Land Disputes – A guide to procedure

Overview

This factsheet summarises the steps involved in making an application to resolve a dispute about the ownership of land, especially between people who have lived together. It describes the procedure that must be followed before and after an application is made.

The Legal Framework

The Trusts of Land and Appointment of Trustees Act 1996 (ToLATA) gives courts certain powers to resolve disputes about the ownership of land.

The dispute may relate to the legal or beneficial ownership of the property.

These concepts of ownership are explained in our **Cohabitation** factsheet (under the heading *Terminology*).

There are two main types of application that can be made under ToLATA to resolve disputes about land. These are:

- to decide who is entitled to occupy, and
- to decide the nature and extent of the ownership

of a property owned by two or more people.

Taken together, these applications permit a court to decide who are the legal and beneficial owners of a property, and in what proportions.

There are complementary powers in ToLATA that allow a court to direct the owner of land to behave in a certain way. In disputes about co-ownership, these powers are used most frequently to require a co-owned property to be sold so that the proceeds can be divided.

It is important to recognise that ToLATA limits a court to deciding on co-ownership of property, applying the concepts described in our **Cohabitation** factsheet. ToLATA does not give the court the power to vary that co-ownership, and adjust the proportions that each person owns.

The procedure before making an application

Alternatives to court proceedings

Before court proceedings under ToLATA, the person planning to make an application should consider alternative ways to settle the dispute.

Any mechanism for resolving disputes outside of the court process is called Alternative Dispute Resolution (ADR). There are many types and models of ADR. The two most frequently used are **mediation** and **negotiation**.

ADR is not compulsory. However, it is positively encouraged. If court proceedings are issued, the Judge dealing with the case will be interested to see if ADR has been tried. The court can impose penalties if ADR has not been attempted. A common form of penalty applied relates to the costs of the proceedings. The court can:

- Deprive a person who would otherwise be entitled to claim costs from the other party, or
- Order a person to pay the costs of the other party if they were not willing to explore resolving the dispute through ADR.

ADR should be considered at all stages of a dispute. ADR, and a commitment to it, should be mentioned in the **pre-action letter** (see below).

The Pre-Action Letter

Any person wishing to start court proceedings to resolve a land ownership dispute (the **claimant**) is required first to set out in a letter the basis of dispute and what they propose asking the court to do. This is known as a **pre-action letter**. A pre-action letter is a requirement in almost all situations. The only exceptions are situations where the need to have the court deal with an issue is urgent (see below for some examples).

The pre-action letter should outline the background to the claim and the legal principles relied upon. It should also identify any documents on which the claimant intends to rely in support of the proposed claim. The pre-action letter should be sent to all co-owners (whether legal or beneficial) of the land in dispute (the **defendant/s**).

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The defendant then has 14 days from receipt within which to acknowledge that they have received the pre-action letter. The defendant ought to provide a full response within 30 days of receipt. More time can be sought if the issues are particularly complicated. That full response should indicate whether the proposed claim is accepted or disputed. If disputed, the reasons for that should be provided. Any documents relied upon by the defendant should likewise be identified. Any proposed counter-claim as to ownership should be identified and explained. This is also an opportunity for the defendant to ask the claimant for any additional information or documents needed to consider the proposed claim.

A claimant ought to respond to any reasonable request for further information and/or documents from a defendant, and to any counter-claim made.

This exchange process is called the **pre-action protocol**. The pre-action protocol encourages the claimant and defendant to set out their cases in full before court proceedings start, to encourage a settlement. The emphasis is placed on cooperation to identify the main issues. A claimant or defendant may choose not to follow the pre-action protocol. However, unless there are good reasons for doing so, this may give rise to costs penalties if court proceedings are brought.

Experts

As part of the pre-action protocol, the claimant and defendant are entitled to involve an expert to help them negotiate a compromise. The expert can provide an opinion to help resolve the whole claim, or part of it. In disputes about land, the experts involved most frequently are valuers and surveyors, to help put a value on the land in question.

Nowadays courts encourage the use of single joint experts – this encouragement applies to the pre-action protocol, and also if court proceedings are started. A single joint expert is an expert instructed by all parties to a dispute (as opposed to the claimant and defendant each instructing their own separate expert).

Any expert opinion obtained as part of the pre-action protocol may be used later in court proceedings, but only if the court gives permission.

Urgent cases

It will be appropriate in most cases to use the pre-action protocol and try to resolve a dispute using ADR before starting court proceedings. However, there may be a small number of cases where an approach to the court is needed urgently. That urgency may make the pre-action protocol unsuitable and likewise ADR.

Examples of situations where court action might be needed prior to ADR or application of the pre-action protocol include where orders (called **injunctions**) are needed:

- To ensure a property is not dealt with in a way that might prejudice the claimant's case, until the case is resolved;
- To ensure that documents that are relevant to the dispute are provided by one party to the other, if a party has been unwilling to provide those voluntarily, and
- To preserve documents that are relevant to the dispute if there is a risk the other party might destroy or hide those.

Making a court application

If it has not been possible to resolve a claim using ADR and/or the pre-action protocol, the claimant will have to start court proceedings against the defendant. Claims about land ownership are usually started in the County Court responsible for the area where the defendant lives.

Different rules apply to different types of court claim. The rules that apply to claims about land ownership are the Civil Procedure Rules 1998 (**CPR**).

The CPR identifies two main types of claim that a claimant can start. The first is more appropriate where there are disputes of fact between the parties. This is called a **Part 7** claim. The second is more appropriate where there is no significant dispute about the facts, but where there is a disagreement about the legal principles that apply. This is called a **Part 8** claim.

Issuing the application

The application that starts the court process is called a Claim Form.

A claimant must summarise in the Claim Form:

- What he or she is claiming and why;
- The evidence relied upon;
- The value of the claim, and
- The order sought from the court.

A fee is payable on the Claim Form, which varies depending on the value of the claim.

Under Part 8, at the same time as filing the Claim Form with the court, the claimant should also provide the evidence in writing he or she intends to rely upon

The Claim Form is issued by the court and then served on the defendant (or each of them, if more than one).

The defendant's response

How a defendant responds depends on whether Part 7 or Part 8 has been used by the claimant.

Under Part 7, each defendant has 14 days after receipt within which to respond to the Claim Form. In that response, the defendant may:

- Concede the claimant's case, or
- Dispute the claimant's case.

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The time for filing the defence (and any counterclaim) is explained in the CPR. Generally, a defendant must first confirm safe receipt of the Claim Form within 14 days (called the acknowledgement). Any defence and counterclaim must then be sent to the claimant and filed at court within 28 days of receiving the Claim Form.

Under Part 8, the same general principles apply, but the procedure is slightly different. The defendant does not have to file a defence. Instead, the defendant must file an acknowledgement within 14 days of receiving the Claim Form. That acknowledgement must be sent to the claimant and filed at court. It must say whether the case is conceded or disputed. If disputed, the acknowledgement should be accompanied by any evidence in writing the defendant intends to rely upon.

If a defendant does not respond to a Claim Form in time, the claimant may be able to ask the court to grant the claim.

Case Allocation

Once a court knows a land claim is disputed by a defendant (through a defence), it will identify the resources needed to resolve it.

It does this by allocating a dispute to a **track**. There are three tracks, and allocation is generally decided by the value of the claim and the complexity of the dispute. The three tracks are:

- **The small claims track**, for claims worth less than £10,000 where the trial of the claim is not likely to take more than 1 day and there is no substantial pre hearing preparation.
- **The fast track**, for claims worth more than £10,000 where the trial of the claim is likely to last more than 1 day and expert evidence is likely to be required.
- **The multi track** will normally be dealt with at a Civil Trial Centre. A case will be allocated to the multi track irrespective of its value. Claims will only be allocated to the multi track if they are considered to be specialist proceedings under part 49 of the Civil Procedure Rules, or if the claim is relevant under part 58 - 62 of the Civil Procedure Rules.

Under Part 7, the court decides which track is appropriate by asking the parties to complete an **allocation questionnaire**. In the allocation questionnaire, each party must identify (amongst other matters) the need for expert evidence and the likely length of the trial. The claimant has to pay a court fee when filing his or her allocation questionnaire. On receiving the allocation questionnaires, the court will either set down a structure for how the rest of the case will be run (called **directions**) or will schedule a **Case Management Conference** (CMC).

Under Part 8, applications are usually sent to the multi track. Allocation questionnaires are not generally used. Instead, Part 8 applications usually are scheduled for a **Case Management Conference**.

Directions and CMCs

Under Part 7, a court may make directions on receiving the allocation questionnaires or at a CMC. Unless a case is particularly complex, it will make directions without calling a hearing and without the parties (or their lawyers) needing to go to court.

Directions commonly made in land disputes include:

- A timetable for serving any further written evidence;
- A timetable for disclosing and exchanging any relevant documents;
- Regarding expert evidence: deciding whether an expert is needed, in what discipline, what questions ought to be asked, whether the expert should be a single joint expert, etc;
- Where the trial should take place, and
- How long the trial will last.

At any stage, the court may schedule a CMC and there may be more than one. At a CMC, the court will:

- Review the progress of the claim and preparations for trial;
- Consider compliance by all parties with existing directions
- Make any further directions needed to progress the claim, and
- If possible, try to help identify and reduce the issues between the parties.

A CMC usually lasts for about 30 minutes. It is not uncommon for CMCs to be conducted on the telephone. All parties' representatives are required to attend the CMC.

It may be possible to use a CMC as a form of Judge-led mediation. Provided the Judge and parties are willing, the Judge may consider any settlement proposals and give a non-binding indication of the likely outcome. This indication may help the parties settle the claim, or at least part of it. A Judge who conducts a CMC in this way could not then hear the trial.

Scheduling the trial

Once the court is satisfied the case is ready for trial, it will look to schedule the trial. This usually involves a document called the **pre-trial checklist**. This pre-trial checklist asks each party to say who they require to give evidence (to include experts) and when those witnesses will be available. The parties also have to say how long they think the trial will last, as the hearing time estimate might have changed since any allocation questionnaire.

The claimant must pay a fee on the pre-trial checklist.

There is also a hearing fee payable by the claimant, the amount of which varies depending on the track. The court may dismiss a claim or counter-claim if this hearing fee is not paid when required.

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Offers to settle

At any time before the trial, either party may make an offer to compromise the claim. The CPR provides a mechanism for communicating settlement offers on a formal basis. Offers made using this mechanism are called **Part 36** offers. A Part 36 offer must:

- Be in writing, and
- Remain open for acceptance for at least 21 days.

A Part 36 offer will not be shown to the Judge who hears the trial, but will be shown to him or her when it comes to arguments about costs.

Trial

This is the court hearing at which a Judge reads the documents, listens to the witnesses, hears legal argument and then makes a decision on the claim.

In most land disputes, the trial will last for at least a day.

The general rule is that the trial will be in open court. This means that members of the public and press will be allowed into the courtroom to hear the case. A Judge may decide that a particular case involves issues that justify the public and press being excluded from the courtroom, but this is unusual.

Under ToLATA, the Judge must take into account the following issues when deciding the claim:

- The intentions of the parties in relation to ownership of the property;
- The purpose for which the property was acquired;
- The welfare of any child who has (or who might be expected to have) their home in the property, and
- The claim of any secured creditor (such as a mortgagee) or any other person or organisation with a claim to the property.

After reading the documents, hearing the evidence and considering the legal arguments, the Judge will give his or her decision (the **Judgment**). The Judgment has to explain the reasons for the decision taken. If the facts were disputed, the Judgment should say what the Judge found them to be. It should set out the legal principles that are relevant and how the Judge applied them to the case.

Judgment may be given straight away, although many Judges prefer to take a short time to consider the case and then give a decision (called **reserved Judgment**). Judgment may be given by the Judge in the form of a speech or in writing.

Costs

The Judge who hears the trial usually also has to decide what to do about the costs of the claim.

The general rule is that costs will follow the outcome. So, a claimant who makes a successful claim will usually be entitled to recover costs. A defendant who successfully disputes a claim will usually be entitled to recover costs.

However, the court retains the power to make the costs order it believes does justice to the case overall. Identified earlier are some examples of situations where a court may decide not to apply the general rule, to penalise a party for not trying ADR or not using the pre-action protocol. The court will also take into account any Part 36 and other settlement offers made, the response to those, and how those offers compare to the Judgment.

Contact us

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