Strange bedfellows: case management in Sch 1 and TOLATA

Alexander Chandler, *Barrister, 1 King's Bench Walk*

Alexander Chandler is recommended as a leading junior in matrimonial finance by Chambers and Partners ('a rising star') and the Legal 500. He also specialises in TOLATA and Sch 1 claims, and sits as an arbitrator, deputy district judge in civil and family and as a Bar Tribunals and Adjudication Service panel member.

In a recent lecture, 'Family law at a distance', Lord Sumption remarked that:

> '. . . even by the standards of legal specialists, family law seems unusually self-contained to an outsider. Not only is it surrounded by impermeable barriers but it is internally subdivided by equally impermeable partitions. There are practitioners, and even judges, who regard themselves as money people and will not touch children cases and vice versa. Some practitioners in both categories would run a mile rather than deal with trusts and tax. To me this all seems rather surprising.'

Recalling how, as a practitioner, '… [he] liked to trespass on other people's cabbage patches', Lord Sumption lauded the generalist and explained:

> '… the essential reason why I am sceptical of specialisation is that I do not regard law as comprising distinct bundles of rules, one for each area of human affairs. This is partly because no area of law is completely self-contained.'

This view is unlikely to be shared by anyone who has acted in a case involving separate applications under TOLATA 1996 and Sch 1 to the Children Act 1989. These involve not only distinct statutory criteria and powers but 'bundles of rules' (ie CPR and FPR) which, while having some provisions in common, are quite different and difficult to meld together effectively.

As the authors of the Family Court Practice 2016 remark (in the notes at p 16), '… there is no practice direction that assists courts or parties to know how they are to deal with cases where separate rules and court administrative arrangements assist'. It is almost as though the possibility had not been considered that a party seeking a declaration as to beneficial ownership of a property might also be seeking (or responding to) an application for financial relief for the benefit of a child of the family. What case management directions should be made so as to avoid delay and disproportionate cost?

Family procedure in Schedule 1

A Sch 1 financial provision claim is 'family business', assigned to the Family Court (s 32, Matrimonial and Family Proceedings Act 1984, Sch 1 to the Senior Courts Act 1981, para 1(3)(e)). The application is issued on Form A1 and the rules that presumptively apply are the abbreviated 'Chapter 5' provisions (FPR rr 9.18 to 9.21A; r 9.18(A1)(a)(iii)), ie that the parties exchange the shortened Form E1, with a first hearing between 4 and 8 weeks after issue and no provision for questionnaires or a FDR.

Under FPR Pt 9.18A an applicant (but seemingly not a respondent) may apply to change the procedure to the standard 'Chapter 4' procedure at rr 9.12 to 9.17, with Forms E, questionnaires, a first appointment and FDR etc. The court can also direct, either at the request of the respondent or of its own motion, that the

Chapter 4 procedure should be adopted (FPR Pt 4.1(3)(o); 4.3(1)).

The first rule about costs in Sch 1 is . . . there are no rules about costs in Sch 1. Or, to be more precise, while CPR Pt 44.3 applies (excepting 44.3(2)), the court adopts a 'clean sheet' in exercising its discretion whether to make an order for costs (*Baker v Rowe* [2010] 1 FLR 761; *KS v ND* [2013] 2 FLR 698). Since FPR Pt 28.3 does not apply to Sch 1 (FPR rr 28.3(1), 28.3(4)), there is no prohibition on a court having regard at the end of a final hearing to *Calderbank* offers, which therefore should generally be sent. The court can make a costs allowance, applying the common law jurisdiction as opposed to s 22ZA of the MCA (*BC v DE* [2016] EWHC 1806 (Fam), [2016] FLR (forthcoming)).

Civil procedure in TOLATA

By contrast, a TOLATA claim is 'Chancery business' assigned to the county court (s 23(b), County Courts Act 1984). While the ceiling of county court jurisdiction is now £350,000 (previously £30,000), exceeding this figure will not determine a transfer to the High Court. The recent Chancery Masters' Guidance for the Transfer of Claims sets out the relevant criteria at para 9, and notes at para 15 that, '… most claims under TOLATA will be suitable for transfer to the county court'. If the claim involves a '… substantial dispute of fact' (CPR Pt 8.1(2)), which TOLATA claims often do, the claimant should issue a Form N1, attaching particulars of claim (which may follow within 14 days) to which the defendant should serve an acknowledgment and defence.

Where there is no substantial dispute of fact, the abbreviated procedure set out at CPR Pt 8 should be used, which requires a Form N208 accompanied by a witness statement but no pleadings. The hybrid innovation of family practitioners of serving particulars of claim and a witness statement (a sort of Part 7 ½), is not supported in any rule and should be avoided. After the parties have filed their directions questionnaires, TOLATA claims are generally allocated to the multi-track, but may be allocated to the fast track, eg where the value of the claim is less than £25,000 (CPR Pt 26.6(4)).

While this article is not intended as a guide to civil procedure, it is worth noting that a TOLATA claim is unambiguously a civil claim to which all of the complexities of civil procedure apply including costs budgeting, Part 36 offers on costs and the general rule that the unsuccessful party normally pays the successful party's costs. There is no jurisdiction in TOLATA to make either a costs allowance of a legal services payment order.

W v W

The sole reported case on what procedure should apply where Sch 1 and TOLATA intersects is the Court of Appeal decision in *W v W (Joinder of Trusts of Land Act and Children Act Applications)* [2003] EWCA Civ 924, [2004] 2 FLR 321, in which Lord Justice Thorpe commented at para [5]:

> '… As a matter of sensible management in the county court, if one co-owner invokes one statutory power and the other invokes a different statutory power, sensible management demands that the competing applications be conjoined. If one had to be given leading status, I would have myself assumed that it would be the application under Sch 1, since that statute confers upon the court a much more extensive power, namely the power to make adjustive orders between the co-owners.'

This passage is often cited, and often cited wrongly, in support of the two propositions: first, that a Sch 1 application will invariably be the 'lead application'; secondly, that the claims should be consolidated.

Which is the 'lead application'?

In *W v W*, the parties were beneficial joint tenants. There was no dispute over beneficial ownership: each was entitled to an equal share. The issue was whether an order for sale should be deferred. In such circumstances, the Court of Appeal held that the competing claims under Sch 1 and

TOLATA should be heard together (as opposed to sequentially), with lead status being given to Sch 1, under which the court exercised wider powers including adjustive as opposed to declaratory orders.

However, this is not typical of most Sch 1 / TOLATA claims, where there is often a significant issue over beneficial ownership. Faced with a TOLATA claim (eg where one party asserts equal ownership, and the other disputes the other has any interest), it is respectfully suggested that the TOLATA claim must take the 'lead', in that the Sch 1 claim cannot be quantified until after the applicant's own assets (ie her share in the property) is established. How this is case-managed in practice (ie in a single hearing, or in two split hearings before the same trial judge) involves a consideration above all of the overriding objective (CPR Pt 1.1 and FPR Pt 1.1, which contain some subtle differences).

Consolidated or heard together?

In *W v W*, Thorpe LJ refers to the Sch 1 and TOLATA claims as being 'conjoined' which in practice can be confused with 'consolidated' (CPR Pt 3.1(2)(g), FPR r 4.3(3)(h)), ie to combine two claims so that they proceed as one, under one case number. While TOLATA and Sch 1 claims should generally be heard alongside each other (CPR Pt 3.1(2)(h), FPR Pt 4.1(3)(i)), the applications are unsuitable to be consolidated together. Per Arden LJ in *W v W* at para [27]:

> 'The powers under each Act are not, therefore, co-extensive. Unless for some special reason it is not desired that the court should consider exercising powers under both Acts, it seems to me that the application should be under both Acts and the exercise of the powers under each Act *should be considered by the same court and at the same time*.' (Emphasis added)

Where to issue and level of judge

Care should be taken to issue TOLATA and Sch 1 claims at a court that exercises both family court and county court jurisdiction. The family court – and in particular the central family court and its predecessor the Principal Registry of the Family Division – will not issue a TOLATA claim even where it is connected to an existing family application (an experience which many London solicitors will have faced).

In these circumstances, the claimant can issue both claims at a court which exercises dual jurisdiction (eg within London in Wandsworth or Barnet or, outside in the South-East, in Guildford or Reading. Alternatively, the claims may be issued at the High Court and then transferred out to a court exercising family and civil jurisdictions, or to one of the remaining district judges of the PRFD.

Where the TOLATA claim is proceeding under Pt 7 and has been allocated to the multi-track, the trial must be listed before a circuit judge and not a district judge, unless this has been authorised by the designated civil judge (whereas a fast track trial may be heard by a district or circuit judge). There is no similar restriction with respect to a Sch 1 final hearing being allocated to a district judge.

Privacy and confidentiality

TOLATA claims are normally held in open court (CPR Pt 39.2(1)). Statements of case (excluding attachments) and court orders are public documents which may be obtained from the records (CPR Pt 5.4C). By contrast, a Sch 1 application is normally held in private (FPR Pt 27.10) subject to the discretion of the individual judge to hold the hearing in public (*Luckwell v Limata (No 2)* [2014] EWHC 536 (Fam), [2014] 2 FLR 1252) and no document is available to the public save with the permission of the court (FPR Pt 29.12). It is also worth recalling that a Sch 1 claim comes within the definition of 'children proceedings' for rules concerning the instruction of an expert (ie the stricter provisions contained in FPR PD25C and not FPR PD25D).

Disclosure

Disclosure in Sch 1 will depend on whether the application remains on the abbreviated

Chapter 5 procedure, in which case it will involve the attachments to Form E1 (FPR Pt 9.19(2)(b)), together with such disclosure as the court directs at the first hearing (FPR Pt 9.20). A transfer to Chapter 4 will require the more extensive Form E disclosure with provision for questionnaires.

CPR Pt 31, PD31A and PD32A sets out the detailed rules on disclosure and inspection which apply to civil claims such as TOLATA. Standard disclosure is defined at CPR Pt 31.6, which is generally provided by way of List and provision for inspection (CPR Pt 31.10). For reasons such as proportionality the court may depart from the requirement to give standard disclosure (CPR Pt 31.5).

Given that the court's enquiry in Sch 1 and TOLATA is often so different, particularly when there is an issue as to whether the claimant can establish a beneficial interest, provision for both 'family' and 'civil' disclosure (eg replies to questionnaire and disclosure by list) can be unavoidable.

Should there be an FDR?

It is often thought that an FDR does not fit into a non-discretionary area of law such as TOLATA, where the issues tend to be binary and may turn on the court's assessment of whose evidence is to be preferred, rather than its own view of what is fair. I recently attended a Chancery Bar Association lecture at which the speaker struggled to explain the FDR procedure to a slightly bewildered audience of Chancery lawyers. His conclusion was 'there are no rules. You make it up as you go along.'

Paragraph 18.18 of the new Chancery Guide (2016) explains that, following Lord Justice Briggs' report into Chancery modernisation and the expansion of CPR Pt 3.1(2)(m), a Chancery FDR ('Ch FDR') is now an available ADR option in areas such as TOLATA:

> 'The origins of FDR lie in money claims in Family cases. It has been widely used in claims under the Trusts of Land and Appointment of Trustees Act 1996, inheritance and partnership claims. It is likely to have most application to claims in which there is strong animosity and/or a breakdown of personal or business relationships and trust disputes.'

Given the possibility of a FDR in a stand-alone TOLATA claim, there appears to be no good reason why a FDR should not always be listed in a dual Sch 1 / TOLATA case.

Must there be costs budgeting?

To the uninitiated, costs budgeting (the process by which parties to a Pt 7 multi-track claim exchange estimates of existing and future costs to trial on 'Precedents H' in advance of a costs and case management hearing at which ceilings may be imposed on the budgets) is a mysterious process. Perhaps most baffling to the family lawyer is the provision that the parties may kick the ball out of touch by simply agreeing each other's budgets, thereby denying the court any role in making budgeting orders (CPR PD3E, para 7.3). Moreover, the court may order that costs budgeting is not required (CPR Pt 3.12(e)). In other words, the court may direct that costs budgeting should not apply in a Sch 1 / TOLATA claim.

Which bundles direction applies?

As is now notorious, in a family case such as Sch 1, the court bundle must follow the detailed rules set out at FPR PD27A including that a bundle should not (without the court's permission) exceed 350 pages (para 5.1)). Judges hearing family cases abhor the practice of preparing a core bundle with further 'library' bundles (*J v J* [2014] EWHC 3654 (Fam) per Mostyn J at para [51]). By contrast, the rules regarding bundles in civil claims, such as TOLATA, as set out at CPR PD39A para 3, have no similar requirement for a single bundle, or a maximum page limit, save that 'the bundle should normally be contained in a ring binder or lever arch file' (CPR PD39A, para 3.6). Indeed, the Chancery Guide expressly provides for a separate core

bundle to be prepared where the volume of material requires (Chancery Guide 2016, para 21.65 to 21.72).

The tension between these two provisions came to a head in *Seagrove v Sullivan* [2014] EWHC 4110 (Fam), [2015] 2 FLR 602 when Mr Justice Holman returned to the parties the 10 court bundles that had been submitted comprising a total of 3,500 pages, with the requirement that the following day a bundle not exceeding 350 pages (including skeleton arguments) should be submitted. While this judgment stands as a further example of the potential sanctions a party may face when they breach FPR PD27A, there remains the question as to why that was the governing rule rather than CPR PD39A. If the civil rules applied, it is difficult to see how the parties were in breach, or were deserving of the public sanction contained within that judgment. This is perhaps a vivid explanation of the importance of determining which application takes the 'lead'. For reasons explained above, save where there is no issue as to beneficial ownership, this should generally be the civil / TOLATA claim.

Summary

For family lawyers trespassing into the cabbage patch of civil litigation by way of a case involving Sch 1 and TOLATA, the following steps and directions are suggested:

(1) Issue at a court exercising family court and county court jurisdiction or, in central London, ensure a listing before a district judge of the PRFD.

(2) Ensure the claims are heard together (but not consolidated).

(3) Lead status should normally be ascribed to the TOLATA claim, save where there is no issue over beneficial ownership.

(4) Consider whether the Sch 1 application is to proceed under Chapter 4 or Chapter 5; provide, in addition to the usual family disclosure, standard disclosure by list (unless another, less onerous, method of disclosure is warranted).

(5) Consider whether costs budgeting is required.

(6) List towards a FDR / 'Ch FDR'.

(7) Clarify if the trial/ final hearing (or any part of it) is to be in open court or in private.

(8) Clarify, by reference to which application is lead, whether the applicable rules in preparing for a hearing (including the court bundle) are civil or family.