bought?
  - a. Would the other party have shared this view?
  - b. What was it based on?
6. Was anything said about the beneficial ownership of the property after purchase for instance when major life events happened, other assets were acquired or disposed of and/or upon separation?
  - a. What was said, by whom, where, when?
  - b. Were there any witnesses?
  - c. Is there any subsequent corroboration, e.g. by conduct?

*Financial contributions / detrimental reliance*

7. Has the client incurred any financial detriment anything in reliance upon an understanding that they would receive a greater share e.g.:
  - a. Making a greater share of mortgage payments?
  - b. Incurring any expenditure, undertaking works to the property?
8. Has either party acted to their detriment in any way not directly connected to the finances?
  - a. e.g. giving up secure accommodation elsewhere, giving up a career, caring responsibilities, labour on the property?
  - b. Why did they do so? Was this connected with a promise that they would have a share? Would they have done this anyway?

N.B unless coupled with express promises of a share in the property, conduct of this nature alone unlikely to be enough to establish an interest in a sole name case or rebut presumption of beneficial joint tenancy in joint name case.
2. Timing – when did any alleged act of detrimental reliance take place? Before or after discussions about ownership?
3. How much was the purchase price and the costs of purchase?
4. Details of the mortgage:
  - a. What was the original mortgage advance? Interest only or capital repayment?
  - b. Who was expected to pay it and in what shares?
  - c. Who in fact paid the mortgage? Has either party failed to pay their agreed share of the mortgage?

- d. What about any associated policies e.g. endowment or mortgage protection?
  - e. Were these payments enabled by contributions made by the other owner?
  - f. Has any capital owing been repaid, and by whom and from what source?
  - g. Have any further advances been made and for what were they used?
  - h. What is currently outstanding?
5. How was the balance of the purchase paid?
- a. Where part of the purchase price came from the sale of a previous property, in what shares was that property beneficially owned?
  - b. Contributions from relatives:
    - i. Who contributed? What was their relationship (both connection and quality of relationship) like with each purchasing party?
    - ii. Nature of the contribution – gift or loan or might the contributor have an interest?
    - iii. To whom was any gift made, to the parties jointly or only one of them?
    - iv. If a loan, what were the terms of the agreement, who was to repay it, has it in fact been repaid and by whom?
  - c. Was there any right to buy discount? Who was the original tenant? Was the right formally shared? What discussion took place about that? At what point was the sharing formalised?
6. What were the respective earnings of the parties during their ownership of the property?
- a. What did each contribute to household expenditure?
  - b. Were they effectively running joint finances?
  - c. How did they manage their finances? Each broadly contributing what they could? More mercenary ring-fencing their resources or more 'in it together' attitudes?
  - d. Has household expenditure been arbitrarily split – one paying mortgage and one paying other bills? Could the party paying the mortgage have afforded to do this without the other party covering other bills?
7. What improvements / repairs have been done to the property?
- a. How much did they cost?
  - b. When? Before or after separation?
  - c. Were they agreed or envisaged at the time of the purchase? Were they subsequently agreed?
  - d. What is the resulting increase in value of the property, if any?
  - e. Who funded them and how?
8. What documentary evidence does the client have of the above?
- a. Bank statements?
  - b. Invoices?
  - c. Texts, emails?

**Post separation considerations – what should happen to the property?**

9. What is the current value of the property?

10. Has there been any discussion between the parties about what should happen to the property?

- a. Does any express declaration of trust include a mechanism to trigger a sale or permit a buy out?
- b. Has there been a separation agreement of any description and is it binding?
- c. Is there anything from which a variation of the beneficial interests can be inferred (where permissible – see *Jones v Kernott*) e.g. either party receiving any capital post separation such proceeds of an endowment policy or cash to enable them to purchase other accommodation?

11. Whether the property should be sold:

- a. How did the parties intend the property be used?
- b. Who now occupies the property?
- c. Can they maintain the mortgage instalments?
- d. What resources do they have to re-house themselves?
- e. If there are any children (or other vulnerable people) in occupation, do they have any particular needs to stay or in respect of re-housing (think about health and education in particular)? Is that need time limited?
- f. What prejudice will the non-occupier suffer from any delay in sale?
- g. Can one buy the other out? Now it is clear there is scope for seeking an order to that effect pursuant to *Bagum v Hafiz* [2016] EWCA Civ 801 (see also *Kinglsey v Kingsley* [2020] EWCA Civ 297 (Ch)).

12. Accounting issues:

- a. Who has remained in the property post separation? Are there children continuing in occupation?
- b. Was the other party excluded – could they practically have continued to live at the property?
- c. What is the rental value of the property? How are you going to evidence this if you are proposing to seek an occupation rent?
- d. Who has paid what after separation? What are the precise figures for the mortgage instalments, broken down into interest and capital repayments?
- e. Has either party paid for works to the property post-separation, if so how much and was the other party aware of the expenditure or asked for a contribution?

13. Ancillary issues e.g.:

- a. Occupation or non-molestation orders;
- b. Schedule 1 Children Act 1989;
- c. Contents;
- d. Joint accounts;
- e. Joint debts;
- f. Loans or other debts between the parties.



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