How does the 'trust of land' introduced in the 1996 Act differ from the statutory trust of sale enacted in 1925? How satisfactory is it as a basis for co-ownership of land?

This paper discusses the difference between the old 'trust for sale' (TFS) and the new 'trust of land' (TOL) introduced in the Trusts of Land and Appointment of Trustees Act (TLATA) 1996. This paper through it discussion highlights the adequacy of this new trust as a basis for co-owned land, and follows through into a discussion of how well this TOL work for co-owned land the problems it poses.

Prior to the 1925 legislation, two separate situations resulted in land title[1] becoming fragmented. Concurrent ownership fragmented title in space[2] and successive interest fragmented ownership down in time. Therefore to deal with these future interests were made into settled land.[3] However, where future interests were granted on trust with the power to sell, this made it subject to the rules governing TFS. In all concurrent cases after 1925, a TFS was imposed.[4] The TFS as the name suggests is essentially an investment notion, meaning that the trustees were under a duty to sell the property unless they all agreed to postpone sale. The legal owners held the property on TFS as trustees for themselves and any additional number of equitable co-owners.[5]

The TFS operated for seventy years until it was changed by the Trusts of Land and Appointment of Trustees Act 1996 (TLATA), following a Law Commission Report.[6] TLATA 1996 effected a considerable simplification, because, after the Act was passed any successive interest in the form of life interests takes effect as a TOL. From 1997, all concurrent interest was transmuted retrospectively[7] overnight from being TFS to being held under a TOL. TOL usually arises in three main circumstances the first is where the settlor expressly creates it. He may if he wishes describe it as a TFS, it will take effect as a TOL but his intention as manifested by calling it a TFS will be significant in some circumstances. The second circumstance is where it is implied and this would be cases like ***Williams & Glyn's Bank Ltd. v. Boland*** [8] where one person is on the title but the law looks at it and says there is a contribution; there is a resulting trust or a constructive trust. The third is by statute.

[1] Fee simple absolute in possession
[2] Through *ius accrescendi*
[3] Governed by the Settled Land Act (SLA) 1925.
[4] s.34(2) and 36(1) Law of Property Act 1925
[5] Law of Property Act 1925, s.34 (2)
[6] Transferring Land: Trust of Land, (H.C. 391) Law Com. No. 181 (1989)
[7] s.1(2)(b) TLATA 1996
[8] [1981] A.C. 487

TOL includes any trust, which consists of land[9] it can arise in any character or through the old TFS.[10]

The most significant difference of the TOL from the original TFS is that there is no longer a duty to sell the land.[11] The courts when considering whether to order a sale of land may feel less compelled to so. This was suggested obiter in ***Banker's Trusts Co v. Namdar***:[12] *'It is unfortunate for Mrs Namdar that the very recent Trusts of Land and Appointment of Trustees Act 1996 was not in force at the relevant time as the result might have been different.'* Moreover, Neuberger J. observed that former decisions where there was a duty to sell under the TFS should be treated with caution because '*…they are unlikely to be of great…assistance*'.[13] The preamble and side note to s.3[14] refers to the abolition of the doctrine of conversion. This would suggest that the TOL is not an interest in the proceeds of sale rather an interest in land. This brings us back to the *de facto* position under the TFS as asserted by Lord Wilberforce in ***Williams and Glyn's Bank v Boland***.[15] Furthermore, trustees of land, now have all the powers of an absolute owner.[16] Under the TFS, trustees had all the powers of a tenant for life of settled land. This is a considerable change because certainly for settled land there were severe limits to the restrictions on the powers to the tenant to life, because it was thought settlors would use that to try and keep land in the family.

In the old regime, some restraints existed on powers, there were limited powers in the first place, only those granted to a tenant for life on settled land and there are several restraints on them, simply the fact the trustees are just that, they are fiduciaries, they can't just act to please themselves. The wider powers of trustees in TOL is balanced by trustees having to think of the beneficiaries in two ways, the first is the '…*trustees* [should] *have regard to the rights of the beneficiaries*.'[17] Nevertheless s.6(5) TLATA is vague in indicating what beneficial rights trustees should regard, and it can be asked, what are these rights beneficiaries have, that they don't have under trusts law ? The second is that the trustees must consult the beneficiaries concerned before taking any decision whatsoever relating to the land,[18] it extends to all new trusts, but the trust instrument can exclude it.[19] Consultation requirements placed on the registered can protect the equitable co-owners in the eventuality of a trustee overreaching without their consent. However, this

[9] s.1(a) *Ibid.*
[10] s.1(2)(a) *Ibid.*
[11] s.4(1) *Ibid.*
[12] [1997] EGCS 20 per Peter Gibson L.J.'s at p 15 at http://www.lawtel3.co.uk/clft/0/0/0/2/T_C0002837CA.pdf
[13] ***Mortgage Corp v Shaire*** [2000] 1 FLR 973 at 991
[14] TLATA 1996
[15] [1981] A.C. 487
[16] s.6 (1) TLATA 1996
[17] s.6(5) *Ibid.*
[18] s.11 TLATA 1996
[19] s.11(2) TLATA 1996

consultation procedure does not differ from its repealed predecessor s.26(3)[20] which has been criticised by the Law Commission as weak.[21]

Section 11, has that potentially lethal phrase '*so far as consistent with the general interest of the trust*', which can be problematic, where trustees consult and the beneficiaries say they would like to do this, the beneficiaries may still disagree and say it is not consistent with the trust. Where there are three life tenants and they would like to sell because they would like more money, the trustees would oppose and argue they need to think of the remainder. It is not immediately apparent how effective these restrictions are likely to be and most of these restrictions and express powers are likely to be of more importance in successive interest trusts rather than pure co-ownership. This is because a husband and wife co-owning are both beneficiaries and trustees and have identical interests that will just deadlock. This type of dispute will then have to be resolved under an s.14[22] application where the court is directed to take account of the majority's wishes when settling disputes.[23]

Trustees also have the power to jointly, delegate powers to a beneficial owner,[24] although the beneficiary to whom delegation can be made cannot give a valid receipt for capital money and so cannot overreach.[25] This replaces the power of delegation given to trustees for sale under s.29.[26] One of the things that are likely to provoke disagreements is the actual occupation of the land. Under the TFS co-owners had a *prima facie* right to occupy the whole land. On the other hand successive interests under the sale for land it was really at the trustee discretion whether a life owner or any other beneficiary was allowed to occupy or not, they didn't have the right to occupy. This has been considerably changed by s.12,[27] which allows all beneficiaries the right to occupy land but only provided the purpose of the trust includes occupation of that class of beneficiary.[28] Secondly there must be available and suitable land held by the trustees for occupation.[29] Furthermore, s.12 appears to statutorily empower the trustee to purchase land from the money in the trust for the 'purpose' of a beneficiary's occupation.[30] Where several or more beneficiaries have the right under s.12 to occupy trust property, the trustees are given powers[31] to exclude or restrict such rights in relation to some of the beneficiaries, but not to prevent all the beneficiaries from occupying the land. A beneficiary who is

[20] Law of Property Act 1925
[21] Law Commission Consultation Paper No.94, para 3.12
[22] TLATA 1996
[23] s.15(3) *Ibid.*
[24] s.9, *Ibid.*
[25] s.9(7) *Ibid.*
[26] Law of property Act 1925
[27] *Ibid.*
[28] s.12 (1) (a) *Ibid.*
[29] s.12 (1) (b) *Ibid.*
[30] Law Com no. 181, para13. 3
[31] s.13 (1) TLATA 1996

permitted to occupy at the expense of another co-owner may be made subject to an obligation to pay compensation to a non-possessing co-owner[32] or forgo some benefit or payment.[33] In the case of a married couple in co-ownership a deadlock in the rights of occupation and exclusion can arise. Hence, the courts assistance under s.14 application will be needed to resolve this deadlock, which produces the danger of the old s.30[34] case law creeping back.[35] The problem is s.30 case law was developed on a presumption to sell, which no longer exists.

Section 14[36] provides an application for a variety or orders that can be made by any person with an interest in the land. While s.15 provides guidance to the court in what matters need to be considered in determining applications. The Law Commission originally proposed six factors;[37] this was reduced to four by TLATA. The court is expected to have regard to the intentions of the settlor,[38] purposes for which property is held,[39] the interests of any minors that occupy or could be expected to occupy the property as their home.[40] There is also a provision in s.15 that the court must have regard to the circumstances and wishes of the beneficiaries who are entitled to occupy the land.[41] If there is a dispute between co-owners these factors are particularly relevant. Under the old TFS it was open to any person interested in the property, (creditors) to bring an order for the sale of that property under s.30. The new procedure will not be applicable to cases of a trustee in bankruptcy; they are in a different position,[42]which is not affected by the 1996 legislation.[43] TLATA treats creditors differently to trustees in bankruptcy. When an application for sale by a creditor is made their interest is one of those stated in s.15 and court's determination of the sale will focus on the factors laid down in this section.

Under the old law the archetypical co-owners were the husband and wife, who would agree to postpone a sale under a TFS because the purchase would be of a family home. If relations broke down and an agreement to postpone the sale was not wanted by one of the co-owning parties, then under the old scheme an application could be made to the court to order a sale under what was then s. 30 of the Law of Property Act 1925.[44] However, if the person resisting the sale could prove that the parties had agreed on a *collateral purpose*, when the trust was made which was

[32] s.13(6)(a) *Ibid.*
[33] s.13(6)(b) TLATA 1996 adopts a similar position to that of ***Dennis v. McDonald***, [1982] Fam. 63
[34] Law of property Act 1925
[35] Clements, L. M., The Changing Face of the Trusts: The Trust of Land and Appointment of Trustees Act 1996, [1998] 61 Modern Law Review, 56-67, p. 61
[36] TLATA 1996
[37] See para. 12.10 of Law Com. No. 181.
[38] s.15(1)(a) TLATA 1996
[39] s.15(1)(b) *Ibid.*
[40] s.15(1)(c) *Ibid.*
[41] s.15(3) *Ibid.*
[42] Governed by s.335 – 336 Insolvency Act of 1986
[43] s.15(4) TLATA 1996
[44] ***Jones v. Challenger*** [1961] 1QB 176

capable of continuing, the court would then not order the sale.[45] Proving a continuing collateral purpose through the fact a home was used to bring up children who were of dependant age certainly deferred a sale.[46]

Under the new scheme of TLATA the new provisions take into account some of the courts developed positions under the old s.30.[47] Today the court is expected to have regard to: (a) the intentions of the settlor, (b) purposes for which it is held, (c) interests of any minors that occupy or could be expected to occupy the property as their home, (c) interests of any secured creditor[48] these will no longer be considered in the context of a TFS with a presumption to sell as in ***Re Mayo.***[49] If it is a dispute between the owners the above mentioned are particularly relevant, and there is no longer a bias toward sale. This should lead to a greater disposition not to order a immediate sale. These things are not prioritise it is just asking for these things to be considered. When the court is faced with something like this does it take regard to the jurisprudence it has built up over a long period in application for sale, or does it look new rules? It is argued the new rules will be meaningless without the court taking substance from the previous developed positions. Thus it is important to observe how the court is interoperating this TLATA in post 1996 cases.

In ***Mortgage Corporation v. Shaire***.[50] Neuberger J.'s specific question was: did s.15 modify the law from how it had been developed in Citro[51] and Byrne[52]? Neuberger J. advanced eight reasons as to why s.15 has changed the law. Although these reason can be criticized for not embracing the true meaning of s.15 along with the Law commission proposals,[53] they nevertheless, appears to fundamentally change the courts approach in deciding whether a beneficiary or creditors interests should prevail. [54] Neuberger J. approach has been praised for blowing away '*the remnants of the harshness for families*'[55] caused by s.30.[56]

However, ***Bank of Ireland Home Mortgages Ltd v. Bell***[57]suggests that the departure of one of the co-owners will bring the purpose of providing a family home to an end, with the result that the interests of the children will be a small consideration against

[45] ***Re Buchanan-Wollaston's Conveyance*** [1939] Ch 738
[46] ***Re Evers' Trust*** [1980] WLR 1338
[47] Law of property Act 1925
[48] s15(1) TLATA 1996
[49] [1943] Ch 302,
[50] [2001] Ch 743
[51] [1991] Ch. 142; [1990] 3 All E.R. 952. The earlier cases are discussed in Re Citro: Re Bailey [1977] 2 All E.R. 26 and Re Lowrie [1981] 3 All E.R. 353.
[52] [1991] 23 H.L.R. 472
[53] Pascoe, S., 's. 15 TLATA 1996 - a change in the law?', [2000] Conveyancer 315 (Westlaw)
[54] Gardner, Chargees and Family Property [2001] 1 web JCL1 at http://webjcli.ncl.ac.uk/2001/issue1/gardner1.html
[55] Pascoe, S., 's. 15 TLATA 1996 - a change in the law?', [2000] Conveyancer 315 (Westlaw)
[56] Law of Property Act 1925
[57] [2001] 2 F.L.R. 809

sale. In reaching the decision to order the sale the court restricted the weight[58] that was to be given to the factors in s.15. Peter Gibson L.J. declared the collateral purpose of a family home '*ceased to be operative once Mr. Bell left the property*.'[59] This has been described as '*contentious*'[60] considering there was a dependant child aged five.

The factors drafted in s.15 collapse the welcomed positions developed by the courts, (collateral purpose) under old authority[61] by which vulnerable beneficiaries were protected. If this decision and equal weighting of factors listed in s.15 prevails the likelihood is that a sale will be ordered notwithstanding the obliteration of the duty to sell under the TFS. Probert has described this case as changing the direction of the wind therefore it has '*blown us back to where we started.*' Whether a sale will be ordered under s.14 remains to be determined and will depend on the correct judicial application of when a sale should be ordered.

This begs the question of whether TOL is a more satisfactory trust for land co-ownership. It has been demonstrated there is no longer the duty to sell a property, but because the most common type of co-ownership is used by a husband and wife most of the rights are identical. In the eventuality of a relationship breakdown all the right ands provisions of the trust deadlock. It is argued above there is limited use of this trust and its provisions in co-ownership. Where one co-owner has surrendered his right to a creditor, the new regime can have the effect ordering a sale over interests the old regime regarded as worth guarding. TOL is a new concept with little case law. Whether it is satisfactory a trust for co-ownership, will depended on whether its provisions and the Act which creates it is read in the light of previous case law. The extent to which it will, is yet to be seen. Although the TOL is different, a lot of the law from TFS will have to be carried forward and quite a lot of judicial decisions on TFS will have to be read in aid.

[58] This could be because the welfare of minors is drafted as a consideration and grouped equally with creditors interests. s.15(1)(c) and (d) TLATA 1996
[59] [2001] 2 F.L.R. 809 at p. 815
[60] Probert, R., 'Creditors and section 15 of the Trusts of Land and Appointment of Trustees Act1996: first among equals?', [2002] Conveyancer 61-67 (Westlaw)
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