

FortyTwo Talks

Trust Issues

The Extent of the Court's Discretion Under s14 and 15 of TOLATA

Alex Bailey: Hello and welcome to this second podcast in our series, *Trust Issues*, which covers a variety of trust related matters, including TOLATA.

My name is Alex Bailey and I specialise in Property and Chancery.

Michael Grant: And I'm Michael Grant, and I also specialise in Property and Chancery.

The podcast today is the second one, as Alex has mentioned, this is on the topic of the extent of a court's discretion under Sections 14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996, or as we will affectionately and commonly refer to as TOLATA.

The reason why we've chosen this topic is when Alex and I were discussing what to do a podcast on, I thought about an instruction I had a year ago, where I was asked to provide advice on a rather interesting, family dynamic, and I'll read out the facts for you and then we will go into a couple of authorities that Alex and I have been looking into, which I looked into for the provision of my advice.

So, I was instructed last year to provide advice on the following scenario: Two sisters, let's call them A and B. They were joint tenants of the legal estate in land, but tenants in common of the equitable estate whereby both owned equal shares of 50%. Sister B dies and her husband, C, inherited his late wife's share of 50% in accordance with the terms of her will. Now, the husband, C, now becomes joint tenants with A, and he offers to buy A's share for a stated price. A refused C's offer and informed him that she had no intention of selling her interest. Then C then instructs me to provide advice on the merits of bringing a claim under Section 14 of TOLATA for an order that A sell her beneficial interest to him at a price to be determined by the court.

So, in the provision of my advice, my researchs took me to the following two very interesting cases, which Alex and I will be discussing in this podcast.

The cases in question are *Bagum v Hafiz* from 2015 and *Kingsley v Kingsley* in 2020. So first off, let's take a look at *Bagum*. Over to you, Alex.

AB: Yes, so this is very interesting case as you've said Michael from 2015. It's another family dynamic, albeit a little bit different from the situation you were asked to advise on.

In this instance, it was a mother and two sons who owned the property as tenants in common in three equal shares. Now, all three of the parties, so mother and two sons, were both trustees and beneficiaries. They each owned a third of the beneficial interest, and this was an intergenerational property in Central London in Islington. And the three parties, we've got mother and two sons, and as the sons grew up, they both got married and their respective wives both moved into the family property. Now, after the families moved in, sadly they fell out and couldn't decide who the property should be sold to.

So the claimant in this case, Mrs Bagum, wanted the son that remained in the property to purchase it. But the son who'd moved out of the property was described as being non-cooperative for that sale. So, they have to go to court then for an order.

Now, Mrs. Bagum, the mother in this instance, wanted an order that Mr Hafiz, who remained in the property, could purchase both her beneficial interest and the interest of Mr Hai, the son who'd left the property. So he would in effect, own the whole property.

Now the court at first instance looked at this and said, 'well, we can't order one beneficiary to sell their interest to another beneficiary'.

MG: Well, that's interesting, Alex, because there is an overriding principle here, a well-known principle, that courts cannot order a beneficiary to sell their interest to another. I don't think they can order that under Section 14.

AB: No, they can't order that Michael, and there is a very wide discretion of what the court can do. But that simply isn't within the discretion, they can't order one

beneficiary to sell to another beneficiary. And so in this case, the court had to come to a creative workaround to get the result that the parties actually wanted.

And the workaround that the court at first instance came to was that the trustees were to sell the property, but that Mr Hafiz, the son who remained in the property, would have the right of pre-emption.

So it's, it's a creative workaround there and they said if after six weeks, Mr Hafiz, the son who remains, had not purchased that property, it was to be put on the open market, at which time anyone could bid on it, including the other beneficiaries.

Now, Mr Hai wasn't very happy with that, and he said, '*the court has no jurisdiction to order that*', and secondly, '*it shouldn't have ordered it*'. And so that was challenged in the Court of Appeal and within the court, Lord Justice Briggs found the court had been well within its jurisdiction to make this order, again, reinforcing the general principles.

So within his judgment, he states that a court can order the trustees to sell a property, and the right of pre-emption is something that's within that very broad discretion.

MG: Now, just to assist some of those listeners that might not be that familiar with the phrase 'pre-emption', as far as I understand it, Alex, you can correct me if I'm wrong, the right of pre-emption would be essentially right of 'first dibs' to purchase a property, for instance. Is that what you would you say?

AB: Absolutely! That's exactly what it is, Michael.

And it's one of those where it's an opportunity to buy the property. And the court in this instance gave Mr Hafiz six weeks, and they said, if you've not purchased it in six weeks, and importantly, the court said it could be purchased at evaluation that would've been decided by the court after evidence was produced, then it would've gone on to the open market at which time anyone could buy the property.

So yes, he does get 'first dibs' but it's only for six weeks.

MEG: So as far as I understand the facts of Bagum then, the court determined the price or the value of the property, but restricted that determined price only for Mr Hafiz?

AXB: Yes. So only to Mr Hafiz, but for six weeks. So, if within the six weeks he didn't purchase the property, then it would go onto the open market. And if Mr Hai wished, he could then put an offer in on the property.

So, it is the right of pre-emption. As you say 'first dibs' but it's only for six weeks because the court's obviously not going to order that it has to be sold to a specific person and not give any further order about what should happen thereafter if it's not taken up well.

MG: It's an interesting case, Alex. When looking through this in the provision of my advice, I did come to that judgment and I thought, well, that's a creative workaround and would certainly possibly benefit my client, if he was minded to be asking the court to make a similar order. What I did find, though was a further case in 2020 by the name of *Kingsley and Kingsley*.

Now, the background facts of that case are also rather interesting.

The case involved a dispute over farmland, jointly owned by siblings, Sally and Roger Kingsley, beneficially in equal shares.

After Roger's death, his executors wished to sell the land on the open market, but Sally, who was the surviving sibling, she wanted the right to buy the land herself at a price set by the court rather than a sale on the open market.

Now, the executors commenced proceedings against her for an order for sale under Section 14 of TOLATA. At first instance, the court determined that while the land should be sold, Sally should have the opportunity of purchasing it as a market value, a bit like a right of pre-emption, without the land being exposed to an open market sale.

So therefore, it was ordered that the trustees, so that was defined as the executors and Sally, shall sell the whole of the property to Sally for a price determined at £3.24 million and for Sally to pay 50% of that sum as she already had 50% equitable share. The sale to be completed by a certain date, and in the

event that Sally did not acquire the interest by that date set by the court, then the trustees were to sell the property on the open market.

So, a bit like Begum but actually the court going further, the court ordering the trustees to sell to an actual beneficiary.

As for the valuation, the expert valuation evidence, it was provided by both parties and their respective figures were only about 10% apart. However, when I say only 10% apart, we're talking about a difference of about £150,000.

AB: We are talking quite a lot of money in this case, aren't we?

MG: So it was quite a significant amount of money.

Yes, so 10% of, three point something million is quite substantial. The court set a value about 4% below the executor's experts figures. So that's essentially 60% in favour of the executor's valuation.

Then it went to appeal, the executors appealed on various grounds. I'm only going to be highlighting two of those grounds, which are of most importance to this podcast.

The first ground was, 'did the order breach the principle that a court could not order one beneficiary to sell their interest to another beneficiary?'

Now, that was a question that we raised in Begum, didn't we?

AB: Absolutely. That's what this is all about.

MG: Or in other words, did the court go too far in ordering the trustees to sell the property to a beneficiary?

Because the issue was one of the trustees was a beneficiary to whom the court was ordering the sale to go to. So the question was, does that exceed a court's jurisdiction?

AB: And that's why this can be quite complicated, isn't it? Because beneficiaries are also often trustees and so there is an overlap there.

MG: There is, but the question is whether they're acting in their capacity as trustees or beneficiaries.

And the second ground that the executives appealed on was, 'could an order for sale at a court assessed price only be justified if there was a low risk of the beneficiaries receiving less than they would've done on the open market?'

In other words, 'is there a threshold that the court has to adopt?' Court of Appeal ruled as follows, so on the first ground in relation to whether the order breached the principle that a court could not order one beneficiary to sell their interest to another beneficiary. The court found that the Judge, at first instance, had made an order for sale of the whole legal and beneficial interest, which was within the court's powers under the 96 Act, under TOLATA. What followed was a mechanism under which the respondent discharged the sale price by paying only half of it to the executors.

That did not make it any less of a sale of the legal estate carrying the beneficial interest, and the court said as a matter of conveyancing, the order technically was an order for the sale of the property and not for a sale of the executor's beneficial interest in it.

So, the economical effect of the order did not alter that conclusion, and the court said on its true construction, the order was for sale by the trustees of trust property.

So therefore, the Court of Appeal drew a distinction between something that was otherwise impermissible, such as ordering a beneficiary to transfer their beneficial interest to another, with something that was permissible in the eyes of the court, which was ordering trustees, in their capacity as trustees, to sell the whole legal and beneficial interest in the property to an individual who just so happened to be a beneficiary and who just so happened to be a trustee as well.

On the second ground concerning whether the court can only justify ordering a sale of property at a court assessed price, where that price is very close or equal to what the property would fetch on the open market, the Court of Appeal found that the risk of undervaluation is just one factor for the court to weigh in the balance.

In other words, there is no threshold that must be met before exercising its discretion to TOLATA. And I think the court also found that, notwithstanding any event, the trial Judge actually found about 60% in favour of the executor's expert,

meaning that the court deliberately erred on the higher side of the valuation spectrum in order to reduce the risk of any undervaluation.

AB: So what I'm taking from these cases, Michael, is that the court's going to be very creative when it comes to the fact that, yes there's an established rule, they can't order a beneficiary to sell to another beneficiary, but again, those lines become a little bit blurred when beneficiaries are also trustees, because in effect what they're doing is they're ordering someone who is a beneficiary and trustee to sell to another beneficiary and trustee, but they're just wrapping it in a cloak, so we get round that rule of the fact that you can't order a beneficiary to sell to a beneficiary, in effect, what they're saying is, 'You can't do that, but what we will do is we'll accept the fact that said beneficiary is also a trustee, and we will order that in their capacity as a trustee to sell to another beneficiary'. Is that right?

MG: Sort of, yes. I mean, essentially what the court was deciding was it matters not actually that the person that they're selling to is a beneficiary so long as the one selling was actually the trustees selling the whole of the property.

So, they're exercising their power as trustees to sell the entire property, and the court could order the sale to a beneficiary.

It matters not if that beneficiary was also a trustee because they weren't exercising the power of sale as a beneficiary.

AB: And so that's the point, isn't it? It's a very creative work around where courts just looking at this and saying, 'okay, well we can't do one thing, but actually we're going to look at this purposefully, and what we want to do is get the right result'. It's almost as if they've worked back from the result looking at the legislation and said, 'well, this is what we can do'.

And I think that's why this rise of pre-emption or this rise of specific sale is so interesting that it's such a unique workaround and stops the offending of the rule that you cannot order a beneficiary to sell to the other beneficiary.

MG: I think that's right. At the end of the day, the courts are trying to find very clever workarounds to that very well-known principle and what we're also seeing as time progresses as these cases have sort of been applied over time since 2015, since *Begum* came onto the scene, then through *Kingsley*, and then the most recent case, you looked into this, didn't you Alex, *Savage v Savage*.

AB: Absolutely. *Savage and Savage* is a case that we will look at in one of the further podcasts because that looks at this principle and it shows that even very well learned Judges have found these principles to be quite complicated and it's that case again, that reached the Court of Appeal, and first instance in *Savage and Savage*, there was a specific order that was then appealed that all was overturned, then on appeal, the Judge at first instance their order was restored, and as I say, this is something we will come to in a

future podcast. But it just shows that, yes there is a creative workaround, but it's not always that simple and there is a number of other statements that the courts are looking at when they're considering TOLATA as a whole.

MG: Yes it's certainly not simple, but what it does show is that the court is, extending its discretion as time goes on. As you saw in *Begum*, the court was reluctant to order a sale to an individual but in *Kingsley* the court actually ordered the trustees to sell to an individual who happened to be a beneficiary. And as you saw in *Savage*, you had an even more creative work around to extend the extent of a course jurisdiction under Section 14 and 15, which we will talk about in due course.

So you're now probably wondering what I advised my client well, look, my advice for the client in the end was for him to make a claim as trustee under Section 14 of TOLATA for a court determination as to valuation because he wanted to buy the other sisters beneficial interest at a certain price.

I had to obviously advise him that you can't obtain an order that one beneficiary buys another beneficiary's interest. What you can order though, is an order for sale on the same terms or similar terms as either *Begum* or *Kingsley*. So following *Begum*, he could ask the court for an order that the trustees, so both he and the surviving sister, sell the land on the open market, but giving him first opportunity to purchase the land at the price determined by the court.

So obviously the price that would be determined would be reserved for him alone as a right of pre-emption. The alternative to that though, following *Kingsley*, he could ask the court for an order that the trustees sell the land to him at the price determined by the court, but with him paying only 50%, to take into account he already owned 50% with the beneficial interest, by a certain date failing, which the trustees are to place the land for sale on the open market.

Clearly *Kingsley* would be better for him than *Begum*, but essentially that was my advice. Well, in essence, that marks the end of our podcast, two very interesting cases, wouldn't you say, Alex?

AB: I think they are very interesting cases, definitely Michael. And as you've said, *Savage and Savage* does build upon these principles, and there's also some different points that *Savage and Savage* takes into account, which is why we're going to look at that in a podcast of its own because honestly, it justifies a podcast.

MG: Well, let's do it, and I look forward to it.

AB: Thank you to all of those listening to this podcast.

We hope you found it informative, and if you should have any queries concerning TOLATA or anything else, Property or Chancery related, please do get in touch with the clerks at 42BR marked for the attention of Michael or I, and we will be more than happy to respond.

MG: Thank you.