

Your guide to making an application under the Trusts of Land and Appointment of Trustees Act 1996

Overview

If you are a joint legal owner or have an interest in a property and you are not able to agree with your cohabitant or former cohabitant how the equity in the property should be distributed or whether it should be sold you can make an application under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996) to ask the court to determine the issues between you. This guide will explain the application process and orders the court can make.

For an overview of the difference between legal and beneficial interests and the trust law principles that are applied to determine beneficial interests please refer to our guide to determining shares in the family home and personal property on cohabitation breakdown.

Who can apply?

An application can may be made by any person who is a trustee of land or has an interest in trust property. You will be a trustee of land if the property is jointly owned and you will have an interest in the trust property if the property is solely owned but you assert you have a beneficial interest in it. Trust of land means any trust property which consists of or includes land.

The person who makes the claim against a property is called the applicant. The person against whom the claim is made is called the defendant.

What orders can the court make?

The relevant legislative provisions are set out in TOLATA 1996 and the Civil Procedure Rules 1998 (CPR). The court has a broad discretionary range of powers and under section 14 TOLATA 1996 can make orders:

- regarding the exercise of the functions of the trustees, which may include relieving them of an obligation to obtain the consent of, or consult, any person in connection with the exercise of their functions, e.g. an order for sale, a postponement of sale or payment of an occupation rent; or
- declaring the nature or extent of a person's interest in property subject to the trust. In the absence of evidence of what shares in the property were intended, the court can impose a fair solution based on the parties' dealings about the property.

The court cannot make an order under TOLATA 1996 to appoint or remove trustees.

Case law has confirmed that the court has the discretion to order the arrangement of a sale in such a way that one party is entitled to have the opportunity to be the purchaser for the other's share.

The court can also be asked to adjust the sale proceeds to take account of unmatched mortgage payments or other payments in connection with the property, such as maintenance or improvement costs. This process used to be called 'equitable accounting'. The time from when these compensatory payments can be claimed will usually be from the date of separation, however, they might extend into the period of the relationship if this was the common intention of the parties.

Claims may also be made for costs in association with being absent from the property (known as an occupation rent). The court has the power to order a party in occupation of the property to make payments to the other co-owner(s) whose entitlement to occupy has been excluded or restricted.

What factors does the court have to consider?

Under section 15 of TOLATA 1996 the court must consider:

- the intention of the person or persons who created the trust;
- the purposes for which the property subject to the trust is held;
- the welfare of any minor who occupies or might reasonably be expected to occupy the property subject to the trust as their home;
- the interests of any secured creditor or any beneficiary.

In the absence of evidence of an agreement that the property is to be held in the way the applicant asserts, the court may, where appropriate, infer or impute a common intention from the conduct of the parties.

What steps should be taken before issuing an application?

Before commencing a claim, sufficient information should be exchanged so that both parties can understand each other's position and decide whether it is possible to reach a settlement or how to otherwise proceed. This is done by a letter of claim from the applicant and a written response from the respondent. You will also be required to consider alternative forms of dispute resolution, such as mediation. Possible sanctions by the court for non-compliance with these steps may include:

- making an adverse costs award, which may include indemnity costs;
- for a successful claimant who receives a monetary award, reducing the amount or rate of interest; or
- for an unsuccessful defendant who is ordered to make a monetary payment, awarding interest on the sum awarded at a higher rate (not exceeding 10% above base rate).

What are the cost rules?

Part 44 of the CPR govern the costs rules in TOLATA 1996 claims. Although the court can make a different order, costs will usually follow the event, meaning that the successful party is ordered to pay the costs of the unsuccessful party.

What are Part 36 offers?

This is an offer to reach a settlement, which, if made in accordance with certain rules, carries costs consequences if refused by the party to whom the offer was made, depending on the ultimate outcome of the case. A Part 36 offer will not be shown to the trial judge but will be disclosed at the end of the trial when the court is asked to consider who should pay the costs of the proceedings. A Part 36 offer is a useful way to attempt settlement without potentially compromising your case.

A Part 36 offer can be made at any time, including before the commencement of proceedings. A Part 36 offer can include a request for clarification and can be withdrawn or have its terms changed so long as the other party has not served a notice of acceptance. A Part 36 offer can also be written so that any offer may be automatically withdrawn after a period of time, provided it says so in its terms.

The court procedure

1. Making the application

You will first need to decide whether your application is suitable to proceed under CPR Part 7 or 8. Part 8 will only be appropriate if a claim is unlikely to include a substantial factual dispute, for example if a sale is agreed but one party wishes to delay it and there is no dispute over the parties' interests or the dispute is in relation to the taking of account for unmatched mortgage payments or other expenditure on the property. Part 8 claims are not suited to claims where the beneficial interests are in dispute, and these should be pleaded under Part 7.

There are certain circumstances in which the Part 8 procedure cannot be used, such as where there are concurrent claims in relation to other aspects of cohabitation that must be dealt with under Part 7 or where there is an application under Schedule 1 to the Children Act 1989. Part 7 is likely to be the more appropriate choice where there is a substantial dispute of fact.

The application is made to the County Court or the High Court on Form N208 (Part 8) with accompanying evidence (a witness statement including any exhibits such as bank and/or mortgage statements and verified by statement of truth). Where the application is made under Part 7 the application is in Form N1 and should be accompanied by Particulars of Claim or, if this is not possible, these should be served within 14 days.

Where the application is made in the High Court it will usually be issued in the Chancery Division unless there are related family law issues, for example a concurrent claim under Schedule 1 to the Children Act 1989.

2. Acknowledgement of service and filing a defence

Once issued the application must be served on all persons with an interest in the property.

The defendant is required to complete an acknowledgment of service in Form N210 (Part 8) or in Form N9 (Part 7) and serves evidence on the claimant verified by a statement of truth (Part 8). Under Part 7 the defendant files and serves their defence in Form N9D.

3. Making directions and fixing a directions appointment

The court will make directions, fix a directions appointment or fix a hearing date.

Although parties are likely to have exchanged material documents as part of the pre-action procedure with their letter of claim and response, the court will typically make a direction for formal disclosure at the first case management conference. The court has discretion as to the extent of the disclosure and may make directions ranging from no disclosure at all to extremely thorough disclosure. The court will also make directions on how the disclosure is to be given, for example, in what form and timing and what is to be done in relation to documents that no longer exist.

Ordinarily, each party's disclosable documents must be set out and identified in a list of documents, which is usually in Form N265. Each party's list is normally exchanged simultaneously.

Following exchange of lists of documents, each party has the right to inspect and/or take copies of any disclosed documents, except for privileged documents or where a document is no longer in the other party's control. The party wishing to inspect a document should give written notice of their wish to do so and the other party should allow inspection or provide a copy within seven days.

The court will also consider directions regarding witnesses in the case and the preparation of witness statements. The court will identify or limit the issues to which factual evidence may be directed, identify the witnesses who may be called or whose evidence may be read and may also limit the length or format of witness statements. There are comprehensive rules as to the layout and content of witness statements, to which the parties must strictly adhere. If the application has proceeded under Part 8, witness statements will have been filed at the outset and in place of pleadings. Parties will however usually be afforded the opportunity to file and serve further witness statements.

No expert evidence may be given without the court's permission. Ordinarily, this will be within the directions order at the case management conference stage. The court also has power to order the parties to instruct a single joint expert, rather than to each instruct an expert.

4. Costs case management in Part 7 claims

Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets (a) where the stated value on the claim form is less than £50,000, with their directions questionnaires; or (b) in

any other case, not later than 21 days before the first case management conference.

If costs budgets cannot be agreed, there may be a costs and case management hearing to determine the proposed costs.

This guide is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more information about the issues referred to in this guide, please seek formal advice.