

# ToLATA 1996 Update

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1. This update will focus on three core areas of law and practice:
  - a. Equitable accounting (EA)
  - b. Imputing and inferring intentions and whether to apply a resulting trust analysis or a common intention constructive trust analysis
  - c. Bringing the claim (tactics and pitfalls): pre-action conduct and issuing claims under Part 7 or Part 8 of the CPR
2. It is case law that shapes and develops the law in TLATA 1996 matters. Therefore, the law invariably fails to move in a straight line....!

## **Issue 1: Equitable accounting ('EA')**

3. **EA is the process whereby the court uses the sale proceeds of a property owned by co-owners to account between them for various items of expenditure related to the property and its ownership. To that end, an EA can drastically affect the ultimate division of the proceeds (although not the underlying beneficial interests).**
4. Equitable accounting is an equitable remedy: as such, equitable maxims apply and the court's wide discretion is engaged.
5. EA is an account that is distinct from the determination of beneficial interests: the only relevance, perhaps, is as to the percentage applied to any account (i.e., a 60/40 beneficial ownership will likely result in an account being taken in proportion to those beneficial shares).
6. EA has a body of pre-TALATA case law and a line of authority that post-TLATA cases should be decided on the basis of the statutory criteria. The reality is that Judges may focus on either or, on occasion, combine the two.

7. The common threads of EA cases are:
  - a. Payments by one party and not the other to mortgage interest and capital payments
  - b. Expenditure on improvements or repairs at a property
  - c. The application of an occupational rent
8. It is called EA because you effectively take a balance sheet of each co-owners financial claims and responsibilities arising out of their co-ownership and draw up an account of these, providing at the end either a credit or debit to one party or a nil account.

It was described by Lord Justice Griffiths in **Bernard v Josephs [1982] 1 Ch 391 at 405**, in the following way:

*" When the proceeds of sale are realised there will have to be equitable accounting between the parties before the money is distributed. If the woman has left, she is entitled to receive an occupation rent, but if the man has kept up the mortgage payments, he is entitled to credit for her share of the payments; if he has spent money on recent redecoration which results in a much better sale price, he should have credit for that, not as an altered share, but by repayment of the whole or a part of the money he has spent. These are but examples of the way in which the balance is to be struck."*

#### Fig 1. The 'account'

9. An occupation rent is a notional rent charged against the occupier of a property in favour of the non-occupier.
10. The modern law is that an occupation rent may be ordered where this is necessary to do broad justice or equity between the parties (**Byford v Butler [2004] 1 FLR 56**).
11. Essentially, the occupation rent is a compensatory payment to the non—occupying party (see TLATA 1996, section 13(c): the trustees may 'require any beneficiary in occupation of the property to pay compensation to any beneficiary whose right to occupy has been excluded or restricted').

#### Exclusion

12. The occupation rent used to be confined to cases where one party was 'excluded' from the home: the modern approach seems to be that, in all but the average case, the court will approach the issue on the basis that a relationship breakdown necessitates one party leaving the property. Therefore, arguments about exclusion rarely add anything to a case.

13. The rate of occupation rent –in modern terms – is normally calculated according to the market rent for the property or the cost of alternative accommodation (see Neuberger, **Stack v Dowden**, dissenting judgment, para 157). There is also authority to assess the rental value on the basis of a 'fair rent' assessment of a rental officer (**Dennis v McDonald (1982) 3 FLR 398**).
14. Expert evidence may be required to provide rental values.

What if the occupying party has children of the family to house?

15. The responsibility of both parties to continue to house their children may provide a good defence to a claim for occupation rent.
16. In **Stack v Dowden [2005] EWCA Civ 857, [2006] 1 FLR 254** the Court of Appeal was in no doubt about its power to order a beneficiary under a trust of land who is in occupation of that land to make payments to a beneficiary whose own entitlement to occupy the land has been excluded or restricted. However, this was subject to the factors set out in s.13(4) TOLATA which required the court to have regard to the intentions of the person who created the trust, the purposes for which the land is held and the circumstances of each of the beneficiaries. The trial judge had overlooked the fact that the occupying party (Miss Dowden) continued to provide a home for the four children of the couple. Consequently, there was no continuing obligation to pay occupation rent (or in the words of TOLATA "...make payments by way of compensation...") pending sale of the property. It is clear from the judgment of Lord Justice Chadwick that the position may have been different if the court concluded that Miss Dowden was deliberately stalling the sale of the property.

Liability for mortgage payments

17. The occupying party may continue to pay the mortgage (capital and/or interest).

Interest payments

18. The occupying party will normally seek to set off the mortgage interest payments against the occupation rent charged by the non-occupying party (if one is applicable).
19. **In Re Gorman (A Bankrupt) [1990] 1 WLR 616, sub nom Re Gorman (A Bankrupt) ex parte the Trustee of the Bankrupt v The Bankrupt and Another [1990] 2 FLR 284**, Mr Justice Vinelott noted the practice of setting occupation rent off against mortgage interest payments and stated:-

*"That practice is not, of course, a rule of law to be applied in all circumstances irrespective of, on the one hand, the amount of the mortgage debt and the installments paid, and on the other hand, the value of the property and the*

*amount of the occupation rent that ought to be fairly charged. It is a rule of convenience and more readily applies between husband and wife or cohabitantes than between a spouse and a trustee in bankruptcy of the other co-owner. Moreover, although the practice as recorded in Suttill v Graham [1977] 1 WLR 819 is to set the interest element in mortgage installments against a notional occupation rent, leaving the party paying the mortgage installments free to charge a due proportion of any capital repayments against the share of the other, I can see no reason why, if an account is taken, the party paying the installments should not be entitled to set a due proportion of the whole of the installments paid against the share of the other party. The mortgagee will normally have a charge on the property for principal and interest and a right to possession and sale to enforce his charge. The payment of installments due under the mortgage operates to relieve the property from the charge and gives rise to an equitable right of contribution by the co-owner who has not paid his due proportion of the installments. "*

20. See also **Leake v Bruzzi [1974] 1 WLR 1528** in which the court treated the interest element of the mortgage as offsetting the occupation rent.

#### Capital repayments

21. Capital repayments in excess of the interest element of the mortgage increase the equity available on sale.
22. To that extent, it is often unfair if the non-paying party receives the benefit of the paying party's capital repayments.
23. Often, therefore, the additional 50% of a capital repayment paid by the occupying party can be 'credited' to his or her side of the equitable accounting exercise (he/she being liable for 50% of the capital repayment in any event).

#### Improvements

24. Here I am discussing larger expenditures, not general repair and maintenance of a property.
25. The general approach is that expenditure on a property without the non-occupying party's knowledge or (constructive) consent will not be credited to the payer: expenditure undertaken with such knowledge will be credited to the payer.
26. Improvements / work that the co-owners were obliged to carry out will be taken into account (e.g. subsidence work required to prevent collapse).

### Calculation

27. Generally, the payer may seek an account to be credited with the lesser of (a) 50% of the increase in the value of the property resulting from the expenditure or (b) 50% of the actual expenditure.

### Rent received and other payments

28. If the occupying party receives rental income (for example, from a lodger), they must be accounted for to the non-occupying party.
29. Account may be taken of buildings insurance payments (and perhaps contents if the content remain both parties' property)

Assessment of the EA

**Fig 2, example of an annual account to be undertaken during the conference, joint owners with equal beneficial shares. Sandra in occupation, John in a rental property**

	John	Sandra	Sandra's account	John's account
Rent received from lodger				
Occupation rent				
Mortgage payment (interest)				
Mortgage payment (capital)				
Buildings insurance				
New windows (cost £4,000 with consent of John)				
<b>TOTAL</b>				

**Update: the case of Davis (as Trustee in Bankruptcy of Jackson) v Jackson [2017] EWHC 698**

- a. Married couple but estranged from 2001 and lived apart
- b. W re-mortgaged family home, raised £36,000 deposit, purchased a second property with a mortgage and moved to the second property. Title and mortgage to second property in W's sole name.
- c. 2 years later, W executed declaration of trust stating that the second property was held by her on trust for H and W in equal shares / she also agreed to pay half the mortgage payments

- d. The purpose of this declaration of trust is unclear!
- e. W paid all the interest payments on the mortgage and household costs herself
- f. W faced financial difficulty a few years later. Possession proceedings. H intervenes and property is transferred to joint names in law with a joint mortgage. H continues to make no payments to the mortgage. TR1 indicated joint tenants.
- g. Five years later, H is declared bankrupt. Trustee seeks to realise his half share in the second property.
- h. W bound by the TR1 and the declaration of trust.
- i. Equitable account: W paid mortgage interest of £103,000 between purchase date and H's bankruptcy. £123,000 to date of trial. W entitled to claim a credit of one half of the payments of interest which she made under the mortgage until date of trial. Trustee argued that, after H's bankruptcy, credits to W for mortgage payments should be offset against an occupation rent in favour of the Trustee. The court decided that, although TLATA guidelines apply, the court is not bound to follow these and can rely on the older case law. The reason for this decision is that, pursuant to 12(2) TLATA, a beneficiary (the Trustee) does not have a right to occupy land 'if it is unsuitable for occupation by him'. Clearly, it would not be suitable for the Trustee to actually occupy the property with W, hence the argument that no compensatory payment is due to the Trustee.
- j. As the second property had been purchased to provide a home for the W and not for H and W together, H never had, nor was he intended to have, a right to occupy the second property himself. Therefore, it would not be equitable for the Trustee, who simply has H's interest in the second property vested in him, to claim an occupation rent.
- k. Therefore, the proceeds of sale were divided equally subject to W receiving credit for one half of all the mortgage payments made from date of purchase to date of sale..

## **TLATA 1996**

### 12 The right to occupy.

(1) 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.

(2)Subsection (1) does not confer on a beneficiary a right to occupy land if it is either unavailable or unsuitable for occupation by him.

(3)This section is subject to section 13.

### 13 Exclusion and restriction of right to occupy.

(1)Where two or more beneficiaries are (or apart from this subsection would be) entitled under section 12 to occupy land, the trustees of land may exclude or restrict the entitlement of any one or more (but not all) of them.

(2)Trustees may not under subsection (1)—

(a)unreasonably exclude any beneficiary's entitlement to occupy land, or

(b)restrict any such entitlement to an unreasonable extent.

(3)The trustees of land may from time to time impose reasonable conditions on any beneficiary in relation to his occupation of land by reason of his entitlement under section 12.

(4)The matters to which trustees are to have regard in exercising the powers conferred by this section include—

(a)the intentions of the person or persons (if any) who created the trust,

(b)the purposes for which the land is held, and

(c)the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.

(5)The conditions which may be imposed on a beneficiary under subsection (3) include, in particular, conditions requiring him—

(a)to pay any outgoings or expenses in respect of the land, or

(b)to assume any other obligation in relation to the land or to any activity which is or is proposed to be conducted there.

(6) Where the entitlement of any beneficiary to occupy land under section 12 has been excluded or restricted, the conditions which may be imposed on any other beneficiary under subsection (3) include, in particular, conditions requiring him to—

(a) make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted, or

(b) forgo any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary.

(7) The powers conferred on trustees by this section may not be exercised—

(a) so as prevent any person who is in occupation of land (whether or not by reason of an entitlement under section 12) from continuing to occupy the land, or

(b) in a manner likely to result in any such person ceasing to occupy the land, unless he consents or the court has given approval.

(8) The matters to which the court is to have regard in determining whether to give approval under subsection (7) include the matters mentioned in subsection (4)(a) to (c).

#### 14 Applications for order.

(1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section.

(2) On an application for an order under this section the court may make any such order—

(a) relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or

(b) declaring the nature or extent of a person's interest in property subject to the trust, as the court thinks fit.

(3) The court may not under this section make any order as to the appointment or removal of trustees.

(4) The powers conferred on the court by this section are exercisable on an application whether it is made before or after the commencement of this Act.

## ISSUE 2: Inference and imputation

30. The debates continue as to what can be inferred and what can be imputed in relation to divining the parties' common intentions (in cases in which there is no express declaration of trust).

31. In my view, the law is relatively settled.

### Overview

1. An express declaration of trust is conclusive, and a defendant may not go behind it, in the absence of fraud or mistake (*Clarke v Harlow* [2007] 1 FLR 1).
2. In the absence of an express declaration, the various routes to be followed in establishing a beneficial interest in property are:
  - (i) resulting trust, through direct or indirect contributions to the property (less important in domestic / family cases but still relevant in cases of commercial ventures, e.g., buy-to let investments); and
  - (ii) common intention constructive trust at the time of purchase – or later -, or where parties formed a common intention that an incoming cohabitee would have a beneficial share in the property owned by the other; and
  - (iii) proprietary estoppel, where a representation by the owner must relate to a specific property or part of a property, which must be objectively ascertainable, and in reliance the claimant was induced to act to their detriment (*Lissimore v Downing* [2003] 2 FLR 308; *Van Laethem v Brooker and Caradoc Estates Ltd* [2006] 2 FLR 495);
3. The leading case, of course, is *Stack v Dowden* [2007] 1 FLR 1858. Courts must apply strict legal principles and ignore 'fairness' in determining whether a common intention constructive trust exists.
4. A claimant must show that it was **jointly intended** (i.e., 'commonly intended') that she should have a share. A common intention that a person provides a home for another and children is not sufficient to establish the common intention that the latter should also have a share in the property:  
*Thomson v Humphrey* [2010] 2 FLR 107, Ch.

### Registration in joint names

5. Where the transfer of property into joint names was completed before 1 April 1998 and in circumstances where Form TR1 does not expressly declare the beneficial interests, there is a presumption in the case of domestic property that the beneficial interests are also held equally, until the contrary is proved on trust principles.

6. In *Stack v Dowden* [2007] 1 FLR 1858 (HL) a couple had cohabited over 27 years and raised four children together, latterly in jointly owned property. The woman had made the greater capital contribution and had the higher earnings and established a beneficial entitlement of two thirds. However, '*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***' (and see *Fowler v Barron* [2008] 2 FLR 831). This is not so unusual, as subsequent case law has shown.
7. The starting point where there is joint legal ownership is that there is joint beneficial ownership. The burden is on the party who wishes to show other than joint beneficial ownership.
8. Baroness Hale identified a non-exhaustive list of factors, as evidence of the parties' intentions: including the reason the home was acquired, the nature of the relationship, how the purchase was financed initially and subsequently, and how the parties arranged their finances and discharged their outgoings. To this list can be added the financial contributions (or lack of them) to the maintenance of children, unless it is clear that to do so would result in double liability, e.g. arrears owed to the Child Maintenance Service; see *Barnes v Phillips* [2015] EWCA Civ 1056, para 41.
9. The Supreme Court has given further guidance in *Jones v Kernott* [2012] 1 FLR 45. A family home was bought and registered in the joint names of the parties, paid for jointly and occupied by them and their two children for 8 years. Upon the relationship ending, they tried unsuccessfully to sell the property. An insurance policy was then divided equally and the man went on to buy his own property. He made no further contribution to the family home, which was thereafter solely funded by the woman.
10. The Supreme Court has established the guiding principle that where a family home is in the joint names of a cohabiting couple and both are responsible for the mortgage, without any express declaration as to beneficial interests
  - (i) they are joint tenants in law and, on presumption, equity;
  - (ii) this presumption may be displaced by a different common intention expressed when the home is purchased, or at a later stage;
  - (iii) otherwise, a common intention may be deduced objectively (inferred) from their conduct, as in *Gissing v Gissing* [1971] 1 AC 886 at [906] and *Stack v Dowden* at [69];
  - (iv) where there is no evidence as to their joint intentions at the outset, or that intention has changed but it is not possible to determine the new

intention, each is entitled to such share as the court considers fair, having regard to the whole course of their dealings with regard to the property: *Oxley v Hiscock* [2004] 2 FLR 669 at [69] followed; and

(v) each case turns on its facts.

11. In *Barnes v Phillips*, CA (see above), the fact that the man received the full benefit of monies released by way of a re-mortgage on the jointly owned property shortly before the relationship ended was good evidence of an inferred common intention to vary the parties' interests in the property.
12. Different principles can apply to the ownership of commercial property (e.g. buy to let investments), see *Laskar v Laskar* [2008] 2 FLR 589, CA, where the shares of a rental property held by mother and daughter were defined as two-thirds / one-third in accordance with their respective financial contributions.

### **Registration in a sole name**

13. Where a property is registered in the name of one party, but is occupied by both of them, they may have agreed to a sharing of the beneficial interest or each party may have made a financial contribution to purchase costs, mortgage costs and household bills, but there may be no express agreement or declaration of trust.
14. In the case of such an asset (owned in law by one person but another claims to share a beneficial interest in it), a two-stage analysis is required to determine whether a common intention constructive trust arises.
15. First, the person claiming the beneficial interest must show that there was an agreement (express or *inferred* from conduct) that he should have a beneficial interest in the property owned by his partner, even if there was no agreement as to the precise extent of that interest.
16. Secondly, if such an agreement can be shown to have been made, then absent agreement or inference on the extent of the interest, the court may *impute* an intention that the person was to have a fair beneficial share in the asset and may assess the quantum of that fair share in the light of the whole course of dealing between them in relation to the property; see *Jones v Kernott*, para 64.
17. The determining principles were set out by the HL in *Lloyds Bank plc v Rosset* [1990] 2 FLR 155, subsequently applied by the Court of Appeal in *Oxley v Hiscock* [2004] 2 FLR 669.

**18.** The principles where the family home is in the name of one party only have been considered in *Jones v Kernott* [2012] 1 FLR 45, at [52].

51. In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.

(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.

(2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.

(3) Their common intention is to be deduced objectively from their conduct: "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party" (Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden*, at para 69.

(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that each is entitled to that share which 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, para 69. In our judgment, "the whole course of dealing ... in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).

52. This case is not concerned with a family home which is put into the name of one party only. The starting point is different. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct. If

the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at para 51(4) and (5) above.

53. The assumptions as to human motivation, which led the courts to impute particular intentions by way of the resulting trust, are not appropriate to the ascertainment of beneficial interests in a family home. Whether they remain appropriate in other contexts is not the issue in this case.

**19.** Care must be taken not to *impute* an intention within the first stage: *imputation* only applies to the second stage in determining the appropriate beneficial interest, see *Capehorn v Harris and Another* [2015] EWCA Civ 955.

### **Establishing a fair share and the whole course of dealing**

**20.** The requirement for the court to establish a fair share, having regard to the whole course of the parties' dealings in relation to the property, was established in *Stack v Dowden* [2007] 1 FLR 1858 (HL).

**21.** In *Graham-York v York* [2015] EWCA Civ 72 the Court of Appeal clarified that

(a) in deciding what a party's fair share is in a property, the court is not concerned with some form of 'redistributive justice'; instead

(b) the 'fair' share is decided only by considering the parties' dealings in relation to the property (emphasis added); and

(c) there is no presumed starting point of equality of interests, even in cases involving a substantial financial contribution from a non-owner.

22. It is essential, in my judgment, to bear in mind that, in deciding in such a case what shares are fair, the court is not concerned with some form of redistributive justice. Thus it is irrelevant that it may be thought a "fair" outcome for a woman who has endured years of abusive conduct by her partner to be allotted a substantial interest in his property on his death. The plight of Miss Graham-York attracts sympathy, but it does not enable the court to redistribute property interests in a manner which right-minded people might think amounts to appropriate compensation. Miss Graham-York is "entitled to that share which the court considers fair having regard to the whole course of dealing between

them in relation to the property". It is these last words, which I have emphasised, which supply the confines of the enquiry as to fairness.

Wodzicki v Wodzicki [2017] EWCA Civ 95

- a. At first instance, decision made that the property was held on trust. Appellant sought declaration that he is the sole beneficial owner of the property.
- b. Property purchased in 1988 by appellant's father, George: property registered in joint names of George and his wife. Property purchase financed by loan secured on a property jointly owned in France over 8 year term. The mortgage stated that the finance was provided to 'purchase a property to be occupied as a primary residence by the daughter of the borrower (the appellant)'.
- c. Appellant paid £5,000 in repairs and various outgoings for the property but not the mortgage, which was repaid by George and his wife.
- d. George visited the property but he and his wife never lived there.
- e. George dies intestate in 2010. George's wife sought possession of the property in 2013.
- f. In 2010 George's wife wrote to the appellant stating 'if you give up any entitlement to inheritance under French law, I could gift you the house in London (the property) and you would have the house for yourself alone without having to share it'.
- g. The appellant claimed that George had told her that when he finished repaying the mortgage, and when he thought she was 'ready', he would transfer the property to his daughter.
- h. The judge accepted that there had been an agreement for the appellant to have a life interest in the property by means of occupation. However, the judge refused the submission that the appelland had sole beneficial ownership of the property.

15. The judge did not, however, accept that the appellant was the sole beneficial owner of the property. She said in her judgment at [30]-[31]:

*"30. The fact that it was put in joint names of George and the Claimant militates against that intention because it was not necessary to put it in their joint names to*

*secure the mortgage. The loan was secured on the house which they had built in France. The fact that George put the English house in joint names is evidence that he intended his wife to be the joint owner and never made known to her expressly or impliedly that his daughter was to be the sole owner.*

*31. That would explain the content of the August 2010 letter from the Claimant to the Defendant offering that if the Defendant disclaimed her share of the French inheritance the Claimant would transfer the London house to her alone. That suggests to me that at that time the Claimant was proceeding on the basis that she was not the sole beneficial owner of the London house and that she and the Defendant both had beneficial interests in it. This is contrary to the case pleaded for her that the Defendant had no beneficial interest in the house."*

- i. The judge held that the appellant and respondent beneficially owned the property in the proportions to which they had respectively contributed to its purchase, maintenance and outgoings, i.e. on the basis of a resulting trust.
- j. The judge held that, as George repaid the mortgage in 1996 but had not thereafter transferred the property to his daughter, the inference was that he had not determined that she was at any point in time **ready** to receive the benefit of that transfer. **On appeal, that was an inference open to the judge.**
- k. The starting point was joint beneficial ownership by George and his wife. George had never told his wife that he intended his daughter to have a share in the property. George's wife's letter to the daughter confirmed that she did not think the daughter had any interest in the property.
- l. The appellant argued that the judge should not have applied a resulting trust analysis but should have imputed to the parties an intention that the appellant was in all the circumstances the sole beneficial owner. This imputation was not permissible. **First, the judge had inferred an actual intention. Second, if an actual agreement is inferred, it leaves no room for an imputation. Third, a constructive trust approach (Jones v Kernott) is not appropriate given the lack of relationship between the appellant and George's wife.**

### **Issue 3: Part 7 or Part 8 and issuing the claim / pre-action conduct: tips and tricks**

## Part 7 or Part 8 CPR?

32. Part 7 and Part 8 CPR are very different. They each have separate rules of procedure and consequences for failure to abide by procedure.
33. The court may seek a re-issuing of the claim if proceeded under the wrong Part. The Defendant should, under CPR 8.8 refer in his acknowledgment of service to any contention that the claim has been brought under the 'wrong' Part. See also C 8.1(3) allowing the court to transfer between Parts.
34. Part 7 requires thought, legal analysis and pleadings. Part 8 requires a witness statement to issue the claim. This can be a tactical pursuit by a claimant, as a Part 8 claim requires a written statement from the Defendant which, if quickly and sloppily drafted and without proper analysis, can be a hostage to fortune as the case progresses.

## Part 8

35. A Part 8 claim is commenced with form N208.
36. Part 8 applies to an issue that 'is unlikely to involve a substantial dispute of fact'. That is rarely a contested TLATA case!
37. A Part 8 claim does not allow the court to make a default judgment (CPR 8.1(5)). Instead, if the Defendant does not acknowledge service, the **Defendant may attend the hearing of the claim but may not take part in the hearing unless the court gives permission** (CPR 8.4).
38. Under Part 8, the claimant must file any written evidence on which he intends to rely when serving his claim form and the Defendant must do likewise when acknowledging service (CPR 8.5).
39. Under Part 8, a counterclaim under Part 20 may not be brought without the court's permission (PR 8.7).
40. Under Part 8 there is no requirement for the filing of a Statement of Case (pleadings) nor a Defence.
41. Under Part 7 and 8 the parties are required to comply with a myriad of rules as to documents and directions. A key one is tucked away in PR 29.4 '**The parties must endeavour to agree appropriate directions for the management of the proceedings and submit agreed directions, or their respective proposals to the court at least 7 days before any case management conference.....**' (multi-track directions to which a Part 8 claim is allocated).

## Part 7

42. In my view, Part 7 is the appropriate procedural route in all but the most rare of cases involving no dispute of fact (e.g. the parties are in agreement as to the history but disagree as to the legal analysis of such history).
43. Part 7 requires Particulars of Claim. This document requires thought and analysis and a structured argument as the basis of the claim. The benefit of using Part 7 from the claimant's perspective is that the Defendant is forced to file a defence and to articulate his or her case in a reasoned way.
44. Guidance on the contents of Particulars of Claim is useful: the Particulars may
  - a. Refer to any point of law on which the claim is based
  - b. Name any witnesses that may be called
  - c. Have attached any document necessary / relevant to the claim (including an expert's report pursuant to Part 35).
45. As Defendant to a Part 7 claim, you can delay filing your defence by filing an acknowledgment of service: this provides a further 28 days to file the defence (CPR 15.1(1)(b)). The period for filing a Defence can be extended by agreement by up to 28 days (CPR 15.5).
46. Any counterclaim by the Defendant should be made within the Defence. If this is filed with the Defence, the Part 7 Defendant does not require the court's permission to counter-claim.
47. If a Part 7 Defendant fails to file an acknowledgment of service or a defence, the claimant may apply for default judgment (CPR Part 12).

## Pre-action conduct

48. Failure to engage in proper pre-action conduct can result in adverse costs consequences.
49. There is no specific pre-action protocol in relation to TLATA claims. Nevertheless, the spirit of pre-action must be followed (both for bringing the claim and, in principle, any Part 20 Counterclaim).
50. See Section II of Annex A to the Practice Direction.
51. In summary, a detailed letter of claim (preferably in one document), should be sent (to which defendant should respond in a 'reasonable' time, 14-90 days depending on complexity) outlining:

- a. Details of the claim
  - b. Name and address
  - c. Legal basis of claim
  - d. Summary of facts
  - e. What Claimant wants
  - f. Listing the documents on which claimant intends to rely
  - g. Proposing ADR and which suitable method
  - h. Stating date expected for response
  - i. Identifying any documents that claimant would like to see
52. The Defendant's response should cover
- a. Facts which are accepted and not
  - b. Any proposed counterclaim
  - c. ADR
  - d. Documents relied on
  - e. Providing any document requested by the claimant
  - f. Identifying any documents requested by the defendant

### Other tactics

53. Consider the use of CPR 31.16 (Disclosure before proceedings start). The court can make a pre-action disclosure order if the respondent is likely to be party to subsequent proceedings and if disclosure is desirable to dispose fairly of the anticipated proceedings or to save costs.
54. Consider CPR 32.18, which allows a party to serve notice on the other requiring him to admit facts (so as to narrow the areas for dispute). This can be a tactically advantageous notice. Furthermore, if facts are not admitted that ought to have been admitted, this can be accounted for in any costs decision.
55. Do not forget to give a hearsay notice under CPR Part 33, if applicable. Failure to do so does not affect the admissibility of the evidence but it may (a) affect the weight to be attached and (b) be reckoned in costs.

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