

## Self-test questions

**1. Some years ago, Rehana and Alan bought a house together as their family home. Unfortunately, their relationship has broken down. Rehana wants to sell the property, but Alan says that it makes more sense to separate it into two flats, one for each of them to occupy. Rehana comes home one day to find that the building work has started. Advise Alan and Rehana.**

**Answer:** Rehana and Alan are both legal owners of the property. As a trust of land arises when land is co-owned, they are also trustees (s.5 TOLATA 1996), holding the land on trust for themselves as beneficiaries.

As trustees, TOLATA gives them considerable powers to deal with the land, including the power to partition it (s.7). However, the beneficiaries must agree to it (s.7(3)) and in this case, Rehana has not agreed.

TOLATA provides a dispute mechanism for when co-owners cannot agree on how to deal with their land. Rehana can apply to the court under s.14 of TOLATA, so that the court can make a decision about what is to happen to the land. This happened in *Rodway v Landy* [2001] EWCA 471 (see Case Close-Up at 11.3.2.2). In reaching its decision, the court will take into account the factors in s.15 of TOLATA. These include the intention of the parties who created the trust; the purpose for which the land is held; the welfare of any minor, if relevant and the interest of any secured creditor.

*See 11.4, and especially 11.4.1 for more detail.*

**2. Amiel, Charlotte, and Jacob bought a flat together to share while they were at university. They are all registered proprietors. Now that they have well-paid jobs as lawyers, Amiel and Charlotte want to sell the flat. Jacob, who is an academic, wants to keep it. Advise Jacob as to how he can best resolve the dispute.**

**Answer:** As joint legal owners of the property, Amiel, Charlotte and Jacob hold the land under a trust of land on trust for themselves as beneficiaries (s.5 of TOLATA).

TOLATA provides a dispute mechanism for when co-owners cannot agree on how to deal with their land. Jacob can apply to the court under s.14 of TOLATA, so that the court can make a decision about whether the land should be sold or kept.

In reaching its decision, the court will take into account the factors in s.15 of TOLATA. These include the intention of the parties who created the trust; the purpose for which the land is held; the welfare of any minor, if relevant and the interest of any secured creditor. If the purpose of buying the flat was to provide them with a home whilst at university, it may well be that the court will decide that that purpose has come to an end, and that the flat should be sold.

*See 11.4, and especially 11.4.1.2 for more detail on s.15(1)(b) - purpose.*

**3. Charles died and left his house to his partner, Simon, for life, and then to his niece, Felicity, in remainder. Felicity wants to sell the property, but Simon insists that he wants to live there. Advise Felicity, particularly in relation to the factors that the court will consider if she applies to the court for an order for the sale of the property.**

**Answer:** Simon has an interest in possession of the property, as he has a life interest in it. Felicity, although she has an interest in the property, has an interest in remainder, which means that she does not have the

right to occupy the property (see 11.3.2.1). Both can make an application to the court under s.14 of TOLATA for a decision as to whether to sell or keep the property.

In reaching its decision, the court will take into account the factors in s.15 of TOLATA. These include the intention of the parties who created the trust; the purpose for which the land is held; the welfare of any minor, if relevant and the interest of any secured creditor.

Felicity should be aware that in this case, it is unlikely that an order for sale will be made. Charles' intention was clearly that Simon should have a home for life; this too was the purpose of the trust. The court will very probably give effect to Charles' wishes, and refuse to grant an order for sale.

**See 11.4.1.1 for more on s.15(1)(a) – Intention.**

### Examination questions

**1. Julie and Mick bought a house together, but have fallen behind with their mortgage repayments.**

**The bank wants to sell their home and has applied to the court under TOLATA, s. 14. The couple have a three-year-old child who has a disability. Advise Julie and Mick.**

**Answer:** The mortgagee bank clearly has an “interest” in the property and so is entitled to make an application under s.14 of TOLATA.

In reaching its decision, the court will take into account the factors in s.15 of TOLATA. These include the intention of the parties who created the trust; the purpose for which the land is held; the welfare of any minor, if relevant and the interest of any secured creditor.

Before TOLATA, the interest of a secured creditor would always prevail, unless there were exceptional circumstances. Since TOLATA, however, the interest of the bank will be only one of the various factors that the court will consider (*Mortgage Corporation v Shaire* [2001] All ER 380. In the case of Mick and Julie, for example, the court will consider the needs of their disabled child. Case law since TOLATA has indicated, however, that the court still attaches great weight to the interest of the bank in these circumstances, and the court may well still order a sale. See *Edwards v Bank of Scotland* [2010] EWHC 652

**See 11.4.1.4 on s.15(1)(d) – the interest of secured creditors.**

**2. Suppose that Mick has been made bankrupt. What will the court now consider? Would it make any difference if the house had been specially adapted to accommodate the child's disability?**

**Advise Julie and Mick.**

**Answer:** If Mick has been made bankrupt, and an application is made by his trustee in bankruptcy for the sale of the property, the court will no longer consider the factors in s.15 of TOLATA. Instead, under s.15(4) of TOLATA, it will look at the factors in s.335A of the Insolvency Act 1986. Some of these factors are similar to s.15. However, there is one crucial difference: if the application is made more than one year after the bankruptcy, the court must order a sale of the property unless there are exceptional circumstances.

“Exceptional circumstances” in this context have usually been related to severe ill health. The needs of Mick & Julie's disabled child, and the adaptations made to the house may be a relevant factor. However, it is likely that even in these circumstances, the court would not refuse an order for sale entirely, but would

probably only postpone it until Mick and Julie could make appropriate arrangements elsewhere. See 11.5 for more detail.