

Cohabitant Property Rights - Overview

An application under section 14 of the **Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996)** may be made by a trustee of land, or a beneficiary with an interest in property subject to a trust of land. The court has a broad discretionary range of powers to make orders regarding the exercise of the trustees' functions, or to the nature and extent of beneficiaries' interests, including a sale or postponement of sale.

TOLATA 1996, s 15 requires the court to consider:

- the intention of the trust creator or creators
- the purposes for which the property subject to the trust is held
- the welfare of any minor, and
- the interests of any secured creditor

Case law

Beneficial interests are determined and declared under established principles of trust law. The leading case regarding cohabitant disputes is *Stack v Dowden*, where the House of Lords was concerned with the effect of a conveyance into joint names without an express declaration of the beneficial interests. In her leading judgment, Baroness Hale set out a framework of guidance, including that:

- a conveyance into joint names indicates both a legal and beneficial joint tenancy, unless and until the contrary is proved
- the court must 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, and
- the burden is on the person seeking to show that the parties intended their beneficial interests to be different from their legal interests and in what way.

In *Jones v Kernott*, the Supreme Court held, inter alia, that the following principles apply:

- the starting point where a family home is bought in joint names is that the parties own the property as joint tenants in law and equity
- that presumption can be displaced by evidence that their common intention was, in fact, different, either when the property was purchased or later
- common intention is to be objectively deduced (inferred) from the conduct and dealings between the parties
- where it is clear that the parties had a different intention at the outset, or had changed their original intention, but it is not possible to infer an actual intention as to their respective shares, then the court is entitled to impute an intention that each is entitled to the share which the court considers fair having regard to the whole course of dealing between them in relation to the property
- each case will turn on its own facts, and
- financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended or fair

Procedure

Proceedings are commenced in either:

- the High Court (Chancery or Family Division), or
- the County Court for the area in which the property is situated, or where the defendant to the application resides

The court has power under the Civil Procedure Rules 1998 (CPR), SI 1998/3132, Pt 30 to transfer proceedings between courts and divisions.

CPR Part 8 is used where the court's decision is unlikely to involve a substantial dispute of fact and where a property is owned by cohabitants in joint names. For example, the other party refuses to sell the home. CPR Part 7 procedure should be used if there is likely to be a substantial dispute of fact. Many courts require the proceedings to commence as a CPR Part 8 claim and to then continue as a CPR Part 7 claim. Enquiries should be made of the court of issue. The claimant's statement of case must be filed with the claim.

On obtaining an order under **TOLATA** 1996, it is for the parties to seek to enforce the order if its terms are not complied with. The method of enforcement used will depend on the circumstances of the case.

There are a number of circumstances in which the costs provisions of CPR 1998 will apply to proceedings conducted by family lawyers, as opposed to the costs provisions of the Family Procedure Rules 2010 (FPR 2010), SI 2010/2955. These will include claims made under **TOLATA** 1996. It is therefore important for family practitioners to be aware of the general costs rules contained within the CPR.

Occupation rent

In some circumstances the court may make an order for an occupation rent to be paid by an occupying party where another party has a beneficial interest and is denied their right of occupation. Such an order may be made either during the period of occupation or, more commonly, as an off-set against the parties' respective shares in the property following a sale. An occupation rent order is discretionary. Relevant factors include the intention of the parties when they purchased the property, responsibilities in relation to any minor children and any increase in the net capital value of the property by virtue of payments made by the occupying party. The appropriate level of rent will usually be the market rate with a discount to take into account the occupying party's beneficial interest in the property.

Occupation of the family home

Part IV of the Family Law Act 1996 governs rights to apply for occupation orders. Beneficiaries have rights of occupation under **TOLATA** 1996. If a claimant establishes a beneficial interest in the property, the court may determine the occupational rights that result under the trust. The parties may have contractual or other equitable rights that confer a right of occupation. If an applicant fails to establish a beneficial interest in a property or a statutory right to occupy, they may

demonstrate a contractual licence to remain there resulting from the property owner's conduct.

While the parties live together, the owner gives the other a licence to occupy their home. If no consideration is given, then if the relationship breaks down, the owner may recover exclusive possession by giving the other notice to quit. If the licensee has given up a right or suffered detriment to live with the owner, a contractual licence may be established enabling:

- the occupant to remain at the property for life or while the property is needed to care for children of the relationship, or
- the occupant to remain subject to reasonable notice, so that immediate possession will not be provided

A licence by estoppel may also arise if the property owner leads the other to believe that the right of exclusive possession will not be enforced and the other acts to their detriment in reliance on such a promise.

If the contractual licence gives rise to an interest under a constructive trust, it will be enforceable against a purchaser of the family home provided the purchaser has notice of the licence or if it constitutes an overriding interest.

A non-tenant cohabitant who is deserted, or where their partner defaults on rent payment, is not entitled to remain in possession of the family home and should enquire whether the landlord is prepared to accept rent.

If the mortgage is in the name of one cohabitant only, the other cohabitant has no contractual obligation to the mortgagee. Where the cohabitant borrower defaults on mortgage payments, the other cohabitant could ask the court to adjourn possession proceedings to enable them to find alternative accommodation, or to offer payment to the lender.

A minor cohabitant who has occupied a property and lived with a bankrupt when the bankruptcy petition was presented may establish limited rights of occupation for a year.